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Personal Jurisdiction over Retailers and Regional Distributors in Products Liability Litigation: Sufficiency of a Single Contact

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PERSONAL JURISDICTION OVER RETAILERS AND REGIONAL DISTRIBUTORS IN PRODUCTS LIABILITY LITIGATION: SUFFICIENCY OF A SINGLE CONTACT

In World-Wide Volkswagen Corp. v. Woodson, *The Supreme Court attempted to resolve the uncertainty surrounding the application of the "minimum contacts" doctrine in a products liability context. This Comment examines the source of this uncertainty, then argues that* Woodson *is inconsistent with the ultimate goals of the "minimum contacts" doctrine.*

INTRODUCTION

Marketing techniques have changed drastically in recent years. Products are passed through the hands of an increasing number of middlemen before ultimately reaching the consumer.[1] This development, along with the increasingly complex nature of the products themselves,[2] has increased the risk of injury to the consumer. Fortunately, substantive law has been quick to react. In order to facilitate compensation of tort victims, the fault basis for recovery has been largely supplanted by strict liability.[3]

However, the tort victim still must overcome procedural barriers to recovery.[4] Foremost among these is securing personal jurisdiction over all the potential defendants. Consider the following fact situation: Manufacturer, whose products are sold nationwide, sells a product to Regional Distributor, who does

1. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

2. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938).

3. For a discussion of the status of the strict liability rule in the United States, see 1 R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:41 (2d ed. 1975).

4. PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE 661 (2d ed. P. Rheingold & S. Birnbaum 1975).

business in states *A*, *B*, and *C*. Regional Distributor, in turn, sells the product to Retailer, whose activities are confined to state *A*. Consumer, a resident of state *D*, purchases the product from Retailer in state *A* and carries it back to state *D* where a defect in the product causes an injury. What are the consumer's alternatives?

The problems involved in securing personal jurisdiction over the national manufacturer have been solved.[5] However, the maintenance of personal jurisdiction over the retailer and regional distributor presents complex issues on which the lower courts have disagreed.[6] The Supreme Court recently attempted to resolve the conflict among the lower courts in *World-Wide Volkswagen Corp. v. Woodson*.[7] This Comment focuses on the factors responsible for the confusion prior to *Woodson*, provides an analysis of the opinion, and forecasts the effect this case should have on products liability litigation in the future.

The jurisdictional reach of a state court is limited by the due process clause of the fourteenth amendment and the "long arm" statute of that particular state.[8] Because the due process clause qualifies state "long arm" statutes, this Comment is restricted to an examination of due process limitiations.[9]

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5. This is due to the following dicta from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), which has confirmed the approach taken by most lower courts:

> If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98.

In these cases involving national manufacturers, jurisdiction is not really based solely on the presence of the product in the forum state. Although the presence of the product and the occurrence of injury initiate the filing of the suit, jurisdiction actually rests on the manufacturer's prior course of conduct. The continuing purposeful relationship with the forum state established by injecting products into a national stream of commerce merely manifests itself in the transaction out of which an individual suit arises. Thus, it is somewhat misleading to label these national manufacturer cases as examples of jurisdiction being based on a single contact.

6. *Compare, e.g.*, Oliver v. American Motors Corp., 70 Wash. 2d 875, 425 P.2d 647 (1967) *with* Tyson v. Whitaker and Son, Inc., 407 A.2d 1 (Me. 1979).

7. 444 U.S. 286 (1980).

8. Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 713 (4th Cir. 1966), discusses the respective roles of the due process clause and the state long-arm statute.

9. Many states have drafted long-arm statutes which are designed to allow the state to exercise jurisdiction up to the maximum point permitted by the fed-

BACKGROUND

Traditional rules of personal jurisdiction were based on power.[10] The power of a state to adjudicate a particular controversy extended only as far as its borders.[11] These jurisdictional rules adequately served the needs of a parochial society in which almost all economic activity was conducted on a local basis. There was rarely any need for a state to extend its jurisdictional reach beyond its borders.

