Nova Law Review

Volume 5, *Issue* 3 1981 *Article* 3

Personal Jurisdiction in Florida: Some Problems and Proposals

Marc Rohr*

*

Personal Jurisdiction in Florida: Some Problems and Proposals

Marc Rohr

Abstract

As any well-taught law student knows, two things must generally be true in order for an American court to render a binding *in personam* judgment against a party who does not reside within the borders of the state in which the court is located:' (1) the party's conduct must fall within the terms of a statute of that state, universally known as a "long arm statute," conferring power upon that state's courts to hear cases of the kind described therein, and (2) the assertion of personal jurisdiction under the long arm statute must satisfy the "minimum contacts" test articulated by the United States Supreme Court in the case of *International* Shoe Co. v. Washington.

KEYWORDS: problems, proposals, jurisdiction

Personal Jurisdiction in Florida: Some Problems and Proposals

by Marc Rohr*

As any well-taught law student knows, two things must generally be true in order for an American court to render a binding *in personam* judgment against a party who does not reside within the borders of the state in which the court is located:[1] (1) the party's conduct must fall within the terms of a statute of that state, universally known as a "long arm statute," conferring power upon that state's courts to hear cases of the kind described therein, and (2) the assertion of personal jurisdiction under the long arm statute must satisfy the "minimum contacts" test articulated by the United States Supreme Court in the case of *International Shoe Co. v. Washington.*[2] Florida attorneys are presently blessed with a patchwork quilt of long arm statutes,[3] some of which contain obviously duplicative provisions and each of which is tied, not always with clarity or reason, to one or another method of service of process on nonresidents. This collective result of sporadic legislative activity is, at best, aesthetically displeasing, and, at worst, confusing and productive of some judicial decisions that seem wholly without a basis in reason. My primary purposes in writing this article are (1) to explore the interrelationship of Florida's long arm statutes and to recommend amendments which would make them simpler and more sensible, (2) to consider some of the decisions interpreting those statutes, in the light of the recent opinion of the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson,*[4] and (3) to evaluate the continuing vitality of *quasi in rem* jurisdiction in Florida in the aftermath of the

* Associate Professor of Law, Nova University Center for the Study of Law; B.A. 1968, Columbia; J.D. 1971, Harvard University.

1. Greenspun v. Del E. Webb Corp., 634 F.2d 1204 (9th Cir. 1980).
2. 326 U.S. 310 (1945).
3. FLA. STAT. §§ 48.011 *et seq.* & 49.011 *et seq.* (1979).
4. 444 U.S. 286 (1980).

United States Supreme Court opinion in *Shaffer v. Heitner*.[5]

I. THE STATUTORY SCHEME

Florida's "general" (*i.e.*, most comprehensive) long arm statute, § 48.193,[6] was enacted in 1973. Most significantly, it asserts the jurisdic-

5. 433 U.S. 186 (1977).

6. 48.193 Acts subjecting persons to jurisdiction of courts of state

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

(a) Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state.

(b) Commits a tortious act within this state.

(c) Owns, uses, or possesses any real property within this state.

(d) Contracts to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to proceedings for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:

1. The defendant was engaged in solicitation or service activities within this state which resulted in such injury; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use or consumption resulted in the injury.

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in § 48.194. The service shall have the same effect as

tion of the Florida courts over any "person" who commits a tortious act within Florida,[7] causes injury in Florida resulting from an act or omission outside the state (provided that certain other facts are true),[8] breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida,[9] or engages in a "business or business venture in this state or has an office or agency in this state."[10] In any of such cases, the statute provides for jurisdiction only with respect to a cause of action "arising from" one of the enumerated activities.[11] The statute is typical and essentially unobjectionable. But when the Florida legislature enacted § 48.193, it did not repeal any of five pre-existing statutes which are arguably unnecessary in light of § 48.193.

Section 48.171[12] provides for personal jurisdiction over a nonresident motor vehicle owner or operator with respect to civil actions arising out of any accident or collision occurring within the State of Florida in which the motor vehicle is involved. Section 48.19[13] makes similar provision with respect to operators of aircraft or watercraft in

---

if it had been personally served within this state.

(3) Only causes of action arising from acts or omissions enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section, unless the defendant in his pleadings demands affirmative relief on other causes of action, in which event the plaintiff may assert any cause of action against the defendant, regardless of its basis, by amended pleadings pursuant to the rules of civil procedure.

(4) Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereinafter provided by law.

FLA. STAT. § 48.193 (1979).

7. FLA. STAT. § 48.193(1)(b) (1979).

8. FLA. STAT. § 48.193(1)(f) (1979).

9. FLA. STAT. § 48.193(1)(g) (1979).

10. FLA. STAT. § 48.193(1)(a) (1979). Very few decisions have construed the other subsections of § 48.193. With respect to § 48.193(1)(d), see Atlantic Lines, Ltd. v. M/V Domburgn, 473 F. Supp. 700 (S.D. Fla. 1979). With respect to § 48.193(1)(e), see Estanislao v. State of Florida Dep't of HRS, 368 So. 2d 677 (Fla. 1st Dist. Ct. App. 1979).

11. FLA. STAT. § 48.193(3) (1979).

12. FLA. STAT. § 48.171 (1979).

13. FLA. STAT. § 48.19 (1979).

the state. These statutes obviously make primary reference to conduct which is encompassed by § 48.193 (1)(b), which confers jurisdiction over one who "[c]ommits a tortious act within the state." A few Florida cases have held § 48.171 applicable to contract disputes arising out of automobile accidents in the state,[14] but such cases should easily fall within the coverage of § 48.193(1)(g). Both § 48.171 and § 48.19 expressly include cases of vicarious liability by nonresidents, but so does § 48.193(1), although admittedly not in the same words; it is therefore possible that the statutes do not completely overlap.[15] Another situation to which § 48.171, but not § 48.193, might apply, although apparently there is no reported decision of this kind in Florida, is an action against a nonresident motorist based upon his allegedly negligent omission, outside of Florida, to repair his vehicle prior to driving it into this state; such conduct might well fail to satisfy the terms of either § 48.193(1)(b) or (f). Still, the typical cases under § 48.171 and § 48.19 are now covered by § 48.193.

Another pre-1973 long arm statute which has survived is § 48.181.[16] This was by far the most useful and most frequently utilized

---

14. Maryland Casualty Co. v. Hartford Accident and Indemnity Co., 264 So. 2d 842 (Fla. 1st Dist. Ct. App. 1972); Marion County Hospital Dist. v. Namer, 225 So. 2d 442 (Fla. 1st Dist. Ct. App. 1964); Aetna Casualty & Surety Co. v. Miller, 172 So. 2d 11 (Fla. 2d Dist. Ct. App. 1965).

15. Section 48.171 confers jurisdiction over one who permits a motor vehicle owned by him to be driven in the State of Florida. Young v. Young, 382 So. 2d 355 (Fla. 5th Dist. Ct. App. 1980). Section 48.193(1) confers jurisdiction over one who "personally or through an agent" does any of the acts enumerated in the statute. The mere fact that the owner of a vehicle has given the driver his permission may not suffice to render the driver the "agent" of the owner, within the meaning of § 48.193(1), although it has generally been held that the owner of an automobile is liable for the negligence of one driving with his consent. *E.g.*, Skroh v. Newby, 237 So. 2d 548 (Fla. 1st Dist. Ct. App. 1970); Slitkin v. Avis Rent-a-Car Syss., Inc., 382 So. 2d 883 (Fla. 3d Dist. Ct. App. 1980); Langstron v. Personal Serv. Ins. Co., 377 So. 2d 993 (Fla. 2d Dist. Ct. App. 1979).

16. 48.181 Service on nonresident engaging in business in state

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to

statute prior to the enactment of § 48.193, and it continues to be utilized today. It provides for personal jurisdiction over any nonresident legal entity who accepts "the privilege extended by law . . . to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state" with respect to any civil action "arising out of any transaction or operation connected with or incidental to the business or business venture."[17] Aside from the grammatical reconstruction of the sentence, the language in § 48.193(1)(a) is identical, and indeed Florida courts have held that the language of § 48.193(1)(a) means exactly the same thing as the language of § 48.181(1).[18] Again, however, there is at least one potential difference between the statutes. Section 48.181(3), added in 1957, provides that any person who sells or leases property through "brokers, jobbers, wholesalers or distributors" to anyone in Florida "shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state." To my knowledge, no reported decision has yet considered the question of whether the principle ex-

---

operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

(2) If a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer.

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person, firm or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.

FLA. STAT. § 48.181 (1979).

17. FLA. STAT. § 48.181(1) (1979).

18. Bank of Wessington v. Winters Gov't Sec. Corp., 361 So. 2d 757 (Fla. 4th Dist. Ct. App. 1978); Escambia Treating Co. v. Otto Candies, Inc., 405 F. Supp. 1235 (N.D. Fla. 1975).

pressed in § 48.181(3) is also applicable, by implication, under § 48.193(1)(a); possibly it is not, and possibly that could lead to different results under the two statutes, but certainly it would be simple enough to add the language of § 48.181(3) to § 48.193(1)(a).

The most important distinction, however, between § 48.193, on the one hand, and § 48.181, § 48.171, and § 48.19, on the other, concerns the methods of service of process authorized by these statutes. Section 48.193(2) states that service upon anyone who is subject to the jurisdiction of the Florida courts under § 48.193 "*may* be made by personally serving the process upon the defendant outside this state, as provided in § 48.194." Regrettably, the Florida courts have, with virtual unanimity, interpreted this section to mean that nonresidents sued in Florida under § 48.193 *must* be personally served outside the state in the manner described in § 48.194.[19] This conclusion has led to absurd results, as, for example, where service of process upon a Panamanian corporate defendant was held invalid, in a suit in which jurisdiction was based upon § 48.193(1)(g), because service was made upon the corporation's president at his home in Dade County.[20]

According to the three older statutes, in contrast, the defendant's relevant activity in the state constitutes an appointment of the Florida Secretary of State as his agent for service of process. One must then look to § 48.161,[21] which prescribes the method of service upon the Secretary of State and requires that a copy of the process be mailed or delivered to the nonresident defendant as well. From the face of the statutes it would appear that § 48.161 represents the exclusive method for service in cases in which personal jurisdiction is predicated on § 48.171 or § 48.19. Section 48.181(2) provides a preferred alternative method in "business or business venture" cases: if a foreign corporation

19. Underwood v. University of Ky., 390 So. 2d 433 (Fla. 3d Dist. Ct. App. 1980); Tucker v. Dianne Elec., Inc., 389 So. 2d 683 (Fla. 5th Dist. Ct. App. 1980); A.B.L. Realty Corp. v. Cohl, 384 So. 2d 1351 (Fla. 4th Dist. Ct. App. 1980); Bradford White Corp. v. Aetna Ins. Co., 372 So. 2d 994 (Fla. 3d Dist. Ct. App. 1979); P.S.R. Assocs. v. Artcraft-Heath, 364 So. 2d 855 (Fla. 2d Dist. Ct. App. 1978); *but see* Rosen v. Rosen, 306 So. 2d 546 (Fla. 3d Dist. Ct. App. 1974) (dictum); Poston v. American President Lines, Ltd., 452 F. Supp. 568 (S.D. Fla. 1978) (no discussion of this issue).

