BYU Law Review

Volume 1983 | Issue 1 Article 1

3-1-1983

Jurisdiction Over the Travel Industry: A Proposal to End It's Preferential Treatment

William J. Knudsen Jr.

Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment

*William J. Knudsen, Jr.**

The travel industry is not just big business; it is gigantic. Some idea of its size can be obtained from a trade journal article now over five years old: "Tourism ranks second only to petroleum as an item of world trade. . . . Tourism expenditures were estimated to be $120 billion for U.S. residents during 1977. . . . [T]he greatest percentage of this amount was spent for 'vacation/pleasure and personal reasons.' "[1] Another industry magazine, referring to a survey by Lou Harris & Associates, concluded that retail sales by travel agents totaled almost fifteen billion dollars in 1976, with hotel sales alone amounting to more than one and three quarter billion dollars.[2] There are approximately 17,000 travel agents in the United States,[3] and an estimated forty million consumers making up the traveling public.[4] Since some members of that traveling public return home disgruntled, dissatisfied, and even physically or financially injured, travel related litigation occurs frequently. Many of these prospective plaintiffs find it difficult to obtain jurisdiction in their states of residence over defendant hotels and passenger carriers. Ignoring the realities of the marketplace and the principles which have supported jurisdiction over other industries, some state courts have been reluctant to exercise jurisdiction over the various components of the travel industry, apparently on the assumption that to do so would subject the travel industry to an intoler-

---

* Professor of Law, Northwestern School of Law, Lewis and Clark College; B.S., 1943, St. John's University; J.D., 1948, Columbia University School of Law.

Professor Knudsen wishes to express his appreciation to Professor Edward J. Brunet and Mr. Richard W. Nahstoll for their editorial comments, and to Mr. Brad C. Kaplan, Ms. Linda J. Scheldrup and Mr. W. Samuel Simpson for their research assistance in the preparation of this article.

1. *Travel Trade,* December 19, 1977, at 10, *reprinted in* T. DICKERSON, TRAVEL LAW § 1.02 n.4 (1982).

2. *Travel Weekly,* April 8, 1977, at 1, *reprinted in* Dickerson, *Travel Law (Part 1),* 24 PRAC. LAW. 13 (1978).

3. T. DICKERSON, TRAVEL LAW, § 1.02 (1982).

4. Dickerson, *Travel Law (Part 1),* 24 PRAC. LAW. 13 (1978).

able and unconstitutional burden. California is one such state.

In 1969, the Supreme Court of California authored what has perhaps become the most cited state court opinion in the field of personal jurisdiction, *Buckeye Boiler Co. v. Superior Court.*[5] Seven years later, the same court handed down *Archibald v. Cinerama Hotels.*[6] Although it cited *Buckeye Boiler, Cinerama Hotels* clearly failed to follow the rationale of that case. Since *Cinerama Hotels* has become the leading authority in California on jurisdiction over the travel industry,[7] while *Buckeye Boiler* continues to govern jurisdiction over the manufacturing industry, a comparison of the two cases is instructive. Analysis shows that two widely different approaches were taken: *Buckeye Boiler*'s jurisdictional theory follows broad principles laid down by the United States Supreme Court, while *Cinerama Hotels* does not. This Article seeks to determine whether *Cinerama Hotels'* departure from the prevailing rule is justified by economic factors uniquely present in the travel industry, as the opinion appears to assume, or whether it represents a preferential, inconsistent, and mistaken approach to the assertion of jurisdiction over a particular industry. A survey of other state and federal opinions dealing with jurisdiction over travel related defendants will help resolve that issue and may assist in illuminating the proper limits of personal jurisdiction over the hotels, airlines, cruise ships, tour bus companies, and other businesses that collectively constitute the travel industry.

I. *Buckeye Boiler* AND *Cinerama Hotels*

In *Buckeye Boiler,* the California Supreme Court helped to clarify the scope of the minimum contacts test enunciated almost a quarter of a century earlier in *International Shoe Co. v. Washington*[8] and its progeny.[9] Buckeye, an Ohio corporation with its principal place of business in Ohio, had no agents, offices, sales representatives, warehouses, merchandise, property, or bank accounts in California, where one of its pressure tanks

5. 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

6. 15 Cal. 3d 853, 126 Cal. Rptr. 811, 544 P.2d 947 (1976).

7. *See* Circus Circus Hotels, Inc. v. Superior Court, 118 Cal. App. 3d 53, 173 Cal. Rptr. 115 (1981) (relying in part on *Cinerama Hotels*).

8. 326 U.S. 310 (1945).

9. Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

exploded, injuring an employee of General Electric Company. There were no evidence as to how the tank, admittedly a Buckeye tank, had been obtained by General Electric. Buckeye had, however, been selling pressure tanks to the Cochin Manufacturing Company, located in San Francisco, for a period of five years prior to the injury.[10] The annual gross sales to Cochin for the two or three year period immediately preceding the injury were between $25,000 and $35,000.[11] Cochin incorporated Buckeye tanks in its hydraulic automobile lifts for service stations and then sold these lifts throughout California and other states.[12] Apparently Cochin did not resell Buckeye tanks other than as part of the lifts.

The California high court had decided earlier that its jurisdictional reach over foreign corporations goes as far as the federal due process clause permits;[13] thus, the issue of jurisdiction over Buckeye was essentially an issue of federal constitutional law. After examining *McGee v. International Life Insurance Co.*,[14] *Hanson v. Denckla*,[15] and *International Shoe*, as well as some of its own decisions,[16] the court reaffirmed as its standard the "economic activity" test of *Empire Steel Corp. of Texas v. Superior Court*,[17] which it equated with *Hanson v. Denckla*'s requirement of "purposeful activity within the [forum] state."[18] The court declared that an out-of-state manufacturer would be found to be engaged in

> economic activity within a state as a matter of "commercial actuality" whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an

---

10. Buckeye contended that it had not sold any tanks in California except to Cochin and had not sold any products to General Electric between January 1960 and the time the case commenced, although its records did not go back prior to 1962. 71 Cal. 2d at 897, 80 Cal. Rptr. at 117, 458 P.2d at 61.

