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Case Notes

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Case Notes and Statute Notes

TORTS—GOVERNMENT INSPECTION AND CERTIFICATION OF PRIVATE PROPERTY—In the Absence of Liability under the Applicable State Good Samaritan Doctrine, the United States is not Liable Pursuant to the Federal Tort Claims Act for Negligence in the Inspection of Private Activities or Property, even though Federal Statutes or Regulations Direct that Government Employees Undertake the Activity. *United Scottish Insurance Co. v. United States*, 614 F.2d 188 (9th Cir. 1979).

On October 8, 1968, a DeHavilland Dove aircraft[1] caught fire in midair and crashed shortly after its takeoff.[2] The post-crash investigation indicated that the fire had begun in heaters which had been defectively installed by the plane's previous owner.[3] Pursuant to federal regulations,[4] the installation of the heaters had been inspected by Federal Aviation Administration (FAA) officials. The inspectors found the installation airworthy, and they issued a supplemental type certificate documenting their approval.[5]

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[1] The DeHavilland Dove, a twin engine propeller driven airplane, seats eight to ten passengers and two crew members.

[2] Brief for Appellant at 5, United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979).

[3] *Id.* at 7.

[4] 14 C.F.R. § 21.1113 (1980) requires that any person who makes a major change in the design of an aircraft apply to the FAA for a supplemental type certificate. Applicants must demonstrate that the altered aircraft meets applicable airworthiness requirements. 14 C.F.R. § 21.1115 (1980). Issuance of supplemental type certificates is based upon the approval by the Federal Aviation Administrator of the design change and the type certificate previously issued for the aircraft. 14 C.F.R. § 21.1117 (1980).

The usual method of obtaining a supplemental type certificate involves submitting drawings and other detailed documentation to the FAA to allow it to determine that the proposed installations will be airworthy and will meet FAA standards. The modification cannot be performed until it is approved. A lower level of documentation is permitted for only one or two aircraft installations, provided that an FAA inspector examines the "as built" installation. If the supplemental type certificate cannot be issued, the installation must be removed. Reply Brief for Appellees at 3, United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979).

[5] 614 F.2d at 190.

Plaintiffs filed suit under the Federal Tort Claims Act (FTCA)[6] alleging that damages had resulted from the negligence of the FAA inspectors who had issued the supplemental type certificate approving the defective installation of the heaters.[7] The district court found that the United States was liable on grounds that the FAA had been negligent in inspecting and certifying the aircraft and that this negligence proximately caused the fire and crash.[8] On appeal, the United States argued that the FTCA gives the district courts jurisdiction to award damages against the government only in situations where a private individual could be held liable pursuant to state law.[9] Consequently, the government contended that a violation of FAA regulations cannot serve as a basis for liability where the United States' role was simply one of conducting a safety inspection because there is no analogous "private person" liability for such activity.[10] *Held, reversed and remanded*: In the absence of

[6] The applicable portions of the FTCA are 28 U.S.C. § 1346(b) (1976) and 28 U.S.C. § 2674 (1976). 28 U.S.C. § 1346(b) (1976) provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages . . . for injury or loss of property, of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 (1976) states in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

[7] Brief for Appellant at 6, United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979). Three cases were filed for wrongful death claims, for property damage, and another for subrogation. Brief for Appellant at 2, United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979).

[8] United Scottish Ins. Co. v. United States, Nos. 70-138, 71-36, 71-37, 71-39 (S.D. Cal., Apr. 2, 1975).

[9] United Scottish Ins. Co. v. United States, 614 F.2d 188, 190 (9th Cir. 1979).

[10] *Id.* See note 6 *supra* and accompanying text. Alternatively, the government argued that the plaintiffs were asserting a claim arising from "misrepresentation," an exception to liability under 28 U.S.C. § 1346(b). The United States also contended that the district court erroneously failed to find contributory negligence as to the claim of the insurance companies. Finally, the government urged that the district court had erred in finding that the defective fuel line to the combustion heater proximately caused the crash. Because the Ninth Circuit accepted the government's argument that the FAA could not be held liable for negligent inspection of aircraft absent a showing of analogous private

liability under the applicable state good samaritan doctrine, the United States government is not liable pursuant to the Federal Tort Claims Act for negligence in the inspection of private activities or property, even though federal statutes or regulations direct that government employees undertake the activity. *United Scottish Insurance Co. v. United States*, 614 F.2d 188 (9th Cir. 1979).

THE FAA AND LIABILITY FOR NEGLIGENCE

Although governmental liability under the FTCA had earlier been explored in a variety of situations unique to aviation,[11] prior to *United Scottish Insurance Co. v. United States*[12] one commentator remarked that "[g]overnmental liability for the negligent airworthiness certification of aircraft, however, is one area which remains unsettled."[13] The question of governmental liability for negligent certification of aircraft was first examined in *Gibbs v. United States*.[14] While the court in *Gibbs* found that the FAA negligence was not the proximate cause of the accident in question, its opinion implied that the government might have been liable if the plaintiff could have proved that the negligence of government employees had proximately caused the accident.[15] The court noted that "[h]aving decided to enter the broad field of the regulation of the flight and repair and modifications of aircraft . . . the Government becomes responsible for the care with which those

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person liability under state law, the court did not rule on the other arguments set forth by the government. 614 F.2d at 190.

[11] *See* Note, *It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L.J. 247, 249 (1979). *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) and United States v. Causby, 328 U.S. 356 (1946) (government liability for excessive noise from airplanes); Kirk v. United States, 451 F.2d 690 (10th Cir. 1971) (government liability to homeowners for sonic booms); Duncan v. United States, 335 F. Supp. 1167 (D.D.C. 1973) (government liability for negligent denial of pilot certification).

[12] 614 F.2d 188 (9th Cir. 1979).

[13] Note, *It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L.J. 247, 249 (1979).

[14] 251 F. Supp. 391 (E.D. Tenn. 1965). This case involved a wrongful death action in which the plaintiff alleged that the government had negligently certified a jet after it had been modified. The government argued that pilot error was the proximate cause of the crash.

[15] *Id.* at 400.

activities are conducted."[16]

The *Gibbs* rationale was strengthened in *Rapp v. Eastern Air Lines, Inc.*[17] The court there held the government liable for failing to prescribe in a type certificate that certain engines were not to be used in areas where birds were known to congregate.[18] *Rapp* was followed by *Arney v. United States*,[19] in which the court held that because the government assumed responsibility for aircraft safety by certifying aircraft, it could be held liable for negligently performing its duties.[20] In *Arney*, the court noted that "[t]he purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be held liable for negligence in improper issuance of a type airworthiness certificate."[21] Both *Rapp* and *Arney*, however, were brought pursuant to the admiralty jurisdiction of the district courts, rather than pursuant to jurisdiction under the FTCA.[22]

Air traffic controllers have also been the subject of negligence

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[16] *Id.*

[17] 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970).

[18] 264 F. Supp. at 680. Sixty-two people died when an engine ingested a number of birds during takeoff, causing the aircraft to crash. *See* Note, *It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L.J. 247, 256 n.54 (1979), suggesting that the government did not appeal the decision because it was attempting to bury what it considered a dangerous precedent by engaging in extensive settlement negotiations. The author reports that the plaintiffs stipulated that the lower court judgment would be vacated in exchange for money from the government. Moreover, according to the author, the government sought to keep the case unpublished. The author cites no authority for these propositions.

[19] 479 F.2d 653 (9th Cir. 1973).

[20] *Id.* at 658.

[21] *Id.*

[22] Arney v. United States, 479 F.2d 653, 655 (9th Cir. 1973); Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673, 680 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970). The Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1976), provides the exclusive remedy against the United States for a maritime tort when the situs of the tort is within the admiralty jurisdiction of the court. Brady v. Roosevelt S.S. Co., 317 U.S. 575, 577 (1943). Wrongful death actions arising from the same accident as *Rapp* were held to be within the admiralty jurisdiction of the United States in Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir. 1963). In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), the Supreme Court eliminated the Suits in Admiralty Act as a basis for jurisdiction in suits arising out of airplane accidents over navigable waters.

suits for their failure to comply with FAA regulations.[23] Federal regulations state that "[a]n air traffic control operator shall perform his duties in accordance with . . . the procedures and practices prescribed in air traffic control manuals of the FAA to provide for the safe, orderly, and expeditious flow of air traffic."[24] A wide range of duties are owed to the air-travelling public by federal air traffic controllers, and the Air Traffic Control Procedures Manual is used by courts when assessing the scope of the duty owed.[25] Decisions have also held that these duties extend beyond those required by the FAA manual.[26] For example, the duty of air traffic controllers to give warnings to pilots is based upon the simple tort principle that once the government has assumed a function or service, it is liable for negligent performance of that task.[27]

In *Clemente v. United States*,[28] however, the First Circuit Court of Appeals rejected claims that a duty of care arises from the FAA regulations.[29] There, relatives and representatives of passengers killed in the crash of a chartered private plane filed suit against the government pursuant to the FTCA.[30] The plaintiff alleged that FAA employees had negligently failed to warn the passengers that

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[23] *See, e.g.*, Dickens v. United States, 545 F.2d 886 (5th Cir. 1977) (government liable for negligence of air traffic controller who failed to warn private aircraft pilot of wake turbulence created by commercial jet); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969) (government liable for negligence of controller who failed to warn small plane pilot of wing tip vortex of commercial aircraft); Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied sub nom.*, United States v. Ingham, 389 U.S. 931 (1967) (government liable for negligence of air traffic controller who failed to warn incoming aircraft that visibility had dropped).

[24] 14 C.F.R. § 65.45(a) (1980).