However, as the fundamental character of American society began to change, it became necessary to revise this traditional standard. Revolutionary developments in transportation[12] and communication rapidly transformed the localized, self-sufficient economic communities of the 1800's into the highly interdependent national economy of today.[13] Commercial transactions between parties separated by the full continent, at one time unheard of, became commonplace.[14] Thus, while each state retained a separate legal and political identity, distinctions in the economic sphere were blurred.

In order to meet the problems that accompanied the develop-

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eral constitution. When this is the case, the constitutional issue and the statutory construction issue are identical. Annot., 19 A.L.R.3d 61 (1968).

10. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); McDonald v. Mabee, 243 U.S. 90, 91 (1917); Barry, *Jurisdiction Over Non-Residents*, 13 VA. L. REV. 175, 177 (1927).

According to the Court in *McDonald v. Mabee*:

> The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person . . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind.

243 U.S. 90, 91 (1917).

11. *See generally* Comment, *Tortious Act As a Basis for Jurisdiction in Products Liability Cases*, 33 FORDHAM L. REV. 671, 672-75 (1965).

12. Railroads were the major transportational development in the 19th century. In the early 20th century, the increasing frequency of automobile travel also influenced jurisdictional considerations. Hess v. Pawloski, 274 U.S. 352 (1927), illustrates the significant role of the automobile in relaxing jurisdictional limitations. In *Hess*, the Supreme Court upheld a Massachusetts statute which declared that the use of Massachusetts highways was equivalent to the appointment of the registrar as agent for service of process in any action based on an accident taking place on such highways. This rule was the equivalent of the "implied consent" theory for obtaining jurisdiction over foreign corporations. *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855).

13. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

14. *Id.* at 222-24.

ment of a national economy, the "power" doctrine was gradually expanded. Through the development of fictional devices such as "implied consent,"[15] "presence,"[16] and "doing business"[17] it became possible to assert jurisdiction over foreign defendants. At the same time, however, the increasing reliance on these fictions ensured the doom of the "power" theory. In the words of Justice Holmes, "The Constitution is not to be satisfied with a fiction."[18] Thus, in *International Shoe Co. v. Washington*,[19] the Supreme Court rejected the outmoded "power" theory in favor of the more flexible "minimum contacts" doctrine.[20]

Eschewing the application of a "mechanical or quantitative" test,[21] the "minimum contacts" doctrine emphasized instead a case-by-case evaluation of fairness.[22] Considerations relevant to this evaluation were: an estimate of the inconveniences which defendant would suffer by being subjected to suit in the foreign forum,[23] whether the activity was continuous or isolated,[24] and whether the activity was related to the cause of action.[25]

International Shoe was revolutionary not as much in its result as in its approach. By eliminating the need for fictionalized exceptions, the "minimum contacts" doctrine allowed courts to focus on the underlying realities.[26] The net effect was to expand the permissible scope of personal jurisdiction.

This expansive effect became even more apparent following the Supreme Court's decision in *Perkins v. Benquet Consolidated Mining Co.*[27] In *Perkins* the defendant corporation maintained its main office in Ohio. A suit was filed against the corporation in Ohio based on a transaction that took place outside of that state. The Supreme Court found that the corporation's contacts with Ohio were sufficiently strong to sustain jurisdiction, even though they were unrelated to the cause of action.[28] In reaching this con-

15. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).
16. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).
17. A fictional finding of "doing business" was sometimes necessary to determine whether a corporation was subject to jurisdiction based on the "implied consent" or "presence" theories. *See* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 584 (1958).
18. Hyde v. United States, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting).
19. 326 U.S. 310 (1945).
20. *Id.* at 316.
21. *Id.* at 319.
22. *Id.*
23. *Id.* at 317.
24. *Id.* at 317-18.
25. *Id.* at 318.
26. *Id.*
27. 342 U.S. 437 (1952).
28. *Id.* at 448.

clusion, the Court distinguished between those causes of action that arose directly out of the contact with the forum state, and causes of action that were unrelated to the contacts.[29] In the latter instance, jurisdiction could still be sustained, but the contacts had to be more substantial.[30] Conversely, when the cause of action arose directly out of defendant's activity in the forum state, the contact did not have to be so strong to support jurisdiction.[31]

