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## RECASTING *WORLD-WIDE VOLKSWAGEN* AS A SOURCE OF LONGER JURISDICTIONAL REACH

David E. Seidelson\*

*Professor Seidelson discusses World-Wide Volkswagen's primary rationale that the due process clause is intended to protect the nonresident defendant from jurisdictional surprise, and proposes that World-Wide Volkswagen may point the way to a longer jurisdictional reach than some have contemplated. After exploring the jurisdictional functions that the Supreme Court has historically assigned to the due process clause, he critically addresses the territorial sovereignty function, demonstrates how it was revived by the Court in World-Wide Volkswagen, and explains how this rationale may work to increase, rather than decrease, court jurisdiction.*

*His conclusion is that World-Wide Volkswagen is a paradox. It limits jurisdictional reach by rejecting as a basis for jurisdiction the reasonably foreseeable presence of a nonresident defendant's injury-causing product in the forum when that presence is attributable to intervening user conduct. At the same time, however, it casts the due process clause in the role of protecting nonresident defendants from jurisdictional surprise and may point toward a longer jurisdictional reach when a nonresident defendant's significant contacts with the forum make*

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*actions of a particular kind reasonably foreseeable, even though the specific action did not arise out of those contacts.*

## I. INTRODUCTION

Some years ago, I proposed that the United States Supreme Court should eliminate the due process inhibition on a state's ability to assert jurisdiction over a nonresident defendant and permit the plaintiff the forum of his choice, subject only to the defendant's *forum non conveniens* motion to dismiss or its federal court equivalent, a section 1404(a) motion to transfer.<sup>1</sup> That seemed to me, and still does, the

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1. Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221 (1968). My proposal was predicated on utilization of a mode of constructive service that is "reasonably calculated to provide the defendant with actual notice of the proceedings and an opportunity to defend." *Id.* at 222. *See, e.g.*, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940): "[The] adequacy [of substituted service] so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard." *Id.* I would, of course, retain that due process requirement as to the mode of service. The function of the *forum non conveniens* motion has been aptly described by many courts:

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some-inconvenience to himself.

Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice. . . . [T]he problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one most likely to be pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947) (footnotes omitted).

Like state courts, federal courts may resist imposition upon their jurisdiction:

The discretionary determinations of both the state and federal courts [confronted with a *forum non conveniens* motion to dismiss and a 1404(a) motion to transfer, respec-

sensible and logical extension of the continuing expansion of jurisdictional reach which had been approved by both federal and state appellate court opinions.<sup>2</sup> After all, any court that heard the action

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tively] in this case required, to be sure, evaluations of similar, but by no means identical, objective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation here presented.

Thus, for example, in determining that Cook County was an inconvenient forum, the state court in this case could appropriately consider the availability of a state forum at Ludington, Michigan, where [plaintiff's] alleged injury had occurred. But since there is no federal court in Ludington, the federal district judge in making his determination was limited to consideration of the alternative of a trial in the federal court in Grand Rapids, a city some 60 miles from Ludington. Obviously, the question whether the convenience of the parties and of the witnesses would be better served by a trial in a state court in Ludington is not the same question as whether those interests would be better served by a trial in a federal court in Grand Rapids. Similarly, a trial judge weighing the interests of justice could legitimately consider the condition of his court's docket an important factor. While docket congestion is a problem facing all trial courts in large metropolitan areas, there is nothing to show that the problem in the federal court in Chicago is identical in either nature or quantity to the problem in the Cook County court system.

These considerations no more than illustrate the many variables which might affect the exercise of discretion by a state court, as contrasted to a federal court, in any given case.

*Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 72-3 (1963) (footnote omitted).

The federal courts' power to resist jurisdiction is found in section 1404(a) of title 28: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1982). Section 1404(a) speaks of transfer only. But federal courts have retained their dismissal powers:

The enactment of 28 U.S.C. § 1404(a) in 1948 did not . . . deprive Federal District Courts of the power to dismiss, rather than transfer, an action for *forum non conveniens* when the alternative forum is a state court or a court in a foreign country to which, obviously, transfer is impossible.

*Domingo v. States Marine Lines*, 340 F. Supp. 811, 813 n.2 (S.D.N.Y. 1972) (citing *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499 (2d Cir. 1966) and *C. WRIGHT, FEDERAL COURTS* § 44, at 165 (2d ed. 1970)). *Accord* *McCarthy v. Canadian Nat'l. Ry.*, 322 F. Supp. 1197 (D. Mass. 1971). However, the federal courts' dismissal power is now severely limited:

Although the doctrine of *forum non conveniens* has flourished in the states since 1947, it has largely been suspended in federal courts by the 1948 adoption of § 1404(a). Only in rare instances where the alternative forum is a state court or the court of a foreign country may the federal court now dismiss on grounds of *forum non conveniens*.

*C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS* § 44, at 259-60 (4th ed. 1983) (footnotes omitted).

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court held that a federal court is not barred from granting a *forum non conveniens* motion to dismiss simply because the law of the alternative forum (Scotland) is less favorable to the plaintiff than the law of the forum selected by the plaintiff.

2. *See, e.g.*, *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (nonresident insurer's issuance of a single life insurance policy to a forum resident subjected insurer to jurisdiction of forum in action arising out of that policy); *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950) (nonresident defendant's mail-order business, directed in part to forum, subjected defendant to forum's "Blue Sky Law"); *Oregon ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 448 P.2d 571 (1968) (Florida corporation's contracting with Oregon corporation subjected Florida defendant to jurisdiction of Oregon court in action arising out of contract); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 761 (1961) (foreign corpora-

presumably would possess the legal competence to resolve the issues presented. And any inclination the court might have to apply its own local law, perhaps as the result of undue parochialism, would be subject to constitutional restraints.<sup>3</sup> In those circumstances, it seems unlikely that the defendant would be threatened with a deprivation of property without due process. Then came *World-Wide Volkswagen Corp. v. Woodson*.<sup>4</sup> That case made it rather apparent that the Supreme Court did not approve of the expanded jurisdictional reach which federal and state courts had permitted under the long-arm statutes. Perhaps now circumspection and discretion should counsel me toward silence. Instead, however, I am going to suggest that *World-Wide Volkswagen* and its basic rationale may point toward a jurisdictional reach longer than some courts had contemplated.

## II. A REVIEW OF *WORLD-WIDE VOLKSWAGEN*

To support this proposition, it is necessary to review *World-Wide Volkswagen*. The Robinson family's Audi automobile was rear-ended by another vehicle in Oklahoma. That collision "caus[ed] a fire which severely burned [Mrs.] Robinson and her two children."<sup>5</sup> To recover for those injuries, plaintiffs sued the manufacturer, importer, regional distributor, and retail dealer of the Audi, alleging that the fire had resulted from "defective design and placement of the Audi's gas tank and fuel system."<sup>6</sup> The action was brought in an Oklahoma state court. The regional distributor, World-Wide Volkswagen Corporation (Worldwide), and the retail dealer, Seaway Volkswagen, Inc. (Seaway), entered special appearances,<sup>7</sup> challenging the court's jurisdiction. The Robinsons, then residents of New York, had purchased the Audi from

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tion's alleged negligence in manufacturing safety valve in Ohio, incorporated in water heater in Pennsylvania, subjected defendant to jurisdiction of court in Illinois where heater exploded, injuring plaintiff), see *supra* text accompanying note 79; *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951) (foreign corporation's reroofing of house of forum resident subjected corporation to jurisdiction of forum in action alleging negligent performance).

3. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, *reh'g denied*, 450 U.S. 971 (1981). The Court concluded that Minnesota's application of its own local law permitting the "stacking" of uninsured motorist coverage, rather than Wisconsin's local law prohibiting such "stacking," was permissible under the full faith and credit clause, U.S. CONST. art. 4, § 1, and consistent with the carrier's due process rights, U.S. CONST. amend. XIV, § 1, because of Minnesota's "contacts . . . with the parties and with the occurrence or transaction giving rise to the litigation." 449 U.S. at 308.

4. 444 U.S. 286 (1980).

5. *Id.* at 288 (footnote omitted).

6. *Id.*

7. *Id.* (footnote omitted).

