

MINIMUM CONTACTS CONFUSED AND RECONFUSED—VARIATIONS ON A THEME BY *INTERNATIONAL SHOE*—OR, IS THIS TRIP NECESSARY?

I. THE CASE

In March, 1967, a boiler exploded in General Electric's Ontario, California plant, injuring a worker. An inspection of the ruptured boiler revealed a name plate with the legend, "The Buckeye Boiler Co., Dayton, Ohio. Built 1960. . . ." For a variety of reasons¹ in addition to the obvious convenience, the injured worker sought to recover his damages in a California court. The facts, however, on which he based his allegation of jurisdiction were tenuous and incomplete.

Buckeye was an Ohio corporation, with its principal place of business in Dayton. As the court notes, it had "no agent, office, sales representative, exclusive agency, or exclusive sales outlet, warehouse, stock of merchandise, property, or bank account in California."² Although it did solicit sales in eighteen states, California was not one of those states.³

In fact, Buckeye's only clear business contact with California was through a series of sales to Cochin Manufacturing Co., also an Ohio corporation, which maintained a plant in San Francisco. Of these sales to Cochin, some orders came directly from, and the merchandise was shipped directly to the San Francisco plant. However, the cause of action did not arise from any of these transactions. There was evidence (apparently uncontested) before the court that, because of specification differences, the tank which exploded at G.E. could not have been one of those sold to Cochin.

1. Plaintiff claimed that while in the hospital for the explosion injuries, he suffered a fall, after which he was stricken with paralysis of his left side. He joined his doctor and hospital, alleging that the fall was proximately caused by their negligence. He was uncertain whether the paralysis was a result of the fall or the explosion. The medical defendants allegedly cannot be sued anywhere but in California. Clearly plaintiff hopes to avoid a multiplicity of suits, carrying the unhappy possibility of each defendant avoiding liability by pointing the finger at the other.

2. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. 933, 937, 458 P.2d 57, 61, 80 Cal. Rptr. 113, 117 (1969).

3. As a matter of fact, California is not even geographically close to the eighteen eastern and southern states which are solicited by Buckeye. The solicitations never reached further west than Michigan.

The evidence of how Buckeye's boiler did, in fact, wind up in G.E.'s plant made plaintiff's prospects for jurisdiction even dimmer. Aside from sheer conjecture, neither Buckeye nor G.E. could account for it. Buckeye alleged that it sold no tanks to G.E. or anyone else in California other than Cochin. G.E. not only had no record of the purchase from Buckeye, but testified that its policy was to avoid out-of-state purchases whenever possible.⁴ Both, however, admitted that they had no business records prior to 1962.

Buckeye's motion to quash service of summons was denied, and it petitioned the California Supreme Court for a writ of mandate. The problem facing the court was redetermination of the scope of California's personal jurisdiction statute,⁵ which allowed the exercise of jurisdiction over foreign corporations who are "doing business" within the state. In as much as this section has long been interpreted to invoke the full power granted by the due process clause,⁶ the real issue became the constitutional limitation of "due process." Controlling cases of the United States Supreme Court⁷ express the opinion that the requirement for exercise of personal jurisdiction over a non-resident defendant is the existence of "certain minimum contacts. . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁸

Having determined that Buckeye was in no fashion "present" within the state,⁹ the court examined its current, three step test for exercising jurisdiction over foreign corporations. Based upon United States, and California Supreme Court decisions, the California courts have generally required (1) that

4. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 938, 458 P.2d at 61, 80 Cal. Rptr. at 117.

5. CAL. CODE CIV. PROC. § 411(2) (West 1954) *repealed by* CAL. GEN. LAWS ANN. ch. 1610 § 12 (Deering 1969).

6. *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959); *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

7. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958).

8. *International Shoe Co. v. Washington*, 326 U.S. at 316, partially quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) to the effect that traditional notions of fair play and substantial justice are implicit in the due process clause. *Milliken*, in turn was drawing on Justice Holmes' opinion in *McDonald v. Mabee*, 243 U.S. 90 (1917), which spoke of the exercise of jurisdiction being limited by common law "natural justice" and the 14th amendment's implied requirement of "fair play."

9. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 938-39, 458 P.2d at 62, 80 Cal. Rptr. at 118.

there be purposeful activity within the forum whereby the defendant avails himself of the benefits and protections of the forum,¹⁰ (2) that the cause of action arise from that activity,¹¹ and (3) that upon balancing the interest of the state in providing its residents with a forum, against the potential inconvenience to the out-of-state defendant, it be fair to maintain suit locally.¹²

In determining whether there is the requisite "purposeful activity," the practice has been to apply a "mechanical checklist" of the outward manifestations of business activity.¹³ This approach has focused on such indicia of corporate activity as: offices, agents, property, employees, jobbers, distributors, manufacturer's agents or representatives in the state, and local solicitation or advertising.

When compared with this checklist of local contacts, Buckeye's meager contacts with California did not look much like the required purposeful activity. The court was dissatisfied with that result. Unceremoniously, it rejected the checklist approach in favor of a new test designed to focus on the economic reality of business transactions. Speaking for a unanimous court, Justice Peters stated that the purposeful activity requirement will be met where the defendant has engaged in "economic activity within the state as 'a matter of commercial actuality.'" ¹⁴ Apparently fearful that this was not precise enough, Justice Peters further elaborated that "commercial actuality" will be satisfied when "purchase or use of [defendant's] product within the state generates gross income for the manufacturer, and is not so fortuitous or unforeseeable as to negative the existence of an intent . . . to bring about this result."¹⁵

Applying the test to the case at bar, the court found itself without sufficient facts to determine the issue of foreseeability, and remanded for further inquiry.

10. *Hanson v. Denckla*, 357 U.S. 235; *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1.

11. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Long v. Mishicot Modern Dairy Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967).

12. *McGee v. International Life Insurance Co.*, 355 U.S. 220; *Fischer Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1.

13. *Gill v. Surgitool, Inc.*, 256 Cal. App. 2d 583, 64 Cal. Rptr. 207 (1967); *daSilveira v. Westphalia Sperator Co.*, 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967).

14. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 942, 458 P.2d at 64, 80 Cal. Rptr. at 120.

15. *Id.*

II. PERSONAL JURISDICTION PRIOR TO *Buckeye*

To fully appreciate *Buckeye's* impact (or relative lack thereof) the case must be seen in context of the ongoing development of judicial attitude toward the due process clause as it limits state court jurisdiction. The classic case is *Pennoyer v. Neff*,¹⁶ with its strict requirement of personal service of the defendant within the state. *Pennoyer* was reasonably viable while the sheer distances between states still erected social and commercial barriers. But with continued advancements in transportation and commerce, *Pennoyer's* rule has been gradually relaxed, almost into extinction. The United States Supreme Court has gone from allowing service of process on transients,¹⁷ through fictions as to "consent,"¹⁸ "doing business,"¹⁹ "presence,"²⁰ until finally, in *International Shoe Co. v. Washington*,²¹ the Court decided that the essence of due process requires simply "minimum contacts" between the defendant and the forum, such that it would be consistent with "traditional notions of fair play and substantial justice" to require him to defend locally.²²

Unfortunately, what followed was a seemingly endless series of state and federal cases²³ attempting to construe, or clarify what Justice Stone meant by "minimum contacts . . . fair play and substantial justice." Those decisions created substitute tests which the courts have equated with *International Shoe's* mandate, but which they find more explicit, and therefore easier to apply.²⁴ For the purpose of this analysis, it is both impossible and unnecessary to distinguish the approach taken by the California courts from

16. 95 U.S. 714 (1878).

17. *Barrell v. Benjamin*, 15 Mass. 354 (1819).

18. *Hess v. Pawloski*, 274 U.S. 352 (1926).

19. This was the California statutory language until 1969, when it was finally changed expressly to adopt the full extent of due process power. The new section reads: "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. GEN. LAWS ANN. ch. 1610 § 3 (Deering 1969).

20. See Justice Black's discussion of all these in *McGee v. International Life Insurance Co.*, 355 U.S. at 222.

21. 326 U.S. 310 (1945).

22. *International Shoe Co. v. Washington*, 326 U.S. at 316; see note 8, *supra*.

