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In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions

Nationwide distribution of merchandise has created a likelihood that persons injured by defective products will reside in a state far distant from the manufacturer's principal place of business. In order to provide a more convenient forum for their citizens, many state legislatures have enacted "long-arm" statutes enabling suit to be brought in the state where the plaintiff resides.¹ Two basic problems are encountered in attempting to gain jurisdiction over the nonresident manufacturer. The first results from constitutional limitations upon the assertion of judicial power over nonresidents. The Supreme Court has articulated this issue in terms of fairness to the defendant in requiring him to defend in a foreign state, with fairness conclusively established when the cause of action is related to a purposeful contact of the defendant with the state in which jurisdiction is sought.² The second problem is simply a matter of statutory construction. Does the language of the "long-arm" provision encompass what the plaintiff alleges the nonresident manufacturer has done? For example, when dealing with a statute that confers jurisdiction over defendants who commit a "tortious act" within the state,³ there is some question whether the tortious act in a product liability case is committed outside the state, at the time of manufacture, or within the state, at the time of injury.

A wide divergence of opinion exists regarding the wisdom as well as the constitutionality of extensive jurisdiction through the use of liberally drafted and construed "long-arm" statutes.⁴ Hesitance may

1. The following are among those states having "long-arm" statutes: Alabama, Arkansas, California, Connecticut, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

2. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). For an analysis of the evolution of the limitations on in personam jurisdiction over nonresidents, see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

3. *E.g.*, ILL. REV. STAT. ch. 110, § 17 (1959); N.Y. CIV. PRAC. LAW § 302; WASH. REV. CODE § 4.28.185 (1959).

4. See generally Cardozo, *The Reach of the Legislature and the Grasp of Jurisdiction*, 43 CORNELL L.Q. 210 (1957); Currie, *The Growth of the Long Arm—Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Kurland, *supra* note 2; Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Sobeloff, *Jurisdiction Over Non-Residents in Our Federal Jurisdiction*, 43 CORNELL L.Q. 196 (1957); Stimson, *Omnibus Statutes Designed To Secure Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J.

result from a fear of burdening a defendant with the inconvenience and expense of a foreign suit brought against him solely for the purpose of harassment. While this comment does not advocate the extent to which a court should assert the jurisdictional powers conferred on it by a given "long-arm" provision, it examines the scope of jurisdiction constitutionally permissible over nonresident manufacturers in product liability cases with a view toward formulating administrable standards that a court may utilize to reconcile the varieties of commercial activity with the now-frequently-frustrated legislative goal of providing injured plaintiffs with a convenient forum.

I. THE CONSTITUTIONAL TEST OF FAIRNESS

A. Supreme Court Pronouncements

In *International Shoe Co. v. Washington*,⁵ the state of Washington sued a nonresident defendant for unpaid contributions to the state unemployment compensation fund. The alleged basis of liability was the in-state activities of defendant's salesmen. Upholding jurisdiction in Washington, the Supreme Court stated that a nonresident is amenable to jurisdiction wherever he has established certain "minimum contacts" within a foreign state.⁶ The test did not call for a quantitative analysis of defendant's in-state activities to see if some numerical threshold had been exceeded. Rather, the nature and quality of the activities were to be balanced against the burden of requiring the nonresident to defend in a distant forum.⁷ If the judicial scales indicated that the former preponderated, maintenance of the suit would not offend "traditional notions of fair play and substantial justice."⁸

However, the flexible factor of judicial sensitivity for the defendant was all but eliminated, and the test acquired a more objective nature, in *McGee v. International Life Ins. Co.*⁹ The Court there sustained jurisdiction in a suit against a nonresident insurance company to collect life insurance proceeds where the company's only contact with the forum was the mailing of the policy to an in-state resident

725 (1962); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

5. 326 U.S. 310 (1945) (hereinafter cited as *International Shoe*).

6. *Id.* at 317.

7. "Those demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *Ibid.* (Emphasis added.)

8. *Id.* at 316.

9. 355 U.S. 220 (1957) (hereinafter cited as *McGee*).

and the acceptance of premiums by return mail. The decision did not necessarily depart from precedent because a single in-state act in an activity regulated by the forum had long been recognized as a sufficient basis for jurisdiction.¹⁰ However, while the Court referred to the "manifest interest" of the state in providing a forum, it was a restricted version of the minimum contacts thesis of *International Shoe*, rather than the rationale of cases dealing with regulated activities, that controlled the decision.¹¹ Thus, a fair interpretation of *McGee* is that jurisdiction over a nonresident is permissible whenever he voluntarily performs a single act within the forum, provided, of course, that the asserted cause of action is related to the single act upon which jurisdiction is predicated.

The Supreme Court, however, has issued a caveat to those who would utilize *McGee* to authorize nationwide service of process by state courts. In *Hanson v. Denckla*,¹² the residuary legatees of a will instituted proceedings in a Florida court to invalidate an inter vivos trust created by a Pennsylvania resident with a Delaware trust company, the settlor having subsequently moved to Florida. Under Florida law, the nonresident trustee was an indispensable party to the suit, his absence being a jurisdictional defect. Correspondence between the settlor and the trustee was the trustee's only connection with the forum. The Supreme Court ruled that a third party could not unilaterally impose the contacts requisite for jurisdiction upon a nonresident who did not himself "purposefully" institute a relationship with the foreign state.¹³

10. E.g., *Hess v. Pawloski*, 274 U.S. 352 (1927) (nonresident motorist subject to jurisdiction under nonresident motorist statute for injuries caused within the forum state). Under the McCarran Act, 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1958), the federal government recognizes the wide powers of a state over insurance activities within its borders. The forum state of California in *McGee* had exercised these regulatory powers. CAL. INS. CODE §§ 1610-20.

