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## NOTE

### *Poyner v. Erma Werke GmbH: The Long-Arm Statute as a Protectionist Device\**

#### INTRODUCTION

Technological and economic progress have continually fostered the development of international trade. As greater quantities of international goods enter American markets, there is a greater potential that American consumers will bring actions against international manufacturers for injuries sustained from defective products. Consequently, state and federal courts must consider the constitutional restrictions involved in asserting personal jurisdiction over alien<sup>1</sup> as well as over foreign<sup>2</sup> defendants. One hundred years ago, a state's jurisdictional power was virtually limited to its territorial boundaries.<sup>3</sup> State and federal courts, however, began to abandon this restrictive jurisdictional approach as interstate commerce developed.<sup>4</sup> In the seminal case of *International Shoe Co. v. Washington*,<sup>5</sup> the Supreme Court expanded a state's jurisdictional authority by holding that a nonresident defendant could be served with process if he sustained "minimum contacts" with the forum.<sup>6</sup> After the Supreme Court announced this flexible minimum contacts standard, state legislators passed long-arm statutes which enabled state and federal courts to establish personal jurisdiction over

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\* Winner, 1982 Lowden-Wigmore Prize. Northwestern University School of Law annually awards the Lowden-Wigmore Prize to the best student contribution to each of its legal publications.

<sup>1</sup> As used in this note, the term "alien" refers to an international corporate defendant.

<sup>2</sup> As used in this note, the term "foreign" refers to an out-of-state corporate defendant.

<sup>3</sup> *Pennoy v. Neff*, 95 U.S. (5 Otto) 714 (1878).

<sup>4</sup> See *infra* note 57.

<sup>5</sup> 326 U.S. 310 (1945).

<sup>6</sup> *Id.* at 316.

nonresident defendants.<sup>7</sup> Generally, these statutory provisions permit constructive service over nonresident defendants who conduct business or who commit other acts within the state. Thus, if a nonresident defendant's contact falls within the constitutional scope of the state's long-arm statute, an injured plaintiff may seek redress in a court within his state.<sup>8</sup>

Recently, the Supreme Court modified the flexible minimum contacts standard enunciated in *International Shoe*. In *World-Wide Volkswagen v. Woodson*,<sup>9</sup> the Supreme Court held that the minimum contacts inquiry must focus upon whether the defendant had purposefully availed himself of the privilege of conducting business in the forum state. The Court emphasized that the defendant could then reasonably have anticipated litigating in that forum. State and federal courts have generally followed the *Volkswagen* standard when determining the constitutionality of asserting personal jurisdiction over nonresident defendants.

Some courts, however, have concluded that jurisdictional requirements should be relaxed when evaluating whether an alien defendant sustained sufficient contact with a forum. In *Poyner v. Erma Werke GmbH*,<sup>10</sup> the Sixth Circuit adopted this more relaxed jurisdictional standard and upheld personal jurisdiction over a German corporation which had no direct contact with Kentucky. This note first will examine personal jurisdiction theory as it has been applied in the United States and contend that the Sixth Circuit should have applied the *Volkswagen* standard to determine whether defendant Erma's indirect contact with Kentucky met due process requirements. Secondly, this note will evaluate arguments in favor of applying a more liberal "minimum contacts" formula to alien defendants, and argue that there is no reasonable basis for relaxing jurisdictional requirements when the defendant is an alien corporation. Finally, this note will discuss the implications of discriminating against alien defendants and conclude that the economic and political disadvantages of applying a more liberal construction of the minimum contacts formula to alien defendants clearly outweigh any jurisdictional advantages.

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<sup>7</sup> Rule 4(e) of the Federal Rules of Civil Procedure authorizes state legislatures to enact long-arm statutes. FED. R. CIV. P. 4(e). Many of the statutes are modeled after § 103 of the Uniform Interstate and International Procedure Act.

<sup>8</sup> See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

<sup>9</sup> *Id.*

<sup>10</sup> 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

## BACKGROUND

The plaintiff, Joseph Poyner, a Kentucky resident, filed a products liability action against the defendant, Erma Werke GmbH (Erma), one of Erma's distributors (L.A.), and Erma's insurer<sup>11</sup> (Insurance Company of North America—INA) based on negligence and breach of warranty in the manufacture of a .22 caliber, semi-automatic pistol. Erma is a wholly owned German subsidiary of an American firm, Lear Siegler Industries (LSI).<sup>12</sup> In the business of manufacturing firearms, including .22 caliber semi-automatic pistols,<sup>13</sup> Erma has no assets or offices in the United States<sup>14</sup> and conducts no business outside of Germany. Its products are sold to German and American distributors who market the pistols in Germany and the United States.<sup>15</sup>

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<sup>11</sup> At the time of Poyner's accident, INA provided Erma with liability insurance. INA is an American insurance company which operates a branch office in Germany. In its brief, defendant INA stressed that it had decided to terminate Erma's insurance coverage since "Erma had failed to notify INA of Poyner's claim, and had allowed limitations to intervene as a bar to a claim for coverage." Brief for Appellee, *Poyner v. Erma Werke GmbH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

<sup>12</sup> Poyner joined Lear Siegler Industries as a defendant in an earlier action against Erma and one of its distributors, L.A. In *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), the Sixth Circuit ruled that LSI was not liable for Poyner's damages.

<sup>13</sup> For many years, Erma has manufactured .22 caliber semi-automatic pistols. Erma admitted it supplied the pistol to a German distributor, Wischo KG, on August 8, 1965. In an interrogatory, LSI stated that according to its information and belief "at some previous time L.A. Distributors was a customer of Wischo KG." *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 4 (W.D. Ky. Sept. 6, 1977).

<sup>14</sup> *Id.* at 3.

<sup>15</sup> The district court emphasized that L.A. was Erma's exclusive distributor in the United States. As a result, the district court concluded that Erma should not be held liable for Poyner's injuries since all profits made from the sale of Erma's products in the United States accrued to L.A. Erma's lack of control over L.A. is critical to due process analysis. Although the courts are not in accord on this issue, some jurisdictions held that a distributor's act should not be imputed to an alien or foreign wholesaler defendant absent that wholesaler's control over the distribution. *See, e.g.*, *Marston v. Gant*, 357 F. Supp. 1122, 1123 (E.D. Va. 1972) (court dismissed a patent infringement action, asserting that jurisdiction was lacking because the defendant did not appear to control the distributor's activities, and did not partly own the distributor's stock). In the context of a parent corporation and its subsidiary, *see Velandra v. Regie Nationale Del Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964) (court rejected the argument that it was justifiable to impute the subsidiary's contact to the parent for purposes of acquiring jurisdiction over the parent corporation). *But cf.* *Blum v. Kawagachi, Ltd.*, 331 F. Supp. 216 (D. Neb. 1971) (court upheld jurisdiction over the defendant even though the defendant did not have any agents marketing his product in the forum, and the sale to the plaintiff was made through an intermediate entity); *Thornton v. Toyota Motor Sales U.S.A., Inc.*, 397 F. Supp. 476, 482 (N.D. Ga. 1975) (court found that the defendant had derived "substantial revenue by placing its products in channels of international commerce [knowing] full well that normal product migration through the distribution chain will inevitably bring a significant number of its automobiles to . . . Georgia"); and *VanEeuwen v. Heidelberg E., Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (1973) (court observed that although the distributor may not be the manufacturer's agent in the legal sense, he is in the practical sense).

On February 28, 1968, Poyner was injured in Kentucky as a result of the negligent firing of a defective pistol manufactured by Erma.<sup>16</sup> According to records, Erma sold the pistol to a German exporter, Wischo KG.<sup>17</sup> No evidence was presented as to the manner in which L.A. acquired the pistol.<sup>18</sup> Erma's records revealed, however, that L.A. sold the gun to Stewart Bear of Nashville, Tennessee,<sup>19</sup> whom L.A. employed on a commission basis.<sup>20</sup> The sale to Bear was the last recorded transaction of the firearm. At the time of Poyner's injury, Lee Dyer of Paducah, Kentucky owned the pistol.<sup>21</sup>

In July, 1969, Poyner filed suit against Erma and L.A. under the Kentucky Long-Arm Statute.<sup>22</sup> Based on LSI's advice, Erma failed to answer the complaint.<sup>23</sup> Erma also refused to provide INA with timely notice of the action.<sup>24</sup> Consequently, a default judgment of \$398,830.77

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<sup>16</sup> Poyner v. Erma Werke GmbH, 618 F.2d at 1187. Poyner is now a paraplegic.

<sup>17</sup> This transaction occurred in Germany on August 8, 1965. Poyner v. Erma Werke GmbH, No. 1981-P(G), slip op. at 6 (W.D. Ky. Sept. 6, 1977).

<sup>18</sup> See *supra* note 13.

<sup>19</sup> Poyner v. Erma Werke GmbH, 618 F.2d at 1191.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* In its brief in *Poyner v. Lear Siegler, Inc.*, the defendant stated that Lee Dyer's son-in-law ultimately purchased the gun. Poyner was injured when he and a minor, Robert Dyer, were playing with the gun. Brief for Appellant at 6, Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977).

<sup>22</sup> Section two of the Kentucky Long-Arm Statute reads in pertinent part:

(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

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4. Causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth, provided that the tortious injury occurring in this commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the commonwealth;

5. Causing injury in this commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth.

KY. REV. STAT. § 454.210(2)(a)(4)-(5) (1970).

<sup>23</sup> In *Poyner v. Lear Siegler, Inc.*, No. 1981-P, slip op. (W.D. Ky. May 1, 1975), the district court found that correspondence between LSI and Erma disclosed that LSI was responsible for Erma's default. *Id.* at 8. An executive at LSI informed Erma's management that:

It is our strategy to, first, help the attorney for the L.A. Distributors Insurance prove that the Erma pistol was not at fault. In this way we can contest the facts in the case without putting Erma into the court's jurisdiction. That is, they must still sue Erma in Germany no matter what the outcome. Second, that LSI is not directly involved in this case.

