
The Viability of Enterprise Jurisdiction: A Case Study of the Big Four Accounting Firms

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One of the boundaries that U.S. courts must observe as they adjudicate regulatory disputes is the limit on their own jurisdictional authority — authority that is measured at the level of the particular forum state. Confronting the expansion of U.S. business activity from the local to the national scale during the second half of the twentieth century, courts consciously broadened jurisdictional standards to address the expanded activities of nationwide corporate groups. Today, by contrast, as the economy continues to expand from the national to the transnational scale, the U.S. Supreme Court has begun a retrenchment. In cases decided during the past several years, the Court has both restricted the basis for general jurisdiction over non-resident defendants and articulated a highly localized approach for assessing the availability of specific jurisdiction. This retrenchment opens a gap between the effectiveness of global enterprises in operating within the transnational space and the effectiveness of our courts in regulating their activity.

This Article investigates whether enterprise theory can provide a way to fill that gap. In general, jurisdictional analysis follows an entity approach: personal jurisdiction over a particular company within a corporate enterprise must be predicated on that company's own contacts with the forum. Even the exceptions that courts have developed to this rule — for instance, using agency principles to attribute the contacts of one

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company to another, or using alter-ego principles to collapse the boundary between two companies — fit within the entity theory framework. Under an enterprise approach, by contrast, where the components of a group constitute a unitary business that operates as an integrated enterprise, the jurisdictional analysis would under certain circumstances take into account the forum contacts of the entire group.

Exactly how an enterprise-jurisdiction standard would operate remains unclear. Some gestures toward enterprise analysis can be seen in the case law, but they are typically under-explained and often confuse that analysis with more traditional entity-based approaches to jurisdictional attribution (an area that is itself widely viewed as a mess). Moreover, enterprise theory in general has been much criticized for its complexity and indeterminacy. At this point, then, many more questions have been raised than answered. Can certain enterprises — whether held together by ownership ties or other linkages — fairly be characterized as “unified,” and using what criteria? Are there circumstances under which the objectives underlying jurisdictional law would be better served by an approach considering enterprise-wide contacts? Would such an approach be consistent with the due process analysis articulated in the recent Supreme Court jurisprudence?

The goal of this Article is to address these questions through an investigation of litigation involving the Big Four accounting firms. These enterprises, which operate as integrated multinational service providers but constitute networks of independently-owned offices, provide a useful case study that: (1) assesses the feasibility of making accurate and predictable determinations that particular enterprises are unified; and (2) illuminates the vagaries of current jurisdictional analysis relating to multinational enterprises. Through this study, the Article lends much-needed specificity to the analysis of enterprise jurisdiction and the consideration of its prospects.

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INTRODUCTION: MAPPING THE SCOPE OF JURISDICTION ONTO THE SCALE OF THE ECONOMY

What boundaries must U.S. courts observe as they adjudicate cross-border regulatory disputes? Even a cursory overview of the field of transnational regulatory litigation reveals the breadth and complexity of that question. Courts confront limits on the geographic scope of the regulatory statutes they apply,¹ on the application of various procedural rules to actors outside the United States,² and on their own authority vis-à-vis other branches of government.³ Defining the precise contours of those limits is a complicated and often ambiguous exercise

¹ These limits restrict the extraterritorial application of domestic regulatory law, defining the circumstances under which it can be applied to conduct occurring in other jurisdictions.

² For example, courts confront limits on their authority to order the production of evidence from entities outside the United States.

³ The private enforcement of regulatory law in cross-border cases sometimes intersects with the enforcement efforts of public regulatory agencies; more generally, it can raise foreign-affairs concerns and therefore questions about the appropriate involvement of the judiciary.

that can provoke serious concern, both in the United States and abroad, about the projection of U.S. regulatory power in the global arena.

Perhaps the most fundamental restriction U.S. courts confront as they address cross-border economic activity is the limit of their own jurisdictional authority. More and more of that activity is conducted by multinational enterprises,⁴ and so litigation in U.S. courts frequently involves claims against corporate entities that are affiliated with U.S. companies but not themselves incorporated in, or active in, the forum state. In assessing whether they have personal jurisdiction over such defendants, courts must often untangle complicated legal and operational relationships, as the structure of many multinational enterprises today is quite complex.⁵ More generally, they must explore the relationship between the scale of those enterprises' activity and the scale of their own jurisdictional authority.

These challenges are reminiscent of those that courts addressed several decades ago in confronting the shift of the U.S. economy from the local to the national scale. That period was marked by the rapid expansion of national industries as domestic corporations widened the markets for their products and services. As the geographic scope of corporate activity expanded, courts identified a need to expand their jurisdictional reach accordingly.⁶

⁴ In 2012, the 100 largest transnational corporations alone were responsible for \$8.7 trillion in sales, and employed almost 17 million persons. See UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT 25 (2013), available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf.

⁵ While some groups continue to adopt a traditional pyramid structure with a single parent company and layers of subsidiaries, other structures abound. They include the "two-headed" sorts of companies formed by transnational mergers, such as Daimler-Chrysler and Royal Dutch-Shell Petroleum; groups of firms bound together by cross-holding arrangements, along the lines of the Japanese *keiretsu*; companies affiliated by means of contractual relationships; and network-type associations of service providers. See generally PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 48, 51-77 (2d ed. 2007) (reviewing such structures).

⁶ See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 422 (1984) (Brennan, J., dissenting) ("The vast expansion of our national

A number of developments in the law of personal jurisdiction during the second half of the twentieth century extended judicial authority over non-resident defendants. First, states adopted long-arm statutes that expanded the acceptable legislative bases for the assertion of personal jurisdiction over non-residents.⁷ Second, the Supreme Court refined the standard for establishing specific jurisdiction⁸ in ways that extended the reach of the courts. It held that even isolated contacts with the forum state provided an adequate basis for jurisdiction in cases arising from those contacts;⁹ that placing a product into the stream of commerce could be sufficient to create jurisdiction in a distant forum;¹⁰ and that acts taken outside the forum could create jurisdiction within it if they caused foreseeable effects there.¹¹ Third, lower courts sometimes applied the doctrine of general jurisdiction¹² in fairly liberal ways, asserting their authority over non-resident companies doing business within U.S. forums.¹³ Fourth, in cases involving actions by the non-resident subsidiaries or affiliates of local companies, courts began to borrow various principles from the law of business associations to justify a sort of jurisdictional veil-

economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.”)

⁷ See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (3d ed. 2014). The effect of most of these long-arm statutes was to remove any limitations on jurisdiction other than the limitations imposed by the constitutional due process analysis. *Id.*

⁸ That is, jurisdiction over a defendant in litigation arising out of the defendant's contacts with the forum state. The watershed 1945 decision in *International Shoe*, which replaced the requirement of defendant's presence within the forum with a requirement simply of “minimum contacts” within the forum such that the exercise of jurisdiction would be reasonable, had of course already laid the foundation for more extensive jurisdiction over non-resident defendants. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

⁹ *McGee*, 355 U.S. at 223.

¹⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

¹¹ *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

¹² That is, jurisdiction over a defendant based on its high level of activity within the forum, even where the particular claims do not arise out of that activity.

¹³ See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 635-36 (1988) (describing the circumstances under which courts have extended the doctrine of general jurisdiction “beyond its traditional contours” in the interest of fairness to plaintiffs).

piercing — for instance, using agency theory to attribute the acts of one entity within the forum to a non-resident affiliate, or holding two companies within the same group to be alter egos.¹⁴ By means of such devices, they asserted jurisdiction over non-resident members of corporate groups that had sought to avail themselves of the benefits of U.S. markets.

In sum, during the phase of nationwide economic expansion, the approach to personal jurisdiction was modernized in a way that mapped onto the scale and nature of economic activity as conducted by modern corporate groups. Today, by contrast, as the economy shifts from the national to the transnational scale, the U.S. Supreme Court has begun a retrenchment in the law of personal jurisdiction. Three recent cases in particular exemplify this shift.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court considered whether general jurisdiction was available in North Carolina over three of Goodyear's foreign subsidiaries.¹⁵ Concluding that it was not, the Court articulated a new gloss on the standard for that "all-purpose" form of jurisdiction: the defendant's affiliations with the forum state must be not merely continuous and systematic, but "so 'continuous and systematic' as to render them essentially at home" there.¹⁶ It went on to identify a corporation's place of incorporation and its principal place of business as the paradigmatic forums for general jurisdiction.¹⁷ Although the new "essentially at home" standard leaves some room for the exercise of jurisdiction over non-resident corporations in other circumstances, it was clearly designed to restrict the scope of general jurisdiction, and those circumstances will be rare.¹⁸ As a result, an entity incorporated in a foreign country and active primarily outside the United States is highly unlikely to be subject to general jurisdiction in U.S. courts.¹⁹

¹⁴ See *infra* notes 74–75 and accompanying text.

¹⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851–53 (2011). Each of the subsidiaries manufactured tires that were distributed primarily overseas but also within the forum state. *Id.* at 2852. Because the plaintiff's claims were not related to tires distributed within the forum, however, the question was one of general, not specific, jurisdiction. *Id.* at 2851.

¹⁶ *Id.* at 2851.

¹⁷ *Id.* at 2853–54.

¹⁸ See Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 532 (2012).

¹⁹ But see Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman*, 34 U. PA. J. INT'L L. 765, 782 (2013) [hereinafter *Further Thinking*] (distinguishing between non-resident corporations incorporated in another U.S. state and those incorporated in a

Standing on its own, the result in *Goodyear* is unobjectionable. The exercise of jurisdiction over non-resident defendants on the basis that they were “doing business” within the forum, in lawsuits unconnected with that business, has been widely viewed by commentators as theoretically unsound and by other countries as exorbitant.²⁰ By reserving this form of jurisdiction for the “paradigmatic cases” in which the defendant is either incorporated within the forum or maintains its principal place of business there (and, perhaps, in other cases where it has an equally home-like presence there), the Court restored some proportion to the doctrine.²¹ However, the *Goodyear* decision must be viewed in combination with the Court’s decisions in other recent cases.

*J. McIntyre Machinery, Ltd. v. Nicastro*²² dealt with a typical specific jurisdiction issue. Nicastro, a U.S. resident, was injured in his home state of New Jersey while operating a machine manufactured by J. McIntyre Machinery, Ltd., a U.K. company. McIntyre did not sell its products directly to U.S. buyers; instead, it used an independent distributor based in Ohio, McIntyre Machinery America, Ltd., to market and sell its machines throughout the United States. The Court held that McIntyre U.K. was not subject to specific jurisdiction in the New Jersey forum, on the basis that it had engaged in no activities specifically targeting that state.²³

foreign country, and suggesting that “a strong argument can be made that under *Goodyear* foreign corporate defendants may be amenable to general jurisdiction in the U.S. state in which they do their most substantial business (assuming the quantum is ‘so continuous and systematic as to render them essentially at home in the forum State’).”

²⁰ See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 481-82 (2006).

²¹ Indeed, the holding might be seen as the validation of the argument made in 1966 by Professors von Mehren and Trautman that reliance on broad notions of general jurisdiction would eventually diminish as the law of specific jurisdiction became more fully developed. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1143-44 (1966) (noting that under the “more functional approach to the jurisdictional problem” adopted in *International Shoe*, “absent the kind of total, close, and continuing relations to a community implied in incorporation or in the location of a head office within a state, jurisdiction over legal persons . . . should take the form of specific jurisdiction,” and referring to broader notions of general jurisdiction as “obsolescing”).

²² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

²³ See *id.* at 2790-91. At the time of the litigation, McIntyre Machinery America had filed for bankruptcy, leaving McIntyre U.K. as the only entity capable of satisfying a judgment in plaintiffs favor. *Id.* at 2796 n.2. In assessing the defendant’s “purposeful contacts” with the forum state, the Court noted that the U.K. company did not have an office in New Jersey, did not advertise there, and had not attended trade shows

In articulating “the premises of lawful judicial power,” the plurality opinion in *McIntyre* focused on “the central concept of sovereign authority.”²⁴ On this view, “[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign”²⁵ — the sovereign, within our federal system, being a particular state. By narrowing its frame of reference to consider the economy of the forum state rather than the national economy, the plurality uncoupled the jurisdictional analysis from the economic reality of the defendant’s business activities.²⁶

In a dissenting opinion, Justice Ginsburg points out the artificiality of this approach:

McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, “purposefully availed itself” of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. . . .

Courts . . . confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury.²⁷

As this dissenting opinion makes clear, the plurality’s approach disrupts the relationship between the scope of jurisdictional authority

there (although it had attended such events in other states). *Id.* at 2790. It concluded that while McIntyre may have had “an intent to serve the U.S. market,” it had not purposefully availed itself of the New Jersey market in particular, and therefore was not subject to jurisdiction there. *Id.* On this analysis, it might be argued that McIntyre U.K. would not be subject to jurisdiction in *any* U.S. state; at oral argument, however, McIntyre’s counsel conceded that jurisdiction would have been appropriate in Ohio (on a theory of common law indemnity). Transcript of Oral Argument at 8-10, *McIntyre*, 131 S. Ct. 2780 (No. 09-1343), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf.

²⁴ *McIntyre*, 131 S. Ct. at 2788-89. As the dissenting opinion noted, this was a regressive move, rejecting the focus on fairness and foreseeability that is the hallmark of modern due process analysis. *See id.* at 2798 (Ginsburg, J., dissenting).

²⁵ *Id.* at 2789 (majority opinion).

²⁶ For a summary of arguments in favor of a national (rather than state-based) contacts test in international cases, see GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 200-01 (4th ed. 2007).

²⁷ *McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

and the scope of economic activity that had characterized analysis during the phase of nationwide economic expansion.²⁸ Because that approach did not command a majority,²⁹ it remains to be seen what effect it may have on jurisdictional analysis going forward.³⁰ Nevertheless, it signals substantial support for a more restrictive and territorially bounded view of judicial authority that would be at odds with the multinational activities of today's enterprise groups.

Finally, in *Daimler AG v. Bauman*, the Supreme Court considered the interaction between agency theory and jurisdictional law.³¹ That case involved claims brought in a California court against Daimler, a German company, for injuries allegedly caused by the acts of its Argentinian subsidiary in Argentina.³² Because the claims arose from events that occurred outside the forum, it was necessary for the plaintiffs to establish a basis for general jurisdiction, rather than specific jurisdiction, over Daimler.³³ It was clear that Daimler's own activities in California did not meet the *Goodyear* standard that the company be "essentially at home" there.³⁴ Plaintiffs therefore argued that MBUSA, a Delaware subsidiary that served as Daimler's exclusive importer and distributor in the United States, acted as Daimler's agent within the forum — and that its contacts, which were sufficient to expose it to general jurisdiction there, should be attributed to Daimler.³⁵ In holding for the plaintiffs, the U.S. Court of Appeals for the Ninth Circuit had applied an extremely broad version of agency analysis. Its opinion focused not on actual control over specific activities but rather on whether the services performed by the subsidiary were "sufficiently important to the foreign corporation that

²⁸ For an example of analysis to the contrary, see *Anderson v. Dassault Aviation*, 361 F.3d 449, 453 (8th Cir. 2004).

²⁹ Justices Ginsburg, Kagan and Sotomayor dissented, and Justices Breyer and Alito joined in a concurring opinion that agreed with the outcome but not the reasoning of the plurality opinion. *McIntyre*, 131 S. Ct. at 2791-94 (Breyer, J., with Alito, J., concurring); *id.* at 2794-804 (Ginsburg, J., with Sotomayor, J., and Kagan, J., dissenting).

³⁰ As a number of post-*McIntyre* cases have held, Justice Breyer's concurrence, which was based on existing Supreme Court precedent, is taken as the controlling opinion in *McIntyre*. See, e.g., *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 894 F. Supp. 2d 819, 847 (E.D. La. 2012) (so stating, and citing additional cases supporting that conclusion).

³¹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 748 (2014).

³² *Id.* at 750-51. The claims were asserted under the Alien Tort Statute, the Torture Victim Protection Act, and the laws of California and Argentina. *Id.* at 751.

³³ *Id.* at 758.

³⁴ *Id.* at 751.

³⁵ *Id.* at 752.

if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."³⁶

In analyzing this argument, the Supreme Court did not explicitly address the circumstances under which an agency relationship might be used to establish *specific* jurisdiction over a foreign defendant based on the acts of its U.S. agent.³⁷ And, indeed, it ultimately declined to pass judgment on whether agency analysis was appropriate even in the context of general jurisdiction.³⁸ It simply rejected the Ninth Circuit's version of the agency theory as unacceptably broad.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*.³⁹

As post-*Daimler* cases and commentary have noted, the effect of this decision will be to limit the circumstances in which the forum activities of one entity may be attributed to an affiliated company.⁴⁰

³⁶ *Id.* at 759 (citation omitted).

³⁷ *See id.* at 759.

³⁸ *Id.* As others have noted, however, the Court signaled strongly that it was not. *See* Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 199 (2014).

³⁹ *Daimler*, 134 S. Ct. at 759-60 (citations omitted). The Court then went on to conclude that even if MBUSA's contacts had been attributed to Daimler, the company's activities within the California forum were not sufficient to meet the "essentially at home" standard. *Id.* at 760.

