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Matthew Schultz

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Minimum Contacts in Contract Cases: A Forward-Looking Reevaluation

In recent years, the Supreme Court of the United States has decided four cases addressing the extension of state court jurisdiction over nonresident defendants.¹ All four cases denied jurisdiction and marked a trend by the Supreme Court to limit state court jurisdiction.²

In *Shaffer v. Heitner*,³ the Supreme Court required that a defendant have "minimum contacts" with a state before that state could exercise long-arm jurisdiction.⁴ In *World-Wide Volkswagen Corp. v. Woodson*,⁵ the Supreme Court said that these contacts must make litigation in the state "foreseeable."⁶ These decisions, however, did not address the issue of the contacts necessary to force a nonresident to defend a suit on a contract in a foreign jurisdiction.⁷ Much of the discussion centers around whether the plaintiff's interest in litigating

1 *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

The Supreme Court first recognized long-arm jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The extension of jurisdiction was prompted by two Supreme Court decisions which followed *International Shoe*. In *McGee v. International Life Ins.*, 355 U.S. 220 (1957), the Court allowed California to exercise jurisdiction over a nonresident insurance company based on a single insurance policy sold to a California resident. The case marked a broad extension of state court jurisdiction. The Supreme Court limited the extension a year later in *Hanson v. Denckla*, 357 U.S. 235 (1958), when it expressly stated that territorial boundaries placed limits on the exercise of jurisdiction. The Supreme Court remained silent for approximately twenty years before it reevaluated the standard for asserting jurisdiction in the four recent cases.

2 See Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407 (1980).

3 433 U.S. 186 (1977).

4 *Id.* at 204. Long-arm jurisdiction is exercised over a defendant who is not present within the state. Whether jurisdiction over persons who are only transiently present within the state may still be exercised without minimum contacts is still undecided. See Ripple & Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65, 75-77 (1980).

5 444 U.S. 286 (1980).

6 *Id.* at 297.

7 Justice White noted, in his dissent to the denial of certiorari in two cases, the diversity of holdings in lower courts involving commercial contracts. See *Chelsea House Publishers v. Nicholstone Book Bindery*, 102 S. Ct. 1623 (1982) (White, J., dissenting); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907 (1980) (White, J., dissenting).

should be weighed in determining the necessary contacts.⁸ The Supreme Court through Justice White has emphasized that fairness to the defendant is the primary concern and that contacts are therefore required.⁹ Others argue that fairness can be ensured by other tests and that contacts are only one way of creating jurisdiction.¹⁰

This note argues for a middle position. Contacts should be required, but the number of contacts should vary with each case, depending on the plaintiff's interest in litigating in his forum and on whether the defendant could foresee the plaintiff's interest when he established contacts. Part I discusses the minimum contacts test and its rationale as set forth in *World-Wide Volkswagen*, the commentators' criticism of the *World-Wide Volkswagen* rationale, and a proposed compromise.¹¹ Part II seeks support for this compromise in the actual results of the minimum contacts test's application, in *World-Wide Volkswagen*'s discussion of foreseeability of suit, and in an analogy to liability in substantive law.¹² Part III analyzes the contract cases and attempts to reconcile the various holdings by applying a test which considers the defendant's contacts in relation to the foreseeable plaintiff's interest.¹³

I. The Minimum Contacts Test in *World-Wide Volkswagen Corp. v. Woodson*

A. *Limitations on State Court Jurisdiction*

A state court cannot exercise long-arm jurisdiction over a non-resident defendant unless the defendant has contacts with the state which make it fair and reasonable for the state to require the defendant to litigate in its courts.¹⁴ Although the state may have a strong interest in providing the plaintiff with relief and the plaintiff may be inconvenienced by litigating in the defendant's forum, the court can-

8 See Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156 (1982) (hereinafter cited as Chicago Comment); Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B.U.L. REV. 375 (1981) (hereinafter cited as Boston Note); Note, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser*, 75 NW. U.L. REV. 345 (1980) (hereinafter cited as Northwestern Note).

9 *World-Wide Volkswagen*, 444 U.S. at 292.

10 For example, Justice Brennan argues that contacts are only one way of creating jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting).

11 See notes 14-41 *infra* and accompanying text.

12 See notes 42-79 *infra* and accompanying text.

13 See notes 81-103 *infra* and accompanying text.

14 *International Shoe*, 326 U.S. at 316.

not exercise jurisdiction absent some contact with the defendant.¹⁵

The Supreme Court authorized extension of jurisdiction beyond state territorial boundaries when interstate business transactions greatly increased.¹⁶ The Supreme Court has held, however, that the due process clause of the United States Constitution limits this extension.¹⁷ The due process clause serves two functions in limiting jurisdiction: 1) it protects the nonresident defendant from unfair litigation; and 2) it promotes interstate federalism.¹⁸

The fairness requirement is satisfied by finding sufficient contacts between the defendant, the forum, and the litigation.¹⁹ Courts focus primarily on the defendant's contacts but may consider both the forum's and plaintiff's interest in trying the case in the forum's courts.²⁰ If the defendant's contacts should make him aware of the potential forum and plaintiff interest, he should reasonably foresee litigation in the forum.²¹

Interstate federalism is also a legitimate concern and limits jurisdiction through the due process clause.²² Justice White has given two reasons why federalism should limit jurisdiction: 1) the states' economic interdependence; and 2) each state's sovereign power to try cases in its own courts.²³

According to Justice White, the commerce clause prevents states from acting as separate economic entities.²⁴ Broad state court jurisdiction over nonresidents could threaten interstate commerce if businesses decided that they should not carry on interstate commerce to avoid the risk of expensive litigation.²⁵

15 *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

16 *McGee v. International Life Ins.*, 355 U.S. 220, 222-23 (1957) (discussing the reasons for recognizing long-arm jurisdiction). The Supreme Court recognized long-arm jurisdiction in *International Shoe*, 326 U.S. at 316.

