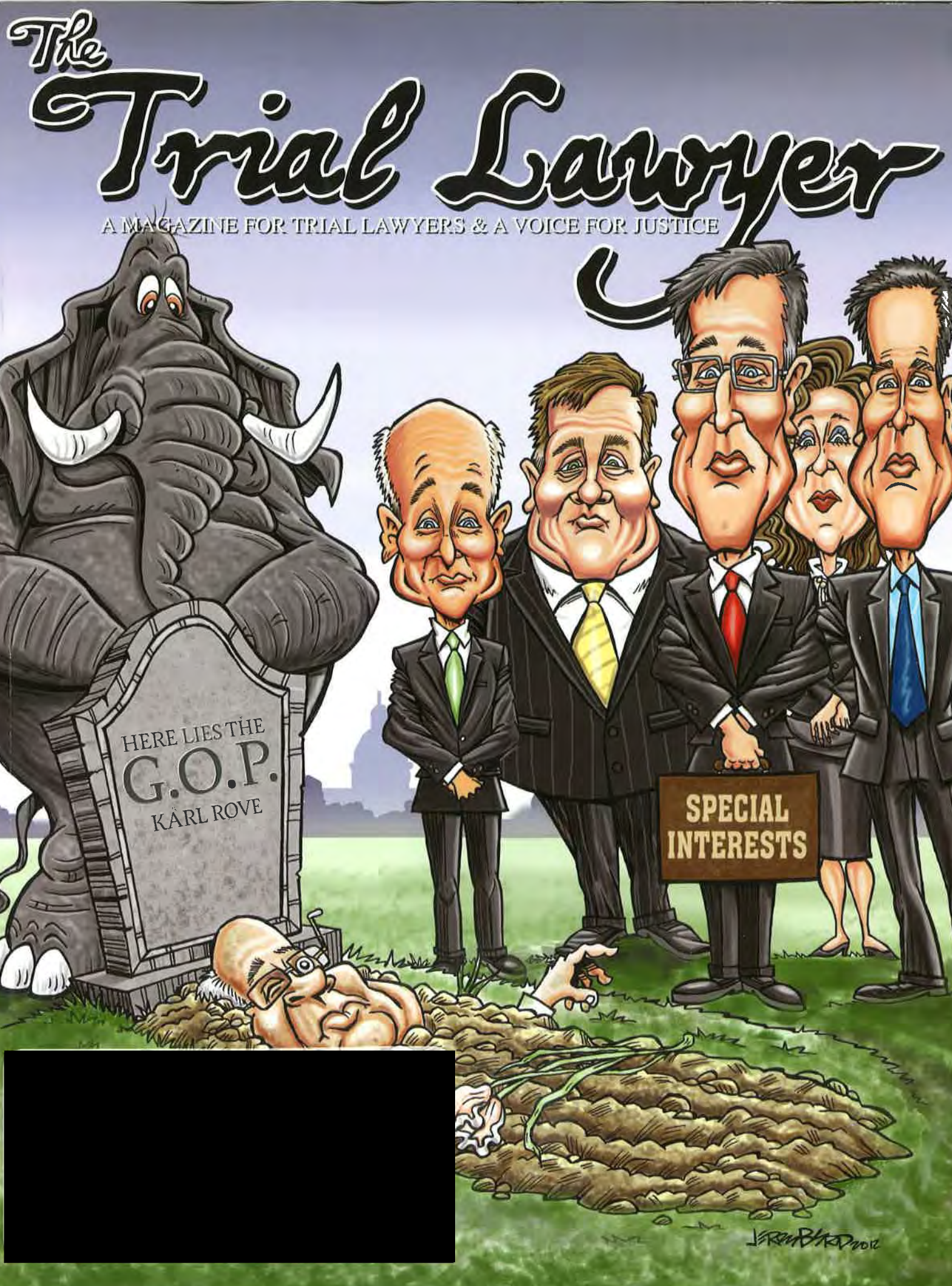

The Trial Lawyer
A MAGAZINE FOR TRIAL LAWYERS & A VOICE FOR JUSTICE
HERE LIES THE
G.O.P.
KARL ROVE
SPECIAL
INTERESTS

ARE INTERNATIONAL WRONGDOERS ABOVE THE LAW?