Brief for Appellee at 9, Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977).

<sup>24</sup> Poyner v. Erma Werke GmbH, 618 F.2d at 1187.

was entered against Erma.<sup>25</sup> In July of 1973, Poyner filed a supplemental complaint against LSI, seeking to recover the judgment obtained against Erma.<sup>26</sup> In an unpublished opinion, the district court held LSI liable for the default judgment.<sup>27</sup> On the basis of LSI's control over Erma,<sup>28</sup> the district court ruled that, for the purpose of this suit, LSI and Erma should be considered one legal entity.<sup>29</sup> On appeal, the Sixth Circuit reversed.<sup>30</sup> The court rejected Poyner's contention that the arrangement between LSI and Erma was a "fraudulent avoidance of jurisdiction,"<sup>31</sup> because the plaintiff had not shown that Erma had defended itself in forums in the United States or subjected its assets to the jurisdiction of American courts prior to its acquisition by LSI.<sup>32</sup> Further, since Erma's operations had not been altered materially subsequent to its purchase by LSI, the court refused to hold LSI liable for the default judgment entered against Erma.<sup>33</sup>

As a result of that decision, INA filed a motion for summary judgment, alleging that there was no valid claim against INA because the Kentucky courts lacked jurisdiction over Erma.<sup>34</sup> On September 7, 1977, the district court granted summary judgment for INA.<sup>35</sup> The court concluded that the Kentucky Long-Arm Statute<sup>36</sup> did not extend jurisdiction over Erma,<sup>37</sup> and that even if it had extended to Erma, assertion of jurisdiction by the Kentucky courts would violate due pro-

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Poyner v. Lear Siegler, Inc., No. 1981-P, slip op. at 7 (W.D. Ky. May 1, 1975).

<sup>28</sup> The district court observed that:

Without the separate corporate entity fiction, *Erma is nothing more than a factory owned by LSI*. Even with the fiction, since *LSI is the sole shareholder in Erma*, whatever happens to Erma necessarily affects LSI to an equal extent. *A closer union of interests would be difficult to imagine.*

Poyner v. Lear Siegler, Inc., No. 1981-P, slip op. at 6 (W.D. Ky. May 1, 1975) (emphasis added).

<sup>29</sup> The district court stressed the state's interest in providing a forum in which the plaintiff could adjudicate his claims. The court observed that had it not held LSI liable, the plaintiff, in order to recover, would have to bring the action in a German court. *Id.* at 5.

<sup>30</sup> Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 1969 (1977).

<sup>31</sup> *Id.* at 960.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 961. The Sixth Circuit also discussed the reluctance of Kentucky courts to hold a parent corporation liable for the actions of a subsidiary absent a showing that but for the parent corporation's control over the subsidiary, the plaintiff could have obtained a remedy against the subsidiary at law.

<sup>34</sup> Brief for Appellee at 3, Poyner v. Erma Werke GmbH, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

<sup>35</sup> Poyner v. Erma Werke GmbH, No. 1981-P(G), slip op. at 15 (W.D. Ky. Sept. 6, 1977).

<sup>36</sup> KY. REV. STAT. § 454.210(2)(a)(4)-(5) (1970). The text of these subsections is quoted *supra* in note 22.

<sup>37</sup> The district court interpreted sections four and five of the Kentucky Long-Arm Statute to be more stringent than the minimum contacts standard. The court held that the Kentucky Long-

cess as defined by the Sixth Circuit<sup>38</sup> and as interpreted by the United States Supreme Court.<sup>39</sup>

On appeal, the Sixth Circuit reversed and upheld personal jurisdiction over Erma.<sup>40</sup> The Sixth Circuit based its conclusion on three factors. First, the Sixth Circuit concluded that the Kentucky legislature intended the Kentucky Long-Arm Statute to reach the outer limits of due process.<sup>41</sup> The reviewing court based its interpretation of the statute on its language, its preamble, and the case law interpreting the statute.<sup>42</sup> Secondly, by imputing L.A.'s business activities in Kentucky to Erma, the court found that Erma's contact with Kentucky satisfied the due process requirements outlined in *International Shoe*<sup>43</sup> and its progeny.<sup>44</sup> Finally, the Sixth Circuit briefly noted the constitutional differ-

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Arm Statute required a foreign corporation to have sustained substantial contacts in Kentucky. *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 9 (W.D. Ky. Sept. 6, 1977).

<sup>38</sup> Apparently, the district court assumed that the Sixth Circuit would apply the minimum contacts standard as enunciated in *Hanson v. Denckla*, 357 U.S. 235 (1958), and inquire, specifically, whether the defendant had purposefully availed himself of the privilege of conducting business in Kentucky. *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 12-14 (W.D. Ky. Sept. 6, 1977).

<sup>39</sup> The district court noted that the Supreme Court's recent decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), retreated from the expansive interpretation of "minimum contacts" set forth in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 14 (W.D. Ky. Sept. 6, 1977).

<sup>40</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d 1186 (6th Cir.), cert. denied, 449 U.S. 841 (1980). The court concluded that Kentucky law would determine the power of a Kentucky court to assert personal jurisdiction over Erma on the basis of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Smart v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963). *Poyner*, 618 F.2d at 1187.

<sup>41</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1189. The Sixth Circuit's interpretation of subsections four and five of the Kentucky Long-Arm Statute was more liberal than the district court's finding that those sections required more substantial contact than required under due process.

<sup>42</sup> *Id.* at 1188-89.

<sup>43</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The *Poyner* court observed that three criteria have been established in the Sixth Circuit to determine due process under *International Shoe's* minimum contacts requirement:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

*Poyner v. Erma Werke GmbH*, 618 F.2d at 1190. This three-pronged test was first enunciated in *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). After the Supreme Court's decisions in *Kulko v. California Superior Court*, 436 U.S. 84 (1978), and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), it is clear that the minimum contacts formula requires that the defendant purposefully avail himself of the privilege of acting or causing a consequence in the forum state. Although the second prong of the test will often serve as a basis for determining if the defendant sustained contact with the forum, the third prong does not advance due process analysis since it only focuses upon whether the defendant's contact with the forum was substantial, and does not discuss if those activities were voluntary.

<sup>44</sup> These opinions demonstrate the Court's varying conclusions concerning the degree of con-

ence between asserting jurisdiction over a foreign defendant and over an alien defendant. The Sixth Circuit observed that the minimum contacts formula served to limit the jurisdictional reach of the sovereign states. As that objective was minimized in an international context, the court submitted that it would be constitutional to apply a less stringent minimum contacts formula to alien defendants.<sup>45</sup> The Sixth Circuit then reversed and remanded, directing the district court to consider other grounds for summary judgment or to dispose of the case on the merits.<sup>46</sup>

## DISCUSSION

### I. THE EVOLUTION OF PERSONAL JURISDICTION THEORY

#### A. *The State's Power to Serve Alien and Foreign Defendants with Process*

Until the United States Supreme Court's landmark decision in *International Shoe*,<sup>47</sup> a state court traditionally asserted jurisdiction over an entity under three sets of circumstances: (1) the physical presence of the defendant or his property in the state;<sup>48</sup> (2) the defendant's consent to suit in that state;<sup>49</sup> or (3) the presence of the defendant's domicile or

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tact with the forum necessary to satisfy due process: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (Court refused to grant jurisdiction over an auto manufacturer who had sold a defective car to the plaintiffs, observing that the defendants could not have reasonably anticipated that the plaintiffs would have been involved in an accident in a distant forum); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (ownership of stock by the directors of a corporation was insufficient contact); *Hanson v. Denckla*, 357 U.S. 235 (1958) (Court rejected the Florida Supreme Court's assertion of jurisdiction over a Delaware corporate trustee, concluding that even though the settlor had resided in Florida and received income from a trust in that State, there was not enough contact to satisfy due process); and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (Court found that entry into an insurance contract, the defendant's sole contact with the forum, was sufficient activity for jurisdictional purposes).

<sup>45</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1192.

<sup>46</sup> *Id.*

<sup>47</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>48</sup> Formerly, state courts were not empowered to serve foreign defendants who were not "present" in the forum state. The prevailing notion was that a state only had power over property in its jurisdiction. See Lynch, *Recent Developments in Securing Jurisdiction Over Foreign Firms and Individuals*, 11 LAW. AM. 375 (1979). For a discussion of the territorial notion of jurisdiction, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer to Denckla, A Review*, 25 U. CHI. L. REV. 569 (1958); Von Mehren & Trautman, *Jurisdiction to Adjudicate, A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

<sup>49</sup> This theory is based on the presumption that a foreign corporation's decision to conduct business in a state constituted its consent to be served with process in that state: Since a corporation could not carry on business within a state without the permission of that state, the state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within the state. Kurland, *supra* note 48, at 578.



residence in that state.<sup>50</sup> The notion that a state's jurisdictional powers were limited to its territorial boundaries was enunciated in *Pennoyer v. Neff*,<sup>51</sup> where the Supreme Court refused to recognize substituted service as a method of acquiring personal jurisdiction over a foreign defendant.<sup>52</sup> The *Pennoyer* Court did not, however, preclude establishing jurisdiction over nonresident defendants. The Court observed that a judgment rendered by a state court would be given full faith and credit<sup>53</sup> by its sister states if it conformed to due process requirements.<sup>54</sup>

Specifically, a state court could serve a nonresident defendant with process if the defendant was present in the forum state or had consented to appoint a representative in the forum to receive notice of a pending action. Although *Pennoyer* established the foundation for determining jurisdictional bases over nonresident defendants, the Court's refusal to recognize "substituted service"<sup>55</sup> posed procedural difficulties when a plaintiff filed suit against a nonresident defendant or foreign corporation in the plaintiff's forum. Even though the nonresident defendant conducted business in or committed a tort within the plaintiff's forum state, courts were often unable to assert jurisdiction over a nonresident defendant if he did not own property within the state.<sup>56</sup> The

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Kurland pointed out certain problems with this theory. First, Kurland questioned whether a corporation can "implicitly consent to do business in a state." *Id.* Second, this state action might violate the commerce and privileges and immunities clauses. According to Kurland, no satisfactory theory of personal jurisdiction could be developed until the courts recognized that "the real question becomes not whether a state could itself enforce a judgment, but under what circumstances the national power should be used to assist the extra-territorial enforcement of a state's judicial decrees." *Id.* at 585.