11. *Id.*, 80 Cal. Rptr. at 117, 458 P.2d at 61.

12. *Id.*, 80 Cal. Rptr. at 117, 458 P.2d at 61.

13. Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 1 Cal. Rptr. 1, 347 P.2d 1 (1959). *See also* CAL. CIV. P. CODE § 410.10 (West 1982).

14. 355 U.S. 220 (1957).

15. 357 U.S. 235 (1958).

16. The court examined Empire Steel Corp. of Texas v. Superior Court, 56 Cal. 2d 823, 17 Cal. Rptr. 150, 366 P.2d 502 (1961); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 1 Cal. Rptr. 1, 347 P.2d 1 (1959); and Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958).

17. 56 Cal. 2d 823, 17 Cal. Rptr. 150, 366 P.2d 502 (1961).

18. 71 Cal. 2d at 902, 80 Cal. Rptr. at 120, 458 P.2d at 64.

intent on the manufacturer's part to bring about this result.[19]

In pursuing this economic benefit theory, the court focused on substance; it rejected as formalism the manufacturer's attempt to hide behind middlemen when the manufacturer knew or could "reasonably anticipate that [its goods would] ultimately be resold in a particular state."[20] Mechanical reliance on such factors as the location of the sale and the existence or nonexistence within the forum of offices, property, agents, employees, jobbers, solicitation, and advertising was expressly disapproved as failing to focus on economic reality.[21] Indeed, the mechanical approach had been rejected long before by the United States Supreme Court in *International Shoe.*[22]

Since *Buckeye Boiler,* commentators have joined in recognizing the superiority of economic substance over form as the crucial jurisdictional inquiry,[23] and the question appears to be well settled, at least insofar as jurisdiction over the manufacturing industry is concerned. However, as *Cinerama Hotels* demonstrates, the same analysis has not been consistently applied to the travel industry's world of hotels, airlines, and other carriers.

In *Cinerama Hotels,* plantiff Archibald, a resident of California, sued various hotels in Hawaii on behalf of herself and others for conspiring to impose room rates on mainland visitors higher than those charged to residents of Hawaii. Defendant Waikiki Surf Hotel moved to dismiss on the ground that it was not subject to personal jurisdiction in California.[24] Because the

---

19. *Id.,* 80 Cal. Rptr. at 120, 458 P.2d at 64.

20. *Id.,* 80 Cal. Rptr. at 120, 458 P.2d at 64 (dictum).

21. *Id.,* 80 Cal. Rptr. at 121, 458 P.2d at 65.

22. The International Shoe Company supported its objection to jurisdiction by arguing that title to all shoes shipped to the State of Washington from points outside the state passed to the buyer at the point of shipment and that all contracts for the sale of such merchandise were made outside the State of Washington. The Supreme Court rejected these formal indicia of ownership. Choosing instead to base jurisdiction on the economic realities of the situation, it noted that commissions to salesmen exceeded $31,000 per year between 1937 and 1940 and that these commissions were based on sales of defendant's goods in Washington. 326 U.S. at 313.

23. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569, 592 (1958); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1147-48, 1169 (1966); Note, *The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970,* 21 HASTINGS L.J. 1105 (1970).

24. 15 Cal. 3d at 856-57, 126 Cal. Rptr. at 814, 544 P.2d at 950.

> The complaint named Waikiki Hotels-Seven as a defendant which owns a group of Hawaiian hotels, including the Waikiki Surf in Honolulu. Hotel Operating Co. of Hawaii, Ltd., appeared specially and moved to quash service of

record was insufficient as developed by defendants' affidavits and plaintiff's declaration in opposition thereto, the high court remanded the case to the trial court in order to give the parties an opportunity to clarify the ambiguities in the original record by furnishing more precise jurisdictional facts.[25] Before doing so, however, the supreme court quoted with approval a large segment of the lower court's refusal to allow jurisdiction, making its position on the issue of jurisdiction over out-of-state hotels eminently clear.

Plaintiff argued that although there had been only a single contact by defendant Waikiki Surf in the forum state, *McGee v. International Life Insurance Co.*[26] had held that a single contact may suffice. The California Supreme Court seemed to agree that jurisdiction in *McGee* was based on the insurance "company's single act of mailing to its California customer the insurance certificate upon which suit had been brought,"[27] but found the analogy wanting for other reasons. The crucial point, the court concluded, was the status of American Express Company, the travel agency which had placed plaintiff's reservation with Waikiki Surf. Apparently the court assumed that if there were sufficiently few ties of ownership, control, or agency between Waikiki Surf and American Express Company, the independent nature of the travel agency's services would preclude any assertion of personal jurisdiction over the hotels for which the agency made reservations. Stating that independent travel agencies

---

summons on the ground that it was not amenable to the jurisdiction of the California courts. . . .

Through an affidavit of one of its officials, Hotel Operating Co. declared that there was no entity known as Waikiki Hotels-Seven; [but] that it had an "interest" in three named hotels, one of which was the Waikiki Surf . . . .

Id. at 862-63, 126 Cal. Rptr. at 818, 544 P.2d at 954. In this Article, Waikiki Surf alone will be referred to as the defendant.

25. The court suggested that traditional bases of jurisdiction could not be ruled out by the defendant's vague assertions. These bases included the ownership of hotels engaging in "California activity" and a contractual relationship amounting to more than nonexclusive sales representation. *Id.* at 865, 126 Cal. Rptr. at 819, 544 P.2d at 955. On remand the trial court apparently found that jurisdiction existed, since an appeal from the trial court judgment dealt only with the merits of the controversy. Archibald v. Cinerama Hotels, 73 Cal. App. 3d 152, 140 Cal. Rptr. 599 (1977).