⁴⁰ *See, e.g.,* Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014) (stating that the *Daimler* decision "expressed doubts as to the usefulness of an agency analysis . . . that focuses on a forum-state affiliate's importance to the defendant rather than on whether the affiliate is so dominated by the defendant as to be its alter ego"); *Tansey v. Cochlear Ltd.*, No. 13-CV-4628 (SJF), 2014 WL 4829453,

Together with *Goodyear* and *McIntyre*, *Daimler* restricts the role of U.S. courts in adjudicating regulatory disputes involving multinational enterprises.

The complex legal and operational structures adopted by transnational enterprises facilitate more fluid cross-border activity, enabling the enterprises to provide goods and services in multiple markets.⁴¹ Yet those structures can also permit such enterprises to exploit the space between national regulatory systems.⁴² The jurisdictional retrenchment therefore hampers the ability of domestic courts to participate fully in the global regulatory project, opening up a gap between their effectiveness and the effectiveness of corporate actors operating within the transnational arena.⁴³

This Article investigates whether enterprise theory may provide a way to fill this gap. The Court referred to this possibility at the end of

at *4 (E.D.N.Y. Sept. 26, 2014) (characterizing the decision as “reversing the Ninth Circuit’s adoption of a ‘less rigorous [agency] test’” for the imputation of contacts); *Newlead Holdings Ltd. v. Ironridge Global IV Ltd.*, No. 14cv3945, 2014 WL 2619588, at *4 (S.D.N.Y. June 11, 2014) (citing *Daimler* in doubting the usefulness of agency analysis beyond the alter-ego context); see also Childress, *supra* note 38, at 199 (“At a minimum, the Court may be sending a message that to the extent imputation is available at all, it can only be done in the alter ego context. This could have ramifications for imputation questions concerning both general and specific jurisdiction.”).

⁴¹ Within multinational groups, assets and activities move easily across borders. The United Nations Conference on Trade And Development’s 2013 World Investment Report focuses in significant measure on global value chains, pointing out that these chains “are typically coordinated by [transnational corporations], with cross-border trade of inputs and outputs taking place within their networks of affiliates, contractual partners and arm’s-length suppliers.” UNITED NATIONS CONFERENCE ON TRADE & DEV., *supra* note 4, at xxiii. It goes on to say that “TNC-coordinated [global value chains] account for some 80 per cent of global trade.” *Id.*

⁴² See generally Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 556-57 (2006) (“Enterprises can exploit the territorial principle, the principles of limited liability, and that of independent juridical personality to minimize risk to assets partitioned to the entity.”); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 935 (2012) (noting that multinational enterprises can “engage in regulatory arbitrage, shifting operations and assets to the most favorable (i.e. weakest) regulatory jurisdictions, and in asset partitioning, strategically shielding corporate assets by isolating riskier operations in separate legal entities, each with limited liability”).

⁴³ As I have argued elsewhere, the Supreme Court’s recent jurisprudence in the area of legislative jurisdiction has contributed to this regulatory gap as well. See Hannah L. Buxbaum, *Class Actions, Conflict and the Global Economy*, 21 IND. J. GLOBAL LEGAL STUD. 585, 595-96 (2014); see also Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 508-14 (2011) (providing an empirical account of the decline in alienage litigation).

its opinion in *Goodyear*, noting that the plaintiffs had “belatedly assert[ed] a ‘single enterprise’ theory” under which all Goodyear entities might be treated as a “unitary business.”⁴⁴ The Court declined to address this argument on the basis that the plaintiffs had forfeited it by failing to raise it earlier, but noted the implication: on such a “single enterprise” view, the separateness of the different Goodyear entities might be ignored such that jurisdiction over the U.S. parent would create a basis for jurisdiction over its foreign subsidiaries.⁴⁵

The “single enterprise” approach to jurisdiction draws on the broader theory of enterprise law, which is conceptualized as follows:

The traditional corporation law presupposing as its subject the individual corporation and looking upon it as the basic legal unit entity no longer adequately serves all the needs of modern jurisprudence. To deal with this institutional weakness, the traditional law in a growing number of areas is being supplemented by a doctrine of enterprise law that focuses on the business enterprise as a whole, not on its fragmented components. In selected areas, this newer perspective of the law better serves a society in which business is overwhelmingly conducted by corporate groups.⁴⁶

Proponents of that theory posit that jurisdiction is one of the areas in which enterprise principles might usefully be applied.⁴⁷ The view that motivates an enterprise approach to jurisdiction is that an integrated enterprise utilizing a particular forum for business purposes should not be able to shield itself from lawsuits there by relying on the legal separation between its constituent entities.⁴⁸ As discussed in further detail in Part I, such an approach would rest on economic realities rather than legal formalism in analyzing jurisdiction over members of integrated groups. Thus, it would potentially expand the authority of U.S. courts to adjudicate disputes arising out of the activities of multinational enterprises — not by altering the relevant jurisdictional

⁴⁴ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011) (referring to respondents’ argument that all Goodyear entities could be seen as a “unitary business,” such that jurisdiction over the U.S. parent would confer jurisdiction over the foreign subsidiaries as well). For a discussion of this argument in the *Goodyear* case, see Hoffman, *Further Thinking*, *supra* note 19, at 776-77.

⁴⁵ See *Goodyear*, 131 S. Ct. at 2857.

⁴⁶ Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 605-06 (2005).

⁴⁷ See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* chs. 3-5 (1983).

⁴⁸ *Id.* at 71.

standards, but by applying them differently to defendants with certain characteristics.

Exactly how an enterprise-jurisdiction standard would operate is unclear. Some gestures toward enterprise analysis can be found in the case law, but they are typically under-explained and often confuse that analysis with more traditional agency-based theories of jurisdictional attribution.⁴⁹ Moreover, enterprise theory in general has been criticized for its complexity and indeterminacy.⁵⁰ At this point, then, many more questions have been raised than answered. Can certain enterprises fairly be characterized as unified? Using what criteria? Are there circumstances under which the objectives underlying jurisdictional law (themselves notoriously opaque) would be better served by an approach considering enterprise-wide forum contacts? Would such an approach be consistent with the due process analysis articulated in the recent Supreme Court jurisprudence?

The goal of this Article is to address these questions, assessing the viability of an enterprise approach to personal jurisdiction. Part I of the Article introduces the concepts of enterprise liability and enterprise jurisdiction. Part II then turns to a case study, examining the analysis of personal jurisdiction in litigation involving the Big Four accounting firms. It begins by exploring both the legal and the operational structure of the Big Four accounting networks, analyzing whether they can fairly be considered unified enterprises. It then examines the theories that courts have applied in considering jurisdiction over firms within these networks, including traditional entity-based theories of jurisdictional attribution as well as enterprise-based concepts. Building on the lessons from that case study, Part III then analyzes some of the inconsistencies and weaknesses of current jurisprudence in this area and assesses the viability of an enterprise approach to personal jurisdiction.

I. ENTERPRISE LIABILITY AND ENTERPRISE JURISDICTION

The concept of enterprise law developed as a counterpoint to the *entity* orientation of modern corporation law — that is, the view that each individual corporation is a distinct legal entity with its own rights and obligations.⁵¹ The core principle enshrined in this view is limited

⁴⁹ See *infra* Part III.A.

⁵⁰ See *infra* notes 87–88 and accompanying text.

⁵¹ See generally 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 43 (perm. ed., rev. vol. 2014) (articulating this traditional view).

liability; if the corporation is an independent juridical person, then its owners cannot be held responsible for its debts and obligations. In the context of a simple corporation whose owners are natural persons, limited liability protects the individual assets of investors who contribute capital to a business enterprise. In the context of a corporate group, however, the principle protects the assets of other corporations within that group.⁵²

As courts and commentators have long recognized, strict adherence to the entity view does not always square with the economic realities of corporate structures.⁵³ As a result, corporate doctrine developed to permit certain exceptions to the rule of limited liability, such as alter-ego analysis and other veil-piercing techniques. Going further, some scholars have proposed an “enterprise” theory of corporate law, focusing on the economic reality of the corporate enterprise rather than on the legal formalism of corporate personality.⁵⁴ It is largely a descriptive theory, developed to explain and systematize the exceptions to entity analysis,⁵⁵ although in some work — most prominently, that of Professor Phillip Blumberg — it has a normative aspect as well, promoting a more radical departure from entity theory in situations where a “unitary enterprise” is involved.⁵⁶ This approach

⁵² See *id.* § 26 (noting that even a wholly-owned subsidiary is presumed to be an entity independent of its parent corporation); see also BLUMBERG, *supra* note 47, at 5 (“Doctrines that had developed to protect ultimate investors from involvement in the legal problems of the enterprise were blindly adopted to govern the legal relationships between the components of the enterprise itself.”).

⁵³ See, e.g., Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947) (noting the “divergence between corporate theory and the underlying economic facts” of modern business practice).

⁵⁴ See PHILLIP I. BLUMBERG & KURT A. STRASSER, *THE LAW OF CORPORATE GROUPS: ENTERPRISE LIABILITY IN COMMERCIAL RELATIONSHIPS, INCLUDING FRANCHISING, LICENSING, HEALTH CARE ENTERPRISES, SUCCESSOR LIABILITY, LENDER LIABILITY, AND INHERENT AGENCY* 4 (1998); Berle, *supra* note 53, at 345 (“The corporation is emerging as an enterprise bounded by economics, rather than as an artificial mystic personality bounded by forms of words in a charter, minute books, and books of account. The change seems to be for the better.”); Kurt A. Strasser & Phillip Blumberg, *Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy*, ACCT. ECON. & L., Jan. 2011, at 10.

⁵⁵ See, e.g., Berle, *supra* note 53, at 344 (suggesting that a number of such exceptions “are applications of a single dominant principle” that can be described as “enterprise entity”); Maurice J. Dix, *The Economic Entity*, 22 FORDHAM L. REV. 254 (1953) (surveying circumstances under which courts ignored the corporate form).

⁵⁶ See, e.g., Strasser & Blumberg, *supra* note 54, at 19, 26 (arguing that “the law should move from outdated entity rules to enterprise analysis”). It is important to note that, in Blumberg’s articulation, enterprise theory is not an all-purpose tool; that is, a business might be considered integrated for some purposes but not for others. See *id.*

is predicated on the conclusion that in many corporate groups, “[t]he various companies in the corporate group are really fragments that collectively conduct the integrated enterprise under the coordination of the parent.”⁵⁷ On this view, the rights and responsibilities of a single integrated enterprise should not be determined by the particular structure it chooses to adopt:

Today, economic activity is predominantly conducted by giant multinational enterprises organized in complex multitiered structures, consisting of scores or hundreds of subholding companies and subsidiaries. The traditional doctrines of corporation law which focus on the particular components in a complex multitiered corporate structure, rather than on the enterprise as a whole, have become an anachronism.⁵⁸

Proponents of enterprise analysis promote a model that places function above form, looking to the economic reality of corporate groups and asking — with respect to each particular area of the law — “whether legal decision making and legal responsibility should extend to the whole enterprise or only part of it.”⁵⁹

There are several areas of law in which enterprise-based analysis is explicitly established in statutes or case law. Perhaps the most prominent is the doctrine of antitrust conspiracy. Section 1 of the Sherman Act prohibits restraints of trade effectuated by means of a “contract, combination . . . or conspiracy” between separate entities.⁶⁰ In its 1984 decision in *Copperweld Corp. v. Independence Tube Corp.*,⁶¹ the Supreme Court held that for purposes of that section, a parent and its wholly-owned subsidiary must be considered a “single enterprise,” thus incapable of forming a conspiracy.⁶² The Court stated that

[a] parent and its wholly-owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . A § 1

at 26. I will return to this point in Part III.

⁵⁷ Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 639 (2005).

⁵⁸ BLUMBERG & STRASSER, *supra* note 54, at 4.

⁵⁹ Strasser & Blumberg, *supra* note 54, at 4; *see also* Harper Ho, *supra* note 42, at 906-07 (describing the emergence of a “real enterprise” approach that “meshes as a descriptive matter with the economic realities of corporate groups”).

⁶⁰ 15 U.S.C. § 1 (2012).

⁶¹ 467 U.S. 752 (1984).

⁶² *See id.* at 771.

agreement may be found when “the conspirators had a unity of purpose or a common design and understanding” But in reality a parent and a wholly owned subsidiary always have a “unity of purpose or a common design.” They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.⁶³

Other examples include the bankruptcy doctrine of substantive consolidation, which under certain circumstances permits bankruptcy courts to pool the assets of separate entities within a corporate group,⁶⁴ and the principle of unitary taxation, which permits the apportioned taxation of the global revenues of multinational businesses that function as a “unitary business,” on the ground that in such structures all the component parts of those groups contribute to a single enterprise.⁶⁵ In the area of labor and employment law, the “integrated employer test” is frequently used to deem separate entities parts of a single employer for jurisdictional purposes.⁶⁶ In international arbitration, a “group of companies” doctrine has developed that can be used to bind affiliated companies of a contract party to the latter’s agreement to arbitrate.⁶⁷ And many statutes in a variety of regulatory areas use the concept of “control” to extend liability beyond the regulated company to other companies within the same group.⁶⁸

⁶³ *Id.* at 771-72 (citations omitted).

⁶⁴ See *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (1988) (identifying as one of two critical factors in the consolidation analysis “whether creditors dealt with the entities as a single economic unit and ‘did not rely on their separate identity in extending credit’ . . .”).

⁶⁵ See *Mobil Oil Corp. v. Comm’r of Taxes of Vt.*, 445 U.S. 425, 439-41 (1980).

⁶⁶ See *Trusz v. UBS Realty Investors, LLC*, No. 3:09cv268 (JBA), 2010 WL 1287148, at *6-7 (D. Conn. March 30, 2010) (discussing “[t]he integrated employer test, also referred to as the single employer test,” as applied in cases under statutes including Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Sarbanes-Oxley Act).

⁶⁷ See *Dow Chem. Fr. v. Isover Saint Gobain*, 9 Y.B. Comm. Arb. 131, 136 (ICC Int’l Ct. Arb. 1984) (“[I]rrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality . . . of which the arbitral tribunal should take account.”). The doctrine applies only when the affiliated company was involved in the formation, performance, or termination of the contract in question.

⁶⁸ See, e.g., 15 U.S.C. § 78t(a) (2011) (extending liability under certain provisions of the securities laws to “[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter”).

The precise content of enterprise concepts varies among these different applications. For instance, in the *Copperweld* case, the Supreme Court defined the unified nature of the enterprise by reference to ownership alone.⁶⁹ In the case approving unitary taxation, on the other hand, it referenced not only ownership linkages but also functional integration within corporate groups.⁷⁰ And, of course, the objectives served by the substantive laws in the different areas vary (for instance, the need to develop an adequate taxation base is a very different objective than the need to protect competitors against unfair trade practices). Nonetheless, in each context, those objectives were served by looking beyond the individual entities within a group to consider the enterprise as a unified whole.⁷¹

The same tension between form and economic reality that appears in the context of substantive liability appears in the jurisdictional context as well. On a strict entity-based approach, the jurisdiction of a forum state with respect to the activities of a corporate group would extend only to the particular company active within that state, and not to its parent or other affiliates. The so-called *Cannon* doctrine, articulated in a 1925 Supreme Court decision, takes this view:

Through ownership of the entire capital stock and otherwise, the defendant dominates the [subsidiary] corporation, immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market [its] products in other states. The existence of the [subsidiary] as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation . . . was

⁶⁹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-76 (1984) (emphasizing the link between a parent and its wholly-owned subsidiary).

⁷⁰ *Mobil Oil Corp.*, 445 U.S. at 440.

⁷¹ Proponents of enterprise liability have argued that a broader application of enterprise principles would increase corporate accountability in a range of areas including human rights and products liability. For examples of this argument, see David Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis*, 10 N.C. J. INT'L L. & COM. REG. 31, 38-40 (1985); Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195 (2009).

doubtless adopted solely to secure to the defendant some advantage under the local laws.

....

The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the state in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. It preferred to employ a subsidiary corporation. . . . The corporate separation, though perhaps merely formal, was real. It was not pure fiction.⁷²

As the closing sentences of this excerpt indicate, this is a highly formalistic approach. The corporation in question apparently could have achieved the same “commercial and financial” results by operating in the forum state through an unincorporated department, in which case it would have been subject to jurisdiction there. By incorporating an independent subsidiary to conduct that business, it shielded itself from that jurisdiction.

As in the case of corporate liability, the formalism of this jurisdictional approach led to the development of exceptions — doctrines of “imputed” or “vicarious” jurisdiction.⁷³ These doctrines were applied to support the exercise of jurisdiction in situations where the activity giving rise to a lawsuit was conducted not by the defendant entity directly, but by some other entity within the same enterprise.⁷⁴ Courts borrowed the mechanisms used to justify imputed jurisdiction, generally without much explanation, from the laws governing business associations.⁷⁵ For instance, a court might use corporate veil-piercing doctrine to determine whether a subsidiary was a “mere department” or “alter ego” of its parent; if it concluded that it

⁷² Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 335-37 (1925) (citations omitted).

⁷³ For general accounts of these developments, see Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 15-21 (1986); Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1078-82 (2004) [hereinafter *The Case Against Vicarious Jurisdiction*]; John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. Rev. 445, 453-57 (2004).

⁷⁴ The clearest and most common situation of this kind arises when a parent company is sued for damages arising out of the activities of a wholly-owned subsidiary within the forum.

