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Specific Jurisdiction: Can the Fourth Circuit Approach Survive Woodson?

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NOTES

SPECIFIC JURISDICTION: CAN THE FOURTH CIRCUIT APPROACH SURVIVE *WOODSON*?

In 1945, the United States Supreme Court sought to cure a significant jurisdictional problem that had developed from the increase in interstate travel and the burgeoning of interstate corporations. State courts frequently were called upon to assert jurisdiction over nonresident defendants. While the *Pennoyer* doctrine[1] allowed a state to assert jurisdiction over persons actually present in the state, courts otherwise had little control over absent parties whose activities nonetheless affected the state.[2] In *International Shoe Co. v. Washington*,[3] the United States Supreme Court attempted to remedy this problem by recognizing that, under certain circumstances, asserting jurisdiction over an absent corporate defendant "does not offend 'traditional notions of fair play and substantial justice.' "[4]

Although lower courts, legal scholars, and the Supreme Court itself have subjected *International Shoe* to considerable scrutiny, the Fourth Circuit Court of Appeals has advanced some interesting approaches not adopted by the United States

1. The Supreme Court, in Pennoyer v. Neff, 95 U.S. 714 (1877), held that a state had no power to confer jurisdiction over a defendant, absent his presence in the state.

2. The Supreme Court had advanced two other theories on which to base jurisdiction over absent parties. First, a state had the authority to confer jurisdiction over its domiciliary even though he was not actually present in the forum at the time of service of process. *See* Milliken v. Meyer, 311 U.S. 457 (1940). Second, a state could assert jurisdiction over a defendant who consented. *See* Adams v. Saenger, 303 U.S. 59 (1938)(defendant consented to jurisdiction by initiating a suit in the forum even though he subsequently defaulted); Hess v. Pawloski, 274 U.S. 352 (1927)(consent to jurisdiction over a nonresident driver was implied, based on the state's police power to regulate the use of its highways); Kane v. New Jersey, 242 U.S. 160 (1916)(a nonresident motorist consented by filing an instrument required by the state appointing the Secretary of State to receive service of process). Presence, domicile, and consent were inadequate, however, to meet the changing times. See text accompanying notes 8-13 *infra*.

3. 326 U.S. 310 (1945).

4. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

Supreme Court. This Note will analyze the Fourth Circuit's resolution of jurisdictional questions in light of the standard established by *International Shoe* and will contrast the court of appeals' reasoning with a line of United States Supreme Court decisions,[5] particularly *World-Wide Volkswagen Corp. v. Woodson.*[6]

I. THE BEGINNINGS OF SPECIFIC JURISDICTION

International Shoe Co. v. Washington "was a child of its times."[7] Suits prior to this decision primarily concerned individuals; corporations then were small and locally owned.[8] It became apparent, however, that traditional bases of jurisdiction were inadequate to assert jurisdiction over foreign corporations.[9] Concepts such as physical presence and domicile were not applicable to corporations, and fictional approaches based on consent or implied consent,[10] presence,[11] and "doing business"[12] were not

5. *See* Rush v. Savchuk, 444 U.S. 320 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

6. 444 U.S. 286 (1980).

7. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem or In Personam Principles,* 1978 DUKE L.J. 1147, 1183.

8. *Id.* at 1182-83.

9. See notes 1 & 2 and accompanying text *supra.*

10. Some states enacted statutes giving the state personal jurisdiction over a corporation as a condition to its doing business within the state. Kalo, *supra* note 7, at 1166-76; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla: *A Review,* 25 U. CHI. L. REV. 569, 578-79 (1958). Some corporations, pursuant to statute, appointed agents to receive service of process; however, even absent such an appointment, the corporation might have "consented" to jurisdiction by transacting business in the state. *See* Kalo, *supra* note 7, at 1166-76; Kurland, *supra,* at 578-82.

11. As corporations began to do business outside of their state of incorporation, the consent doctrine became an inadequate basis of jurisdiction, particularly absent a statute requiring appointment of an agent. The presence doctrine came to be used when other bases for jurisdiction, such as consent, were not appropriate. Kalo, *supra* note 7, at 1176-80; Kurland, *supra* note 10, at 582-84.

12. The "doing business" theory was actually an extension of the consent and presence doctrines. The "doing business" approach attempted to measure the scope of a corporation's activities in the state; if the activities were found to be substantial, the court took jurisdiction based on "implied consent" or "presence." Kalo, *supra* note 7, at 1182.