The Court did not stop here. In *McGee v. International Life Insurance Co.*,[32] due process limitations were further relaxed. Jurisdiction over the defendant insurance company in *McGee* was based on the mailing of a single insurance policy into the forum state. *McGee* seemed very encouraging when considered in a products liability context, for it recognized that a single, isolated act might be a sufficient contact for due process purposes when the cause of action arose out of that act.[33] Justice Black, writing for the majority, cited with approval a case where jurisdiction was upheld based on the commission of a single tort in the forum state.[34] Thus, it was conceivable that a corporation might be subject to jurisdiction based solely on the fact that its product had caused an injury in the forum state. Extending *McGee* into the field of products liability was the next logical step, considering the expansive trend that was developing.[35]

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29. *Id.* at 445-46.

30. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966). The authors refer to this type of jurisdiction as "general" jurisdiction.

31. *Id.* at 1144-53. This type of jurisdiction is labeled "specific" jurisdiction by the authors.

32. 355 U.S. 220 (1957).

33. *Id.* at 223.

34. *Id.* at 223 n.2. In that case, Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951), defendant maintained a roofing business in Massachusetts where it conducted most of its business. The roofer was employed by plaintiff to re-roof plaintiff's house in Vermont. While doing the job, the roofer negligently put holes in the roof, causing it to leak. Even though this was the roofers only contact with Vermont, the supreme court of that state upheld the jurisdiction of the Vermont courts, noting however, that the Supreme Court of the United States had not yet ruled on the issue:

> We are of the opinion that the United States Supreme Court has left undecided whether isolated tortious activity could result in a proper subjection of a foreign corporation to suit in the forum when the cause of action arose out of that activity; no generally applicable standards can be ascertained from the decisions beyond the statements in the *International Shoe* case.

Id. at 573, 80 A.2d at 666.

35. At least one commentator took an even more extreme position: "It is at

The Court erected a barrier to such expansion, however, in *Hanson v. Denckla*,[36] an action for the adjudication of a trust. While acknowledging the trend towards expanding personal jurisdiction over nonresidents,[37] *Hanson* made it clear that limitations still existed: "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[38] This requirement of a "purposeful" contact proved to be particularly difficult to deal with in a products liability context where the defendant was a retailer or regional distributor serving a limited geographical market.[39] The problem primarily arose when the product caused an injury outside of the geographical scope of defendant's business, and its only contact with the forum state was the presence of the product and the occurrence of injury there.[40] When this was the case, the court's decision hinged on its interpretation of *Hanson*.

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least arguable that as a result of *McGee* there is now almost no constitutional limitation on a state court's assertion of jurisdiction." Note, *Personal Jurisdiction in Minnesota over Absent Defendants*, 42 MINN. L. REV. 909, 922 (1958).

36. 357 U.S. 235 (1958).

37. As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe* . . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.

Id. at 250-51 (citations omitted).

38. *Id.* at 253.

39. *See, e.g.*, Tyson v. Whitaker, 407 A.2d 1 (Me. 1979).

40. Oliver v. American Motors Corp., 79 Wash. 2d 875, 425 P.2d 647 (1967), presented a typical fact situation: Plaintiffs purchased an automobile from the defendant, an Oregon automobile dealer, whose business was entirely confined to that state. When plaintiffs traveled to Washington, they were overcome by carbon monoxide fumes, allegedly due to a defective exhaust system. A suit was filed against the dealer in Washington.

The rationale employed to sustain jurisdiction over national manufacturers could not be applied in these circumstances:

> The distinction is obvious. Though it may be just to infer minimal contacts as to a manufacturer who produces goods and puts them into the broad stream of interstate commerce as was done in Gray v. American Radiator and Standard Sanitary Corp. . . . we believe that no such inference is warranted where there is a sale by an out-of-state retailer to his local customer, if nothing further appears by way of a purposeful act on his part or possession of information, which would in any way charge the retailer with knowledge that his transaction might have out-of-state consequences.