20. Caribe & Panama, Invs. S.A. v. Christensen, 375 So. 2d 601 (Fla. 3d Dist. Ct. App. 1979) (J. Pearson, dissenting).

21. FLA. STAT. § 48.161 (1979).

engaging in such activity in Florida has a "resident agent or officer" in the state, process "shall" be served on him or her. The Florida courts appear to have held that a foreign corporation amenable to suit in Florida under § 48.181 may be served, if feasible, according to § 48.081(1) and (2),[22] which list the corporate officers and agents upon whom process may be served.[23]

What all this means is that, even within the substantially overlapping coverage of § 48.193, on the one hand, and §§ 48.171, 48.181, and 48.19, on the other, the statutes are not duplicative because they are tied to different methods of service of process. I submit that this is a senseless state of affairs, and the product of historical accident rather than design. There is no good reason why methods of service of process available in one category of cases should differ from those available in another category. The sensible thing to do would be to list all of the methods of service upon nonresidents deemed constitutionally acceptable, and provide that any of them may be utilized in conjunction with any long arm statute. Among the methods so listed should be personal service inside *or* outside the State of Florida, and service by registered or certified mail addressed to persons outside the state.[24] Substituted service upon the secretary of state is a vestige of long-discredited doctrine that should be scrapped. It arose as a feature of the early "im-

22. FLA. STAT. § 48.081(1) & (2) (1979). *See also* FLA. STAT. § 48.081(3), providing the further alternative of service upon the registered agent required by section 48.091 in the case of Florida corporations and foreign corporations qualifying to do business in Florida.

23. At least a few courts have held that personal jurisdiction over a nonresident corporation is not effectuated merely by satisfaction of § 48.081(1); they have stated that § 48.181 must be satisfied as well. Caribe & Panama, Invs. S.A. v. Christensen, 375 So. 2d 601 (Fla. 3d Dist. Ct. App. 1979); Goffer v. Weston, 217 So. 2d 896 (Fla. 3d Dist. Ct. App. 1979); *see also* Heritage Corp. of S. Fla. v. Apartment Invs., Inc., 285 So. 2d 629 (Fla. 3d Dist. Ct. App. 1973). The strong implication is that the methods of service provided by § 48.081(1) and (2) may be utilized in cases in which jurisdiction is conferred by § 48.181.

24. Gadd v. Pearson, 351 F. Supp. 895 (M.D. Fla. 1972), offers another example of an undesirable result compelled by the present statutory scheme. The federal district court, obliged to follow Florida law under Federal Rule of Civil Procedure 4(e), quashed service on a Florida resident who received substituted service in North Carolina under §§ 48.161 and 48.181. The court stated that those statutes did not apply because the defendant was neither a nonresident nor concealing himself.

plied consent" statutes[25] designed to circumvent the proscription declared in *Pennoyer v. Neff*[26] against service of process beyond the boundaries of the state. The United States Supreme Court stated over thirty years ago that what matters, as a matter of constitutional due process, is that the notice given to a defendant be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ."[27] Obviously the meaningful part of § 48.161 is the provision for the mailing of process to the defendant, and not the delivery of papers to a public official; even when the defendant's whereabouts are unknown, constructive service by publication is more likely to give him notice than substituted service upon the secretary of state.

Once having eliminated the needless differences in the long arm statutes with respect to service of process, the Florida legislature should decide whether any substantive considerations justify the retention of §§ 48.171, 48.181, or 48.19. Two other long arm statutes should be reconsidered as well. One is § 48.071,[28] providing for jurisdiction over a nonresident individual or partnership which "engages in business" in Florida, with respect to civil actions "arising out of such business." The statute provides for service on "the person who is in charge" of such business, with a copy to be sent by registered or certified mail to the nonresident defendant. If the methods of service of process are harmonized, the overlap with § 48.193(1)(a) appears to be total. If the number of reported decisions are any indication, moreover, this statute has received remarkably little use.

The other statute whose utility should be reconsidered is § 48.081(5),[29] which confers jurisdiction over a corporation which "has a

25. *See, e.g.*, the Massachusetts statute upheld in Hess v. Pawloski, 274 U.S. 352 (1927).

26. 95 U.S. 714 (1877).

27. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

28. FLA. STAT. § 48.071 (1979).

29. 48.081 Service on corporations

. . .

(5) Where a corporation has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case, that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation con-

business office within the state and is actually engaged in the transaction of business therefrom"; service may be made upon "any officer or business agent, resident in the state." Paragraph 48.193(1)(a) is potentially more far-reaching than this statute in that it refers to a party who "has an office or agency in this state." But there is one crucial difference between § 48.193 and § 48.081(5) that gives the latter statute greater scope: § 48.193(1), again, extends jurisdiction only to causes of action arising from the Florida activities listed in the statute; § 48.081(5), uniquely among the Florida long arm statutes, states that a civil action against a corporation covered by that section need not have arisen out of the corporation's business transacted within the State of Florida.

Is such a legislative pronouncement constitutional? The Florida courts seem to have acted somewhat schizophrenically with respect to that question. When long arm statutes have required that the cause of action have arisen from the defendant's relevant Florida activities, the courts have naturally insisted upon compliance with such statutes,[30] but often they have gone on to suggest that such a statutory requirement was constitutionally compelled.[31] When long arm statutes have *not* required such a connection, however, no Florida court has yet suggested that a serious constitutional problem was presented. Thus, the few reported Florida decisions applying § 48.081(5) have done so without difficulty (and without any discussion of due process or "minimum contacts"), despite the fact that the cause of action was clearly

---

nected with or incidental to the business being transacted within the state. FLA. STAT. § 48.081 (1979).

30. *E.g.*, Holiday Inns, Inc. v. Jamison, 353 So. 2d 1269 (Fla. 1st Dist. Ct. App. 1978); Youngblood v. Citrus Assoc. of the N.Y. Cotton Exch., Inc., 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973).

31. "In addition, in order to meet constitutional standards, the exercise of personal jurisdiction over a nonresident must be limited to causes of action arising out of and directly related to the acts of the nonresident by which he 'purposefully avail[s] . . . [himself] of the privilege of conducting activities within the state.'" Corley v. Miliken, 389 So. 2d 976, 977 (Fla. 1980) (applying § 48.19). Similar statements were made in Illinois Cent. R.R. Co. v. Simari, 191 So. 2d 427 (Fla. 1966); Giannini Cont. Corp. v. Eubanks, 190 So. 2d 171 (Fla. 1966); Manus v. Manus, 193 So. 2d 236 (Fla. 4th Dist. Ct. App. 1966); *but see* H. Bell & Assocs. Inc. v. Keasbey & Mattison Co., 140 So. 2d 125 (Fla. 3d Dist. Ct. App. 1962); Hoffman v. Air India, 393 F.2d 507 (5th Cir. 1968); Woodham v. Northwestern Steel & Wire Co., 390 F.2d 27 (5th Cir. 1968).

unconnected to the defendant's Florida contacts.[32]

The Supreme Court of Florida confronted the issue in a related context in *Confederation of Canada Life Insurance Co. v. Vega y Arminim*[33] back in 1962. The plaintiff sued a Canadian insurer for the cash surrender value of an insurance policy purchased by the plaintiff in Cuba in 1928; the transaction had nothing to do with Florida. The defendant had qualified to do business in Florida, and thus personal jurisdiction was upheld under § 624.0221, providing that an insurer who applies for authority to transact business in Florida "shall file . . . its appointment of the [insurance] commissioner . . . as its attorney to receive service of all legal process issued against it in any civil action . . . ." In response to the insurer's argument that due process was violated by applying the statute to a case in which the cause of action was unconnected to the defendant's Florida activities, the court made a firm distinction between corporations which had qualified to do business in Florida and those which had not:

> The statute and cases pertaining to service of process upon an actual representative or an impliedly appointed agent of a foreign corporation *not authorized* to do business within the state wherein the suit is brought are not applicable to the instant issue. The issue before us is restricted to those cases wherein the foreign corporation, as a condition precedent to its operations within the state, has expressly designated a public official as its agent for the purpose of receiving service of process.
>
> [T]he decided weight of authority is to the effect such a foreign corporation qualifying to do business in the state becomes amenable to process even as to causes of action not arising out of its transactions therein and thereby suffers no denial of due process of law.[34]

At least one lower Florida appellate court has reached the same conclusion with respect to the statutory provision allowing service to be

---

32. Killingsworth v. Montgomery Ward & Co., 327 So. 2d 50 (Fla. 2d Dist. Ct. App. 1976); Crown Colony Club, Ltd. v. Honecker, 307 So. 2d 889 (Fla. 3d Dist. Ct. App. 1974); *see also* Donnelly v. Kellogg Co., 293 F. Supp. 53 (S.D. Fla. 1968).

33. 144 So. 2d 805 (Fla. 1962).