Yet, as one commentator wrote regarding these doctrines: "[T]he time had long since passed for the Supreme Court to acknowledge the truth of Holmes' dictum that '[t]he Constitution is not to be satisfied with a fiction.' " Kurland, *supra* note 10, at 586 (quoting Hyde v. United States, 225 U.S. 347, 390 (1937) (Holmes, J., dissenting)). Justice Marshall discussed these "fictions" in Shaffer v. Heitner, 433 U.S. 186, 202-03

satisfactory. Because the Depression had a resounding effect on the business community and its relation to society, even litigational issues were influenced by a new social philosophy.[13] Because of the nature of corporate activity, more lawsuits appeared as corporations grew. Jurisdictional doctrine that once focused on the parties began to require an examination of issues such as judicial economy and the interest of the forum's residents in the litigation. The factual situation in *International Shoe* provided the perfect test for a new approach.[14]

In finding the state's assertion of jurisdiction proper in *International Shoe,* the Court went beyond the traditional question of whether the corporation was "doing business" in the state. Rather, the Court concluded that the corporation had enough contacts with the forum to make a suit "reasonable, in the context of our federal system of government . . . ."[15] When the corporation objected on due process grounds, the Court responded that due process requires only that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[16] The Court relied heavily upon the corporation's "systematic and continuous" activities in the state[17] and indicated that a corporation enjoying "the benefits and protection of the laws of that state" must be subject to suit in that state for "obligations" arising from defendant's activities

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(1977).

13. During the Depression, individualism, spurred by the lost faith in business, declined in general acceptance. Instead, individualism came to mean "the individual" with an emphasis on the protection of persons from unrestrained corporate power. *See* Kalo, *supra* note 7, at 1182-83.

14. The International Shoe Company sold shoes in Washington through the efforts of local salesmen. These salesmen displayed the shoes, but did not authorize the sale of any shoes within the state. A Washington statute required that a corporation that employed persons in the state make contributions to the state's unemployment compensation fund. The International Shoe Company contended that the local salesmen's activities did not constitute "doing business" in the state and, thus, the company was not subject to the state court's jurisdiction to enforce the payments. The United States Supreme Court ruled that the state had jurisdiction. 326 U.S. at 321.

15. *Id.* at 317.

16. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

17. 326 U.S. at 320. The eleven to thirteen salesmen for the International Shoe Company were all residents of Washington. These salesmen displayed samples of the corporation's products and took orders from purchasers. These orders were sent to International Shoe's St. Louis office. The salesmen made no collections, and the corporation had no offices in the state. *Id.* at 313-14.

there.[18]

International Shoe, thus, opened the door for suits that once were not possible because of a state court's inability to effectuate jurisdiction. The Court's decision was a practical one; since it was impossible to assert jurisdiction over an absent, nonresident defendant under traditional notions, the Court had to focus on the effect and character of that defendant's actions in the forum. To establish the due process standard of "fair play and substantial justice," the Court focused on two factors: (1) whether defendant's activities established a substantial relationship with the forum,[19] and (2) whether the cause of action arose from defendant's contacts with the forum.[20] Yet, this decision made clear that a mechanical test was not to be used to determine if the assertion of jurisdiction was proper.

> [T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or *quantitative.* . . . Whether due process is satisfied must depend rather upon the *quality and nature of the activity in relation to the fair and orderly administration of the laws* which it was the purpose of the due process clause to insure.[21]

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18. *Id.* at 319. The only "benefit and protection" specified was "the right to resort to the courts for the enforcement of its rights." *Id.* at 320.

The jurisdiction asserted in *International Shoe* became known as specific jurisdiction, a term credited to Arthur T. von Mehren and Donald T. Trautman, authors of one of the most comprehensive articles concerning jurisdiction. *See* von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966). Specific jurisdiction focused on the specific claim, or cause of action; the more traditional basis for jurisdiction, general jurisdiction, focused on the relationship between the interested party and the forum: the forum's ability and right to draw the defendant into court because of his presence in the forum, his consent to jurisdiction, his domicile in the state, or the presence of his property in the forum. *Id.* at 1128, 1137; Woods, Pennoyer*'s Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861 (1978). See note 2 *supra.*

As one commentator explained: "[I]f a defendant is subject to general jurisdiction, he may be called upon to defend in regard to any or all claims that a plaintiff may hold against him." Woods, *supra,* at 863. In effect, the transaction or event that was the basis of the suit was not at issue in deciding jurisdictional questions; rather, only the parties and the forum were considered. Woods, *supra,* at 863. Increased interstate travel and the growth of corporations made general jurisdiction less useful. See notes 9-12 and accompanying text *supra.*

19. 326 U.S. at 320.

20. *Id.*

21. *Id.* at 319 (emphasis added).

II. The Fourth Circuit Approach to Specific Jurisdiction

The Fourth Circuit Court of Appeals, following the dictates of *International Shoe,* has considered a variety of factors in determining whether jurisdiction in a particular case conforms with due process standards. Unfortunately, the United States Supreme Court has failed to examine several factors that, under *International Shoe,* legitimately might affect a determination of whether due process requirements have been met. This failure, particularly in light of the Court's most recent major jurisdictional decision,[22] introduces uncertainty into the future of the analytical approach taken by the Fourth Circuit.