26. 355 U.S. 220 (1957). In *McGee*, the United States Supreme Court upheld California's jurisdiction in a suit brought by a California life insurance beneficiary against an insurance company located in Texas. Although the record showed no solicitation in California, and no contacts other than the mailing of a single life insurance policy to California and the receipt of premiums on the policy, the exercise of jurisdiction was held not to contravene the due process clause. *Id.* at 222-23.

27. 15 Cal. 3d at 864, 126 Cal. Rptr. at 819, 544 P.2d at 955.

place "reservations with practically any hotel or transportation firm throughout the world"[28] and that plaintiff's position would subject all such hotels and transportation firms "to lawsuits [wherever] . . . an independent travel agency sells its accommodations,"[29] the court, citing a total of three cases, concluded that "[e]stablished decisional law calls for a contrary holding."[30] Conspicuously absent were either a *Buckeye Boiler* economic analysis of the jurisdictional facts or a considered discussion of relevant principles established by the United States Supreme Court. In addition, the three precedents relied on by the court are not as persuasive as its opinion suggests.

The first case, *Vibration Isolation Products, Inc. v. American National Rubber Co.*,[31] is inapposite. Finding no basis for jurisdiction over the defendant manufacturer, the California Court of Appeal focused on the fact that defendant's products entered California through "independent nonexclusive sales representatives,"[32] analagous to the travel agency in *Cinerama Hotels*. However, unlike the arrangement between Waikiki Surf and the travel agency, the sales representatives were not located in California, and the manufacturer did not know—and probably could not reasonably have been expected to know—that the product would enter the California market.[33] Although Waikiki Surf employed the services of American Express as an independent nonexclusive sales representative, it did so apparently on a regular basis, with the specific intent of generating business in California.[34]

The second case, *Kenny v. Alaska Airlines, Inc.*,[35] a federal district court case of 1955 vintage, is equally inapplicable. Alleging injury due to fraud and the issuance of watered stock, plaintiff commenced a derivative action.[36] Admittedly, here at least we find a somewhat similar factual situation since the defendant, Alaska Airlines, was not physically providing any services within California. But the precedential value of *Kenny* is ques-

---

28. *Id.* at 864, 126 Cal. Rptr. at 819, 544 P.2d at 955.
29. *Id.*, 126 Cal. Rptr. at 819, 544 P.2d at 955.
30. *Id.*, 126 Cal. Rptr. at 819, 544 P.2d at 955.
31. 23 Cal. App. 3d 480, 100 Cal. Rptr. 269 (1972).
32. *Id.* at 484, 100 Cal. Rptr. at 271 (quoting Fisher Govenor Co. v. Superior Court, 53 Cal. 2d 222, 225, 1 Cal. Rptr. 1, 3, 347 P.2d 1, 3 (1959)).
33. *Id.*, 100 Cal. Rptr. at 271.
34. *See infra* text accompanying notes 90-93.
35. 132 F. Supp. 838 (S.D. Cal. 1955).
36. *Id.* at 841.

tionable for two reasons. First, unlike the situation in *Cinerama Hotels,* the plaintiff's cause of action was unrelated to the defendant's activities in the forum state, thus requiring a greater number of jurisdictional contacts.[37] Additionally, the case preceded *Buckeye Boiler* by fourteen years.

The last of the three precedents, *Miller v. Surf Properties, Inc.,*[38] a 1958 decision of the New York Court of Appeals, presents factual circumstances which squarely support the decision in *Cinerama Hotels.* Unfortunately, the New York court's cursory analysis and failure to consider adequately the jurisdictional principles established by the Supreme Court also subject *Surf Properties* to the same defects which impair *Cinerama Hotels.* Holding that New York had no jurisdiction over an out-of-state hotel, the New York Court of Appeals spent only a little more time and effort than did its California counterpart. It seemed to prefer the term "doing business" rather than "minimum contacts,"[39] more than a decade after *International Shoe.* Moreover, aside from a brief reference to that opinion, *Surf Properties* reverts to the pre-*International Shoe* era by considering such a mechanical factor as where the hotel reservation contracts became final.[40]

These were the three earth shaking precedents relied upon by the California Supreme Court as "established decisional law." Perhaps the court can be excused to a certain extent since a good deal of the court's energies were diverted to the apparently more important issue of forum non conveniens. Nevertheless, the court expressly stated that upon remand, the trial court, after considering additional documentary evidence, would be able to decide whether the case would be "clearly lodge[d] . . . on one side or the other of the governing rules of [jurisdictional] law."[41]

Despite the paucity of discussion in *Cinerama Hotels* and the lack of depth of the precedents, the rule announced is fairly clear: an out-of-state hotel with no contacts in California except for an independent travel agency which places reservation with

---

37. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952). *See also* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968).

38. 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

39. *Id.* at 478, 151 N.E.2d at 875, 176 N.Y.S.2d at 319.

40. *Id.* at 479-80, 151 N.E.2d at 875-76, 176 N.Y.S.2d at 320-21.

41. 15 Cal. 3d at 865, 126 Cal. Rptr. at 820, 544 P.2d at 956.

it on a regular basis[42] is not subject to personal jurisdiction in California. Moreover, this is California's interpretation of federal constitutional law, since California's jurisdiction over foreign corporations goes to the constitutional line.[43]

The rationale for the *Cinerama Hotels* rule, however, is not as obvious as the court would like to assume. Any reliance on the independence of the travel agency would appear to conflict with one of the court's earlier statements,[44] as well as those of its lower appellate courts[45] and the better holdings in some of its sister states.[46] Moreover, *Cinerama Hotels* appears to signal a retreat from *Buckeye Boiler*'s emphasis on economic activity rather than form, since the opinion refers neither to the economic benefit derived by the Waikiki Surf Hotel from business regularly transacted with American Express,[47] nor to the total business Waikiki Surf conducted in California through all of its independent travel agents.[48]

II. Precedent for Jurisdiction Over Travel Related Defendants

Before making any further comparison between *Cinerama Hotels* and *Buckeye Boiler,* it may be useful to examine other decisions dealing solely with hotels, airlines, and other such travel related businesses to ascertain judicial willingness to apply the economic benefit theory to the travel industry. *Cinerama Hotels* gave us the "established decisional law" as of 1976; clearly an inquiry seven years later should consider whether other opinions also reflect the reasoning adopted in *Cinerama*

---

42. *See infra* text accompanying notes 90-92.