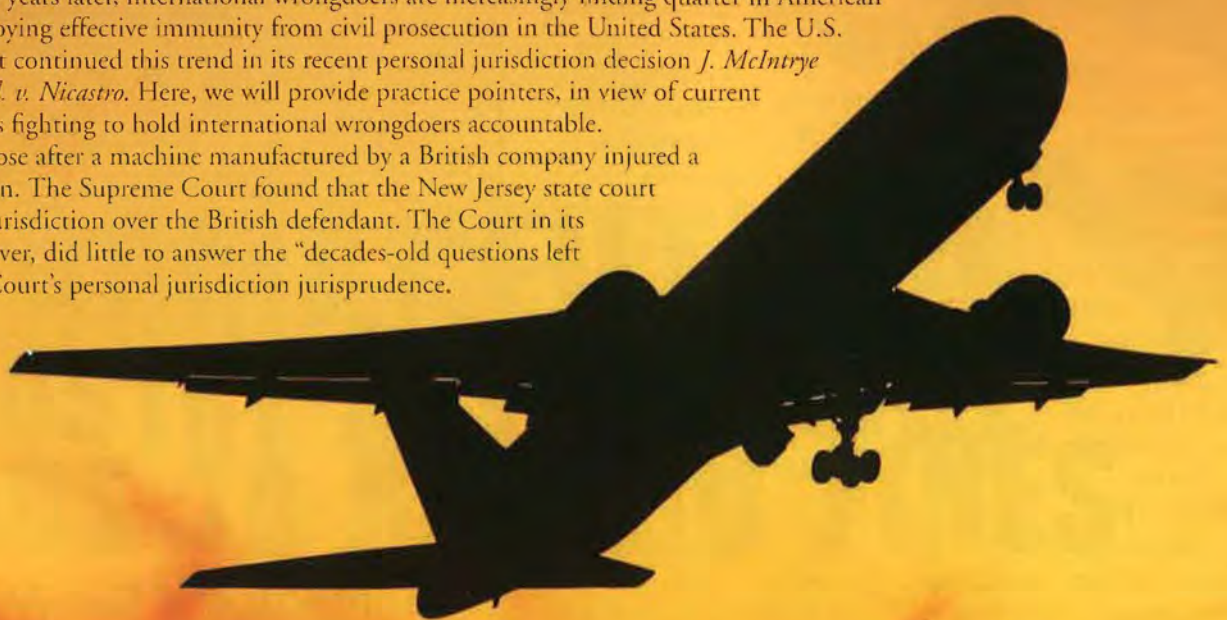
By Mark P. Chalos

To permit every lawless capitalist, every law-defying corporation, to take any action, no matter how iniquitous, in the effort to secure an improper profit and to build up privilege, would be ruinous to the Republic…

— *Theodore Roosevelt,* Eighth Annual Message to Congress, December 8, 1908

President Roosevelt recognized that holding wrongdoers accountable is essential to our nation's survival. Yet, more than 100 years later, international wrongdoers are increasingly finding quarter in American courts and enjoying effective immunity from civil prosecution in the United States. The U.S. Supreme Court continued this trend in its recent personal jurisdiction decision *J. McIntrye Machinery, Ltd. v. Nicastro.* Here, we will provide practice pointers, in view of current law, for lawyers fighting to hold international wrongdoers accountable.

Nicastro arose after a machine manufactured by a British company injured a New Jersey man. The Supreme Court found that the New Jersey state court did not have jurisdiction over the British defendant. The Court in its decision, however, did little to answer the "decades-old questions left open" by the Court's personal jurisdiction jurisprudence.