⁷⁵ See Brilmayer & Paisley, *supra* note 73, at 24.

was, it would consider the two entities merged for purposes of the jurisdictional analysis. Similarly, a court might inquire whether an agency relationship existed between a parent and its subsidiary. If it concluded that such a relationship had been formed, it would attribute the contacts of the entity operating as an agent within the forum to the defendant (principal) outside it.⁷⁶

These doctrines of vicarious jurisdiction have been criticized on a number of grounds. The substantive law that they rely on — particularly corporate veil-piercing doctrine — is itself widely recognized as inconsistent and indeterminate.⁷⁷ It therefore forms a shaky foundation for analogous jurisdictional analysis. Moreover, the relationship between the substantive law on vicarious liability and “jurisdictional veil-piercing” is poorly explained and inconsistently observed. Jurisdictional law rests on a Constitutional due process analysis, whereas “alter ego”-type theories are a matter of state corporate law, and therefore vary across jurisdictions.⁷⁸ In addition, the objectives underpinning jurisdictional law (to protect a defendant from being haled unreasonably into the courts of a foreign forum) are very different from those underpinning the various substantive statutory and common-law standards governing vicarious liability.⁷⁹ Veil-piercing under corporate law, for instance, typically requires a showing of fraud of some kind,⁸⁰ which is rarely present even in cases in which jurisdictional veil-piercing appears reasonable. While some courts recognize these differences,⁸¹ others do not mention them.

⁷⁶ These developments in imputed jurisdiction went hand in hand with developments in imputed liability on the substantive side. As corporate groups became more complex, courts sought to strike an appropriate balance between the goals of limited liability and the need for sufficient regulation. During the same era, legislation was adopted or amended that used various metrics of control to justify vicarious liability under certain circumstances.

⁷⁷ For criticism of veil-piercing doctrine on these grounds, see Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001); John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1100-01 (2009); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81 (2010).

⁷⁸ See Swain & Aguilar, *supra* note 73, at 447-57 (describing the variability among states).

⁷⁹ See Hoffman, *Further Thinking*, *supra* note 19, at 770-71.

⁸⁰ See, e.g., *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991) (noting one requirement for piercing the veil is that “circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice”).

⁸¹ Several courts, for instance, have considered whether meeting the “control person” standard under securities laws simultaneously satisfies jurisdictional

Although imputed-jurisdiction doctrines do chip away at *Cannon's* logic, in that they “rel[y] on the realities of the business operations rather than artificial conceptual tests to determine questions of jurisdiction,”⁸² they remain framed by an entity view of the corporation. A handful of decisions have gone further, casting the analysis more explicitly in enterprise terms:

The test of whether a foreign corporation does business here has been said to be a “simple pragmatic” one, but the problem with that classic formulation is that simplicity and pragmatism are, more often than not, mutually exclusive. Thus, it would often be a simple solution to find for a defendant on the basis of the relatively immaculate formal separation it has engineered between itself and its subsidiaries. . . . The realities and not the formalities must be dealt with.

. . . .

Hattori and its American subsidiaries do maintain some independence[,] about as much as the egg and vegetables in a western omelette. Just as, from a culinary point of view, we focus on the ultimate omelette and not its ingredients, so, too, from a jurisdictional standpoint, it is the integrated international operation of Hattori affecting activities in New York that is the primary focus of our concern. . . . The metaphoric fiction by which the parent and child corporation are treated as separate is here carried too far. “Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁸³

requirements. *See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 351 (D. Md. 2004) (“Equating ‘the broad understanding of control person liability adopted by the Securities Act’ with personal jurisdiction ‘impermissibly conflates statutory liability with the Constitution’s command that the exercise of personal jurisdiction must be fundamentally fair,’” but going on to note that control-person status is a relevant factor in considering jurisdiction, since, for instance, a control person that approves the filing of a form with the SEC should reasonably foresee being haled into court in the United States in any resulting litigation (quoting *In re Baan Co. Sec. Litig.*, 245 F. Supp. 2d 117, 129 (D.D.C. 2003))); *see also Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 386 (D. Del. 1983) (holding that “the exercise of control over the offending corporation is a sufficient contact upon which to predicate jurisdiction” in securities litigation).

⁸² BLUMBERG, *supra* note 47, at 71.

⁸³ *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1335, 1341 (1981) (citations omitted).

Again as in the case of corporate liability, commentators have promoted enterprise theory as an appropriate basis for tailoring the application of jurisdictional law to corporate groups. Applying an enterprise framework to address issues of procedural law, which he defines to include the law of personal jurisdiction, Professor Blumberg states that

Where the constituent components of the group form a unitary business and conduct interrelated operations as part of an integrated enterprise under common direction directed at the maximization of return for the group as a whole, the legal consequences . . . should reflect a judgment of the extent to which the objectives of the particular procedural rule under discussion are best achieved in dealing with the several components of the group. In such an analysis, entity should not be decisive. The solution to the procedural question should rest on the underlying policies and purposes of the procedural statute or rule, on the one hand, and the economic realities of the enterprise, on the other. That the enterprise may have been divided into various corporate constituents for its own convenience should have little significance if the policies of the procedural statute or rule are better served by its application to the various components of an integrated enterprise as a group.⁸⁴

The status today of “enterprise jurisdiction” in this sense is uncertain. Early suggestions that courts were beginning to reject traditional entity-based jurisdictional analysis have been contested, and a number of empirical studies have demonstrated that the *Cannon* doctrine is alive and well.⁸⁵ Moreover, using enterprise theory to expand personal jurisdiction under state law is somewhat at odds with the decision not to develop a general nationwide standard for personal jurisdiction in the federal courts.⁸⁶ Finally, critics have challenged enterprise theory either generally or as applied in the context of jurisdictional law. Some argue that the factors that would lead to a finding of sufficient integration within a particular enterprise are

⁸⁴ BLUMBERG, *supra* note 47, at 24-25.

⁸⁵ See Swain & Aguilar, *supra* note 73, at 450 (rejecting the hypothesis that courts are moving toward a less entity-based view of jurisdiction).

⁸⁶ The Federal Rules of Civil Procedure permit a federal court to exercise jurisdiction on the basis of aggregate nationwide contacts only in federal-question cases. FED. R. CIV. P. 4(k)(2). For an argument in favor of a system of nationwide federal personal jurisdiction, see Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014).

unacceptably ambiguous;⁸⁷ others, focusing on the jurisdictional context, object to the importation of corporate law doctrines into jurisdictional analysis.⁸⁸ And, indeed, assessing the presence or absence of personal jurisdiction over an entity on the basis of enterprise theory presents thorny questions. How exactly would one distinguish between a group that constitutes a “unitary business” and one that does not? What are the underlying policies and purposes of the law on personal jurisdiction, and how would they best be served in the context of claims arising out of the activities of a unitary business?

The following Part uses a case study of accounting firms in order to investigate these questions. Developing a study of this particular industry advances my analysis in three ways. First, it lends specificity to the concept of a “unified enterprise.” As discussed above, the predicate for any application of enterprise analysis (whether in the context of liability or of jurisdiction) is a factual determination that the business in question can be considered a single enterprise. Conducting that analysis in connection with a specific form of business structure, rather than in the abstract, is helpful in assessing whether such a determination can be made with accuracy and predictability. Second, this study permits me to separate the question of economic integration from the question of ownership. Unlike traditional corporate groups whose components are connected by ownership links, the accounting firms are constituted as networks of independently-owned offices connected by contractual and operational relationships. For this reason, studying them helps to shift the focus of analysis away from ownership, which is often viewed as a proxy for integration within business groups, and toward other elements that can create the mutual dependence characterizing firms within integrated enterprises. A conclusion that these networks may be characterized as unified enterprises would suggest that enterprise analysis would be appropriate in easier cases as well — for instance, where a single parent company wholly owns a number of subsidiaries active in different jurisdictions.⁸⁹ Third, the body of case law on

⁸⁷ See, e.g., Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 67 (1996).

⁸⁸ For objections to the importation of corporate law doctrine into jurisdictional analysis, see Brilmayer & Paisley, *supra* note 73, at 30-34; Hoffman, *Further Thinking*, *supra* note 19, at 770; Hoffman, *The Case Against Vicarious Jurisdiction*, *supra* note 73, at 1078-82. Cf. Aronofsky, *supra* note 71, at 32 (criticizing veil-piercing doctrine, but arguing that the adoption of enterprise theory would “achieve greater consistency and coherence” in the area).

⁸⁹ See Strasser & Blumberg, *supra* note 54, at 11 (noting that “determining the scope and boundaries of an enterprise” is more complicated when the enterprise is formed by contract rather than by ownership).

personal jurisdiction over non-resident accounting firms is large enough to permit the identification of patterns in the judicial application of enterprise concepts.⁹⁰

II. THE BIG FOUR ACCOUNTING NETWORKS: A CASE STUDY

Subpart A of this Part analyzes the legal and operational structure of the Big Four accounting networks, examining the various indicia of integration within them. Subpart B traces the use of entity and enterprise concepts in cases addressing the jurisdiction of U.S. courts over their member firms.

A. *The Structure of the Big Four Accounting Networks*

Accounting firms engaged in cross-border business adopt a variety of different organizational forms. Some may remain essentially national practices but establish reciprocal referral mechanisms with national practices in other countries; others, where permitted by local laws, may establish subsidiary organizations abroad.⁹¹ The largest of the international accounting groups tend to organize as networks of associated firms — although that term is assigned multiple meanings even within the specific context of the accounting profession.⁹²

⁹⁰ In addition, studying the Big Four provides an opportunity to examine how enterprise jurisdiction might function with respect to entities such as global franchise networks, insurance companies and law firms.

⁹¹ See generally FÉDÉRATION DES EXPERTS COMPTABLES EUROPÉENS, TRANS-NATIONAL ORGANISATIONS AND PRACTICES WITHIN THE ACCOUNTANCY PROFESSION 20-22 (2008) [hereinafter TRANS-NATIONAL ORGANISATIONS AND PRACTICES], available at http://www.fee.be/images/publications/sme-smp/TOPs_080409_Clean195200826176.pdf (surveying the range of organizational forms).

⁹² The European Union's audit directive defines "network" as follows:

'[N]etwork' means the larger structure:

–which is aimed at cooperation and to which a statutory auditor or an audit firm belongs, and

–which is clearly aimed at profit- or cost-sharing or shares common ownership, control or management, common quality-control policies and procedures, a common business strategy, the use of a common brand-name or a significant part of professional resources.

Council Directive 2006/43, art. 2(7), Statutory Audits of Annual Accounts and Consolidated Accounts, 2006 O.J. (L 157) 87, 92 (EC) [hereinafter Audit Directive]. A leading study of transnational accounting firms uses the term to refer to "a contractual cooperation between legally and economically autonomous national audit firms, which are organized based on partnership principles under the strategic leadership of one or more member firms for the joint fulfilment of international client needs."

Groups within that category may display significantly different levels of operational integration.⁹³ This study focuses on the Big Four accounting firms, which exhibit the highest degree of integration: Deloitte Touche Tohmatsu, Ernst & Young, KPMG, and PricewaterhouseCoopers (“PwC”).⁹⁴

This Part describes the structure of these networks, both in legal and in operational terms. Many of the networks’ organizing documents are not publicly available.⁹⁵ However, information regarding their structure is available from the following sources: (1) the websites of the accounting firms; (2) transparency reports filed each year in compliance with E.U. regulations;⁹⁶ (3) annual reports filed with the U.S. Public Company Accounting Oversight Board; and (4) occasional reports prepared by trade associations or by the regulatory bodies charged with oversight of the accounting profession. In addition, an extensive literature from the fields of management, accounting, and organization theory sets forth the results of qualitative empirical research on the structure and operation of professional accounting

Hansrudi Lenz & Marianne L. James, *International Audit Firms as Strategic Networks — The Evolution of Global Professional Service Firms*, in *ECONOMICS AND MANAGEMENT OF NETWORKS: FRANCHISING, STRATEGIC ALLIANCES, AND COOPERATIVES* 367, 376 (Gérard Cliquet et al. eds., 2007).

⁹³ See *TRANS-NATIONAL ORGANISATIONS AND PRACTICES*, *supra* note 91, at 25 (establishing a sliding scale of interaction, coordination, and integration); Lenz & James, *supra* note 92, at 379 (sketching out factors differentiating low-integration and high-integration firms).

⁹⁴ Some of the following discussion of litigation against auditors also involves Arthur Andersen, which before its collapse in the wake of the Enron scandal belonged to this group of the largest accounting networks, and to groups including Grant Thornton and BDO Seidman, which are at the next level down in terms of market share but share the operational characteristics of the Big Four. See generally Jeff P. Boone et al., *Do the Big 4 and the Second-tier Firms Provide Audits of Similar Quality?*, 29 *J. ACCT. & PUB. POL’Y* 330 (2010) (ranking auditing firms by size and stating that Grant Thornton, BDO Seidman, and the Big Four comprise the six “global audit firm networks.”).

⁹⁵ The vast majority of the member firms within each of the Big Four networks are partnerships rather than corporations, for which less information is publicly available. In addition, the contracts used to organize the operations of each network (such as membership and license agreements) are not publicly available. See discussion *infra* Part II.A.3.

⁹⁶ Article 40 of the EU’s audit directive requires member states to ensure that audit firms publish annual reports including, among other items, a description of any network to which they belong and of the “legal and structural arrangements” in place within that network. Audit Directive, *supra* note 92, at art. 40, 2006 O.J. (L 157) 87, 102. Big Four member firms outside of the E.U. have established a practice of publishing similar reports.

networks. The following account draws on all of these sources, as well as on filings in litigation against accounting firms.

1. The Global Face of Accounting Networks

A strong global presence is critical to the business model of each of the Big Four networks. So much is evident from their websites alone. Ernst & Young's, for instance, includes the following message:

At EY, we have long thought that globalization is one of the defining issues of our time. Our response has been to transform our organization so that we keep in step with the changing needs of our clients and our people. . . . Our clients need integrated, cross-border service and the same high quality wherever they do business around the world. . . . [Our] structure is streamlined allowing us to make decisions quickly, execute our strategy and provide exceptional client service wherever in the world our clients do business.

Our global structure means we can respond faster than our competitors. We can access the right people and assemble high-performing teams to deliver exceptional client service worldwide. So we're not merely a loose collection of national practices — we are a global organization, unified in our approach.⁹⁷

The other networks project a similar image, stressing their worldwide presence,⁹⁸ the breadth of resources enjoyed by member firms,⁹⁹ and the global nature of their organizations.¹⁰⁰

⁹⁷ *Our Global Approach*, ERNST & YOUNG, <http://www.ey.com/US/en/About-us/Our-global-approach> (last visited Aug. 2, 2014).

⁹⁸ The Deloitte website states that “Deloitte’ is the brand under which tens of thousands of dedicated professionals in independent firms throughout the world collaborate to provide audit, consulting, financial advisory, risk management, tax and related services to selected clients.” *About Deloitte*, DELOITTE, <http://www2.deloitte.com/global/en/pages/about-deloitte/articles/about-deloitte.html> (last visited Aug. 2, 2014).

⁹⁹ In describing its network structure, PwC states that “Member firms of PwCIL can use the PwC name and draw on the resources and methodologies of the PwC network. In addition, member firms may draw upon the resources of other member firms and/or secure the provision of professional services by other member firms and/or other entities.” *How We Are Structured*, PwC, <http://www.pwc.com/gx/en/corporate-governance/network-structure.jhtml> (last visited Aug. 2, 2014).

¹⁰⁰ The “values” statement on the KPMG website states that

[o]ur values create a sense of shared identity within the KPMG organization, which is a network of member firms in over 155 countries. They define what

As the Ernst & Young statement suggests, the Big Four accounting firms globalized their practices in response to the globalization of their clients.¹⁰¹ This link is particularly clear in the core service area of auditing. As corporate enterprises came to include increasing numbers of foreign subsidiaries, they required auditing services in multiple jurisdictions in order to prepare their consolidated financial statements.¹⁰² Accounting firms sought a business structure that would permit them to gain a competitive edge in serving such clients.¹⁰³ The Big Four expanded their global presence and tightly integrated their operations across jurisdictions, thus offering their clients comprehensive and efficient accounting services in complex cross-border engagements.¹⁰⁴

Adapting to the needs of multinational clients has helped the Big Four dominate the accounting industry. They audit an extremely high percentage of public companies worldwide, representing nearly 100% of the global market capitalization of U.S. issuers.¹⁰⁵ This dominance is

we stand for and how we do things. Our values help us to work together in the most effective and fulfilling way. They bring us closer as a global organization.

Our Values, KPMG, <http://www.kpmg.com/global/en/about/governance/values-culture/pages/our-values.aspx> (last visited Aug. 2, 2014).

¹⁰¹ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 48 (“[T]he economic impetus and overall rationale for the profession’s development of trans-national structures lie in the need to service trans-national client requirements.”).

¹⁰² See Lenz & James, *supra* note 92, at 368-69.

¹⁰³ See DEP’T OF THE TREASURY, FINAL REPORT OF THE ADVISORY COMMITTEE ON THE AUDITING PROFESSION, at V:5 (2008) [hereinafter TREASURY REPORT], available at <http://www.treasury.gov/about/organizational-structure/offices/Documents/final-report.pdf> (noting that the mergers used to expand the Big Four networks were driven by “the desire to be able to service large public and multinational companies, have greater technical and industry-specific expertise, and capture the benefits from economies of scale”); Royston Greenwood et al., *The Organizational Design of Transnational Professional Service Firms*, 39 ORG. DYNAMICS 173, 175 (2010).