[25] See note 23 *supra.*

[26] *See, e.g.*, American Airlines, Inc. v. United States, 418 F.2d 180 (5th Cir. 1969) (controller must warn of dangers reasonably apparent to him which are not apparent to pilot exercising due care, whether or not warning is required by manual); United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967) (warnings beyond those prescribed by manuals must be given when danger is immediate and extreme); United Air Lines, Inc. v. Weiner, 355 F.2d 379 (9th Cir. 1964) (warnings beyond those set forth in manuals must be given when danger is known only to federal personnel).

[27] *See* Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972).

[28] Clemente v. United States, 422 F. Supp. 564 (D.P.R. 1976), *motion for reconsideration denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977).

[29] Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1977).

[30] *Id.* at 1143.

their aircraft was overweight and that it lacked a proper flight crew.[31] Although the district court found for the plaintiffs on the issue of negligence,[32] the First Circuit Court of Appeals reversed and held that an order issued by a regional director of the FAA regarding surveillance of large turbine-powered aircraft was not sufficient to give rise to a duty the breach of which would create a cause of action under the FTCA.[33] The court noted that failure to perform the order could lead to internal discipline by the FAA, but not to liability to the public.[34] The court pointed out that this was the first case in the jurisdiction to allege such a basis for liability.[35] The question of liability would be governed by the RESTATEMENT (SECOND) OF TORTS, Sections 323 and 324A,[36] the requirements of which were not met.[37] According to the court, there was no statutory duty to offer special protection to the plaintiffs' decedents, the failure to inspect the aircraft did not increase the risk of injury, and there was no showing that any of the decedents relied on the contents of the regional director's order so as to adjust his safety precautions accordingly.[38] Finally, the court stated that a contrary decision could impose limitless liability upon the federal government by interpreting every command made by supervisory or administrative staff to create a duty in the federal government owed to the beneficiaries of that command.[39]

The *Clemente* court distinguished the air traffic controller cases[40] on three levels.[41] First, the court noted that air traffic controllers operate under federal rules designed to establish standards of care for their activities, regardless of whether they are private, public, municipal or federal employees:[42] "[A] federal employee is

[31] *Id.*

[32] Clemente v. United States, 422 F. Supp. 564, 576 (D.P.R. 1976), *motion for reconsideration denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977).

[33] Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1977).

[34] *Id.*

[35] *Id.*

[36] *Id.* See notes 58-60 *infra* and accompanying text.

[37] Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1977).

[38] *Id.*

[39] *Id.* at 1146.

[40] See notes 23-27 *supra* and accompanying text.

[41] Clemente v. United States, 567 F.2d 1140, 1147-48 (1st Cir. 1977).

[42] *Id.* at 1147.

subject to whatever duty is imposed by these regulations in the same manner in which any citizen would be."[43] Second, the nature of the role of air traffic controllers involves duties to air traffic regardless of the procedures outlined in the FAA manual:[44] "[O]nce the government took control of the air towers it became subject to the duties that would devolve on any entity that took on such responsibility."[45] The court stated that no comparable duty existed for the FAA inspector.[46] Third, "[t]he relationship between pilots and passengers and air controllers is imbued with reliance, a foundation stone of tort liability."[47] The court said there was no evidence that any person relied on the FAA to inspect the charter aircraft.[48]

Thus the question of governmental liability for negligent inspection and certification of aircraft was unsettled after *Clemente*.[49] *Rapp*,[50] *Arney*,[51] and the air traffic controller cases[52] indicated that the government would be held to a duty of due care in inspecting and certifying aircraft.[53] *Clemente*,[54] which was brought under the FTCA but which did not deal with the issues of inspection and certification of aircraft, indicated that the good samaritan doctrine[55] should be considered when determining the existence of an actionable duty of due care under FAA regulation.[56]

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1147-48.

[47] *Id.* at 1148.

[48] *Id.*

[49] Note, *It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L.J. 247, 249 (1979).

[50] Rapp v. United States, 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970). See notes 17, 18 & 22 *supra* and accompanying text.

[51] Arney v. United States, 479 F.2d 653 (9th Cir. 1973). See notes 19-22 *supra* and accompanying text.

[52] See notes 23-27 *supra* and accompanying text.

[53] See notes 17-27 *supra* and accompanying text.

[54] Clemente v. United States, 422 F. Supp. 564 (D.P.R. 1976), *motion for reconsideration denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977).

[55] See notes 57-61 *infra* and accompanying text.

[56] See notes 28-48 *supra* and accompanying text.

THE GOOD SAMARITAN DOCTRINE AND THE FEDERAL TORT CLAIMS ACT

The good samaritan doctrine protects a rescuer from the imposition of liability unless his undertaking somehow worsens the position of the endangered person.[57] The doctrine is set forth in the RESTATEMENT (SECOND) OF TORTS, Sections 323 and 324A.[58] Under Section 323, one who undertakes to render services to another person is liable to him for negligence if the rescuer's failure to use reasonable care either increases the risk of harm to the other person or if the harm to the other person is suffered because of the other person's reliance on the undertaking.[59] Section 324A states that one is liable to third persons for negligently rendering services to another which he recognizes are necessary to protect the third person, if his failure to use reasonable care increases the risk of harm, or if he has undertaken to perform a duty owed by another to the third person, or if the harm results from the reliance of the other person or the third person on the undertaking.[60]

[57] United States v. Devine, 306 F.2d 182, 186 (5th Cir. 1962). *See generally* PROSSER, LAW OF TORTS 343-48 (4th ed. 1971); 35 AM. JUR. 2d *Federal Tort Claims Act* § 84 (1967).

[58] RESTATEMENT (SECOND) OF TORTS §§ 323 & 324A (1965).

[59] RESTATEMENT (SECOND) OF TORTS § 323 (1965) states:

> NEGLIGENT PERFORMANCE OF UNDERTAKING TO RENDER SERVICES: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

[60] RESTATEMENT (SECOND) OF TORTS § 324A (1965) reads:

> LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING:
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to the third person for physical harm resulting from his failure to exercise care to protect his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Most states have adopted the Restatement definition.[61]

The good samaritan doctrine was first applied under the FTCA in *Indian Towing Co. v. United States.*[62] In that case, decided in 1955, the Supreme Court held that the United States government could be liable under the FTCA for the negligent operation of a lighthouse which resulted in a barge running aground.[63] The Court noted that the language of that part of the FTCA[64] which imposes liability on the federal government in the same manner and to the same extent as a private individual under like circumstances, "is not to be read as excluding liability for negligent conduct in the operation of an enterprise in which private persons are not engaged."[65] Under the Court's rationale, the Coast Guard was obligated to exercise due care in maintaining the lighthouse in good working order once it had exercised its discretion and had decided to operate the lighthouse.[66] If the light went out, the Coast Guard had a duty of due care to discover that condition and to repair the light or to warn that it was broken.[67] The Court admonished that "[i]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner."[68] The good samaritan doctrine was subsequently applied to a number of air traffic controller cases.[69]

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[61] *Significant Developments, Government Liability for Negligent OSHA Inspections Under the Federal Tort Claims Act*, 59 B.U.L. REV. 546, 564 (1975). *See, e.g.*, Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1977) (Puerto Rico looks to §§ 323 and 324A); Coffee v. McDonnell-Douglas Corp., 8 Cal. 3d 551, 503 P.2d 1366, 105 Cal. Rptr. 358 (1972) (California applies § 323); Colonial Savings Ass'n v. Taylor, 544 S.W.2d 116 (Tex. 1976) (Texas applies provisions of good samaritan doctrine as set forth in RESTATEMENT (SECOND) OF TORTS 324A (1965)). *But see* Mosely v. United States, 456 F. Supp. 671, 675 (E.D. Tenn. 1978) (Tennessee has not adopted good samaritan doctrine).

[62] 350 U.S. 61 (1955).

[63] *Id.* at 69.

[64] See note 5 *supra.*

[65] 350 U.S. at 64.

[66] *Id.* at 69.

[67] *Id.*

[68] *Id.* at 64-65.

[69] *See, e.g.*, Spaulding v. United States, 455 F.2d 222, 226 n.9 (9th Cir. 1975) (holding that controller's warning about weather was sufficient to meet duty to warn); Yates v. United States, 497 F.2d 878, 884 (10th Cir. 1974) (failure of FAA controller to warn pilot of small aircraft of close proximity to wake turbulence from jet was negligence for which government could be held

In 1977, the doctrine was applied in *Blessing v. United States*,[70] a case dealing with negligent government inspection. There, injured employees sued the federal government under the FTCA, basing their cause of action on the allegedly negligent inspection of their private employers' premises by Occupational Safety and Health Administration (OSHA) inspectors.[71] The district court found that the plaintiffs had failed to allege either the increased risk or harm, or the reliance required by the causation elements of the good samaritan doctrine.[72] Accepting the government's argument, the court held that the plaintiffs could not base their claims on breaches of duty arising solely out of federal law if there was no corresponding duty under state tort law.[73]

United Scottish Insurance Co. v. United States— THE COURT'S REASONING

In *United Scottish Insurance Co. v. United States*, the Ninth Circuit Court of Appeals accepted the district court's finding that the FAA regulations in question could serve as the basis of liability.[74] The government had argued that the statement in *Arney v. United States*[75] that "the government may be held liable for negligence in improper issuance of a type airworthiness certificate"[76] was only dicta.[77] The Court of Appeals did not accept this contention;[78] however, it noted that *Arney* should not be read to mean that a duty of due care would *necessarily* arise directly from FAA regulations.[79] The court explained that in *Arney* it had been reviewing a summary judgment and that it therefore had not had the opportunity to elaborate on the elements required for a cause

liable); Gill v. United States, 429 F.2d 1072, 1074 (5th Cir. 1970) (government could be held liable for supplying inexact and incomplete weather information to pilots).

[70] 447 F. Supp. 1160 (E.D. Pa. 1978).

[71] *Id.* at 1164.

[72] *Id.* at 1160-61.

[73] *Id.* at 1186 n.37.

[74] United Scottish Ins. Co. v. United States, 614 F.2d 188, 191 (9th Cir. 1979).