A. *Recognizing the General Standard of* International Shoe

Ratliff v. Cooper Laboratories, Inc.[23] concerned two products liability cases. In one, plaintiffs, residents of Florida, allegedly purchased and used harmful drugs in Florida. They brought suit in South Carolina against defendant, Cooper Laboratories, a Delaware corporation with its principal place of business in Connecticut. Cooper Laboratories' primary activity in South Carolina was soliciting drug wholesalers and dealers by mail and mailing promotional literature to approximately 650 physicians in the state.[24]

In the other case, plaintiff, a resident of Indiana, purchased and consumed in Indiana drugs manufactured by Sterling Drug, Incorporated. Sterling, a Delaware corporation with its principal place of business in New York,[25] was authorized to do business in South Carolina and had appointed an agent there for service of process. Five "detail men" lived in South Carolina and promoted defendant-Sterling's product through personal contacts with physicians and drug stores throughout the state. Although these men promoted the sale of the drugs, they did not sell them.[26] Plaintiffs in both cases filed suit in South Carolina to take advantage of the six-year statute of limitations.[27]

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22. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
23. 444 F.2d 745 (4th Cir. 1971).
24. *Id.* at 746.
25. *Id.*
26. *Id.*
27. *Id.* The statute of limitations had run in Delaware, Florida, Connecticut, New York, and Indiana. *Id.*

The Fourth Circuit, citing *International Shoe,* ruled that defendant's activities in South Carolina were not substantial enough to meet the standards of "fairness" and "convenience." The court noted that neither corporation had an office or warehouse, real or personal property, or a bank account in the state. Neither Sterling's appointment of an agent nor the mere solicitation by detail men was sufficient.[28] Further, the court emphasized that the cause of action did not arise in the state or out of defendant's contacts with the state:[29] "If 'plaintiff's injury does not arise out of something done in the forum state, then other contacts between the corpration [sic] and the state must be *fairly extensive* before the burdens of defending a suit there may be imposed upon it . . . .' "[30]

B. Importance of the Plaintiff's Residence and Solicitation by the Defendant

In *Lee v. Walworth Valve Co.,*[31] the court expounded on the factors touched on in *Ratliff.* Here, a South Carolina resident brought suit in South Carolina for the wrongful death of her husband, who was killed in an explosion caused by a ruptured steam valve on the *U.S.S. Trenton* while the ship was cruising the high seas.[32] The valve had been manufactured in Pennsylvania by defendant, Walworth Valve Company, and sent to Seattle to be assembled on the *Trenton.*[33]

The court found that, although Walworth Valve Company had no place of business, property, bank account, or salesmen in South Carolina, it did conduct a substantial amount of business in the state. Between 1969 and 1972, Walworth solicited business in the state approximately eighty days a year and had sales in South Carolina averaging $200,000 a year.[34] Further, the court pointed out that, although the cause of action did not arise in

28. *Id.* at 748.

29. *Id.*

30. *Id.* (quoting F. JAMES, CIVIL PROCEDURE 640 (1st ed. 1965))(emphasis added by court).

31. 482 F.2d 297 (4th Cir. 1973).

32. The accident occurred off Guantanamo Bay, Cuba. At no time prior to the incident had the *Trenton* been in South Carolina. *Id.* at 298.

33. *Id.* The other defendant, Lockheed Shipbuilding and Construction, consented to suit in South Carolina. *Id.*

34. *Id.* at 298-99.

South Carolina or from contacts within the state, it did not occur in another state. According to the court, plaintiff had only two possible forums, South Carolina and Pennsylvania, and because plaintiff was a citizen of South Carolina, South Carolina had a substantial interest in the suit.[35] The court distinguished *Ratliff* by concluding that plaintiffs there were not residents of South Carolina and the cause of action arose in another state.

The Fourth Circuit, while recognizing the due process concerns of *International Shoe,*[36] did not limit its analysis to the two factors expressed therein—defendant's contacts with the forum and whether the cause of action arose from those contacts.[37] The court analyzed the first factor by explaining that the substantiality of defendant's contacts should "be determined by an appraisal of the *quality* of the corporation's contacts with the forum state and the fairness, under the circumstances, of holding it answerable there."[38] Rather than characterizing defendant's contacts in terms of their continuity and regularity, the approach in *International Shoe,*[39] the Fourth Circuit emphasized the actual monetary benefits that defendant derived from its contacts in the state. Although this distinction is consistent with *International Shoe*'s recognition that a defendant who enjoys "the benefits" of a forum must be prepared to meet "obligations" that arise there,[40] the Fourth Circuit's decision nonetheless suggests that a different standard exists if defendant has solicited business in the forum. The circuit court's reasoning suggests that jurisdiction may be asserted more readily against a corporate defendant who actively solicits a market for its product than against a noncorporate or noncommercial defendant.

Although jurisdiction over corporations conducting business interstate was the context in which *International Shoe* was decided,[41] the United States Supreme Court has never indicated if solicitation by a commercial defendant, as opposed to other types of contacts by a noncommercial defendant, warrants a different analysis when determining whether substantial contacts

35. *Id.* at 299-300.
36. *Id.* at 299.
37. See text accompanying notes 19 & 20 *supra.*
38. 482 F.2d at 299 (emphasis added).
39. 326 U.S. at 320.
40. See text accompanying note 18 *supra.*
41. See notes 7-14 and accompanying text *supra.*

exist.[42] The court did discuss the solicitation activities of salesmen in *International Shoe*; however, its decision was based on the totality of defendant's activities within the state. The Court noted that "solicitation . . . plus some additional activities . . . are sufficient to render the corporation amenable to suit . . . ."[43]