<sup>50</sup> See Von Mehren & Trautman, *supra* note 48, at 1150.

<sup>51</sup> 95 U.S. (5 Otto) 714 (1878). In *Pennoyer*, the Court faced the issue of whether to recognize an Oregon judgment that upheld the validity of the transfer of the title to the defendant's property, even though the defendant was a resident of California and had not been personally notified of any action pending against him. Pursuant to an Oregon statute, the defendant had been given notice only by the publication in a state newspaper of a pending action to transfer his Oregon property. The Supreme Court refused to grant Oregon personal jurisdiction over the defendant on the basis of substituted service.

<sup>52</sup> The Supreme Court, however, indicated that substituted service would be constitutionally permissible to obtain *in rem* jurisdiction. *Id.* at 733.

<sup>53</sup> A major purpose of the minimum contacts formula is to limit the jurisdictional reach of coequal sovereigns. In *Volkswagen*, the Court emphasized that judgments which violate due process are void in the forum state, and will not be entitled to full faith and credit in any state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

<sup>54</sup> See Kurland, *supra* note 48, at 571-73. Kurland observed that the due process requirements outlined in *Pennoyer* have been the "backbone" of personal jurisdiction theory. *Id.* at 570.

<sup>55</sup> Substituted service was the forerunner of the long-arm statute. It was a means of serving a nonresident defendant with process. Before *International Shoe*, many courts refused to permit a plaintiff to acquire jurisdiction over the defendant in this manner. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-20 (1945).

<sup>56</sup> In *Pennoyer*, the Supreme Court concluded that a court could constitutionally serve a for-

Court resolved the dilemma of actions against foreign corporations by predicating jurisdiction on whether the corporation conducted business within the forum state.<sup>57</sup> The Court presumed that the corporation's business activities rendered it "present" in the forum state for jurisdictional purposes.<sup>58</sup>

The "doing business" test, however, further complicated jurisdictional analysis, as it lacked clear standards for determining the extent of business necessary to satisfy due process requirements. Consequently, in *International Shoe Co. v. Washington*,<sup>59</sup> the Supreme Court shifted the due process emphasis to a reasonableness inquiry by adopting a flexible formula which weighed the interests of all the parties to determine the scope of the state's jurisdiction. *International Shoe* involved an action by the State of Washington against the International Shoe Company of Delaware.<sup>60</sup> The State sought to recover unemployment compensation taxes from International Shoe on the basis of compensation paid to thirteen salesmen that the company employed on a full-time commission basis to display its products within the State of Washington. International Shoe had no offices in Washington, and made no contracts for the sale or purchase of merchandise in Washington. The salesmen occasionally rented rooms in which they displayed various shoe samples to prospective purchasers. All orders were transmitted to and filled in International Shoe's principal place of business, St. Louis. Goods were shipped F.O.B.<sup>61</sup> from places outside Washington to purchasers within the state. The Court ruled that it was reasonable to assert jurisdiction over the International Shoe Company,

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eign defendant if he owned property in the state or if he voluntarily appeared in court. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 914 (1878). State courts could not serve a foreign corporation since the corporation's legal existence was limited to the incorporating state's territory. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). See also Hazard, *supra* note 48, at 272. Hazard noted that *Pennoyer* determined jurisdiction in the United States for almost 25 years. According to Hazard, *Pennoyer* exerted three distinct impacts: (1) "*Pennoyer* limited the reach of state court service, and thus posed problems for certain plaintiffs, e.g., those injured by motorists from another state." See *Hess v. Pawloski*, 274 U.S. 352 (1927); (2) *Pennoyer* established that seizing a defendant's property was insufficient to notify the defendant of a pending law suit; (3) "*Pennoyer* also differentiated between *in rem* and *in personam* jurisdiction." *Id.* Hazard stressed that the differentiation between the two types of jurisdictions is unpredictable and, thus, useless. *Id.*

<sup>57</sup> See the discussion of the evolution of personal jurisdiction over foreign corporations in *Hanson v. Denckla*, 357 U.S. 235 (1958).

<sup>58</sup> See *supra* note 48.

<sup>59</sup> 326 U.S. 310 (1945).

<sup>60</sup> The International Shoe Company conducted business in several states in the United States.

<sup>61</sup> F.O.B. is the abbreviation of "free on board." The term is used to designate the person who bears the risk of loss and shipment costs of the goods. If a contract is F.O.B. destination, the seller bears the costs of shipment. Conversely, if it is F.O.B. origin, the buyer bears the costs once the goods are duly delivered to a carrier.

emphasizing that the company had maintained sufficient minimum contacts with the State of Washington:

Whether due process is satisfied must depend rather upon 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 . . . . [a defendant may be subject to a judgment in personam where] operations establish *sufficient contacts* or ties with the state of the forum *to make it reasonable and just, according to our traditional conception of fair play and substantial justice*.<sup>62</sup>

Although *International Shoe* established a broad and flexible minimum contacts standard to determine whether a defendant's activities were sufficient to sustain personal jurisdiction over a defendant,<sup>63</sup> the Court also outlined several factors which courts should balance. The Court found that the state's interest<sup>64</sup> in providing a forum in which the state's inhabitants could achieve justice, the extent of the defendant's business activities in the state, the burden upon the defendant if he were subjected to litigation in the forum,<sup>65</sup> and the relationship between the cause of action and the defendant's activities in the forum<sup>66</sup> should be considered in determining the constitutionality of asserting personal jurisdiction over a nonresident defendant.

*International Shoe* also marked the expansion of the long-arm statute.<sup>67</sup> Once the Supreme Court established the constitutionality of constructive service, state legislators approved long-arm statutes which

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<sup>62</sup> *International Shoe*, 326 U.S. at 310, 319-20 (emphasis added). Interpreting the outer limits of due process under the Fourteenth Amendment, the Supreme Court maintained that due process requires providing the defendant with adequate notice of the suit, and that he be subject to the jurisdiction of the court. In *Volkswagen*, the Court noted that the policy protects the defendant against the burdens of litigating in a distant or inconvenient forum and ensures that the states, through their courts, do not reach beyond the limits imposed by their status as coequal sovereigns in the federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>63</sup> *International Shoe*, 326 U.S. at 320. Commentators have interpreted *International Shoe* to establish a flexible policy for the assertion of personal jurisdiction. See Kurland, *supra* note 48, at 591; Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 869 (1978).

<sup>64</sup> The Court discussed the state's interest in receiving taxes from those who invoke the benefits and protections of the state. *International Shoe*, 326 U.S. at 321. Historically, states have broad discretion in the area of taxation.

<sup>65</sup> *Id.* at 318. The Court suggested that a corporation's single act committed within a forum state might be an insufficient basis for jurisdiction.

<sup>66</sup> *Id.* at 319. See *infra* note 69.

<sup>67</sup> See *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 989, 999 (1960) [hereinafter cited as *Developments*]. The authors note that during the same year *International Shoe* was decided, Vermont and Maryland enacted laws which subjected foreign corporations to suits arising from torts committed in the forum state or contacts made there. See also Hazard, *supra* note 48, at 292. Hazard stressed that long-arm statutes would fill a gap in the United States jurisdictional system, as they would enable plaintiffs to sue out-of-state persons in instances such as disastrous accidents and products liability cases.

enabled courts to serve out-of-state-or-nation persons who had committed a local tort, entered a local contract, or owned local property.<sup>68</sup>

*B. Minimum Contacts After International Shoe: An Expansive Interpretation*

Following *International Shoe*, the Supreme Court broadened the scope of the minimum contacts formula. In *Perkins v. Benguet Mining Co.*,<sup>69</sup> the Supreme Court concluded that a state may exercise personal jurisdiction over an alien corporation, if a corporate official is doing business in that state and is personally served with process, regardless of the fact that the cause of action is unrelated to the business conducted in the forum state. In *McGee v. International Life Insurance Co.*,<sup>70</sup> moreover, the Supreme Court extended the notion of personal jurisdiction to its furthest limits by permitting jurisdiction over a foreign corporation on the basis of a single act—entry into an insurance contract.<sup>71</sup> To support its conclusion in *McGee*, the Court maintained

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<sup>68</sup> For further discussion, see *supra* note 7. The notion that a state has a strong interest in providing a forum in which its residents may bring their claims against nonresidents is not unique to the United States. Many civil law countries have enacted such provisions. The French Code, for example, provides that French courts have jurisdiction over a person who injures a French citizen. CODE CIVIL [C. CIV.] art. 14. Further, Section 23 of the German Code of Civil Procedure provides that “actions against a person without domicile in the interior may be brought before a court in whose district the property of the defendant is situated.” ZIVILPROZESSORDNUNG [ZPO] § 23, as reprinted in Note, *Civil Procedure—Long-Arm Statutes—Jurisdiction Over Alien Manufacturers in Products Liability Actions*, 18 WAYNE L. REV. 1585, 1591 (1972).

<sup>69</sup> 342 U.S. 437 (1952). In *Perkins*, the plaintiff shareholder of the defendant corporation brought suit in Ohio against the Benguet Consolidated Mining Co., a corporation organized under the laws of the Philippines. The Court upheld Ohio’s assertion of personal jurisdiction over the defendant mining company, even though the cause of action was unrelated to the business conducted in the state.