Seaway in New York. Seaway, in turn, had acquired the Audi from World-Wide, which distributed Audis to dealers in New York, New Jersey, and Connecticut.<sup>8</sup> At the time of the collision in Oklahoma, the Robinsons were in the process of relocating to a new home in Arizona.<sup>9</sup> The Supreme Court of Oklahoma found that the state's long-arm provision "conferr[ed] jurisdiction to the limits permitted by the United States Constitution,"<sup>10</sup> and concluded that the asserted jurisdiction was consistent with due process.<sup>11</sup> The Supreme Court of the United States reversed.<sup>12</sup> The Court concluded that, although the intervening conduct of the Robinsons' driving their car in Oklahoma was reasonably foreseeable, such conduct was superseding for jurisdictional purposes.<sup>13</sup> Consequently, the presence of the car in Oklahoma did not constitute minimum contacts between that state and the nonresident retail dealer and distributor. The Court noted that:

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. . . . The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co. v. Washington*, . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>14</sup>

Apparently, the Court concluded that the principal role of the due process clause was to protect nonresident defendants from jurisdictional surprise.

### III. FUNCTIONS OF THE DUE PROCESS CLAUSE

Over the years, the Court has assigned various functions to the due process clause in the context of jurisdiction over nonresident defendants. In *Pennoyer v. Neff*,<sup>15</sup> the Court found that the clause was in-

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8. *Id.* at 289.

9. *Id.* at 288.

10. *Id.* at 290 (footnote omitted).

11. *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 353 (1978).

12. *World-Wide Volkswagen*, 444 U.S. 286 (1980).

13. *Id.* at 297.

14. *Id.*

15. 95 U.S. 714 (1878).

tended to preserve:

[T]he authority of independent States, and the principles of public law . . . applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law . . . follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.<sup>16</sup>

The historical reasons for that limitation on “the authority of independent states” seem to be inextricably entwined with the political concept of national sovereignty and the procedural device of a writ of *capias ad respondendum*. The *capias* writ directed: “the sheriff to take the defendant, and him safely keep, so that he may have his body before the court on a certain day, to answer the plaintiff in the action. It notifies defendant to defend suit and procures his arrest until security for plaintiff’s claim is furnished.”<sup>17</sup> It is not difficult to imagine the degree of circumspection the *capias* writ imposed on an English law court when an English plaintiff asked the Court to assert jurisdiction over a cause of action against a French national. If an English sheriff attempted to execute the writ in France by seizing the defendant and effecting his presence in an English gaol, there to await trial or post appropriate security to satisfy the plaintiff’s asserted claim, France might very well feel that its sovereign integrity had been violated.

Of course, in *Pennoyer*, the forum was Oregon, not England, and the nonresident defendant resided in California, not France. Yet the Court seemed gripped by the analogy between independent nation-states and “[t]he several States of the Union”<sup>18</sup> which, though having “many of the rights and powers which originally belonged to them . . . now vested in the government created by the Constitution,”<sup>19</sup> remained, “except as restrained and limited by that instrument . . . independent states.”<sup>20</sup> The Court’s analogy seems all the more strained since, by the time *Pennoyer* was decided, the *capias ad respondendum* was an anachronism, having been supplanted by simple service of pro-

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16. *Id.* at 722 (citations omitted).

17. BLACK’S LAW DICTIONARY 188 (5th ed. 1979) (emphasis in original). See Seidelson, *Sniadach, Fuentes, Subchapter II and Foreign Attachment*, 13 DUQ. L. REV. 1, 17 (1974).

18. 95 U.S. at 722.

19. *Id.*

20. *Id.*

cess.<sup>21</sup> Still, *Pennoyer* did assign a "territorial sovereignty" function to the due process clause.

By the time *International Shoe Co. v. Washington*<sup>22</sup> was decided, the Court had concluded that:

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff* . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, 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."<sup>23</sup>

In *Hanson v. Denckla*,<sup>24</sup> the Court recognized that:

As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe*. . . .<sup>25</sup>

Then, surprisingly, *Hanson* resurrected the "territorial sovereignty" function for due process noted in *Pennoyer*: "Those restrictions [on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."<sup>26</sup> And, in the very next sentence, *Hanson* effected an awkward wedding of "territorial sovereignty" with *International Shoe*: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimum contacts" with that State that are a prerequisite to its exercise of power

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21. See Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 68 & n.75, 69 n.84, 97 (1968).

22. 326 U.S. 310 (1945).

23. *Id.* at 316 (citations omitted).

24. 357 U.S. 235 (1958).

25. *Id.* at 250-51 (citations omitted).

26. *Id.* at 251.



over him. See *International Shoe* . . . ."<sup>27</sup>

Nearly twenty years later, *Shaffer v. Heitner*<sup>28</sup> seemed to reinter "territorial sovereignty":

Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [is] the central concern of the inquiry into personal jurisdiction.

. . . .

Nothing in *Hanson v. Denckla* . . . is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction "are a consequence of territorial limitations on the power of the respective States," . . . simply makes the point that the States are defined by their geographical territory. After making this point, the Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.<sup>29</sup>

Finally, however, *World-Wide Volkswagen*<sup>30</sup> once again disintegrated "territorial sovereignty":

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

. . . .

[T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.<sup>31</sup>

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27. *Id.* (citations omitted).

28. 433 U.S. 186 (1977).

29. *Id.* at 204 & n.20 (footnote and citations omitted).

30. 444 U.S. 286 (1980).

31. *Id.* at 291-92, 293. Justice White, author of the Court's opinion in *World-Wide Volkswagen*, has subsequently cast some doubt on the independent significance of the "territorial sovereignty" function of the due process clause. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), Justice White, writing for the Court, concluded that: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 702. Justice White also remarked that:

Why did the Court in *World-Wide Volkswagen* find it necessary to revive "territorial sovereignty," probably anachronistic when *Pennoyer* was decided and apparently so labeled by *International Shoe*? Why, especially, since the primary rationale of *World-Wide Volkswagen* seems to be the protection of the nonresident defendant from jurisdictional surprise, rather than the protection of the sovereign integrity of New York? I think I may know the answer.

Were the due process clause said to perform only the function of protecting the nonresident defendant "against the burdens of litigating in a distant or inconvenient forum," two conclusions would almost immediately follow: (1) "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome,"<sup>32</sup> and (2) a *forum non conveniens* motion to dismiss or a section 1404(a) motion to transfer<sup>33</sup> goes more directly to the remaining "burdens of litigating in a distant or inconvenient forum"<sup>34</sup> than does the due process clause. Consequently, absent "territorial sovereignty," the due process clause would appear to have little or no role in the jurisdictional context. Apparently, the Court was unwilling to cede the basis for its role as constitutional arbiter in determining the extent to which a state may assert jurisdiction over a nonresident defendant. So the Court retained "territorial sovereignty" to maintain its due process foundation for review, even though the basic rationale of *World-Wide*

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It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other states. . . . *World-Wide Volkswagen Corp. v. Woodson* . . .

. . . .  
The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest protected by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

*Id.* at 702-03 n.10.

That language, I believe, corroborates the conclusion in the text accompanying notes 32-35 *infra*, that the resurrection of the "territorial sovereignty" function in *World-Wide Volkswagen* served only to preserve the Court's role as constitutional arbiter.

*Insurance Corp. of Ireland* was a diversity case in which jurisdiction over the nonresident defendants was based on the Pennsylvania long-arm statute. The Court approved the district court's imposition of the sanction of Rule 37(b), Federal Rules of Civil Procedure, to find jurisdiction based on the defendants' failure to comply with discovery orders directed to the defendants' contacts with Pennsylvania. *Id.* at 707-709.

32. *Hanson*, 357 U.S. at 250-51.

33. 28 U.S.C. § 1404(a) (1982).

34. *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (1980).

*Volkswagen*<sup>35</sup> seems to have been the protection of the nonresident defendant from jurisdictional surprise. And it is that basic rationale that may point the way to a jurisdictional reach greater than some may have contemplated before *World-Wide Volkswagen*.