17 *World-Wide Volkswagen*, 444 U.S. at 294.

18 *Id.* at 291-92. *But see* notes 33-37 *infra* and accompanying text.

19 *Shaffer v. Heitner*, 433 U.S. at 204. The contacts must make litigation in the forum "reasonable" or "fair" to the defendant. *World-Wide Volkswagen*, 444 U.S. at 292.

20 *See World-Wide Volkswagen*, 444 U.S. at 292. *See also* notes 44-79 *infra* and accompanying text.

21 *World-Wide Volkswagen*, 444 U.S. at 297.

22 *Id.* at 294.

23 *Id.* at 293.

24 *Id.*

25 *See Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (holding that hindering free flow of commerce is a factor in denying jurisdiction). *See also* Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 550-53 (1982); Chicago Comment, *supra* note 8, at 173-80.

Early decisions mentioned interstate commerce as a limiting factor in jurisdictional analysis. *See Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956). *See also*

A state's sovereign power to try cases arising under its own laws, in its courts, also limits the jurisdiction of other states' courts.²⁶ This limitation flows from the territorial conception of state sovereignty which is long established in Anglo-American jurisprudence.²⁷ When a state exercises jurisdiction over a defendant who has no minimum contacts, it encroaches on the sovereignty of the defendant's state and could cause friction among the states.²⁸ Also, the ideal of sovereign states' coexisting in a federal system would disappear if a state could judge the rights and obligations of persons having no contacts with that state.²⁹

B. *Criticisms of the World-Wide Volkswagen Approach*

Commentators have criticised both the minimum contacts test and Justice White's reasons for requiring minimum contacts. They propose other tests which may also protect the defendant without requiring contacts between the defendant and the forum.³⁰ For example, one commentator has suggested that the due process clause be interpreted to prohibit only undue burdens on the defendant.³¹ In this way, the defendant could be made to defend a suit in a jurisdiction where he has no contacts, but where he will not be unreasonably inconvenienced, as long as the forum has a very strong interest in providing relief to the plaintiff.³²

In addition, federalism may not be a legitimate limitation on jurisdiction since the due process clause protects only the defendant's liberty interest and does not necessarily limit sovereignty.³³ Both of

Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 234 (1967) (saying that the commerce clause and not the due process clause limits jurisdiction).

26 *World-Wide Volkswagen*, 444 U.S. at 293.

27 *Id.* See also *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1877).

28 This friction occurs, for example, when one state applies jurisdictional standards to the citizen of a second state simply because the second state would apply the same standard to citizens of the first state. See *Minichiello v. Rosenberg*, 410 F.2d 106, 117 (2nd Cir. 1968) (Anderson, dissenting), *cert. denied*, 396 U.S. 844 (1969); *Forbes v. Boynton*, 113 N.H. 617, 620, 313 A.2d 129, 131 (1973).

29 See *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 509 (4th Cir. 1956).

30 McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1 (1982); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. REV. 1112 (1981).

31 Redish, *supra* note 30, at 1137-43.

32 McDougal, *supra* note 30, at 9-10. Professor McDougal cites Justice Brennan's dissent in *World-Wide Volkswagen* as a possible application of this approach. See *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting) (stating that minimum contacts are only one way to create jurisdiction).

33 Redish, *supra* note 30, at 1133.

Justice White's reasons for using federalism to limit jurisdiction have been criticized. First, the effects of extended jurisdiction on interstate commerce are not clear and may be beyond the province of the courts to determine.³⁴ Second, a state's exercise of jurisdiction over a defendant need not divest a sister state of sovereignty. A sovereign's interest lies in enforcing its substantive laws—not in exercising exclusive jurisdiction over its residents.³⁵ Sovereignty is adequately protected by restricting the forum's choice of law. Restricting the forum's jurisdiction is unnecessary.³⁶ Also, the principle of comity, recognized in international law, should promote interstate harmony.³⁷ If all states' jurisdiction extended to equal limits, they would be able to defer to each other without sacrificing their sovereignty.

C. *A Proposed Development of World-Wide Volkswagen*

Even if the Supreme Court follows the commentators' lead and decides that federalism should no longer limit jurisdiction, the defendant will still have a liberty interest in where he is sued.³⁸ This liberty interest places territorial limitations on a state's jurisdiction by requiring contacts with the state.³⁹ If a state could exercise jurisdiction over a defendant simply because he would not be inconve-

34 Braveman, *supra* note 25, at 550-53. *Contra* Chicago Comment, *supra* note 8, at 173-80.

35 Redish, *supra* note 30, at 1139-40.

36 According to Professor Redish, application of its substantive law is the state's interest which should be protected by constitutional limitations. Redish, *supra* note 30, at 1139-40. *See also* Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Ripple & Murphy, *supra* note 4, at 81-86; Note, *Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendant Jurisdiction and Nationwide Service of Process*, 51 FORDHAM L. REV. 127, 155-58 (1982).

The U.S. Supreme Court may not be willing to oblige these commentators by placing strict constitutional limitations on a state's choice of law. In *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Court allowed a state to apply its own laws as long as the contacts between the state and the litigation create state interests which make application of the state's law neither arbitrary nor fundamentally unfair. *Id.* at 320. The test for applying state law is much broader than the test for exercising personal jurisdiction. *Id.* at 320 n.3 (Stevens, J., concurring).