43. Cal. Civ. P. Code § 410.10 (West 1982).

44. Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959) (since the minimum contacts test was satisfied, a defendant manufacturer was subject to jurisdiction effected through service of process on its sales representative, whether or not the representative was designated as an independent contractor, agent, or employee).

45. Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 265 P.2d 130 (1953); Iowa Mfg. Co. v. Superior Court, 112 Cal. App. 2d 503, 246 P.2d 681 (1952); Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P.2d 968 (1952); Thew Shovel Co. v. Superior Court, 35 Cal. App. 2d 183, 95 P.2d 149 (1939).

46. *See, e.g.,* Hollingsworth v. Cunard Line, Ltd., 152 Ga. App. 509, 263 S.E.2d 190 (1979); Gullett v. Qantas Airways, Ltd., 417 F. Supp. 490 (D. Tenn. 1975).

47. *See infra* text accompanying notes 90-93.

48. The record is silent on the extent of Waikiki Surf's use of other travel agents (independent or otherwise) in California, but it is unlikely that the hotel's representation in California was limited to only one travel agent or one office of that travel agent in the entire state.

Hotels.

As might be expected there are numerous cases dealing with this issue, many of which are diametrically opposed to the rationale of *Cinerama Hotels,* and some of which, significantly, had been decided prior to the decision in that case. Unfortunately there are no state supreme court opinions other than *Miller v. Surf Properties, Inc.,*[49] dealing with the narrow fact situation in *Cinerama Hotels,* and no opinions which focus on the economic benefit theory to the extent *Buckeye Boiler* did. However, there are several well-reasoned opinions elucidating jurisdictional limits over travel related businesses in states where defendants were neither physically located nor doing much more than carrying on a "ticket" business.[50]

The best of these opinions is probably *Hollingsworth v. Cunard Line, Ltd.*[51] Plaintiff purchased tickets through a local travel agent for a cruise around the world on one of defendant's ships. Upon his return to Georgia, plaintiff sued defendant for breach of contract and fraud. Defendant had advertised on at least two occasions in an Atlanta newspaper where references were made to the Thomas Cooke Travel Agency which had been employed "to handle the nationwide promotion of the . . . trip."[52] Plaintiff had made all arrangements for the cruise with Osborne, another travel agency, which had been issued blank passenger ticket stock from Cunard, although confirmation was required by defendant itself in New York. The trial court granted defendant's motion to dismiss for lack of jurisdiction, but the court of appeals reversed. Significantly, the court of appeals did not rely on Osborne's status as an agent or independent contractor, but rather on the travel agent's " 'activities and status in a realistic commercial light.' "[53] Stating that advertising alone was not sufficient to establish jurisdiction, the court then went on to find that the purpose of the advertising "was to

---

49. 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958). *See supra* text accompanying note 38.

50. In Kenny v. Alaska Airlines, Inc., the court applied the term "ticket cases" to those situations "in which the ticket of the defendant for transportation in other states, was sold in a particular state by a connecting carrier, and where the question arises as to whether such act alone, constitutes doing business on the part of that defendant in that state." 132 F. Supp. at 852 n.11.

51. 152 Ga. App. 509, 263 S.E.2d 190 (1979).

52. *Id.* at 510, 263 S.E.2d at 191.

53. *Id.* at 513, 263 S.E.2d at 193 (quoting Mulhern v. Holland America Cruises, 393 F. Supp. 1298, 1302 (D.N.H. 1975)).

create consumer demand for the advertised product and the *created business cycle* was completed through the implied appointment of local travel agencies by forwarding to them blank ticket stock for the particular advertised cruise."[54] The court noted that "the commercial travel business is apparently operated on an organizational arrangement so as to insulate the carrier from local jurisdiction."[55] Placing substance over form the court concluded that if Cunard had done all the acts which Osborne did there would be no question of jurisdiction over Cunard.

Gullett v. Qantas Airways, Ltd.,[56] provides a somewhat similar situation and an analagous holding. Plaintiff obtained his airline tickets from a local travel agent in Nashville, Tennessee, for transportation by Qantas in the South Pacific. Since the Tennessee long arm statute is congruent with the federal due process clause,[57] the federal district court's job was merely to determine whether Qantas' contacts in Tennessee were sufficient to expose it to jurisdiction under *International Shoe*'s minimum contacts test. In applying this test, the court focused on the actual benefits derived from Qantas' continuous and systematic solicitation. Finding that defendant advertised and solicited business in Tennessee, maintained listings in telephone directories, made occasional calls on local travel agents through its salesmen, and conducted over $140,000 worth of business between 1972 and 1974, the court decided that jurisdiction was proper.[58] Since the defendant "purposefully entered the commercial market in Tennessee," it was not "unreasonable to require [Qantas] to defend" itself in that state.[59]

Several other decisions have upheld jurisdiction over out-of-state hotels and airlines where some combination of the following contacts existed: advertising in the forum state; accepting reservations and deposits through local travel agencies, subject to confirmation by defendant; supplying travel agencies with brochures; and maintaining toll free telephone numbers.[60] Either