11. *McGee* cited with apparent approval two state court decisions which upheld jurisdiction over nonresidents who committed single tortious acts within the forum while conducting unregulated activity there: *S. Howes Co. v. W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954) (breach of warranty action with contact made by independent sales representative); *Smyth v. Twin State Improvement Co.*, 116 Vt. 569, 80 A.2d 664 (1951) (corporate agent committed tort in forum). See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 n.2 (1957).

12. 357 U.S. 235 (1958) (hereinafter cited as *Hanson*).

13. *Id.* at 253. The court explained that the defendant must act in a manner to invoke the "benefits and protection" of the laws of the forum state.

This statement, being a conclusion of law, has offered little aid in solving the problems that surround the test for "minimum contacts." After considering the impact of *Hanson* on jurisdictional inquiry, the court in *DeVeney v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963), concluded that the constitutional test had been unchanged: "Thus, the long arm of state courts is permitted to reach out-of-state defendants only in suits growing out of acts which have created contacts with the forum state, *however limited or transient such contracts may be.*" *Id.* at 127. (Emphasis added.) It has been similarly held that a nonresident manufacturer, who supplies a component part to another nonresident manufacturer, invokes the "benefits and protection" of the laws of the forum state to which the latter manufacturer ships

B. Jurisdictional Principles in Product Liability Actions

In all product liability cases, one contact with the forum always exists—the product itself. Thus, the question is presented whether this single factor is a sufficient foundation upon which to assert personal jurisdiction over the nonresident manufacturer in a suit arising from this contact. If the presence of the product resulted from direct shipment by the manufacturer, the existence of a jurisdictionally sufficient relationship is evident.¹⁴ However, the fortuities of product migration do not always permit an automatic association of product location with a deliberate act of the manufacturer within the forum state. The movement of the product may have been effected by the consumer or by independent middlemen. Or, it may have resulted from the distribution of a secondary manufacturer who purchased the defendant's product as a component for his goods, the component proving to be the defective item. Since the manufacturer over whom personal jurisdiction is sought may have had no control over the process by which his product reached the forum, the attribution to the nonresident of a purposefully instituted relationship becomes less meaningful. The language of *McGee* and *Hanson*, which speak of contacts emanating *directly* from the defendant, seems inapposite where such intimacy is lacking. Therefore, fairness to the nonresident, within the meaning of *International Shoe*, must be formulated with reference to broader considerations when the presence of the product stems from a more circuitous route than direct shipment.

It would seem consonant with fairness to subject the manufacturer to jurisdiction whenever his product gave rise to the cause of action within the forum state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located.¹⁵

the completely assembled product. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

14. Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

15. See *Feathers v. McLucas*, 152 N.Y.L.J. col. 1, p. 1 (App. Div., 3d Dept., Aug. 4, 1964) (Jurisdiction sustained over a nonresident manufacturer of fuel tanks for use on truck beds. The tank had been supplied to an out-of-state fuel truck manufacturer who sold the truck to another out-of-state fuel distributor. Plaintiff sustained injuries when the tank exploded in New York, a state with which the manufacturer had no other contacts.) But cf. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960) (jurisdiction in North Carolina unconstitutional where motorist's injury in North Carolina was caused by negligent repairs performed in South Carolina by defendant garage).

Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately determine his economic success. There can be no unfairness in forbidding the manufacturer to disassociate himself from his product. In sum, the manufacturer should be amenable to personal jurisdiction wherever the product causes injury,¹⁶ wherever he may consensually submit to jurisdiction,¹⁷ and wherever he may have purposefully established direct connections with the forum.¹⁸

C. *An Analysis of State Court Decisions*

A number of courts have sustained jurisdiction where a corporate agent's in-state activities were related to the cause of action.¹⁹ Although it is difficult to project what these courts would have held had the agent not visited the forum, an increasing number of states are exercising jurisdiction although the defendant's only activity was

16. *Feathers v. McLucas*, *supra* note 15.

17. *Cf. National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

18. *Chovan v. E. I. DuPont de Nemours & Co.*, 217 F. Supp. 808 (E.D. Mich. 1963) (direct shipment of \$130,000 worth of dynamite safety fuses into forum over a two-year period sufficient for jurisdiction when fuse exploded, injuring plaintiff within forum); *Sheridan v. Cadet Chem. Corp.*, 25 Conn. Supp. 17, 195 A.2d 766 (1963) (direct shipment of negligently packed chemicals); *Singer v. Walker*, 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1964) (direct shipment of geologist's hammer to the forum state sufficient for jurisdiction over action for an out-of-state injury); *cf. Shealy v. Challenger Mfg. Co.*, 304 F.2d 102 (4th Cir. 1962) (employee's deliveries to forum sufficient); *Aldridge v. Marco Chem. Co.*, 234 Ark. 1080, 356 S.W.2d 615 (1962) (employee's delivery to forum sufficient); *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963) (dictum). Compare *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See *Currie*, *supra* note 4; *Reese & Galston*, *supra* note 4.

19. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *DeVeny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963) (salesmen in addition to a substantial volume of sales); *Moore-McCormack Lines, Inc. v. Bunge Corp.*, 307 F.2d 910 (4th Cir. 1962) (independent agent in addition to a continuous traffic of goods); *Shealy v. Challenger Mfg. Co.*, *supra* note 18 (employees' deliveries); *Berk v. Gordon Johnson Co.*, 212 F. Supp. 365 (E.D. Mich. 1962) (salesmen and direct shipment of product with employees installing defective equipment in forum state); *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962) (presence of corporate agent); *Connecticut Tool & Mfg. Co. v. Bowsteel Distrib., Inc.*, 24 Conn. Supp. 290, 190 A.2d 236 (1963) (salesmen in addition to substantial sales volume); *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959) (salesmen in addition to large sales volume); *Nelson v. Miller*, 11 Ill. App. 2d 378, 143 N.E.2d 673 (1957) (employee committed tort in forum); *S. Howes Co. v. W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954) (presence of independent sales representative); *Smyth v. Twin State Improvement Co.*, 116 Vt. 569, 80 A.2d 664 (1951) (employee committed tort in forum state); *Nixon v. Cohn*, 62 Wash. 2d 987, 385 P.2d 305 (1963) (in addition to other factors, defendant's president visited the purchaser of the product); *Huck v. Chicago St. P., M. & O. Ry.*, 4 Wis. 2d 132, 90 N.W.2d 154 (1958) (sales office in forum state). *Cf. Hearne v. Dow-Badische Chemical Co.*, 224 F.Supp. 90 (S.D. Tex. 1963) (salesmen's activities unrelated to the cause of action); *Mays v. Oxford Paper Co.*, 195 F. Supp. 414 (E.D. Pa. 1961) (salesmen's activities unrelated to the cause of action); *Singer v. Walker*, 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1964) (salesmen's activities unrelated to cause of action, but in-state retailer solicited by catalog). *But see Mueller v. Steelcase Inc.*, 172 F. Supp. 416 (D. Minn. 1959) (salesmen in forum state).

shipping the product to the forum where the plaintiff was injured.²⁰ The rationale previously suggested for jurisdiction in product liability actions agrees with these latter cases as to the low threshold of required contact, but departs from those cases requiring that the defendant should have been able to foresee contact with the particular forum state.²¹

In *Gray v. American Radiator & Standard Sanitary Corp.*,²² jurisdiction was sustained in a suit to recover damages for injuries received in Illinois when a defective valve caused a hot water heater to explode. The defendant had manufactured the defective valve in Pennsylvania and supplied it to an Ohio corporation, which incorporated the valve into the water heater and shipped it for sale into Illinois. Jurisdiction was sustained because the product had created a jurisdictional contact out of which the cause of action arose. While the court felt that the defendant should have been able to foresee the product's eventual distribution in Illinois,²³ this factor should not be considered important because the shipment by the assembling manufacturer was only a continuation of the flow of the defendant's economic endeavors. An intermediate manufacturer is integral to and only a furtherance of the original manufacturer's enterprise and marketing activities; therefore, the original manufacturer should be deemed to have a contact with the forum state sufficient to sustain jurisdiction over it.

It is more difficult to sustain jurisdiction in a state where the injury, but not the product's distribution, has occurred. However,

20. *Hutchinson v. Boyd & Sons Press Sales, Inc.*, 188 F. Supp. 876 (D. Minn. 1960); *Sheridan v. Cadet Chem. Corp.*, 25 Conn. Supp. 17, 195 A.2d 766 (1963); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Ehlers v. United States Heating & Cooling Mfg. Co.*, 267 Minn. 56, 124 N.W.2d 824 (1963); *Atkins v. Jones Laughlin Steel Corp.*, 258 Minn. 571, 104 N.W.2d 888 (1960). Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Williams v. Connolly*, 227 F. Supp. 539 (D. Minn. 1964) (dictum); *Chovan v. E. I. DuPont de Nemours Co.*, 217 F. Supp. 808 (E.D. Mich. 1963) (direct shipment of \$130,000 worth of dynamite safety fuses into forum over a two-year period sufficient for jurisdiction when a fuse injured plaintiff within forum); *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963) (dictum).

21. E.g., *O'Brien v. Comstock Foods, Inc.*, *supra* note 20. Jurisdiction was refused over a nonresident food processor in a suit for injuries caused by the sale of its product in the forum where the only allegation of contact was that the defendant placed its product "into the stream of commerce" in Newark, New York. The court refused to infer foreseeability of use in the forum state as was done in *Gray v. American Radiator & Standard Sanitary Corp.*, *supra* note 20. This reluctance may have been due to the pronounced difference in size of the two companies or to a difference in state policies with respect to jurisdiction over nonresidents. In any event, the proposed test rejects the foreseeability distinction as far as due process limitations are concerned. The plaintiff need only allege either distribution or injury in the forum. Undoubtedly, the language in *Hanson* troubled the court since a "purposeful" connection between the forum and the defendant is difficult to find in the context of such indirect distribution.

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

23. *Id.* at 442, 176 N.E.2d at 764.

the manufacturer's economic purposes are still being effectuated wherever his products are being consumed. The manufacturer has taken the initiative in marketing his product for public consumption and jurisdiction should be sustained wherever this enterprise causes injury. It is not unfair to subject a manufacturer to suit where his product causes injury when it is being used for the purpose for which it was designed.²⁴

In accord with this theory is *Feathers v. McLucas*,²⁵ in which a New York appellate court overruled a lower court's refusal of jurisdiction. The defendant was a nonresident manufacturer of fuel tanks for installation on truck beds, and his only contact with the forum was the existence of the product which caused the injury. He had supplied the defective tank to another out-of-state manufacturer who assembled the truck and sold it to a Pennsylvania fuel distributor operating in interstate commerce. The plaintiff sustained injuries when the tank exploded on a New York highway. The court held that the defendant was amenable to suit in New York even though his marketing activities had terminated in another state.