In *McGee v. International Life Insurance Co.*,[44] the Supreme Court considered a case in which defendant's solicitation in the forum was its only contact. In its analysis, however, the Court did not address the significance of the fact that the nature of the contact was solicitation. Instead, the Court chose to focus on the effect of that contact on the forum.[45] Plaintiff sued the International Life Insurance Company, a Texas corporation, in the California courts to collect on a life insurance policy that plaintiff's son had purchased.[46]

The facts developed at trial were that the company's principal place of business was Texas, that it had no office or agent in California, and that its only solicitation in the state was a single request by mail for renewal of the policy.[47] The Court, nevertheless, found that defendant's activities had a "substantial connection with that State."[48] The contract had been delivered in California, the premiums had been mailed from there, the insured

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42. One commentator, citing the Supreme Court's decision in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), says "a defendant who solicits or initiates interstate sales . . . must ordinarily litigate wherever his customers live." Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407, 429 (1980)(citations omitted).

43. 326 U.S. at 314.

44. 355 U.S. 220 (1957).

45. Arguably, if the Court had used the Fourth Circuit approach, it would not have found defendant's contacts to be substantial. This lack of substantial contacts, however, may not have been fatal to the California court's assertion of jurisdiction under the Fourth Circuit approach, because plaintiff resided in the state and the state had an interest in this type of litigation.

46. Plaintiff was the designated beneficiary. The company refused to pay, contending that the deceased had committed suicide, a bar to collection under the terms of the policy. *Id.* at 221-22.

Deceased, a resident of California, had purchased the life insurance policy from an Arizona corporation. The policy was later assumed by defendant, a Texas corporation. International eventually sent a reinsurance certificate to the decedent in California; he accepted the certificate and paid the premiums for two years before he died. When plaintiff sought to collect on the policy, the lower court ruled that it had no jurisdiction. *Id.*

47. *Id.*

48. *Id.* at 223.

was a resident of California at the time of his death, and witnesses were located in California; taken together these factors amounted to a "substantial connection" according to the Court.[49] Since the Court did not examine defendant's action in terms of the benefit defendant received, this case provides little guidance for evaluating the Fourth Circuit's approach in *Lee*. In *McGee*, however, the Court recognized that a purely quantitative analysis of defendant's contacts with the forum was not the test advanced in *International Shoe*.

A year after *McGee*, the Supreme Court shed further light on the role of solicitation in the minimum contacts analysis. Unlike *McGee*, *Hanson v. Denckla*[50] did not involve a commercial enterprise. Rather, the controversy centered around the appointment of trust beneficiaries.[51] At issue was whether the Florida courts could assert jurisdiction over a Delaware trustee[52] when the settlor had moved to Florida and exercised her power of ap-

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49. *Id.*

50. 357 U.S. 235 (1958).

51. At issue was the corpus of several trusts established by Dora Browning Donner. Mrs. Donner, a domiciliary of Pennsylvania, executed a trust instrument in Delaware. The trustee was the Wilmington Trust Company; securities comprised the corpus. Mrs. Donner reserved the income for her life with the remainder to those whom she appointed by *inter vivos* or testamentary instrument. Mrs. Donner subsequently moved to Florida and executed an instrument that directed the sum of $200,000 to each of two trusts previously created for the benefit of the children of Elizabeth Donner Hanson, her daughter. The instrument was delivered to the Delaware Trust Company, the trustee of both trusts. At the same time, Mrs. Donner executed her will. Mrs. Donner died in 1952. Two of her daughters contended that the $400,000, which was to go to Mrs. Hanson's children, had not effectively passed by the *inter vivos* instrument and should pass to them by way of the residuary clause of her will. The daughters petitioned the Florida chancery court for a declaratory judgment that this $400,000 was to pass to them. Personal service was made on various parties including Mrs. Hanson, her children, and the Wilmington Trust Company and Delaware Trust Company as trustees. These defendants contended that Florida had no jurisdiction. While the chancellor ruled that the court lacked jurisdiction over nonappearing defendants, he did find jurisdiction based on the appearance of Mrs. Hanson and her children and ruled that the disposition of the $400,000 was testamentary in nature and invalid under the applicable Florida law.

During the pendency of this action, the executrix instituted an action in Delaware. Although the residuary legatees claimed that the issue was res judicata because of the Florida court action, the Delaware court ruled that the power of appointment and trust were valid. A subsequent Florida Supreme Court decision affirmed the Chancellor's finding that Florida law was controlling, but reversed the Chancellor by finding jurisdiction over the absent defendants proper. *Id.* at 238-43.

52. Florida law indicated that a trustee was an indispensable party to the type of proceeding in *Hanson*. The Supreme Court did not deal with that requirement in its opinion. *Id.* at 254-55.

pointment there. The Supreme Court ruled that the Florida court had no jurisdiction over the trustee.[53]

The Court emphasized that the trustee had no office and transacted no business in Florida. The Court noted that the trustee, unlike the defendant in *McGee,* had not solicited business in the forum. The settlor's exercise of her power of appointment in Florida was not significant since the trust assets were in Delaware. The only contact the trustee had with the forum was the remittance of trust income into the state;[54] this activity, according to the Court, did not rise to the level of "purposeful avail[ment]" necessary to meet the standard of *International Shoe.*[55]

Arguably, the distinction made between *Hanson* and *McGee* turned on the characterization of the *McGee* defendant's activities as commercial and on the nature of its contacts with the forum. The acts of the trustee, according to the Court, did not "bear the same relationship to the agreement as the solicitation in *McGee.*"[56] Yet, the Court's failure to express the distinction explicitly in terms of commercial solicitation leaves unclear the viability of the approach suggested by the Fourth Circuit.