Id. at 889, 425 P.2d at 656.

A similar distinction between manufacturers and retailers was made in Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972), and Pellegrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974). In *Pellegrini*, the court recognized that such a distinction was a technical one at best, but was justified as a matter of policy.

Two alternatives were possible: *Hanson*'s "purposefully avails" language could be applied literally, or *Hanson* could be carefully limited to its facts.

In those cases where *Hanson* was applied literally, jurisdiction could not be sustained.[41] There was no jurisdiction because the defendant's only contacts with the forum state were the presence of his product and the occurrence of injury there. These contacts, standing alone, did not satisfy the "purposefully avails" requirement of *Hanson*.[42] In this line of cases, jurisdictional reach was limited to the states in which the retailer conducted its business.[43] Only in those states could the retailer be said to have acted purposefully.[44]

Other courts, however, refused to apply *Hanson* literally, and instead limited it to its facts, or ignored it altogether.[45] The argument for this position was based on the necessity of carefully examining the unique facts of each case.[46] *Hanson*, a trust

41. Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128 (1968); Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972); Pellegrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974); Oliver v. American Motors Corp., 79 Wash. 2d 875, 425 P.2d 647 (1967).

42. Of course, jurisdiction might be sustained even where *Hanson* is applied literally if, for example, the court finds other collateral contacts existed between the retailer and the forum state, such as advertising. The question then would be one of degree: what quantum of contacts will be required before defendant can be said to have "purposefully availed" itself? *Compare, e.g.*, King v. Hailey Chevrolet Co., 462 F.2d 63 (6th Cir. 1972) *with* Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960). The scope of this Comment, however, is limited to the sufficiency of a single contact as a basis for asserting jurisdiction.

43. *See* case cited in note 39 *supra*.

44. *Id.*

45. *See, e.g.*, Tyson v. Whitaker, 407 A.2d 1 (Me. 1979).

46. The argument for this position was perhaps best expressed in Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966). In addressing itself to the "purposefully avails" requirement of *Hanson*, the court explained:

> We do not think the quoted language can be construed literally. To do so is to revitalize the "implied consent" theory emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the *Hanson* decision. To make the requirement of purposeful activity within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant. Furthermore, it is apparent that all personal jurisdiction questions cannot be determined by asking whether the defendant purposefully conducted activities within the forum state to obtain the benefits and protections of its laws. Tortious and negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. A rule limiting jurisdiction to defendants who "purposefully" con-

adjudication, could easily be distinguished from a products liability action, particularly where a mobile product, such as an automobile or airplane, was involved.[47] In these cases, the foreseeability of the product's use in the forum state was sometimes employed as a jurisdiction-helping element.[48]

World-Wide Volkswagen Corp. v. Woodson

It was against this background that the Supreme Court recently decided *World-Wide Volkswagen Corp. v. Woodson*.[49] Harry and Kay Robinson, plaintiffs in *Woodson*, had purchased a new automobile from defendant retailer Seaway Volkswagen. A year later the Robinsons, who were New York residents when they purchased the automobile, decided to move to Arizona. While passing through Oklahoma, they were injured in an accident, allegedly caused by a defect in the automobile. Mrs. Robinson required extensive medical treatment.

The Robinsons filed a products liability suit in Oklahoma state court. In addition to the retailer (Seaway), the manufacturer (Audi), the importer (Volkswagen), and the regional distributor (World-Wide) were joined as defendants. Only World-Wide and Seaway contested jurisdiction. Seaway's retail market was limited to New York, while World-Wide distributed automobiles to retailers in New York, Connecticut, and New Jersey. Essentially, Seaway and World-Wide claimed that since neither had conducted any business in Oklahoma, that state could not properly assert personal jurisdiction. The lower state court rejected this claim and the Supreme Court of Oklahoma affirmed.[50] The Supreme Court of the United States reversed.[51]

The Supreme Court began its analysis by outlining the factors that had been used to determine "fairness" in previous decisions. These included "the burden on the defendant, the forum state's interest in adjudicating the dispute, . . . 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 fur-

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duct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state.