The state where the injury has occurred is not, however, the only state which may exercise jurisdiction over a product liability action. In *Singer v. Walker*,²⁶ the plaintiff was injured in Connecti-

24. In the application of this theory it is not necessary to determine whether the product is particularly dangerous as was done in *Pendzimas v. Eastern Metal Prods. Corp.*, 218 F. Supp. 524 (D. Minn. 1961) (electric "deep fry" insufficiently dangerous to warrant jurisdiction). This issue goes to the question of whether the plaintiff may have a cause of action in implied warranty, not whether the court may entertain the litigation.

The argument that a foreign suit is a burden on interstate commerce, a doctrine whose current vitality is questionable, seems to have been limited to cases where the defendant is a foreign common carrier operating in interstate commerce. Compare *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312 (1923) (jurisdictional statute violated commerce clause of the Constitution), with *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941) (limiting *Davis* to its facts) and *Standard Oil Co. v. Superior Ct.*, 44 Del. 538, 62 A.2d 454 (1948), *appeal dismissed for want of a substantial federal question*, 336 U.S. 930 (1949). See generally McGowan, *Litigation as a Burden on Interstate Commerce*, 33 ILL. L. REV. 875 (1939); Comment, *Jurisdiction Over Non-Resident Carriers as Limited by Doctrine of Unreasonable Burden on Interstate Commerce*, 34 MICH. L. REV. 979 (1936).

25. 152 N.Y.L.J. col. 1, p. 1 (App. Div., 3d Dep't, Aug. 4, 1964), *But see* *Arundel Crane Service v. Thew Shovel Co.*, 214 Md. 387, 135 A.2d 428 (1957); *Moss v. City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961).

26. 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1964) (hereinafter cited as *Singer*); cf. *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962) (foreign airplane crash; the basis for jurisdiction was a contract to be partly performed within the forum with an additional contact by a corporate agent). Compare *McAvoy v. Texas E. Transmission Corp.*, 185 F. Supp. 784 (W.D. Ark. 1960), where the court declined jurisdiction but indicated it would have reached a different result if the defendant had sufficient contacts with the forum, regardless of the situs of injury.

If the cause of action arises in a foreign state that is *unrelated* to the defendant's activities within the forum, it is generally accepted that jurisdiction may be exercised within the forum only if the defendant has engaged in relatively continuous

cut by a geologist's hammer which had been purchased by his aunt in New York.²⁷ The defendant had manufactured the hammer in Illinois and shipped it directly to a New York retailer. Since the plaintiff was a New York resident, he sought jurisdiction there. The court sustained jurisdiction on the theory that the sale in New York created a relationship between the parties without which the injury would not have occurred. The *Singer* holding was, of course, correct even under the more traditional theories requiring a purposeful and foreseeable contact with the forum. The hammer had been shipped directly to New York and the incidence of out-of-state injury did not affect the defendant's expectations of contact. The same result should be reached even if the product were shipped to New York by intermediaries with no subjective expectations of contact there on the part of the defendant. The sale of products to a consumer is a contact that is purposefully sought by manufacturers; if the cause of action arises from such activity, the manufacturer should be subject to suit wherever this endeavor is consummated.

II. THE "LONG-ARM" STATUTES

Statutory authority must exist before a state can exercise jurisdiction over a nonresident defendant. The "long-arm" statutes, through which jurisdiction is accomplished, follow no definite pattern except for some usual interstate borrowing. A number of states have statutes that specifically extend jurisdiction to non-residents whose out-of-state acts create consequences within the forum.²⁸ These statutes are especially suited to product liability

and important activities there. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (main office of a Philippine corporation in Ohio during World War II). Compare *Owen v. Illinois Baking Corp.*, 235 F. Supp. 257 (W.D. Mich. 1964) (presence of salesmen in addition to a systematic business in the forum state held to be sufficient activity for jurisdiction over a cause of action accruing outside that state and unrelated to defendant's in-state activity), with *Bryant v. Finnish Nat'l Airline*, 33 U.S.L. WEEK 2240 (N.Y. App. Div., Nov. 22, 1964) (in-state ticket reservation office which did not accept, but forwarded, reservations was insufficient activity to sustain jurisdiction over suit for damages arising from a European airplane crash).

27. It is generally unnecessary that the plaintiff also be the purchaser of the product because of the trend to abolish the requirement of privity in product liability actions. See Jaeger, *Product Liability—The Constructive Warranty*, 39 NOTRE DAME LAW. 501, 504-05 (1964).

Singer also indicates that where direct shipment is involved, it is irrelevant for jurisdictional purposes where title may have passed. 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1964).