23. A more detailed chronicle of these cases is contained in Annot. 19 A.L.R.3d 13 (1968).

24. The "vagueness" of *International Shoe's* test has been the rationale of most of the arguments against it. As will be seen, the writer, supported by eminent authorities, would prefer instead adjectives like "flexible," or "discretionary." Viewed from this angle, the quality becomes a major recommendation rather than a drawback.

that taken by the federal courts. Since California has long held its jurisdiction statutes²⁵ as co-equal with the full power allowed by the due process clause,²⁶ they are one in the same.²⁷

The most common gloss put on *International Shoe* is the three part test used by California.²⁸ In addition, scattered through the cases are a few other criteria. "Presence" although outmoded and discredited in *International Shoe*, and *McGee v. International Life Insurance Co.* is retained in California as an alternative to the three step test, where the cause of action did not arise from the activity by which the defendant availed himself to the benefits and protections of the forum.²⁹ "Expectations of the defendant," or "foreseeability" of the likely consequences of his activity appear as criteria in some federal cases,³⁰ and, indeed are the second part of *Buckeye's* "commercial actuality" test.

These interpretations have all but preempted and obscured the original rule. No longer, for example, do the California courts decide a question on the basis of minimum contacts and fair play. This simple test, calling on the trial judge to exercise his good judgment and discretion on the facts of each case, has been unofficially discarded. In its place, while paying lip service to "the full power of the state consistent with the due process clause,"³¹ the California courts have saddled themselves with an inviolable, black and white set of *sine qua non's* to the exercise of that power.

25. CAL. CODE CIV. PROC. § 411(2) (West 1954).

26. *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1.

27. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 938, 458 P.2d at 61, 80 Cal. Rptr. at 117.

28. See notes 10, 11, 12, *supra*; see also Leflar, *Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 283 (1960) (for a rewording of the same three-step test); *Tyce Construction Co. v. Dulein Steel Products Inc.*, 62 Wash. 2d 106, 381 P.2d 245 (1963) (for Washington's version of the same test). THE UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03, uses the same mechanical treatment, in the same three steps, as does the 9th federal circuit in *L.D. Reeder Contractors v. Higgins Industries, Inc.*, 265 F.2d 768 (9th Cir. 1959).

29. *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1; see also *Long v. Mishicot Modern Dairy Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967); and Justice Brandeis' discussion of this in *Philadelphia and Reading Railway Co. v. McKibbin*, 243 U.S. 264, 268 (1917).

30. *Deveny v. Rheem Manufacturing Co.*, 319 F.2d 124 (2d Cir. 1963); *Aftanse v. Economy Bailer Co.*, 343 F.2d 187 (8th Cir. 1965).

31. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 938, 458 P.2d at 61, 80 Cal. Rptr. at 117; *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d at 224, 347 P.2d at 3, 1 Cal. Rptr. at 3.

III. *Buckeye's* PRACTICAL EFFECT

The court in *Buckeye*, on examining California's application of *International Shoe*, seemed to recognize the problem. But either the court failed to see it in its entirety, or decided that it was not the proper time to solve it.³² Resolving to end these hampering mechanics, all it actually accomplished was to change the test for satisfying the first part of the California three part test for satisfying *International Shoe's* two part test for satisfying due process.³³ That is, one step has merely been substituted for another in a process so complicated that it is nearly unintelligible.³⁴

To put *Buckeye* more simply: The United States Constitution³⁵ says, "no state shall . . . deprive any person of life, liberty, or property, without due process of law." As applied to state court jurisdiction over non-resident defendants, the United States Supreme Court has made minimum contacts, consonant with fair play and substantial justice, the criterion for determining due process.³⁶ Subsequent cases applying minimum contacts have held that: (1) the defendant must be involved in some purposeful activity by which he avails himself of the benefits of the forum, (2) the cause of action must arise from this purposeful activity, and (3) the state's interest in providing a local forum must outweigh the inconvenience to the defendant. If all three are met then there are minimum contacts, fair play and substantial justice. Further, to determine whether there was purposeful activity, the California courts until *Buckeye*, have employed a checklist of the manifestations of this activity.

With this quagmire of unnecessary confusion before it, the *Buckeye* court has done virtually nothing. "Commercial actuality" has merely replaced the checklist approach as the

32. *Buckeye Boiler Co. v. Superior Court*, 71 Adv. Cal. at 943, 458 P.2d at 65, 80 Cal. Rptr. at 121.

33. If this seems confusing, it is partly intentional. After all, the point is that the process itself is confusing. Read the sentence once more. With each successive reading, it makes more sense.

34. To illustrate just how confusing the test has become, *compare* cases cited in note 6, *supra*, (holding that the power of the California courts over non-residents is as broad as the due process clause itself, invoking the full extent of power constitutionally available) with *Leach Co. v. Superior Court*, 266 Cal. App. 2d 367, 72 Cal. Rptr. 216 (1968). In *Leach*, Judge Christian, surveying California's law, notes that while the case at bar may present no constitutional impediment to the exercise of jurisdiction, C.C.P. § 411(2) clearly precluded it. The judge's confusion is certainly understandable.