¹⁰⁴ See Mehdi Boussebaa, *Struggling to Organize Across National Borders: The Case of Global Resource Management in Professional Service Firms*, 62 HUM. REL. 829, 833 (2009) (discussing the client demands that pushed professional service firms in the direction of increased cooperation and integration); Jochen Zimmermann & Jan-Christoph Volckmer, *Accounting Firms: Global Spread with Limited Transnationalization* (ZenTra Working Papers in Transnational Studies, No. 11, 2012), available at <http://ssrn.com/abstract=2190836> (noting that most transnational enterprises prefer to hire the same auditor (that is, firms within the same network) for their entire group).

¹⁰⁵ See Jeanette M. Franzel, Bd. Member, Pub. Co. Accounting Oversight Bd., *Accountability: Protecting Investors, the Public Interest and Prosperity* (July 17, 2013), available at http://pcaobus.org/News/Speech/Pages/07172013_AGA.aspx. A 2010 study by the European Commission found that the market share of the Big Four

due not only to their efficiency in delivering cross-border services, but also to the widespread perception, captured in empirical studies of the profession, that their auditing services are of higher quality than those of their competitors.¹⁰⁶ This gives the Big Four an advantage over their competitors in the market for accountancy services in connection with new listings in particular¹⁰⁷ and for public companies in general,¹⁰⁸ as their audits send a signal of higher reliability in the market. As one court put it,

Independent auditors serve a crucial role in the functioning of world capital markets because they are reputational intermediaries. In certifying a company's financial statements, their reputations for independence and probity signal the accuracy of the information disclosed by the company, the managers of which typically are unknown to most of the investing public.

This is especially true of defendants and other global accounting firms. Certification by an entity named Deloitte & Touche, Grant Thornton, or one of the small handful of other major firms is incalculably more valuable than that of a less known firm because the auditor "is in effect pledging a reputational capital that it has built up over many years of performing similar services for numerous clients." In the case

firms with respect to listed European companies exceeded 90% in the majority of member states. *Green Paper on Audit Policy: Lessons from the Crisis*, at 15, COM (2010) 561 final (Oct. 13, 2010) [hereinafter *Green Paper*].

¹⁰⁶ See Stephen A. Fafatas & Kevin Jialin Sun, *The Relationship Between Auditor Size and Audit Fees: Further Evidence from Big Four Market Shares in Emerging Economies*, in 10 RESEARCH IN ACCOUNTING IN EMERGING ECONOMIES 57, 60-61 (Mathew Tsamenyi & Shahzad Uddin eds., 2010) (reporting empirical research showing that Big Four firms deliver audits of higher quality than those of other accounting firms). Explanations for the quality difference include more stringent quality controls within the Big Four, leading to the expenditure of greater resources in audits and the use of higher-quality staff. See Peter Moizer, *Auditor Reputation: The International Empirical Evidence*, 1 INT'L J. OF AUDITING 61, 67 (1997).

¹⁰⁷ Indeed, when a company goes public, its financial advisors often insist that it employ one of the Big Four to audit its financial reports. See TREASURY REPORT, *supra* note 103, at VIII:5-6. See generally Moizer, *supra* note 106, at 68-70 (surveying a number of studies on the reputational effect of the largest auditing firms on the IPO market).

¹⁰⁸ See *Green Paper*, *supra* note 105, at 15 (noting that financial institutions may impose "Big Four only" requirements on companies in connection with lending arrangements); Xin Chang et al., *The Effect of Auditor Quality on Financing Decisions*, 84 ACCT. REV. 1085, 1087 (2009) (concluding that using a Big Four auditor facilitates equity financing).

of these defendants and their *confreres*, the relevant reputational capital is that associated with the worldwide organizations, at least to a predominant extent.¹⁰⁹

As a result of this comparative reputational advantage, the Big Four are able to charge a premium for audit services over the rates charged by their competitors.¹¹⁰ The success of their globalized business strategy is reflected in their annual earnings. In fiscal 2013, they reported worldwide revenues as follows: Deloitte Touche Tohmatsu, \$32.4 billion;¹¹¹ Ernst & Young, \$25.8 billion;¹¹² KPMG, \$23.4 billion;¹¹³ PwC, \$32.1 billion.¹¹⁴

2. The Legal Structure of Accounting Networks

a. Ownership

Each of the four networks includes a global umbrella organization. Three of these — Ernst & Young Global Limited, PricewaterhouseCoopers International Limited and Deloitte Touche

¹⁰⁹ *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 289-90 (S.D.N.Y. 2005) (quoting John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid."* 57 BUS. LAW. 1403, 1405 (2002)). Plaintiffs have picked up on this argument as well. See, e.g., *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814(MP), 2003 WL 21058090, at *2 (S.D.N.Y. May 12, 2003) (alleging that an accounting firm "intentionally creat[ed] and fostered the belief in the investing public, including the Class herein, that the audit reports issued by International should be relied upon because they were backed by the expertise of its global network of member firms — expertise that was ensured by the strict quality controls imposed and implemented by International").

¹¹⁰ See Moizer, *supra* note 106, at 61 (reviewing audit fee studies in twelve countries and concluding that "[t]he results point to a Top Tier fee premium of between 16 to 37% across all the countries"); Rouven Fleischer & Max Goettsche, *Audit Pricing: The Size Factor 19* (November 26, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1725519> (reporting results confirming an audit fee premium for the German market of 27.4%).

¹¹¹ Press Release, Deloitte, *Deloitte Grows for Fourth Consecutive Year, Reporting U.S. \$32.4 Billion in Revenue* (Sept. 16, 2013), available at <http://www.deloitte.com/2013revenues>.

¹¹² Press Release, Ernst & Young, *EY Reports 2013 Global Revenues of US\$25.8 Billion* (October 8, 2013), available at http://www.ey.com/GL/en/Newsroom/News-releases/News_EY-reports-2013-global-revenues-of-US-25-8-billion-dollars.

¹¹³ KPMG LLP, *TRANSPARENCY REPORT 2013*, at 22 (2013) [hereinafter *KPMG TRANSPARENCY REPORT 2013*], available at <http://www.kpmg.com/US/en/about/Documents/2013-KPMG-LLP-Transparency-Report-web.pdf>.

¹¹⁴ Press Release, PwC, *PwC FY 2013 Global Revenues Grow to US\$32.1 Billion* (Oct. 1, 2013), available at <http://press.pwc.com/global/pwc-fy-2013-global-revenues-grow-to-us32.1-billion/s/a25dfdaa-5ae8-4818-b09a-99a3821e3765>.

Tohmatsu Limited — are U.K. companies limited by guarantee.¹¹⁵ The fourth, KPMG International Cooperative, is a cooperative under Swiss law.¹¹⁶ The umbrella organizations are funded by contributions from the member firms, and their own financing facilities are guaranteed by certain member firms.¹¹⁷ They do not themselves provide client services; rather, they serve as coordinating entities for a network of independent firms, each of which provides services in a particular geographic region.

These independent firms, to which I will sometimes refer as “affiliates,”¹¹⁸ are generally structured as limited liability entities¹¹⁹ under the laws of their state or country. They are owned by their respective partners and other principals, and funded by capital contributions from the partners.¹²⁰ In the smallest markets, there is only one member firm per country; in larger markets, each network

¹¹⁵ This is a form of corporation typically used by non-profit organizations. A company limited by guarantee does not have any share capital; rather, it is formed by members who serve as guarantors, agreeing to contribute a nominal amount in the event of the company’s dissolution. A company limited by guarantee generally does not distribute profits to its members. See BRENDA HANNIGAN, *COMPANY LAW* 14-15 (2d ed. 2009).

¹¹⁶ This form of enterprise too is typically used by non-profit organizations. It is a union of members (with a minimum of seven) who contribute nominal capital to the cooperative. See OBLIGATIONENRECHT [OR] [Code of Obligations] March 30, 1911, RS 220, arts. 828–926 (Switz.), available at www.admin.ch/opc/en/classified-compilation/19110009.

¹¹⁷ These financing arrangements are discussed in a number of the cases against Big Four firms. See, e.g., *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 137 (S.D.N.Y. 2013) (regarding Deloitte’s structure); *In re Parmalat Sec. Litig.*, 598 F. Supp. 2d 569, 579 (S.D.N.Y. 2009) (regarding Grant Thornton International’s structure); *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 459 (S.D.N.Y. 2009) (regarding Deloitte Touche Tohmatsu’s structure).

¹¹⁸ I use this term in the colloquial sense to suggest connection, not in the narrow sense of an inter-company relationship involving stock ownership linkages.

¹¹⁹ In the United States, for instance, each of the Big Four affiliates providing audit services is a limited liability partnership organized under the laws of Delaware. DELOITTE & TOUCHE LLP, 2014 TRANSPARENCY REPORT 2 (2014) [hereinafter DELOITTE TRANSPARENCY REPORT 2014], available at http://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us_aers_2014_transparency_report_082714.pdf; ERNST & YOUNG LLP (US), TRANSPARENCY REPORT 2013, at 3 (2013) [hereinafter EY TRANSPARENCY REPORT 2013], available at [http://www.ey.com/Publication/vwLUAssets/EY_Transparency_report_2013/\\$FILE/Transparency-report-US-2013.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Transparency_report_2013/$FILE/Transparency-report-US-2013.pdf); KPMG TRANSPARENCY REPORT 2013, *supra* note 113, at 2; PWC, OUR FOCUS ON AUDIT QUALITY 2014, at 25 (2014) [hereinafter PWC FOCUS ON AUDIT QUALITY 2014], available at <http://www.pwc.com/us/en/audit-assurance-services/publications/our-focus-on-audit-quality.jhtml>.

¹²⁰ DELOITTE TRANSPARENCY REPORT 2014, *supra* note 119, at 2; EY TRANSPARENCY REPORT 2013, *supra* note 119, at 3-4; KPMG TRANSPARENCY REPORT 2013, *supra* note 113, at 2; PWC FOCUS ON AUDIT QUALITY 2014, *supra* note 119, at 25.

maintains multiple offices serving clients in different regions. In the largest markets, multiple member firms may be organized as subsidiaries of a single company or partnership that does not itself provide client services.¹²¹ There are no ownership ties between firms either vertically or horizontally: the global umbrella organization has no ownership interest in any of the affiliates, and no client-service affiliate has an ownership interest in any other affiliate.¹²²

Some of the networks have interposed additional coordinating organizations between the global entity and the individual affiliates that provide client services. Ernst & Young, for instance, employs a regional structure. Thus, an entity known as EY Americas, structured as a Delaware limited liability company, coordinates the activities of all affiliates in the United States and twenty-nine other countries.¹²³ The network includes three other regional entities, operating in Japan, Asia-Pacific, and Europe/Middle East/India/Africa respectively.¹²⁴

In contrast to the marketing-oriented language discussed above regarding globalization and integration, the legal disclaimers included on the Big Four's websites stress the separation between the constituent members of the networks. Each of the Big Four emphasizes that their member firms are separate and distinct legal entities,¹²⁵ and that the networks do not constitute international partnerships.¹²⁶

¹²¹ In the United States, for instance, Deloitte maintains four primary subsidiaries, organized along service lines including auditing and tax. DELOITTE TRANSPARENCY REPORT 2014, *supra* note 119, at 2. The subsidiaries are owned by Deloitte LLP, a U.S. umbrella organization, and the partners and principals of the respective subsidiary. *Id.* Deloitte & Touche LLP, the auditing subsidiary, maintains more than eighty client-service offices in the United States. *Deloitte Office Locator*, DELOITTE, <http://www2.deloitte.com/us/en/footerlinks/office-locator.html> (last visited Feb. 28, 2015).

¹²² There are a few exceptions to this rule in the form of "service provider"-type affiliates. These conduct various business services for the client-service affiliates (rather than performing client engagements directly), and may be owned by one of the client-service affiliates. *See supra* text accompanying note 109.

¹²³ EY TRANSPARENCY REPORT 2013, *supra* note 119, at 3.

¹²⁴ *Id.*

¹²⁵ *See, e.g., About Deloitte*, *supra* note 98 (stating that "DTTL and each DTTL member firm are legally separate and independent entities, which cannot obligate each other. DTTL and each DTTL member firm are liable only for their own acts and omissions, and not those of each other").

¹²⁶ *See, e.g., How We Are Structured*, *supra* note 99 (stating that "PwC member firms do not and cannot currently operate as a corporate multinational. The PwC network is not a global partnership, a single firm, or a multinational corporation").

b. Governance and Control

The Big Four umbrella organizations are managed by global boards that are supported by executive committees, organized by geographic region and/or service line, and by various advisory boards.¹²⁷ These governance institutions are staffed largely by individuals drawn from among the member firms.¹²⁸ The governance of the individual affiliate firms depends upon local regulations; in the United States, for instance, member firms are managed by members elected from among the partners.¹²⁹

The networks stress the fact that the umbrella organizations simply coordinate the activities of affiliates, and do not manage their day-to-day operations.¹³⁰ On their websites and in their disclosure documents, they disclaim the existence of any control in that vertical relationship, and specifically state that the individual member firms are not agents of the umbrella organization.¹³¹ They also emphasize the absence of control linkages on the horizontal scale, stating that no one client-service affiliate acts as the agent of any other.¹³²

Some of the firms' regulatory filings reveal a slightly greater degree of differentiation in the level of control between various entities within the networks. Item 5.2 of the Annual Report form that must be filed with the U.S. Public Company Accounting Oversight Board calls for disclosure of "[a]udit-related memberships, [a]ffiliations, or [s]imilar [a]rrangements."¹³³ In describing their basic network arrangements, the

¹²⁷ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 39.

¹²⁸ See, e.g., EY TRANSPARENCY REPORT 2013, *supra* note 119, at 5-7 (describing its Global Advisory Council and Global Executive, populated by representatives of member firms, and its small group of independent non-executive representatives).

¹²⁹ See, e.g., DELOITTE TRANSPARENCY REPORT 2014, *supra* note 119, at 4-6 (describing the local governance structure).

¹³⁰ See, e.g., *Legal*, ERNST & YOUNG, <http://www.ey.com/UL/en/AccountingLink/Navigation-Footer-Legal> (last visited Dec. 23, 2014) ("Although Ernst & Young Americas LLC oversees implementation of EYG policies at Americas Area Firms and facilitates their cooperation, it does not control or manage, or have any ownership in, any Americas Area Firm.").

¹³¹ See *supra* notes 125-26.

¹³² See, e.g., *How We Are Structured*, *supra* note 99 ("A member firm cannot act as agent of PwCIL or any other member firm, cannot obligate PwCIL or any other member firm, and is liable only for its own acts or omissions and not those of PwCIL or any other member firm.").

¹³³ The Item requires disclosure of any:

- (1) Membership or affiliation in or with any network, arrangement, alliance, partnership or association that licenses or authorizes audit procedures or manuals or related materials or the use of a name in connection with the

affiliates of each network use language similar to that in the disclaimers on their websites.¹³⁴ But some of the reports disclose the existence of additional affiliates over whose work there is a higher level of supervision and control. For instance, the 2013 Annual Report filed by Pricewaterhouse Coopers LLP, that network's U.S. affiliate, identifies two "Service Delivery" affiliates — one in Argentina and one in India — that it engages on a subcontract basis. In describing its relationship with the Service Delivery affiliate in Argentina, the report states that

PricewaterhouseCoopers Service Delivery Center (Argentina) S.R.L. (PwC SRL) is a PwCIL member firm which PricewaterhouseCoopers LLP (PwC US) subcontracts to provide certain standard and repeatable audit-related tasks for US engagement teams. This framework differs from our network arrangement insofar as the work performed by PwC SRL personnel is reviewed by the PwC US engagement team and is performed under the direction and control of the PwC US engagement partner.¹³⁵

provision of audit services or accounting services; (2) Membership or affiliation in or with any network, arrangement, alliance, partnership or association that markets or sells audit services or through which joint audits are conducted; or (3) Arrangement, whether by contract or otherwise, with another entity through or from which the Firm employs or leases personnel to perform audit services.

Form 2 — *Annual Report Form, Part V: Offices and Affiliations*, PUB. CO. ACCOUNTING OVERSIGHT BD., http://pcaobus.org/Rules/PCAOBRules/Pages/Form_2.aspx#BM_Part5 (last visited Feb. 19, 2015) (emphasis added).

¹³⁴ Thus, for example, PwC US's form states in response that

PricewaterhouseCoopers LLP is a member firm of PricewaterhouseCoopers International Limited (PwCIL). PwCIL is an English private company limited by guarantee. Member firms operate locally in countries around the world. Each member firm obtains the right to use the PricewaterhouseCoopers name and access to common resources, methodologies, knowledge and expertise of the PwC network. Each member firm agrees to abide by PwCIL's common standards and policies, which are approved by the PwCIL Board, and engages in quality control and compliance monitoring activities covering the provision of services, ethics and independence. PwCIL does not provide services to clients. PwC member firms do not act as agents of PwCIL in providing services to clients or otherwise, and PwCIL does not act as the agent of its member firms.

Responses from PwC, Form 2 — *Annual Report Form, Item 5.2: Audit-Related Memberships, Affiliations, or Similar Arrangements*, to Pub. Co. Accounting Oversight Bd. 14 (Mar. 31, 2013) (on file with author).

¹³⁵ *Id.*

Under such arrangements, some of the work done in connection with audits may be performed by non-U.S. affiliates under the supervision and control of the U.S. firm.