---

54. *Id.*, 263 S.E.2d at 193 (emphasis added).
55. *Id.* at 513-14, 263 S.E.2d at 193.
56. 417 F. Supp. 490 (M.D. Tenn. 1975).
57. *Id.* at 493.
58. *Id.* at 497.
59. *Id.*
60. Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481 (7th Cir. 1968); Ladd v. KLM Royal Dutch Airlines, 456 F. Supp. 422 (S.D.N.Y. 1978); Forsythe v. Cohen, 305 F. Supp. 1194 (D.R.I. 1969); Reed v. American Airlines, Inc., _ Mont. _, 640 P.2d 912 (1982). Even the New York Court of Appeals has found jurisdic-

explicitly or implicitly, these decisions generally refer to *International Shoe*'s minimum contacts standard; they find in the activities of the defendant contacts sufficient to make it reasonable to subject the defendant to the forum state's jurisdiction. *Forsythe v. Cohen*[61] suggested that "an intentional scheme of interstate operation by hotel proprietors competitively seeking economic benefits satisfies . . . due process."[62] In *Hutter Northern Trust v. Door County Chamber of Commerce,*[63] the court looked closely at defendant's argument that mere solicitation could not support jurisdiction. The court rejected this claim since the advertising and other forms of solicitation were successful in generating business in Wisconsin from the Illinois market.[64] In *Ladd v. KLM Royal Dutch Airlines*[65] and *Reed v. American Airlines, Inc.,*[66] jurisdiction was upheld although neither airline maintained scheduled flights within the respective jurisdictions. The defendants had, however, advertised in the forum state, provided travel agents with posters and brochures, maintained telephone book listings and occasionally sent personnel into the jurisdiction to train independent travel agents. The airlines' sales in the forum states averaged well over $250,000 and $800,000 respectively, for two consecutive years.[67]

Paralleling the argument made in *Cinerama Hotels,* in almost every one of these cases the out-of-state defendant attempted to hide behind the independent contractor status of the local travel agency. Those courts which upheld jurisdiction were uniformly unimpressed by this defense. The *Gullett* court re-

---

tion in these circumstances. Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967), examined the activities of a local travel agent generating business in New York. The court found it significant that this agent did "all the business which [the defendant] could do were it here by its own officials." *Id.* at 537, 227 N.E.2d 854, 281 N.Y.S.2d 44. Submission to jurisdiction was a "part of the price which may properly be demanded" of foreign corporations seeking to tap the New York market. *Id.* at 538, 227 N.E.2d 854, 281 N.Y.S.2d at 45. The approach taken in *Frummer* resembles that of *Hollingsworth* and *Gullett,* since all of the defendant's contacts in New York occurred through an agent. The number of contacts present in *Frummer* was much greater, however. Additionally, since the defendant and the nonprofit travel agency were commonly owned, the court had less difficulty attributing the travel agency's actions to the defendant. *See id.*

61. 305 F. Supp. 1194 (D.R.I. 1969).

62. *Id.* at 1196.

63. 403 F.2d 481 (7th Cir. 1968).

64. *Id.* at 485-86.

65. 456 F. Supp. 422 (S.D.N.Y. 1978).

66. _ Mont. _, 640 P.2d 912 (1982).

67. *Ladd,* 456 F. Supp. at 424; *Reed,* _ Mont. at _, 640 P.2d at 913-14.

jected the independent contractor argument out of hand, stating that it should not "serve to immunize" the defendant from suit in the forum state: " 'The fact that physical contacts are minimized through the use of independent contractors and distributors does not alter the basic existence of . . . [a defendant's] involvement in, and its pecuniary benefit from, a full exploitation of the . . . market.' "[68] *Buckeye Boiler,* of course, took this same position.

Although all these cases involved some advertising by either the local agent or the defendant itself, they do not preclude jurisdiction in the absence of this form of solicitation. Even if it is assumed that in *Cinerama Hotels* no advertising was conducted in California by either Waikiki Surf or its local agent, personal jurisdiction still may be asserted. Advertising is only one of many factors considered when assessing minimum contacts.[69] Direct sales and advertising can have the same effect; the solicitation of business "*either through sales persons* or through advertising" is a significant jurisdictional contact.[70] I submit that it is not the form of the business solicitation that is legally significant, but rather the economic reality that business has been solicited and solicited successfully. This position is consistent with *World-Wide Volkswagen Corp. v. Woodson*[71] as well as *International Shoe* and *Buckeye Boiler.* It is the *carrying on* of business rather than the *method of initiating* the business that is material. Thus, jurisdiction would have been proper in *Cinerama Hotels* upon a finding that Waikiki Surf actually engaged in business in California through an agent, whether that agent advertised on its behalf or not.

III. Supreme Court Guidelines

The position of the California Supreme Court that solicitation through an independent travel agency immunizes a hotel from jurisdiction highlights the difficult question at issue: Should an out-of-state hotel, airline or other type of carrier be subject to jurisdiction in a state where it has no contacts except for representation by an independent travel agency which earns

---

68. Gullett v. Qantas Airways, Ltd., 417 F. Supp. 490, 496 (quoting Curtis Publishing Co. v. Golino, 383 F.2d 586, 593-94 (5th Cir. 1967)).

69. *See infra* text accompanying notes 88-89.

70. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (emphasis added).

71. *Id.*

commissions by accepting deposits and reservations, subject to confirmation, on a systematic and regular basis? Although most of the factual situations in the opinions finding jurisdiction over defendants in the travel industry presented some contacts in addition to solicitation, the reasoning of these courts can clearly be extended to allow jurisdiction in the *Cinerama Hotels* context, when solicitation generates business on a regular and systematic basis. Jurisdiction over this type of defendant is entirely consistent with the jurisdictional limits imposed by the due process clause as construed by the United States Supreme Court.