Nicastro Plurality Opinion — Four Justices Advocate a Bright-Line Rule of No Jurisdiction

Writing for four justices, Justice Kennedy opined that the proper principle to apply was the notion sometimes called "Stream of Commerce Plus." This concept was set forth by Justice O'Connor in the Court's 1987 *Asahi* decision. In short, to be subject to personal jurisdiction in a U.S. forum, under Stream of Commerce Plus, the alleged wrongdoers' minimum contacts must come about by "an action of the defendant purposefully directed toward the forum State." The placement of a product, without more, does not constitute an act purposefully directed to the forum. Mere foreseeability that a product would enter a certain forum state is not sufficient. Additional conduct is necessary, to confer jurisdiction, such as designing the product for that forum's market, advertising in the forum state, and marketing through a distributor or agent in the forum state. The *Nicastro* plurality, in applying Steam of Commerce Plus, found that the defendant had not targeted New Jersey; therefore, New Jersey courts had no jurisdiction over it.

The *Nicastro* plurality expressly rejected the less restrictive notion of jurisdiction, sometimes called a "Stream of Commerce" theory, set forth by Justice Brennan in *Asahi* and later embraced by other courts. Stream of Commerce theory would permit an exercise of jurisdiction where a defendant deliberately placed the product into the stream of commerce and is aware that a product is marketed in a forum state.

The four *Nicastro* justices, however, did not garner a majority of the Court for their reasoning, thereby leaving open the question of which test definitively applies to personal jurisdiction questions.

Nicastro Concurrence — Two Justices Stake a Middle Ground

Justice Breyer, joined by Justice Alito, concurred in the plurality's holding of no jurisdiction, but found that such

holding required nothing more than applying the Court's existing precedents. In particular, Justice Breyer stated that this case presented only a single isolated sale into New Jersey, which even Justice Brennan's Stream of Commerce framework would hold was insufficient to confer jurisdiction. Justice Breyer observed that the plurality opinion's "strict rules" do not properly account for realities of modern commerce, such as buying items through a website or through the Amazon.com system. These modern issues, however, were "totally absent in this case," and, as such, *Nicastro* was "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."

Nicastro Dissent — Three Justices Would Find Personal Jurisdiction Existed

Justice Ginsburg, writing for three justices, dissented. She opined that although the Court had not previously faced an identical fact pattern - a foreign manufacturer selling its products nationwide through a U.S. distributor - the Court's precedent permitted an exercise of jurisdiction in this case. Justice Ginsburg described some pertinent facts: defendant's stated intention was to reach "anyone interested in the machine from anywhere in the United States;" defendant stated "[a]ll we wish to do is sell our products in the [U.S.] — and get paid!"; defendant made efforts to make sales in the U.S., including sending representatives to trade shows in the U.S.; and defendant failed to take steps to avoid any specific State markets. By its conduct, defendant "purposefully availed" itself to the New Jersey market. The product that injured Mr. Nicastro arrived in New Jersey "not randomly or fortuitously, but as a result of the U.S. connections and distribution system that [defendant] deliberately arranged." The foreign manufacturer should not, in Justice Ginsburg's view, be permitted, "Pilate-like [to] wash its hands of a product by having independent distributors market it."

The *Nicastro* opinions underscore the divergence that persists at the margins of the jurisdiction analysis and the corresponding lack of clarity courts and litigants face.

Despite the trend in U.S. courts of non-accountability for international wrongdoers, persons harmed by the conduct of foreign actors are not categorically without recourse. Lawyers handling such cases should consider early in the litigation the following practice pointers:

1) Develop a factual record of conduct in the U.S.