[75] Arney v. United States, 479 F.2d 653 (9th Cir. 1973).

[76] *Id.* at 658.

[77] United Scottish Ins. Co. v. United States, 614 F.2d 188, 191 (9th Cir. 1979).

[78] *Id.*

[79] *Id.*

of action to arise from the negligent issuance of a type airworthiness certificate.[80] Furthermore, the court recognized that *Arney* had been brought pursuant to the admiralty jurisdiction of the district court and thus could not be considered to control the FTCA claim in *United Scottish Insurance*.[81]

The Court of Appeals stressed that the good samaritan doctrine is applicable to the federal government under the FTCA.[82] The court rejected the government's argument that because the activity in question was a safety inspection/certification there was no analogous private person liability and thus no liability under the FTCA.[83] However, it refused to hold that because inspection and certification is a uniquely governmental function, liability would not arise from misfeasance.[84] Recognizing the nature of the inspection/certification activity, the court concluded that these endeavors warranted an analysis of the applicable regulations based upon something other than an automatic application of state negligence per se law.[85] The court found that analyzing the federal regulations differently from an automatic application of negligence per se law is "the only approach that is consistent with the Federal Tort Claims Act which dictates that the government '[s]hall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.' "[86]

The Ninth Circuit bolstered its holding by looking to decisions from other jurisdictions which dealt with the extent of govern-

[80] *Id.*

[81] *Id.* at 191-92. In deciding *Arney*, the Ninth Circuit relied on Rapp v. Eastern Airlines, 264 F. Supp. 673 (E.D. Pa. 1967). Subsequent to the decision in *Arney*, the Third Circuit announced that it had vacated by the agreement of the parties the district court's decision in *Rapp* before *Arney* was decided. The Ninth Circuit stated: "[T]hat *Rapp* is no longer case authority in no way undermines the procedural value of *Arney* in this circuit." *Id.* at 191. *Arney* was a non-binding decision, and the court will rely on non-binding decisions only when it believes their reasoning provides some support for what it concludes is the correct analysis. *Id.* The court also declined to reconsider and overrule *Arney* because three-judge panels will abide by a prior decision until the United States Supreme Court or a Circuit Court of Appeals, sitting *en banc*, overrules it, either implicitly or explicitly. *Id.*

[82] United Scottish Ins. Co. v. United States, 614 F.2d 188, 192 (9th Cir. 1979).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* See note 6 *supra* and accompanying text.

mental liability pursuant to the FTCA when the government undertakes good samaritan activities such as inspection and certification. Finding the "best approach"[87] in the majority opinion in *Blessing v. United States*,[88] the court noted that the FTCA was not designed to redress breaches of federal statutory duty.[89] After examining the authority behind *Blessing*,[90] the Court of Appeals concluded that the purpose of the FTCA is to permit recovery for common law torts.[91] Since failure to inspect another's vehicle or machinery or failure to inspect them with due care is not a common law tort, the court reasoned that liability could not accrue under the FTCA unless the applicable state good samaritan doctrine would recognize the action if the United States were a private person.[92]

Public policy considerations played a role in the court's decision that a federal statutory duty does not give rise to a duty of due care under a state's negligence per se doctrine.[93] The Ninth Circuit noted that government conduct includes activities which are also performed by private persons and corporations, such as driving delivery vehicles.[94] Although there is no primary duty to provide the service, activities such as the inspection of aircraft are good samaritan functions carried out pursuant to regulations.[95] "[N]ot only would there be no potential liability if government declined to provide such service at all, but the government does not purport to relieve other actions of the primary duty to see that the underlying activity is accomplished safely or consistent with public policy."[96] The court expressed concern that automatic liability might cause governmental reluctance to undertake such inspections in the future.[97]

Having established that liability under the FTCA for govern-

[87] United Scottish Ins. Co. v. United States, 614 F.2d 183, 192 (9th Cir. 1979).

[88] Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

[89] United Scottish Ins. Co. v. United States, 614 F.2d 183, 192 (9th Cir. 1979).

[90] Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978). See notes 70-73 *supra* and accompanying text.

[91] United Scottish Ins. Co. v. United States, 614 F.2d 188, 193 (9th Cir. 1979).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

mental negligence in the inspection and certification of aircraft would be predicated on the applicable state good samaritan doctrine, the Ninth Circuit proceeded to delineate the two general approaches to the doctrine.[98] One view taken by the courts has been that the requirements of the good samaritan doctrine are prerequisites to finding any duty at all.[99] The other approach has held that the undertaking itself creates a duty, with the elements required by the good samaritan doctrine being prerequisites for a finding of proximate or legal causation.[100] In a given jurisdiction, state law will control which approach is applicable.[101]

The Court of Appeals found that the requirement that the elements of the good samaritan doctrine be demonstrated was supported by cases involving "analogous governmental activity."[102] Those cases held air traffic controllers liable for negligence, with their conduct evaluated in terms of regulations and air traffic control manuals.[103] However, the Ninth Circuit did not extend the analogy to include liability for negligent inspection and certification of aircraft.[104] The court reiterated its opinion in *Spaulding v. United States*[105] that "the duty resting upon the [air traffic control] manuals arises because of expected pilot reliance, in the air control situation, on published explanations of controller functions."[106] Endorsing the distinction[107] between FAA inspectors and air traffic controllers[108] developed by the First Circuit in *Clemente v. United States*,[109] the court concluded that "[t]his inherent and ongoing reliance by pilots upon controllers satisfies the good samaritan test,

[98] *Id.* at 195.

[99] *Id. See, e.g.*, Clemente v. United States, 576 F.2d 1140, 1149 (1st Cir. 1977).

[100] United Scottish Ins. Co. v. United States, 614 F.2d 188, 195. *See* Blessing v. United States, 447 F. Supp. 1160, 1193, 1200 n.51 (E.D. Pa. 1978).

[101] United Scottish Ins. Co. v. United States, 614 F.2d 188, 195 (9th Cir. 1979).

[102] *Id.* at 196.

[103] See notes 23-27 *supra* and accompanying text.

[104] United Scottish Ins. Co. v. United States, 614 F.2d 188, 197 (9th Cir. 1979).

[105] Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972).

[106] United Scottish Ins. Co. v. United States, 614 F.2d 188, 196 (9th Cir. 1979).

[107] *Id.*

[108] See notes 40-48 *supra* and accompanying text.

[109] Clemente v. United States, 567 F.2d 1140, 1147-48 (1st Cir. 1977).

and alone, distinguishes the air traffic controller cases from that before us here."[110]

Since the court held that the existence of governmental liability would depend on the existence of liability of a private person in similar circumstances under the applicable state law, the court remanded the case to the district court for further proceedings consistent with the opinion.[111] The court suggested that the district judge determine which state's substantive law applies.[112] After the applicable state law is determined, the issue will be whether the plaintiffs can satisfy the requirements of the applicable law.[113] "Should state law preclude liability against a private person who undertakes an inspection on behalf of others, or if the court finds that the government's activity here would not allow a finding that a duty relationship had been created or a proximate cause requirement satisfied, the district judge must dismiss the action for failure to state a claim pursuant to the Federal Tort Claims Act."[114]

CONCLUSION

The Ninth Circuit Court of Appeals decision in *United Scottish Insurance Co. v. United States*[115] squarely addresses the issue of FAA negligence in the inspection and certification of aircraft.[116] For the first time, a case explicitly holds that the FAA may not be held liable for negligence in the inspection and certification process[117] unless the plaintiffs can prove that a private person would have been held liable in similar circumstances under the applicable state law.[118] Whether a private individual in similar circumstances would be held liable for the negligent inspection and certification

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[110] United Scottish Ins. Co. v. United States, 614 F.2d 188, 197 (9th Cir. 1979).

[111] *Id.* at 198.

[112] *Id.* See text accompanying note 122 *infra.*

[113] *Id.*

[114] *Id.* at 198-99.

[115] United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979).

[116] *Id.* at 191.

[117] See note 13 *supra* and accompanying text.

[118] United Scottish Ins. Co. v. United States, 614 F.2d 188, 195 (9th Cir. 1979).

of aircraft in turn depends on the applicable good samaritan doctrine.[119]

Before looking at the substantive law, courts first will have to decide which state's law to apply.[120] Conflicts of law problems can become very complicated when a case involves the certification and inspection of aircraft.[121] As in *United Scottish Insurance Co.*, courts may face situations where the aircraft was built in one state, it was modified and was issued supplemental type certificate in another state, and it carried passengers from numerous states.[122] Because most states accept the Restatement definition of the good samaritan doctrine, the question of which jurisdiction's law to apply may be purely academic.[123] However, at least one state does not recognize the good samaritan doctrine,[124] and it remains to be seen how courts will interpret the Restatement's requirements of increased harm and reliance.[125]

In fact, the real impact of this case will become clearer after courts determine exactly what plaintiffs will have to prove to demonstrate that the increased risk of harm or reliance prerequisites of the good samaritan doctrine have been satisfied.[126] It is unlikely that many inspection/certification cases will arise where the negligent conduct of the FAA actually increases the risk of harm.[127] Moreover, the Ninth Circuit implied that reliance on the FAA inspections does not arise from the nature of the activity itself.[128] The court said that this case was distinguishable from air traffic controller cases because reliance is inherent in the relationship between pilots and air traffic controllers.[129] Arguably, pas-

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[119] *Id.*

[120] *Id.* at 198.

[121] *See, e.g., id.* at 188-89.

[122] *Id.*

[123] See note 61 *supra* and accompanying text.

[124] Mosely v. United States, 456 F. Supp. 671, 675 (E.D. Tenn. 1978) (Tennessee has not adopted good samaritan doctrine).

[125] See notes 59 & 60 *supra* and accompanying text.

[126] *Id.*

[127] See notes 59 & 60 *supra* and accompanying text.

[128] United Scottish Ins. Co. v. United States, 614 F.2d 188, 196-97 (9th Cir. 1979).