Some commentators maintain that *Perkins* should be limited to its facts. See, e.g., Von Mehren & Trautman, *supra* note 48, at 1144. These commentators suggest that *Perkins* is an exceptional extension of personal jurisdiction. They maintain that the defendant’s contacts with Ohio were extremely tenuous. Despite this, the Court permitted the plaintiff to file suit in Ohio, stressing that as a result of the Second World War, the defendant had no other alternative but to bring suit in that forum. The courts, however, have not interpreted *Perkins* in this manner. Rather, courts view *Perkins* as providing state courts with an option to assert jurisdiction. See, e.g., *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980); *Long v. Vessel “Miss Ida Ann,”* 490 F. Supp. 210 (S.D. Tex. 1980). Similarly, the Sixth Circuit glossed over whether the cause of action arose from Erma’s activities in Kentucky. The court concluded that it was more probable than not that the cause of action arose from Erma’s activities in Kentucky, given Erma’s relationship with L.A. and L.A.’s relationship with Bear. *Poyner v. Erma Werke GmbH*, 618 F.2d at 1191.

<sup>70</sup> 355 U.S. 220 (1957).

<sup>71</sup> In *McGee, id.*, the Court upheld jurisdiction even though the defendant insurance company’s only contacts with the state were through the defendant’s letters to the plaintiff’s son, a resident of the forum state, California. The plaintiff’s son had taken out an insurance policy from a company located in Texas. After the insured died, the insurance company refused to pay the

that the insurance contract between the plaintiff's decedent and the insurance company demonstrated a substantial connection with the State of California.<sup>72</sup>

The Court's liberal construction of the minimum contacts formula in *McGee* and *Perkins* affirmed that a state has a strong interest in providing a convenient forum in which the plaintiff can redress grievances. The plaintiff, permitted to litigate in his forum state, would avoid the expense and inconvenience of bringing an action in a distant state or nation.<sup>73</sup> Further, had the plaintiff been forced to litigate in the alien defendant's forum, he might have been disadvantaged by language barriers and an unfamiliar legal system.

Some courts adopted interpretations of the minimum contacts formula which were more expansive than those set forth by the Supreme Court in *McGee* and *Perkins*. Reading *McGee* to sanction jurisdiction over an alien or foreign defendant on the basis of any isolated act, several courts advanced the "stream of commerce" theory:<sup>74</sup>

[A] manufacturer who voluntarily plac[ed] his product in the national channels of commerce not only [submitted] himself to jurisdiction in all states where his product cause[d] injury, but also to the law of those states.<sup>75</sup>

Some jurisdictions, however, stretched the minimum contacts formula

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proceeds of the insured's claim. The plaintiff then brought suit against the defendant insurance company in the state of California and obtained a default judgment. Since she was unable to execute the default judgment, the plaintiff filed suit in Texas. Maintaining that the California judgment violated due process, the Texas court dismissed the plaintiff's request for relief. The Supreme Court reversed the Texas court and upheld jurisdiction on the basis of the insurance contract. *Id.*

<sup>72</sup> The Court observed that the insurance contract demonstrated a substantial connection with the State of California, and that California had a strong interest in providing redress for its citizens wronged by persons outside of the state.

<sup>73</sup> For example, in *Alliance Clothing Ltd. v. District Court*, 400 Colo. 400, 532 P.2d 351 (1965), the court permitted jurisdiction over the defendants, observing that it would be easier for the defendant, a worldwide corporation, to litigate in a foreign country than the plaintiff. Moreover, the court noted that the plaintiff's witnesses were in the United States. *See also Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969) (the court observed: "[T]he hardship of defending the [defective] product in [a foreign state] . . . must be assumed as an attribute of foreign trade. . . ."); *Olmstead v. Brader Heaters, Inc.*, 5 Wash. App. 258, 487 P.2d 234 (1971) (court noted that it was more reasonable to place the burden of litigating in a foreign forum on the defendant as it was a worldwide manufacturer whereas the plaintiffs were local businessmen); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 196 N.E.2d 761 (1961) (court upheld jurisdiction over a foreign defendant that manufactured a safety valve in Ohio—the safety valve had been incorporated into a hot water heater in Pennsylvania and the defective product was subsequently sold to an Illinois purchaser).

<sup>74</sup> *Keckler v. Brookwood Country Club*, 248 F. Supp. 645, 647-50 (N.D. Ill. 1965); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 441-43 196 N.E.2d 761, 766 (1961).

<sup>75</sup> *Keckler v. Brookwood Country Club*, 248 F. Supp. 645, 650 (N.D. Ill. 1965).

even further when the defendant was an alien. Courts in those states asserted jurisdiction over an alien defendant on the basis of his aggregate contacts with the nation, even though the alien corporation had established either no contact or insufficient contact with the forum state.<sup>76</sup>

*C. Personal Jurisdiction Narrowed: Emphasizing the Defendant's Interest in Adjudication*

Shortly after *McGee* and *Perkins*, the Supreme Court narrowed personal jurisdiction theory by shifting the focus of the minimum contacts analysis from the plaintiff's burden to the defendant's burden.<sup>77</sup> Recognizing the inconvenience to a defendant required to litigate in a forum when his contact with that forum was insignificant or fortuitous, the Supreme Court, in *Hanson v. Denckla*,<sup>78</sup> limited a state's jurisdictional reach to a defendant who deliberately sustained contact within the state.<sup>79</sup> The Court in *Hanson* held that the Florida Supreme Court did not have jurisdiction over a Delaware corporate trustee, even though the settlor of the trust had resided in Florida at the time of her death and had received income from the trust while she resided in Florida. The Court distinguished *McGee* from *Hanson* by comparing the nature of the defendants' contact with their respective forums. In *Mc-*

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<sup>76</sup> For example, in *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975), jurisdiction was sustained over an alien corporation even though the defendant's contacts with the forum state were questioned:

[W]hen a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole, regardless of whether the contacts with the state in which the district court sits would be sufficient considered alone. *Id.* at 290.

*Accord* *Fosen v. United Technologies Corp.*, 484 F. Supp. 490 (S.D.N.Y. 1980) (nationwide contacts served as a basis for jurisdiction in an admiralty action); *Centronics Data Computer Corp. v. Mannesmann, S.G.*, 432 F. Supp. 659 (D.N.H. 1977) (conceding that Congress had not enacted a federal statute authorizing jurisdiction on the basis of an alien's contact with the United States, the court nonetheless upheld jurisdiction over the defendant on the basis of its nationwide contact).

<sup>77</sup> Some courts, however, equally weighed the factors delineated in *International Shoe*. See, e.g., *Woods*, *supra* note 63, at 890-98. Some commentators have suggested that each case should be decided on its own merits, regardless of the inconsistency inherent in this process. See *Lynch*, *supra* note 48, at 394; Note, *Lakeside Bridge and Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser*, 75 Nw. U.L. Rev. 345, 356 (1980). Given the Court's conclusion after *Volkswagen*, that the minimum contacts formula requires that the defendant deliberately sustain contact with the forum, it is unlikely that courts will balance equally the "parties' interests" when determining the constitutionality of personal jurisdiction over a foreign corporation.

<sup>78</sup> 357 U.S. 235 (1957). Although *Hanson* was decided during a period of expansion of state courts' personal jurisdiction over nonresident defendants, the Supreme Court cautioned that territorial limitations still restricted the states' jurisdictional power. *Id.* at 251.

<sup>79</sup> *Id.*

*Gee*, the Court observed, the insurance company had voluntarily solicited business in California, while in *Hanson*, the trustee's contact with Florida resulted from the settlor's decision to move to that state. Reinterpreting the minimum contacts formula, the Court concluded that "in each case there [must] 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."<sup>80</sup>

For the next twenty years, the Supreme Court was silent as to whether the *Hanson* decision was an aberration or whether it signalled a movement toward imposing restrictions upon the then expansive interpretation of personal jurisdiction.<sup>81</sup> The jurisdictional question arose again in *Kulko v. California Superior Court*,<sup>82</sup> where the Supreme Court limited a state's jurisdictional authority. The Court held that a father's act of sending a child to live with her mother in another state did not indicate the father's intent to obtain a benefit from that state, and thus the act was not a basis on which a state court could assert personal jurisdiction over the father.<sup>83</sup>

Two years after *Kulko*, the Court, in *World-Wide Volkswagen v. Woodson*,<sup>84</sup> reaffirmed that the scope of the minimum contacts standard had been narrowed. *Volkswagen* involved motorists travelling from New York to Arizona who were injured in Oklahoma when their car was struck and subsequently caught fire. The motorists filed a products liability action in Oklahoma against the car manufacturer, its

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<sup>80</sup> *Id.* at 253.

<sup>81</sup> In *Shaffer v. Heitner*, 433 U.S. 186 (1977), Justice Brennan, dissenting in part and concurring in part, infused vitality into the *Hanson* interpretation of the minimum contacts formula. According to Brennan, minimum contacts should be determined on the basis of whether the defendants *voluntarily* associated themselves with the forum state. *Id.* at 227-28. Brennan, however, did not assert that that standard requires subordination of all other factors in *Volkswagen*. Brennan disagreed with the narrow interpretation placed upon the stream of commerce theory by the majority:

It is difficult to see why the constitution should distinguish between a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same state because a consumer, using them as the dealer knew the customer would, took them there. In each case the seller *purposefully* injects the goods into the stream of commerce and those goods predictably are used in the forum state.

*Id.* at 507-08. Brennan also vigorously dissented because the *Volkswagen* court, in his estimation, accorded insufficient weight to the forum state's interest in the case.

<sup>82</sup> 436 U.S. 84 (1978).

<sup>83</sup> *Id.* at 95.