In deciding whether to hear cases involving foreign defendants, courts require as a minimum a showing of substantial conduct in the U.S. In general, the more substantial conduct in the U.S. demonstrated, the more likely a court will be willing to hear the dispute. When facing an early motion to dismiss on jurisdictional grounds, practitioners should anticipate that the court might restrict early discovery to jurisdictional issues only and should be prepared to focus targeted discovery efforts on those issues. Examples of the conduct courts have found significant include defendants' attempts to market its products in the forum, actual sales made into the forum, distribution networks that target the forum, and physical presence of defendants and/or their agents in the forum. Practitioners should be mindful that in view of the Justice Ginsberg's *Nicastro* dissent, which raised the question of whether contacts with the U.S. as a whole are sufficient to give rise to jurisdiction in a specific state, the more state-specific contacts that can be developed in discovery, the more of a basis a court will have for exerting jurisdiction. In addition to the customary methods of obtaining discovery, practitioners should consider obtaining discovery from third parties, including informally through "old-fashioned" investigative means. For example, in *Nicastro*, the number of defendants' expensive scrap-metal processing machines imported into the forum state was central. Plaintiffs' investigator located an additional machine in a shop in the forum state. Although this piece of information ultimately did not change the outcome for the Nicastro family, one could imagine where similar information obtained form third parties could be determinative.

2) Provide a plan for discovery and trial

Successfully holding foreign defendants accountable involves not just providing a legal basis for the court to act, but also addressing practical concerns a court might have, such as how can discovery be taken from overseas sources, can key witnesses be compelled to give testimony, can trial be conducted without imposing tremendous burdens on foreign defendants, and will the unique issues raised in cases involving foreign defendants consume a disproportionate amount of party and judicial resources. Where warranted, practitioners should consider demonstrating to the court how discovery and trial can be conducted efficiently and cost-effectively, even with foreign defendants. Claimants might consider submitting discovery and trial plans to prospectively address concerns a court might have, such as providing:

- outline of the types of discovery needed from foreign sources and the available mechanisms for obtaining that discovery with minimal judicial intervention, taking into account any discovery staging the court might impose, including restricting early discovery to jurisdictional issues;
- a reasonable list of expected witnesses (by type of knowledge, if names are unknown), the locations of those witnesses, and the means for obtaining testimony from those witnesses;
- a reasonable projection of trial duration that would indicate that any travel burden on foreign witnesses would be reasonable and limited; and
- a discussion of alternate means for presenting certain trial evidence, such as videoconference or video deposition.

One must be mindful that cases involving international defendants, while occurring more frequently, are outside the everyday experience of many judges. Answering early the basic question of "how are we going to do this lawsuit" could provide comfort for judges who will be making discretionary threshold decisions about whether to hear the case.

3) Remember that there is no need to reinvent the wheel

Claimants seeking to hold international wrongdoers accountable need not proceed as though they are the first. Others likely have faced many of the

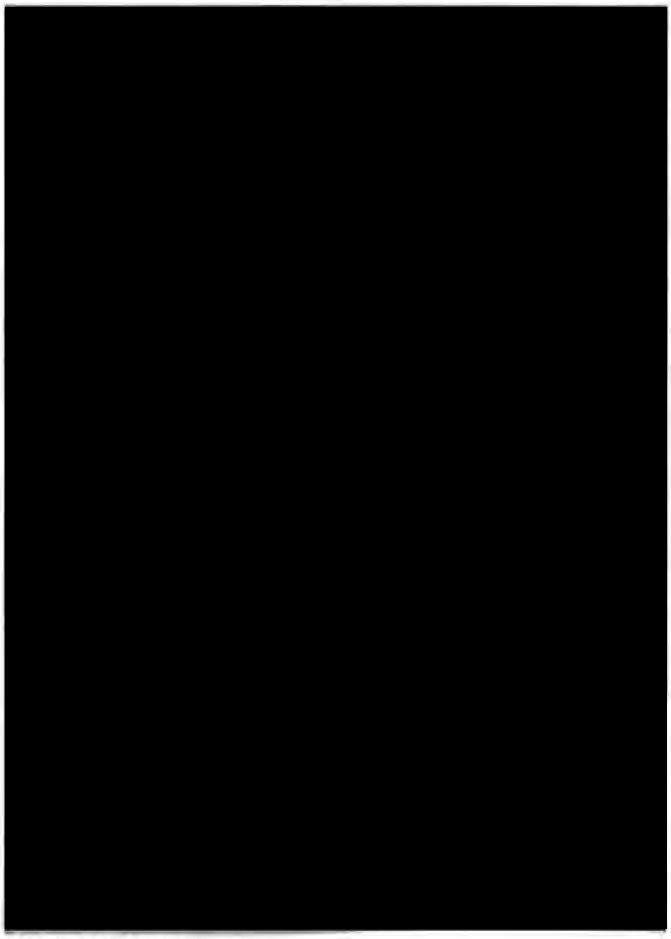
same challenges — perhaps involving the same defendants. There are many resources available to provide information on such issues as serving process in foreign countries, obtaining discovery from foreign sources, and locating local counsel in foreign countries, including the U.S. Department of State, which makes significant information available through its website www.state.gov.