37 Comity among sovereign states was the basis for refusing to enforce judgments of another state in older Supreme Court cases. *See, e.g.*, *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850). Professor Redish says the courts relied on the principle of comity rather than on the United States Constitution to limit jurisdiction. Redish, *supra* note 30, at 1123-24.

English courts and commentators have also discussed this question in relation to the English counterpart to long-arm jurisdiction. *See* CHESHIRE & NORTH, *PRIVATE INTERNATIONAL LAW* 89 & 643-44 (10th ed. 1979).

38 *World-Wide Volkswagen*, 444 U.S. at 297. *See also* Redish, *supra* note 30, at 1125.

39 *See* *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 102 S. Ct. 2099, 2104 n.10 (1982) (saying that jurisdiction is limited by due process and not federalism and stating that

nienched by litigating there, the plaintiff would have much greater freedom in his choice of forum, at the expense of the defendant. In a minimum contacts analysis, the plaintiff may have a choice of forum but it is restricted to forums where the defendant has chosen to establish contacts. If no contacts were required, the defendant would be less able to anticipate where he might be sued since the forum would largely depend on the plaintiff's decision.⁴⁰

Once the contacts requirement is accepted, courts must consider what contacts are necessary to create jurisdiction. The test for determining the contacts necessary to create jurisdiction should consider the plaintiff's interest in obtaining relief in his forum as well as the defendant's contacts with the forum.⁴¹ The emphasis should still be on the defendant's contacts but it should be on the quality and nature of the contacts instead of simply on the quantity of contacts. When the plaintiff has a strong interest in litigating in the forum, few contacts should be necessary. When the plaintiff has a weak interest in litigating in the forum, a greater number of contacts should be required. Part II argues that courts have implicitly done this when deciding the contacts necessary to create jurisdiction.

II. Application of the Minimum Contacts Test

A. *The Accepted Test*

The Supreme Court's minimum contacts test in *World-Wide Volkswagen* has lead courts and commentators to focus on the first question in the minimum contacts analysis: whether the defendant has sufficient contacts with the forum to create jurisdiction.⁴² In contract cases, for example, discussion centers around issues such as whether the defendant was ever present in the forum, whether the

"our holding today does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum state.").

Justice Powell expressed concern that the Court's holding would no longer require contacts to create jurisdiction. *Id.* at 2110 (Powell, J., concurring). In the majority opinion, Justice White assured Justice Powell that this is not the case. *Id.* at 2104 n.10.

40 *See* *Kulko v. California Superior Court*, 436 U.S. 84, 93-94 (1978) (denying jurisdiction and mentioning as a factor that the plaintiff could arbitrarily subject the defendant to suit in any state if the plaintiff's unilateral acts could create jurisdiction between the forum and the defendant).

41 The Supreme Court left this approach open when it said that presence of the defendant's property in a forum might be sufficient contact with the state to allow jurisdiction in a case where the plaintiff could be unable to obtain relief in another forum. *Shaffer v. Heitner*, 433 U.S. at 211 n.37 (1977).

42 Chicago Comment, *supra* note 8, at 158-64; Boston Note, *supra* note 8, at 383-84. *See* notes 44-47 *infra* and accompanying text.

defendant was a seller or purchaser of goods, whether the defendant was an active or passive purchaser, whether the defendant initiated the negotiations, whether the terms of the contract were F.O.B., or whether the contract applied the forum state's law.⁴³ The minimum contacts test postpones considering whether the plaintiff or defendant would be unduly burdened by litigating in the other party's forum and whether the state has an interest in enforcing its laws or providing relief for the plaintiff. These factors are weighed only after finding the necessary minimum contacts.

The lower courts usually state that the minimum contacts test involves a two step analysis: 1) does the defendant have the necessary minimum contacts?; and 2) is the exercise of jurisdiction reasonable?⁴⁴ After finding the necessary minimum contacts, which create jurisdiction, the court must weigh several factors to determine whether exercising jurisdiction is reasonable.⁴⁵ *World-Wide Volkswagen* provides several factors for determining whether jurisdiction is reasonable and fair: 1) the forum's interest in adjudicating the dispute; 2) the plaintiff's interest in obtaining convenient and effective relief; 3) the interstate judicial system's interest in resolving conflicts; and 4) the several states' interest in substantial social policies.⁴⁶ These interests alone, however, cannot create jurisdiction over the defendant. The threshold determination is the defendant's contacts and not the forum's or the plaintiff's interests.⁴⁷

B. *The Implicit Approach*

The problem with the accepted test, which courts have attempted to apply, is that the minimum contacts concept has never been a fixed concept which can be mechanically applied to each case.⁴⁸ The United States Supreme Court views fairness to the de-

43 Ripple & Murphy, *supra* note 4, at 79.

44 *See, e.g.*, Southern Mach. Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir. 1968); Zerbel v. Federman & Co., 179 N.W.2d 872, 877 (Wis. 1970), *appeal dismissed*, 402 U.S. 902 (1971). When the contact is a single act or otherwise insubstantial, the cause of action must arise out of the contact. *International Shoe*, 326 U.S. at 319.

45 *World-Wide Volkswagen*, 444 U.S. at 292.

46 *Id.* *See also* Product Promotions v. Cousteau, 495 F.2d 483, 498 (5th Cir. 1974) (weighing the state's interest in providing a forum for the plaintiff, inconvenience to the parties and equity); Zerbel v. Federman & Co., 179 N.W.2d at 878-79 (weighing the quantity and quality of contacts, the source of the wrong, the interest of the forum in providing relief to its residents and convenience to the parties).

47 *Rush v. Savchuk*, 444 U.S. at 332-33.