The Fourth Circuit's treatment of the second factor advanced in *International Shoe*—the relation of the cause of action to the forum—represents a substantial deviation from the Supreme Court's approach. In *Lee,* the Fourth Circuit, in effect, substituted the state's interest in the suit arising from the plaintiff's residence for the relationship between the cause of action and the forum. In *Ratliff,* when the cause of action also had arisen outside the state, the court had found that jurisdiction could not be exercised over defendant. The *Lee* court distinguished *Ratliff* as follows:

> We held that the actions [in *Ratliff*] could not be maintained, though the sale solicitation activity of the defendants there was comparable to the in-state activity of Walworth here. Our holding in *Ratliff* was dictated by the fact that South Carolina had no interest in or connection with the controversy.[57]

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53. *Id.*
54. *Id.* at 251-53.
55. *Id.* at 253.
56. *Id.* at 252.
57. Lee v. Walworth Valve Co., 482 F.2d 297, 300 (4th Cir. 1973).

Thus, the Fourth Circuit in *Lee* made clear that even if the cause of action does not arise in the forum, jurisdiction may be properly asserted if the plaintiff resides there, so long as certain other factors, such as extensive solicitation, are present.

C. *Limiting the Scope of* Lee v. Walworth Valve Co.

After *Lee,* it appeared the Fourth Circuit would provide a forum for plaintiffs who established substantial contacts by the defendant and a relationship between either the cause of action and the forum or the plaintiff and the forum. A subsequent Fourth Circuit decision, *O'Neal v. Hicks Brokerage Co.,*[58] however, modified this unique standard. Plaintiffs, residents of South Carolina, were injured in a collision in North Carolina between the truck in which they were riding and defendant's truck. Plaintiff's truck was owned by a South Carolina corporation; defendant was a brokerage firm incorporated in Mississippi, which arranged the transportation of cotton from Mississippi to other states. Defendant's driver and truck were engaged in that business at the time of the accident.[59]

The Fourth Circuit held that the South Carolina court had no jurisdiction and remanded the suit,[60] explaining that defendant did not maintain an office in or advertise in South Carolina. Defendant's only contacts with the state were arrangements made by an agent for cotton to be shipped there. Deliveries had been made under such arrangements approximately ninety times; the total amount of commissions from these deliveries did not exceed $10,000.[61]

In distinguishing *Lee,* the court noted that, although as in *Lee* the cause of action had not arisen in South Carolina, it did arise in another state. In *Lee,* the cause of action arose at sea. The residence of the *Hicks* plaintiffs in South Carolina was not sufficient to counter the occurrence of the accident in North Carolina. The court noted that "North Carolina law will apply

58. 537 F.2d 1266 (4th Cir. 1976).

59. *Id.* at 1267.

60. *Id.* at 1268. The court affirmed the United States District Court for the District of South Carolina's order granting the motion to quash service of process, but vacated and remanded the case to afford appellants an opportunity to move to transfer the case to a proper district. *Id.* This procedure is in accordance with 28 U.S.C. § 1406(a) (1976).

61. 537 F.2d at 1267.

and witnesses concerning the happening of the accident are available in North Carolina."[62] Balanced against defendant's *"de minimis"*[63] contacts with the forum, "the fairness required by due process"[64] did not give South Carolina jurisdiction in the suit.

This type of analysis demonstrates the principle expressed in *International Shoe*: the analysis requires an evaluation of due process requirements in light of the "quality and nature of the [defendant's] activity in relation to the fair and orderly administration of the laws . . . ."[65] Although the Fourth Circuit's method of measuring the degree of a defendant's solicitation in a forum may suggest a quantitative approach, its express consideration of the plaintiff's residence, the forum's interest in the litigation, the place where the cause of action arose, and the nature of the defendant's contacts demonstrates the court's recognition of the *International Shoe* principles.

It is also this type of analysis that distinguishes Fourth Circuit decisions from those in the United States Supreme Court since *International Shoe*. Although the Supreme Court has suggested that it *might* consider numerous factors, it has never expressly done so. On two occasions, for example, the Supreme Court has mentioned the plaintiff's relation to the forum. Yet, it has never denominated this factor as critical, as has been the case in Fourth Circuit decisions. In *McGee*, the Court did point out that plaintiff was a forum resident, but it impliedly diminished the importance of this factor by choosing to characterize defendant's contact with the forum as "substantial."

In *Kulko v. Superior Court*,[66] the Court noted that the forum had an interest in a wife's claim for support because of her and her children's residence in the forum; however, it did not

62. *Id.* at 1268.

63. *Id.*

64. *Id.*

65. 326 U.S. at 319.