34. 144 So. 2d at 808 (emphasis in original). *Accord,* Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th Dist. Ct. App. 1972) (applying §§ 624.422-23); Crown Life Ins. Co. v. Luzanaga Y Garay, 141 So. 2d 633 (Fla. 3d Dist. Ct. App. 1962).

made upon the registered agent of a foreign corporation qualified to transact business in Florida.[35] The Florida Corporation Code[36] requires foreign corporations doing non-exempted intrastate business in Florida to "qualify" as such, in order to be able to do so without penalty;[37] one requirement for qualification is the appointment of a registered agent for service of process.[38] Sub-section 48.081(3) provides that process may indeed be served upon such an agent. Need the plaintiff's cause of action in such a case have arisen out of the foreign corporation's activities in Florida in order to satisfy the demands of due process? A Florida district court of appeal answered this question in the negative. The court stated that the question of minimum contacts had not been raised in the action, but added:

> We believe, however, that such minimum contacts would seem patently established where, as here, the foreign corporation has actually qualified under Florida law to transact business in this state and has appointed a resident agent for service of process as required by . . . 48.091, F.S.A.[39]

The Florida courts appear to have taken too simplistic a view, in different ways at different times, of the "requirement" that the cause of action have arisen from the defendant's contacts with the forum state. The *only* requirement - but a constant one - is "minimum contacts." A connection between the plaintiff's cause of action and the defendant's activities in the state is, in effect, one more contact between the defendant and the forum state; it is fairer and more reasonable, in such circumstances, to require the defendant to defend in the courts of the forum state. In the absence of such a connection, "minimum contacts" may still exist, but only if the defendant's contacts with the state are greater, in quantity and/or quality, than would be necessary if the connection existed. The United States Supreme Court appears to have endorsed this point of view, although admittedly in dictum, in the *Inter-*

35. Junction Bit & Tool Co. v. Institutional Mortgage Co., 240 So. 2d 879 (Fla. 4th Dist. Ct. App. 1970). *See also* Killingsworth v. Montgomery Ward & Co., 327 So. 2d 50 (Fla. 2d Dist. Ct. App. 1976).

36. FLA. STAT. §§ 607 *et seq.* (1979).

37. FLA. STAT. §§ 607.034 *et seq.* (1979).

38. FLA. STAT. §§ 607.324 & 48.091(1) (1979).

39. 240 So. 2d at 882.

national Shoe case, in which Chief Justice Stone wrote:

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.
>
> [T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activites.[40]

Perkins v. Benguet Consolidated Mining Co.,[41] on which the Florida Supreme Court relied in the *Confederation* case, is not to the contrary. There the United States Supreme Court upheld the refusal of the Ohio courts to assert jurisdiction over a Philippine corporation with respect to a cause of action that had arisen outside of Ohio. The Supreme Court stated that Ohio could constitutionally have asserted jurisdiction in such a case, but it must be noted that the Court characterized the activities of the defendant in Ohio as "continuous and systematic."[42]

To say, then, that a connection between plaintiff's cause of action and defendant's activities in the forum state is, with respect to a given category of cases, either *always* required or *never* required, is too simplistic. Moreover, as at least one federal court has recognized,[43] it is

---

40. 326 U.S. at 317-18 (citations omitted). *Accord,* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 413 (9th Cir. 1977).

41. 342 U.S. 437 (1952).

42. *Id.* at 448.

43. Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 748 (4th Cir. 1971), *cert. denied,* 404 U.S. 948 (1972) (citations omitted):

> We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context. Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another . : . . The prinicples of due process require a firmer foundation than mere compliance with state domestication statutes.

A sentence from the Supreme Court opinion in *Perkins v. Benguet Mining Co.* is also worth quoting: "The corporate activities of a foreign corporation which, under

unrealistic to view a case any differently simply because state law compels the written appointment of a state official as one's agent for service of process in order to transact business in that state. To my knowledge, the Florida appellate courts have given no evidence of a proper understanding of this aspect of the "minimum contacts" analysis, with the consequence that the few cases decided under § 48.081(5) have reached very questionable results.[44] Properly applied, however, that section reaches further than § 48.193(1)(a), and thus serves a useful purpose.

II. The Case Law

A. Products Liability Cases Under § 48.193

The United States Supreme Court stated, in *International Shoe,* that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[45] The somewhat amorphous concept of "minimum contacts" remains the test for personal jurisdiction over nonresident defendants, its case-by-case application properly and ultimately guided by considerations of basic fairness. The United States Supreme Court has had several occasions to apply this test in the years since *International Shoe,* and it has done so with uncharacteristic consistency;[46] the one theme that pervades all of its opinions in this area,

---

state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." 342 U.S. at 445.

44. *See* Killingsworth v. Montgomery Ward & Co., 327 So. 2d 50 (Fla. 2d Dist. Ct. App. 1976); Crown Colony Club, Ltd. v. Honecker, 307 So. 2d 889 (Fla. 3d Dist. Ct. App. 1974); *see also* Donnelly Co., 293 F. Supp. 53 (S.D. Fla. 1968).

45. 326 U.S. at 316.

46. Rush v. Savchuk, 444 U.S. 320 (1980); *see* Kulko v. Superior Court of Cal. 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins., Co., 355 U.S. 220 (1957). An unexplained departure from the general pattern is the decision in City of Milwaukee v. Illinois, 49 U.S. Law Week 4445 (April 28, 1981), involving an action brought in a federal court in Illinois seeking to enjoin the flow of inadequately treated sewage from Milwaukee, Wisconsin, into Lake Michigan

culminating in the *World-Wide Volkswagen*[47] decision of 1980, is the concept of "purposeful activity." Chief Justice Warren expressed it this way in *Hanson v. Denckla:*[48]

> The application of the [minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.[49]

Florida courts have clearly shown that they understand this requirement. Thus, for example, in *Jack Pickard Dodge, Inc. v. Yarbrough,*[50] it was held that a Florida court lacked jurisdiction over a North Carolina automobile dealer whose alleged negligence in repairing a car in North Carolina gave rise to an accident in Florida; the language of § 48.193(1)(f)(2) seemed to apply, the court found, but the North Carolina third-party defendant had engaged in no purposeful activity vis-a-vis the State of Florida. Similarly, according to *Osborn v.*

---

and ultimately into Illinois waters. Although the suggestion of "purposeful activity" in Illinois seems a bit strained in this context, the Court of Appeals for the Seventh Circuit concluded simply that it was not "unfair or unreasonable" to extend jurisdiction over the City of Milwaukee in Illinois. 599 F.2d 151, 156 (7th Cir. 1979). The Supreme Court agreed, with Justice Rehnquist, for the majority, addressing the issue in a footnote: "We agree that, given the existence of a federal common law claim at the commencement of the suit, . . . personal jurisdiction was properly exercised . . . ." 49 U.S. Law Week at 4447 n.5. *See also* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971).

47. ___ U.S. ___, 100 S. Ct. 559 (1980).

48. 357 U.S. 235 (1958).

49. *Id.* at 253.

50. 352 So. 2d 130 (Fla. 1st Dist. Ct. App. 1977). *See also* Harlo Prods. Corp. v. J. I. Case Co., 360 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1978); Hyco Mfg. Co. v. Rotex Int'l Corp., 355 So. 2d 471 (Fla. 3d Dist. Ct. App. 1978); Dunn v. Upjohn Co., 350 So. 2d 127 (Fla. 1st Dist. Ct. App. 1977); *but see* Youngblood v. Citrus Assocs. of the N.Y. Cotton Exch., Inc., 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973). The court in *Pickard* also rejected the view, expressed by the Fifth Circuit Court of Appeals in Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd., 543 F.2d 1107 (5th Cir. 1976), that the mere fact that an injury (caused by a tortious act) occurs in Florida is sufficient to invoke § 48.193(1)(b). *But see* Lee B. Stern & Co., Ltd. v. Green, 398 So.2d 918 (Fla. 3d Dist. Ct. App. 1981).

University Society, Inc.,[51] Florida had no jurisdiction over a New York defendant in an action seeking payment for services rendered by the Florida plaintiff in New York, despite the literal application of § 48.193(1)(g), where there was no indication that the nonresident defendant had engaged in purposeful activity in Florida.[52]

One of the most interesting contexts in which the "purposeful activity" requirement has been applied is the products liability case. When is it fair for a court to assert jurisdiction over a nonresident manufacturer of seller who has directly or indirectly sent one or more of its products into the forum state? Consider two archetypal and leading cases of the 1960s that considered this question. The famous Illinois case of *Gray v. American Radiator & Standard Sanitary Corp.*[53] concerned an action by an Illinois resident arising out of the explosion of a water heater in Illinois; she sued the Pennsylvania corporation which had manufactured the water heater and the Ohio corporation (Titan) which had manufactured a safety valve, incorporated into the water heater, which was allegedly defective. Although the opinion of the Supreme Court of Illinois reveals no clear evidence of Titan's intent to send its products into Illinois or knowledge that its products would find their way into Illinois, the court made the following statements in upholding personal jurisdiction over Titan in Illinois:

> Where the alleged liability arises, as in this case, from the manufacture of products *presumably sold in comtemplation of use here,* it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State. . . .

---

51. 378 So. 2d 873 (Fla. 2d Dist. Ct. App. 1979).

52. A few Florida courts have held that § 48.193(1)(g) applies simply by virtue of the fact that payment by the defendant is due in Florida, and that this is true when the plaintiff resides in Florida even though the contract is silent on the point. Professional Patient Transp. Inc. v. Fink, 365 So. 2d 209 (Fla. 3d Dist. Ct. App. 1978); Madox Int'l Corp. v. Delcher Intercontinental Moving Servs., Inc., 342 So. 2d 1082 (Fla. 2d Dist. Ct. App. 1977); First Nat'l Bank of Kissimmee v. Dunham, 342 So. 2d 1021 (Fla. 4th Dist. Ct. App. 1977). Those holdings are properly modified by the concern for minimum contacts reflected in *Osborn* and Lakewood Pipe of Tex., Inc. v. Rubaii, 379 So. 2d 475 (Fla. 2d Dist. Ct. App. 1979); *but see* Guritz v. American Motivate, Inc., 386 So. 2d 60 (Fla. 2d Dist. Ct. App. 1980).

53. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

> As a general proposition, 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.[54]

Compare *Gray* with the opinion of the Supreme Court of California in *Buckeye Boiler Co. v. Superior Court of Los Angeles County*.[55] In *Buckeye* a California resident sued the Ohio manufacturer (Buckeye) of a pressure tank which exploded in California. Buckeye's contacts with the State of California were not extensive, and no one seemed able to explain how the particular pressure tank which had injured the plaintiff had come to rest in California. Nevertheless, the Supreme Court of California held that Buckeye was amenable to suit in California, and made the following key pronouncements while doing so:

> If the manufacturer sells its products in circumstances such that it knows *or should reasonably anticipate* that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state.
>
> . . .
>
> Buckeye did not allege before the trial court that the tank which allegedly injured plaintiff arrived in California in a manner so fortuitous and *unforeseeable* as to demonstrate that its placement here was not purposeful.[56]

The difference in the theories suggested by the language of the Illinois and California courts is evident. *Gray,* although somewhat unclearly, suggests that the purposeful activity requirement can be satisfied by the intentional sale of one's products for ultimate use in other states, with at least a subjective "contemplation" of such use in the forum state. *Buckeye* goes further, suggesting rather clearly that the mere objective foreseeability of the product's entry into the forum state will suffice.