28. E.g., CONN. GEN. STAT. REV. § 34-411(c) (1959); FLA. STAT. §§ 47.16 (Supp. 1964); MICH. COMP. LAWS § 600.715 (1962); N.C. GEN. STAT. § 55-145(a)(3) (1960); WIS. STAT. § 262.05(4) (1963). The benefits of some statutes, however, are limited to resident plaintiffs. See MINN. STAT. § 303.13, subd. 1(3) (Supp. 1964). The constitutionality of such "door-closing" may be questioned. Cf. *Hughes v. Fetter*, 341 U.S. 609 (1951) (semble); *Canadian No. Ry. v. Eggen*, 252 U.S. 553 (1920).

cases where the injury occurs within the forum state. The remaining statutes vary from those using the old "doing business" terminology²⁹ to those predicating jurisdiction on the commission of an "act" within the state,³⁰ some statutes qualifying the nature of this act by requiring it to be "tortious"³¹ or "part" of a tort.³²

These statutes should be liberally construed to achieve their intended objective. Assuming the various state legislatures intended to confer the maximum jurisdictional powers on their courts that will comport with due process limitations, a suggested approach to interpretation of the statutes is to direct attention to the three causal elements which are essential to the manufacturer's liability: the defective manufacture, the distribution of the product to the purchaser, and the resulting injury. For example, viewed in this manner, it seems apparent that the shipment of a product to the forum is an *act* committed by the defendant. If there is an intermediate distributor who is also a nonresident, his activity is but a continuation of the defendant's act of shipment. Using similar reasoning, the negligent manufacture and the resultant injury are also acts which, if occurring in the forum state, would sustain jurisdiction. All three elements, *i.e.*, manufacture, distribution, and injury, are *parts* of the tort, for they represent phases of the continuum of events leading to the cause of action. While a court's interpretation of a statute should reflect legislative policy toward subjecting a nonresident to suit, unnecessarily restrictive results have occurred all too often that could have been avoided by this approach.

A. *The Battle of Semantics*

The following examples should reflect the semantic difficulties the courts have had as they have tried to cope with the language of various long-arm statutes. These difficulties have led to confusion in this area of the law and frequent frustration of legislative intent.

The California Code of Civil Procedure prescribes jurisdiction over any nonresident corporation that is "doing business in this

29. *E.g.*, CAL. CIV. PROC. CODE § 411(2); ILL. REV. STAT. ch. 110, § 17(1)(a) (1959); KY. REV. STAT. § 271.610(2) (1962); MICH. COMP. LAWS § 660-711 (1962); N.M. STAT. ANN. § 21-3-6(b) (1953); OKLA. STAT. tit. 18, § 471 (1961); WIS. STAT. § 262.05 (1)(d) (1963). See also MASS. LAWS ANN. ch. 181, § 3A (Supp. 1964) (cause of action "arising out of business in this state"); N.H. REV. STAT. ANN. ch. 300, § 11 (1955) ("transacting business" in state).

30. See PA. BUS. CORP. LAW § 1011B (1951), which also requires that the defendant have done business in the state.

31. *E.g.*, ILL. REV. STAT. ch. 110, § 17 (1959); N.Y. CIV. PRAC. LAW § 302; WASH. REV. CODE § 4.28.185 (1959). See also CONN. GEN. STAT. REV. § 33-411(c) (1959) ("tortious conduct" in forum state); N.C. GEN. STAT. § 55-145(a)(4) (1955) ("tortious conduct" in forum state).

32. *E.g.*, MINN. STAT. § 303.13, subd. 1(3) (Supp. 1964); TEX. CIV. STAT. art. 2031(b), § 4 (1959); VT. STAT. ANN. tit. 12, § 855 (1959); W. VA. CODE ANN. § 3083 (1961).

state."³³ The "doing business" theory formerly required that the corporation transact a *substantial* amount of business within the state—enough so that it could possibly be sued on a cause of action entirely divorced from its activities there.³⁴ But with a progressive attitude, the California courts have held that the statute grants them authority to exercise jurisdiction whenever such action is consistent with contemporary notions of due process.³⁵ They have thereby been able to assume jurisdiction when the plaintiff sustained injury within the state and the defendant's activity, other than the presence of his product, amounted to no more than advertising in a medical journal³⁶ or solicitation through an "independent" sales representative.³⁷

The Pennsylvania "long-arm" statute similarly requires that the defendant be "doing business" in the state. It, however, affords additional protection to the defendant by providing:

"Any foreign corporation which shall have done business in this Commonwealth . . . shall be conclusively presumed to have designated the Secretary of the Commonwealth as its true and lawful attorney authorized to accept, on its behalf, service of process in any *action arising out of acts or omissions of such corporation within this Commonwealth.*"³⁸

A federal court first interpreted this section in the context of a product liability action in *Florio v. Powder Power Tool Corp.*³⁹ The court assumed jurisdiction, concluding that the resultant injury within the forum was an "act" flowing from the defendant's negligent manufacture in a foreign state. The Pennsylvania Supreme Court later disapproved this construction in *Rufo v. Bastian-Blessing Co.*,⁴⁰ saying that the only act in a product liability action is

33. CAL. CIV. PROC. CODE § 411(2). "Doing business" or "transacting business" statutes are particularly useful in gaining jurisdiction over a cause of action arising in a foreign state that is unrelated to the defendant's activities within the forum. See *Owen v. Illinois Baking Corp.*, 235 F. Supp. 257 (W.D. Mich. 1964). See also WIS. STAT. § 262.05(1)(d) (Supp. 1965).

34. See Kurland, *supra* note 2.

35. E.g., *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502 (1961). See Note, 10 HASTINGS L.J. 206 (1958). Similar treatment has been accorded the New Hampshire "doing business" statute. See *W. H. Elliot & Sons Co. v. Nuodex Prods. Co.*, 243 F.2d 116 (1st Cir. 1957).

36. *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 325 P.2d 21 (1958). See also *Florence Nightingale School of Nursing, Inc. v. Superior Court*, 168 Cal. App. 2d 74, 335 P.2d 240 (1959) (mail solicitation and correspondence courses).