<sup>84</sup> 444 U.S. 286 (1980). See Louis, *The Grasp of Long-Arm Jurisdiction Finally Exceeds its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuck*, 58 N.C. L. REV. 407 (1980). Louis contends that although *Volkswagen* and *Kulko* were decided during a period in which the constitutionality of personal jurisdiction over a defendant was determined by the effect of the defendant's acts or the foreseeability of the impact of these acts in the forum state, those cases rejected this theory. *Id.* at 425.

importer, its regional distributor, and its local dealer. Service of process was obtained against all the defendants under the Oklahoma Long-Arm Statute. The Supreme Court noted that although the plaintiff's interest and the interest of the forum state in adjudicating the dispute should be considered, the primary focus of due process analysis was on the quality and nature of the defendant's contacts with the forum state to determine if it would be reasonable and non-burdensome for the defendant to conduct its defense there.<sup>85</sup> The Court stressed that only when a corporation has purposefully availed itself of the privilege of conducting activities within the forum state is it on notice that it is subject to suit within the forum state, and thus able to take appropriate measures to alleviate the risks of litigation.<sup>86</sup> The *Volkswagen* court observed that an isolated occurrence, absent an expectation that the product would be marketed in the state, would not be a sufficient basis for jurisdiction.<sup>87</sup>

## II. ANALYSIS OF *POYNER*

### A. *The Kentucky Long-Arm Statute*

The Sixth Circuit's decision to assert jurisdiction over Erma is based upon incorrect interpretations of the Kentucky Long-Arm Statute and the minimum contacts formula. The plaintiff relied on subsections four<sup>88</sup> and five<sup>89</sup> of the Kentucky Long-Arm Statute, the negligence and breach of warranty provisions of the act, respectively. Although these subsections broaden the jurisdictional reach of Kentucky courts, neither provision is coextensive with due process because each requires the defendant to sustain substantial contact with the forum. Subsection four permits a court to exercise personal jurisdiction

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<sup>85</sup> *Volkswagen*, 444 U.S. at 292.

<sup>86</sup> *Id.* at 297.

<sup>87</sup> *Volkswagen* appears to narrow, but does not eliminate, the stream of commerce theory as a basis for the assertion of personal jurisdiction. 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 the goods will be marketed in that state. *Id.* at 298.

<sup>88</sup> See Phillips, *The Kentucky Long-Arm Statute: How Long Is It?* 4 N.E. KY. L. REV. 65, 75 (1977) ("The 'tortious' act provision of the statute is important because it fills the jurisdictional void which exists when plaintiffs seek to obtain jurisdiction over nonresidents who come here and cause injury by a single isolated act."). Under subsection four of the Kentucky Long-Arm Statute, the injury must occur in Kentucky. *Id.* at 76. See *supra* note 22.

<sup>89</sup> Under the Kentucky Long-Arm Statute, a plaintiff may recover economic or commercial damages. KY. REV. STAT. § 454.210(2)(a)(5) (1970). The text of subsection five is quoted *supra* in note 22. The plaintiff must prove, however, that the injury arose from a breach of warranty of goods known to affect Kentucky commerce, and that the manufacturer derived monetary benefits from marketing his product in Kentucky. Phillips, *supra* note 88, at 79.



over a nonresident if the nonresident derives, among other things, substantial revenue from goods used or consumed in Kentucky, and the tortious injury arose as a result of the nonresident's regular and persistent business activities in the forum.<sup>90</sup> Subsection five, which authorizes jurisdiction over a non-resident who distributes goods directly or indirectly in Kentucky and breaches an express or implied warranty made in connection with the sale of those goods, also requires regular and persistent business contact with Kentucky.<sup>91</sup>

Moreover, unlike other provisions of this statute, these subsections require greater contact with the forum state. Although subsection one<sup>92</sup> authorizes jurisdiction if a claim arises from the transaction of *any* business in the Commonwealth, the negligence and breach of warranty subsections require regular, persistent, and substantial contact with Kentucky.<sup>93</sup> Subsection one, significantly broader than the negligence and breach of warranty provisions, has been interpreted as coextensive with due process.<sup>94</sup> Further, Kentucky courts have concluded that the negligence and breach of warranty provisions require greater contact than other provisions of the Kentucky Long-Arm Statute. None of the three precedents<sup>95</sup> relied upon by the Sixth Circuit inter-

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<sup>90</sup> KY. REV. STAT. § 454.210 (1970). See *supra* note 37.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Subsection one of section two of the Kentucky Long-Arm Statute provides jurisdiction under the following circumstances:

454.210. Personal jurisdiction of courts over nonresidents—Process. How served—Venue.—  
(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, who is a nonresident of this commonwealth.

(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this commonwealth.

KY. REV. STAT. §§ 454.210(1)-(2)(a)(1) (1970).

<sup>93</sup> See *supra* notes 88 and 89. The district court in *Poyner* stressed the difference between the subsections: "Given the broad language of KRS 454.210(2)(a) 1, the more restrictive language contained in Sections 4 & 5 of the same statute obviously shows a desire to limit what 'contacts' will be in cases arising in tort or warranty." *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. (W.D. Ky. Sept. 6, 1977). The district court also noted that the use of the words "regularly," "persistent," and "substantial" in subsections four and five support the proposition that the Kentucky legislature intended substantial contacts, and not minimal contacts, to be the basis for asserting personal jurisdiction over foreign corporations under Subsections 4 and 5 of the Kentucky Long-Arm Statute. *Id.* Finally, the Kentucky Business Corporation Act, KY. REV. STAT. § 271 A.520 (Supp. 1978) specifies 10 activities that are not considered transacting business, and corporations which engage in those activities do not have to apply to the state for certification to conduct business in Kentucky. Arguably, four of the 10 exemptions apply to Erma's activities in Kentucky: e) affecting sales through independent contractors; f) soliciting orders which require acceptance outside Kentucky before becoming binding contracts; i) transacting any business in interstate commerce; and j) conducting an isolated transaction of less than 30 days duration. *Id.*

<sup>94</sup> *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 7-8 (W.D. Ky. Sept. 6, 1977).

<sup>95</sup> See *Etheridge v. Grove Mfg. Co.*, 415 F.2d 1338 (6th Cir. 1969) (jurisdiction sustained over

preted the negligence subsection to be coextensive with due process, and only one precedent,<sup>96</sup> decided by the Kentucky Court of Appeals, found the breach of warranty subsection to extend to that limit.

By applying a broader minimum contacts standard, the Sixth Circuit precluded consideration of whether Erma's contact with Kentucky fell within the meaning of the negligence and breach of warranty subsections of the statute. Further, the Sixth Circuit gave cursory treatment to the issue of whether Erma sustained any contact with Kentucky. As Erma had no direct contact with Kentucky, the court imputed L.A.'s activities in that state to Erma. It is not firmly established that a distributor's contact may be imputed to the manufacturer as a basis for asserting personal jurisdiction.<sup>97</sup> Even if the court could impute L.A.'s contact with the state to Erma, the court should nonetheless have determined whether L.A.'s contact with Kentucky was regular, persistent, and substantial.

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the defendant corporation on the basis of the defendant's salesman's activities in the forum); *Volvo of Am. Corp. v. Wells*, 551 S.W.2d 826 (Ky. 1977) (jurisdiction upheld over a foreign automobile manufacturer who advertised in Kentucky, and pursuant to agreements with Kentucky automobile dealers, provided services to Kentucky citizens); *Ford Motor Credit Co. v. Nantz*, 516 S.W.2d 840 (Ky. 1974) (court dismissed the defendant's argument that the Kentucky Long-Arm Statute controlled venue actions). The observation of the courts in *Etheridge v. Grove Mfg.* and *Ford Motor Credit Co. v. Nantz* that the Kentucky Long-Arm Statute reached nonresident corporations with minimal contacts in Kentucky is tenuous since these observations are mainly dicta. In *Etheridge*, the Sixth Circuit refused to apply subsection four of the Kentucky Long-Arm Statute retroactively to a tort action because the plaintiff had filed the complaint prior to the enactment of the Kentucky Long-Arm Statute. In *Nantz*, there was no issue pertaining to whether the defendant company had conducted business within the meaning of subsection four of the Kentucky Long-Arm Statute. Further, reliance on *Nantz* is even more tenuous since the *Nantz* court's interpretation of the Kentucky Long-Arm Statute is based upon dictum in *Etheridge*.

<sup>96</sup> *Volvo of Am. Corp. v. Wells*, 551 S.W.2d 826 (Ky. 1977). In *Volvo*, the plaintiff, a Kentucky resident, bought a car from a Volvo dealer in West Virginia. The car was delivered to the plaintiff in Kentucky. After the car malfunctioned, plaintiff filed suit against the dealer. The dealer filed an indemnity claim against Volvo. The court held that Volvo, the manufacturer of the automobile, knew or should have known that vehicles shipped to West Virginia would be sold in Kentucky, and thus was subject to jurisdiction under the Kentucky Long-Arm Statute. Unlike Erma, however, Volvo advertised in Kentucky and provided service to its customers through dealers in Kentucky.

<sup>97</sup> *Compare Volvo of Am. Corp. v. Wells*, 551 S.W.2d 826 (Ky. 1977), with *Tube Turns v. Division of Clemetren*, 562 S.W.2d 99 (Ky. 1979). The *Tube Turns* court held that absent proof that the defendant should have anticipated that its contact with the Tube Turn Company could have had a substantial impact on commerce in Kentucky, the Kentucky court's assertion of jurisdiction would be unreasonable and a violation of due process. *See also Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) (in a suit against an alien parent corporation, the parent's contact with the jurisdiction, and not the foreign subsidiary's contact, was determined to be the primary factor to consider for jurisdictional purposes).