In *World-Wide Volkswagen* the Supreme Court of Oklahoma[57] took a position reminiscent of the *Buckeye* approach to the minimum contacts test, but without explicitly saying so. The plaintiffs in the case, who had been injured in an automobile accident in Oklahoma, sued the

54. *Id.* at ___, 176 N.E.2d at 766 (emphasis supplied).
55. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).
56. *Id.* at ___, ___, 458 P.2d at 64, 67 (emphasis supplied).
57. 585 P.2d 351 (Okla. 1978).

manufacturer of their automobile as well as the regional distributor and dealer who had sold them the automobile in New York, alleging defective design and placement of the gas tank and fuel system. The regional distributor and the New York dealer contested the assertion of personal jurisdiction over them in Oklahoma, but without initial success. Oddly, the opinion of the Supreme Court of Oklahoma is devoted entirely to the question of whether the Oklahoma long arm statute applied to these facts; at no point did that court expressly address itself to the question of minimum contacts. Nonetheless, the court did make the following statement en route to its conclusion that the defendants could be sued in Oklahoma: "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma."[58]

The United States Supreme Court reversed.[59] In the process of doing so, it seems to have eliminated the possibility of equating the mere objective "foreseeability" of a product's entry into a state with the requisite "purposeful activity" on the part of the nonresident. Justice White, writing for a six-man majority of the Court, observed that the defendants carried on "no activity whatsoever in Oklahoma."[60] Conceding that it was foreseeable that the purchasers of automobiles sold by the defendants might take them to Oklahoma, he stated: "Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[61] If it were, he continued, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."[62] Justice White added:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

58. *Id.* at 354.
59. ___ U.S. ___, 100 S. Ct. 559 (1980).
60. *Id.* at ___, 100 S. Ct. at 566.
61. *Id.*
62. *Id.*

> . . .
> The forum state does not exceed its powers under the Due Process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare *Gray v. American Radiator & Standard Sanitary Corp.* . . . .[63]

The citation of *Gray* is somewhat cryptic. Whether the Supreme Court approves of *Gray's* language and result is impossible to say; the opinion in *Gray* does not disclose whether the plaintiff purchased the water heater in Illinois, nor did the Supreme Court of Illinois insist that the defendant must have had an expectation that such a sale would occur. What is important is that a majority of the United States Supreme Court has suggested, albeit in dictum, that the intentional sale of one's products in the forum state, directly or indirectly, may serve as a basis for the assertion of personal jurisdiction over the seller.

The Supreme Court reinforced that suggestion when it dismissed, for lack of jurisdiction, an appeal from the 1979 ruling of the Supreme Court of Illinois in *Connelly v. Uniroyal, Inc.*[64] The plaintiff in that case sued the Belgian manufacturer of plaintiff's tires, the failure of one of which had allegedly caused injury to the plaintiff. The tire was manufactured in Belgium, then sold there to General Motors, which installed it on an automobile which was shipped to Illinois and sold there to the plaintiff's father. Discovery revealed that numerous such tires manufactured by the defendant had been similarly shipped to Illinois during a relevant time period; the defendant apparently had no other contacts with Illinois. The Illinois Supreme Court held that the courts of Illinois had jurisdiction over the Belgian manufacturer. The

---

63. *Id.* at 567. Mr Justice White's highly quotable reference to a "critical" foreseeability standard is misleading (and therefore regrettable) in that it appears to provide a test for jurisdiction but in actuality does not do so. As one commentator has noted, "jurisdictional foreseeability is a conclusion that implies advance litigant perception of relevant grounds for jurisdiction. The foreseeability concept itself cannot provide those grounds." Ratnep, *Procedural Due Process and Jurisdiction to Adjudicate,* 75 N.W. L. REV. 363, 379 (1980). *See generally* Ripple & Murphy, *Worldwide Volkswagen Corporation v. Woodson: Reflections on the Road Ahead,* 56 NOTRE DAME LAW. 65 (1980).

64. 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *appeal dismissed,* ___ U.S. ___, 100 S. Ct. 992 (1980).

only real explanation given was as follows:

> Defendant Englebert's tires, introduced into the stream of commerce *in obvious contemplation of their ultimate sale or use in other nations or States,* came into Illinois on a regular basis and in substantial numbers, and we hold that its activities rendered it amenable to process. . . . Given the nature and quality of its activities, we hold further that Englebert has purposefully invoked the benefits and protections of the law of Illinois. . . .[65]

The fact that the United States Supreme Court dismissed the defendant's appeal for lack of jurisdiction, although a somewhat ambiguous act,[66] means in theory that the United States Supreme Court considered any argument for a contrary result to be erroneous.[67] What is troubling about that conclusion is the fact that the Supreme Court of Illinois never focused, even in a conclusory way, upon the knowledge, intent, or contemplation of the defendant with respect to the indirect sale of its products in the State of Illinois. It may be overwhelmingly likely that the defendant *did* know, contemplate, and perhaps even intend that its tires would be sold to consumers in Illinois, but the law would be clearer if the court had said so. Adding to the unsettling quality of the opinion is its lengthy quotation from *Buckeye Boiler,* with all of its references to foreseeability, which the Supreme Court of Illinois found "persuasive."[68] Approximately a month after the apparently helpful *World-Wide Volkswagen* opinion, the United States Supreme Court muddied the waters just a bit by giving its seal of approval to this unclear ruling of the Supreme Court of Illinois.[69] It seems most

---

65. *Id.* at ___, 389 N.E.2d at 160 (emphasis supplied).

66. *See generally* Lewis, *Is the Supreme Court Creating Unknown and Unknowable Law? The Insubstantial Federal Question Dismissal,* 5 NOVA L.J. 11 (1980).

67. Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 344 (1975).

68. 75 Ill. 2d at ___, 389 N.E.2d at 160.

69. More consistent with its *World-Wide Volkswagen* opinion was the action of the Supreme Court vacating and remanding the opinion of the Colorado Court of Appeal in Byrd v. Butterfield, No. 78-973 (Colo. Ct. App. March 29, 1979), *vacated sub nom.* Eschmann Bros., & Walsh, Ltd. v. V. Mueller & Co., ___ U.S. ___, 100 S. Ct. 1003 (1980), for further consideration in light of *World-Wide Volkswagen.* The Colorado court had upheld jurisdiction in a products liability case over a British third-party defendant who had manufactured a component of a product which found its way into

unlikely that the United States Supreme Court meant to retreat so quickly from its forceful statement in *World-Wide Volkswagen* that "foreseeability alone" will not suffice.[70] Given the *Volkswagen* opinion, one is inclined to conclude that the *Uniroyal* dismissal means that the requisite purposefulness may be *inferred* from continuous and systematic commercial activity vis-à-vis the forum state on the part of a nonresident manufacturer of a component of a product shipped into the state by a third party. I hope that the *Uniroyal* dismissal means no more than that, because the distinction between subjective contemplation and objective foreseeability makes perfect sense; sending one's product into a state for sale is surely purposeful activity vis-à-vis that state, whereas the foreseeable but unintentional arrival of that product in the state is not. Curiously enough, the Florida courts do not seem to have focused upon and fully understood that distinction.

To my knowledge, only two Florida appellate courts have ever addressed themselves to the possibility that "foreseeability" might serve as a viable basis for personal jurisdiction in a products liability case. The holdings of these cases are not incorrect, but, in light of *World-Wide Volkswagen,* their language probably is. The first of these cases, *Aero Mechanical Electronic Craftsman v. Parent,*[71] was decided by the Fourth District Court of Appeal in 1979. The plaintiff was injured in Florida by a product which he purchased here from Sears, Roebuck & Company, part of which had been manufactured by the third-party de-

---

Colorado; the third-party complaint appears to have contained insufficient allegations of purposeful activity by the third-party defendant vis-à-vis Colorado, and the court made some ambiguous references to foreseeability.

More recently, the Supreme Court dismissed an appeal, for lack of jurisdiction, from the decision of the Utah Supreme Court in Mallory Eng'r, Inc. v. Ted R. Brown & Assocs., Inc., No. 15530 (Utah March 6, 1980), *dismissed sub nom.* Valad Elec. Heating Corp. v. Ted R. Brown & Assocs., Inc., 49 U.S.L.W. 3420, 3427 (Dec. 9, 1980). The case involved a breach of contract by a New York corporation to supply goods within the State of Utah. In a clear and persuasive opinion, the Utah court held that the New York defendant, by contracting to ship goods into Utah and doing so, had purposefully availed itself of the privilege of conducting activities within the forum state.

70. ___ U.S. at ___, 100 S. Ct. at 566. "Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." Mandel v. Bradley, 432 U.S. 173, 176 (1977).

71. 366 So. 2d 1268 (Fla. 4th Dist. Ct. App. 1979).

fendant Aero in California. Aero's product had gone through the hands of two other California companies before being sold to Sears, Roebuck & Company in Chicago. The court approached the question of jurisdiction in the following manner:

> In construing § 48.193(1)(f)(2), our courts have required a more substantial contact with Florida than the mere possibility that the product might reach this state.
>
> . . .
>
> We . . . interpret the phrase *in the ordinary course of commerce* [in § 48.193(1)(f)(2)] to mean that the non-resident must at least have some reason to anticipate that his product will reach another state in the ordinary course of interstate commerce. The manufacturer could then be said to have acted in a purposeful manner or with such knowledge as to make its deeds the equivalent of having purposefully availed itself of the privilege of conducting activities within our state.[72]

Since the complaint contained no allegation that Aero knew or had reason to anticipate that its product would be shipped in interstate commerce when Aero passed it along to another California manufacturer, the court held that Florida had no jurisdiction over Aero. The holding is unobjectionable, but "having some reason to anticipate" that one's product will enter Florida does not constitute purposeful activity in the state.

At least it can be said in defense of the Fourth District Court of Appeal that it wrote the opinion in *Aero* prior to the ruling of the United States Supreme Court in *World-Wide Volkswagen.* No similar excuse is available to the panel of the Third District Court of Appeal that recently decided *Life Laboratories, Inc. v. Valdes.*[73] The plaintiff in that case sued the manufacturer of a product, disclosing in her complaint that the defendant manufactured the product for a non-party wholesaler who distributed it. Since these allegations do not adequately support a finding of purposeful activity vis-à-vis Florida, the court's remand for dismissal of the complaint is not surprising. What is surprising is the fact that the court cited *World-Wide Volkswagen,* yet went on to quote not only the language of *Aero* set forth above, but some of

72. *Id.* at 1270 (emphasis in original).
73. 387 So. 2d 1009 (Fla. 3d Dist. Ct. App. 1980).

the "foreseeability" language of *Buckeye Boiler* as well.[74] Thus, the Third District Court of Appeal seemed oblivious to the fact that the United States Supreme Court had, at the very least, cast serious doubt upon the "foreseeability" analysis over eight months prior to the district court's action. Florida attorneys relying on the language of *Life Laboratories* do so at their peril.