In the thirteen years following *International Shoe* the Supreme Court issued four additional opinions dealing with personal jurisdiction.[72] The last of these, *Hanson v. Denckla,*[73] was followed by a dry spell of nineteen years, ending in 1977 with *Shaffer v. Heitner.*[74] Since then the Court has made further refinements in *Kulko v. Superior Court*[75] and *World-Wide Volkswagen Corp. v. Woodson.*[76]

None of these cases deals with the narrow question under consideration in this Article. Nevertheless, the general concepts outlined by the Supreme Court clearly point in the direction of upholding jurisdiction. In the seminal case on minimum contacts, *International Shoe,* the Court emphasized the significance of "continuous and systematic"[77] activities within the forum state, the "quality and nature"[78] of those activities, the rejection of "mechanical"[79] criteria, and the enjoyment of "the benefits and protection of the laws of [the forum] state,"[80] the totality of which would indicate whether it was reasonable to subject a defendant to litigation there. Building on the language in *International Shoe* which stressed the importance of the relationship between the obligation sued upon and defendant's activities in the state,[81] *Perkins v. Benguet Consolidated Mining Co.*[82] re-

72. Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

73. 357 U.S. 235 (1958).

74. 433 U.S. 186 (1977).

75. 436 U.S. 84 (1978).

76. 444 U.S. 286 (1980).

77. 326 U.S. at 317.

78. *Id.* at 319.

79. *Id.*

80. *Id.*

81. *Id.* at 317, 319.

82. 342 U.S. 437 (1952).

quired more extensive forum contacts when there is no connection between plaintiff's cause of action and defendant's forum activities.[83] *McGee v. International Life Insurance Co.*[84] included another factor: the forum state's "manifest interest in providing effective means of redress for its residents."[85] In *Hanson v. Denckla* the Supreme Court added a slight gloss to *International Shoe* when it held that there had to "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 protection of its laws."[86] A domestic relations case, *Kulko v. Superior Court* went to some pains to show, contrary to the California Supreme Court's opinion in that case,[87] that the *Hanson v. Denckla* test was not met, and that the father in New York had not derived any financial benefit sufficient to confer jurisdiction on California merely because his daughter was living in California with her mother. In *World-Wide Volkswagen,* plaintiffs sued out-of-state automobile dealers for damages sustained while traveling through Oklahoma. The Court reviewed these precedents and then searched the record for those "affiliating circumstances"[88] required to establish jurisdiction. It catalogued the relevant factors this way:

> [The defendants] carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the state. Nor does the record show . . . that they indirectly, through others, serve or seek to serve the Oklahoma market.[89]

Given the absence of jurisdictional contacts, the Court concluded that personal jurisdiction could not be asserted.

Let us reexamine the facts of *Cinerama Hotels* in light of these principles and the economic activity test of *Buckeye Boiler*

---

83. *Id.* at 447-49.

84. 355 U.S. 220 (1957).

85. *Id.* at 223.

86. 357 U.S. at 253 (emphasis added).

87. The Supreme Court of California had asserted that obtaining financial benefit from California was a sufficient ground for California courts to uphold a finding of jurisdiction over the out-of-state defendant. Kulko v. Superior Court, 19 Cal. 3d 514, 138 Cal. Rptr. 586, 564 P.2d 353 (1977), *rev'd,* 436 U.S. 84 (1978). This would appear to be contrary to its rationale in *Cinerama Hotels.*

88. 444 U.S. at 295.

89. *Id.*

in order to ascertain whether the California court's rationale is consistent. Although the record in *Cinerama Hotels* does not clearly depict the extent of the relationship between the defendant, Waikiki Surf, and the local travel agent, American Express, there are indications that the transaction between the two in which plaintiff Archibald was involved was not a single isolated transaction. On the contrary, the arrangement between the two was probably a regular and continuous business relationship such as those found in *Hollingsworth*[90] and *Gullett*,[91] although there is no indication of the amount of business generated. This assumption is reinforced by the fact that no contrary assertion was made by the parent corporation of Waikiki Surf, Waikiki Hotels-Seven, in its affidavit supporting the motion to dismiss. It is significant that the plaintiff in *Cinerama Hotels* sought to assert a class action on behalf of plaintifffs who had made their reservations with Hawaiian hotels through American Express. In addition, the affidavit of American Express stated that it did "business throughout the world representing hotels in the sale and marketing of computerized reservations."[92] As a consequence, the assumption that American Express and Waikiki Surf were engaged in systematic and regular business transactions would seem warranted. The record was also silent on the availability of Waikiki Surf brochures at the office of American Express and whether the hotel itself, or American Express on its behalf, did any advertising in California.[93] Accordingly, let us assume that American Express had no Waikiki Surf brochures and that no advertising by or on behalf of that hotel occurred in California. At a minimum, the jurisdictional contacts include the representation by a local travel agent of an out-of-state hotel for the solicitation and receipt of reservations and deposits on behalf of that hotel, with confirmations made only by the hotel, and commissions paid to the local travel agent by the hotel.

I submit that such contacts are sufficient to support jurisdiction over a hotel or an analogously situated airline or ship-

90. Discussed *supra* in text accompanying note 51.

91. Discussed *supra* in text accompanying note 56.

92. 15 Cal. 3d at 863, 126 Cal. Rptr. at 818, 544 P.2d at 954.

93. A visit by a research assistant to a local Oregon office of American Express disclosed brochures of all kinds provided by hotels in Hawaii, although not one for the Waikiki Surf. The travel agent did make available for inspection, however, a large volume which listed seven Waikiki Surf Corp. hotels, including the Waikiki Surf. A toll free number was also listed for these hotels. The clerk added that she would be glad to make a reservation for the student at the Waikiki Surf.

ping company, provided the arrangement is carried out on a continuous and systematic basis, something more than an insignificant amount of business is generated, and the cause of action is related to defendant's contacts in the forum state.[94] By soliciting business through American Express, Waikiki Surf was indirectly enjoying the "benefits and protection of [California's] laws" referred to in *International Shoe*. The "purposeful activity" required by *Hanson v. Denckla* is present, since Waikiki Surf's employment of American Express as its local travel agent was clearly "purposeful." Because its long-arm statute extends as far as permitted by the United States Constitution, California would also seem to have a legitimate and established policy of providing effective redress for its injured citizens, an important factor in *McGee*. The *Kulko* "financial benefit" and *Buckeye Boiler* "economic activity" tests are also satisfied, if, as assumed, Waikiki Surf was successfully engaged in regular and systematic solicitation of business in California. In fact, returning to *World-Wide Volkswagen*, we discover that the jurisdictional facts in *Cinerama Hotels* are identical with Justice White's catalog of affiliating circumstances, except for a single factor, namely, the closing of sales in the forum state.[95] Every other element is present: the out-of-state hotel did (1) carry on activity in California, (2) perform services there, (3) avail itself of the privileges and benefits of California law, (4) solicit business in California,[96] and (5) serve the California market. That Waikiki Surf did all this through an independent contractor as its local representative should make no difference: *World-Wide Volkswagen* expressly refers to the service of a market "indirectly, through others" as