Id. at 256, 413 P.2d at 735.

47. *See, e.g.*, Tyson v. Whitaker, 407 A.2d 1 (Me. 1979).

48. Reilly v. Phil Tolkan Pontiac, Inc., 372 F. Supp. 1205 (D.N.J. 1974). *See also* the decision of the Supreme Court of Oklahoma in World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

49. 444 U.S. 286 (1980).

50. 585 P.2d 351 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

51. 444 U.S. 286 (1980).

thering fundamental substantive social policies."[52]

An additional factor was considered in *Woodson*. Earlier lower court decisions often cited foreseeability as a relevant jurisdictional criterion in products liability cases. These cases held that when it was foreseeable that defendant's product would be used in the forum state, it was not unreasonable to allow that state to assert jurisdiction.[53] This jurisdiction-helping element was narrowed considerably in *Woodson*:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. 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.[54]

EFFECTS OF *WOODSON* ON JURISDICTIONAL ANALYSIS

The modified concept of foreseeability is especially important in products liability litigation because past decisions tended to rely on traditional notions of forseeability.[55] Still, the new test is not objectionable. The problem is that the Court is unclear as to the factors to be taken into consideration in applying the test. It is important to remember that the "minimum contacts" doctrine, first adopted in *International Shoe*, is ultimately based on fairness.[56] In *International Shoe* the Supreme Court expressly re-

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52. *Id.* at 292.

53. *See, e.g.*, Williams v. Vick Chem. Co., 279 F. Supp. 833, 837 (S.D. Iowa 1967); Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 313 (1970).

54. 444 U.S. 286, 297 (1980). The Supreme Court of Oklahoma had applied the traditional concept of foreseeability in its opinion, and consequently concluded that the assumption of jurisdiction was fair:

> In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile [*sic*] in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

55. *Supra* note 53.

56. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

fused to apply a mechanical or quantitative test.[57] Instead, the Court chose to decide each case on its own facts weighing all the appropriate factors.[58]

In applying the *Woodson* test of foreseeability, the Court appears to have lost sight of the underlying notion of fair play. There is nothing inherently unfair with a test that limits a retailer's amenability to suit to those states in which it should reasonably anticipate being haled into court. This gives the retailer the opportunity to purchase insurance so that it can lessen the burden of defending a suit in the foreign forum.[59] However, in order to insure a fair and uniform application of such a test, there must be careful consideration of all the surrounding circumstances.

Certain language in the *Woodson* opinion creates the danger that lower courts in applying *Woodson* may not consider all these circumstances. For example, the Court stated:

> It is true that automobiles are uniquely mobile, . . . that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, . . . and that some of the cases have treated the automobile as a "dangerous instrumentality". But today, under the regime of *International Shoe*, we see no difference for jurisdictional purposes between an automobile and any other chattel.[60]

This apparently precludes consideration of the uniquely mobile nature of a product as a relevant jurisdictional criterion.

The court also cited with approval a hypothetical posed in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*,[61] as an example of where maintenance of jurisdiction would be unfair.[62] By simply citing to the hypothetical and not fully explaining it, the Court creates an additional difficulty. In the hypothetical, a Pennsylvania resident with Pennsylvania license plates on his automobile purchases a set of tires from a California retailer. The Pennsylvania resident then returns to his home state where a blowout occurs. The retailer should know that the car will be driven back to Pennsylvania, yet the court indicates that an assumption of jurisdiction by Pennsylvania courts would be unfair.

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57. *Id.* at 319.

58. As stated in Kulko v. Superior Court, 436 U.S. 84 (1978), "[T]his determination is one in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 92 (quoting Estin v. Estin, 334 U.S. 541, 545 (1948)).

59. 444 U.S. at 297.

60. *Id.* at 297 n.11. The failure of the Court to consider the uniquely mobile nature of the automobile in *Woodson* is confusing considering the decision in *Hess v. Pawloski*, 274 U.S. 352 (1927), where the Court placed particular emphasis on the automobile as a "dangerous instrumentality."