35. Amendment XIV § 1.

36. *International Shoe Co. v. Washington*, 326 U.S. 310.

ultimate level of intricacy. Now, instead of running down the list of indicia of business activity (agents, offices, etc.) the courts will begin their jurisdictional jigsaw puzzle by determining, (1) whether the purchase or use of the products generates gross income for the defendant, and (2) whether such purchase or use is sufficiently foreseeable as to impute intent to him.

IV. IS THIS TRIP NECESSARY?

When Justice Stone wrote his opinion for the court in *International Shoe*, he handed the courts of the nation a simple, easily understood test. It was flexible enough that judges could, on a case by case basis, use their discretion to determine whether it would be fair to exercise jurisdiction. The only guideline was the implicit fair play requirement of due process. The years since then have seen a considerable departure from Stone's test.³⁷

The *Buckeye* court, concerned with the subsequent obscuring of this guideline, regarded the checklist as an artificial criterion, and abandoned it in favor of "commercial actuality." Indeed, this does seem to be a slightly more straightforward method of settling the purposeful activity issue. But, should not the court look one step further? It condemned the checklist as merely going to the outward manifestations of the true consideration. But the three step test which it summarily affirmed is just as mechanical and artificial as was the checklist.

Maintaining the three *sine qua non's* of jurisdiction denies the courts the flexibility to adapt to changing times and cases which was granted them by *International Shoe*. There is substantial authority from the United States Supreme Court that it, in fact, intended the due process test to remain as open and flexible as was enunciated by Justice Stone. In *McGee v. International Life Insurance Co.*³⁸ for example, Justice Black, writing for the majority, noted that in a continuing process of evolution, the Court had accepted and then abandoned the concepts of "consent," "doing business," and "presence" as standards for measuring the reach of due process. The whole thrust and purpose of due process is fairness. So, Black seemed to indicate, rather than define it in terms of artificial fictions, *International Shoe*

37. See *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732, 19 A.L.R.3d 1 (1966) and annotation following.

38. 355 U.S. 220.

settled on this basic purpose itself.³⁹ In fact, Justice Stone, in *International Shoe*, addressing himself to the old artificial tests, seemed to anticipate the new ones. He said;

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical and quantitative. [It] must depend rather on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.⁴⁰

This view finds strong state court support in *Phillips v. Anchor Hocking Glass Corp.*⁴¹ There, the Arizona Supreme Court strongly criticized the majority opinion in *Hanson v. Denckla* for stressing the requirement that the defendant corporation purposefully avail itself of the privilege of conducting business within the forum.⁴² In a three pronged attack, the *Phillips* court denounced the requirement as: (1) a revitalization of the implied consent theory disapproved in *International Shoe*; (2) a reversal of the trend towards expanding state court jurisdiction, which was noted and impliedly approved in *Hanson*; and, (3) an undermining of the basic idea that each case should be determined on its merits as to fairness, rather than by strict application of an artificial set of requirements. *Phillips* also disapproved the requirement of foreseeability by the defendant of the consequences of his activity. The court felt that this may well be a valid consideration, but it, just like all other requirements, should be limited to the status of a consideration, rather than being controlling.

This then is the suggestion: Rather than merely exchanging one requirement for another, *Buckeye* should have abandoned all the requirements, as requirements, and re-established "minimum contacts" and "traditional notions of fair play and substantial

39. *McGee v. International Life Insurance Co.*, 355 U.S. at 222. Even California's Supreme Court has accepted this as late as 1957. Justice Traynor notes in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 345, 316 P.2d 960, 965, ". . . emphasis is no longer placed on actual or physical presence but on the bearing that local contacts have to the question of overall fair play and substantial justice."

40. *International Shoe Co. v. Washington*, 326 U.S. at 319.

41. *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732.

42. Note that the very requirement which is denounced by *Phillips* is the subject of *Buckeye's* holding. The purpose of "commercial actuality" is to determine whether the defendant has purposefully availed itself of the privilege of conducting business within the forum.

justice." It is past time to return to the simplicity of rule and to the flexibility of application which was originally intended by *International Shoe*. Certainly the concepts of "purposeful activity," "availing itself of the forum benefits," "arising from the contacts," "forum conveniens" and all the others should not be discarded. They are useful, logical considerations to be weighed in determining minimum contacts. It is simply urged that they be used only as considerations, not essential requirements.