---

94. Plaintiff alleged injury due to discriminatory pricing of hotel accommodations in Hawaii. Although the injury could arguably be considered as occurring outside the forum state, it is nevertheless directly related to defendant's solicitation of business within the state. *Cf.* Gullett v. Qantas Airways, Ltd.:

> In the case at bar, the cause of action cannot fairly be said to be entirely unrelated to defendant's activities within this state. An injury occurring on a flight which was contracted and paid for within this state cannot be said to be wholly unrelated to the sale of the ticket. There is an obvious logical nexus between defendant's exploitation of the Tennessee market and an injury occurring on a flight which was contracted for as a result of the exploitation.

447 F. Supp. 490, 497 (D. Tenn. 1975). When the cause of action is entirely unrelated to the forum activities, more forum contacts are necessary before jurisdiction may be asserted. *See supra* text accompanying notes 81-83. *See also* Kenny v. Alaska Airlines, Inc., 132 F. Supp. 838 (S.D. Cal. 1955).

95. 444 U.S. at 295.

96. *See supra* text accompanying notes 69-71.

an affiliating circumstance.[97] Moreover, California itself has on several occasions looked past the purely formal in order to find the substance.[98] *Buckeye Boiler* expressly rejected the argument that a defendant manufacturer could avoid jurisdiction by employing a middleman.[99] There is no reason why hotels, airlines, and other carriers should escape jurisdiction by such insulation when manufacturers cannot. *Hollingsworth* and *Gullett* provide us with emphatic precedent.[100]

If we reject the independent contractor argument, as it seems we must, is there any reason left to deny jurisdiction over this class of defendants? *Cinerama Hotels* suggests that somehow it would be unfair or unreasonable to subject a hotel located in Hawaii to jurisdiction in California when the nature and quality of its contacts revolve around solicitation through travel agencies. This reluctance to follow the reasoning of *Buckeye Boiler* to its logical conclusion can be attributed to a fear of the results such a holding would authorize: hotels and transportation firms would be subject to jurisdiction wherever they sold their accommodations through local travel agencies.[101] The simple response to this concern is, Yes, and why not? Are they not engaged in *Buckeye Boiler*'s "economic activity within [the] state,"[102] receiving "pecuniary benefit from a full exploitation of the . . . market"?[103] Have they not "purposefully availed [themselves] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws"?[104] Do they not solicit business there indirectly and thus serve that particular market?[105] When a regular and systematic business generates quantitatively significant income, subjection to jurisdiction should be "part of the price which may properly be demanded of it."[106]

Admittedly the hotel or airline business differs from the

---

97. 444 U.S. at 295.

98. *See supra* notes 44-48 and accompanying text.

99. 71 Cal. 2d at 902-03, 80 Cal. Rptr. at 120, 458 P.2d at 64.

100. Cases discussed *supra* part II. *See also* Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).

101. *See Cinerama Hotels*, 15 Cal. 3d at 864, 126 Cal. Rptr. at 819, 544 P.2d at 955.

102. 71 Cal. 2d at 902, 80 Cal. Rptr. at 120, 458 P.2d at 64.

103. Curtis Publishing Co. v. Golino, 383 F.2d 586, 593-94 (5th Cir. 1967).

104. Hanson v. Denckla, 357 U.S. at 253.

105. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 295.

106. Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45 (1967).

manufacturing industry, but that does not mean the jurisdictional test should also differ. The test for a manufacturing defendant requires basically that the defendant receive economic benefits foreseeably resulting from business within a particular state. The travel industry also obtains economic benefits foreseeably resulting from business within a particular state, although the business is obtained through intermediaries. The only apparent difference between the two industries is the nature of the product sold: the manufacturer produces a tangible piece of merchandise that comes to rest in the forum state; the travel industry supplies a service rendered in a sister state after soliciting the business in the forum state. Economically, however, the transactions are substantially the same. Just as the manufacturer is dependent upon the sale of his products at the final stage of the business cycle, the travel industry relies heavily upon business initiated in the forum state at the incipient phase of the economic cycle. Although the facts will differ for individual defendants, as a general rule both industries owe their very existence—almost, if not entirely—to the initiation or conclusion of the transaction within the forum state.

The reasonableness of asserting jurisdiction based on solicitation through travel agents hinges upon the status of the travel agent as a necessary link in the business cycle. It appears that travel agents are absolutely essential to the suppliers[107] in the travel industry.

> As a general rule the marketing and delivery of a given travel service rarely involves a single, discrete travel supplier or seller. More often than not a supplier will market a specific service through intermediaries such as tour operators, wholesalers and travel agents.[108]

Travel agents are middlemen in the travel industry.[109] *Buckeye Boiler* refused to allow a manufacturer's middleman to immunize the manufacturer from jurisdiction. An application of

---

107. "Suppliers" includes air carriers, steamships, railroads, buses, rental cars, and hotels. Suppliers are entities which are ultimately responsible for the delivery of transportation and accommodations to the traveling public. T. DICKERSON, TRAVEL LAW § 1.02 (1982).

108. *Id.* § 1.05[1].

109. An overwhelming percentage of travel services [is] marketed by so-called middlemen, persons who sell travel services supplied by others. Middlemen consist of travel agents, wholesalers and tour operators. Travel agents retail travel services and give advice to travelers.

Id. § 5.05.