37. *Cosper v. Smith & Wesson Arms Co.*, 53 Cal. 2d 77, 346 P.2d 409 (1959), *cert. denied*, 362 U.S. 927 (1960).

38. PA. BUS. CORP. LAW § 1011B (1951). (Emphasis added.)

39. 248 F.2d 367 (3d Cir. 1957). *Accord*, *Mays v. Oxford Paper Co.*, 195 F. Supp. 414 (E.D. Pa. 1961).

40. 405 Pa. 12, 173 A.2d 123 (1961). It should be pointed out that the court expressly recognized that the legislature had not chosen to exercise "the full extent of jurisdiction" that it might constitutionally have done. *Id.* at 21.

that of negligent manufacture, which admittedly had not occurred "within this Commonwealth." Since the product had been shipped to the forum by the initial consumer as a second-hand article and the defendant's distributive activity had terminated six years before in another state, the court was correct in holding that the defendant had committed no act in Pennsylvania. But by disapproving *Florio* and indicating that even the direct shipment of a product to the forum is not an "act," Pennsylvania, under its present statute, has discarded any possibility of providing a forum for its citizens who are injured by a product manufactured in a foreign state.

The Illinois statute omits the requirement of "doing business." It, however, compounds the interpretative problems associated with the words "act within this state" by requiring that the cause of action arise from "the commission of a *tortious* act within this state."⁴¹ In *Hellriegel v. Sears Roebuck & Co.*,⁴² the plaintiff sued for injuries received from a power lawn mower negligently manufactured in a foreign state. The federal district court held that in product liability cases the only tortious act is the negligent manufacture. Therefore, the mere fact of injury within the forum would not permit jurisdiction under the statute. However, the Illinois Supreme Court subsequently disapproved *Hellriegel*, citing the *Restatement of the Law of Conflict of Laws*⁴³ for the proposition that the place of wrong is where the last event necessary for liability occurs.⁴⁴ Under this analysis, the injury rather than the negligence completes the cause of action in tort and it alone satisfies the statutory necessity of a "tortious act."⁴⁵

The West Virginia Code is similar to the Illinois "tortious act" statute in that it provides for jurisdiction as follows:

"A foreign corporation not authorized to do business in this state . . . shall nonetheless be deemed to be doing business herein if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State, or if it *commits a tort in whole or in part in this State.*"⁴⁶

It would initially seem that jurisdictional issues could be solved

41. ILL. REV. STAT. ch. 110, § 17 (1959) (Emphasis added.) See also N.Y. CIV. PRAC. LAW § 302; WASH. REV. CODE § 4.28.185 (1959).

42. 157 F. Supp. 718 (N.D. Ill. 1957). Cf. *Dimeo v. Minster Mach. Co.*, 225 F. Supp. 569 (D. Conn. 1963) ("tortious conduct" committed only at place of negligent manufacture).

43. RESTATEMENT, CONFLICT OF LAWS § 377 (1934). See also GOODRICH, CONFLICT OF LAWS § 92 (3d ed. 1949).

44. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

45. Cf. *Feathers v. McLucas*, 152 N.Y.L.J. col. 1, p. 1 (N.Y. App. Div., Aug. 4, 1964); *Nixon v. Cohn*, 62 Wash. 2d 987, 385 P.2d 305 (1963).

46. W. VA. CODE ANN. § 3083 (1961). (Emphasis added.) See also MINN. STAT. § 303.13, subd. 1(3) (Supp. 1964); TEX. CIV. STAT. art. 2031(b), § 4 (1959); VT. STAT. ANN. tit. 12, § 855 (1958).

more readily under this provision than under the Illinois statute because there is no express requirement of an "act," and the specified event need be only "part" of a tort, thereby omitting the troublesome requirement that it be expressly "tortious." This provision of the West Virginia Code has been interpreted, however, to be applicable only when the corporation or its agent is present in the state at the time of the commission of an alleged tort.⁴⁷ A West Virginia plaintiff, therefore, may never obtain jurisdiction in a product liability case where the negligence occurred outside the forum unless the product is personally delivered to the state by an agent of the corporation who remains there until the injury occurs or unless the corporation makes a contract to be performed, in part at least, in the state.

In *Mueller v. Steelcase, Inc.*,⁴⁸ a Minnesota federal court reached the same result as West Virginia with an identical statute.⁴⁹ The court, however, interpreted the statute with an eye more colored by constitutional considerations than by statutory language because it said: "If jurisdiction were sustained . . . the door would be open to practically unlimited jurisdiction over foreign corporations and the concept of the required contacts and connections . . . would be whittled away."⁵⁰ The *Mueller* interpretation was disapproved by the Minnesota Supreme Court in *Atkins v. Jones & Laughlin Steel Corp.*⁵¹ The *Atkins* court approached the problem by considering the various parts of a tort and concluded that because injury is an indispensable element to recovery in tort, it is a "part" of a tort. Since the injury had occurred within the forum, the court sustained jurisdiction.

This wide divergence in statutory construction has made it extremely difficult for a state legislature to enact a "long-arm" statute which it can be reasonably certain will be construed in accordance with a legislative intent to confer maximum jurisdictional capabilities. An examination of the recently enacted Michigan statute discloses the decisions with which the legislature had to contend, and the qualifying language necessary to prevent a misconstruction:

"The existence of any of the following *relationships* between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against

47. *Mann v. Equitable Gas Co.*, 209 F.Supp. 571 (D. W.Va. 1962).