[129] *Id.* at 197.

sengers do rely[130] on the government to insure that the aircraft they board are safe. If the courts require a more specific showing of reliance, however, it is unlikely that plaintiffs can ever meet such a burden. As one observer pointed out: "While the public is no doubt aware that the aviation industry is highly regulated, in all probability few persons who are the passengers of commercial aviation have even heard of airworthiness certification, much less rely on it before stepping into an airplane."[131]

To the extent that the primary duty for air safety depends on the carriers, the holding in *United Scottish Insurance Co. v. United States* is a good decision. The Ninth Circuit made it clear that the government will not be held liable for negligently inspecting and certifying private property if that activity is the responsibility of another party.[132] However, if the reliance element of the good samaritan doctrine presents a virtually insurmountable hurdle for plaintiffs, little encouragement will be given to the FAA to upgrade its inspection/certification procedures.[133]

To the extent that consumers expect aircraft to be safe, regardless of whether they know the technical procedure for determining airworthiness, the decision may fail to honor their expectations. On the other hand, one might conclude that carriers and their insurance companies now stand forewarned that they will be fully responsible for airworthiness and that they will therefore take greater precautions. The Ninth Circuit Court of Appeals has created a framework for imposing governmental liability under the FTCA for the negligent inspection and certification of aircraft,[134]

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[130] See notes 59 & 60 *supra* and accompanying text.

[131] Note, *It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HASTINGS L.J. 247, 272 (1979).

[132] United Scottish Ins. Co. v. United States, 614 F.2d 188, 193 (9th Cir. 1979).

[133] *See generally* TIME, July 7, 1980, at 43, citing a study by a blue ribbon panel of thirteen aviation experts headed by George M. Low, a high-ranking NASA official and president of Rensselaer Polytechnic Institute. The report concluded that the FAA is not capable of competently certifying new aircraft. About 370 of the FAA's engineering staff are involved with certifying aircraft, and they cannot consider every detail. For example, Lockheed submitted 300,000 sketches and 2,000 reports in designing the L-1011. To deal with the barrage of documents, the FAA turns to designated engineering representatives (DER's) who are actually employed by aircraft manufacturers. *Id.*

[134] United Scottish Ins. Co. v. United States, 614 F.2d 188, 195 (9th Cir. 1979).

but the framework will require development. In any event, given the importance of this issue, it is likely that the Supreme Court will eventually be forced to address the question of governmental liability for the negligent inspection and certification of aircraft.

Julie Lanier Bloss

CIVIL PROCEDURE—PERSONAL JURISDICTION— MERE FORESEEABILITY OF CONTACTS WITH A STATE IS NOT THE TEST FOR PERSONAL JURISDICTION; TO SATISFY DUE PROCESS A NONRESIDENT DEFENDANT MUST HAVE SUCH CONTACTS WITH A STATE THAT HE IS ON CLEAR NOTICE THAT HE IS THERE SUBJECT TO SUIT. *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980).

In 1976, Harry and Kay Robinson purchased a new Audi automobile from Seaway Volkswagen, Inc. (Seaway) in Massena, New York. At the time of the purchase the Robinsons were New York residents; however, they acquired the car to use for their move to Arizona. On the way to Arizona, while in Oklahoma, the car was struck from the rear by another automobile. The Audi exploded when the gas tank ruptured, thus causing injuries to the occupants. Claiming that the gas tank had been defective, the Robinsons brought a products liability suit in the District Court of Creek County, Oklahoma, against, among other defendants, the automobile's regional distributor, World-Wide Volkswagen Corporation (World-Wide),[1] and its retail dealer, Seaway.[2] World-Wide and Seaway entered special appearances[3] contending that

[1] World-Wide Volkswagen is incorporated and has its business office in the State of New York. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 563 (1980). See text accompanying note 5 *infra*.

[2] Suit was also brought against the automobile's manufacturer and importer; however, these defendants did not seek appellate review in the Supreme Court of Oklahoma on the issue of the exercise of personal jurisdiction and were not petitioners before the United States Supreme Court. *Id.* at 562 n.3.

[3] A special appearance is an appearance before the court "for the purpose of objecting by motion to the jurisdiction of the court, the venue of the action, or an insufficiency of process or service of process." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 520 (1969). Failure to follow the proper

Oklahoma's exercise of personal jurisdiction over them would violate the Due Process Clause of the Fourteenth Amendment.[4]

When this action was instituted, World-Wide was incorporated in New York, and it distributed vehicles and vehicle parts in the three-state area of New York, New Jersey and Connecticut.[5] Seaway had contractual relations with World-Wide, but it was otherwise a totally independent corporation.[6] There was no evidence that either Seaway or World-Wide did any business in Oklahoma,[7] and the Respondent, during oral appellate argument, admitted that with the single exception of the Robinsons' Audi, there was no evidence of any other car sold by World-Wide or Seaway having entered Oklahoma.[8]

The trial court ruled that the exercise of personal jurisdiction by Oklahoma over the two defendants under the Oklahoma long-arm statute[9] was proper. The defendants sought a writ of prohibi-

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procedure may result in a waiver of the defense. Rule 12 of the Federal Rules of Civil Procedure abolished the distinction between special and general appearances in the federal courts. However, in state courts which continue to utilize special appearances, the defendant must object to defects in jurisdiction, venue or service of process by special motion, as an answer to the merits of the complaint is tantamount to an appearance for all purposes. *Id.* at 520-22.

[4] U.S. CONST. amend. XIV, § 1. The due process rationale is based upon the requirements of notice and opportunity to be heard. As the Supreme Court said:

> Since the adoption of the 14th Amendment to the Federal Constitution the validity of . . . judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

[5] World-Wide Volkswagen v. Woodson, 100 S. Ct. at 563.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] OKLA. STAT., tit. 12, § 1701.03(a)(4) (1961). This section provides that:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state. . . .

The Oklahoma Supreme Court has interpreted this statute to confer personal jurisdiction upon that State's courts to the limits permitted by the Due Process Clause of the Fourteenth Amendment. *See* Fields v. Volkswagen of America Inc., 555 P.2d 48 (Okla. 1976); Carmack v. Chemical Bank of New York Trust

tion in the Supreme Court of Oklahoma to restrain the trial court from exercising *in personam*[10] jurisdiction over them, but the writ was denied.[11] The Supreme Court of the United States then granted *certiorari* to resolve the conflict between the decision of the Oklahoma Supreme Court and the decisions of the highest courts of several other states.[12] *Held, reversed and remanded*: Mere foreseeability of contacts with a state is not the test for personal jurisdiction; to satisfy due process a nonresident defendant must have such contacts with a state that he is on clear notice that he is there subject to suit.

Co., 536 P.2d 897 (Okla. 1975); Hines v. Clendenning, 465 P.2d 460 (Okla. 1970).

[10] *In personam* jurisdiction (personal jurisdiction) was based upon physical power. A court did not have the power to adjudicate a matter involving a defendant unless he was served with process while he was physically present within the sovereign's territory. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 206-07 (1969). A judgment by a court having *in personam* jurisdiction over a defendant rendered that party personally liable for the judgment. Eventually the requirement that service of process be accomplished while the defendant was in the forum state was relaxed, and the determination of the validity of a state's assertion of personal jurisdiction rested upon minimum contacts between the state, the defendant and the litigation. See text accompanying notes 16-22 *infra*. *In rem* jurisdiction also relied upon the territorial power of the sovereign; the *res* was required to be within the borders of the state:

> The essential function of an action in rem is the determination of title to or the status of property located within the court's jurisdiction. Conceptually, in rem jurisdiction operates directly on the property that the court's judgment is effective against all persons who have an interest in the property. . . . A quasi in rem action is basically what the name implies—a halfway house between in rem and in personam jurisdiction. The action is not really against the property; rather it involves the assertion of a personal claim of the type usually advanced in an action in personam and the demand ordinarily is for a money judgment, although in some contexts the objective may be to determine rights in certain property. The basis for transforming the suit from one in personam to an action against defendant's property is the attachment or garnishment of some or all of the property he may have in the jurisdiction. If plaintiff eventually secures a judgment in a quasi in rem action, it will be satisfied to the extent possible out of the attached property.

Id. at 268. The usual criticism of quasi in rem jurisdiction is that it is used solely as a device to obtain jurisdiction over nonresident defendants. *Id.* at 283.

[11] World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978).

[12] 440 U.S. 907 (1979). *See* Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972); Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128 (1968); Pellegrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974); Oliver v. American Motors Corp., 70 Wash. 2d 875, 425 P.2d 647 (1967).

I. PERSONAL JURISDICTION—*Pennoyer* TO *Kulko*

The limits, complexion and foundation of personal jurisdiction have undergone immense change in recent history. The early landmark case in this area of the law, *Pennoyer v. Neff*,[13] solidified the mechanical "territorial power"[14] theory of jurisdiction. According to this theory, a court had personal jurisdiction over a nonresident, nonconsenting defendant only if he was personally served while physically present within the borders of the forum state.[15]

The foundation of modern jurisdictional theory is *International Shoe Co. v. Washington*.[16] In that case the State of Washington brought suit in one of its courts to collect state unemployment insurance contributions from International Shoe, a Missouri-based Delaware corporation which had no offices and which made no contracts in Washington, but which did employ eleven to thirteen salesmen who lived in Washington. Those employees were supervised and compensated from the St. Louis office of the company.[17]

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[13] 95 U.S. 714 (1877). For a more detailed analysis of the history of personal jurisdiction, *see* Hazard, *A General Theory of State Court Jurisdiction*, 165 SUP. CT. REV. 241 (1965) [hereinafter cited as Hazard]; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[14] Casad, *Shaffer v. Heitner: An End To Ambivalence In Jurisdiction Theory?* 26 U. KAN. L. REV. 61, 61 (1977) [hereinafter cited as Casad].