Serving process on foreign defendants, whether through the Hague Convention or other means, often involves highly specific rules that vary by country. Rather than attempting to master a complex scheme that a lawyer might encounter few times in her practice, service can be accomplished by commercial vendors specializing in foreign service of process and other documents.

Moreover, particularly for larger companies, other claimants might have sought to hold them accountable for causing harm in the U.S. Lawyers who have prosecuted claims against a common defendant can be reached though list-serves and litigation groups. Similarly, substantive experts who have consulted on cases involving a common international defendant can be helpful. A practitioner should ask him or herself early in the assessment of a case involving international defendants, "what ground has been plowed and who is most likely to have plowed it?" The answers will potentially lead to beneficial efficiencies.

4) Explore links with American companies

Often, foreign entities rely on American companies to effect their business in the U.S., i.e., importers, distributers, sales agents. Agreements between those companies, such as indemnity agreements, might make suing the foreign defendant unnecessary to obtain redress for the harm suffered. In addition to express agreements, under some states' substantive law, particularly regarding product liability claims, sellers remain jointly and severally liable for harm caused by their dangerous and defective products. Even in some states where sellers have been largely immunized, sellers of bad products can be held to account where the product manufacturer cannot be brought into the forum. An example of this principle occurred in *Nicastro*, where the product at issue was imported by an American company. Unfortunately for Mr. Nicastro, the American company was bankrupt. But, the principal remains valid and practitioners should consider whether state substantive law permits recovery under alternate theories against culpable domestic parties, where appropriate.



5) Consider alternate venues

One primary consideration courts will analyze when deciding whether to hear a dispute involving international parties is whether complete relief can be accorded to the harmed party. As part of that analysis, courts will consider whether all, or at least the key responsible parties can be brought before it without substantial dispute regarding the appropriateness of the forum. As a general principle, courts tend to feel more comfortable hearing cases where the entire dispute can be effectively resolved in that forum, by trial or other disposition. A related principle is that where the basis for asserting jurisdiction over one or more international parties is less solid, courts might express reluctance to allow the expenditure of judicial and party resources, only later to have an appellate court rule that the court had no jurisdiction in the first place. When deciding where to file suit, practitioners should consider, among other concerns, into which venue as many of the key players can be brought with the most solid jurisdictional foundations.

6) Don't overreach

In the search for justice, some lawyers take a "sue 'em all" approach, under the theories that more defendants might increase the amount of money available to satisfy a judgment or fund a settlement and that more defendants might lead to intra-defendant finger-pointing. When considering the resources required to prosecute a case against a foreign defendant, lawyers should consider whether adding such potentially culpable defendants adds justifiable value to the case, including as part of that analysis:

- whether there is necessary discovery to be obtained from the potential defendant that could not be obtained through other means;
- whether witnesses associated with the potential defendant can be interviewed and/or deposed; and
- whether complete resolution can be obtained without the foreign defendant as a party.

Weighing the costs and benefits of suing a foreign defendant sometimes leads to the conclusion that under current law, the undertaking would not be warranted. In other cases, foreign defendants could and should be named — and reminded that they are not above the law.