#### IV. TRADITIONAL MINIMUM CONTACTS ANALYSIS

Since *International Shoe*,<sup>36</sup> the minimum contacts test has been the essential criterion for determining the propriety of an assertion of in personam jurisdiction over a nonresident defendant. Since *Shaffer*, that same test has been applicable to quasi in rem jurisdiction. And under *World-Wide Volkswagen*,<sup>37</sup> the minimum contacts test became the manner of shielding the defendant from jurisdictional surprise. But "minimum contacts" describes just one of several relationships that may exist between nonresident defendant and forum state.

*International Shoe* implied the existence of three such relationships. The first might be characterized as a "pervasive presence." If a nonresident defendant has a pervasive presence within the forum state, the courts of that state may assert jurisdiction over the defendant as to any cause of action, whether or not the action arises out of the defendant's activities within the forum.<sup>38</sup> The second of those relationships

35. 444 U.S. 286 (1980).

36. 326 U.S. 310 (1945).

37. 444 U.S. 286 (1980).

38. "[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 activities." 326 U.S. at 318 (citations omitted).

Perhaps the classic example of such a pervasive presence exists in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). Defendant owned and had operated gold and silver mines in the Philippine Islands. "Its operations there were completely halted during the occupation of the Islands by the Japanese." *Id.* at 447. Thereafter:

[T]he [company] president, who was also the general manager and principal stockholder of the company, returned to his home in . . . Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in . . . Ohio, two active bank accounts carrying substantial balances of company funds. A bank in . . . Ohio . . . acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in [Ohio]. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.

*Id.* at 447-48.

The Court concluded that the due process clause did not prohibit an Ohio court from asserting jurisdiction over the company in a cause of action not arising from the Ohio activities. *Id.* at 448.

could be characterized as “minimum contacts.”<sup>39</sup> If a nonresident defendant has only isolated or occasional contacts with the forum state, the courts of that state may assert jurisdiction over the defendant only as to causes of action arising out of those minimum contacts.<sup>40</sup> The third relationship would be one that is significantly less than a pervasive presence but somewhat more than minimum contacts. Given that relationship, in what circumstances may state courts assert jurisdiction over the defendant?

Unfortunately, *International Shoe* does not seem to provide a clear answer. Here is one of the most lucid judicial responses to that elusive problem which I have found:

Attempting to give specific content to the “fair play and substantial justice” formulation, Chief Justice Stone catalogued cases involving out-of-state corporations. First, where the corporation’s in-state activity was “continuous and systematic” and that activity gave rise to the episode in suit, personal jurisdiction unquestionably could be asserted. . . . *International Shoe* itself ranked in that category. Further, the commission of “some single or occasional acts” in a state might be sufficient to render the corporation liable to suit in the state with respect to those acts, though not with respect to matters totally unrelated to the forum connections. . . . These categories, sometimes described by the label “specific jurisdiction,” have comprised the area in which the most significant development has occurred since *International Shoe*. “Long-arm” statutes and rules reflect that development.<sup>41</sup>

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39. See *supra* text accompanying note 23.

40. As one court stated:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319 (citations omitted).

41. *Donahue v. Far Eastern Air Transport Corp. (F.E.A.T.)*, 652 F.2d 1032, 1036 (D.C. Cir. 1981) (emphasis in original). In *Donahue*, wrongful death actions were brought against the carrier, F.E.A.T., whose flight from Hualien, Taiwan, to Taipei, Taiwan, crashed while landing at Taipei. The decedents had been Connecticut domiciliaries, temporarily residing in Guam, and on holiday in Taiwan. *Id.* at 1033. Plaintiff commenced identical actions against F.E.A.T. in five U.S. district courts: the District of Guam, the District of Hawaii, the Central District of California, the Southern District of New York, and the District of Columbia. Pursuant to 28 U.S.C. § 1407 (1982), the Judicial Panel on Multidistrict Litigation ordered all five actions consolidated for pretrial proceedings in the District of Columbia. *Id.* at 1034.

The court concluded that due process precluded the assertion of jurisdiction by any of the five courts because the actions asserted had not arisen out of any activities of defendant in any of the

I believe that judicial language portrays an accurate assessment of the traditional view of *International Shoe*, as read by courts and legislatures. Under the traditional view, when a nonresident defendant has had only minimum contacts with the forum state or contacts somewhat more than minimum, but significantly less than a pervasive presence, the courts of the forum may assert jurisdiction over the defendant only as to causes of action arising out of those contacts.

Even after *World-Wide Volkswagen*, courts have been assiduous in noting with regard to nonresident defendants having significant contacts with the forum that the cause of action arose out of those contacts. For example, in *Poyner v. Erma Werke GMBH*,<sup>42</sup> plaintiff, a Kentucky resident, was rendered a paraplegic as the result of a bullet wound inflicted by an Erma manufactured .22 caliber semi-automatic pistol.<sup>43</sup> To recover for his injury, plaintiff sued Erma, a German manufacturer of firearms<sup>44</sup> and L.A. Distributors, Inc. (L.A.), a New York based distributor of Erma products.<sup>45</sup> Finding that the Kentucky long-arm stat-

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five jurisdictions, and the defendant lacked a pervasive presence in any of the jurisdictions which would justify hearing actions unrelated to defendant's in-forum activities.

The court's assertion that "'Long-arm' statutes . . . reflect [the conclusion that specific jurisdiction is the area in which the most significant development had occurred since *International Shoe*]" is precisely correct. *Id.* at 1036. Almost without exception, "comprehensive detailed statutes," require that the cause of action asserted arise out of nonresident defendant's in-forum activities. E. SCOLES & R. WEINTRAUB, *CASES AND MATERIALS ON CONFLICT OF LAWS* 145 (2d ed. 1972). See, e.g., UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03, 13 U.L.A. 466 (1962), which, after enumerating those in-forum activities that make defendant vulnerable to jurisdiction, requires that: "When jurisdiction over a person is based solely upon this section, only a [cause of action] arising from acts enumerated in this section may be asserted against him." *Id.* No similar inhibiting statutory language appears in the more general, and, therefore, potentially broader, long-arm statutes: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

A certain awkwardness may arise in those instances where a state has enacted a detailed long-arm statute and the state's appellate court concludes that the statute was intended to afford jurisdiction to the fullest extent permitted by the Constitution. In *Garfield v. Homowack Lodge, Inc.*, 249 Pa. Super. 392, 378 A.2d 351 (1977), *allocatur refused*, the court, finding that the state's long-arm statute provided for jurisdiction over foreign corporations to the extent permitted by the Constitution, approved jurisdiction over a cause of action not arising out of the foreign corporation's in-forum activities. See *infra* text accompanying notes 68-73.

The current Pennsylvania long-arm statute, unlike the statute under which *Garfield* was decided, although purporting to afford jurisdiction over foreign corporations "to the fullest extent allowed under the Constitution of the United States," also requires that the cause of action arise out of the foreign corporation's "minimum contact with this Commonwealth." 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981). Presumably, *Garfield* would be decided differently today, not because of the due process clause, but because of the more inhibiting statute.

42. 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

43. *Id.* at 1187.

44. *Id.*

45. *Id.*

ute was "to be interpreted as coextensive with the outer limits of due process,"<sup>46</sup> the court examined the constitutional propriety of asserting jurisdiction over the manufacturer, Erma. The court found that Erma and L.A., "the sole United States distributor for Erma,"<sup>47</sup> had made significant efforts to promote Erma's products "throughout the United States."<sup>48</sup> In addition to "conduct[ing] nationwide advertising,"<sup>49</sup> L.A. "[sold] to a distributor in Lexington, Kentucky, [and had] a salesman in Tennessee and a warehouse in North Carolina, all capable of selling to or servicing customers in Kentucky."<sup>50</sup> Moreover, with Erma's knowledge, L.A. "solicited business in Kentucky through telephone calls and mail order catalogues."<sup>51</sup> Clearly, Erma, through its distributor, had significant contacts with Kentucky. The essence of the jurisdictional issue, as identified by the court, then became:

Did this cause of action arise from Erma's activities in Kentucky? The pistol admittedly was manufactured by Erma. [In] its brief, Erma asserts that the firearm was sold by L.A. to Stewart Bear of Nashville, Tennessee, which was the last sale reflected by the record, although the firearm was owned by Lee Dyer of Paducah, Kentucky, at the time of [plaintiff's] injury. The brief then asks "Query: Where and from whom did he buy it?"<sup>52</sup>

The obvious implication of the "query" is that, notwithstanding Erma's significant contacts with Kentucky, jurisdiction over Erma would be permissible only if plaintiff's cause of action arose out of those contacts. The court found that it did:

What Erma has failed to mention is that Stewart Bear of Nashville, Tennessee, is a salesman for L.A., employed on a commission basis. In light of the relationship between Erma and L.A. and between L.A. and Stewart Bear, we find it more probable than not that this cause of action arose from Erma's activities in Kentucky.<sup>53</sup>

Apparently, the court considered that conclusion necessary to justify the assertion of jurisdiction.