48. 172 F. Supp. 416 (D. Minn. 1959) (hereinafter cited as *Mueller*).

49. MINN. STAT. § 303.13, subd. 1(3) (Supp. 1964).

50. *Mueller v. Steelcase, Inc.*, 172 F. Supp. 416, 419-20 (D. Minn. 1959).

51. 258 Minn. 571, 104 N.W.2d 888 (1960).

such corporation arising out of the act or acts which create any of the following relationships: . . .

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."⁵²

A reasonable interpretation of this statute would appear to allow a Michigan court to entertain every conceivable product liability action having some relationship to the forum. Matters of constitutional authority would, therefore, be the limiting factor to exercising jurisdiction. However, it would still be possible, even with this statute, for a court to refuse jurisdiction for lack of statutory authority where the plaintiff sustains injuries outside the state. No "consequences" would have occurred within the forum and, under the Pennsylvania interpretation, no "act" would have occurred within the state, even if the product had been shipped directly to the forum.

B. *The Evils of Improper Characterization in Statutory Construction*

It is elementary that the meaning of a word will vary with the context in which it is used.⁵³ It is apparent, therefore, that the purpose for which a given classification is made influences the content to be given the language used to express that purpose. Nevertheless, many courts have a tendency to assume that a word used in a number of different contexts will have the same meaning in all of them.⁵⁴ This has been particularly true in the application of "long-arm" statutes to product liability cases because the contacts with which the court must deal do not normally fit into traditional jurisdictional categories such as actual presence of the defendant within the state. The only contact may be the inanimate product itself, brought into the state not by the nonresident manufacturer but by independent transportation agencies. As a result of this novelty, the question of whether the contact amounts to a jurisdictionally-sufficient event has often been decided not in terms of the statutory objectives but by the significance that the event has in other legal concepts. Frequently, the reference has been made to

52. MICH. COMP. LAWS § 600.715 (1962). (Emphasis added.)

53. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Mr. Justice Holmes, in *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

54. This is strikingly illustrated in *Reinhardt v. Newport Flying Serv.*, 232 N.Y. 115, 133 N.E. 371 (1921), where the court had to determine whether a hydroaeroplane while floating on navigable waters was a "vessel." Professor Walter W. Cook has aptly criticized the tendency to solidify the meaning of words as having "all the tenacity of original sin [which] must constantly be guarded against." Cook, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (1942).

choice of law problems because of the significance a particular event has in choosing the applicable law.⁵⁵

Under traditional choice of law theory the law governing a tort with multi-state implications was that of the state where the injury occurred.⁵⁶ The injury is viewed as significant because it constitutes the last act necessary to establish liability.⁵⁷ Thus, if the injury occurred within the forum, the court could utilize the choice of law criteria in the jurisdictional inquiry. While a correct decision might be reached—under the tests posited herein—it could foster the notion that the choice of law event was the *only* significant event for jurisdictional purposes. Carried to its logical extreme, the proposition would be that a state had power to assert jurisdiction over non-residents only when it had power to apply its own laws, a manifestly fallacious conclusion.⁵⁸

The statutory language that has particularly troubled the courts and led to the analogy with choice of law rules is "tort in whole or in part" and "tortious act." The legislatures undoubtedly used these words to describe the general sweep of conduct they wanted to have adjudicated in the forum, separate provisions usually existing for actions in contract.⁵⁹ But the legislatures had the further ob-

55. See, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 435, 176 N.E.2d 761, 762-63 (1961). *Gray* also referred to the operation of the Illinois statute of limitations as indicating that the defendant had caused some legally significant event to occur within the forum at the time of injury because it was sufficient to start the statute of limitations running. *Ibid.* In some states, reliance on these statutes to resolve jurisdictional issues could lead to curious results. In product liability cases, the plaintiff's action will often lie in both negligence and breach of warranty. The relevant statutes of limitations for these actions may, however, be triggered by different events: the sale activating the statute for warranty, and the injury activating the statute for negligence. If a court were to look to these statutes for an answer to the question whether the defendant has conducted sufficient activity in the forum upon which to base jurisdiction, a specious result would be reached if the sale of the product had occurred within the state, but the injury had occurred elsewhere. The defendant would have acted sufficiently to be subject to an action for warranty but not for an action based upon negligence. Although this hypothetical has not as yet been the subject of litigation, the possible disparity indicates the futility in referring to other bodies of law to resolve unrelated issues. For a discussion of statutes of limitations vis-à-vis actions in negligence and warranty, see Freedman, *Statutes of Limitations in Products Liability Actions*, 497 Ins. L.J. 328 (1964).

56. RESTATEMENT, CONFLICT OF LAWS § 378 (1934). The Restaters have since become dissatisfied with this rule and now propose the "interest analysis" approach, which applies the law of the state which has the most significant relationship to the parties and the events leading to liability. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

57. RESTATEMENT, CONFLICT OF LAWS § 377 (1934).

58. Compare *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), with *Hanson v. Denckla*, 357 U.S. 235 (1958). Additionally, choice-of-law rules can consider the relationships with the forum of the plaintiff and third parties such as medical creditors, *Griffith v. United Airlines, Inc.*, 33 U.S.L. WEEK 2218 (Pa. Oct. 14, 1964), while the jurisdictional inquiry ought to focus exclusively on the defendant.