[15] Pennoyer v. Neff, 95 U.S. at 727. Although Justice Field called this theory "a principle of general, if not universal, law," he foreshadowed its eventual demise in the penultimate paragraph of his opinion:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-resident both within and without the State.

Id. at 735.

[16] 326 U.S. 310 (1945).

[17] Upon those facts, the Supreme Court affirmed the state court's assertion of jurisdiction over the Delaware corporation. The Court stated: "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of

The Supreme Court in *International Shoe* abandoned the fictions of "presence"[18] and "consent"[19] which had been employed to conform to the territorial power theory. Instead, the Court established new constitutional guidelines against which future exercises of personal jurisdiction by courts would be measured:

> [N]ow that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts within it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[20]

Since the defendant had conducted activities in the state, a natural obligation of the defendant to defend suits connected with such activities arose from the exercise of that privilege.[21] Under this test, one act alone could be sufficient to render the defendant liable to suit; however, "whether due process is satisfied must depend . . . upon the quality and nature of the activity . . . ."[22] The result of *International Shoe* was a shift from an emphasis on territoriality to an emphasis on minimum contacts and fairness.[23] The full impact, though, of this new standard had to await future decisions.[24]

The first major Supreme Court decision which gave insight into the meaning of *International Shoe* was *McGee v. International Life*

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fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." *Id.* at 320.

[18] For an illustration of the use of the doctrine of "presence," *see* Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264 (1917).

[19] For an illustration of the use of the doctrine of "consent," *see* Hess v. Pawolski, 274 U.S. 352 (1927).

[20] International Shoe Co. v. Washington, 326 U.S. at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[21] International Shoe Co. v. Washington, 326 U.S. at 319.

[22] *Id.*

[23] Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 593 (1978-1979) [hereinafter cited as Nordenberg].

[24] As one legal scholar stated in commenting on the *International Shoe* decision: "[S]implicity, predictability and ease of application . . . were sacrificed, perhaps as a matter of necessity. . . . Whatever may be their merits as constitutional standards, tests such as 'fairness,' 'justice' and 'reasonableness' undeniably create a measure of uncertainty in terms of their future application." *Id.* at 595.

Ins. Co.[25] There the only contact by the nonresident defendant insurance company with the California plaintiff was an offer by mail to reinsure the plaintiff in accordance with the terms of an existing policy which had been issued by the defendant's predecessor. The Supreme Court held that the exercise of personal jurisdiction by the California court was proper even though the nonresident defendant's sole contact with the forum state was the offer to reinsure the plaintiff.[26] Justice Black,[27] writing for a unanimous court, quoted the "minimum contacts" language of *International Shoe*;[28] however, this was not the basis of his opinion. First, Justice Black concluded that the defendant no longer needed the protection once afforded him in a jurisdictional inquiry. Black stated:

> Looking back over this long history of litigation 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.[29]

Second, Black stressed the strong state interest California had in

[25] 355 U.S. 220 (1957). The International Life Insurance Company assumed the obligations of an Arizona corporation which had issued a life insurance policy to a California resident in 1944. In 1948, International Life mailed a letter to the California resident offering to insure him in accordance with the terms of the original policy. He accepted and continued to pay premiums. After his death his beneficiary was denied recovery on the policy because of a claim of suicide. Neither the original insurance company nor International Life had an office or an agent in California. International Life's only contact with California was the insurance contract. Despite this, the California courts held that there were sufficient contacts so that the exercise of jurisdiction over the nonresident corporation was within the limits of due process. The courts of Texas disagreed, and refused to give the California judgment full faith and credit. *Id.*

[26] *Id.* at 221-24.

[27] Justice Black had dissented in *International Shoe*. International Shoe Co. v. Washington, 326 U.S. at 322-26. Black felt the Court was formulating broad rules concerning the exercise of personal jurisdiction before there was a need to address such a constitutional issue. *Id.* at 322.

[28] McGee v. International Life Ins. Co., 355 U.S. at 222.

[29] *Id.* at 222-23.

providing its citizens with a convenient forum,[30] an interest which was manifested by a special jurisdictional statute.[31] Essentially, the Court took a forum-biased analysis of contacts rather than the traditional defendant-biased analysis.[32]

Any appearance of clarity as a result of *McGee* was short-lived. Only one year later, during the same term in which *McGee* had been decided, the Supreme Court issued its decision in *Hanson v. Denckla*.[33] In that case a Florida court attempted to exercise jurisdiction over the assets of a Delaware trust and the Delaware trust company trustee which had arranged the trust while the settlor was a resident of Pennsylvania.[34] The Court attempted to distinguish *McGee* by pointing out that the Florida legislature had not evidenced an interest in this type of litigation through enact-

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[30] Justice Black stated:

> It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.

Id. at 223.

[31] *Id.* at 224. In support of a State's strong interest in providing a forum for its residents, Justice Black cited Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) and Hess v. Pawolsky, 279 U.S. 352 (1927). In *Doherty* the Court emphasized that Iowa had demonstrated an interest in corporate securities by specially regulating such securities. Henry L. Doherty & Co. v. Goodman, 294 U.S. at 627. In *Hess*, Massachusetts had enacted a special long arm statute to enable its citizens to obtain personal jurisdiction over nonresident defendants involved in automobile accidents within its borders. Hess v. Pawolski, 274 U.S. at 354. The Court reasoned that the long arm statute forced the defendant to answer for his conduct in the State where the accident occurred and also provided a convenient forum for the plaintiff to enforce his rights. *Id.* at 356.

[32] 355 U.S. at 223-24. Justice Brennan explained in his dissent in World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), that the defendant-biased analysis of personal jurisdiction gave the defendant a "veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances was slow and unpredictable and when notions of state sovereignty were impractical and exaggerated." *Id.* at 587.

[33] 357 U.S. 235 (1958).

[34] *Id.* at 239. Mrs. Donner had established a trust while she was a domiciliary of Pennsylvania. She later moved to Florida where she exercised her power of appointment over the assets of the trust. The Florida courts contended that they possessed jurisdiction over both the assets of the trust and the trustee, a foreign corporation whose sole contacts with Florida were its relations and communications with Mrs. Donner. The United States Supreme Court reversed the Florida Supreme Court and held that Florida did not have jurisdiction over the assets of the trustee. *Id.*

ment of special jurisdictional statutes.[35] Although the trend had been to expand jurisdiction, the Court emphasized that restrictions on the exercise of jurisdiction by state courts still existed and that these restrictions were a direct result of the:

> territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimum contacts" with that State that are a prerequisite to its exercise of power over him.[36]

Thus, the Court with a bare majority[37] returned to a defendant-biased analysis of personal jurisdiction. Moreover, as an added requirement to justify the exercise of personal jurisdiction the Court stated that "it is essential in each case that there be some act by which the defendant *purposely avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[38] (emphasis added). With

[35] *Id.* at 253. Many courts have perceived an inconsistency in the Supreme Court's reasoning resulting in a split of authority. *Compare* Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co., 323 F. Supp. 996 (D. Colo. 1971) (relying on *Hanson* and stating that *McGee* had been narrowed by *Hanson*); White v. Goldthwaite, 204 Kan. 83, 460 P.2d 578 (1969) (stressing the unilateral aspect of *Hanson* in an attempt to distinguish *McGee*); Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963) (suggesting that *Hanson* limited *McGee*), *with* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972) (avoiding a literal interpretation of *Hanson* by stating that its "purposefully avails" language means that a person is not to be subject to suit if the only contact with the forum has been the unilateral activity of the plaintiff); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) (noting the dichotomy between *McGee* and *Hanson*); *and* Phillips v. Archer Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966) (refusing to apply the *Hanson* language literally). Some scholars have suggested that the restrictive language of the majority in *Hanson* was a natural reaction to the broad wording of *McGee*. The Court may have felt that it needed to curb the expansive philosophy embodied in *McGee*, and thus drafted its opinion with that goal in mind. *See, e.g.*, Nordenberg, *supra* note 23, at 615. Some courts followed this trend and limited the holding in *McGee* to its specific factual situation, particularly because California had demonstrated a special interest in the insurance industry. *See, e.g.*, Iowa Electric Light Power Co. v. Atlas Corp., 603 F.2d 1301, 1305 (8th Cir. 1979). For criticism of the *Hanson* decision, *see* Hazard, *supra* note 4; Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

[36] Hanson v. Denckla, 357 U.S. at 251.

[37] The 5-4 decision of *Hanson* caused some courts to ignore the suggestion of more stringent standards in determining personal jurisdiction. Nordenberg, *supra* note 23, at 616.

[38] Hanson v. Daniels, 357 U.S. at 253.

this statement the Court introduced a subjective element into jurisdictional analysis.[39]

Although *McGee* and *Hanson* were decided within one year of each other, nearly twenty years passed before the Supreme Court again directed its attention to the problem of personal jurisdiction. During the interim, the issue of personal jurisdiction was left to the state courts.[40] This led to a variety of results. Some courts read *Hanson's* "purposefully avails" language literally,[41] believing that it required what has been called the "civil equivalent of mens rea."[42] Other courts refused to read the decision literally.[43] Indeed, the highest court of one state suggested that to read the "purposefully avails" language literally, particularly in negligence and products liability suits where the actors rarely consider the laws of the foreign state, would be to return to the "implied consent" doctrine.[44] Some decisions quoted the *Hanson* language and then expanded jurisdiction by means of some other test, such as foreseeability.[45] Finally, a few courts attempted to reconcile *International Shoe*, *McGee*, and *Hanson* through a type of balancing test.[46]

[39] Woods, *Pennoyer's Demise: Personal Jurisdiction after Shaffer and Kulko and a Modern Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 885 (1978) [hereinafter cited as Woods].

[40] *Id.* at 868.

[41] *See, e.g.*, Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co., 323 F. Supp. 996 (D. Colo. 1971); White v. Goldthwaite, 204 Kan. 83, 460 P.2d 578 (1969); Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963).