This was the extent of the relevant case law in Florida[75] prior to the decision of the Supreme Court of Florida on January 8, 1981, in the case of *Ford Motor Co. v. Atwood Vacuum Machine Co.*[76] The fact pattern in the case closely approximates that of *Uniroyal.* The plaintiff sued Ford, alleging that she was injured by the faulty operation of the rear door hinge of a new Ford station wagon. Ford impleaded Atwood, a nonresident corporation which had manufactured the door hinge assembly. Ford alleged that Atwood supplied door hinge assemblies to Ford "knowing that they were to be incorporated into automobiles manufactured by Ford and knew that some of these automobiles would be shipped to Florida and sold."[77] Significantly, Atwood did not dispute the factual allegations of the third-party complaint, which therefore had to be regarded as true for the purpose of the motion to dismiss. The supreme court held that the circuit court had jurisdiction over Atwood under § 48.193(1)(f)(2).

Justice Boyd, writing for the majority, properly distinguished this

---

74. *Id.* at 1011.

75. It should also be noted that the Supreme Court of Florida approved of the assertion of jurisdiction over a nonresident defendant in a products liability case on the basis of very general allegations in Electro Eng'r Prods. Co., Inc. v. Lewis, 352 So. 2d 862 (Fla. 1977). Wrote Justice Hatchett:

> Here, the facts stated in the complaint show that petitioners manufactured a defective paint gun, and were engaged in the business activity of marketing and distributing this product *for use by citizens of this state.* These allegations place them within the reach of the Long Arm statute and satisfy the 'minimum contacts' required by the federal constitution.

Id. at 864 (emphasis supplied). The italicized language connotes purposeful activity in Florida. Since the allegations were undisputed, the court held that they had to be regarded as true for purposes of the motion to dismiss.

76. 1981 Fla. L. Weekly 31 (Jan. 9, 1981), *appeal dismissed,* 49 U.S.L.W. 3890 (June 1, 1981). Again, the theoretical meaning of a dismissal of an appeal by the United States Supreme Court is that the Court agreed with the result in the individual case. *See* text at footnotes 66-67, *supra.*

77. *Id.*

case from *World-Wide Volkswagen,* and framed the question for decision this way: "whether a manufacturer who by continuous and systematic activity indirectly through others *serves or seeks to serve* a state's market is subject to the jurisdiction of that state's courts."[78] The italicized words are words which arguably connote *purposeful* conduct. Justice Boyd then quoted at length the passage from Justice White's opinion in *Volkswagen* leading up to its citation of *Gray,*[79] finding significance in the implication (which Justice Boyd was willing to draw) that the United States Supreme Court approved of the *Gray* opinion. After quoting at length from *Gray* itself, he added:

> A number of courts have cited the *Gray* case as authority for the proposition that a manufacturer engaged in interstate commerce, which *expects* its products to be used in other states, can reasonably expect to be held subject to the jurisdiction of those other states' courts.[80]

Although Justice Boyd made no further mention of the fact, it is significant that Atwood had not disputed the allegation that it knew that Ford vehicles containing Atwood's door hinge assemblies would be sold by Ford in Florida. This knowledge on the part of the nonresident that it was benefiting from contact with the State of Florida, on a systematic and continuous basis, obviates the need to analyze the jurisdictional question in terms of mere foreseeability, and, in light of *Uniroyal,* satisfies the "purposeful activity" requirement. While Justice Boyd largely spoke the language of volitional behavior in his majority opinion, it is unfortunate that he did not make this argument more clearly. There is, in fact, some very puzzling language by him toward the end of the opinion that casts doubt on the cogency of his rationale. Included is a terribly ambiguous quotation from a 1966 Arizona opinion[81] that appears to suggest that even foreseeability may not be required for jurisdiction in a products liability case. This regrettable sentence, apparently intended to have some relevance and significance, follows:

78. *Id.* at 33 (emphasis supplied).
79. 444 U.S. at 297-98, (*quoted at* 1981 Fla. L. Weekly at 33-4).
80. *Id.* at 34 (emphasis supplied).
81. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), (*quoted at* 1981 Fla. L. Weekly at 34).

> Other cases have held that the occurrence of a single injury in the state is a sufficient basis upon which to conclude that the nonresident manufacturer's product got there through normal commercial channels, thus justifying the conclusion that sufficient contacts existed.[82]

Given such statements, one can almost understand the viewpoint of Chief Justice Sundberg, joined by Justice England in dissent. Atwood "carries on no discernable activity in this state," wrote the Chief Justice. "Its only connections with this state are that it is foreseeable that some of Atwood's components might end up in cars sold by Ford in Florida, and the indirect economic benefit derived from such sales."[83] The remainder of the dissenting opinion reveals an astute awareness of the teachings of *World-Wide Volkswagen,* but one wonders whether anyone stressed the fact that, again, Atwood's commercial relationship with Florida was not merely foreseeable but known. Had Ford's pleadings been less helpful, the question would have been whether an inference of "purposeful activity" might properly be drawn from the allegation of ongoing commercial activity; in that regard *Uniroyal,* whose significance may well have been unclear to the Supreme Court of Florida, would have been relevant.[84] In any event, the result

---

82. *Id.* at 34.

83. *Id.* at 35.

84. Should the Florida courts decide that purposefulness cannot simply be inferred from a continuing course of indirect commercial dealings with the State of Florida, it would probably be necessary for the plaintiff in such a case to make a showing of the state of mind of the defendant or its agents. Discovery might well be necessary in order to make such a showing. Florida plaintiffs have utilized discovery with respect to jurisdictional issues. *See, e.g.,* American Baseball Cap, Inc. v. Duzinski, 359 So. 2d 483 (Fla. 1st Dist. Ct. App. 1978); Youngblood v. Citrus Assocs. of the N.Y. Cotton Exch., Inc. 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973); Eder Instrument Co. v. Allen, 253 So. 2d 902 (Fla. 3d Dist. Ct. App. 1971); *but see* Ward v. Gibson, 340 So. 2d 481 (Fla. 3d Dist. Ct. App. 1976). One district court has held, however, that a trial court could not require a nonresident defendant to appear in Florida for the purpose of giving testimony concerning jurisdiction. Thomas v. Lane, 348 So. 2d 408 (Fla. 3d Dist. Ct. App. 1977). The Court in *Thomas* went on to say that the defendant could not be required to give a deposition in Florida, but might be required to give one in his state of residence. These conclusions appear to be correct, regardless of the procedural posture of the case or purpose of the deposition. *See* Kaufman v. Kaufman, 63 So. 2d 196 (Fla. 1952); Madax Int'l Corp. v. Delcher Intercontinental Moving Servs., Inc., 342 So. 2d 1082 (Fla. 2d Dist. Ct. App. 1977); Godshall v. Hessen, 227 So. 2d 506 (Fla. 3d Dist.

appears to be correct, and even the dissenters were willing to state that a nonresident "manufacturer-distributor of the finished product" could be sued in Florida "because of significant business contacts that a manufacturer-distributor necessarily incurs through his commercial efforts."[85]

B. Products Cases Under § 48.181

Perhaps more significant than the apparently occasional tendency of Florida courts to reach too *far* under the long arm statutes is the overly *restrictive* approach taken by them over the years with respect to this very same category of cases, *i.e.*, cases in which a nonresident defendant has sent products into the state. These restrictive cases, however, have arisen under the "business or business venture" long arm statute, § 48.181. Prior to 1973, it should be remembered, § 48.181

Ct. App. 1969). The question of whether sanctions may be imposed upon a nonresident defendant who refuses to respond to a discovery request pertaining to jurisdiction has apparently not been considered by the Florida courts, but has been considered by some federal courts. The Third, Fourth and Eighth Circuits have answered the question in the affirmative; the Fifth Circuit has answered in the negative. Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434 (5th Cir. 1981); Compagnie Des Bauxites De Guinea v. Ins. Co. of North America, 49 U.S.L.W. 2801 (June 2, 1981); English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir. 1979), *cert. denied,* 444 U.S. 832 (1979); Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971). *But see* Blanco v. Carigulf Lines, 632 F.2d 656 (5th Cir. 1980). *See also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977).

The basic procedure to be followed by the parties when a challenge to jurisdiction has been raised is described in Electro Eng'r Prods., v. Lewis, 352 So. 2d 862 (Fla. 1977); Elmex Corp. v. Atlantic Fed. Savings & Loan Ass'n of Ft. Lauderdale, 325 So. 2d 58 (Fla. 4th Dist. Ct. App. 1976); Dublin Co. v. Peninsular Supply Co., 309 So. 2d 207 (Fla. 4th Dist. Ct. App. 1975); and American Baseball Cap, Inc. v. Dunzinski, 308 So. 2d 639 (Fla. 1st Dist. Ct. App. 1975). Basically, plaintiff must allege in his complaint facts supporting jurisdiction; defendant must then make a prima facie showing, through affidavits, of the absence of personal jurisdiction, whereupon plaintiff must substantiate his allegations via affidavits or testimony at a hearing. The case law has been modified by one of the 1980 amendments to the Florida Rules of Civil Procedure, adding subpart (i) to Rule 1.070, allowing a plaintiff to plead the basis for service of process under a long arm statute "in the language of the statute without pleading the facts supporting service." *See generally* H. TRAWICK, FLORIDA PRACTICE AND PROCEDURE 121-22 (1980).

85. Ford Motor Co. v. Atwood Vacuum Machine Co., No. 56, 238 (Fla. 1981), 1981 Fla. L. Weekly at 35.

was the primary long arm statute available with respect to torts, other than vehicular collisions, committed by nonresidents.

The Supreme Court of Florida held in *DeVaney v. Rumsch*[86] that the practice of a profession constituted "engaging in business" under § 48.181, and stated: "The determinative question is whether goods, property or services are dealt with within the state for the pecuniary benefit of the person providing or otherwise dealing in those goods, property or services."[87] The same court has also made clear that, for § 48.181(1) to apply, the nonresident must have been engaging in a general course of business activity in the state, as opposed to an isolated act stemming from a pecuniary motive;[88] under § 48.181(3), however, which states in essence that anyone who sells property "through brokers, jobbers, wholesalers or distributors" to anyone in Florida shall be conclusively presumed to be engaging in a business venture here, even a single in-state sale will suffice.[89] Sub-section 48.181(1) has been applied numerous times, in vastly differing fact patterns, and often with great liberality.[90] Oddly enough, however, there have been several cases in which the direct shipment of products into Florida would seem to

86. 228 So. 2d 904 (Fla. 1969).