The secondary literature also suggests some differentiation in the relationships involving “core” affiliates and “peripheral” affiliates.¹³⁶ Particularly when existing accounting firms in developing countries are brought within the networks, the organization may choose to put mechanisms in place providing, at least temporarily, for some degree of supervision and control by other firms.¹³⁷

There are multiple reasons that the Big Four choose to structure their networks in this manner, of which the most important are (a) regulatory requirements and (b) the limitation of liability.¹³⁸ Historically, the rules governing the accounting profession in virtually every country included limitations regarding the management and/or ownership of auditing firms. In the United States, for example, statutes restricted the ownership of accounting firms to licensed CPAs; thus, accountants licensed in other countries would not be permitted to own a U.S. accounting practice.¹³⁹ In Europe, similarly, an E.U.

¹³⁶ See Anthony Ferner, Paul Edwards & Keith Sisson, *Coming Unstuck? In Search of the “Corporate Glue” in an International Professional Service Firm*, 34 *HUM. RESOURCE MGMT.* 343, 354 (1995) (concluding that offices “away from the dominant Anglo-Saxon and northern European center” of one of the networks were less integrated). In addition, the global executive boards are composed largely of individuals from the most important of the member firms. See David J. Cooper et al., *Globalization and Nationalism in a Multinational Accounting Firm: The Case of Opening New Markets in Eastern Europe*, 23 *ACCT. ORG. & SOC’Y* 531, 533 (1998) (citing one of the major firms, where representatives of the “very largest national practices” compose the governing board). By way of illustration, Ernst & Young’s 2013 global report identifies nineteen “Global Executive” members. EY GLOBAL, TRANSPARENCY REPORT 2013, at 29 (2013), available at [http://www.ey.com/Publication/vwLUAssets/EY-Global-Transparency-Report-2013/\\$FILE/EY_Transparency_%20Report_%202013_EY%20Global_final.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Global-Transparency-Report-2013/$FILE/EY_Transparency_%20Report_%202013_EY%20Global_final.pdf). Thirteen are from either London or a U.S. office. The remaining six members are from Tokyo, Gurgaon, Paris, Shanghai, Milan, and Singapore. *Id.*

¹³⁷ See, e.g., Cooper et al., *supra* note 136 (studying the involvement of more established firms in initial operations of an affiliate in Russia).

¹³⁸ See generally Ethan S. Burger, *Regulating Large International Accounting Firms: Should the Scope of Liability for Outside Accountants Be Expanded to Strengthen Corporate Governance and Lessen the Risk of Securities Law Violations?*, 28 *HAMLIN L. REV.* 1, 12 (2005) (outlining various motivations for accounting firms to structure their operations in this manner, including limiting exposure to liability to clients or third parties, taxation concerns, and licensing concerns in particular jurisdictions).

¹³⁹ Today, the Uniform Accountancy Act provides that only a simple majority of a

Company Law Directive adopted in 1984 required that both the majority of voting rights in an auditing firm and the majority of its management body be represented by auditors licensed in the relevant member state.¹⁴⁰ Under licensing rules of this type, it would not have been possible to structure cross-border accounting enterprises as single global partnerships. In certain regions, the regulations restricting management and ownership of accounting firms have been loosened, and entities have emerged that encompass multiple jurisdictions.¹⁴¹ Nevertheless, up to this point the structure of the Big Four as networks of affiliated but separately owned firms is due in part to this regulatory history.

The second critical reason to form a network rather than a global partnership is to insulate a particular partnership from liability for the acts or omissions of another office.¹⁴² Accounting firms face significant litigation risk as a result of alleged audit failures.¹⁴³ Liability regimes differ from country to country. In some jurisdictions, auditor liability is limited by statute, or may be offset by means of indemnification agreements with clients; in others, however, auditors remain jointly and severally liable with other defendants for any harm caused by an audit failure.¹⁴⁴ If cross-border practices were structured as single

firm's ownership must belong to U.S.-licensed accountants. UNIF. ACCOUNTANCY ACT § 7(c)(1) (Nat'l Ass'n of State Bds. of Accountancy 2014). This provision has not been included in all states' implementing legislation, however; in New York, for instance, all owners must be licensed. N.Y. EDUC. LAW § 7408(2) (McKinney 2011).

¹⁴⁰ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 15.

¹⁴¹ For instance, the E.U. Directive was modified to permit majority control by auditors licensed in any member state within the European Union, which has led to the emergence of some pan-European practices. In 2007, for example, KPMG integrated its United Kingdom, Germany, and Switzerland practices into a single U.K.-registered limited partnership. Indeed, some commentators have suggested that the networks would in fact restructure as full global partnerships if they were permitted to do so. See, e.g., Lenz & James, *supra* note 92, at 375 ("Without these restrictions of cross-border competition eventually more integrated audit firm organizations with minor organization and control costs and better funding options would have been evolved.").

¹⁴² See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 26 (concluding that "one of [the] key drivers for the use of the association model is the consideration of liability. . . . [C]oncern regarding possible litigation transfer over jurisdictions constituted one of the principal reasons for working through the organisational model of an association").

¹⁴³ See *infra* Part II.B for additional details regarding litigation against accounting firms.

¹⁴⁴ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 17. Under the U.S. securities laws as amended by the Private Securities Litigation Reform Act, for instance, an auditor sued in a securities class action can be jointly and severally liable for the total amount of damages only if it "knowingly" violates the securities laws;

partnerships, then the assets of all offices in all jurisdictions would potentially be accessible in litigation against an office in one country.¹⁴⁵ The current structure of the Big Four therefore serves to limit the liability of their individual member firms.¹⁴⁶

3. The Operational Integration of Accounting Networks

From an operational perspective, there are a number of ways in which business activities within the Big Four networks are integrated. This integration is achieved in part by contract: each member firm must enter into a membership agreement with the respective umbrella organization in which it agrees to certain associational requirements and by-laws. Under these membership agreements, affiliates enjoy certain rights (such as use of the network's brand, and exclusive rights to a particular territory) and take on certain obligations (such as submitting to ongoing quality review).¹⁴⁷ It is also achieved in part through less formal mechanisms such as the use of shared resources and the development of shared knowledge practices across individual affiliates. The following section outlines some of the major elements of this operational integration.

a. Brand identity

Each of the Big Four umbrella entities holds the intellectual property rights relating to the network's name and logo,¹⁴⁸ and

otherwise, it would be liable for the proportion of the amount that corresponded with the percentage of responsibility assigned to it. 15 U.S.C. § 78u-4(f)(2) (2010).

¹⁴⁵ As noted above, *supra* note 119, the individual affiliates are generally structured as limited liability partnerships, which protect each partner from personal liability for the debts of the partnership.

¹⁴⁶ For a discussion of auditor litigation risk in general, see TREASURY REPORT, *supra* note 103, at VII:23-32.

¹⁴⁷ See *In re Parmalat Sec. Litig.*, 598 F. Supp. 2d 569, 572 (S.D.N.Y. 2009) (describing certain obligations of member firms under the terms of the member firm agreements with Grant Thornton International); Lenz & James, *supra* note 92, at 378 (summarizing the content of these membership agreements). Member firms that do not meet their obligations under these agreements are subject to a variety of possible sanctions, including expulsion from the network. See KPMG TRANSPARENCY REPORT 2013, *supra* note 113, at 22.

¹⁴⁸ In some cases, the IP rights are held directly; in other cases, the rights are held through an intermediate holding company. Searches in the U.S. Trademark Electronic Search System and the German Patent and Trademark registry, for instance, show that Deloitte Touche Tohmatsu holds its trademarks directly, while Ernst & Young employs a Bahamas company, EYGN Limited, to hold and manage its trademarks. See DPMRegister: Register Number: 1163875, DEUTSCHES PATENT- UND MARKENAMT,

licenses those rights to the individual member firms. This arrangement creates the most visible form of integration within the Big Four networks: each firm providing client services uses the same name and logo. The shared brand identity within each network is supported by centralized marketing support services.¹⁴⁹

b. Shared practices

One requirement of member firms within the Big Four is that they adhere to a uniform quality standard.¹⁵⁰ Each of the Big Four has developed proprietary, standardized audit methodology the use of which is mandatory for the member firms.¹⁵¹ They supply standardized software applications as well as training programs to ensure compliance with the common methodology.¹⁵² They also carefully oversee compliance with these standards, establishing committees charged with monitoring performance and conducting regular reviews of member firms.¹⁵³ In addition, the Big Four set

<https://register.dpma.de/DPMAreger/register/marke/register/1163875/DE> (last visited Feb. 19, 2015); *Trademark Electronic Search System: Deloitte Touche*, U.S. PATENT & TRADEMARK OFFICE, <http://tmsearch.uspto.gov> (click “Basic Word Mark Search,” then search “Deloitte Touche”) (last visited Feb. 19, 2015).

¹⁴⁹ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 62.

¹⁵⁰ Uniform quality of service is important to the success of the entire network, and so would be required in any event by the umbrella organization. In addition, each of the Big Four belongs to a trade association, the Forum of Firms, which requires network-wide adherence to particular quality control standards. The Forum of Firms is an association open to international networks of accounting firms. See *Forum of Firms Membership*, INT’L FED’N OF ACCOUNTANTS, <http://www.ifac.org/about-ifac/forum-firms-and-transnational-auditors-committee/forum-firms-membership> (last visited Feb. 19, 2015). It requires its members, among other things, to maintain certain quality control standards and to conduct regular internal quality assurance reviews. See generally ELIZABETH CARSON, ROGER SIMNETT & PER CHRISTEN TRØNNES, INTERNATIONAL CONSISTENCY IN AUDIT REPORTING BEHAVIOUR: EVIDENCE FROM GOING CONCERN MODIFICATIONS 12-13 (2012), available at http://files.iaaer.org/research/IAASB_Report_Final_working_version_9_January_2012.pdf?1406556333 (discussing this organization).

¹⁵¹ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 57; see also *In re Parmalat*, 598 F. Supp. 2d at 574 (describing these practices within the Grant Thornton network); Michael Barrett, David J. Cooper & Karim Jamal, *Globalization and the Coordinating of Work in Multinational Audits*, 30 ACCT. ORGS. & SOC’Y 1, 3 (2005) (identifying a firm’s audit technology as one of the primary mechanisms used “to ensure the coordination, standardization and control of work” in the audit sphere).

¹⁵² One study describes these common standards as part of the “glue” holding professional accounting networks together. See Ferner, Edwards & Sisson, *supra* note 136, at 352.

¹⁵³ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 56;

specific standards for risk management policies and practices within their member firms.¹⁵⁴

c. Personnel training and deployment; knowledge networks

There are also significant personnel-related connections within each Big Four network. Employees of member firms are frequently seconded to other members¹⁵⁵ or temporarily assigned to other offices when needed,¹⁵⁶ and training, although to a variable degree, is centralized.¹⁵⁷ In this area, the degree of centralization and coordination appears less than in other areas of operation;¹⁵⁸ nevertheless, these sorts of connections have been described by some researchers as an “international control strategy.”¹⁵⁹

The construction of cross-firm professional knowledge networks is another element of operational integration. As noted above, the governance structures of the global executive committees draw members from among the affiliate firms and are constantly being expanded to enhance strategic and knowledge integration.¹⁶⁰ Additional committees structured along either service lines or industry lines similarly pull together personnel from multiple locations to form knowledge communities across the different affiliate firms.¹⁶¹

Ferner, Edwards & Sisson, *supra* note 136, at 352.

¹⁵⁴ See *In re Parmalat*, 598 F. Supp. 2d at 574.

¹⁵⁵ See Zimmermann & Volckmer, *supra* note 104, for a recent study of cross-border transfers within accounting networks.

¹⁵⁶ See *Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N.V.*, No. Civ.A. 00-5965 JCL, 2005 WL 3658006, at *4 (D.N.J. June 7, 2005) (describing KPMG’s practice of “put[ting] the right people with the right skills in the places where [its] clients need them most”).

¹⁵⁷ See TREASURY REPORT, *supra* note 103, at V:10; Greenwood et al., *supra* note 103, at 179.

¹⁵⁸ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 65.

¹⁵⁹ Ferner, Edwards & Sisson, *supra* note 136, at 353 (noting that in the particular organization they studied, “[a]t any one time, several hundred . . . staff were on international assignment throughout the world. These transfers were seen . . . as a way for individuals . . . to absorb the international ethos and practices of the firm — part of . . . an international control strategy based on socialization”).

¹⁶⁰ See Zimmermann & Volckmer, *supra* note 104; see also DELOITTE TRANSPARENCY REPORT 2014, *supra* note 119 at 2; EY TRANSPARENCY REPORT 2013, *supra* note 119, at 3-4; KPMG TRANSPARENCY REPORT 2013, *supra* note 113, at 2; PWC FOCUS ON AUDIT QUALITY 2014, *supra* note 119, at 25.

¹⁶¹ See Greenwood et al., *supra* note 103, at 176.

d. *Shared resources*

The umbrella firms also provide various services to their affiliates.¹⁶² These include technical support services and, in some networks, resource centers with substantive expertise in particular sectors.¹⁶³ Another shared resource particularly important in the litigation context is insurance. Each of the Big Four umbrella organizations maintains a captive insurance company that provides professional liability insurance to each of the member firms.¹⁶⁴

e. *Cooperation in audit services*

Individual client engagements often involve multiple member firms, each responsible for a particular portion of an audit involving different companies within a multinational enterprise. Within each network there are systems in place at the central level to coordinate and monitor work that is referred by one member firm to another, or that is carried out jointly.¹⁶⁵ In its 2008 report, the Federation of European Accountants observed that some accounting networks have enhanced these systems by establishing “global ‘heads of service’ who act as the coordination point for specific sectors and facilitate the sharing of sector-specific knowledge across the association, assisted through the central body.”¹⁶⁶ One study reviewing the inter-office instructions

¹⁶² See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 48 (stating that affiliates pay for these services in the form of a membership fee).

¹⁶³ See *id.* at 62.

¹⁶⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-163, AUDITS OF PUBLIC COMPANIES: CONTINUED CONCENTRATION IN AUDIT MARKET FOR LARGE PUBLIC COMPANIES DOES NOT CALL FOR IMMEDIATE ACTION 33 (2008) (discussing the unavailability of commercial insurance at requisite levels); Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1643 (2006).

¹⁶⁵ See TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 51. As a Deloitte report noted,

Performing audits of multinational companies with subsidiaries around the world involves complexities regarding scoping, coordinating, and executing audit work, whether performed by the U.S. lead engagement team or component auditors in non-U.S. locations. Given these complexities, supervision and review of work relevant to the audit opinion on the consolidated financial statements of U.S.-based multinational audit clients, performed by other member firms, is a highly coordinated and managed element of the engagement.

DELOITTE TRANSPARENCY REPORT 2014, *supra* note 119, at 3.

¹⁶⁶ TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 51. Nevertheless, as the report goes on to note, each client engagement is contracted not at the global level but with an individual member firm or with a group of member

used to coordinate cross-border audits concluded that these instructions generated a “highly integrated process, driven by the worldwide audit team” located in the office where the worldwide engagement partner for the relevant client was located,¹⁶⁷ that strove for “the eventual production of the audit as a seamless product.”¹⁶⁸

In his study of enterprise law in the United States, Professor Blumberg surveys the circumstances under which enterprise principles are applied, across a range of substantive and procedural areas of law, to address modern economic activity. He finds that the “common distinguishing element” in such situations is the presence of an “interdependent economic undertaking in which the commercial activities of the participants are marked by an extensive degree of economic integration.”¹⁶⁹ Of the additional elements relevant to an enterprise analysis, he identifies control of a subservient party by a dominant party as the most important.¹⁷⁰

firms. *Id.*

¹⁶⁷ Barrett, Cooper & Jamal, *supra* note 151, at 9.

¹⁶⁸ *Id.* at 20. Litigation involving the Big Four often focuses on this form of integration. See, e.g., Dep’t of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.), 683 F. Supp. 1463, 1470-71 (S.D.N.Y. 1988) (citations omitted):

While most of the field work performed for the audit of DMC and its subsidiaries was conducted in the United Kingdom and the Republic of Ireland by AA-UK and AA-Ireland, ultimate “engagement partner responsibility” for the audit of DMC and its subsidiaries resided first in AA-US’s Detroit offices and later in its New York offices. Plaintiff has submitted numerous documents and “Interoffice Communications” from AA-US to AA-UK and AA-Ireland that indicate a greater supervisory role on the part of AA-US than mere ratification of the overseas audit work. . . . Plaintiff has brought forth evidence showing that specific instructions concerning audits of DMCL were issued from this country by AA-US. Some of these instructions were very detailed. Upon completion of the field work abroad, AA-UK or AA-Ireland would send to the Detroit or New York office of AA-US “Interoffice Clearances” or “Interoffice Opinions” for use by AA-US in preparing and issuing the reports on the Consolidated Financial Statements. AA-US did more than synthesize this information, and often conducted additional investigation spurred by Interoffice Opinions received from AA-Ireland and AA-UK.

¹⁶⁹ BLUMBERG & STRASSER, *supra* note 54, at 828; see also BLUMBERG, *supra* note 47, at 68-71 (identifying “integrated economic activity” as “the cardinal factor that leads courts to assert jurisdiction over [a] foreign affiliate”).