*B. The Constitutional Analysis*

Besides misconstruing the Kentucky Long-Arm Statute, the Sixth Circuit failed to recognize that the Supreme Court modified due process requirements by narrowing the scope of the minimum contacts formula. The court misinterpreted *Volkswagen*, and thus did not determine if Erma's contact with Kentucky was purposeful. Further, the Sixth Circuit ignored significant constitutional and practical considerations by concluding that it would be permissible to apply more relaxed jurisdictional standards to alien defendants.<sup>98</sup> Because Erma sustained no direct contact with Kentucky,<sup>99</sup> the Sixth Circuit reviewed the contacts Erma's distributor sustained with Kentucky to determine if Erma had deliberately invoked the benefits and privileges of doing business in the state. The record disclosed that L.A. and Erma had entered into an agreement whereby L.A. was the exclusive United States distributor of Erma's products. The district court noted that L.A. admitted importing Erma's pistols and distributing them in certain areas in the United States, and that some pistols ultimately were distributed in Kentucky. The district court also found that L.A. sold exclusively to wholesalers, maintained an office in New York City and a warehouse in North Carolina, and solicited business in Kentucky through mail order catalogues, telephone calls, and at a national sporting goods convention in Chicago.<sup>100</sup> L.A. also admitted employing Stuart Bear, the Tennessee salesman, who eventually sold the defective firearm. L.A. further admitted that there was at least one distributor of its products in Lexington, Kentucky.

The Sixth Circuit's inquiry, however, ended at this point. The court failed to consider any economic factors to determine if Erma had obtained substantial revenue and thus benefitted from its alleged business in Kentucky. The minimum contacts formula, focusing on the quality and nature of the defendant's activities in the state, requires an assessment of the defendant's business activities in the forum.<sup>101</sup> In *Volkswagen* and *International Shoe*,<sup>102</sup> the Supreme Court observed

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<sup>98</sup> See Note, *Civil Procedure—Long Arm Statute—Jurisdiction over Alien Manufacturers in Products Liability Actions*, 18 WAYNE L. REV. 1585, 1588-89 (1972).

<sup>99</sup> Although Erma is a wholly owned subsidiary of an American corporation, LSI, that fact is not important for the purposes of this litigation since LSI did not own Erma when the tort occurred. Erma also has no offices or assets in Kentucky and does no advertising in the United States. All of its guns are sold to distributors in Germany.

<sup>100</sup> *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 3 (W.D. Ky. Sept. 6, 1977).

<sup>101</sup> The district court pointed this out: "Unfortunately, plaintiff has not, in all the years of this lawsuit, tracked down the actual dollar value of Erma's products sold in Kentucky." *Id.*

<sup>102</sup> This note is limited to a discussion of the *Volkswagen* standard and does not purport to discuss in depth the vitality of *Gray v. American Radiator Co.*, 22 Ill. 2d 432, 176 N.E.2d 761

that only when the defendant derived commercial benefits in the forum, and thus had been protected by the laws of that state, was he obliged to the state and therefore on notice that he was amenable to jurisdiction in that forum.<sup>103</sup> Further, the Sixth Circuit had previously considered certain economic factors to ascertain whether the defendant had sustained minimum contacts with a forum.<sup>104</sup> To evaluate Erma's contact with Kentucky, the Sixth Circuit should have assessed the volume and value of Erma's sales in Kentucky, the ratio of those sales to the total market for similar products in the state, and the quantity or value of Erma's total production in respect to the total output of that production in Kentucky.<sup>105</sup>

Finally, the Sixth Circuit neglected to consider whether Erma had any control over L.A.'s choice of location to distribute its products. The Sixth Circuit improperly held that Erma's awareness of L.A.'s marketing efforts in Kentucky constituted a purposeful availing of the privilege of acting in Kentucky or causing injuries there. The Sixth Circuit, however, never found that Erma's entry into Kentucky was voluntary. Instead, it misrepresented the district court's findings by stating that the district court had held that Erma was "a strong backstage promoter of its products in the United States."<sup>106</sup> The district court simply had concluded that since L.A. performed all the advertising and distribution of Erma's products, Erma was "at best, a strong backstage promoter of its products," and absent evidence to determine that L.A. was anything but an independent distributor, the district

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(1961). Although the Illinois Supreme Court adopted relaxed jurisdictional standards in *Gray*, the court applied the rubric of the "purposefully availing test" set out in *Hanson* and reaffirmed in *Volkswagen*. The Illinois Supreme Court observed that the defendant's activities resulted in substantial use and consumption in this state and said: "To the extent that its business may be directly affected by transactions occurring here, it enjoys the benefits from the laws of this state." *Id.* at 766.

<sup>103</sup> This *Volkswagen* test has been the subject of criticism. See Comment, *World-Wide Volkswagen Corp. v. Woodson: A Limit to the Expansion of Long-Arm Jurisdiction*, 69 CAL. L. REV. 611 (1981). This commentator argued that *Volkswagen's* circularity renders it virtually useless. Although difficult to apply, the *Volkswagen* test requires a determination that the manufacturer expects his goods to enter a forum. This is different from fortuitously finding that these goods are in the forum. Indeed, this commentator conceded that *Volkswagen* has been viewed as a restriction upon personal jurisdiction theory.

<sup>104</sup> See *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964). Instead of distinguishing *Velandra* because it was an older decision, and an inherently dangerous product was at issue, the Sixth Circuit should have addressed some of the economic factors outlined in *Velandra* to determine if Erma had voluntarily sustained contacts with Kentucky.

<sup>105</sup> *Id.* at 298. It is assumed that if the plaintiff loses money he is still amenable to jurisdiction in the state.

<sup>106</sup> 618 F.2d at 1191.

court determined that Erma had no control over L.A.<sup>107</sup>

The Sixth Circuit's conclusion ignores the salient factor in *Volkswagen*—awareness that a product might be sold in a state is insufficient to establish personal jurisdiction.<sup>108</sup> Under the *Volkswagen* test, Erma must have intended to sell its products in Kentucky and, consequently, must have anticipated being subject to jurisdiction there.<sup>109</sup> Had the Sixth Circuit found that Erma had control over L.A.'s distribution system, the court's decision to invoke jurisdiction over Erma would have been consistent with the *Volkswagen* minimum contacts standard. The Supreme Court noted in *Volkswagen* that efforts to market a product in a state were a sufficient basis for personal jurisdiction because such efforts demonstrated the defendant's intent to conduct business in the forum.<sup>110</sup>

*Poyner* applied the *Volkswagen* test in form, but not in substance. The Sixth Circuit's failure to consider adequately the burden on the defendant forced to litigate in a forum in which he had insignificant contact is inconsistent with the jurisdictional requirements established by the Supreme Court. Consequently, future courts should reject *Poyner's* interpretation of the minimum contacts formula because it invades the interests protected by *Volkswagen*. By concluding that the minimum contacts test only requires the defendant to be aware that his product might enter a forum, the Sixth Circuit virtually reincorporated a foreseeability standard into due process analysis. The Supreme Court, however, sought to restrict reliance upon a foreseeability standard, recognizing that such a standard would burden the defendant with spurious claims and subject him to jurisdiction under fortuitous circumstances. As the majority in *Volkswagen* noted: "if foreseeability were the criterion, every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."<sup>111</sup> The Court's narrow interpretation of the minimum contacts formula in *Volkswagen*, however, eliminates these problems. Foreign or alien defendants would only be amenable to jurisdiction if they voluntarily sustained minimum contacts with a forum, and thus would be on notice of potential lawsuits.

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<sup>107</sup> *Poyner v. Erma Werke GmbH*, No. 1981-P(G), slip op. at 7 (W.D. Ky. Sept. 6, 1977).

<sup>108</sup> *Volkswagen*, 444 U.S. at 295.

<sup>109</sup> *Gray* may be consistent with *Volkswagen*. The Illinois Supreme Court found that, "as a general proposition, if a corporation elects to sell its goods for ultimate use in another state, jurisdiction is appropriate." *Gray v. American Radiator Co.*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961).

<sup>110</sup> 444 U.S. at 297. See also Comment, *supra* note 103.

<sup>111</sup> *Volkswagen*, 444 U.S. at 296.

### C. Jurisdiction over Alien Defendants

In addition to incorrectly interpreting the *Volkswagen* standard in *Poyner*, the Sixth Circuit exceeded its jurisdictional authority by concluding that more relaxed jurisdictional requirements should be applied to an alien defendant.<sup>112</sup> The court's conclusion resulted from overemphasizing the state's interest in adjudicating the claims of alien defendants and failing to apply fundamental constitutional considerations.

#### 1. The State's Interest in Adjudication of Claims against Alien Defendants

A literal interpretation of *Volkswagen* suggests that the state's interest in adjudicating a dispute is only material if the defendant voluntarily sustains contact with the forum state.<sup>113</sup> Most courts, however, have not read *Volkswagen* so narrowly.<sup>114</sup> Similarly, in *Poyner*, the

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<sup>112</sup> One commentator has argued that *Volkswagen* sanctions applying a less relaxed jurisdictional standard to alien defendants. See Comment, *supra* note 103. According to this commentator, courts are not bound by principles of federalism when the defendant is an alien, and thus should apply less restrictive minimum contacts standards to those defendants. This argument ignores general fundamental constitutional factors. See *supra* text accompanying notes 98-101. Compare *Shon v. District Court ex rel. City*, 605 P.2d 472 (Colo. 1980), with *Lakeside Bridge & Steel v. Mountain State Const. Co.*, 597 F.2d 596 (1979).

<sup>113</sup> Comment, *supra* note 103, at 919.