87. *Id.* at 906.

88. Dinsmore v. Martin Blumenthal Assocs., Inc., 314 So. 2d 561, 564 (Fla. 1975).

89. *Id.*

90. Among the cases applying § 48.181(1) liberally are Compania Anonima Simantob v. Bank of America Int'l of Fla., 373 So. 2d 68 (Fla. 3d Dist. Ct. App. 1979); Horace v. American Nat'l Bank & Trust Co. of Ft. Lauderdale, 251 So. 2d 33 (Fla. 4th Dist. Ct. App. 1971); McCarthy v. Little River Bank & Trust Co., 224 So. 2d 338 (Fla. 3d Dist. Ct. App. 1969); Odell v. Signer, 169 So. 2d 851 (Fla. 3d Dist. Ct. App. 1964); and International Graphics, Inc. v. MTA - Travel Ways, Inc., 71 F.R.D. 598 (S.D. Fla. 1976). The statement in Lake v. Lucayan Beach Hotel Co., 172 So. 2d 260, (Fla. 3d Dist. Ct. App. 1965), to the effect that "the mere solicitation of business is not sufficient" was criticized in Reader's Digest Ass'n v. State *ex rel.* Conner, 251 So. 2d 552 (Fla. 1st Dist Ct. App. 1971), which held to the contrary; even the *Lake* opinion held in favor of jurisdiction, on the basis of little *more* than "mere solicitation." The liberal holding of Flying Saucers, Inc. v. Moody, 421 F.2d 884 (5th Cir. 1970), was disapproved in Youngblood v. Citrus of the N.Y. Cotton Exch., Inc., 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973). Of particular interest to Florida attorneys is the case of Atwood v. Calumet Indus., Inc., 308 So. 2d 555 (Fla. 4th Dist. Ct. App. 1975), in which a Florida law firm was able to sue a nonresident client for fees in Florida, because the client had transacted business in Florida *through* the plaintiff law firm.

have supported jurisdiction under § 48.181, yet the court apparently ignored that contact in reaching its conclusion.[91]

The restrictiveness of the "product" cases under § 48.181 seems owing at least in part to the development of the "control" test under that statute with respect to sales in Florida through "brokers, jobbers, wholesalers or distributors." The "control" test has been applied by Florida courts at least since 1962,[92] but the Supreme Court of Florida endorsed it in 1975 in the case of *Dinsmore v. Martin Blumenthal Associates, Inc.*[93] The test requires that the nonresident defendant have "some degree of control" over either (1) the property in the hands of the brokers, or (2) the brokers themselves.[94] *Dinsmore* was not a products liability case, but the supreme court applied the "control" test in such a context later the same year in *AB CTC v. Morejon.*[95] The plaintiff in that case sued the Swedish manufacturer of an allegedly defective washing machine which had caused personal injury to the plaintiff in Florida. The defendant claimed that all of its products were sold and shipped in Sweden to its distributor, an independent contractor, which in turn sent the washing machine to Florida. Since the plaintiff failed to prove that the defendant exercised any control over the distributor, or over the washing machine in the hands of the distributor, the plaintiff lost. Given the opinions in *World-Wide Volkswagen, Uniroyal,* and *Ford,*[96] it appears that the minimum contacts test would have been satisfied in *Morejon* as long as the Swedish manufacturer had "deliver[ed] its products into the stream of commerce with the expectation

91. Richard Bertram & Co. v. American Marine, Ltd., 258 So. 2d 335 (Fla. 3d Dist. Ct. App. 1972); Viking Superior Corp. v. W.T. Grant Co., 212 So. 2d 331 (Fla. 1st Dist. Ct. App. 1968); DiGiovanni v. Gittelson, 181 So. 2d 195 (Fla. 3d Dist. Ct. App. 1965); Forston v. Atlantic Eng'r & Mfg. Corp., 143 So. 2d 364 (Fla. 2d Dist. Ct. App. 1962); Newark Ladder & Bracket Co. v. Eadie, 125 So. 2d 915 (Fla. 3d Dist. Ct. App. 1961); *but see* Eder Instrument Co. v. Allen, 253 So. 2d 902 (Fla. 3d Dist. Ct. App. 1971); Sayet v. Interstate Blood Bank, 245 So. 2d 142 (Fla. 3d Dist. Ct. App. 1971).

92. Fawcett Publications, Inc. v. Rand, 144 So. 2d 512 (Fla. 3d Dist. Ct. App. 1962); Fawcett Publications, Inc. v. Brown, 146 So. 2d 899 (Fla. 2d Dist. Ct. App. 1962).

93. 314 So. 2d 561 (Fla. 1975).

94. *Id.*

95. 324 So. 2d 625 (Fla. 1975).

96. See text accompanying notes 58-85 *supra.*

that they [would] be purchased by consumers in" Florida;[97] but the Florida courts showed no interest in such an inquiry. If the "control" test is not constitutionally compelled, why the long arm statute should be so interpreted is unclear, and the Supreme Court of Florida offered no real explanation for the doctrine in either *Dinsmore* or *Morejon.*[98]

If the "control" test is needlessly restrictive in cases in which products manufactured by a nonresident reach the State of Florida through intermediaries, it is even less justifiable when the nonresident has shipped those products directly into the state, whether to an intermediary or to the plaintiff himself. Yet the "control" test was applied to just such a fact pattern in one of the earliest decisions invoking the doctrine, *Fawcett Publications, Inc. v. Rand,*[99] quoted with approval by the Supreme Court of Florida in *Dinsmore.*[100] A recent case arising under § 48.181, *American Baseball Cap, Inc. v. Duzinski,*[101] illustrates the problem well. The plaintiff in that case was injured in Florida while wearing a baseball helmet manufactured by the defendant, a Pennsylvania corporation. Plaintiff alleged in his complaint that the defendant sold its products in Florida, through middlemen here, on a general basis, and that the particular helmet in question had been sold, either directly or through a distributor, to the Florida supplier of athletic equipment to the plaintiff's school, which gave it to plaintiff. The defendant claimed, among other things, that it shipped its goods directly to buyers, in response to purchase orders. Although it appears that the

97. World-Wide Volkswagen Corp. v. Woodson, ___ U.S. ___, 100 S. Ct. 559, 567 (1980).

98. Cases with similar fact patterns in which the "control" test precluded the exercise of jurisdiction by a Florida court include Cooke-Waite Laboratories, Inc. v. Napier, 166 So. 2d 675 (Fla. 2d Dist. Ct. App. 1964), and Talcott v. Midnight Publishing Corp., 427 F.2d 1277 (5th Cir. 1970).

99. 144 So. 2d 512 (Fla. 3d Dist. Ct. App. 1962).

100. 314 So. 2d at 565. To the same effect are Mac Millan-Bloedel, Ltd. v. Canada, 391 So. 2d 749 (Fla. 5th Dist. Ct App. 1980); Publications, Inc. v. Brown, 146 So. 2d 899 (Fla. 2d Dist. Ct. App. 1962); and Jenkins v. Fawcett Publications, Inc., 204 F. Supp. 361 (N.D. Fla. 1962). Courts found jurisdiction by virtue of strained applications of the "control" test in Dublin Co. v. Peninsular Supply Co., 309 So. 2d 207 (Fla. 4th Dist. Ct. App. 1975), and DiGiovanni v. Gittelson, 181 So. 2d 195 (Fla. 3d Dist. Ct. App. 1965), both involving goods apparently sent directly into Florida by the defendant.

101. 359 So. 2d 483 (Fla. 1st Dist. Ct. App. 1978).

plaintiff alleged in the alternative that the sale had been made through a distributor, the court found no evidence of such sales, and thus held that § 48.181(3) was inapplicable. The court then turned to the applicability of § 48.181(1), the general "business or business venture" section, and said this:

> The sales to nonresident major sporting goods companies which were shipped in accordance with the purchaser's directions to sales outlets in Florida could not constitute the doing of business in Florida because . . . those companies were not "brokers, jobbers, wholesalers or distributors" in this state; and even if they were, neither they nor the product after it reached them were under the control of the defendant.[102]

Was the court making the startling statement that, in order to be doing business under § 48.181, a nonresident seller of goods *must* be selling through "brokers, jobbers, wholesalers or distributors"? The court went on to observe that the defendant did sell some helmets directly to Florida retailers, but concluded:

> [D]irect sales by a foreign corporation, not otherwise doing business in Florida, from a place of business not in this state, to retailers in Florida, when no control is retained by the foreign corporate seller, does not constitute operating, conducting, engaging in, or carrying on a business or business venture in Florida within the meaning and contemplation of § 48.181(1).[103]

As Judge Ervin said in his reluctant concurrence in *American Baseball Cap,*[104] and as *World-Wide Volkswagen* suggests, no constitutional concerns would have been raised by the assertion of jurisdiction over the defendant in this case. Judge Ervin felt, however, that the language of *Dinsmore,* with respect to the "control" test under § 48.181(1) and (3), compelled the result reached by the appellate court. In this he may be correct, although, as he noted, *Dinsmore* is arguably distinguishable in that it did not involve a general course of business activity in Florida (so that § 48.181(1) did not apply, without the assistance of § 48.181(3)) and the single "sale" did not occur in Florida (so

102. *Id.* at 488.
103. *Id.*
104. *Id.* at 489-90.

that § 48.181(3) did not apply). Furthermore, former Chief Justice Adkins stated in *Dinsmore* "that the requisite control, as explained herein, is also applicable to § 48.181(1), *where the nonresident is doing business through brokers, jobbers, wholesalers, or distributors.*"[105] The court in *American Baseball Cap* seems to have concluded that the defendant was *not* selling through such persons, yet it applied the "control" test anyway. It seems possible, then, for the court to have distinguished the *American Baseball Cap* case from the apparently controlling precedents, and it is my belief that justice would have been served by doing so. At least two possible bases for distinction exist: (1) sales through "wholesalers," etc., versus sales through retailers or directly to the consumer; and (2) shipment into Florida through intermediaries versus direct shipment into Florida by the defendant. To draw the second distinction, however, would be to overrule, in effect, the *Fawcett* line of cases.[106]

It must be noted that what has been said thus far about the *American Baseball Cap* decision concerns what is technically dictum in the case. The court declined to fully resolve the "control" issue in the case, concluding instead that § 48.181 could not apply because there was no showing that the plaintiff's cause of action arose out of the defendant's activities in Florida. On this point Judge Ervin disagreed,[107] and I can only add that I find the majority's ruling on this point absolutely astonishing.[108]

---

105. 314 So. 2d at 566 (emphasis supplied).