¹⁷⁰ BLUMBERG & STRASSER, *supra* note 54, at 828. There are a few recent cases referring to enterprise principles in the analysis of control. See, e.g., *George v. Uponor*

As the discussion above suggests, each of the Big Four networks is characterized by a high degree of economic interdependence. It is true that the financial results of each individual member firm are independent of other activity within the relevant enterprise, as virtually all revenue is derived from an affiliate's own client engagements rather than calculated as a percentage of its network's global revenues.¹⁷¹ Nevertheless, the economic interest of each affiliate is heavily dependent on the other entities within the network — in part because the affiliates derive significant economic benefit from the use of the relevant Big Four name, and in part because many client engagements require the participation of multiple affiliates.¹⁷² (From this operational perspective, the Big Four resemble franchise networks, with the added factor of highly integrated activity among “franchisees.”¹⁷³) This conclusion is supported by the studies discussed above that identify the fee premium enjoyed by Big Four member firms.¹⁷⁴ Although it is only a single data point, it is also

Corp., 988 F. Supp. 2d 1056, 1066 (D. Minn. 2013) (holding that the close “symbiotic” relationship between parent and subsidiary established “a sufficient degree of control and domination” to satisfy due process). The other elements Blumberg identifies as significant include administrative interdependence; financial interdependence; employment integration; and common public persona. BLUMBERG & STRASSER, *supra* note 54, at 834-35.

¹⁷¹ Some studies have noted that network firms experimented a bit with shared profit pools, whereby a certain level of partnership income would derive from the network's global revenues rather than the income from office engagements. *See, e.g.*, Boussebaa, *supra* note 104, at 833, 840 (discussing resistance to broader profit pooling); Geoff Burrows & Christopher Black, *Profit Sharing in Australian Big 6 Accounting Firms: An Exploratory Study*, 23 ACCT. ORGS. & SOC'Y 517 (1998) (describing profit-sharing patterns in the Australian market). The Arthur Andersen network also adopted a shared-profit structure prior to its demise. *See In re Asia Pulp & Paper Sec. Litig.*, 293 F. Supp. 2d 391, 393 n.3 (S.D.N.Y. 2003) (citing allegations in the plaintiff's complaint that the Arthur Andersen network allocated partner earnings based on global earnings).

¹⁷² The FEE's association report notes that “there is, to varying degrees, economic dependency based on the common name.” TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 61.

¹⁷³ For a discussion of this analogy to franchise networks, see Daniel Allen & Mindy Haverson, Note, *An Alternative Approach to Vicarious Liability for International Accounting Firm Networks*, 15 STAN. J.L. BUS. & FIN. 426, 433-34 (2010). Accounting networks do not fall within the statutory definition of franchises under federal or state law, and the analogy is imperfect. For instance, the profit allocation within the Big Four does not resemble the profit allocation mechanisms typically included in franchise relationships. However, they share a foundation in contractual relationships and, as discussed below, display the same kind of economic interdependence that characterizes franchise enterprises.

¹⁷⁴ *See supra* note 110 and accompanying text.

interesting that in its 1998 decision approving the merger of Price Waterhouse and Coopers & Lybrand, the European Commission concluded that “[Price Waterhouse] ha[d] a sufficiently high degree of concentration of decision-making and financial interests to confer on it the character of a single economic entity for the purposes of the Merger Regulation.”¹⁷⁵

The control picture within the Big Four is mixed. The umbrella organizations utilize membership agreements to control the activities of affiliates in certain respects — for instance, by dictating audit practices to be followed and by establishing rules for inter-office referrals and shared client engagements.¹⁷⁶ Yet, as the secondary literature shows, such control mechanisms are imperfect.¹⁷⁷ They do not necessarily translate into direct control over particular services: thus, qualitative studies have demonstrated that affiliates sometimes ignore or adjust the audit practices to suit local needs.¹⁷⁸ And outside of the audit context, the control exerted by the umbrella organization over individual affiliates is less pervasive. In the area of employment relations, for instance, there is little indication that the affiliates lack independent decision-making authority.¹⁷⁹

Importantly, then, integration within the Big Four accounting firms is a contingent characteristic. While some elements of the networks’ structure integrate all network members into a single enterprise (e.g., brand identity), others bind together only certain units within the network (e.g., cooperation on particular client engagements). Overall,

¹⁷⁵ Commission Decision IV/M.1016, 1998 O.J. (C 1388) 1, 3. The decision is heavily redacted to avoid the disclosure of confidential information, but apparently reviews the centralization of management and the functional integration of the Price Waterhouse network (then active in Western and Eastern Europe, the United States, the Middle East, North Africa, and the Republic of South Africa).

¹⁷⁶ See discussion *supra* Part II.A.3.

¹⁷⁷ The Federation of European Accountants report concludes that “[i]n the final analysis, the main vehicle for the exercise of control in the association model . . . is the monitoring of adherence to these rules: direct control across jurisdictions to implement these rules is not possible without an ownership stake.” TRANS-NATIONAL ORGANISATIONS AND PRACTICES, *supra* note 91, at 68.

¹⁷⁸ See Barrett, Cooper & Jamal, *supra* note 151, at 11-13 (describing a situation in which the local affiliate modified or ignored certain audit instructions from the engagement partner).

¹⁷⁹ See Mehdi Boussebaa, Glenn Morgan & Andrew Sturdy, *Constructing Global Firms? National, Transnational and Neocolonial Effects in International Management Consultancies*, 33 *ORG. STUD.* 465, 474-78 (2012); John L. Brown et al., *Strategic Alliances Within a Big-Six Accounting Firm*, 26 *INT’L STUD. MGMT. & ORG.* 59, 61-62 (identifying local incentives that may weaken the power of the network); Ferner, Edwards & Sisson, *supra* note 136, at 351-54.

however, the Big Four are certainly in the category of businesses that fit within the general contours of enterprise theory.

One would therefore expect to see in the case law some recognition of their nature as integrated businesses, and some application of enterprise-oriented principles in determining the jurisdictional and substantive consequences of their activities. And, indeed, in a significant number of cases involving accounting firms (although by no means all of them), courts have explored a number of the factors contributing to the functional integration of the Big Four networks. The following Subpart surveys that case law, tracing the influence of enterprise analysis on the various doctrines that courts use to analyze personal jurisdiction over non-resident accounting firms.

B. Personal Jurisdiction over Accounting Firms

The vast majority of lawsuits against accounting firms arise from alleged deficiencies or misrepresentations in the audit process.¹⁸⁰ Claims for resulting damages may be asserted in contract or tort actions under state law, or under federal securities law (including in the form of class actions).¹⁸¹ The procedural stage at which jurisdictional issues arise varies: for instance, a court may consider the question in connection with a plaintiff's request for discovery on the jurisdictional issue itself, or in response to a defendant's motion to dismiss for lack of personal jurisdiction.¹⁸² Jurisdictional issues may also arise in connection with a party's request for production of audit work papers, including in cases in which the accounting firm in question is not itself a party.¹⁸³

The following section considers the different doctrines that courts apply in analyzing their jurisdiction over non-resident accounting

¹⁸⁰ See Jay M. Feinman, *Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. ST. U. L. REV. 17, 20-21 (2003).

¹⁸¹ For an overview of litigation against accounting firms, see generally Feinman, *supra* note 180; Talley, *supra* note 164.

¹⁸² The plaintiff's burden of establishing jurisdiction also varies depending on the circumstances. See *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 467 (S.D.N.Y. 2001) ("Where there has been no discovery, 'a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction.' But where there has been discovery regarding personal jurisdiction, the plaintiff's burden is to make a *prima facie* showing which 'must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant'" (citation omitted)).

¹⁸³ See, e.g., *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353 (S.D.N.Y. 1997) (involving plaintiffs in a lawsuit before a U.K. court who filed a motion in a U.S. court to compel discovery from various PWC entities).

firms. These include ordinary minimum-contacts analysis and imputed-jurisdiction doctrines such as agency. In addition, a handful of cases depart entirely from entity-based analysis in favor of an explicitly enterprise-based analysis.

1. Bases of jurisdiction over non-resident accounting firms

- a. *Direct forum contacts*

In some cases, courts have held that a foreign accounting firm's own activities within the forum created sufficient contacts there to support the exercise of specific jurisdiction.¹⁸⁴ Such activities include travel by foreign-office partners to the United States in connection with the preparation of an audit¹⁸⁵ and the conduct of audit-related work within the forum by members of the foreign firm.¹⁸⁶

More frequently, courts have considered whether a foreign firm's activities *outside* the forum justify the exercise of specific jurisdiction. Under the relevant standard, an act taken outside the forum can serve as the basis for jurisdiction within the forum if it has predictable effects there.¹⁸⁷ In several cases, courts have exercised jurisdiction over a foreign accounting firm on the basis that it signed and issued an audit report knowing that it would be incorporated in a securities filing in the United States (and, thus, that it would be relied on by investors or shareholders there).¹⁸⁸ In other cases, similarly,

¹⁸⁴ That is, to support the exercise of jurisdiction in a lawsuit arising out of or related to those contacts.

¹⁸⁵ See, e.g., *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.)*, 683 F. Supp. 1463, 1471 n.6 (S.D.N.Y. 1988) (holding that partners of Arthur Andersen's U.K. and Ireland offices had travelled to the forum state in order to "transact business related to the audit" in question).

¹⁸⁶ See, e.g., *Deloitte & Touche Neth. Antilles & Aruba v. Ulrich*, 172 S.W.3d 255, 263 (Tex. Ct. App. 2005) (holding that employees of a foreign member firm had been sent to Texas to "personally handle" a portion of an audit there).

¹⁸⁷ See *Calder v. Jones*, 465 U.S. 783, 789-90 (1984); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

¹⁸⁸ See, e.g., *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1259-60 (S.D.N.Y. 1984) (allowing evidence to support the conclusion that an Australian firm knew its audit was "part of an active registration statement upon which United States shareholders and investors would rely"); see also *Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N.V.*, No. Civ.A. 00-5965 JCL, 2005 WL 3658006, at *6 (D.N.J. June 7, 2005) (holding that KPMG-U.K. knew or should have known that its input into financial statements and press releases relating to a U.S.-traded company would be relied upon by shareholders and investors in the United States); cf. *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1387 (8th Cir. 1993) (sending a copy of financial statements to an acquiring company in forum, rather than directly to

jurisdiction was based on the fact that an audit opinion was prepared for a partnership located within the forum.¹⁸⁹

In cases such as these, courts assess the activities of an individual accounting firm without reaching the question of its participation within a network. The decisions are consistent with the general rule that even isolated contacts within the forum can suffice to establish jurisdiction there in a claim arising from those contacts.¹⁹⁰

b. Imputed or attributed contacts

As discussed in Part I, courts often apply doctrines of imputed or vicarious jurisdiction in situations where the activity giving rise to a lawsuit was conducted not by the defendant entity directly, but by another entity within the same business enterprise.¹⁹¹ The material that follows describes the range of approaches courts take in considering imputed jurisdiction over members of accounting networks.

i. Agency

The hallmark of an agency relationship is the authority of the agent to act on behalf of, and thereby bind, the principal. As observed above, the Big Four networks expressly disclaim the existence of any agency relationships either between the umbrella organizations and the member firms or among the member firms.¹⁹² Nevertheless, the fact that affiliates perform audits pursuant to standardized audit methodology, and often share the work on client engagements, has led plaintiffs to assert the existence of *apparent* authority in a number of cases.¹⁹³ They

investors, is not sufficient to establish effects-based jurisdiction).

¹⁸⁹ See, e.g., *Tuttle v. Sky Bell Asset Mgmt., LLC*, No. C 10-03588 WHA, 2011 WL 4713233, at *3 (N.D. Cal. Oct. 7, 2011) (noting that Ernst & Young's Isle of Man office prepared an audit opinion for a California partnership and holding that the plaintiff had established a prima facie case for jurisdiction in the California forum on the basis that "it would have been entirely foreseeable that at least some of those partners [relying on that opinion] might reside in California"); see also *Comm'r of Ins. v. Albino*, 572 N.W.2d 21, 27 (Mich. App. 1997) (finding minimum contacts with the state established when "E & Y-Canada quite purposefully directed its audits at Michigan (including Michigan's insurance regulator . . .) and purchasers of insurance products (Michigan citizens)").

¹⁹⁰ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

¹⁹¹ See *supra* notes 73-76 and accompanying text.

¹⁹² See *supra* note 131-32 and accompanying text.

¹⁹³ See RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf

seek to obtain jurisdiction over a non-resident entity — either the umbrella organization or a foreign member firm — by imputing the jurisdictional contacts of a local agent to the absent principal.

The most straightforward of these claims attempt to impute the jurisdictional contacts of a U.S. accounting firm to foreign firms within the same network. In a number of cases, plaintiffs have argued that the U.S. client-service firms within Big Four networks operate as agents of their respective umbrella organizations.¹⁹⁴ These arguments allege that the contractual relationships arranged by the umbrella organizations create not only the means of control but actual control over the audit work performed by the client-service firms. For the most part, such arguments are unsuccessful. Some courts have rejected them on the basis that the Big Four's clear disclaimers of agency relationships among network firms not only prevent a finding of actual agency, but also "preclude[] any reasonable inference of apparent authority."¹⁹⁵ Others have concluded that the disclaimers alone would not bar a finding of apparent authority, but held that the factual allegations in question failed to establish the umbrella entity's ability not just to set "professional standards and principles" but actually to control or influence specific audits.¹⁹⁶

A few decisions have accepted this form of agency argument. In one representative case denying an umbrella organization's motion for summary judgment, the court held that the plaintiff had raised triable issues of fact regarding an alleged agency relationship between BDO International and its U.S. affiliate.¹⁹⁷ It focused on the relevant member firm agreement, which it characterized as "impos[ing] operating directives and restrictions that extend far beyond those utilized in mere licensing agreements," and concluded that the

of the principal and that belief is traceable to the principal's manifestations.").

¹⁹⁴ See, e.g., *In re Parmalat* Sec. Litig., 375 F. Supp. 2d 278, 287 (S.D.N.Y. 2005) (plaintiffs allege that Grant Thornton and Deloitte's Italy firms were agents of their respective umbrella organizations); *In re Lernout & Hauspie* Sec. Litig., 230 F. Supp. 2d 152, 171-72 (D. Mass. 2002) (plaintiffs allege that foreign offices of KPMG were agents of KPMG International).

¹⁹⁵ See, e.g., *In re Royal Dutch/Shell* Transp. Sec. Litig., 380 F. Supp. 2d 509, 571 (D.N.J. 2005) (quoting *In re Lernout & Hauspie* Sec. Litig., 230 F. Supp. 2d at 173) (surveying several decisions to this effect).

¹⁹⁶ See, e.g., *In re Asia Pulp & Paper* Sec. Litig., 293 F. Supp. 2d 391, 396 (S.D.N.Y. 2003) (rejecting plaintiff's arguments regarding control person liability of Andersen's umbrella organization).

¹⁹⁷ *Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V.*, 979 So. 2d 1030, 1033-34 (Fla. Dist. Ct. App. 2008) (considering the agency relationship in the context of substantive liability).

umbrella organization “did control the means” used by the client service affiliate to conduct work.¹⁹⁸ In an earlier, unpublished decision, the court had extended this analysis to the jurisdictional question, holding that the umbrella organization conducted business through the agency of its U.S. affiliate and was therefore subject to jurisdiction in the U.S. forum.¹⁹⁹

In other cases, plaintiffs have claimed that the U.S. client-service firms operate as agents of their foreign counterparts. Cases of this type typically involve audits that are issued by a foreign firm but rely in part on work conducted by a U.S. affiliate. In one representative case, a plaintiff sued DT–Cayman in a Texas court.²⁰⁰ DT–Cayman had issued the audit letter in question; however, pursuant to a “Liaison Agreement” between DT–Cayman and DT–Texas, the latter had conducted the bulk of the auditing work.²⁰¹ Stating that “[a]n essential element of the principal-agent relationship is the alleged principal’s right to control the actions of the alleged agent,” the court held that no agency relationship existed between the two firms. While DT–Cayman had the right to assign tasks, the court concluded, it did not have the right to dictate the “means and details of the process” by which the work would be completed.²⁰² It therefore concluded that DT–Cayman was not subject to jurisdiction in the forum on an agency theory.

Some decisions of this type use slightly watered-down versions of agency analysis. In one, the court considered whether “the PW–US audit of [a U.K. company], performed at the direction of PW–UK, established an *agency-like relationship* sufficient to satisfy the standard for imposing personal jurisdiction.”²⁰³ It relied on New York precedent

¹⁹⁸ *Id.*; see also *Teachers’ Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814(MP), 2003 WL 21058090, at *12 (S.D.N.Y. May 12, 2003) (seeking to establish control person liability of the umbrella organization, plaintiffs “point to statements in the annual reports to show that ‘International’ controls its member firms. Specific references are made to International’s statements that the member firms are its ‘representative practice[s],’ that the organization’s structure ‘ensures strict quality control and encourages the sharing of skills and ideas,’ and that the ‘stringent conditions which each member firm has to comply to be part of the BDO network are paramount”).

¹⁹⁹ *Banco Espirito Santo*, 979 So. 2d at 1031 (discussing *BDO Int’l, B.V. v. Banco Espirito Santo Int’l, Ltd.*, 911 So. 2d 1246 (Fla. Dist. Ct. App. 2005)).

²⁰⁰ See *Gutierrez v. Cayman Is. Firm of Deloitte & Touche*, 100 S.W.3d 261, 265-66 (Tex. Ct. App. 2002).