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46. *Id.* at 1189.

47. *Id.* at 1191.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

In *Oswalt v. Scripto, Inc.*,<sup>54</sup> plaintiff, a resident of Texas, was injured by an alleged malfunction of a cigarette lighter manufactured in Japan by defendant Tokai-Seiki. Pursuant to a contract with the manufacturer, Tokai-Seiki, Scripto was "the exclusive distributor of the . . . lighter in the United States."<sup>55</sup> Prior to Mrs. Oswalt's injury, Scripto had "purchased several million of the lighters and had placed them in commerce for sale to the public in the United States."<sup>56</sup>

The court perceived that the issue was whether Tokai-Seiki had "reason to know or expect that the . . . lighter would reach Texas."<sup>57</sup> The court answered the issue affirmatively. After citing *World-Wide Volkswagen*, the court noted:

Tokai-Seiki delivered millions of the lighters to Scripto with the understanding that Scripto would be the exclusive distributor for the United States and that Scripto would be selling the lighters to a customer with national retail outlets. There is nothing in this record to indicate that Tokai-Seiki attempted in any way to limit the states to which the lighters could be sold. To the contrary, the record shows that Tokai-Seiki had every reason to believe its product would be sold to a nationwide market, that is, in any or all states. Moreover, the record shows that Texas was one of the states in which the lighters were in fact marketed, the distribution chain including a Texas wholesaler [Southwestern Drug Corporation], and a Texas retail store [Mr. Oswalt's drug store].<sup>58</sup>

The ultimate issue then became whether the cause of action asserted arose out of Tokai-Seiki's contacts with Texas. The court found that it did: "Mr. Oswalt, who owns a drug store [in Texas], purchased 12 or 14 of the lighters on a display card from Southwestern . . . , a wholesale supplier in Midland, Texas. Mrs. Oswalt got the lighter which injured her from this display card."<sup>59</sup> Clearly, the nonresident defendant

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54. 616 F.2d 191 (5th Cir. 1980).

55. *Id.* at 197.

56. *Id.*

57. *Id.* at 198.

58. *Id.* at 199-200.

59. *Id.* at 198. *Oswalt's* finding that plaintiff's cause of action arose out of nonresident defendant's contacts with the forum may have been required by then existing decisions of the Supreme Court of Texas interpreting that state's long-arm statute. *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966). Subsequently, however, that court concluded that the Texas long-arm statute was intended to achieve the maximum jurisdictional reach permissible under due process, and that the due process clause did not invariably require that the cause of action asserted arise out of defendant's forum contacts. *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870 (Tex. 1982), *cert. granted*, 103 S. Ct. 1270 (1983). *Hall*, in turn, has required the Court of Appeals for the Fifth Circuit, to amend its method of determining the permissible reach of

had utilized a distributive chain which would foreseeably place its products in the forum state *and* the cause of action arose out of those forum contacts.

In the course of its opinion in *Oswalt*, the Court of Appeals for the Fifth Circuit cited *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>60</sup> and noted that *Gray* had been "cited favorably by the Supreme Court in *World-Wide Volkswagen*."<sup>61</sup> Because *Gray* has become a Conflicts staple, treated in casebooks and treatises,<sup>62</sup> it may be helpful to consider it here.

The plaintiff, Phyllis Gray, was injured when a water heater she had purchased in Illinois exploded in her home. To recover for her injuries, plaintiff sued, among others, the Titan Valve Manufacturing Co. (Titan), alleging that Titan had negligently manufactured the heater's safety valve. Titan had manufactured the valve in Ohio. The valve was then incorporated in the water heater by American Radiator & Standard Sanitary Corp. in Pennsylvania. The court noted:

[Titan's] only contact with [Illinois, the forum,] is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer. The record fails to disclose whether [Titan] has done any other business in Illinois, either directly or indirectly. . . .<sup>63</sup>

Titan challenged the jurisdiction of the Illinois court. The Supreme Court of Illinois concluded that the state's long-arm statute "contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause,"<sup>64</sup> and applied the due process constitutional test. First, the court found that "it is a reasonable inference that [Titan's] commercial transactions, like those of other manufacturers, result in substantial use and consumption in this

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jurisdiction thereunder when the court hears diversity cases initiated pursuant to the Texas long-arm statute. Compare *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), with *Placid Investments, Ltd. v. Girard Trust Bank*, 689 F.2d 1218 (5th Cir. 1982).

60. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

61. 616 F.2d at 201-02.

62. See, e.g., R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS* 560, 561, 564, 565 (1981); R. LEFLAR, *AMERICAN CONFLICTS LAW*, 61 n.12, 80, 83 n.15 (1968); J. MARTIN, *CONFLICT OF LAWS CASES AND MATERIALS* 497 (1978); W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 99, 106, 109 (7th ed. 1978); E. SCOLES & P. HAY, *CONFLICT OF LAWS* 211 n.6, 296, 309 n.11, 333, 338, 339 (1982); E. SCOLES & R. WEINTRAUB, *CASES AND MATERIALS ON CONFLICT OF LAWS* 145 (2d ed. 1972); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 159, 161 (2d ed. 1980).

63. *Gray*, 22 Ill. 2d at 438, 176 N.E.2d at 764.

64. *Id.* at 436, 176 N.E.2d at 763 (citation omitted).



State.”<sup>65</sup> From that inference, the court concluded that:

To the extent that [Titan’s] business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves.<sup>66</sup>

The court went on to note that “[w]here the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation 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.”<sup>67</sup> Thus, Titan had utilized a distributive chain which it knew or should have known would take its products into the forum state *and* the plaintiff’s cause of action arose out of those forum contacts. Consequently, the court concluded that the assertion of jurisdiction over Titan was constitutionally permissible.

#### V. THE EFFECT OF *WORLD-WIDE VOLKSWAGEN*

In the pre-*World-Wide Volkswagen* case of *Gray*, and the post-*World-Wide* cases of *Poyner* and *Oswalt*, the respective courts concluded that the nonresident defendant had significant contacts with the forum and that the plaintiff’s cause of action arose out of those contacts. Thus, each of these cases represents a traditional application of *International Shoe*. If the court in any of the cases had found that plaintiff’s cause of action had not arisen out of those contacts, although defendant had significant contacts with the forum, the same traditional application of *International Shoe* presumably would have precluded jurisdiction.

In *Poyner*, for example, if the court had found that the Kentucky plaintiff’s injury had been inflicted by an Erma pistol sold to a Tennessee consumer and taken by that consumer into Kentucky, the court would have concluded that the cause of action had not arisen out of Erma’s contacts with Kentucky. In *Oswalt*, if the court had found that the lighter which injured the Texas plaintiff had been sold to a consumer in Oklahoma and been taken by the consumer into Texas, the court would have concluded that the cause of action had not arisen out

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65. *Id.* at 442, 176 N.E.2d at 766.

66. *Id.*

67. *Id.*

of the manufacturer's contacts with Texas. Finally, in *Gray*, if the court had found that the plaintiff had purchased the water heater in Indiana and transported it to her Illinois home, the court would have concluded that the cause of action had not arisen out of the manufacturer Titan's contacts with Illinois. In each instance, the hypothetical conclusion that (1) the nonresident defendant had significant contacts with the forum, but that (2) the plaintiff's cause of action did not arise out of those contacts, coupled with the traditional application of *International Shoe*, would seem to preclude jurisdiction. The question is whether the same results would be required by *World-Wide Volkswagen*.