<sup>114</sup> Generally these courts did not focus on whether the defendant voluntarily sustained contact with the forum states. See, e.g., *Long v. Vessel "Miss Ida Ann,"* 490 F. Supp. 210, 214 (S.D. Tex. 1980) ("Cases [subsequent to *Volkswagen*] have held that very little purposeful activity is necessary to satisfy the minimum contacts requirement."); *Crawford v. Minutemen Gourmet Foods, Inc.*, 489 F. Supp. 181, 184 (M.D. Ala. 1980) (court noted that "the test of whether a nonresident corporation is amenable [to jurisdiction] in the forum state . . . should also focus on whether the contacts involving the nonresident were the result of actions taken by the nonresident that *reasonably* constitute purposefully conducting activities within the forum state."); *Corsica Livestock Sales, Inc. v. Sumitomo Bank of Cal.*, 486 F. Supp. 855, 857 (D.S.D. 1980) (court upheld jurisdiction over the defendant, observing that "the more slight the contact between the defendants and the forum state, the stronger and more direct must be the relationship between the cause of action and the contacts with the forum."); *Berkley Int'l Co., Ltd.*, 289 N.W.2d 600 (Iowa 1980) (according to the court, the following factors should be considered before it is permissible to assert jurisdiction over the defendant: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action with those contacts, the interest of the forum state, and the convenience to the parties). See also *Oswalt v. Scripto*, 619 F.2d 902 (1st Cir. 1980) (jurisdiction is permissible over defendants who put their goods into the stream of interstate commerce with the knowledge or expectation that their products would eventually be brought into the forum); *Redford v. Grumman Am. Aviation Corp.*, 408 F. Supp. 144 (N.D. Miss. 1980) (the court adopted the stream of commerce theory to support its assertion of jurisdiction over the defendant). But some jurisdictions have followed *Volkswagen* more closely. See, e.g., *Bross Util. Serv. Corp. v. Aboubshait*, 489 F. Supp. 1366 (D. Conn. 1980) (court refused to grant jurisdiction over the defendant because events critical to the action occurred in another nation, and the defendant's contact did not satisfy the *Volkswagen* test); *Schwegmann Bros. v. Pharmacy Reports, Inc.*, 486 F.

Sixth Circuit stressed that the state's interest in adjudicating the dispute was a critical factor in its decision to uphold jurisdiction over Erma.<sup>115</sup> The court observed that Kentucky had a strong interest in protecting its citizens from injurious articles produced by alien manufacturers who insulate themselves from liability by hiring a local distributor to market their products.<sup>116</sup>

Controlling the entry of defective products into a forum state is an important state interest.<sup>117</sup> The state's interest in adjudication, however, does not become more compelling when an alien corporation, rather than a foreign corporation, manufactures the inherently dangerous product. Attempts to insulate oneself from liability are not unique to alien defendants. Thus, the critical inquiry is not *where* the manu-

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Supp. 606 (E.D. La. 1980) (court upheld jurisdiction on the basis of the defendant's continuous and systematic contact with the forum).

<sup>115</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1192.

<sup>116</sup> Although the current minimum contacts formula is fairer to the defendant, as he will always be on notice of a potential lawsuit, and thus may ensure against possible liability, the formula places a heavy burden on the plaintiff injured by an inherently dangerous instrumentality, e.g., the gun in *Poyner*. The Sixth Circuit stressed that Erma should not be permitted to shield itself from liability by utilizing the services of a distributor. In *International Shoe*, the Court suggested that when a corporate agent is distributing inherently dangerous products, due process standards should be relaxed. *International Shoe*, 326 U.S. at 316. See also *Hess v. Pauloski*, 274 U.S. 352 (1927). In the future, courts might distinguish *Volkswagen* since an automobile, a widely used product, may not be considered an inherently dangerous instrumentality. That argument, however, may be defeated since the Court in *Volkswagen* derided the notion that one isolated act, regardless of the repercussions, is a sufficient basis for the invocation of personal jurisdiction over a nonresident defendant.

<sup>117</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (court noted that the strength of the state's interest in the action may depend on the nature of the defendant's act); *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir.), cert. denied, 439 U.S. 983 (1978) (although the court conceded that the state had a strong interest in protecting its citizens from tortious injury, it denied jurisdiction because the defendant had not sustained minimum contacts with the forum); *Keckler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D. Ill. 1962) (according to the court, a defendant who distributes his product should be subject to jurisdiction in the forum where the injured person resides); *Van Eeuwen v. Heidelberg Eastern, Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (1973) (court upheld jurisdiction over the German defendant who manufactured a defective printing press); and *Gray v. American Sanitary Corp.*, 22 Ill.2d 432, 442, 176 N.E.2d 761, 766 (1961) (court observed that "if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.").

Some commentators have warned of the unfairness to the plaintiff of a voluntariness standard of *Hanson* (and later *Kulko* and *Volkswagen*) applied to products liability cases. See Comment, *Tortious Act as a Basis for Jurisdiction In Products Liability Cases*, 33 FORDHAM L. REV. 671 (1965); Comment, *In Personam Jurisdiction over Nonresident Manufacturers in Products Liability Actions*, 63 MICH. L. REV. 1028 (1964-65). In this latter comment, the author discusses the Single Act Theory: "[The] fairness thesis argues that it is consonant with fairness to subject the manufacturer to jurisdiction, whenever his product gave rise to the cause of action within the forum state, even though the manufacturer had no other contact with the state." *Id.* at 1031.

facturer is incorporated, but *how* a court may acquire jurisdiction over a manufacturer who attempts to shield himself from liability.

After *Volkswagen*, an injured plaintiff may have recourse against those manufacturers who hire exclusive distributors.<sup>118</sup> Admittedly, it would be unreasonable to hold the distributor, merely a conduit,<sup>119</sup> liable for all plaintiff's injuries. If an injured plaintiff could demonstrate that the manufacturer exerted some control over the distributor's marketing practices, a court might invoke jurisdiction by imputing the distributor's activities to the manufacturer. Further, as the *Poyner* Court implied,<sup>120</sup> a state court might afford the plaintiff redress if the minimum contacts standard were interpreted more liberally when the plaintiff is injured by an inherently dangerous product.

Relaxing jurisdictional requirements on the basis of the manufacturer's control over the distributor and the injurious nature of the product is more practical than relaxing jurisdictional requirements simply because a defendant is an alien manufacturer. First, the minimum contacts requirements delineated in *Volkswagen* and *International Shoe* are satisfied. If the manufacturer exerts control over his distributor's marketing practices, it is reasonable and equitable to conclude that the manufacturer voluntarily sustained contacts with the forum. Further, relaxing jurisdictional requirements when the plaintiff was injured by an inherently dangerous product achieves the state's interest in controlling the entry of defective products. Finally, manufacturers of inherently dangerous products would be more responsible to the forum, since they could only avoid litigation by ensuring that products which entered the state were not defective.

## 2. *The Constitutionality of Relaxing Jurisdictional Requirements Applied to Aliens*

Besides overemphasizing the state's interest in adjudicating claims against alien defendants, the Sixth Circuit impermissibly expanded the state's jurisdictional authority over alien defendants. After briefly observing that the minimum contacts formula limited the jurisdictional reach of coequal sovereigns,<sup>121</sup> the court submitted that it was less important to restrict a state's jurisdictional power when the defendant is an alien.<sup>122</sup> Although the Supreme Court did not discuss the role of the

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<sup>118</sup> *Volkswagen*, 444 U.S. at 297.

<sup>119</sup> See *Van Eeuwen v. Heidelberg Eastern, Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (1973).

<sup>120</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1192.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*



minimum contacts formula on the international level in *Volkswagen*, it recognized the restrictions imposed upon a state seeking to assert jurisdiction over a defendant in another state. The Court observed that the minimum contacts formula "acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>123</sup>

The Sixth Circuit's reasoning, however, suggests that relaxing jurisdictional requirements in an international setting would not present constitutional problems. The court apparently ignored the potential conflicts in interstate and international commerce. The federal government, and not state governments, has authority to regulate international commerce.<sup>124</sup> The Constitution expressly limits state regulation of international commerce by providing that the national government has complete power over international affairs, and state governments cannot curtail or interfere with the exercise of that power.<sup>125</sup> The purpose of the commerce clause is to ensure that uniformity exists when the states deal with other nations.<sup>126</sup> If some states follow *Poyner*, however, and apply its relaxed jurisdictional approach rather than the *Volkswagen* standard, uniformity is frustrated, and there is potential for interference with international commerce.<sup>127</sup>

Even if the exercise of jurisdiction by a state is not found to interfere with or curtail the federal government's power over international affairs, a state might challenge another state's broad assertion of jurisdictional authority over an alien defendant. It is conceivable that the relaxed jurisdictional standard recommended in *Poyner* might deter certain alien manufacturers from doing business in the United States.<sup>128</sup> Consequently, other states might view this jurisdictional approach as unduly burdening interstate commerce, and challenge the state's jurisdictional practices as an interference with interstate commerce.

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<sup>123</sup> *Volkswagen*, 444 U.S. at 292.

<sup>124</sup> See U.S. CONST. art. I §§ 1, 10.

<sup>125</sup> *Id.* Article I, section 8 grants Congress power to regulate interstate commerce and commerce with foreign nations.

<sup>126</sup> *Developments, supra* note 67, at 983. Whether the commerce clause would be invoked to limit jurisdiction in *Poyner* is debatable. Because the injury occurred in Kentucky, the Sixth Circuit's decision might not be challenged. On the other hand, this commentator observed that "a defendant assessing the risk of doing business in a particular state should not be expected to provide for the contingency of suit on totally unrelated causes of action, even if brought only by persons who were residents at the time the cause of action accrued." *Id.* at 986.

<sup>127</sup> Even *Gray* incorporated a voluntariness standard into the minimum contacts inquiry, and thus eliminated situations where jurisdiction would have been proper under fortuitous circumstances. *Gray v. American Sanitary Corp.*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 761 (1961).

<sup>128</sup> *Developments, supra* note 67, at 985.