66. 436 U.S. 84 (1978). In *Kulko*, appellee-wife sought to enforce her Haitian divorce in California and to modify its custody and support provisions. Appellant-husband's only contacts with California were a three-day stopover in 1959 and a subsequent twenty-four hour stopover. Appellee asserted as a basis of jurisdiction the appellant's consent for the children to go from New York to California. After the divorce, the wife had moved to California; the children had remained with their father in New York. Appellant consented to the daughter's move to California in 1973. The son joined his mother in 1975 without the father's consent. *Id.* at 87-88.

analyze that factor as a jurisdictional consideration. Rather the court identified this factor in relation to conflict-of-law and visitation considerations.[67] The mention of this factor does suggest that the Court may be influenced by the forum's particular interest in the plaintiff's case. Because the Supreme Court did not analyze this factor as being potentially significant, however, this case provides little guidance concerning the viability of the Fourth Circuit's approach.

D. The Fourth Circuit Approach After Woodson

The major difference between the approach of the Fourth Circuit and that of the Supreme Court is the analytical significance of the locus of the cause of action. In *Lee* and *Hicks*, the Fourth Circuit demonstrated that the relationship of the cause of action to the forum was one of several factors to be considered in determining jurisdiction. The United States Supreme Court, particularly in *World-Wide Volkswagen Corp. v. Woodson*,[68] has indicated that this factor merits almost no consideration, at least until an independent, prior determination is made that defendant had sufficient contacts with the forum. Although the decisions in *Shaffer v. Heitner*[69] and *Rush v. Savchuk*[70] sug-

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67. *Id.* at 93, 98.

68. 444 U.S. 286 (1980). The parties at this stage of the suit were World-Wide Volkswagen Corporation, Seaway Volkswagen, Incorporated, and Charles S. Woodson, the District Judge of Creek County, Oklahoma.

69. 433 U.S. 186 (1977). In *Shaffer*, a nonresident shareholder brought suit in Delaware against the former and present directors and officers of Greyhound for an alleged breach of fiduciary duty. The breach arose from the corporation's activities in Oregon and the payment of damages as a result of its antitrust activities there. Plaintiff also filed a motion for sequestration of stock owned by defendants. The situs of the stock was Delaware. Defendants contended that they did not have sufficient contacts with the forum to allow jurisdiction, and the Supreme Court held that the assertion of jurisdiction was a violation of due process. *Id.* at 216-17.

Although the opinion primarily addresses quasi-in-rem jurisdiction, the Court did point out that the cause of action had no real relation to defendants' contacts with the forum, and those contacts alone were not enough to support jurisdiction. *Id.* at 213.

70. 444 U.S. 320 (1980). *Rush* reiterated the point made in *Shaffer* with regard to the weight given to where the cause of action arose. Appellee in *Rush* sought to bring suit in Minnesota against a nonresident defendant; the cause of action arose from an automobile accident in Indiana. Appellee's basis for jurisdiction was quasi-in-rem in nature; he garnished defendant's insurer's obligation to defend and indemnify Rush for her injury. *Id.* at 322-25. The insured did business in Minnesota, but defendant had no contacts with that state. *Id.* at 322. The decision, although reflecting the Court's attitude concerning quasi-in-rem jurisdiction, is founded upon considerations advanced in *Inter-*

gested the cause of action would be considered simultaneously with defendant's contacts with the forum, *Woodson* demonstrated that this was not the case. As one commentator explained, the approach used in *Woodson* "mandates a bifurcated jurisdictional inquiry, beginning with a straightforward examination of defendant's contacts with the forum state."[71]

Harry and Kay Robinson purchased an Audi from Seaway Volkswagen, Incorporated (Seaway) in New York. During a move to Arizona plaintiffs had an accident in Oklahoma.[72] Plaintiffs brought suit[73] against the Audi representatives, alleging that negligent workmanship caused the car to catch fire in the accident. Mr. Robinson sued the retailer, Seaway; the manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); the importer, Volkswagen of America, Incorporated (Volkswagen); and the regional distributor, World-Wide Volkswagen Corporation (World-Wide). The Oklahoma court granted jurisdiction[74] and World-Wide and Seaway appealed. In a six to three decision, the United States Supreme Court held that the Oklahoma court could not exercise jurisdiction over defendants.[75]

In its analysis, the Court identified two reasons for the test promulgated in *International Shoe*: (1) it protects the defendant from being forced to litigate in distant and inconvenient forums, and (2) it insures that states do not overreach the limits of coequal sovereignty in a federal system.[76] The Court indicated that the inconvenience factor generally has been measured by reasonableness and fairness, that is, " ' "traditional notions of fair play and substantial justice." ' "[77]

The second concern, that of sovereignty, has been one of

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national Shoe. That defendant's insurer did business in the state, according to the Court, did not warrant a finding that defendant had any contacts with the forum. *Id.* at 328. Furthermore, the lower court's basis for finding jurisdiction—the insurance policy itself—was not the subject matter of the suit and was not related to the cause of action. *Id.* at 329.

71. Louis, *supra* note 42, at 422.

72. 444 U.S. at 288.