Even before the Supreme Court decided *World-Wide Volkswagen*, some courts had evidenced a more adventuresome spirit regarding jurisdiction over nonresident defendants. Consider *Garfield v. Homowack Lodge, Inc.*<sup>68</sup> In *Garfield*, the defendant, a New York corporation, operated a resort in the state of New York. Defendant advertised its resort in a Philadelphia newspaper, provided a toll-free phone number in Philadelphia, and paid a ten percent fee to travel agents in Philadelphia through whom clients came to the New York resort. Obviously, defendant sought patrons from the Philadelphia area. Plaintiff, a Pennsylvania citizen, was injured "when he fell on [an allegedly] defectively maintained ice skating rink at [defendant's] resort . . . ."<sup>69</sup> However, the record gave no indication that plaintiff had read the newspaper ads, booked reservations through a Philadelphia travel agency, or used the toll-free telephone number to secure accommodations. In other words, there was no factual basis supporting a contention that the cause of action arose from defendant's activities within Pennsylvania.<sup>70</sup> To recover for his injuries, plaintiff sued defendant in a Pennsylvania state court. The Superior Court of Pennsylvania, in a 4-3 decision, approved the assertion of jurisdiction.<sup>71</sup>

Both the majority and minority opinions recognized that the jurisdictional issue centered on the fact that, although the nonresident defendant had contacts with the forum state, the cause of action did not arise out of those contacts. The majority found the absence of a connection between defendant's contacts and the cause of action did not destroy jurisdiction because the state's long-arm statute provided for

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68. 249 Pa. Super. 392, 378 A.2d 351 (1977), *allocatur refused*.

69. *Id.* at 394, 378 A.2d at 353.

70. *Id.* at 402-03, 378 A.2d at 357 (footnote omitted) (Hoffman, J., dissenting).

71. 249 Pa. Super. 392, 378 A.2d 351 (1977), *allocatur refused*.

jurisdiction over foreign corporations "to the fullest extent allowable under the Constitution of the United States,"<sup>72</sup> and "defendant's method of soliciting business in Pennsylvania consisted of such substantial and continuous activities in this Commonwealth as to render it amenable to *in personam* jurisdiction."<sup>73</sup> In support of the latter conclusion, the majority quoted this language from *International Shoe*: "There 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 activities."<sup>74</sup> Apparently, the majority relied on the "intensity"<sup>75</sup> of defendant's activities in the forum state and found that the defendant had a pervasive presence in the forum. The minority contrasted the case with *Perkins v. Benguet Consolidated Mining Co.*,<sup>76</sup> the classic example of a pervasive presence, and found that the defendant corporation had no pervasive presence in the forum, and that, since the cause of action had not arisen from defendant's contacts with the forum, due process precluded the assertion of jurisdiction.

It seems to me that, under then existing decisions of the Supreme Court of the United States, the dissent was right and the majority wrong. Notwithstanding the "intensity" of the defendant's activities aimed at securing Pennsylvania patrons, it would seem fairly clear that the defendant had not established such a pervasive presence in Pennsylvania that the courts of that state could constitutionally assert jurisdiction over the defendant as to any and all causes of action. Since the cause of action did not arise out of the defendant's contacts with the forum, jurisdiction would seem to have been constitutionally impermissible.

But now consider *World-Wide Volkswagen's* primary rationale: the due process clause is intended to protect the nonresident defendant from jurisdictional surprise. Would the assertion of jurisdiction approved in *Garfield* come as a due process surprise to the defendant? Of course not. Even though the cause of action asserted did not arise out of the defendant's contacts with the forum, it was precisely the kind of

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72. *Id.* at 396, 378 A.2d at 354 (quoting Act of November 15, 1972, PA. CONS. STAT. § 8309(b) in footnote 4) (currently a modified statutory version exists in 42 PA. CONS. STAT. ANN. § 5322(b) (Purdon 1981)).

73. 249 Pa. Super. at 398, 378 A.2d at 354.

74. *Id.* at 397, 378 A.2d at 354 (quoting *International Shoe Co.*, 326 U.S. at 318 (citations omitted)).

75. 249 Pa. Super. at 398, 378 A.2d at 354.

76. 342 U.S. 437 (1952); see *supra* note 38.

action the defendant should have contemplated as a result of those contacts. And that is where I think *World-Wide Volkswagen* points the way to a greater jurisdictional reach than some may have anticipated. If a nonresident defendant has contacts with the forum state somewhat more significant than minimal,<sup>77</sup> though clearly not enough to establish a pervasive presence, and if the cause of action asserted is of the kind that defendant should have contemplated as a result of his contacts with the forum, though not arising out of defendant's actual contacts with the forum, the assertion of jurisdiction would hardly come as a surprise. Therefore, since the principal rationale of *World-Wide Volkswagen* would be satisfied, jurisdiction would seem to be consistent with due process.<sup>78</sup>

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77. *Hanson v. Denckla*, 357 U.S. at 251.

78. Apparently, that potential for extending jurisdictional reach has eluded the Pennsylvania Superior Court. In *Goff v. Armbrrecht Motor Truck Sales, Inc.*, 284 Pa. Super. 544, 426 A.2d 628 (1980), defendant, an Ohio corporation that sold automobiles, sold a Jeep to the plaintiff, an Ohio resident. While riding in the Jeep as a passenger, the plaintiff sustained severe and permanent injuries when the Jeep went out of control and crashed into a guardrail in Pennsylvania. Defendant challenged the jurisdiction of the Pennsylvania court. Citing *World-Wide Volkswagen*, the court concluded that the mere fact that plaintiff's use of the vehicle in Pennsylvania may have been reasonably foreseeable was not sufficient justification to subject defendant to jurisdiction. However, the court then noted defendant's contacts with Pennsylvania, which included: (1) For thirty-six years, defendant had been listed in the Driver's Directory of GMC Truck Dealers, which was distributed in Pennsylvania; (2) Defendant occasionally advertised in an Ohio newspaper which may have had Pennsylvania readers; (3) Defendant occasionally advertised on two Ohio radio stations which may have had Pennsylvania listeners; (4) Defendant had sold vehicles to Pennsylvania residents; (5) Defendant had sold parts and accessories to Pennsylvania residents; (6) Perhaps ten times a year, defendant sent officers into Pennsylvania for the purpose of securing notary service for titles in connection with sales of vehicles to Pennsylvania residents.

Those contacts led the court to conclude that defendant had purposefully availed itself of the privilege of acting within Pennsylvania. Nevertheless, the court found that jurisdiction was inappropriate because plaintiff's cause of action had not arisen out of defendant's contacts with Pennsylvania, but remanded the case for determining the extent of the defendant's activities in Pennsylvania. I would have thought that, given nonresident defendant's forum contacts, the court would have concluded that first, defendant's primary conduct had made the use of vehicles sold by it reasonably foreseeable in Pennsylvania; second, therefore injury from such use in Pennsylvania was reasonably foreseeable; third, thus the cause of action asserted was of the type which defendant should have contemplated as a result of its own conduct; and fourth, consequently the assertion of jurisdiction would not have come as a surprise to defendant, even though the action asserted had not arisen out of defendant's forum contacts.

It is true that the plaintiff, like the defendant, was a nonresident of the forum state. That fact, however, would seem to effect no significant difference in the conclusion that the action asserted was of the type the defendant should have contemplated in Pennsylvania as a result of the defendant's own conduct. In *World-Wide Volkswagen*, the plaintiffs, like the retail dealer and regional distributor, were nonresidents of Oklahoma. See *supra* text accompanying notes 5-15. However, had the dealer's and distributor's primary conduct—for example, advertising their automobiles in Oklahoma and selling their automobiles to Oklahoma residents—made the use of their Audis and subsequent injury from that use in Oklahoma foreseeable, the action brought by the Robinsons in Oklahoma would have come as no jurisdictional surprise to dealer or distributor. Thus, the primary rationale of *World-Wide Volkswagen*, and, presumably, the due process clause, would have been satisfied.

The same approach can be applied to a case that has been characterized as "exceeding the permissible limits"<sup>79</sup> of jurisdiction. In *Brand v. Beech Aircraft Corp.*,<sup>80</sup> a Beech manufactured airplane crashed

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79. E. SCOLES & P. HAY, CONFLICT OF LAWS 308 n.5 (1982). Immediately after the excerpt quoted in this text, the authors noted:

[T]he theory of products liability assumes that a manufacturer benefits from a system of economic distribution in which the product is released into the channels of commerce without regard to control by the manufacturer, and since the second-hand or used plane market may be important in supporting the manufacturer's initial market, it may be that the liability of the manufacturer follows the product, both with regard to substance and to jurisdiction, but that the manufacturer should not be required to respond in a jurisdiction in which the only significant contact is the residence of the plaintiff. Cf. *Poyner v. Erma Werke GmbH*, 618 F.2d 1186 (6th Cir. 1980).