[42] Woods, *supra* note 39, at 869. Some courts take such a literal view of the "purposefully avails" standard that they require that a defendant have the subjective intent to place himself under a given court's jurisdiction before they will rule that he is amenable to process. *Id.* at 885.

[43] *See, e.g.*, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966). *See also* Forster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9 (1969).

[44] *See, e.g.*, Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 254, 413 P.2d 732, 735 (1966).

[45] *See, e.g.*, Products Promotions, Inc. v Cousteau, 495 F.2d 483, 496 (5th Cir. 1974), where the court stated: "The operative consideration is that the defendant's contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise." *See also* Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 900, 458 P.2d 57, 63, 80 Cal. Rptr. 113, 120 (1960) (result of test was "not fortuitous or unforeseeable").

[46] *See, e.g.*, L. D. Reeder Contractors of Ariz. v. Higgins Indus., 265 F.2d

In 1977, the Supreme Court again addressed the issue of personal jurisdiction. In *Shaffer v. Heitner*,[47] a nonresident of Delaware brought a shareholder's derivative suit in a Delaware state court against Greyhound, a Delaware corporation, Greyhound Lines, Inc., its subsidiary incorporated in California with its principal place of business in Arizona, and against twenty-eight present or former corporate officers or directors.[48] The plaintiff sequestered property owned by twenty-one of the twenty-eight defendants. The property, which included stocks, options and warrants, was used as the basis of *quasi in rem* jurisdiction.[49] The Court declared this exercise of *quasi in rem* jurisdiction unconstitutional and stated that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[50] Employing a minimum contacts analysis,[51] the Court

768 (9th Cir. 1959), *quoting* 47 GEORGETOWN L.J. 342, 351-52 (1958):

> There are three rules which can be drawn from combined reading of *International Shoe, McGee* and *Hanson* against which all future litigation of a like nature may be tested . . . . The rules are:
> (1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
> (2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."
> (3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

265 F.2d at 773 n.12.

[47] 433 U.S. 186 (1979).

[48] *Id.* at 189. The plaintiff claimed that a breach of duty by the defendants had resulted in the imposition of liability against the corporation in an antitrust suit and a criminal contempt action. *Id.* at 190.

[49] Shaffer v. Heitner, 433 U.S. at 191-92. For an explanation of *quasi in rem, in rem*, and *in personam* jurisdiction, see note 10 *supra.*

[50] Shaffer v. Heitner, 433 U.S. at 212.

[51] *Id.* at 212-16. Justice Brennan, in his dissenting opinion, argued that the Court should never have reached the question of minimum contacts. The case had been tried on a *quasi in rem* theory; the issue of minimum contacts was

noted that the nonresident defendants did have some contacts with Delaware simply by being officers of a Delaware corporation. The plaintiff stressed Delaware's strong state interest in exercising personal jurisdiction over a Delaware corporation's fiduciaries so that it could supervise the management of the corporation and establish the duties owed to the corporation by its officers and directors.[52] However, the Court stated that Delaware had not evidenced this state interest since it had not enacted a special long arm statute asserting personal jurisdiction over nonresident officers and directors of Delaware corporations.[53] The Court concluded that there were not sufficient minimum contacts to demonstrate that the defendants had " 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,' in a way that would justify bringing them before a Delaware tribunal."[54] The Court stated that the defendants "simply had nothing to do with the State of Delaware"[55] and as a result "had no reason to *expect* to be haled before a Delaware court."[56] (emphasis added). Thus, in its first opinion in twenty years addressing the issue of personal jurisdiction,[57] the Supreme Court reemphasized both the subjective

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never pleaded, raised during discovery, or ruled upon by the Delaware courts. As Brennan said: "In my view, a purer example of an advisory opinion is not to be found." *Id.* at 220.

[52] *Id.* at 214.

[53] *Id.* The Court stated:

> This argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling. Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors, . . . the authorizing statute evinces no specific concern with such actions.

Id. Cf. McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (exercise of jurisdiction upheld on basis of California's strong state interest in providing a forum for its residents in suits against nonresident insurance companies—such interest evidenced by a special jurisdictional statute). See also note 68 and accompanying text *infra*, concerning the Supreme Court's emphasis placed on the lack of a special jurisdictional statute in Kulko v. Superior Court of California, 436 U.S. 84 (1978).

[54] Shaffer v. Heitner, 433 U.S. at 216.

[55] *Id.*

[56] *Id.*

[57] Casad, *supra* note 14, at 69.

element of personal jurisdiction[58] and the preference in jurisdictional analysis favoring defendants.[59]

After *Shaffer*, courts scrutinized more closely the propriety of personal jurisdiction and often mentioned *Shaffer's* reaffirmance of *Hanson's* "purposefully avails" standard.[60] One court went so far as to call the trend the Supreme Court's "new caution."[61] Another court commented that the Supreme Court's decision in *Shaffer* "suggested that the liberal construction placed on the words 'traditional notions of fair play' in a due process context may be evolving into a more conservative one, requiring, perhaps, even more contacts than those present in *McGee*."[62]

The conservative trend restricting the expansion of personal jurisdiction was continued in *Kulko v. Superior Court of California*.[63] There, a California resident brought suit against her former husband, a New York resident, seeking custody of their two children and increased child support. The defendant father had allowed the children to live with their mother during school months and to return to New York for vacations.[64] The father had paid

[58] *See generally* Woods, *supra* note 39, at 885-88. See also note 39 *supra* and accompanying text.

[59] *See* Nordenberg, *supra* note 23, at 618. The reaction to *Shaffer* took three forms: (1) Long-arm statutes authorizing *in rem* and *quasi in rem* jurisdiction were reexamined. *See, e.g.*, Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978); (2) Courts questioned the type of jurisdiction deemed proper in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *See, e.g.*, O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). In *Seider v. Roth*, jurisdiction over the defendant was obtained by the court's attaching the defendant's policy of liability insurance which had been issued by an insurer subject to *in personam* jurisdiction in the forum where the plaintiff brought the action. The question of the validity of such *quasi in rem* jurisdiction was finally answered in Rush v. Savchuk, 100 S. Ct. 571 (1980). The Court in this companion case to *World-Wide Volkswagen* held that the exercise of personal jurisdiction should not be permitted where the insurance contract is the only contract. *Id.* at 579-80. Courts evaluated the effect of *Shaffer* on *in personam* jurisdiction. *See, e.g.*, Securities & Exchange Comm'n v. Gilbert, 82 F.R.D. 723 (S.D.N.Y. 1979); Pavlo v. James, 437 F. Supp. 125, 129 (S.D.N.Y. 1977). *See also* Smith v. Lloyd's of London, 568 F.2d 1115 (5th Cir. 1978).

[60] *See, e.g.*, Securities & Exchange Comm'n v. Gilbert, 82 F.R.D. 723 (S.D.N.Y. 1979).

[61] Pavlo v. James, 437 F. Supp. 125, 129 (S.D.N.Y. 1977).

[62] Smith v. Lloyds of London, 568 F.2d 1115, 1118 n.7 (5th Cir. 1978).

[63] 436 U.S. 84 (1978).

[64] *Id.* at 88. This was the reverse of the terms of the original divorce agreement. *Id.*

to have one child flown to California while the mother had paid the plane fare of the other. The Court, finding that the father had not purposefully availed himself of the benefits and privileges of the laws of California, reasoned that in such a family situation, a parent "could [not] reasonably have anticipated being 'haled before a [California] court' "[65] simply by sending one of his children to live with his or her mother.[66] The plaintiff argued that California had "substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised."[67] While the Court agreed that these were important interests, it noted that, unlike the situation in *McGee*, "California [had] not attempted to assert any particularized interest in trying such cases in its courts by, *e.g.*, enacting a special jurisdictional statute."[68]

The cases following *Kulko* showed that many courts sensed the continuation of the Supreme Court's conservative trend which was begun in *Shaffer*.[69] For example, in *Colorado River Water Conservation District v. Andrews*,[70] a defendant had dumped certain predatory fish into the Colorado River in Utah. According to the plaintiff, the fish eventually depleted the stock of an endangered species of fish. The plaintiff attempted to establish jurisdiction in Colorado by claiming that the defendants had sufficient minimum contacts with Colorado since the fish had caused damage in that state. The District Court disagreed with the plaintiff's assertions on the ground that the defendants were not shown to have purposefully

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[65] *Id.* at 97-98.

[66] *Id.* The Court reasoned that a strain would be placed on family relations if jurisdiction were found to exist in this situation. Obviously, the domestic relations nature of this case weighed heavily on the Court's mind. *Id.*

[67] *Id.* at 98.

[68] *Id.* It should be noted that California's general long arm statute is a grasping long arm statute in that it reaches to the full limits of the Constitution. "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE ANN. § 410.10 (West 1973).

[69] *See, e.g.*, Meineke Discount Muffler Shops, Inc. v. Feldman, 480 F. Supp. 1307, 1313 (S.D. Tex. 1979).

[70] 476 F. Supp. 966 (D. Colo. 1979).

availed themselves of the benefits and privileges of Colorado's laws.[71]

A major problem facing courts as a result of the *Hanson-Shaffer-Kulko* line of decisions was the subjective element introduced into personal jurisdiction by both the "purposefully avails" language of *Hanson* and the "reason to expect to be haled into court" language of *Shaffer* and *Kulko*.[72] Indeed, many courts continued to use an objective foreseeability test in place of the "purposefully avails" requirement.[73] Particularly in the field of products liability the "purposefully avails" language had come under severe attack.[74] As one court reasoned, if a corporation introduced its products into the stream of commerce and those products eventually injured a person in a state where it had reason to know the products would be brought, then that corporation should be subject to jurisdiction where the injury occurred.[75]

One of the first cases to substitute a foreseeability test for the "purposefully avails" test was *Buckeye Boiler Co. v. Superior Court of Los Angeles*.[76] In that case a worker in California was in-

[71] *Id.* at 969. Although some courts had questioned the validity of a liberal application of the language of *Hanson*, the district court felt that the language was still important, particularly in light of its reemphasis in *Shaffer* and *Kulko*. Although the defendant did have some contacts with Colorado which had caused effects in that state, the court refused to assert jurisdiction. As the district judge stated: "In *Kulko*, the Court indicated that it may be unreasonable in certain cases to assert jurisdiction over a defendant who causes 'effects' in a State by acts done elsewhere." *Id.* at 970.