As with any legal position, this one will surely attract criticism. The most foreseeable, and probably the only viable one, would be that of Professor McBain, who complains that "minimum contacts" and "fair play" are entirely too vague, and are utterly incapable of guiding corporations in the conduct of their activities.⁴³ However, this argument seems to be easily answered by a perusal of the many other areas of substantive and procedural law, where the trend is clearly away from intricate complexity, towards more basic considerations of fairness and reasonableness.⁴⁴

As further support, there is an indication from some of the legal scholars that at least to a certain extent, some of the courts as a matter of practice, ignore the complex criteria they set up. Currie, in examining the non-resident motorist statutes,⁴⁵ comes to the conclusion that judges are not really interested in implied consent, as they say. What it really boils down to is that, in light of the activities of the defendant, and the great interest of the state in providing the forum, it is not unfair to require the motorist to defend locally. Moore, in his work on federal practice, attempting to summarize the federal disposition towards personal

43. McBain, *Jurisdiction Over Foreign Corporations: Actions Arising out of Acts Done Within the Forum*, 34 CAL. L. REV. 331 (1946). Professor McBain lumps *International Shoe's* test into the same vague mass as "consent," "doing business," and "presence."

44. The examples of these are legion. But a few will suffice here. California has abolished the complex system of rules as to the liability of owners and occupiers of land in *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The courts now simply apply a standard of reasonableness under the circumstances. Also in California the historic complexity of grounds and defenses for divorce has been abandoned in favor of the simple "irreconcilable differences," FAMILY LAW ACT, CAL. CIV. CODE § 4000 et seq., CAL. GEN. LAWS ANN. ch. 1608 (Deering 1969). There are even indications that the multitude of exceptions to the hearsay rule may someday be abandoned in favor of a blanket consideration of trustworthiness and necessity, Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise*, 54 A.B.A.J. 231 (1968).

45. *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. LAW FORUM at 553.

jurisdiction, seems to conclude that the courts themselves are not inflexible with their own seemingly hard and fast rules. In fact, he finds himself unable to distill the decisions into a rule. He merely observes that the quality of the contact and its relation to the cause of action, interplay as major considerations in the determination.⁴⁶ This is certainly a view more closely allied to "minimum contacts" and "fair play" than is the present California standard.⁴⁷ Professors Erenzweig and Louisell go even one step further. After a discussion of the directions in state court jurisdiction, they have suggested that "a nationwide jurisdiction, limited by 'fair play' to the forum conveniens,⁴⁸ may, with or without the help of federal legislation, become the final answer."⁴⁹

V. CONCLUSION

In response to the ever increasing demands put on the state court system by the spiralling incidence of interstate commerce and transportation, and recognizing the need for the judicial system to be able to adapt to the chameleonic circumstances of the times, the United States Supreme Court in *International Shoe* handed down a view of due process which would give the states the flexibility and discretion they so badly needed. In the years since *International Shoe*, the California courts have interpreted, converted, and perverted the simple test of fairness to the point that it is no longer responsive to the times.

The time has come to reform our state court application of personal jurisdiction, to conform with the "minimum contacts" and "fair play" standards which the courts claim, but refuse to follow. The California Supreme Court had the opportunity, in *Buckeye Boiler v. Superior Court* to take that step. The opportunity should have been seized, but it was not.

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46. 2 J. MOORE, FEDERAL PRACTICE, ¶ 4.25 (2d ed. 1953). Moore notes that: If there are substantial contacts, and the cause of action arises from them, the courts will almost invariably take jurisdiction. If there are substantial contacts but the cause of action does not arise from them, the courts may take jurisdiction. If there are minimum contacts, but the cause of action arises from them, the court will usually take jurisdiction. And if there are minimum contacts and the cause of action does not arise from them, the courts will seldom take jurisdiction.

47. Several professors are, in their classes, preaching the "fairness" standard. For example, Prof. Frank Engfelt (University of San Diego School of Law) suggests in his Conflict of Laws class, that the court's will do "whatever's fair."

48. Erenzweig, *The Transient Rule of Personal Jurisdiction: The "Power Myth" and Forum Conveniens*, 65 YALE L.J. 289, 312 (1956).

49. A. ERENZWEIG AND D. LOUISELL, JURISDICTION IN A NUTSHELL § 5a (2d ed. 1968).