61. 239 F.2d 502, 507 (4th Cir. 1956).

62. 444 U.S. at 296.

Woodson's favorable reference to this hypothetical might induce lower courts to attach no jurisdictional significance to the possibility of an express or implied understanding between the parties that the purchaser would carry the product to a particular foreign state. Surely the retailer is in a position to insulate itself from liability through the purchase of insurance. Particularly if the retailer's business is located on an interstate highway, as it is likely to be in such a case, it should anticipate being sued in a foreign forum. If the retailer still concludes that insurance is too costly, its alternative is to refuse the sale.[63]

Another hypothetical will help to illustrate the problems that might arise in applying *Woodson*. A local retailer sells fireworks on the northern border of North Carolina, where fireworks are legal.[64] In all states to the north of that state, fireworks are illegal. This retailer is clearly catering to a market consisting of residents from those northern states who cannot purchase fireworks within their home state. If the understanding of the parties and the nature of the product are considered, it is highly foreseeable that the retailer may be subjected to suit in a northern state. However, even though a highly dangerous product is involved, jurisdiction might fail under *Woodson*: "The 'dangerous instrumentality' concept apparently was never used to support personal jurisdiction, and to the extent it has relevance today it bears not on jurisdiction but on the possible desirablity of imposing substantive principles such as strict liability."[65] Thus, the transaction might be treated as any other local retail sale.[66]

It is here that the uncertainty surrounding *Woodson* becomes

63. *Id.* at 297.

64. The applicable laws governing fireworks are fictional for the purposes of this hypothetical.

65. 444 U.S. at 297 n.11. Compare this with the following quotation from Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964):

> [T]he nature of the product may well have a bearing upon the issue of minimum contact, with a lesser volume of inherently dangerous products constituting a more significant contact with the state than would a larger volume of products offering little or no hazard to the inhabitants of the state. A careful and discriminating analysis of the nature and quality of the defendants' contacts with the forum state must be made in each case.

Id. at 298.

66. This hypothetical raises another problem: What is the relationship between *Woodson's* test of forseeability and the "purposefully avails" requirement of *Hanson*? The fireworks retailer appears to be purposefully availing himself of the benefits of the laws of those northern states that prohibit fireworks. Nevertheless, as indicated in the text, the test of forseeability might not be satisfied.

most apparent. The test is purportedly based on a defendant's reasonable anticipation of being haled into a foreign forum, yet consideration of the factors most critical to such a determination might be disallowed. A test based on objective factors, such as the nature of the product, would be fairly easy for plaintiff to satisfy. If these factors are disallowed, the plaintiff would be forced to probe the defendant retailer's mind in order to prove a reasonable anticipation of being sued in the forum state. The resulting burden on the plaintiff would be greatly increased as he is forced to rely on subjective considerations. Pre-trial discovery would be the only possible means by which a plaintiff could meet this burden. In order to conduct discovery, plaintiff would need to travel to the home state of the foreign retailer.[67] This defeats the major reason for suing locally, namely, avoiding a trip to the distant state. If plaintiff is in a position to afford such a trip, he would be better off filing his suit in the foreign forum initially and avoiding the jurisdictional issue entirely. The only resulting disadvantage would be the loss of a potentially sympathetic local jury. Even if plaintiff does decide to make the trip for discovery purposes, the costs of discovery itself might be prohibitive. In fact, the most expensive type of discovery would probably be necessary, discovery by deposition. A New York attorney has estimated that discovery by deposition in that state costs roughly three thousand dollars per lawyer per day.[68]

Plaintiff is unlikely to go to such great lengths to secure jurisdiction over the foreign retailer, especially when the results of discovery are so uncertain. Plaintiff would, in effect, be gambling on exposing evidence of defendant's reasonable anticipation of being haled into the foreign forum. Perhaps plaintiff would succeed, if, for example, discovery revealed that defendant had successfully contested jurisdiction in several prior suits in that forum.[69] These results, however, are highly unlikely. Furthermore, because the plaintiff has already secured jurisdiction over the manufacturer of the product, the incentive to pursue the dis-

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67. *See* FED. R. CIV. P. 45d(2):

> A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

Most states have comparable provisions. *See, e.g.*, CAL. CIV. PROC. CODE § 1989 (West 1955 & Supp. 1981).