73. Mrs. Robinson sued on her own behalf. The father brought suit as the father and next friend of the children. *Id.* at 288 n.2.

74. *Id.* at 289.

75. *Id.* at 291.

76. *Id.* at 291-92.

77. *Id.* at 292 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)(quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

importance since the inception of the minimum contacts doctrine, according to the Court. While *McGee* may be cited for the premise that this concern was not important, the Court indicated that this was never its view. Further, the Court rejected a "stream of commerce" theory premised by plaintiffs.[78]

Justices Brennan, Marshall, and Blackmun dissented.[79] Justice Brennan said the Court failed to emphasize the forum's interest in this matter and argued that the "burden" on defendants was not a substantial one, particularly in light of defendants' commercial nature.[80] To discount a "stream of commerce" theory in this particular case, said Brennan, was not justified given the character of defendants' businesses; that defendants' product was intended to travel into other states justified suit in Oklahoma and satisfied all notions of fairness.[81]

Justice Marshall argued that the key issue was the mobility of the product itself. The car entered Oklahoma not by distribution, but by its intended purpose, under its own power. *Kulko,* relied upon by the majority, should be distinguished, according to Marshall, by the very point emphasized in that opinion: the issue there was a personal and domestic one, while here it was a commercial transaction in interstate business.[82] Justice Blackmun summarized the general thrust of the dissents by saying that there was no unfairness in requiring these defendants to defend this suit in Oklahoma.[83]

The decision in *Woodson* leaves a number of unanswered questions. In its analysis, the Court indicated that defendants' contacts were not sufficient, stating that neither of the defendants "does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma."[84] The Court's only reference to the cause of action

78. *Id.* at 293. See note 96 *infra.*

79. Justices Marshall and Blackmun filed dissenting opinions in *Woodson.* Justice Brennan filed a dissent that applied to this case, 444 U.S. at 299 (Brennan, J., dissenting), and to Rush v. Savchuk, 444 U.S. 320, 333 (1980)(Brennan, J., dissenting), decided at the same time.

80. 444 U.S. at 303 (Brennan, J., dissenting).

81. *Id.* at 306-07 (Brennan, J., dissenting).

82. *Id.* at 316 (Marshall, J., dissenting).

83. *Id.* at 317 (Blackmun, J., dissenting).

84. *Id.* at 289.

was to characterize it as "one, isolated occurrence . . . ."[85] The case thus suggests that a defendant has to have substantial contacts with the forum before the cause of action is even considered.[86]

This reasoning illustrates a position that the Court had not before advanced. Previously, it had not been considered that the cause of action itself could not be a substantial contact. In fact, in *Shaffer* and *Rush,* the Court suggested that a stronger showing of the relation of the cause of action to the forum might have altered those decisions.[87] Since the cause of action in *Woodson,* unlike those in the previous Supreme Court decisions, was based on personal injury allegedly caused by a defect in defendants' product, one could argue that this contact in itself was sufficiently substantial to allow the forum to exercise jurisdiction.[88]

Significantly, the Fourth Circuit's approach in this area is in direct conflict with *Woodson.* Although *Lee* is the only case discussed that actually allowed jurisdiction, the Fourth Circuit's analysis in that case and in *Hicks* indicates that the cause of action, balanced with factors such as plaintiff's relation to the forum and the nature and extent of defendant's contacts in the forum, is of crucial importance. In contrast, the Supreme Court, by its refusal to consider the cause of action as important as defendant's contacts with the forum in *Woodson,* discounts the relation of the cause of action to the forum in a case in which it should be a major concern.

Woodson further demonstrates that this Court has lost sight

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85. *Id.* at 295.

86. See text accompanying note 71 *supra.*

87. See notes 69 & 70 and accompanying text *supra.*

88. While the cause of action was not characterized by the Court in terms of tort or contract, it is a crucial distinction that the cause of action was based on tort rather than contract. Unlike contract, in which the place of inception, agreement, and performance may suggest three different forums, the place of injury introduces only one.

The *Woodson* Court, to explain that the occurrence of the accident in the forum was only "one, isolated occurrence" and that the view of such an event as "foreseeable" was unreasonable, cited a 1956 Fourth Circuit Court of Appeals case, Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956). In *Erlanger,* the court refused to find jurisdiction based on a defendant's single shipment of yarn to a North Carolina corporation. Although the court said that the result did not turn on the characterization of the suit as one for breach of contract rather than for tort, *id.* at 507-08, it did point out that the agreement "was consummated in New York," executed in New York, and performed in New York. *Id.* at 505. Thus, this distinction well might be a factor in deciding jurisdictional questions.

of the principle, stated in *International Shoe* and relied upon by the Fourth Circuit, that defendant's activities must be considered in light of "the fair and orderly administration of the laws which it is the purpose of the due process clause to insure."[89] Although the *Woodson* Court suggested that it always considered "other relevant factors,"[90] such a consideration was not evident in the opinion. This approach is a departure from that suggested in *Kulko, Shaffer,* and *Rush.* In those cases, the Court appeared concerned with the events surrounding the cause of action,[91] but it did not say that these alone might justify a finding of jurisdiction. Yet, a reasonable conclusion would have been that the Court's specific mention of where the cause of action arose in each of the cases evidenced a real concern, and thus, given the proper fact pattern, it might find substantial contacts based solely on the facts related to the cause of action. After *Woodson,* that is obviously not the case. Such a result seems inequitable when the cause of action is based on personal injuries sustained by plaintiffs in the forum.