[72] *See generally* Woods, *supra* note 39, at 885-90.

[73] *See, e.g.*, Hutson v. Fehr Bros., Inc., 584 F.2d 833 (8th Cir. 1978) (dissenting opinion), *cert. denied*, 439 U.S. 983 (1979). In his dissenting opinion, Judge Stephenson summarized the feelings of many judges concerning the *Hanson* language: "[I]f a foreseeability test for 'purposefully avails itself' were [*sic*] not applied in products liability cases, an injured person would almost always be left with no direct recourse against the manufacturer of the product causing his injury." *Id.* at 838; Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great Western United Corp., 99 St. Ct. 2710 (1979); Honeywell, Inc. v. Metz Appartewerke, 509 F.2d 1137 (7th Cir. 1975); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Reilly v. Phil Tolkan Pontiac, Inc., 372 F. Supp. 1205 (D.N.J. 1974); Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

[74] See notes 43 and 44 and accompanying text *supra*. For a general discussion of personal jurisdiction over manufacturers and sellers in products liability cases, *see* Annot., 19 A.L.R.3d 13 (1968).

[75] Eyerly Aircraft Co. v. Killian, 414 F.2d at 596.

[76] 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

jured by the explosion of a pressure tank manufactured by the Buckeye Boiler Company, an Ohio corporation.[77] There was no evidence concerning how the tank entered California; however, the plaintiff did show that Buckeye Boiler had carried on regular sales with Cochin, a California dealer, for sales of tanks of another type.[78] The California Supreme Court concluded: "If the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state."[79] The court held that since Buckeye Boiler had not alleged that the tank had arrived in California fortuitously or that the burden of defending the present action in California would be substantially different from the burden of defending actions which might arise from its sales to Cochin, the exercise of jurisdiction was proper.[80] In the same vein, other courts extended the use of foreseeability by noting that certain products, such as automobiles[81] and rides for travelling fairs,[82] are by their very nature mobile. Therefore, the courts reasoned, their manufacturers and distributors[83] should foresee the possibility of defending suits in foreign tribunals. Even so, the use of this foreseeability test continued to generate considerable debate,[84] especially in light of the fact that the test was cap-

[77] *Id.* at 896, 458 P.2d at 60, 80 Cal. Rptr. at 116.

[78] *Id.* at 897, 458 P.2d at 61, 80 Cal. Rptr. at 117.

[79] *Id.* at 900, 458 P.2d at 64, 80 Cal. Rptr. at 120.

[80] *Id.* at 902, 458 P.2d at 66, 80 Cal. Rptr. at 122.

[81] *See, e.g.*, Reilly v. Phil Tolkan Pontiac, Inc., 372 F. Supp. 1205 (D.N.J. 1974). A Wisconsin Pontiac dealer sold an automobile containing a defective jack to the plaintiff, who was injured while changing a tire in New Jersey. General Motors, a Michigan corporation, had manufactured the auto and had equipped the car with the defective jack. The Federal District Court in New Jersey ruled that it possessed jurisdiction over both the manufacturer and the dealer. *But cf.* Erlanger Mills v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956) (the famous hypothetical of a California dealer selling tires for an auto which has Pennsylvania license plates, with the possible result that the California dealer might have to travel to Pennsylvania to defend a suit connected with such tires).

[82] Eyerly Aircraft Co. v. Killian, 414 F.2d at 593-96.

[83] See note 81 *supra.*

[84] Judges on the same court have disagreed over the propriety and valid application of the foreseeability test. *See, e.g.*, Hutson v. Fehr Bros., Inc., 584 P.2d 823 (8th Cir. 1978) where Justice Stephenson wrote a strong dissent to the majority's refusal to apply the foreseeability test. Decisions from the same circuit also have yielded conflicting viewpoints concerning the use of the test. *Compare*

able of causing extreme results.[85]

II. *World-Wide Volkswagen Corp. v. Woodson*

The Supreme Court in *World-Wide Volkswagen* was faced with an assertion of personal jurisdiction by an Oklahoma state court over a New York automobile dealer and a distributor which sold cars in New York, New Jersey and Connecticut. This assertion was made despite the fact that the only contacts between the defendants and Oklahoma were the presence of their car and the possibility of some relations with Oklahoma Audi dealers. The plaintiff argued that the presence of the defective car in Oklahoma, the defendants' relations with Oklahoma Audi dealers, and the movable nature of an automobile,[86] making it foreseeable that the defendant might have to defend against suits in foreign tribunals, combined to provide a sufficient connection with the forum to satisfy due process requirements.[87] The Supreme Court, however, held that the relations between the Oklahoma Audi dealers and

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Honeywell, Inc. v. Metz Appartewerke, 509 F.2d 1137 (7th Cir. 1976) (apparently relying on foreseeability to uphold jurisdiction), *with* McBreen v. Beech Aircraft Corp., 543 F.2d 26 (7th Cir. 1976) (denying that *Honeywell* relied on foreseeability).

[85] *See, e.g.*, Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great Western United Corp., 99 S. Ct. 2710 (1979). Great Western, a Texas corporation, was notified that it would have to comply with the takeover laws of Idaho, New York and Maryland, as well as those of the Securities and Exchange Commission, if it decided to acquire the stock of another company. To escape the conflicting requirements of these regulations, Great Western brought suit in Texas against the state officials responsible for enforcing the Idaho, New York and Maryland laws. Idaho questioned the validity of the Court's assertion of personal jurisdiction. The Court of Appeals upheld jurisdiction:

> When the Idaho officials summarily delayed the effectiveness of Great Western's tender offer for Sunshine, they foreseeably restrained a corporation in Dallas from proceeding with its plans. In other words, the Idaho officials regulated a corporation that acts in the Northern District of Texas and through that regulation foreseeably changed the corporation's actions. These effects—effects with substantial consequences on important business plans—are more than sufficient to satisfy the minimum contacts requirement.

Id. at 1267.

[86] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 566. This theory was argued successfully in Reilly v. Phil Tolkan Pontiac, Inc., 372 F. Supp. 1205 (D.N.J. 1974), discussed in note 75 *supra*.

[87] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 566, 568.

the defendants were not the type that would support jurisdiction.[88] Moreover, the Court declared that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[89]

In Part II of the decision the Court articulated the guidelines for the due process limits of personal jurisdiction. The Court reemphasized the preference in favor of defendants in jurisdictional analysis. The Court stated: "As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State."[90] The Court explained that the concept of minimum contacts performed two functions: (1) ensuring the co-equal sovereignty of each State and (2) ensuring fairness by protecting the defendant from having to litigate in inconvenient forums.[91] While the Court confirmed the bias toward defendants in personal jurisdictional analysis, it recognized in examining the fairness prong of minimum contacts that:

> the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute [citing *McGee*]; the plaintiff's interest in obtaining convenient and effective relief; . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive policies.[92]

Moreover, the Court recognized the expansion of personal jurisdiction as articulated in *McGee*;[93] however, it then stressed federalism and the importance of state boundaries[94] in language remi-

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[88] *Id.* at 566.

[89] *Id.*

[90] *Id.* at 564.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 565.

[94] *Id.* Justice White, writing for the majority, used vehement terms to express his opinion of the importance of federalism:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law

niscent of *Pennoyer v. Neff*.[95]

With this mixture of jurisdictional guideposts the Court in Part III analyzed the foreseeability aspect of personal jurisdiction urged by the plaintiff. The Court concluded that if foreseeability was the appropriate test for invoking personal jurisdiction then jurisdiction should have existed in both *Hanson* and *Kulko* since the defendants in those cases could have foreseen the contacts with the forums.[96] The Court speculated that the foreseeability test, if left unhindered, eventually would cause every seller of chattels to "appoint the chattel his agent for service of process."[97]

Therefore, instead of accepting the objective test proposed by the plaintiff, the Court focused on the subjective awareness of the defendant. The Court stated: "[I]t is not the mere likelihood that a product will find its way into the forum State [which is critical to due process analysis]. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[98] The defendant, the Court commented, is not deemed to have purposefully availed itself of the privileges and benefits of a state unless "it has *clear notice* that it is subject to suit there."[99] (emphasis added). The

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> to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 565-66.

[95] *See* Pennoyer v. Neff, 95 U.S. at 722.

[96] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 566. In analyzing *Hanson*, Professor Woods felt that although it was foreseeable that Mrs. Donner might travel to Florida, it was not foreseeable that a Delaware trustee would find itself litigating matters concerning a Delaware trust under Florida law. Woods, *supra* note 39, at 898.

[97] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 566. The Court concluded that should a chattel be deemed the seller's agent for service of process, a situation analogous to that of Harris v. Balk, 198 U.S. 215 (1905), would result. The basic premise of *Harris v. Balk* was that a debt followed the debtor. A citizen of North Carolina owed money to another citizen of that state. While in Maryland, the North Carolina debtor was sued by a creditor of the North Carolina creditor. The Maryland creditor obtained *quasi in rem* jurisdiction over the nonresident North Carolinian because he owed money to the creditor's nonresident debtor and had travelled to the forum state. *Id.* This type of jurisdiction was later found unconstitutional. Shaffer v. Heitner, 433 U.S. at 212 n.39.

[98] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 567.