48 *See Kulko*, 436 U.S. at 92.

fendant as the crucial issue.⁴⁹ The Court has emphasized that the quality and nature of the contacts—not their quantity—create jurisdiction.⁵⁰ Following this thinking, courts should consider the plaintiff's interest in litigating in his own forum—when this interest is foreseeable to the defendant at the time the defendant established his contacts—in determining whether the necessary contacts exist. Implicitly, the courts have done this. The results of the minimum contacts test's application reveal that weighing the plaintiff's interest, while making the initial determination, is fair and reasonable. Very few contacts create jurisdiction when the interests of the forum and the plaintiff are great, but numerous contacts are required when the interests of the forum and plaintiff are weak. In effect, then, the courts weigh the interests of the forum and the plaintiff when they decide what contacts are necessary for jurisdiction.⁵¹

1. The Forum's and the Plaintiff's Interests

The plaintiff's important interest in jurisdiction analysis is his ability to obtain relief.⁵² When the defendant foresees that the plaintiff will face difficulty in enforcing his cause of action, the defendant subjects himself to jurisdiction by establishing only a few contacts with the plaintiff and the forum. However, when the plaintiff can readily obtain relief in the defendant's forum, the defendant has little reason to anticipate suit in the plaintiff's forum unless he has established more substantial contacts.⁵³

The forum's interest in the litigation is in providing relief for the plaintiff.⁵⁴ This interest is usually expressed in a statute which gives notice to the defendant that he will subject himself to jurisdiction by establishing contacts with the forum.⁵⁵

49 See *World-Wide Volkswagen*, 444 U.S. at 292.

50 See *International Shoe*, 326 U.S. at 319.

51 See *Paolino v. Channel Home Centers*, 668 F.2d 721, 725 (3rd Cir. 1981) ("Due process, after all, is a two way street.")

52 See *McGee v. International Life Ins.*, 355 U.S. at 223. Several state courts have given weight to the plaintiff's interest in obtaining relief and exercised jurisdiction based on few contacts. See also *Zerbel v. Federman & Co.*, 179 N.W.2d at 878-79; *Buckeye Boiler Co. v. Superior Court of Los Angeles County*, 71 Cal.2d 893, 906, 458 P.2d 57, 67, 80 Cal. Rptr. 113, 123 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 443-44, 176 N.E.2d 761, 767 (1961).

53 See *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 528 P.2d 1248, 1253 (Kan. 1974).

54 See *McGee v. International Life Ins.*, 355 U.S. at 223.

55 In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court held that under Delaware's long-arm statute accepting a directorship with a Delaware corporation was not a sufficient contact with Delaware to allow jurisdiction over the directors in a stockholder's

The plaintiff's interest in obtaining relief or the forum's interest in providing it does not, however, create jurisdiction absent minimum contacts.⁵⁶ The defendant must still establish contacts with the plaintiff and his forum through purposeful activity.⁵⁷ A plaintiff who would be inconvenienced by suing in the defendant's forum merely puts the defendant on notice that he will more likely be sued in the plaintiff's forum. Thus, the mere unilateral activity of the plaintiff cannot subject the defendant to jurisdiction.⁵⁸

2. The Defendant's Contacts

The defendant creates jurisdiction by establishing few contacts where the forum and plaintiff interests are great. The defendant also creates jurisdiction where contacts are great but where the forum and plaintiff interests are few. For example, when the plaintiff leaves his domicile to sue a defendant in another jurisdiction, the defendant must have substantial contacts with the forum. Likewise, where a nonresident defendant has contacts with the forum but the cause of action does not arise out of these contacts, courts require substantial contacts.⁵⁹ The plaintiff and forum interests in litigating in the forum are few. The plaintiff, who is usually forum shopping, can bring the suit in another jurisdiction. Also, the state has little interest in applying its laws or in providing a forum for its residents.⁶⁰ Thus, in

derivative action. The Court noted that Delaware had never enacted a statute allowing their state courts to exercise jurisdiction in that situation and that the defendant had no reason to anticipate suit in Delaware. *Id.* at 216.

In response to *Shaffer*, the Delaware legislature enacted a statute allowing its courts to exercise jurisdiction when the only contact is accepting a directorship in a Delaware corporation. DEL. CODE ANN. tit. 10, § 3114(a) (1982 Cum. Supp.). The Delaware Supreme Court upheld the statute while distinguishing *Shaffer*. *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980) ("The defendants accepted their directorships with explicit statutory notice, via § 3114, that they could be haled into the Delaware Courts . . ."). *See also* *In Re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1271-73 (D. Md. 1981) (agreeing with *Armstrong* and distinguishing *Shaffer*).

⁵⁶ *See* *Rush v. Savchuk*, 444 U.S. at 332.

⁵⁷ *See* *Kulko*, 436 U.S. at 93-94.

⁵⁸ *Id.*

⁵⁹ The Supreme Court recognized the possibility in *International Shoe*, 326 U.S. at 318. In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-47 (1952), the Supreme Court allowed Ohio to exercise jurisdiction over a Philippine corporation that was doing sufficiently substantial business in Ohio to subject it to jurisdiction in a cause of action unrelated to that business. *See also* *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

⁶⁰ Some courts have refused jurisdiction when the defendant had few contacts and the plaintiff had other forums in which to litigate. *See, e.g.*, *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 347 (5th Cir. 1966) (court lacked jurisdiction over nonresident publisher when the plaintiffs were also nonresidents); *Washington Scientific Indus. v. Polan Indus.*, 302 F.

these cases the due process clause requires the defendant to have substantial, rather than minimal contacts with the forum.⁶¹

Most courts do not find mechanically fixed "minimum contacts" before weighing the interests of the plaintiff and the forum. Instead, courts implicitly weigh the interests of the plaintiff and the forum in assessing the contacts. Once a court determines that the defendant has some contacts, the quantity of the contacts required to exercise jurisdiction depends on the plaintiff's and forum's interest in litigating in the state.