106. *See* notes 99 & 100 *supra.*

107. 359 So. 2d 483 (Fla. 1st Dist. Ct. App. 1978).

108. *See also* General Tire & Rubber v. Hickory Springs Mfg. Co., 388 So. 2d 264 (Fla. 5th Dist. Ct. App. 1980). Defendant sold its product in Alabama, where it was incorporated into a product sold in Georgia and then in Florida, where it allegedly gave rise to personal injuries. There was no evidence of any notice to or knowledge by the defendant that its product would find its way into Florida, but the court declined to decide the question of whether the defendant was "doing business" in Florida, concluding instead that the plaintiff's cause of action had not been shown to have arisen out of the defendant's activities in Florida. This resolution of the case is a bit odd, since the cause of action certainly *did* arise out of a connection between the defendant and the State of Florida, and the real question was whether that connection amounted to "doing business" in Florida within the meaning of § 48.181 or § 48.193. Federal Ins. Co. v. Michigan Wheel Co., 267 F. Supp. 639 (S.D. Fla. 1967), is also questionable in this regard.

Although Florida courts have sometimes said that jurisdiction under the long arm statutes was meant to extend as far as the United States Constitution permits,[109] it is clear that this has not been the case with respect to actions involving the interstate shipment of goods. Is it possible for Florida courts to completely shed the restrictive "control" test that has evolved under § 48.181? A question that immediately comes to mind is whether the "control" test is also to be applied under the nearly identical "business or business venture" language of the newer long arm statute, § 48.193(1)(a). Although a few cases have indicated that § 48.193(1)(a) is to be interpreted just as § 48.181 has been,[110] and one case under § 48.193(1)(a) has found the "control" test satisfied,[111] no Florida appellate opinion has yet addressed itself to this question. The Florida courts should take advantage of the absence of precedent on this issue and hold that the "control" test was not meant to be encompassed under § 48.193(1)(a). In doing so, the courts might seize upon a reason (albeit an unconvincing one) given long ago for the use of the "control" doctrine;[112] namely the idea that a long arm statute (such as § 48.181, through § 48.161) utilizing substituted service of process should be strictly construed; § 48.193(2) requires personal service of process.[113] They might also note that it would be incongruous for the courts to stretch to the limits of due process in tort and contract cases under § 48.193(1)(b),[114] (f),[115] and (g),[116] while simultaneously

109. *See, e.g.,* Cleveland Compania Maritima v. Logothetis, 378 So. 2d 1336 (Fla. 2nd Dist. Ct. App. 1980); Fisher v. Premiere Realty Co., Inc., 298 So. 2d 447 (Fla. 1st Dist. Ct. App. 1974); Babson Bros. Co. v. Allison, 298 So. 2d 450 (Fla. 1st Dist. Ct. App. 1974); Flying Saucers, Inc. v. Moody, 421 F.2d 884 (5th Cir. 1970); *but see* Youngblood v. Citrus Assocs. of the N.Y. Cotton Exch., Inc., 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973); Spencer Boat Co. v. Lieutermoza, 498 F.2d 332 (5th Cir. 1974); Mallard v. Aluminum Co. of Canada, Ltd., 634 F.2d 236 (5th Cir. 1981).

110. Bank of Wessington v. Winters Gov't Sec. Corp., 361 So. 2d 757 (Fla. 4th Dist. Ct. App. 1978); Escambia Treating Co. v. Otto Candies, Inc., 405 F. Supp. 1235 (N.D. Fla. 1975).

111. Pace Carpet Mills, Inc. v. Life Carpet & Tile Co., Inc., 365 So. 2d 445 (Fla. 4th Dist. Ct. App. 1978).

112. Fawcett Publications, Inc. v. Rand, 144 So. 2d 512 (Fla. 3d Dist. Ct. App. 1962).

113. *See* text accompanying note 19 *supra.* Even if my legislative recommendations are accepted, *see* text accompanying notes 24-27, any method of service allowed will be a fair one, requiring no "strict construction" of statutes.

114. *See* Godfrey v. Neumann, 373 So. 2d 920 (Fla. 1979).

doing substantially less under § (1)(a) of the same statute. Admittedly, the "control" test, even if retained under § (1)(a), will be less significant simply by virtue of the existence, under § 48.193, of general long arm provisions concerning tort and contract cases. The *Aero* and *Life Laboratories* cases, discussed above,[117] demonstrate the courts' lack of interest in "control" in products liability cases under § 48.193(1)(f)(2), as does the opinion of the Supreme Court of Florida in *Ford Motor Company v. Atwood Vacuum Machine Co.*[118] Understanding that the "control" test is needlessly restrictive may nevertheless prove to be important with respect to the rare case to which § (1)(b), (f), and (g) do not apply, but in which personal jurisdiction predicated upon the sale of goods in Florida may yet be possible under § (1)(a). In addition, products liability cases can continue to be brought under § 48.181, if my legislative recommendations do not find favor, by plaintiffs who prefer the substituted service provisions of § 48.161 (or the provisions of § 48.081) to the personal service apparently required by § 48.193.

C. *Quasi In Rem Jurisdiction*

Quasi in rem jurisdiction, of course, describes the situation in which a court lacks jurisdiction to render a binding *in personam* judgment against a nonresident defendant, but does have power over that nonresident's interests in property located within the state; the result is that the court may render a judgment against the nonresident which only affects his interests in that property. *Quasi in rem* jurisdiction has clearly existed in Florida.[119] No statute speaks explicitly of the availability of *quasi in rem* jurisdiction, but it seems to be tied to chapter 49 of the Florida Statutes, which provides for constructive service of pro-

115. *E.g.*, Ford Motor Co. v. Atwood Vacuum Machine Co., 1981 Fla. L. Weekly 31 (Jan. 9, 1981).

116. *See* cases cited at note 52 *supra.*

117. *See* text accompanying notes 71-74 *supra. See also* Shelton v. Wisconsin Motor Corp., 382 So. 2d 1270 (Fla. 3d Dist. Ct. App. 1980).

118. 1981 Fla. L. Weekly 31 (Jan. 9, 1981); *see also* Electro Eng'r Prods. Co., Inc. v. Lewis, 352 So. 2d 862 (Fla. 1977).

119. *See, e.g.*, Kingswood Builders, Inc. v. Wall Plumbing & Heating, Inc., 317 So. 2d 139 (Fla. 4th Dist. Ct. App. 1975); Harris & Co. Advertising, Inc. v. Republic of Cuba, 127 So. 2d 687 (Fla. 3d Dist. Ct. App. 1961).

cess, *i.e.*, service by publication.[120] Since personal and substituted service of process lead to *in personam* jurisdiction, and there is no general provision for service by mail, service by publication appears to be the only method of service available to effectuate *quasi in rem* jurisdiction in Florida.[121] The publication statute does require, however, that notice of the action also be mailed (but not necessarily by certified or registered mail) to any defendant whose address is even partly known.[122] The statute applies, by its clear terms, only to certain enumerated categories of civil actions,[123] most of which seem to embrace rather obviously the property-or-status-oriented actions that have traditionally been associated with *in rem* or *quasi in rem* jurisdiction.

But the present status of *quasi in rem* jurisdiction is the subject of considerable doubt, following the rule of the United States Supreme Court in the 1977 case of *Shaffer v. Heitner*.[124] The decision held that mere ownership of corporate stock, deemed by the state of incorporation to be located therein, did not suffice to give the courts of that state jurisdiction to adjudicate claims against the nonresident owners that did not arise out of that stock ownership. Writing for six members of the Court,[125] Mr. Justice Marshall stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*."[126] After carefully considering that question, he wrote: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[127]

The most natural inference to draw from this opinion is that *quasi in rem* jurisdiction continues to exist, but subject now to the minimum

120. FLA. STAT. § 49.011 *et seq.* (1979).

121. *See, e.g.*, Ferrer v. Sanchez, 247 So. 2d 512 (Fla. 3d Dist. Ct. App. 1971).

122. FLA. STAT. § 49.12 (1979).

123. FLA. STAT. § 49.011 (1979).

124. 433 U.S. 186 (1977).

125. Mr Justice Brennan, while dissenting as to the application of the minimum contacts test to the facts of the case, concurred with that part of the majority opinion which stated that the test should be applied. *Id.* at 219.

126. *Id.* at 206.

127. *Id.* at 212.

contacts test set forth in *International Shoe.*[128] Because, however, the existence of minimum contacts suffices to give rise to *in personam* jurisdiction, and to an *in personam* judgment if the plaintiff prevails, the concept of *quasi in rem* jurisdiction,[129] which is more limited, appears to be completely expendable in light of *Shaffer.* A given state might choose to retain the more limited form of jurisdiction, even though the constitutional requirements for *in personam* jurisdiction be met, and at least some of the courts which have continued to recognize *quasi in rem* jurisdiction have apparantly done so because no state long arm statute applied, thus rendering *in personam* jurisdiction unavailable as a matter of state law.[130] The most rational response to *Shaffer* by a state legislature, however, would be to amend the state's long arm statutes to extend *in personam* jurisdiction over a nonresident whenever property of the nonresident, located in the forum state, has been brought within the custody of the court; the minimum contacts test, of course, would have to be satisfied in each such case. Is it possible, however, that some lesser showing of "minimum contacts" than is needed for *in personam* jurisdiction might suffice for *quasi in rem* jurisdiction? At least one lower federal court seems to have thought so,[131] but there

128. 326 U.S. 310 (1945).

129. At least one federal district court was prepared to conclude that the Court in *Shaffer* had "scuttled" quasi in rem jurisdiction. Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F. Supp. 755, 758 (S.D.N.Y. 1978).

Another court stated that *Shaffer* "has abrogated *quasi in rem* jurisdiction as a separate and insular conceptual category." Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1047 (N.D. Cal. 1977).

130. That condition of New York law seems to explain the decision in Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978); Drexel Burnham Lambert, Inc. v. D'Angelo, 453 F. Supp. 1294 (S.D.N.Y. 1978); and National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 635 (S.D.N.Y. 1978), *aff'd,* 597 F.2d 314 (2d Cir. 1979). *See also* the state cases cited in Leathers, *The First Two Years After Shaffer v. Heitner,* 40 LA. L. REV. 907 (1980).