Buckeye Boiler to the travel industry would be equally appropriate. When judges fail to analyze properly the symbiotic economic relationships of the travel industry, decisions not accurately reflecting the realities of the industry often result.

> Taken as a whole, the component parts of the travel industry constitute an integrated and inter-related system. It is impossible to properly evaluate and analyze a travel case without first considering how the particular travel service was marketed and delivered to the injured traveler. . . . On several occasions, decisions in travel cases have been rendered which failed to consider the inter-relationship between the various components of the travel marketing and delivery system. As a consequence such decisions have been unjust, inequitable and poorly reasoned.[110]

Returning to *Cinerama Hotels,* it is extremely questionable whether the majority of resort hotels in Hawaii could last more than a week or so without the tourist trade from the mainland. The use of travel agencies to represent them in the forum state is the first step in the chain of a business cycle. Regardless of the type of representation used—media advertising, brochures, or personal solicitation—if successful, it is followed by a reservation and deposit, confirmation by the hotel, and finally a stay at the hotel. This first step, representation in the tourist's home state, is essential to the continued success of the resort hotel trade.[111] As the court observed in *Hollingsworth,* if the out-of-state carrier itself had actually done all that the travel agent had done on its behalf there would have been no question of jurisdiction.[112]

Accepting the principle that systematic and continuous solicitation generating a significant amount of business will subject a travel-related defendant to jurisdiction in a claim arising out of the defendant's activities in the forum state, the limits of the rule should be explored, at least tentatively. Economically, it seems more reasonable to subject to out-of-state jurisdiction large resort complexes and hotel chains that have a regional or national presence and that conduct aggressive solicitation programs. It is less clear that a one-location motel which relies primarily on advertisements in phone books or automobile club

110. *Id.* § 1.02.
111. *Id.* at §§ 1.02, 1.05, 5.01, 5.02.
112. 152 Ga. App. at 514, 263 S.E.2d at 193.

listings should automatically be subjected to jurisdiction wherever the listings appear.

The basic test of *International Shoe* allows an assertion of jurisdiction whenever defendant's contacts with the state are "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[113] Understandably, courts have been reluctant to superimpose a specific minimum on the minimum contacts standard; jurisdictional issues continue to be decided on a case-by-case basis with little articulation of the precise amount of income that can be earned before the contacts giving rise to the business are deemed substantial enough to support jurisdiction.

Some courts, including the Supreme Court, have found jurisdiction in situations where defendant's contacts were quite minimal.[114] On the other side of the minimum contacts line, however, are decisions such as *Speigel, Inc. v. Federal Trade Commission.*[115] In *Speigel* the United States Court of Appeals for the Seventh Circuit enforced an order of the Federal Trade Commission requiring that Speigel, a large mail order house, cease and desist from instituting collection suits in its own state against most out-of-state customers because the practice violated public policy as expressed in the Federal Trade Commission Act.[116] Although this was not a true minimum contacts case under the fourteenth amendment, the rationale of the court that such collection actions denied defendants "a meaningful opportunity to defend themselves in court"[117] would clearly be applicable in a case-by-case due process approach. In a somewhat similar vein, a few courts have held that a single commercial transaction involving a relatively small amount of money will not expose the *buyer* to jurisdictional hazards.[118] Of course, in travel industry cases the defendant will almost always be a seller

113. 326 U.S. at 316.

114. *See, e.g.,* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Prentice Lumber Co. v. Spahn, 156 Mont. 68, 474 P.2d 141 (1970); State *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 252 Or. 121, 448 P.2d 571 (1968). Consistent with these precedents are cases allowing jurisdiction based on a single tortious act. *See, e.g.,* Hess v. Pawloski, 274 U.S. 352 (1927); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

115. 540 F.2d 287 (7th Cir. 1976).

116. 15 U.S.C. § 45 (1976).

117. 540 F.2d at 293.

118. Oswalt Indus., Inc. v. Gilmore, 297 F. Supp. 307 (D. Kan. 1969); Leoni v. Wells, 264 N.W.2d 646 (Minn. 1978); Fourth Northwestern Nat. Bank v. Hilson Indus., 264 Minn. 110, 117 N.W.2d 732 (1962); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959).

of services rather than a buyer.

Probably the only comment that can be made with some assurance concerning the problem of subjecting a small, single-location, out-of-state motel or hotel to jurisdiction, is that the minimum contacts test will remain as indefinite in the travel industry as it is in the manufacturing industry. As a result, a small motel which conducts a regular advertising campaign in another state or chooses to avail itself of the services of local travel agencies may well be subjecting itself to jurisdiction when the volume of business it generates from that state reaches a point where the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[119] A motel that conducts no program of solicitation and that receives only sporadic business through its listings could conceivably remain outside the jurisdiction of foreign states.

IV. Conclusion

Wherever the limits of the minimum contacts doctrine eventually come to rest, it is certain that the prevailing principles of jurisdiction applied to the travel industry allow assertion of personal jurisdiction over travel-related defendants that receive consequential amounts of business from continuous and systematic solicitation through independent local travel agents. The reluctance of some courts to subject hotels and passenger carriers to jurisdiction in every state where they intentionally and systematically generate significant income is legally and economically unfounded. The reliance on mechanical principles and the independent status of travel agents exhibited in *Archibald v. Cinerama Hotels*,[120] *Miller v. Surf Properties, Inc.*,[121] and similar decisions should be abandoned. Smaller defendants not depending as extensively upon out-of-state solicitation would continue to be protected from unreasonable assertions of jurisdiction under traditional applications of the minimum contacts and economic benefits rule. Both law and economics demand that hotels, airlines, and other defendants in the travel industry be subjected to personal jurisdiction under the same standards, applied in the same manner, as those applied to defendants in the manufacturing and other industries.

---

119. *International Shoe*, 326 U.S. at 316.
120. 15 Cal. 3d 853, 126 Cal. Rptr. 811, 544 P.2d 947 (1976).
121. 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).