*Id.*

To the extent that that language implies that the manufacturer's vulnerability to jurisdiction should be as broad as the market enjoyed by the manufacturer's product, I would concur. In *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963), a product liability action was brought by Vermont residents injured by the ingestion of glass contained in a can of beans prepared and packed by defendant in New York and purchased by plaintiffs in Vermont. The court denied jurisdiction because the record did not demonstrate an "intentional and affirmative action on the part of the non-resident defendant in pursuit of its corporate purposes within [Vermont]." *Id.* at 464, 194 A.2d at 570. My critical reaction to that decision was this:

In *O'Brien*, the Vermont court was unwilling to conclude that defendant's can of beans had come to be purchased in [Vermont] through some intentional act of defendant. It may be helpful to attempt to determine some of the various ways in which the beans came to be purchased there. Several possibilities exist: defendant made its beans available to an exclusive distributor in Vermont; defendant made its beans available to a number of distributors in Vermont; defendant made its beans available to a distributor in New England (outside Vermont), who in turn made them available to wholesalers in Vermont; defendant made its beans available to one or more distributors in New York, who in turn made them available to wholesalers in Vermont; defendant made its beans available directly to a retail outlet in Vermont; or defendant made its beans available directly to plaintiffs. Whichever of these possibilities existed in fact, it seems fair to conclude that defendant benefited from the purchase of its can of beans in Vermont since such purchase potentially enlarged defendant's profitable manufacturing capacity. Moreover, it would seem appropriate to infer that defendant intended to acquire such benefit.

Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221, 228 (1968) (footnote omitted).

I am not certain how the Supreme Court would react to *O'Brien*. To my suggestion that a defendant's vulnerability to jurisdiction should be congruent with the market enjoyed by defendant's product, *World-Wide Volkswagen* may be read as implying a negative response by rejecting the concept that "[e]very seller of chattels would in effect appoint the chattel his agent for service of process." 444 U.S. at 296. Yet, regardless of which possibility was ultimately utilized by the defendant in *O'Brien* to effect a distributive chain which made the consumption of its beans in Vermont entirely foreseeable, the defendant, by its own conduct, "should reasonably [have] anticipate[d] being haled into court [in Vermont]." 444 U.S. at 297.

In *O'Brien*, the plaintiffs' amended complaint, alleged that, after the beans were packed in New York, the defendant sold the beans to International Grocers Alliance for resale and distribution to grocers in Vermont and other states. *O'Brien v. Comstock Foods, Inc.*, 125 Vt. 158, 159, 212 A.2d 69, 70 (1965). The court deemed this conduct was sufficient to satisfy the jurisdictional requirement. *Id.* at 162, 212 A.2d at 72.

For a discussion of *Poyner*, cited by SCOLES & HAY, *supra* this note, see *supra* text accompanying note 42.

80. 72 Ill. 2d 548, 382 N.E.2d 252 (1978), *aff'ing*, 51 Ill. App. 3d 296, 367 N.E.2d 118 (1977), *cert. denied*, 442 U.S. 928 (1979).

as it approached an airport near Frobisher Bay, Northwest Territories, Canada.<sup>81</sup> All three pilots on board were killed. Two of the pilots and their dependent survivors were Illinois residents. The dependent survivors brought wrongful death actions against Beech in an Illinois state court.<sup>82</sup> Beech is a Delaware corporation with its principal place of business in Kansas, where the plane had been manufactured. In 1966 Beech sold the Kansas-manufactured aircraft to a Texas corporation. In 1968 the Texas corporation sold the plane to a Nevada company. In 1971 the Nevada company sold the aircraft to an Illinois corporation. After being based in Illinois for some time, the aircraft was apparently sold by the Illinois corporation to Eagle Aircraft Services, Ltd., of London, England. At the time of the crash, it was being flown from Illinois to London.<sup>83</sup> At all material times, Beech had a "contractual relationship with . . . a distributor of [Beech's] products . . . in Illinois."<sup>84</sup>

Beech challenged the jurisdiction of the Illinois state court. A divided Appellate Court of Illinois, with both of the majority judges applying different reasoning, found that jurisdiction was appropriate.<sup>85</sup> The lead opinion concluded that Beech had committed a "tortious act"<sup>86</sup> in Illinois "by the delivery into Illinois of a plane that was allegedly unreasonably dangerous."<sup>87</sup> Of course, Beech had not effected that delivery. The author of the lead opinion found that Beech had "minimum contacts"<sup>88</sup> with Illinois apparently because of "the contact that the plaintiffs and their decedents had with the plane."<sup>89</sup> Clearly, this "unilateral activity"<sup>90</sup> by the forum residents was not attributable to Beech. The concurring opinion approved jurisdiction because it found that Beech's relations with the Illinois distributor of Beech planes constituted a sufficiently "pervasive"<sup>91</sup> presence to justify the assertion of jurisdiction "over a cause [of action] not directly related to [those] ac-

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81. 72 Ill. 2d at 550, 382 N.E.2d at 253.

82. *Id.*

83. *Id.* at 551, 382 N.E.2d at 253.

84. *Id.*

85. *Braband v. Beech Aircraft Corp.*, 51 Ill. App. 3d 296, 367 N.E.2d 118 (1977).

86. *Id.* at 298, 367 N.E.2d at 122.

87. *Id.* at 301, 367 N.E.2d at 122.

88. *Id.* at 301, 367 N.E.2d at 123.

89. *Id.*

90. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

91. 51 Ill. App. 3d at 306, 367 N.E.2d at 126 (Stamos, J., concurring).

tivities."<sup>92</sup> So far as I know, the concurring opinion is unique in its conclusion that the existence of an in-forum product distributor constitutes a pervasive presence by the product manufacturer. The dissenting opinion concluded that Beech had not committed a "tortious act"<sup>93</sup> in Illinois, that there was not "sufficient minimum contact to meet due process requirements,"<sup>94</sup> and that Beech did not have a "pervasive"<sup>95</sup> presence that would justify jurisdiction over "a cause of action not related to Beech's alleged Illinois activities."<sup>96</sup>

The Supreme Court of Illinois affirmed the finding of jurisdiction.<sup>97</sup> The court's rationale is difficult to ascertain. First the court noted that:

From the agreed statement of facts it does not appear that plaintiffs' causes of action arose from any act of defendant's [Illinois] distributor, . . . or that the relationship between [the distributor] and defendant was in any manner connected with the occurrence in which plaintiffs' decedents were killed; nor does it appear that plaintiffs' causes of action arose from "the transaction of any business within this State."<sup>98</sup>

But the court concluded that defendant's activities rendered it "present and doing business in Illinois."<sup>99</sup>

Both sections cited by the court deal with the mechanics of effecting service on a "private corporation"<sup>100</sup> or "any party"<sup>101</sup> vulnerable to jurisdiction. Although the court relied on both sections, neither pur-

92. *Id.* The more typical judicial reaction to a nonresident defendant's having a product distributor within the forum state, is to find jurisdiction as to causes of action arising out of in-forum sales by the distributor. *See Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135 (5th Cir. 1964).

93. 51 Ill. App. 3d at 308, 367 N.E.2d at 127 (Downing, J., dissenting).

94. *Id.* at 310, 367 N.E.2d at 129.

95. *Id.* at 312, 367 N.E.2d at 130.

96. *Id.*

97. *Braband v. Beech Aircraft Corp.*, 72 Ill. 2d 548, 382 N.E.2d 252 (1978).

98. *Id.* at 557, 382 N.E.2d at 256 (citation omitted).

99. *Id.* at 539-40, 382 N.E.2d at 257.

100. Section 13.3 provided that:

A private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of said corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law. A private corporation may also be notified by publication and mail in like manner and with like effect as individuals.