68. *A Quicker Route to Court*, BUS. WEEK, Dec. 5, 1977, at 89.

69. Such a finding might be sufficient to show that it was reasonably foreseeable to the defendant that he would be subject to suit in that forum in the future.

covery necessary to join the retailer as well is diminished.[70] This leaves the trial court with only one factor relevant to the *Woodson* test of foreseeability, the geographic scope of the retailer's marketplace. Because the court is not within this geographic area, jurisdiction cannot be sustained.

Thus, *Woodson* might be interpreted as effectively limiting the retailer's amenability to suit to a specific geographic area. This is a standard that can only be mechanically applied, an approach expressly rejected in *International Shoe*. The flexible balancing test advocated by *International Shoe* would be precluded by *Woodson*'s test of foreseeability. Also, the retailer is accorded preferential treatment by being insulated from liability. In this respect *Woodson* is unfair to the manufacturer. The retailer is just as vital a link in the chain of distribution as the manufacturer, and there is no reason to favor one over the other.

The only way a flexible approach can be preserved is to allow the trial court to consider all the circumstances.[71] Then the trial court will be able to evaluate each case on the basis of its unique facts. This flexibility is essential to insure truly fair and reasonable results, the ultimate goal of the "minimum contacts" doctrine.

Woodson's inconsistency with the "minimum contacts" doctrine can perhaps be explained by examining the underlying substantive law. Ideally, substantive law should have no bearing on the due process analysis. However, because of the wide divergence among laws governing products liability, it is possible that the

70. The manufacturer is usually the most solvent defendant in a products liability action. Siegel, *'Longarm' Jurisdiction Pinched by High Court, But Not Broken*, NAT'L L.J., March 17, 1980, at 18.

71. At least one court applied a standard of foreseeability similar to that in *Woodson*, and came up with a conflicting result because it considered the traditional uses of the product. In Braband v. Beech Aircraft Corp., 51 Ill. App. 3d 296, 367 N.E.2d 118 (1977), jurisdiction over a foreign manufacturer of a defective airplane was upheld based on the presence of the product and the occurrence of injury in the forum state. Fundamental to the court's decision was a consideration of the nature of the product: "It is not offensive to 'traditional notions of fair play and substantial justice' to say to the manufacturer of a transient product such as an airplane that it must defend the lawsuit in a reasonable foreseeable place." *Id.* at 302, 367 N.E.2d at 123. As in *Woodson*, the court considered the foreseeability of being subjected to suit in the forum state, and not the mere foreseeability that the product would reach that state. In both cases, a uniquely mobile product was involved. Admittedly, in *Braband* other collateral contacts were present, but the majority felt that the existence of these additional contacts was unnecessary in order to sustain jurisdiction.

Supreme Court allowed substantive concerns to influence its decision of the procedural issue in *Woodson*.

In recent years, an increasing number of states have shifted from a fault basis for recovery to strict liability.[72] However, a few states have been reluctant to adopt strict liability,[73] and even among those that have, some have been more liberal than others in facilitating plaintiff recovery.[74] Similarly, some states are more liberal than others in assessing personal injury damages.[75]

Rules governing the choice of law in products liability litigation have also changed.[76] The law of the place where the injury occurred will no longer necessarily be the law applied to settle the dispute.[77] One commentator has pointed out that this might induce a court to sustain jurisdiction in order to ensure application of that forum's substantive law, even where the requisite minimum contacts are lacking.[78] Thus, the tightening of jurisdictional standards in *Woodson* may represent an attempt to discourage the resulting possibility of forum shopping.[79]

The problems involved in depriving tort victims of a broad choice of forums,[80] however, outweigh the benefits of the *Woodson* approach. Because of changes in marketing techniques,[81] the place where the injury occurs may be the only place where the plaintiff can join all defendants. *Woodson* increases the liklihood of a multiplicity of suits by requiring the tort victim to sue each of these defendants at its place of business, to the extent that defendant's business is conducted on a limited geographical basis.[82]

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72. *See* note 3 *supra*.