C. *Foreseeability of Suit and Plaintiff and Forum Interests*

Development of dictum in *World-Wide Volkswagen Corp. v. Woodson*⁶² supports consideration of the plaintiff and forum interests in determining the amount of contacts necessary for jurisdiction. The Court stated that foreseeability of suit in the forum is critical for long-arm jurisdiction. The Court further stated that the emphasis must be on the defendant's contacts.⁶³ However, strong plaintiff interests in the forum, known to the defendant when he established contacts with the plaintiff, would make suit foreseeable.⁶⁴

According to *World-Wide Volkswagen*, the foreseeability required for jurisdiction, however, is something more than the foreseeability of possibly causing injury in a state.⁶⁵ This would render a person liable to suit in almost any state where he caused some effect⁶⁶ and make it difficult for potential defendants to structure their conduct to reasonably avoid litigation in foreign jurisdictions.⁶⁷ The legal system would consequently lose the degree of predictability necessary to ensure "orderly administration of the laws."⁶⁸

World-Wide Volkswagen requires that the defendant foresee being haled into court⁶⁹ and that he establish contacts with the forum through his own purposeful activity. When a person's conduct in-

Supp. 1354, 1359-60 (D. Minn. 1969) (state lacked jurisdiction over nonresident subcontractor when contractor was also a nonresident); *Fisher Governor Co. v. Superior Court*, 53 Cal.2d 222, 225-26, 347 P.2d 1, 4, 1 Cal. Rptr. 1, 4 (1959) (state lacked jurisdiction over nonresident manufacturer when accident occurred elsewhere).

61 See note 59 *infra*.

62 444 U.S. 286 (1980).

63 *Id.* at 297.

64 See note 72 *infra* and accompanying text.

65 *World-Wide Volkswagen*, 444 U.S. at 296.

66 *Id.*

67 *Id.* at 297.

68 *Id.*

69 *Id.*

vokes the benefits and protection of another state's laws, despite few contacts, he can reasonably foresee suit there as long as the cause of action arises from those contacts.⁷⁰ When a person purposefully establishes contacts with a plaintiff who will be heavily burdened by litigating in the defendant's state, the defendant can also reasonably foresee being haled into the plaintiff's state even when his contacts are few.⁷¹ Thus, through the foreseeability concept, the Court allows for consideration of plaintiff and forum interests in determining the quantity of contacts necessary to exert jurisdiction.

D. *Analogy to Substantive Law*

A foreseeability test, which considers the plaintiff's interest, finds support in the use of foreseeability to determine substantive liability. Foreseeability in jurisdictional analysis is analogous to its use in substantive law.⁷² A person will not be held liable for damages which were not foreseeable.⁷³ Likewise, he will not be subject to suit in a jurisdiction where his contacts do not make litigation foreseeable.⁷⁴ In tort and contract, liability depends on the amount and likelihood of injury.⁷⁵ When the potential damage is great, the defendant can more readily anticipate liability.

Jurisdiction also can depend on the amount of damage. A plaintiff who cannot enforce a claim in the defendant's state without hardship is, in a sense, damaged.⁷⁶ A defendant who has contacts with the plaintiff can anticipate suit in the plaintiff's forum when this hardship would make a suit in the defendant's state inequitable.

⁷⁰ *Id.*

⁷¹ See 1 RESTATEMENT (SECOND) CONFLICT OF LAWS § 37 caveat a (1971). The Restatement recognizes three situations where a state has jurisdiction over a nonresident regarding causes of action arising out of his contacts with the state: 1) the effects in the state are intentionally caused; 2) the effects are reasonably foreseeable; 3) the effects were neither intentional nor foreseeable. The first situation allows jurisdiction just as if the defendant had been present when he caused the effects. The second situation allows jurisdiction depending on a variety of factors, including how closely the defendant is related to the state and how closely the plaintiff is related to the state. When the plaintiff has little or no relation to the state then the defendant's contacts must be correspondingly greater to allow jurisdiction. Another factor to consider is the amount of damage to persons and things the defendant could anticipate. The third situation allows jurisdiction only if the defendant and the plaintiff have extensive relations with the state. *Id.*

⁷² Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 91-96.

⁷³ See CALAMARI & PERILLO, *THE LAW OF CONTRACTS* § 14-5 (2d ed. 1977); PROSSER, *THE LAW OF TORTS* § 43 (4th ed. 1971).

⁷⁴ *World-Wide Volkswagen*, 444 U.S. at 297.

⁷⁵ See note 73 *infra*.

⁷⁶ See Brillmayer, *supra* note 72, at 110.

Jurisdiction, like substantive liability, also depends on the plaintiff's acts as distinguished from his interest in obtaining relief. In substantive law, the plaintiff's contributory negligence or his failure to mitigate damages can reduce and even eliminate the defendant's liability.⁷⁷ In jurisdictional analysis, the plaintiff's "unilateral activity"⁷⁸ and his reciprocal contacts with the defendant's state⁷⁹ can reduce the foreseeability of suit.

The Supreme Court has not discussed the analogy between liability in substantive law and jurisdiction, but the analogy is implicitly contained in the basic concept of jurisdiction. Jurisdiction is the power to enter a binding judgment; this power implies the defendant's *liability* to be subject to suit. The Supreme Court's discussion of foreseeability in *World-Wide Volkswagen* at least leaves room to develop this analogy and apply it to the commercial cases that Justice White found so disoriented.