ILL. ANN. STAT. ch. 110, § 13.3 Civ. Prac. Act (Smith-Hurd 1968) (repealed 1981 (effective July 1, 1982)) (superseded by ILL. ANN. STAT. ch. 110, § 2-204 Code Civ. Proc. (Smith-Hurd 1983)).

101. Section 16 provided that:

Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of

ports to define or describe that conduct which makes a party vulnerable to such jurisdiction. For our purpose, perhaps the most significant language in the court's opinion was this:

In view of defendant's activities within Illinois designed to effect sales to residents of Illinois, defendant could reasonably assume that airplanes which it manufactured would be owned by residents of Illinois and in view of the high degree of mobility peculiar to its products could further assume that they would be flown both within Illinois and into other States, or as in this instance, to other countries. We hold, therefore, that . . . defendant's activities show sufficient contacts with this State so that requiring it to defend this action does not offend "traditional notions of fair play and substantial justice."<sup>102</sup>

Was the result achieved in *Braband* constitutionally permissible? If the answer were based on Court decisions available when *Braband* was decided, I think not. It seems fairly clear that Beech's having a distributor within Illinois would not be deemed by the Court such a pervasive presence within the forum as to justify jurisdiction over actions wholly unrelated to that relationship. It seems equally clear that the actions asserted were wholly unrelated to Beech's contacts with the forum. Therefore, under the tests of *International Shoe* as traditionally applied, due process would seem to preclude jurisdiction. But what about *World-Wide Volkswagen*?

In *Braband*, as in *World-Wide Volkswagen*, the nonresident defendant's injury-causing product was not in the forum as the result of any primary conduct of the defendant. Rather, the product's presence in the forum was attributable to the intervening conduct of the user, or

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summons within this State; otherwise it shall have the force and effect of service by publication.

The service of summons shall be made in like manner as service within this State, by any person over 18 years of age not a party to the action. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on such service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this State.

ILL. ANN. STAT. ch. 110, § 16 Civ. Prac. Act (Smith-Hurd 1968, as amended 1977) (repealed 1981 (effective July 1, 1982)) (superseded by ILL. ANN. STAT. ch. 110, § 2-208 Code Civ. Proc. (Smith-Hurd 1983)).

102. 72 Ill. 2d at 559, 382 N.E.2d at 257. For a more recent Illinois case in which nonresident defendant may have had significant contacts with the forum, but the cause of action asserted was not of the kind reasonably foreseeable as a result of those contacts, see *Cook Associates, Inc. v. Lexington United Corp.*, 87 Ill. 2d 190, 429 N.E.2d 847 (1981).



a series of consecutive users. Still, there remains this factual distinction between the two cases. In *World-Wide Volkswagen*, the nonresident defendants had done nothing to introduce their products into Oklahoma. In *Braband*, however, Beech regularly sought to sell its products through an Illinois distributor. The question is whether this distinction is of constitutional significance. Under *World-Wide Volkswagen*, I believe the answer is yes. By seeking to market its aircraft in Illinois, Beech, through its own conduct, made the use of its planes by Illinois residents entirely foreseeable. That same conduct made it foreseeable that Illinois residents, injured in their use of Beech's planes, would sue Beech in Illinois, even though the actual in-flight injury may have occurred outside Illinois. And, of course, that is exactly the type of actions that were asserted against Beech in *Braband*. Illinois residents, injured by the use of a Beech plane, sued Beech in Illinois. It would seem that subjecting Beech to the jurisdiction of an Illinois court would not come as a surprise to Beech, since the actions asserted were of the kind Beech should have contemplated as a result of its contacts with Illinois, even though the actions asserted had not arisen out of those contacts. It is true, of course, that the injury-producing plane in *Braband* had passed through the hands of a number of owners before the fatal crash. That fact, however, would seem to go more to a possible substantive law defense<sup>103</sup> than to a jurisdictional bar under *World-Wide Volkswagen*. I am inclined to believe, therefore, that *Braband*, perhaps unconstitutional when decided, has been "ratified" by *World-Wide Volkswagen* and its primary rationale that the due process clause is intended to protect nonresident defendants from jurisdictional surprise.

What about the hypothetical spin-offs of *Poyner*, *Oswalt* and *Gray*? In each instance, the nonresident defendant had significant contacts with the forum state. Each defendant utilized a distributive chain which it knew, or should have known, would place its products within the forum. In each case, the cause of action asserted was of the kind that defendant should have contemplated as a result of its own primary conduct. The plaintiff in *Poyner* was injured in Kentucky by a gun

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103. It is possible that, given the series of owners prior to the fatal crash, the plane may have undergone substantial, noncontemplatable changes after leaving Beech's hands.

One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . if . . . it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

manufactured by the defendant, in circumstances in which the defendant's own conduct had made such injuries foreseeable. In *Oswalt*, the plaintiff was injured in Texas by a lighter manufactured by the defendant, in circumstances in which the defendant's own conduct had made such injuries foreseeable. Finally, in *Gray*, the plaintiff sustained injury in Illinois as the result of a malfunctioning safety valve manufactured by the defendant, in circumstances in which the defendant's own conduct had made such injuries foreseeable. Even assuming that the gun in *Poyner* had been carried into Kentucky by a Tennessee consumer, that the lighter in *Oswalt* had been carried into Texas by an Oklahoma consumer, and that the water heater in *Gray* had been purchased in Indiana, the causes of action asserted would have been of the type foreseeable to the nonresident defendants as a consequence of their own conduct. None would have come as a jurisdictional surprise to the defendant. Under *World-Wide Volkswagen*, then, none of the actions would be precluded because of lack of jurisdiction, even though the cause of action had not arisen out of defendant's contacts with the forum.

## VI. ILLUSTRATIONS

A hypothetical situation can now be fashioned to further test that conclusion. Suppose defendant, a State *A* corporation, manufactures helicopters. It sells its total output to a State *B* distributor, which distributes the helicopters to retail dealers in State *B* and State *C*. XYZ, a radio station operator in State *B*, purchased a helicopter manufactured by defendant from a retail dealer in State *B*. XYZ used the helicopter to provide its listeners with rush-hour traffic reports. An employee of XYZ regularly piloted the helicopter over the station's service area in State *B* and State *C*. During one of those flights, the helicopter crashed in State *C*, killing a State *C* resident. Decedent's widow brings a wrongful death action against defendant in a State *C* court, alleging that the helicopter was defective and unreasonably dangerous when it left defendant's hands. Now assume that State *C*'s long-arm statute permits jurisdiction over nonresident defendants to the fullest extent permitted by the Constitution. Defendant enters a special appearance to challenge the court's jurisdiction. How should the court rule?

Here, as in *World-Wide Volkswagen*, the injury-producing product entered the forum state as the result of the intervening conduct of the user, not as the result of primary conduct by the defendant. Presuma-

bly, that intervening conduct, however reasonably foreseeable, would be considered superseding for jurisdictional purposes. The fact that the helicopter in this case may be even more mobile than the Audi in *World-Wide Volkswagen* apparently would not change the superseding character of the user's conduct. After all, as the Court noted in *World-Wide Volkswagen*, "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."<sup>104</sup> Does that mean that the court should dismiss the action? I think not. The hypothetical differs from *World-Wide Volkswagen* in one critical respect. In the hypothetical, the defendant utilized a distributive chain which it knew would take its products to retail dealers in the forum state where the products would be offered for sale to forum residents. Thus, as a result of the defendant's primary conduct, the use of its products within the forum state, as well as injuries resulting from such use, were foreseeable. Consequently, actions of the kind asserted in the instant case in State *C* were foreseeable to the defendant as a result of its own primary conduct. And, as the Court noted in *World-Wide Volkswagen*, the foreseeability that is critical to due process analysis is present when:

the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. . . . The Due Process Clause, . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>105</sup>

Since the assertion of jurisdiction by the State *C* court would come as

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104. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297.