[99] *Id.* (emphasis added). The "notice" language is similar to that used by Professor Woods; however, Woods' notice requirement was objective rather than

Court, shifting from subjective awareness to subjective intent, concluded that if a corporation desired to avoid being subject to jurisdiction in a particular forum, it could consciously sever its relations with that State and thereby become immune from jurisdiction.[100] To hold a manufacturer or a distributor of an allegedly defective product subject to suit in the state where the injury occurred the "corporation [must have] deliver[ed] its products into the stream of commerce with the expectation that they [would] be purchased by consumers in the forum State."[101] The sale involved may not be an isolated occurrence, but must arise "from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States."[102]

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subjective. Woods, *supra* note 39, at 885-90. Woods devised a three-part analysis of personal jurisdiction. Part I of the analysis focuses upon "preliminary jurisdiction," and asks whether or not the forum has a legitimate governmental interest in the subject matter of the litigation. Woods, *supra* note 39, at 880. The requirements to fulfill this test are minimal. There need be nothing more than some rational nexus between the forum, the litigation and the parties. Part II of the analysis discusses "fair notice," a substitute for the literal interpretation of "purposefully avails." *Id.* at 880-90. Woods theorizes that the Supreme Court could not have meant for the courts to interpret this language literally because an unworkable situation would result. Therefore, he uses Justices Stevens' concurring opinion in *Shaffer*, 433 U.S. at 217-19, and the "reasonably anticipates being haled into Court" language of *Kulko*, 436 U.S. at 97 (the same sources cited by White in *World-Wide Volkswagen*), and concludes that the standard embodied in the phrase "purposefully avails" is satisfied if a party is not surprised when called upon to defend in a certain forum. Woods, *supra* note 39 at 887-88. If the tests of Parts I and II are satisfied, the court should proceed to Part III, the phase of the analysis labeled "fairness factors." The application of these factors insures that the exercise of jurisdiction is fair and reasonable, as they are similar to the factors applied in determining allegations of forum non conveniens. Some of those considered are:

> the relative aggressiveness of the parties, the relative economic burden of prosecuting or defending the action, the importance of the governmental interest to be vindicated, the convenience of the forum from a litigational efficiency point of view, the necessity of litigation in the chosen forum, the availability of alternative forums or alternative methods for resolving the dispute, the impact of the forum's choice of law doctrine, and external constitutional limitations.

Woods, *supra* note 39, at 891.

[100] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 567.

[101] *Id.* The Supreme Court cited Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Although the assertion of jurisdiction in *Buckeye Boiler* probably survived *World-Wide Volkswagen*, it was not cited because of its reliance on foreseeability. See notes 76-80 and accompanying text *supra*.

[102] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 567.

Justice Brennan, in one of the three dissenting opinions,[103] stressed two major points. First, he noted the impracticality of the majority's subjective test. He observed that

> [i]t may be true, as the Court suggests, that each sincerely intended to limit its commercial impact to the limited territory, and that each intended to accept the benefits and protection of the laws only of those States within the territory. But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield.[104]

Justice Brennan concluded that if one took the Court's analysis literally it would "exclude jurisdiction in a contiguous State such as Pennsylvania as surely as in more distant States such as Oklahoma.[105] Second, Justice Brennan restated his longstanding opposition[106] toward the defendant-biased analysis used by the majority. He advocated eliminating the preference favoring defendants[107] and replacing it with an analysis for determining the propriety of jurisdiction in which the interests of the forum State, the defendant and the plaintiff would be accorded equal weight.[108]

III. CONCLUSION

World-Wide Volkswagen represents two major ideas which will be the governing standards for future exercises of personal jurisdiction: (1) the retention of the preference favoring defendants[109] and, more importantly, (2) the solidification of a subjective stand-

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[103] *Id.* at 581-88. The other dissenting justices were Blackmun and Marshall. *Id.* at 568-71.

[104] *Id.* at 584. As Justice Marshall stated: "Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums." *Id.* at 570.

[105] *Id.* at 584 n.10.

[106] *See, e.g.*, Hanson v. Denckla, 357 U.S. at 256 (concurring in Justice Black's dissent); Shaffer v. Heitner, 433 U.S. at 219; Kulko v. California Superior Court, 436 U.S. at 101.

[107] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 587. Justice Brennan stated: "I would . . . strip the defendant of an unjustified veto power over certain very appropriate fora—a power that the defendant justifiably enjoyed long ago when communication and travel over long distances was slow and unpredictable and when notions of state sovereignty were impractical and exaggerated." *Id.* at 587.

[108] *Id.* at 586-87.

[109] See note 90 and accompanying text *supra*.

ard as a necessary element before subjecting a defendant to personal jurisdiction.[110] This decision will have its greatest impact in three areas. First, courts must now apply this subjective element when determining the propriety of personal jurisdiction. Though the Supreme Court describes the test as "actual notice"[111] or "predictability,"[112] more illuminating guides were not discussed. A paraphrase of the test may be that the defendant will be amenable to jurisdiction if he knew or must have known that his activities in a State could subject him to suit in that State. Of course the problem with a subjective test is trying to decide what the defendant actually knew.[113]

Second, state long arm statutes must be reexamined by legislatures in light of *World-Wide Volkswagen.* Although the Court reaffirmed the defendant-bias, in the next paragraph the Court stated that a State's interest in adjudicating an action will also be considered.[114] The Court on previous occasions has stressed that this state interest can be evidenced by a special jurisdictional statute.[115] Therefore, legislatures in states which have very general long arm statutes which reach to the limits of the 14th Amendment should consider enacting very specific statutes. Of course, this can lead to an anomolous situation since a plaintiff in a state with a general long arm statute which extends jurisdiction to the consti-

[110] See notes 98-102 and accompanying text *supra.*

[111] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 567.

[112] *Id.*

[113] *See generally* Woods, *supra* note 39, at 885-90. Woods stated: "To ascribe to the corporate entity qualities of cognitive intent . . . stretches even the most creative legal imagination." *Id.* at 885. The subjective standard will be very difficult for courts to apply and the defendant's possession of such a subjective intent will be even more difficult to prove. One only wonders when a case such as Justice Brennan's hypothetical will occur and what the Court's reaction to it will be. Justice Brennan noted that under the majority's analysis jurisdiction would be excluded not only in a distant State such as Oklahoma but also in a contiguous State such as Pennsylvania. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 584 n.10. The hypothetical question is what would have been the result if the plaintiff in this case had been a resident of Philadelphia which is just across the Delaware River from New Jersey? Moreover, would the result differ if the accident occurred in a distant state such as Oklahoma or if it was shown that while the defendant did not advertise on television stations located in Philadelphia, those residents nonetheless saw the advertisements which were broadcast on stations just inside New Jersey? Would the plaintiff have to show that the defendant meant for residents in Pennsylvania to see such commercials and act on them?

[114] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 564.

[115] See notes 30-32, 35, 52-53, 67-68 and accompanying text *supra.*

tutional limits may be denied personal jurisdiction, while if the state had a special jurisdictional statute evincing its interest in such suits the exercise of jurisdiction would be proper.[116] In effect the Court seemed to imply that the scope of the current constitutional limits may be expanded by the showing of stronger state interest through specific long arm statutes.[117]

Finally, *World-Wide Volkswagen* will have its most dramatic impact in products liability suits. Since it is no longer sufficient simply to show that the defendant placed his products into the stream of commerce in order to obtain personal jurisdiction, the real issue is what proof must be offered. The Court stated that the sale must arise "from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States."[118] To show this, the plaintiff will probably have to resort to evidence of the defendant's marketing and advertising schemes.[119]

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[116] See notes 67-68 and accompanying text *supra.*

[117] This is not to say that jurisdiction will exist in the absence of any contacts; however, in determining whether or not the contacts are such that they are "minimum," i.e., whether or not the exercise of jurisdiction is reasonable, a State with a specific long arm statute will be able to exercise personal jurisdiction to a greater extent than a State with a general grasping long arm statute because of the state interest evidenced by the specific long arm statute. *Accord,* Kulko v. California Superior Court, 436 U.S. at 98. *See also* Perry v. Ponder, 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980) (permitting jurisdiction in a child custody suit over a nonresident parent who did not have the traditional minimum contacts with the state on the basis that this was a case dealing with the status of an individual and because the forum state had a strong state interest in adjudicating the case as evidenced by a specific long arm statute).

[118] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 567.

[119] Although showing the propriety of the Court's assertion of personal jurisdiction is a prerequisite to all lawsuits, the possible factual situations of aviation cases can make this especially troublesome. Consider the questions raised below in light of the subjective element presented in *World-Wide Volkswagen,* remembering that the particular facts of the case are critical to the court's exercise of jurisdiction.

A commercial aircraft flies over State X, the airline which owns the plane is not incorporated in that state, nor does it have any offices there. The plane crashes and relatives of some of the deceased passengers bring suit in State X. The cause of the crash is unknown.

a. Suit is brought against the airline and its employees.

(1) Is State X one over which the airline regularly flies or is it a state over which the airlines flew for the first time on the day of the crash (because of unusual circumstances, e.g., bad weather)?

(2) Is the airline a commercial or commuter carrier?

(3) Is the airline a national or regional carrier?

b. Suit is brought against the manufacturer of a defective product which might have caused the crash. Assuming that the manufacturer is neither incorporated nor does business in State X, consider:

(1) Is the product used primarily in aircraft or is it used for multiple purposes?

(2) What is the volume of sales of the product?

(3) What is the distribution pattern of the product?

(4) Is the manufacturer a foreign or domestic company?

(5) Has the manufacturer advertised this particular product in State X?

(6) Has the manufacturer advertised any product in State X?

c. Suit is brought against the distributor of the defective product. Assuming that the distributor is neither incorporated nor does business in State X, consider:

(1) What is the size of the area in which he distributes the product?

(2) Did he have privity with the airline or airline manufacturer?

(3) Is the product used primarily in aircraft or is it used for multiple purposes?

(4) What is the marketing scheme of the distributor?

(5) What is the advertising scheme of the distributor?

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