III. The Contract Cases

State legislatures enable their courts to exercise jurisdiction over nonresidents through long-arm statutes. The forum state's long-arm statute is an important factor in determining the state's interest in exercising jurisdiction.⁸⁰ When a legislature enacts a statute permitting the exercise of jurisdiction over a nonresident, the nonresident has a reason to foresee suit in that state.⁸¹

Many state statutes allow courts to base jurisdiction over a defendant on contacts which arise out of a contract with a resident plaintiff.⁸² These statutes usually require more contacts than a contractual obligation with the resident before jurisdiction is allowed.⁸³ Courts must determine whether the statute applies to the defendant and then whether exercising jurisdiction will deny the defendant due

77 See CALAMARI & PERILLO, *supra* note 73, § 14-15; PROSSER, *supra* note 73, § 65.

78 See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

79 See *Brilmayer*, *supra* note 72, at 110-11.

80 See *McGee v. International Life Ins.*, 355 U.S. at 221.

81 See *Shaffer v. Heitner*, 433 U.S. at 216.

82 See, e.g., 14 CAL. CIV. PROC. CODE § 410.10 (West 1973); 4A KAN. STAT. ANN. § 60.308(b)(5) (1976); 4 TENN. CODE ANN. § 20-2-214 (1980); 5 TEX. REV. CIV. STAT. ANN. art. 2031(b)(4) (West. Supp. 1982-1983); WIS. STAT. ANN. § 801.05(5) (West 1977).

83 The statute usually requires services or goods to be performed in the state. See, e.g., 4A KAN. STAT. ANN. § 60-308(b)(5) (1976) ("Entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state."); 4 TENN. CODE ANN. § 20-2-214(a)(5) (1980) ("Entering into a contract for services to be rendered or for materials to be furnished in this state.").

process of law.⁸⁴ Many times either the statute itself⁸⁵ or judicial interpretation⁸⁶ extends the statute to the full limits possible under the Constitution.

Jurisdiction depends on some contact between the defendant and the forum state. Thus the court must focus on the defendant's acts. In contract cases, however, purchasers and sellers have different "quality" of contacts.

Sellers promise to deliver goods or services which enter the plaintiff's state. When the seller is physically present in the state during the course of performance, his contacts are extensive and the exercise of jurisdiction is usually constitutional.⁸⁷ Even when the seller performs outside the state and sends goods into the state, his contacts are usually substantial enough for jurisdiction.⁸⁸ Courts usually allow jurisdiction in these cases because a nonresident seller purpose-

84 See, e.g., *Peanut Corp. of Am. v. Hollywood Brands, Inc.*, 696 F.2d 311, 313 (4th Cir. 1982); *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d at 377.

85 See 14 CAL. CIV. PROC. CODE § 410.10 (West 1973) ("[a]ny basis not inconsistent with the Constitution of this state or of the United States."); 4 TENN. CODE ANN. § 20-2-214(a)(6) (1980) ("[a]ny basis not inconsistent with the constitution of this state or of the United States").

86 See *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1065 (4th Cir. 1982) (construing the North Carolina long-arm statute to extend to United States constitutional limits).

87 See *Taubler v. Giraud*, 655 F.2d 991 (9th Cir. 1981) (upholding jurisdiction over a wine importer who traveled to forum state in order to promote his product); *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472 (7th Cir. 1959) (allowing jurisdiction when defendant's agents entered the state), *cert. denied*, 361 U.S. 959 (1960).

88 See *Electro-Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d 365 (8th Cir. 1969) (asserting jurisdiction over a nonresident seller even though the buyer initiated the negotiations, assumed the risk of shipment, and traveled to the defendant's state).

Other courts find that simply selling goods to the plaintiff will not create jurisdiction, especially when the plaintiff himself has reciprocal contacts with the defendant's state. See *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956) (denying jurisdiction over nonresident seller when the plaintiff initiated the negotiations and assumed risk of loss in the defendant's state).

When the plaintiff lacks a compelling reason for bringing suit in his own forum the defendant may be required to have additional contacts. In *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583 (2nd Cir. 1965), the court held that negotiating a contract with the plaintiff through the mails and telephone and agreeing to apply the plaintiff's state's law were not sufficient contacts alone. However, the additional contact of shipping the goods F.O.B. the plaintiff's state would be sufficient. *Id.* at 587-89.

The nonresident seller must foresee that his act will have consequences in a particular state. For example, when a manufacturer sells to a distributor who in turn sells in a state unknown to the manufacturer, the manufacturer may not be sued in that state. But when the manufacturer sells directly to a plaintiff in the state, he may be sued. Compare *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818 (4th Cir.), *cert. denied*, 411 U.S. 966 (1972) with *John G. Kolbe, Inc. v. Chromodern Chair Co., Inc.*, 211 Va. 736, 180 S.E.2d 664 (1971).

fully avails himself of a state's laws by entering its markets.⁸⁹

The quality of purchasers' contacts differs from nonresident sellers' contacts.⁹⁰ The nonresident purchaser promises to send payments to the plaintiff. The courts' major concern is under what circumstances does this contact, alone or in addition to other contacts, create jurisdiction.

Early cases dealing with nonresident purchasers generally found payment alone insufficient.⁹¹ Other cases have distinguished purchasers who had additional contacts. For example, purchasers who enter the plaintiff's state to solicit the contract have more extensive contacts and courts exercise jurisdiction more readily.⁹² Besides making payments or soliciting the contract, the purchaser may have other contacts, such as assuming the risk of damage to the goods, or supervising the performance by using the telephone and mails, or agreeing to apply the forum's law to the contract.⁹³ These additional

89 See *Taubler v. Giraud*, 655 F.2d at 994; *Electro-Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d at 369.

90 *Ripple & Murphy*, *supra* note 4, at 79.