131. Feder v. Turkish Airlines, 441 F. Supp. 1273, 1274 (S.D.N.Y. 1977) (footnotes omitted): "[W]e would find on the record now before us that [the defendant] has had insufficient contacts with the forum to render it personally liable for a judgment of this Court. Thus, jurisdiction over [the defendant] rests solely upon the attachment." *See also* Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630, 633 (D. Conn. 1977): "Finally, even if there are not the minimum contacts needed to satisfy *International Shoe* (though there may well be), there are surely sufficient contacts to make the assertion of *quasi in rem* jurisdiction over a foreign corporation fair even under *Shaf-*

is not the slightest hint in *Shaffer* of such a double standard, and, after all, the reference is already to *minimum* contacts, *i.e.,* the minimally requisite contacts compatible with basic fairness.[132]

The primary reason for uncertainty about the present status of *quasi in rem* jurisdiction stems from the concurring opinions in *Shaffer* by Mr. Justices Powell and Stevens. Mr. Justice Powell said the following, and Mr Justice Stevens said he agreed:[133]

> I would explicitly reserve judgment . . . on whether the ownership

---

fer." See also Riesenfeld, *Shaffer v. Heitner: Holding, Implications, Forebodings,* 30 HASTINGS L. J. 1183, 1204 (1979).

132. Mr. Justice Marshall did suggest, in *Shaffer,* the possibility that "a state in which property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe."* 433 U.S. at 210. At least one federal district court has followed that suggestion, allowing the attachment in California of an unrelated debt, owed to the nonresident defendant by a California corporation, as security for a claim being pursued against the defendant in New York. *Carolina Power & Light Co. v. Uranex,* 451 F. Supp. 1044 (N.D. Cal. 1977). The court stressed that it was asserting "jurisdiction merely to order the attachment and not to adjudicate the underlying merits of the controversies." *Id.* at 1048. *See generally* Leathers, *The First Two Years After Shaffer v. Heitner,* 40 LA. L. REV. 907, 911-12 (1980); Note, *Attachment Jurisdiction After Shaffer v. Heitner,* 32 STAN. L. REV. 167 (1979). Whether any showing of "minimum contacts" is necessary for such an attachment to be constitutional is presently unclear. The *Uranex* court stated that

> where the facts show that the presence of defendant's property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient area for defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible.

451 F. Supp. at 1048. The Florida legislature may wish to amend the Florida attachment and garnishment statutes, chapters 76 and 77 of the Florida Statutes, to expressly permit Florida courts to utilize those prejudgment remedies in connection with litigation pending in another state. *See* FLA. STAT. §§ 76.03, 77.01, 77.031 (1979). Mr. Justice Marshall also hinted at another possible exception to the *Shaffer* requirements: "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. at 211 n. 37. This hint was relied upon in Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630 (D. Conn. 1977); *see also* Amoco Overseas Oil Corp. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979).

133. 433 U.S. at 217.

> of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common-law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "traditional notions of fair play and substantial justice."[134]

Because Mr. Justice Rehnquist took no part in the *Shaffer* decision, it is possible that three Justices would adhere to the traditional concept of *quasi in rem* jurisdiction in at least some cases. The fact that no other Justice joined the concurrences, however, probably indicates that the other six are strongly in agreement with the sweeping and unequivocal theoretical pronouncements of the Marshall opinion.[135]

Only one Florida decision,[136] to my knowledge, has utilized the concept of *quasi in rem* jurisdiction subsequent to the *Shaffer* decision in 1977. In addition, at least three other appellate opinions[137] since

---

134. *Id.*

135. *Quasi in rem* jurisdiction seems also to have survived in admiralty cases arising under federal admiralty jurisdiction. Amoco Overseas Oil Corp. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979); Grand Bahama Petroleum Co., Ltd. v. Canadian Transp. Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978); Engineering Equip. Co. v. S,S, Selene, 446 F. Supp. 706, (S.D.N.Y 1978).

136. Gelkop v. Gelkop, 384 So. 2d 195 (Fla. 3d Dist. Ct. App. 1980), concerned, among other things, a claim for child support against a nonresident father who was served by publication. In upholding the judgment against the father but reversing the order holding him in contempt for failing to pay, the court said this:

> It is the prevailing law of this state that a trial court has in rem jurisdiction in a marriage dissolution action to enter a final judgment or order awarding permanent or temporary alimony, child support, attorneys fees and costs against a respondent who had been properly served, as here, by constructive process . . . The trial court in such action may enforce such provisions of the final judgment in rem as against any property held by the respondent within the court's jurisdiction; it may not, however, enforce such provisions in personam by contempt proceedings, as here, or by the entry of a money judgment against the respondent.

Id. at 201. The court referred to "in rem jurisdiction," but was clearly describing *quasi in rem* jurisdiction. No mention was made of *Shaffer* or minimum contacts; the decision is therefore erroneous in this respect.

137. Gaskill v. May Bros., Inc., 372 So. 2d 98 (Fla. 2d Dist. Ct. App. 1979);

then have made reference to the concept as if it were still viable, and, indeed, the Florida statutory scheme appears to continue to allow for it, subject only to the satisfaction of the minimum contacts test. This is because, according to the Florida courts, service by publication under chapter 49 cannot provide the basis for a valid *in personam* judgment;[138] any judgment so obtained, therefore, must be described as *in rem* or *quasi in rem.*

The problem here is twofold. First, *quasi in rem* jurisdiction in the absence of minimum contacts is unfair, for all of the reasons set forth by Mr. Justice Marshall in *Shaffer,* and is conceptually unnecessary if minimum contacts are present. Regardless of the present constitutional status of the concept, then, *quasi in rem* jurisdiction should no longer be recognized under Florida law. Second, the use of service by publication upon a nonresident whose address or location is known is indefensible, regardless of the theoretical basis for jurisdiction.[139] The United States Supreme Court indicated long ago that constructive service is acceptable even as a predicate for *in personam* jurisdiction in the case of defendants whose whereabouts are unknown,[140] and it is to that cate-

---

Boeykens v. Slocum, 356 So. 2d 1341 (Fla. 3d Dist. Ct. App. 1978); Palmer v. Palmer, 353 So. 2d 1271 (Fla. 1st Dist. Ct. App. 1978). Of these three, only *Gaskill* referred explicitly to *quasi in rem* jurisdiction; the ohers referred to "in rem jurisdiction," but clearly meant *quasi in rem.*

138. Palmer v. Palmer, 353 So. 2d 1271 (Fla. 1st Dist. Ct. App. 1978).

139. "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962), referring to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). *Accord,* Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956). Both *Schroeder* and *Walker* were actions involving real property, and might have been described as *in rem* or *quasi in rem* proceedings. In any event, it is clear that the defendant's "legally protected interests" are at stake in such proceedings. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).

140. This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

gory of cases that constructive service should be confined.[141] Even if the best possible notice is not constitutionally required, as in a "true" *in rem* proceeding (*e.g.*, dissolution of marriage), it *should* be required by statute. Again, service by registered or certified mail should be available and satisfactory, as should personal service, with respect to every form of long arm jurisdiction, but the simple mailing provided for by § 49.12 is not satisfactory.

Because I am recommending the repeal of § 49.011, which lists the categories of cases in which service by publication is permitted, it may be desirable to add some of these categories to the general long arm statute, § 48.193(1). Many disputes traditionally adjudicated on the basis of *quasi in rem* jurisdiction should fall within the scope of § 48.193(1)(c), providing for personal jurisdiction over a nonresident with respect to claims arising from his ownership, use, or possession of real property in Florida. If, for example, it is not clear that § (1)(c) would apply to disputes over ownership of real property in Florida, the statute should be amended.[142] Similarly, § 48.193 presently makes no reference to personal property in Florida, or to dissolution of marriage. A provision should also be enacted conferring jurisdiction upon the Florida courts to enforce the valid judgments of the federal courts and courts of other states; Mr. Justice Marshall suggested in *Shaffer* that such jurisdiction is permissible under the Full Faith and Credit Clause,[143] but such actions in Florida presently appear to be encompassed within § 49.011(1), (7), (8), or (11), and thus may be tied to

---

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950), *citing* Jacob v. Roberts, 223 U.S. 261 (1912) which upheld service by publication where the defendant could not be located.

141. Risman v. Whittaker, 326 So. 2d 213 (Fla. 4th Dist. Ct. App. 1976), permitted service by publication upon nonresident defendants whose addresses were known, despite the fact that personal service was concededly possible under §§ 48.193 and .194. Although service by publication gave rise only to "in rem jurisdiction," the ruling is a regrettable one. Other cases have held that service by publication is permissible only when personal service cannot be effected. Taylor v. Lopez, 358 So. 2d 69 (Fla. 3d Dist. Ct. App. 1978); Bradbery v. Frank L. Savage, Inc., 190 So. 2d 183 (Fla. 4th Dist. Ct. App. 1966).

142. "[W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (footnotes omitted).

143. *Id.* at 210, n.36.

service by publication.

III. CONCLUSION

The present configuration of long arm statutes in Florida is needlessly duplicative and complex, the unfortunate product, like so much in this state, of unplanned growth. There is no justification for the present connection between particular long arm statutes and particular methods of service of process. Substituted service of process upon the secretary of state, moreover, is an archaic procedure that should be abolished. Constructive service, by publication, should be confined to those cases in which the defendant, resident or nonresident, cannot be located. The Florida legislature should consider whether any of the long arm statutes other than § 48.193 confers on the Florida courts jurisdiction not conferred by § 48.193 to an extent such that the statute should be retained; if so, the statute should be amended to provide that service of process may be accomplished in any manner provided for by § 48.194. That section should be amended to encompass all permissible methods of service, any of which may be utilized in connection with any long arm statute.

The Florida courts should regard *quasi in rem* jurisdiction as a thing of the past. At the same time, they should extend *in personam* jurisdiction under the long arm statutes to the furthest extent permitted by the federal constitution, confining if not abrogating the "control" test under § 48.181 (if that section is not repealed) and drawing a clear distinction, in products liability cases, between "purposeful activity" and mere "foreseeability." The courts should also recognize, finally, that the existence of "minimum contacts" may depend, in a given case, upon the connection between plaintiff's cause of action and defendant's contact with the state, and that no theory of "consent" stemming from the enforced appointment of an agent can lead to a contrary conclusion.