²⁰¹ *Id.* at 270.

²⁰² *Id.* at 271. However, the court went on to hold that by purposefully directing its activities toward Texas, DT–Cayman had independently established minimum contacts in the forum. *Id.* at 274.

²⁰³ *First Am. Corp. v. Price Waterhouse LLP*, No. M8–85 (RWS), 1998 WL

that “authorized imposition of personal jurisdiction where the foreign corporation has a local affiliate which performs all the business the foreign entity would have done by its own presence in the state.”²⁰⁴ The court stated that

PW–UK conducted the U.S. portion of its worldwide audit of BCCI through PW–US. PW–UK issued detailed instructions on how the audit should be conducted, identified specific areas of inquiry and dictated the form and manner in which PW–US would report its findings to London. . . . Had PW–US not been present in New York, PW–UK would undoubtedly have had to send its employees here to perform these activities.²⁰⁵

Under those circumstances, the court concluded, it was not necessary to show that the local affiliate had the power to bind the foreign entity.²⁰⁶ On the basis of this agency relationship, it held that the foreign member firm was subject to jurisdiction in the U.S. forum for the purpose of compelling discovery.²⁰⁷

Other claims are less straightforward in that they attempt a form of reverse imputation, casting the U.S. client-service firm as the principal rather than the agent. In one case of this type, the plaintiff sued an Australian accounting firm, part of the Deloitte network, in an action arising out of an audit it had provided.²⁰⁸ The plaintiff argued that the Australian office acted as an agent of the U.S. office, and that the agency relationship justified the exercise of jurisdiction in the U.S. forum over the Australian office. The court declined to accept “the application of the agency theory in reverse”²⁰⁹ — in other words, the idea that the *principal’s* contacts within the forum could be attributed to a non-resident *agent*. (In considering the agency argument more

148421, at *2 (S.D.N.Y. March 27, 1998) (emphasis added) (rejecting defendants’ motion for reconsideration of the court’s decision in *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353 (S.D.N.Y. 1997)).

²⁰⁴ *Id.* (citing *Frummer v. Hilton Hotels Int’l, Inc.*, 19 N.Y.2d 533, 537 (1967)). A recent decision of the Supreme Court casts doubt on the continuing validity of this precedent. *See supra* notes 39–40 and accompanying text.

²⁰⁵ *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353, 363 (S.D.N.Y. 1997).

²⁰⁶ *See First Am. Corp.*, 1998 WL 148421, at *2 (stating that the power to bind the foreign entity might be “a factor to consider,” but “not an indispensable aspect of the test”).

²⁰⁷ *First Am. Corp.*, 988 F. Supp. at 366 (granting plaintiff’s motion to compel discovery as to *Price Waterhouse–U.K.*).

²⁰⁸ *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1247–49 (S.D.N.Y. 1984).

²⁰⁹ *Id.* at 1253.

generally, it also stated that “a firm that maintains control of its profits and losses and of its day-to-day operations cannot be generally labelled an agent for jurisdictional purposes.”²¹⁰)

A few cases within this group have addressed arguments that the umbrella organization itself is the agent of one or more of its local affiliates. Plaintiffs in these cases assert that the most powerful and central of a network’s firms — generally affiliates in the United States and/or the United Kingdom — actually control the umbrella organizations. They point to a variety of factors to support this assertion, including the dependence of the umbrella firms on funding from those affiliates; their use of offices and employees of those affiliates; and governance structures that give those affiliates significant voice within the networks.²¹¹ This argument can be combined with other forms of agency argument in order to justify sweeping multiple entities within the jurisdiction of a U.S. forum. In the *Parmalat* litigation, for instance, the plaintiffs began by arguing that Grant Thornton International, the umbrella organization, controlled Grant Thornton Italy (along with its other member firms).²¹² It then argued that “GT U.S. controlled GT [International], and thus indirectly controlled GT Italy, making GT Italy its subagent.”²¹³ These arguments have been raised both in the context of substantive liability and in the context of personal jurisdiction, and, in a very few cases, have been sufficient to advance litigation against accounting firms.²¹⁴

ii. Alter ego

If a corporation is merely the “alter ego” of its owners, and not, in fact, an independent entity, then the corporate form may be disregarded and the liabilities of the corporation imposed upon its owners.²¹⁵ Factors commonly considered in alter-ego analysis include

²¹⁰ *Id.*

²¹¹ See, e.g., *In re Parmalat Sec. Litig.*, 598 F. Supp. 2d 569, 578-79 (S.D.N.Y. 2009) (discussing the relationship between umbrella organization and affiliates at Grant Thornton); *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 458-60 (S.D.N.Y. 2009) (discussing the relationship between the umbrella organization and affiliates at Deloitte).

²¹² See *In re Parmalat Sec. Litig.*, 598 F. Supp. 2d at 573-74.

²¹³ *Id.* at 578.

²¹⁴ See, e.g., *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d at 460 (denying Deloitte defendants’ motion for summary judgment).

²¹⁵ See generally 1 FLETCHER ET AL., *supra* note 51, § 43 (discussing the circumstances in which a corporation’s veil may be pierced).

the failure to observe corporate formalities, the intermingling of assets between the corporation and its shareholders, and misrepresentations to third parties.²¹⁶ In lawsuits against accounting firms, some plaintiffs have attempted to use such analysis as the basis for imputed jurisdiction, claiming that one affiliate within a network is the “alter ego” of another, or a “mere department” of another.²¹⁷ Courts have generally rejected these arguments on the ground that there is no veil to pierce, as an accounting firm is not owned either by other member firms within its network or by its umbrella organization.²¹⁸

c. *Partnership by estoppel*

As discussed in Part I, the Big Four accounting firms are not structured as actual (global) partnerships²¹⁹ — in which case the assets of any office would be available to satisfy the debts of any other. However, a number of cases have suggested that they may be considered “partnerships by estoppel.”²²⁰ Plaintiffs have invoked this doctrine not only to claim that one accounting office may be liable for the acts of another, but also to establish jurisdiction over a foreign accounting office based on a domestic office’s activity.²²¹ In one case

²¹⁶ See *id.*

²¹⁷ See, e.g., *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997) (alleging that within the structure of KPMG, Peat Marwick is a mere department of Klynveld); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241 (S.D.N.Y. 1984) (finding evidence insufficient to establish that one firm was the alter ego or department of another).

²¹⁸ See, e.g., *Reingold*, 599 F. Supp. at 1253 (“A subsidiary relationship or common stock ownership is a threshold minimum to [a finding that one member firm could be a mere department of another].”). *But see* *Tuttle v. Sky Bell Asset Mgmt., LLC*, No. C 10–03588 WHA, 2011 WL 4713233, at *6–8 (N.D. Cal. Oct. 7, 2011) (applying alter-ego analysis, though ultimately concluding that the requirements for piercing the veil had not been met); *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 404 n.95 (S.D.N.Y. 2005) (stating that the absence of ownership ties is “not fatal to an *alter ego* claim”).

²¹⁹ Under New York law, for example, there are four elements required of an actual partnership: “1) the sharing of profits and losses of the enterprise; 2) the joint control and management of the business; 3) the contribution by each party of property, financial resources, effort[,] skill or knowledge; and 4) an intention of the parties to be partners.” *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ.0613 GBD, 2004 WL 112948, at *7 (S.D.N.Y. Jan. 22, 2004).

²²⁰ This doctrine is included in the Uniform Partnership Act, which has been codified (either in its original form or as revised in 1997) in all states except Louisiana. See UNIF. P’SHP ACT § 308 (amended 1997), 6 U.L.A. 128 (1997).

²²¹ See *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353, 360 (S.D.N.Y. 1997) (discussing whether or not *jurisdiction* by estoppel is permitted under New York law); *Coopers & Lybrand-Barbados v. TIG Ins. Co.*, No. 05-98-01997-CV, 1999 WL 326303, at *8 (Tex. Ct. App. May 25, 1999) (rejecting the argument that the

involving Price Waterhouse, a plaintiff that had received an allegedly misleading audit letter prepared by PW–Bahamas sought to assert jurisdiction over that office in a South Carolina court.²²² The court described the jurisdictional prong of plaintiffs’ argument as follows: “[I]f the two partnerships are partners by estoppel, then the court has personal jurisdiction over PW–Bahamas, as PW–US’s partner by estoppel, because PW–US has at least ‘minimum contacts’ with South Carolina.”²²³

Establishing a partnership by estoppel requires two elements. First, representations must be made indicating that a partnership exists; second, the injured party must have relied to its detriment on those representations.²²⁴ In seeking to establish the first factor, plaintiffs emphasize the Big Four’s presentation of themselves as unified enterprises. In one illustrative case, a plaintiff sought to establish jurisdiction in a U.S. court over the U.K. office of Price Waterhouse for the purpose of compelling discovery.²²⁵ In considering plaintiff’s argument that Price Waterhouse should be treated as a “world-wide partnership,” the court assessed Price Waterhouse’s own characterization of its various locations as “offices” rather than separate entities; the use of brochures “emphasizing Price Waterhouse’s global integration as a critical strength of the firm” and “market[ing] itself as a worldwide entity;” Price Waterhouse’s practice of certifying financial statements on behalf of “Price Waterhouse” rather than any particular geographic entity; and the use of services across offices.²²⁶

theory might be used to confer jurisdiction).

²²² *Young v. Jones*, 816 F. Supp. 1070, 1075 (D.S.C. 1992).

²²³ *See id.* The court characterized this as a “double-edged argument,” since a finding of partnership by estoppel would also mean that PW–US could be held liable for any negligent acts of its Bahamas partner — in which case establishing jurisdiction over the latter office would be unnecessary. *Id.* at 1075-76. On appeal, the U.S. Court of Appeals for the Fourth Circuit stated that “*in personam* jurisdiction does not exist over PW–Bahamas unless a basis exists to treat PW–Bahamas and PW–US as a single partnership doing business in South Carolina under the partnership by estoppel doctrine.” *Young v. Fed. Deposit Ins. Corp.*, 103 F.3d 1180, 1193 (4th Cir. 1997).

²²⁴ *First Am. Corp.*, 988 F. Supp. at 358 (summarizing New York partnership law on this point).

²²⁵ *Id.* at 359.

²²⁶ *Id.* (concluding that these facts “may establish representations of partnership and reliance” with respect to one of the parties to the litigation).

d. Enterprise jurisdiction

As the discussion above indicates, some degree of enterprise analysis can already be seen at work in the imputed jurisdiction cases (although those remain grounded in entity theory). In some cases, however, courts have turned toward more explicit theories of enterprise jurisdiction. One decision clearly illustrates the distinction between this form of jurisdictional analysis and the more traditional entity-based approach:

There can be no doubt that KPMG offices are integral parts of a single global enterprise that conducts business in the United States. . . . KPMG UK's argument that there is no legal relationship between it and KPMG International is unavailing. For purposes of personal jurisdiction, a resident entity need not bear an official agency relationship to the foreign defendants, nor even any legal relationship at all to the foreign defendant. Nor is it a requirement that a foreign defendant exercise direct control over the onshore agents. Moreover, there need be no "financial or proprietary relationship" between the parties such as a division of profits and losses.²²⁷

Focusing on the "single global enterprise," the court in this case found that the U.K. affiliate of KPMG was subject to general jurisdiction in the U.S. forum.²²⁸ Other decisions similarly held that the allegations of integrated network functions were sufficient to establish a prima facie case for the exercise of jurisdiction over Ernst & Young, Deloitte, and BDO International entities.²²⁹

III. ASSESSING THE VIABILITY OF AN ENTERPRISE APPROACH

A. *The Role of Enterprise Principles in Jurisdictional Analysis*

It is clear that enterprise concepts have already made their way into the analysis of personal jurisdiction in the cases involving accounting firms. Threaded throughout the case law are factual observations about the nature of the accounting networks' structure. Perhaps most

²²⁷ *Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N.V.*, No. Civ.A. 00-5965 JCL, 2005 WL 3658006, at *7 (D.N.J. June 7, 2005) (citations omitted).

²²⁸ *Id.* at *7.

²²⁹ See *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814(MP), 2003 WL 21058090, at *8-9 (S.D.N.Y. May 12, 2003); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 475-76, 488-89 (S.D.N.Y. 2001) (finding prima facie cases for the exercise of jurisdiction over Ernst & Young and Deloitte).

prominent is a focus on the brand identity of the networks. In a number of cases, courts have considered reliance-based arguments that, having presented themselves publicly as integrated global enterprises, the Big Four should not be able to insist on the legal separateness of their constituent parts. The reliance in question appears to be less the specific reliance of a client on a particular office, and more a general reliance interest involving the entire network. In one case, for instance, the court noted that the firm in question was charged with “intentionally creating and foster[ing] the belief in the investing public . . . that the audit reports issued by International should be relied upon because they were backed by the expertise of its global network of member firms . . . ”²³⁰

In this type of analysis, courts emphasize the economic interdependence of the various members within the accounting networks, and the high degree of their integration — “an integration on which they rely each day both to attract international business and to provide the resources necessary to perform [their] work.”²³¹ These decisions often focus heavily on the marketing material included on the firms’ websites and in other publications.²³² They sometimes also refer to the fact that only the name of the umbrella organization, and not the name of the individual affiliate, is included on the relevant audit reports.²³³ Second, the cases frequently discuss the standardized nature of the proprietary audit methodology used throughout each network, viewing that as an indication of unified business design.²³⁴

²³⁰ *Teachers’ Ret. Sys. of La.*, 2003 WL 21058090, at *2.

²³¹ *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 476.

²³² See *Rocker Mgmt., LLC*, 2005 WL 3658006, at *7 (“That KPMG UK deliberately markets and promotes itself as part of an integrated global network severely undercuts its present attempt to divest itself of a relationship with that network in order to defeat the exercise of personal jurisdiction.”); *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 475. But see *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1254 & n.10 (S.D.N.Y. 1984) (concluding that marketing efforts describing the firm as a “single cohesive worldwide organization” were not enough to overcome the reality of the partnership agreements that “established a cooperative venture between independent economic entities”).

²³³ See, e.g., *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 475 (discussing generally the role of the Ernst & Young name in establishing the group’s international identity). As the complaint in that case noted, “[n]either the audit reports nor the engagement letter purported to limit responsibility for the engagement or the audits to a single office of Deloitte.” Revised Fourth Amended Complaint at 13, *Argos v. Berger*, No. 00 Civ. 2498 (DLC) (S.D.N.Y. June 14, 2002), 2002 WL 33030836.

²³⁴ *Teachers’ Ret. Sys. of La.*, 2003 WL 21058090, at *2 (quoting assertions in the plaintiffs’ complaint alleging that BDO International “is one large global firm that provides a full range of accounting and auditing services and operates as a single entity with

Third, the decisions emphasize the personnel connections that bind together individual firms within the networks.²³⁵ Fourth, although to a lesser degree, the courts address the sharing of resources.²³⁶ Finally, the decisions analyze the cooperation in client engagements that characterizes the work of Big Four member firms.

Yet with the exception of the handful of cases noted in Subsection II.B.1.d, no systematic shift toward a consciously enterprise-based model can be identified.²³⁷ Rather, enterprise principles are often combined with, or conflated with, more traditional entity-based principles in the analysis of personal jurisdiction.²³⁸ In one illustrative case, for instance, the court for the Southern District of New York stated that

[I]nquiry into the relationship between [PWC U.S. and PWC U.K.] may support the inference of that agency function. Although PW–UK and PW–US have denied any partnership, and asserted that they exist as separate firms bearing the same name, their coordinated activities indicate an affiliation closer than that of unrelated corporations. This affiliation may not amount to one of parent and subsidiary, or common ownership, but it lends its weight to a determination that personal jurisdiction may be imposed over PW–UK based on its activities in the United States conducted through [the agency of] PW–US.²³⁹

uniform and stringent quality controls strictly imposed on each of its member firms”); see also *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 137 (S.D.N.Y. 2013) (“DTTL dictates the specific methodologies to be applied in conducting audits and the particular software and documentation procedures to be used.”).

²³⁵ See, e.g., *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 477-78 (reviewing the activities of Ernst & Young Bermuda, the court highlighted a “Global Exchange Program” under which the office hosted two employees from U.S. offices, who remained on the U.S. payroll; in reviewing the activities of Deloitte Bermuda, it noted that the firm’s partners regularly attended conferences and meetings at other offices within the network); see also *Rocker Mgmt., LLC*, 2005 WL 3658006, at *8 (citing plaintiffs’ declaration that KPMG hosts “a team of 20 staff in the U.S.A. . . . working alongside company executives,” and that KPMG U.K. sends its own employees to the United States as part of KPMG’s international rotation and global programs).

²³⁶ See, e.g., *McIntire*, 927 F. Supp. 2d at 137 (“DTTL plays a substantial role in the legal and risk management affairs of member firms.”).

²³⁷ This is consistent with the findings of *Swain & Aguilar*, *supra* note 73, at 483.

²³⁸ Of course, sometimes courts simply reject plaintiffs’ requests for enterprise analysis in favor of more traditional analysis. In the *Parmalat* litigation, for instance, the plaintiffs argued, and the defendants contested, the existence of a single unified firm. The court, however, found it sufficient simply to analyze “conventional theories” of agency and alter ego. *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 290 (S.D.N.Y. 2005).

²³⁹ *First Am. Corp. v. Price Waterhouse LLP*, 988 F. Supp. 353, 363 (S.D.N.Y.