91 See *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902, 906-07 (D. Minn. 1971)(only contact was payment to resident manufacturer and was not sufficient for jurisdiction); *Guardian Packaging Corp. v. Kapak Indus.*, 316 F. Supp. 952, 954-55 (D. Minn. 1970)(payment to resident manufacturer was only contact); *Oswalt Indus. v. Gilmore*, 297 F. Supp. 307, 312-13 (D. Kan. 1969)(payment and one visit to plaintiff's state were not sufficient contacts); *Rath Packing Co. v. Intercontinental Meat Traders*, 181 N.W.2d 184, 189 (Iowa 1970)(purchaser not amenable to suit when only contacts were payment to resident plaintiff and accepting goods in plaintiff's state); *Fourth Northwestern Nat'l Bank of Minneapolis v. Hilson Indus.*, 264 Minn. 110, 117 N.W.2d 732 (1962)(only significant contact was payment of money).

92 Two California cases found jurisdiction over a purchaser whose contacts included sending agents into California to supervise the plaintiff's performance in addition to sending payments into the forum. *Republic Int'l Corp. v. Amco Engineers*, 516 F.2d 161 (9th Cir. 1975); *American Cont. Import Agency v. Superior Court*, 216 Cal. App. 2d 317, 30 Cal. Rptr. 654 (1963). See also *Compania de Astral, S.A. v. Boston Metals Co.*, 205 Md. 237, 261-62, 107 A.2d 357, 367 (1954)(allowing jurisdiction when defendant continually entered plaintiff's state to supervise, when contract applied Maryland law and when defendant accepted product in forum in addition to making payments to forum), *cert. denied*, 348 U.S. 943 (1955).

But when the purchaser's only contacts are promising to pay and placing an order through the telephone without entering the state, jurisdiction may be harder to support. See *Architectural Bldg. Components Corp. v. Comfort*, 528 P.2d 307 (Okla. 1974).

93 See *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973)(making visits to supervise and sending numerous documents and telephone calls created jurisdiction); *Colony Press, Inc. v. Fleeman*, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1974)(purchaser accepting goods had sufficient contacts); *Dahlberg Co. v. Western Hearing Aid Center*, 259 Minn. 330, 335-36, 107 N.W.2d 381, 385 (allowing jurisdiction when defendant purchaser accepted goods in plaintiff's state, attended numerous meetings and where contract was prepared in forum), *cert. denied*, 366 U.S. 961 (1961).

When the plaintiff has reciprocal contacts with the defendant's state, jurisdiction may be more difficult to exercise. See *Sun-X Int'l Co. v. Witt*, 413 S.W.2d 761 (Tex. Civ. App.

contacts make an exercise of jurisdiction more likely. However, the presence or absence of a particular type of contact such as presence in the forum, initiation of bargaining, or assumption of the risk of damage to goods is not in itself decisive.⁹⁴

Some plaintiffs attempt to sue nonresident purchasers whose only contact is making payments. The courts consider this contact in light of the plaintiff's interest in obtaining relief in the forum and the forum state's interest in providing relief, in determining whether making payment alone is sufficient to create jurisdiction.⁹⁵ A court's decision usually hinges on the extent of these interests. The plaintiff's interests are greater when he has extensively altered his position by relying on the defendant's promise.⁹⁶ Courts deny jurisdiction when the plaintiff effectively controls his own actions and the contract does not stipulate where the plaintiff must perform.⁹⁷ Hence, courts do

1967)(denying jurisdiction when defendant's only contacts were acceptance of offer and acceptance of goods in plaintiff's state while payment was made to plaintiff's agent in defendant's state).

94 See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 603-04 (7th Cir. 1979)(the acceptance of goods in plaintiff's state is not necessary), *cert. denied*, 445 U.S. 907 (1980); *Pedi Bares, Inc. v. P & C Food Mkts.*, 567 F.2d 933, 937 (10th Cir. 1977)(the initiation of negotiations is not decisive); *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d 374, 382 (6th Cir. 1968)(the presence of defendant during contract performance is not necessary).

95 See, e.g., *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1069 (4th Cir. 1982); *Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982); *Continental Am. Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1313-14 (10th Cir. 1982); *Product Promotions v. Cousteau*, 495 F.2d 483, 498 (5th Cir. 1974).

96 Many times jurisdiction depends on what type of goods or services are provided. Personal services of an individual usually mark a greater plaintiff interest. In *Zerbel v. Federman & Co.*, 48 Wis. 2d 54, 179 N.W.2d 872 (1970), *appeal dismissed*, 402 U.S. 902 (1971), an accountant prepared financial statements in Wisconsin for a New York corporation. The New York corporation carried on no business within Wisconsin and was never present but it did know that the plaintiff would perform there. The court exercised jurisdiction over the defendant even though the plaintiff had traveled extensively to the corporation's places of business in New York.