59. See, e.g., MINN. STAT. § 303.13, subd. 1(3) (Supp. 1964); W.VA. CODE ANN. § 3083 (1961).

jective of acquiring jurisdiction over nonresident defendants who had committed single acts within the state, as opposed to the traditional, and now discarded, requirement that the defendant must have been "doing business" within the state. Since *International Shoe* specified that isolated acts which are unrelated to the cause of action could not serve as a basis for jurisdiction,⁶⁰ the legislatures were compelled to ensure that the activity to which the courts directed their attention to establish jurisdiction would be associated with the cause of action for which relief was sought. In prescribing jurisdiction over actions in tort, they therefore described the significant isolated acts as those which were "tortious" or "part" of a tort.

The error committed by some courts was in attempting to give substantive content to this language instead of treating it as intended—a *description* of a contact upon which jurisdiction was to be predicated. The error could have been avoided by looking at the primary source of jurisdictional law, the *International Shoe* opinion, which did not command that the contact itself be capable of sustaining liability. It had only to be *related* to the events leading to liability. But imbued with the desire to attribute substantive significance to the contact under the law of torts, many courts set out to discover if any wrongful activity had occurred within the forum. As a result, some said that the negligent act of incorporating the defect into the product was the only wrongful element of a tort, refusing to exercise jurisdiction if that event had not occurred within the forum.⁶¹ Others realized that this was the precise situation in which the legislature had wanted the courts to exercise jurisdiction. They supported their decision by looking to choice of law rules that focussed exclusively on the incidence of injury and found that the injury, not the negligence, was the only wrongful element of a tort.⁶² Finally, some courts recognized the error of drawing an analogy with choice of law rules. But in rejecting this analogy they committed the additional error of discarding the incidence of injury as a jurisdictionally-sufficient event under the statute.⁶³ While they eliminated the choice of law approach, they retained the idea that the statute requires the contact to have significance under the law of torts. The weakness of this approach was recently illustrated by a court faced with an attempt to acquire jurisdiction over a nonresident where neither

60. *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

61. See, e.g., *Mueller v. Steelcase, Inc.*, 172 F. Supp. 416 (D. Minn. 1959); *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957). Cf. *Dimeo v. Minster Mach. Co.*, 225 F. Supp. 569 (D. Conn. 1963).

62. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

63. See *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (D. W.Va. 1962).

the negligence nor the injury had occurred within the forum.⁶⁴ The offending object had been distributed within the forum, however, and the court recognized that this was a jurisdictionally-sufficient event. But the court still felt compelled to attribute some wrongful quality to this act and therefore concluded that the circulation of the product, a defective geologist's hammer, was analogous to the creation of an enjoined *nuisance* within the forum.⁶⁵ The fallacy of this approach rests in its circuitry. In order to assert jurisdiction, the court felt compelled to find something representing wrongful conduct committed in the forum, while the whole purpose of asserting jurisdiction was to determine whether any tortious conduct had in fact taken place. Moreover, that the legislatures did not intend to restrict the application of the statute only to substantively determinative incidents committed by the defendant is buttressed by the language itself, which speaks of parts of a tort or tortious acts. In the light of these considerations, it is suggested that any facet of the events leading to the defendant's liability—be it the negligent manufacture, the distribution of the product, or the resulting injury—is a proper basis upon which to assert jurisdiction under these single-act statutes.

III. CONCLUSION

The shadowy boundaries of due process limitations on the assertion of jurisdiction over nonresidents and the interpretative difficulties the courts have encountered with respect to the language of the "long-arm" provisions have often caused courts to dismiss actions that constitutionally could have been entertained. Occasionally these decisions are explainable by the legislature's reluctance for policy reasons to confer maximum jurisdictional reach on their courts.⁶⁶ For example, a state with a great number of manufacturing concerns may limit the reach of its own statute in the hope that other states will reciprocate, thereby protecting local industries to some extent from defending suits in distant states. Section 1.03(a)(4) of the *Uniform Interstate and International Procedure Act*⁶⁷ reflects such policy considerations by prohibiting jurisdiction in cases where acts or omissions outside the state cause injury within the state unless the nonresident "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state."

If a state should desire, however, to exercise the full scope of constitutional possibilities in bringing nonresident manufacturers

64. *Singer v. Walker*, 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1964).

65. 250 N.Y.S.2d at 221.

66. See *Rufo v. Bastian-Blessing Co.*, 405 Pa. 12, 173 A.2d 123 (1961).

67. 9B U.L.A. p. 78 (Supp. 1964).

before their courts in product liability cases, it is suggested that the legislature delete the above-quoted language from section 1.03(a)(4) of the uniform act and, in addition, amend section 1.03(a) after subdivision (6) by adding a new paragraph to read as follows: "For purposes of this section, a person shall be deemed to have been transacting business in this state whenever his product is distributed in this state."

Should a state legislature fear that such expanded jurisdictional powers would offer opportunities for unwarranted harassment of nonresident defendants, it could further amend the statute to require, on motion by the defendant, that the plaintiff post bond to cover the defendant's expenses of suit in the event the court later discovers that the complaint was frivolous.⁶⁸

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68. The Wisconsin legislature has provided that on motion by the defendant, the plaintiff shall post bond to reimburse the defendant for his litigation expenses if the action is dismissed for lack of jurisdiction. The amount recoverable is limited to \$500. WIS. STAT. § 262.20(1) (1963). The Michigan legislature has provided a similar procedure by which the defendant may be reimbursed for his litigation expenses, excluding attorney's fees. However, the statute goes even further than the Wisconsin provision by permitting recovery whenever the plaintiff loses on the merits. MICH. COMP. LAWS § 600.741 (1962).