73. *See* note 3 *supra*.

74. Strict liability should not be confused with absolute liability. Strict liability requires proof of a defect. The definition of a defect varies from jurisdiction to jurisdiction. PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE 2-3 (2d ed. P. Rheingold & S. Birnbaum 1975).

75. *See generally* S. LEIBOWITZ, PERSONAL INJURY DAMAGES (1971).

76. Von Mehren & Trautman, *supra* note 30, at 1128-29.

77. *Id.* at 1129. Choice of law questions are resolved on the basis of criteria substantially similar to those used to analyze personal jurisdiction. Hanson v. Denckla, 357 U.S. 235, 258 (Black, J., concurring in part and dissenting in part). In Shaffer v. Heitner, 433 U.S. 186, 224-25 (1977), Justice Brennan argued that the jurisdictional and choice of law questions should be decided together. He stressed the fact that the forum state court would be better equipped to implement the policies underlying its own substantive laws, rather than those of another state. This would be particularly appropriate in the area of products liability.

78. Von Mehren & Trautman, *supra* note 29, at 1132-33.

79. *Id.* at 1133.

80. Siegel, *supra* note 68.

81. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

82. A local retailer, by electing to establish its business in a jurisdiction adhering to a negligence theory rather than strict liability, can avoid suits based on strict liability principles because of *Woodson*. This is inappropriate where the re-

Consequently, plaintiff may be forced to persuade a hostile jury that may favor the local defendant. Each defendant may be able to escape liability entirely by "pointing the finger" at the other defendants when the suit is brought in negligence. These dangers are accentuated when one or more defendants are insolvent, or the substantive fault can be traced to a particular defendant.

CONCLUSION

In *Woodson* the increasingly dynamic field of products liability collided with due process limitations on personal jurisdiction. These two areas of law have developed in contrasting fashion. Substantive rules of products liability have evolved steadily toward facilitating plaintiff recovery, culminating in the adoption of strict liability principles by most states.[83] Rules governing personal jurisdiction, however, have not progressed so symmetrically. Initially, the Supreme Court took an expansive view of the power of a state to adjudicate disputes involving foreign defendants. In *International Shoe*, *Perkins*, and *McGee*, jurisdictional limitations were gradually relaxed. *Hanson* reversed this expansive trend by imposing the requirement of a "purposeful" contact with the forum state. However, lower courts disagreed over the applicability of *Hanson* in a products liability context. As a result, the jurisdictional status of retailers and regional distributors remained uncertain where a purposeful contact was lacking.

The Supreme Court attempted to resolve this uncertainty in *Woodson* through its modified concept of foreseeability. Unfortunately, the Court did not clearly explain how this concept is to be applied. The resulting danger is that lower courts might interpret *Woodson* so as to immunize the retailer and the regional distributor from suit beyond the geographical scope of their marketplace.

Perhaps the applicable substantive law and choice of law rules influenced the decision in *Woodson*. Products liability laws vary considerably from state to state, as do rules governing choice of

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tailer has voluntarily chosen to sell a transient product such as an automobile or airplane, or where the retailer has knowledge that a nontransient product will be used in another state. In such cases, the retailer can protect itself by purchasing insurance in advance. This is more desirable than requiring the tort victim to shoulder the jurisdictional burden after an injury has already occurred. In addition, *Woodson* may deter retailers from doing business in those states that are particularly liberal in facilitating recovery by tort victims.

83. *See* note 3 *supra*.

law. As a result, the selection of the forum may determine what substantive law will apply. The Supreme Court's restrictive holding in *Woodson*, possibly prompted by this consideration, eliminates any danger of forum shopping. The Court's approach, however, is inconsistent with *International Shoe*'s emphasis on an overall consideration of fairness.

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