This decision by the Supreme Court demonstrates that the present court has moved away from the very foundation of *International Shoe* and specific jurisdiction.[92] *International Shoe* was decided at a time when jurisdiction over foreign corporate defendants was difficult to achieve.[93] The problem had become acute as corporations began to benefit from extensive interstate activity and, at the same time, could not be held accountable for claims arising from that activity.[94] With *International Shoe,* the Court appeared to counter this advantage of a corporate defendant by forcing the corporation to answer to any obligations in

89. 326 U.S. at 319.

90. 444 U.S. at 292.

91. See text accompanying notes 66, 69 & 70 *supra.*

92. One commentator, approving the decision in *Woodson,* said the Court was "turn[ing] the clock back to an earlier time when jurisdiction, like substantive tort law, was concerned more with defendant's conduct and less with notions of social welfare and convenient risk allocation." Louis, *supra* note 42, at 428. The philosophy that the Court must focus solely on the due process rights of defendant, rather than on a fairness test balancing the interests of all parties, apparently rests upon the assumption that "plaintiffs as a group are no longer as helpless as they perhaps once were . . . ." *Id.* at 429. The obvious reply is that it is the use of a balancing or fairness test by courts such as the Fourth Circuit since *International Shoe* that has made plaintiffs less helpless, if indeed they are.

93. See notes 9-12 and accompanying text *supra.*

94. See notes 9-13 and accompanying text *supra.*

the forum.[95] The Court recognized this principle, if not always expressly, in its subsequent decisions. In *Kulko,* for instance, the Court discussed defendant's contacts with the forum in the context of defendant's noncommercial character. The Court made clear that the nature of the defendant shed a new light on the minimum contacts analysis. As the Court explained:

> The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the state to an insured resident of the State.[96]

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95. Kalo, *supra* note 7, at 1182-83.

96. 436 U.S. at 97. The thrust of this analysis is that a defendant who enters a forum with a commercial intent should be held to a higher standard of duty in the forum. One commentator has suggested that the standard to determine whether a defendant should be so characterized is "the relative aggressiveness of the parties." Woods, *supra* note 18, at 891-92. For instance, a national corporation that seeks out a national market should not be allowed to avoid suit while taking advantage of the consumer by asserting a "lack of jurisdiction" defense. By comparison, a physician, treating an out-of-state visitor who later seeks to sue the physician in the patient's home state, should not be subject to suit without any other contacts with the forum. Wright v. Yarkley, 459 F.2d 287 (4th Cir. 1972), *cited in* Woods, *supra* note 18, at 892. Defendants in *Woodson* may fall somewhere between these examples; yet as Justice Blackmun contended in his dissent of that case: "All [the dealer, the manufacturer, and the importer] are in the business of providing vehicles . . . [and] [i]t is not too much to anticipate at the time of distribution and at the time of retail sale that this Audi would be in Oklahoma." 444 U.S. at 318 (Blackmun, J., dissenting).

This type of analysis is not unique. In Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the Illinois court spoke of defendant's activities and the unjustness that would result if the corporate defendant were not subject to suit after receiving the benefits of selling its products in the state and the protection of the state's laws. This theory has often been characterized as a "stream of commerce" analysis: a commercial defendant that enters goods into the flow of commerce should be aware that suits may arise in other forums.

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), characterized this type of activity as "continuous and systematic [in] nature." Yet, even there the Supreme Court refused to base its decision on defendant's commercial character. Perhaps the most frequent characterization of this factor is the foreseeability approach presented in Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 843, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). The California Supreme Court allowed jurisdiction, indicating that "if the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposely availed itself of the market . . . ." *Id.* at 902, 458 P.2d at 64, 80 Cal. Rptr. at

The *Woodson* Court, however, ignored the crucial difference in the nature of the parties to that suit.

III. Conclusion

The Fourth Circuit Court of Appeals has set forth a broader analysis than yet has been offered by the United States Supreme Court. By indicating that a variety of factors must be considered in determining the proper exercise of jurisdiction, the Fourth Circuit has followed the *important* principles of *International Shoe.* Yet, after *Woodson,* such an approach seems doubtful if not incorrect.

Required now is merely an evaluation of defendant's contacts with the proposed forum in terms of the amount of sales, the number of offices, the presence of an agent, and the degree of advertisement.[97] Thus, the test for jurisdiction now appears to be the mechanically applied, quantitative approach expressly disclaimed in *International Shoe.*[98]

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The Supreme Court rejected the foreseeability standard in *Woodson,* stating that "the mere likelihood that a product will find its way into the forum state . . ." is not a crucial concern in terms of due process. 444 U.S. at 297. Instead, the Court said the concern should focus on defendant's conduct and whether "he could reasonably anticipate being haled into court there." *Id.*

97. 444 U.S. at 295.

98. *See* Louis, *supra* note 42, at 430-31.