105. *Id.* (citations omitted). The significance of that language, in terms of protecting the non-resident defendant from jurisdictional surprise, seems to have been recognized and applied differently by the Supreme Court of Oregon in two cases decided on the same day. In *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 657 P.2d 211 (1982), defendant, a New York corporation, manufactured "servo actuators" in New York and sold them "to businesses for use as component parts of other products." One of those parts was incorporated in an airplane engine which, in turn, was incorporated in an airplane. Cessna Aircraft Company (Cessna) sold the airplane to the plaintiff, an Oregon corporation, in Oregon. The plane crashed in California. Plaintiff sued in Oregon. Defendant challenged the court's jurisdiction. Citing *World-Wide Volkswagen*, the court concluded that "[w]hat is relevant for due process is the foreseeability of being haled into the forum state's courts, and it is 'the defendant's conduct and connection with the forum state' . . . that provides that expectation rather than any 'unilateral activity' of a plaintiff." *Id.* at —, 657 P.2d at 215 (citations omitted).

Applying that test, the court found that jurisdiction was appropriate because the defendant's activity generated "the expectation that its products ultimately will come to rest in every state." *Id.* at —, 657 P.2d at 215. That conclusion is wholly justified, I believe, by the rationale of *World-*

no surprise to the defendant, *World-Wide Volkswagen's* primary consideration would seem to be satisfied and, with it, any due process requirements.

How would our hypothetical have been resolved before *World-Wide Volkswagen*? It seems fairly clear that defendant's use of a distributive chain leading to retail dealers in State *C* would hardly be considered equivalent to a pervasive presence in that state. At most, the

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*Wide Volkswagen*. Certainly, subjecting the defendant to suit in Oregon should not have come as a jurisdictional surprise to the defendant.

In *State ex rel. La Manufacture Francaise des Pneumatiques Michelin (Michelin France) v. Wells*, 294 Or. 296, 657 P.2d 207 (1982), defendant Michelin France manufactured tires in France. It sold the tires to Michelin USA and Sears, Roebuck & Company. Plaintiff, an Oregon corporation, installed one of the defendant's tires on one of the plaintiff's trucks. The truck was damaged when the tire exploded. "The place of purchase, installation and explosion of the tire which allegedly caused the accident were not specified in the complaint." *Id.* at —, 657 P.2d at 208. In addition, the plaintiff failed to indicate "the scope of Michelin USA's or Sears, Roebuck & Company's distribution of Michelin [France] products in the United States and that is not a matter of which [the court] can take judicial notice." *Id.* at —, 657 P.2d at 210. However, the court was willing to conclude "that Michelin France has sought indirectly to serve the Oregon market through a system of distribution by others which covers the United States." *Id.* at —, 657 P.2d at 210. Nevertheless, the court found jurisdiction to be constitutionally precluded: "Here, unlike *Hydraulic Servocontrols*, no fact of substantive relevance, such as sale, use, accident or injury has been shown to have occurred in Oregon." *Id.* at —, 657 P.2d at 211.

That language, and the court's opinion, seem to require a specific minimum contact between the nonresident defendant and the forum state "relevant" (*id.* at 211) to the specific cause of action asserted, even though nonresident defendant has utilized a distributive chain which makes the presence of its product in the forum foreseeable. I do not believe that such an additional requirement is mandated by *World-Wide Volkswagen*, so long as the nonresident defendant's conduct makes suits of the type asserted reasonably foreseeable in the forum state.

In *Hall v. Helicopteros Nacionales de Colombia (Helicol)*, 638 S.W.2d 870 (Tex. 1982), *cert. granted*, 103 S. Ct. 1270 (1983), Helicol, a Colombian business firm, contracted with a Texas consortium to transport workers and supplies to an oil pipeline construction site in Peru. The contract was negotiated in Texas. A helicopter crash in Peru resulted in the deaths of four workers, all United States citizens but none domiciled in Texas. *Id.* at 871. Wrongful death actions were brought against Helicol in the Texas state court, where Helicol challenged jurisdiction. The Texas Supreme Court approved the assertion of jurisdiction. The court concluded that the Texas long-arm statute was intended to reach as far as due process would permit. Given Helicol's significant contacts with Texas, some related to the contract with the Texas consortium, some not, the court concluded that due process did not require that the causes of action asserted arise out of those contacts.

It is somewhat ironic that the Texas court utilized the *Hall* case to adopt the significant contacts test. Given the facts of the case, one could argue that the actions asserted had arisen out of Helicol's contacts with Texas and the contract with the Texas consortium. Moreover, the court's opinion does not make it clear that the significant contacts test would justify jurisdiction only with regard to actions of the kind made foreseeable in the forum as a result of those contacts. Helicol's contacts with Texas did not make the use of Helicol's helicopter service in Texas foreseeable. Rather, those contacts made the use of that service in Peru by workers domiciled in Texas or elsewhere reasonably foreseeable. That, in turn, would seem to point to the conclusion that, since the decedents had been employed by the Texas consortium, the wrongful death actions arose out of Helicol's contacts with Texas.

corporation's in-state activity was "continuous and systematic,"<sup>106</sup> and such activity would support "personal jurisdiction"<sup>107</sup> only if "that activity gave rise to the episode in suit."<sup>108</sup> In our hypothetical, that was not the case. The injury-causing product had not been purchased from a retail dealer in the forum. Apparently, then, jurisdiction would have been unavailable since the cause of action asserted did not arise out of the nonresident defendant's contacts with the forum. It would seem that, again, the primary rationale of *World-Wide Volkswagen* would support a jurisdictional reach unavailable before that decision.

Now, amend the hypothetical slightly by replacing in personam with quasi in rem jurisdiction. This can be accomplished by assuming that the plaintiff initiated the wrongful death action by attaching a bank account of the defendant in State C, and that State C's foreign attachment statute permits jurisdiction to the fullest extent allowable by the Constitution. Under *Shaffer v. Heitner*,<sup>109</sup> the same due process test applicable to in personam jurisdiction is also applicable to quasi in rem jurisdiction. Presumably, that would include the Court's latest formulation of that test in *World-Wide Volkswagen*. Indeed, *Shaffer* said, "We . . . conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."<sup>110</sup> Consequently, though such quasi in rem jurisdiction probably would have been unavailable when *Shaffer* was decided, because the cause of action did not arise out of defendant's contacts with the forum, such jurisdiction would be available today under *World-Wide Volkswagen*.

Would that quasi in rem jurisdiction be available even though there is no relationship between the res attached—defendant's bank account in the forum state—and the wrongful death action asserted? I think the answer is yes. It is true that *Shaffer* indicated:

the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when 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

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106. *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1036 (D.C. Cir. 1981); see *supra* note 41.

107. *Donahue*, 652 F.2d at 1036.

108. *Id.*

109. 433 U.S. 186 (1977).

110. *Id.* at 212 (footnote omitted).

jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.<sup>111</sup>

But *Shaffer* also demonstrates that due process may be satisfied even absent a relationship between the res attached and the cause of action asserted if "other ties"<sup>112</sup> exist. Those other ties may be found in "the relationship among the defendant, the forum, and the litigation."<sup>113</sup> In the hypothetical, the defendant, by utilizing retail distributors in the forum state, generated contacts with the forum that are more than minimal, though less than a pervasive presence. By its primary conduct, the defendant made personal injury and wrongful death actions arising out of its products' use reasonably foreseeable in the forum. The wrongful death action asserted would fall within the kind of forum actions reasonably foreseeable as a result of the defendant's primary conduct. Under *World-Wide Volkswagen*, that would seem to justify in personam jurisdiction over the defendant; under *Shaffer*, that same due process test would seem to justify quasi in rem jurisdiction.

## VII. CONCLUSION

*World-Wide Volkswagen* would appear to be something of a paradox. By rejecting as a basis for jurisdiction the reasonably foreseeable presence of a nonresident defendant's injury-causing product in the forum when that presence is attributable to intervening user conduct, the opinion limits jurisdictional reach more than some courts might have contemplated. At the same time, by casting the due process clause in the role of protecting nonresident defendants from jurisdictional surprise, the opinion may point toward a jurisdictional reach longer than some courts might have anticipated. Where a nonresident defendant's significant contacts with the forum make actions of a particular kind reasonably foreseeable, jurisdiction over an action of that kind may be appropriate, even though the specific action did not arise out of those contacts. In addition, a court's longer jurisdictional reach would be available for both in personam and quasi in rem jurisdiction. I think *World-Wide Volkswagen* has precisely that effect.

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111. *Id.* at 207-08 (footnotes omitted).

112. *Id.* at 209.

113. *Id.* at 204.