In a similar decision, the same court noted that “BDO International B.V. and BDO International are the same entity for jurisdictional purposes,” but at least partly on the basis that “BDO International B.V. is the corporate entity through which defendant BDO International operates,” an agency argument.²⁴⁰ In such decisions, enterprise principles operate simply as an add-on to traditional attribution analysis, or as a reason to adopt a watered-down version of such analysis.

In addition, enterprise analysis is rarely relied upon as a completely independent basis for the exercise of jurisdiction. In the *Lernout & Hauspie* litigation involving KPMG–U.K.,²⁴¹ for instance, which contains some of the most clearly enterprise-focused discussion, the court began by concluding that KPMG–U.K.’s own contacts within the forum were sufficient to establish specific jurisdiction there on an effects theory.²⁴² “For the sake of completeness,” however, the court went on to consider whether it would be proper to exercise *general* jurisdiction over KPMG–U.K. It concluded that it was — due largely to KPMG–U.K.’s relationship with the KPMG network, but also in part to KPMG–U.K.’s conduct of business in the United States “on its own.”²⁴³ When courts consider both the defendant’s own forum contacts and its participation in a unified business enterprise, it is difficult to assess whether the latter is determinative of jurisdictional outcomes.

When enterprise principles are applied in this manner, they do not operate as a separate and independent basis for the exercise of jurisdiction. As a result, in situations where plaintiffs fail to establish the basic elements of a more traditional attribution theory (such as some element of misrepresentation, in the case of attribution on the basis of partnership by estoppel, or actual control over particular acts,

1997) (citations omitted). In the *Rocker* case, in the portion of its opinion considering *general* jurisdiction over KPMG–U.K., the court cited *First American* (which, as here noted, was decided on an agency theory) for the proposition that “courts have found jurisdiction over foreign entities on the basis of globalization of services.” *Rocker Mgmt., LLC*, 2005 WL 3658006, at *7.

²⁴⁰ *Teachers’ Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814(MP), 2003 WL 21058090, at *8-9 (S.D.N.Y. May 12, 2003).

²⁴¹ *Rocker Mgmt., LLC*, 2005 WL 3658006.

²⁴² *See id.* at *6 (noting that the firm had provided information for inclusion in securities filings knowing that those filings would be relied on by U.S. investors).

²⁴³ *Id.* at *7; *see also* *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 477, 490 (S.D.N.Y. 2001) (in analyzing whether the Bermuda offices of two Big Four firms were subject to personal jurisdiction in the U.S. forum on a single-enterprise theory, considering the offices’ own contacts with the United States).

in the case of attribution on the basis of agency), enterprise analysis is unlikely to open an additional avenue for the exercise of jurisdiction.

The following section explores the possibility of establishing a more fully realized enterprise approach to personal jurisdiction. Building on lessons learned from the accounting case study, it examines whether such an approach could be made compatible with the constitutional guarantee of due process.

B. Toward Enterprise Jurisdiction

Under enterprise theory, concluding that a group of firms operates as a unified economic enterprise does not alone dictate particular legal consequences.²⁴⁴ Rather, the application of the specific law at issue in a particular claim would take that conclusion into account. On an enterprise model, a court would consider the objectives of the relevant law, and, in light of the economic reality of the business group in question, ask whether it would better serve those objectives to treat the constituent elements of the group as a single enterprise rather than as separate entities.²⁴⁵

The overarching objective of the law on personal jurisdiction is to ascertain that the connection between the defendant, the cause of action and the forum is strong enough to justify the exercise of judicial authority.²⁴⁶ Because jurisdictional standards derive from the requirement of due process, this is not merely a policy objective, but a constitutional guarantee afforded to all persons — including companies, both foreign and domestic.²⁴⁷ As it is an individual

²⁴⁴ See *supra* note 65 and accompanying text.

²⁴⁵ See BLUMBERG & STRASSER, *supra* note 54, at 19.

²⁴⁶ See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (“The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (focusing on “the relationship among the defendant, the forum, and the litigation”).

²⁴⁷ Some scholars have argued that constitutional due process rights do not extend to non-resident aliens, including foreign corporations, and therefore that different jurisdictional standards should apply in cases against such persons. See, e.g., Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006). However, U.S. courts have consistently treated foreign and U.S. defendants alike in this respect. Even the plurality decision in the recent *McIntyre* case, which reverted to a more sovereignty-based analysis, assumes that the jurisdictional standard applied to the foreign defendant derives from the due process guarantee. See *supra* note 24 and accompanying text; see also *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (“Personal jurisdiction, of course, restricts ‘judicial power not as a matter of sovereignty, but as a

guarantee, the assertion of jurisdiction over a particular defendant (including a juridical entity) *solely* on the basis of that defendant's relationship with another actor would be unconstitutional.²⁴⁸ Whenever forum contacts are attributed among related individuals, it is critical to ensure that conduct has occurred within the relationship in question that establishes the necessary connection between the defendant, the cause of action and the forum.²⁴⁹

The primary risk of an enterprise-based approach to jurisdiction — as opposed to the mere integration of enterprise analysis into traditional entity-based approaches — is that it may encourage overbroad assertions of jurisdiction over entities not directly active in the forum. The question, then, is whether that risk can be mitigated through careful assessment of the relationship between the particular characteristics of a unified economic enterprise²⁵⁰ and the relevant cause of action. Such an assessment would call for considerable specificity regarding two particular issues. First, it matters whether the cause of action arises from activities within the forum or not (i.e., whether specific or general jurisdiction is at stake).²⁵¹ Second, it matters whether the structural elements that contribute to the unified

matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it." (citation omitted)).

²⁴⁸ See *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.").

²⁴⁹ This is true whenever the forum contacts of one actor are attributed to another, including by means of traditional entity-based methods. See Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 *FORDHAM L. REV.* 234, 252-53 (1983) (analyzing the use of agency theory to attribute the contacts of one co-conspirator to another and arguing that "the particular facts of the relationship between the parties" must be sufficient to support a finding of purposeful availment by each individual defendant).

²⁵⁰ As the U.S. Court of Appeals for the Seventh Circuit emphasized in a recent decision applying the single-enterprise theory in a different context (antitrust law), a group may be considered a single entity with respect to some aspects of its operations but not others. *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 743 (7th Cir. 2008), *overruled on other grounds by* 560 U.S. 183 (2010).

²⁵¹ The point here, of course, is that the connection between the defendant and the forum must be much stronger — strong enough to satisfy the "essentially at home" standard articulated in *Goodyear* — if the cause of action does not relate to the defendant's forum activities. See Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 *VAND. L. REV. EN BANC* 123, 125 (2013) (arguing that courts should give more attention to this distinction, whether applying agency theory or enterprise theory).

nature of the economic enterprise in question are relevant to the particular cause of action.

What the accounting case study demonstrates is that current applications of enterprise principles in the area of jurisdiction lack such specificity.²⁵² As a result, the jurisdictional analysis is not only unpredictable but operates in both under- and over-inclusive ways. To demonstrate this point, let us return to the nature of the vertical and horizontal integration within the accounting networks.

As discussed in Part II, when it comes to auditing activities, the vertical integration of entities within the Big Four (that is, the integration between the umbrella organization and each of its member firms) is pervasive. The economic interests of each member firm are tied to its participation in the core business activities of the network — supported by its access to the intellectual property rights, shared resources and standardized methodologies that the umbrella firm provides by contract. Moreover, consumers of audit services rely on that integration, either directly or through reliance on the gatekeeping function that auditors serve.²⁵³ In short, by establishing and controlling the conditions under which the U.S. member firms carry out auditing activity in the United States, the umbrella firms have created a strong connection between themselves, causes of action arising from that activity, and U.S. forums.

As we have seen, however, when enterprise principles are used merely to supplement traditional entity-based attribution doctrines, courts require more. They look for the direct control over particular work that would justify a finding of agency, for instance, or for some form of misrepresentation that would justify a finding of partnership by estoppel.²⁵⁴ Such an approach is therefore under-inclusive, precluding the exercise of jurisdiction over the umbrella organizations in situations in which their economic integration with U.S. affiliates has created connections with U.S. forums sufficient to satisfy the due process guarantee.

The horizontal integration of entities within the Big Four, by contrast, is less pervasive and less structured than the vertical

²⁵² As Professor Harper Ho notes, there is tremendous diversity among different corporate groups in “organizational and decision-making structures.” Harper Ho, *supra* note 42, at 919. It is therefore critical to support the application of enterprise principles — whether in the context of jurisdiction or substantive liability — with specific analysis of the particular group in question.

²⁵³ See *supra* note 109 and accompanying text.

²⁵⁴ See *supra* text accompanying note 240.

integration between the umbrella firms and their members.²⁵⁵ There are no contractual relationships between member firms,²⁵⁶ and it is the umbrella organizations, not the member firms, that establish the conditions for integrated cross-border business activities.²⁵⁷ Thus, integration at the horizontal level results primarily from the particular involvement of any given affiliate in client engagements involving other offices. As a consequence, while each network affiliate is in a loose sense connected to the others by virtue of shared reliance on the strength of the network's brand, its connections to a particular foreign *forum* are more limited. Those connections are created by the work that the affiliate performs on client engagements related to that forum.²⁵⁸

In this context, the unstructured application of enterprise principles has yielded results that are sometimes over-inclusive. In some cases, courts have referred to general levels of cooperation and coordination among Big Four member firms rather than focusing on the involvement of a foreign firm in the particular work giving rise to a claim. For instance, in litigation involving Ernst & Young's Bermuda office, the court noted that almost one-third of that firm's business related to multinational clients whose overall account relationships were managed by partners at other offices, and that the Bermuda firm regularly consulted Ernst & Young offices in the United States on issues relating to accounting, tax, and securities matters.²⁵⁹ On this basis, it concluded that Ernst & Young Bermuda was subject to *general* jurisdiction in the U.S. forum.²⁶⁰ Because this approach does not consider whether the

²⁵⁵ See Greenwood et al., *supra* note 103, at 177-80 (describing this form of integration as largely a "culture of reciprocity").

²⁵⁶ With the limited exceptions of certain "service provider"-type affiliates. See *supra* note 122 and accompanying text.

²⁵⁷ See *supra* notes 165-68 and accompanying text (describing the mechanisms to ensure cross-border cooperation among network affiliates).

²⁵⁸ This analysis is analogous to that used in the arbitration context. See *supra* note 67. Under the "group of companies" doctrine, an affiliated company of a contract party cannot be bound by the latter's agreement to arbitrate simply because they are part of the same group of companies. Rather, the affiliated company must have been involved in some way in the formation, performance, or termination of the contract in question. See Stephan Wilske, Laurence Shore & Jan-Michael Ahrens, *The "Group of Companies Doctrine" — Where Is It Heading?*, 17 AM. REV. INT'L ARB. 73, 74 (2006).

²⁵⁹ *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 477-78 (S.D.N.Y. 2001). Similarly, in addressing Deloitte Bermuda, the court noted that the office served many companies located in the United States, passing its audits through to Deloitte's U.S. office for consolidation and filing with the SEC, and that it regularly relied on Deloitte U.S. for actuarial services and for support in tax and financial consultations. *Id.* at 490-91.

²⁶⁰ *Id.* at 478; see also *Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N.V.*, No. Civ.A. 00-5965 JCL, 2005 WL 3658006, at *7 (D.N.J. June 7, 2005)

cooperation in question extended to the particular activity giving rise to the claim, it permits the exercise of jurisdiction in a situation in which the connection between the defendant, the forum and the cause of action is not sufficient to satisfy due process. It is also incompatible with the standard recently articulated in *Goodyear* that a non-resident defendant must be “essentially at home” in the forum to be subject to general jurisdiction there.²⁶¹

An enterprise-jurisdiction approach, uncoupled from traditional entity-based analysis, would yield results more consistent with the objectives of jurisdictional law. As noted above, such an approach would require careful assessment of the relationship between the particular characteristics of the economic enterprise in question and the relevant cause of action. Because this analysis would require a link between the factual elements creating economic unification and the cause of action, it is incompatible with the theory of general, as opposed to specific, jurisdiction. Consider, for example, a claim against a Big Four umbrella organization arising out of non-audit activity. As discussed above, the economic integration of the umbrella firms and the client-service firms within each Big Four network relates to their core business practices. Other aspects of the Big Four’s activities — aspects that are not covered by those contractual relationships — are far more difficult to characterize as unified.²⁶² For example, the umbrella firms are not able to control day-to-day hiring decisions and staffing practices in the member firms. In litigation arising out of an employment discrimination claim against a U.S. member firm, then, the connection between the relevant umbrella organization, the cause of action, and the U.S. forum would not be strong enough to justify the exercise of personal jurisdiction over the umbrella organization. In other words, the fact that accounting networks may operate as unified enterprises with respect to their auditing activities would be irrelevant in lawsuits involving claims unrelated to those activities.²⁶³

Where the claims in question do relate to the unified aspects of the enterprise’s activity, however, the assertion of jurisdiction over both the

(discussing employee rotation among offices and general globalization of services as relevant to finding of general jurisdiction over KPMG–U.K.).

²⁶¹ See *supra* note 15 and accompanying text.

²⁶² See discussion *supra* notes 177–79 and accompanying text.

²⁶³ In addition, using enterprise theory to hold that the umbrella organization and its U.S. affiliates were a single enterprise for all purposes would be difficult to square with the *Goodyear* standard, as it would be questionable to conclude that the combined enterprise was “essentially at home” in the U.S. forum.

resident and the non-resident entities involved is appropriate. Thus, as the analysis above suggests, in light of the economic integration of Big Four umbrella organizations and their client-service firms with respect to audit activity, the umbrella organizations should be subject to personal jurisdiction in claims arising from that activity.²⁶⁴ Similarly, when a foreign accounting affiliate participates in a U.S.-directed engagement, it should not be protected from jurisdiction in a U.S. forum simply because its own portion of the work was conducted outside the borders of the United States.²⁶⁵ While that argument would prevail on a traditional entity-based view, an enterprise approach would consider the question in light of the fact that with respect to shared work on cross-border client engagements, affiliates within the accounting networks are intended to and do operate as a unified enterprise. When a foreign affiliate directs an audit that involves a significant U.S. component, or conducts a significant portion of an audit for a U.S. client, the connection to the U.S. forum appears strong enough to justify the exercise of jurisdiction over that affiliate in claims arising from that work. Recognizing the foreign affiliate and the U.S. affiliate as a single enterprise would permit the exercise of jurisdiction over the former in a claim arising from that work.

As these examples from the accounting context demonstrate, the risk that enterprise analysis might lead to unconstitutional assertions of jurisdiction can be mitigated through careful assessment of the relationship between the particular characteristics of a unified economic enterprise and the relevant cause of action. Under those circumstances, the exercise of jurisdiction on an enterprise rather than entity basis can satisfy the requirements of jurisdictional law while affording courts needed flexibility in addressing the cross-border activity of transnational entities.

²⁶⁴ It is true that if such an approach were adopted by multiple jurisdictions, then the umbrella organizations would be subject to jurisdiction in audit-based litigation everywhere that their affiliates operated — but that seems a result that is fair and consistent with the global strategy and business model of the firms, as well as foreseeable to the organizations themselves.

²⁶⁵ In the case involving Ernst & Young's Bermuda office, the defendants argued that their own activities in the course of the relevant engagement were conducted outside U.S. borders, and that they should therefore not be subject to personal jurisdiction in the United States. *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 476.

CONCLUSION

Lacking a coherent theoretical underpinning, the law governing personal jurisdiction is confused and confusing.²⁶⁶ As a result, jurisdictional analysis tends to be unpredictable and highly fact-dependent — characteristics that often lead to increased litigation costs.²⁶⁷ Undoubtedly, recognizing a single-enterprise theory of jurisdiction would exacerbate this problem in certain respects. Assessing jurisdiction over a defendant on such a theory would require investigation into the unitary nature of the business in question, an investigation that would itself be somewhat unpredictable and fact-dependent.²⁶⁸ Moreover, because an enterprise-based approach requires analysis of the connection between the unified elements of the defendant's business and the substantive basis of the plaintiff's claims,²⁶⁹ it would necessarily expand the range of issues considered at the stage of jurisdictional discovery.

This Article suggests that an enterprise approach may nevertheless be both viable and useful in the context of transnational litigation. First, as the case study above demonstrates, courts grappling with the complexities of transnational economic activity already inject enterprise principles into their analysis of jurisdiction over foreign defendants — even in the difficult context in which the economic integration of the enterprise in question depends on contractual and operational ties rather than ownership linkages. Second, by adhering to outdated and poorly tailored entity-based theories, courts have sometimes generated results that are inconsistent and that run the risk of undermining due process. Explicitly recognizing an enterprise-based theory would lend much-needed structure to this sort of analysis, and would increase the likelihood that jurisdictional determinations involving complex enterprises meet constitutional requirements. In the absence of a legislative solution to the shortcomings of current jurisdictional doctrine, an enterprise approach would channel more fairly and effectively the judicial response to corporate activity in the global arena.

²⁶⁶ See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010) (surveying commentary to this effect).

²⁶⁷ See A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 7 DENV. U. L. REV. 325, 328 (2010) (discussing the inefficiencies of “satellite litigation” over jurisdictional questions).

²⁶⁸ Additionally, the unpredictability of such a determination would presumably affect the ex ante structuring decisions of multinational enterprises.

²⁶⁹ See *supra* Part III.B (arguing that this is necessary to ensure that the requirements of due process are met).