Although the Court has never expressly invalidated the use of more relaxed jurisdictional standards, *Hanson*, *Kulko*, and *Volkswagen* suggest that broad jurisdictional theories, such as the aggregate contacts theory<sup>129</sup> and perhaps the stream of commerce theory,<sup>130</sup> might not withstand constitutional challenge. The aggregate contacts theory poses greater constitutional difficulties because it is primarily applied in cases involving alien defendants and thus might present equal protection problems.<sup>131</sup> Courts in jurisdictions which have adopted this theory contend that the aggregate contacts standard frustrates alien corporations' attempts to avoid jurisdiction by not sustaining minimum contacts with any state in the United States.<sup>132</sup> A foreign defendant, however, could elude jurisdiction in all but the state in which it is incorporated on the same basis. Moreover, had Congress seen merit in a nationwide aggregate contacts standard, it would have enacted a federal statute authorizing nationwide or worldwide service.<sup>133</sup> Instead, Congress approved Rule 4(e) of the Federal Rules of Civil Procedure, authorizing federal courts to serve foreign or alien defendants pursuant to a state long-arm statute, provided the defendant's contacts are sufficient to invoke jurisdiction in a state court.<sup>134</sup> Further, Congress has not amended the Federal Rules of Civil Procedure to provide for nationwide service. This inaction suggests that Congress does not intend

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<sup>129</sup> See *supra* notes 74-76 and accompanying text, which discuss cases involving the stream of commerce and aggregate contact theories.

<sup>130</sup> Arguably, the stream of commerce theory discussed in *Gray* may withstand constitutional challenge because *Gray* permitted jurisdiction when the defendant elected to do business in a forum.

<sup>131</sup> The court in *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730 (1962), has criticized those courts which apply the Equal Protection clause to alien corporations and, consequently, limit jurisdiction over these entities:

[W]hat has frequently been overlooked is that . . . the United States is deemed to have personal jurisdiction over any defendant within the United States. . . . There is a line of cases apparently denying the validity of an exercise of personal jurisdiction by a federal court over a defendant present within the United States unless the defendant is also present. . . within the district which the court is held. In other words, the restrictions of the Fourteenth Amendment upon state jurisdiction have been applied by these cases to federal jurisdiction. The anomaly here lies not only in overlooking the principal that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.

*Id.* at 736-37.

<sup>132</sup> See, e.g., *Centronics Data Computer Corp. v. Manesmann A.G.*, 432 F. Supp. 659, 665 (D.N.H. 1977) (court relied on *McGee*: "New Hampshire's interest in protecting its corporate employers from the predatory actions of an alien corporation is at least equal to California's interest in protecting its residents injured by a Texas Corporation."); *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975). See also *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276 (D.N.J. 1980) (although the court ultimately rejected the aggregate contacts standard, it discussed the policies that the nationwide contacts formula purported to serve).

<sup>133</sup> See *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1284 (D.N.J. 1980).

<sup>134</sup> See *supra* note 7.

to grant a state the authority to serve alien defendants on the basis of the alien's contacts with the nation as opposed to the forum state.<sup>135</sup>

### 3. *The Alien Defendant's Burden*

Instead of stressing the state's interest in adjudication, the Sixth Circuit should have examined more thoroughly the burden imposed upon the defendant required to litigate in the plaintiff's forum. Minimizing the import of the defendant's burden, the *Poyner* court suggested that an alien corporate defendant is able to spread the costs of litigating in a distant forum more readily than an injured plaintiff because the growth in markets, transportation, and communication have also made it much less burdensome for a party to defend himself in a state where he engages in economic activity.<sup>136</sup> Even if this argument is accepted, it does little to justify the Sixth Circuit's more relaxed application of jurisdictional requirements to alien defendants. Whether or not the defendant is a United States corporation has little or no bearing on whether the corporate defendant or the plaintiff can better bear the cost and inconvenience of adjudicating in a distant forum. Foreign defendants engaging in business activity in a forum should be able to spread economic burdens as well as other consequences of litigation as easily as alien defendants.

### 4. *The Plaintiff's Burden*

Although the due process inquiry currently focuses upon the defendant's burden, legitimate reasons have been articulated in support of shifting the emphasis to the plaintiff's burden. Perhaps the strongest argument in favor of invoking personal jurisdiction over an alien defendant is that it would be inequitable for an innocent plaintiff to bear the inconvenience and expense of litigating in a distant forum.<sup>137</sup> Although certain litigation costs remain constant regardless of the forum, it is reasonable to assume that a plaintiff litigating in an alien jurisdiction will generally have greater expenses than the plaintiff litigating in a foreign jurisdiction. Further, although most plaintiffs litigating in a distant forum must hire new legal counsel, the plaintiff bringing suit in an alien jurisdiction will encounter a different legal system and may be

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<sup>135</sup> Nationwide service is permitted under some federal statutes. See, e.g., Lantham Act of 1952, 35 U.S.C. §§ 100 *et seq.* (1976).

<sup>136</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1192.

<sup>137</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), emphasize this factor. See also *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

confronted with significant language barriers.<sup>138</sup>

The ultimate inquiry is whether the additional burdens imposed upon a plaintiff litigating in an alien forum are relevant after *Volkswagen*, and, if so, whether the burdens imposed upon the plaintiff warrant discriminatory treatment of alien defendants. Contrary to *Poyner*, the better position is not to relax jurisdictional requirements applied to alien defendants. By focusing due process analysis on whether the defendant purposefully availed itself of the benefits of the forum state, *Volkswagen* subordinated consideration of the burdens imposed upon the plaintiff. Even if the plaintiff's burden is considerable, it should not serve as a justification for discriminatory treatment of alien defendants. The benefits to the plaintiff do not outweigh the economic and political ramifications of discriminating against alien defendants. Applying a relaxed jurisdictional standard to alien defendants might discourage an international manufacturer with a marginal United States profit base, unable to offset the expense and inconvenience of spurious litigation, from marketing his products in the United States. Further, international manufacturers might be reluctant to grant exclusive distribution rights to American distributors, since they would have no control over the jurisdictions in which they might become subject to suit.

The Sixth Circuit, however, apparently viewed a reduction in imports as desirable. The court emphasized that the increase in international trade in the United States during the 1970s disadvantaged some American manufacturers because many imported goods began to dominate American markets.<sup>139</sup> The Sixth Circuit, however, ignored the economic benefit to American manufacturers who market their goods internationally. Discriminating against alien manufacturers might harm United States trade abroad. To retaliate against the application of a relaxed jurisdictional standard to alien defendants, courts in alien jurisdictions might uphold jurisdiction over American manufacturers more readily than over manufacturers from other nations.

Finally, political and legal relations between the United States and other foreign nations might be impaired if states exceed their constitutional authority in the area of international commerce.<sup>140</sup> When a state court serves an alien defendant, that alien becomes subject to state and federal laws. Although state laws vary, those differences are insignificant when compared to the vast differences between and among national legal systems. Before asserting jurisdiction over an alien

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<sup>138</sup> See cases cited *supra* note 73.

<sup>139</sup> *Poyner v. Erma Werke GmbH*, 618 F.2d at 1191-92.

<sup>140</sup> See *supra* notes 124 and 125.

defendant, a state court should also consider the jurisdictional standards of that alien's forum. By broadening its jurisdictional analysis to include these standards, the state court may avoid offending political agencies in the alien jurisdiction and minimize the possibility of political reprisals against United States citizens.<sup>141</sup> Finally, the due process requirements enunciated in *International Shoe* and reaffirmed in *Hanson, Kulko*, and *Volkswagen* suggest that courts should exercise judicial restraint in the area of personal jurisdiction. The relaxed jurisdictional standard proposed by *Poyner* is inconsistent with that policy. The Sixth Circuit failed to recognize that when international parties are involved, the fairness and justice objectives set forth in *International Shoe* are of primary importance, because the adjudicating court's determination is binding. There is no neutral international court to review the original proceedings.<sup>142</sup> Thus, the adjudicating court must ensure that its proceedings are fair, since the alien defendant, if found liable in damages, has no recourse.

#### CONCLUSION

Developments in personal jurisdiction theory have been directly related to increases in trade between and among nations and states. Although jurisdictional requirements have been relaxed to enable injured plaintiffs to bring claims against nonresident defendants in the plaintiff's forum state, the notion that a state's jurisdictional power is limited by its territory has not been entirely abandoned. In *International Shoe* and its progeny, the Supreme Court sought to restrict a state's jurisdictional authority by requiring courts to balance all of the parties' respective interests before concluding that serving a defendant with process is constitutional. After *Volkswagen*, it is clear that the critical factor in due process analysis is whether the defendant deliberately sustained minimum contacts with the forum.

The Sixth Circuit in *Poyner*, however, misinterpreted the minimum contacts formula. Instead of focusing on whether the defendant had deliberately sustained minimum contacts with Kentucky, the court emphasized the state's interest in adjudicating the injured plaintiff's claim. The Supreme Court minimized the importance of this factor in *Volkswagen*. Moreover, by advocating that jurisdictional requirements be relaxed when the defendant is an alien, the Sixth Circuit violated the

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<sup>141</sup> See Von Mehren and Trautman, *supra* note 48, at 1127. These commentators generally discuss the repercussions of "conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction" in an international context. *Id.*

<sup>142</sup> *Id.* at 1122.

constitutional interests protected by *Volkswagen* and defeated the principles of fairness and "orderly administration of the laws" outlined in *International Shoe*. If the Sixth Circuit's decision in *Poyner* is followed, state and federal courts will no longer apply a uniform standard to determine the constitutionality of acquiring personal jurisdiction over an alien defendant.

State and federal courts should reject *Poyner* and continue to apply the same jurisdictional requirements to alien and foreign defendants. If the minimum contacts formula were applied uniformly, alien defendants would be on notice of potential litigation, and would not be burdened by spurious claims. Such a policy would not shield alien or foreign defendants from liability but would encourage both to prevent the entry of defective goods into a state. This policy would permit a forum state to hold either type of defendant liable. Finally, a uniform jurisdictional standard preserves the sovereign status of foreign nations and sister states. By adhering to the minimum contacts standard established by the Supreme Court, state courts will not interfere with the United States government's commercial relations with other nations.

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