Courts also exercise jurisdiction when the defendant agrees to accept custom made goods manufactured specifically for the defendant. In *Nicholstone Book Bindery v. Chelsea House Publishers*, 621 S.W.2d 560 (Tenn. 1981), *cert. denied*, 102 S. Ct. 1623 (1982), the Tennessee Supreme Court exercised jurisdiction when the resident plaintiff purchased expensive specialized materials for custom made goods. The court noted the state's interest in providing relief for its residents and emphasized that the defendant knew the plaintiff would perform in the state. *Id.* at 564. The court distinguished cases where jurisdiction was denied because the plaintiff's goods came from a readily available inventory and were not custom made. *Id.*

97 In *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980), the United States Court of Appeals for the Seventh Circuit denied jurisdiction over the nonresident purchaser since the plaintiff promised goods, not services, and since the plaintiff had a choice of where to manufacture the goods. The court said the defendant was not amenable to suit in Wisconsin simply because the plaintiff

not find jurisdiction when the plaintiff seeks to base it on his own unilateral activity.⁹⁸ The defendant can reasonably anticipate suit in a state when he has reason to know that the plaintiff will perform there.⁹⁹

Two factors will weigh against exercising jurisdiction and require additional contacts. The first is the plaintiff's reciprocal contacts with the defendant's state.¹⁰⁰ In these cases, the plaintiff should anticipate suit in the defendant's state and not in his own state, at least when the defendant's contacts with the plaintiff's state are few. The second factor is the plaintiff's ability to obtain relief in the defendant's state.¹⁰¹ When the defendant enters into a contract, he should realize the burden the plaintiff will face if a cause of action arises from the contract. If the plaintiff will face a heavy burden if forced to litigate in the defendant's forum, then the defendant can foresee a suit in the plaintiff's forum.¹⁰² A slight burden on the plaintiff can reduce the defendant's foresight and increase the contacts necessary to create jurisdiction.¹⁰³ Thus, when a nonresident defendant promises to pay money to a plaintiff who is slightly burdened,

chose to manufacture there even though the defendant could anticipate that the plaintiff would manufacture the goods in the forum. In a footnote, the court said it could not express an opinion about a case where the contract required performance in a specific location. *Id.* at 603 n.13.

When the defendant knows where the plaintiff will perform, jurisdiction will be easier to exercise. See *Nicholstone Book Bindery*, 621 S.W.2d at 564.

98 *Lakeside Bridge & Steel Co.*, 597 F.2d at 603. The principle that jurisdiction cannot be based on the plaintiff's "unilateral activity" comes from the holding in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). See also *Nu-Way Sys., Inc. v. Belmont Mktg.*, 635 F.2d 617, 620 (7th Cir. 1980).

99 In *Product Promotions v. Cousteau*, 495 F.2d 483 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit found sufficient contacts when the nonresident defendant sent film into the forum state. The contact with the forum was not simply the unilateral activity of the plaintiff since the defendant could foresee the nexus between the forum and the litigation and the forum's interest in providing relief for the plaintiff. *Id.* at 497.

100 See *U-Anchor Advertising v. N.H. Burt*, 553 S.W.2d 760 (Tex. 1977) (denying jurisdiction where the plaintiff solicited the defendant in the defendant's state, where the contract was signed in the defendant's forum and where the plaintiff performed a substantial part of his obligation in the defendant's forum), *cert. denied*, 434 U.S. 1063 (1978).

101 See *Misco-United Supply, Inc. v. Richard of Rockford, Inc.*, 215 Kan. 849, 528 P.2d 1248 (1974) (where the plaintiff was equally capable of litigating in the defendant's forum, promise to pay in plaintiff's forum was insufficient contact).

102 See *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1069 (4th Cir. 1982) (telephone negotiations and use of mails were sufficient contacts when plaintiff faced greater burden in litigating in defendant's forum). See also *Zerbel v. Federman & Co.*, 179 N.W.2d at 879 (Wis. 1970).

103 *Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (third party plaintiff failed to show suit in forum was more convenient than suit in defendant's forum); *Product Promotions, Inc. v. Cousteau*, 495 F.2d at 498 n.27.

courts will look for additional contacts between the defendant and the forum such as initiating negotiations, assuming the risk of damage, and entering the state to supervise performance.

IV. Conclusion

Jurisdiction over some defendants whose contacts arise from a contractual obligation with a person within the forum is a reasonable extension of long-arm jurisdiction. Long-arm jurisdiction is based on the defendant's obligations to the plaintiff which arise from contacts with the state.¹⁰⁴ These contacts, and resulting obligations, create jurisdiction when the defendant can reasonably foresee litigating his obligations in the plaintiff's state.¹⁰⁵ The quantity of contacts necessary to create jurisdiction depends on the plaintiff's position. The contacts increase as the plaintiff's ability to litigate in the defendant's forum and the plaintiff's reciprocal contacts with the defendant increase. Thus, when a defendant contracts for goods and services which he knows the plaintiff will provide in a particular state, when the plaintiff has few contacts with the defendant's state, and when the plaintiff will be more inconvenienced by litigating in the defendant's state—the defendant should foresee suit. The fairness mandated by due process requires additional contacts when the plaintiff's ability to litigate in the defendant's forum and when his contacts with the defendant increase.

Any disarray in the lower courts¹⁰⁶ does not result from conflicting jurisdictional standards. The disarray results from a poorly defined method of jurisdictional analysis. Once the law recognizes that the defendant's interest in due process and the plaintiff's interest in obtaining relief both determine the contacts necessary for jurisdiction, fixed rules will not be necessary. Two defendants, each with the same amount of contacts, may be treated differently depending on what plaintiff the defendant has dealt with. The question is not simply what contacts create jurisdiction, but also whether the defendant can reasonably foresee litigation when he chooses to deal with particular persons. The Supreme Court's role in this regard is not to promulgate fixed rules. Instead, it should develop a fair method of jurisdictional analysis.

Matthew Schultz

104 *International Shoe*, 326 U.S. at 319.

105 *World-Wide Volkswagen*, 444 U.S. at 297.

106 *See* note 7 *supra*.