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The Long-Arm of the Law: South Carolina's Long-Arm Statute and the Internet

Harry Lowenstein
Coastal Carolina University

Carla F. Grabert-Lowenstein

THE LONG-ARM OF THE LAW: SOUTH CAROLINA'S LONG-ARM STATUTE AND THE INTERNET

Henry Lowenstein*
Carla F. Grabert-Lowenstein**

I. LONG-ARM STATUTES: INTRODUCTION AND BACKGROUND

A consumer in South Carolina opens her high-speed computer, enters the portal of the Internet, and purchases a product or service from a merchant from afar. There from her perch in cyberspace, the Internet Commerce (e-commerce) merchant provides a product that may be defective, fraudulent or even harmful to human life. The consumer turns to her South Carolina courts for relief, but can she, will she, and how would she bring the e-commerce vendor into the jurisdiction of the state, or even be able to serve process upon the non-state merchant? Here is the growing conundrum of the digital age facing South Carolina, and the disputes arising out of e-commerce yet to be resolved.

This Article addresses the application of long-arm jurisdiction to legal conflicts arising out of Internet activity, "online" business, and related

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* Ph.D., Professor of Management and Law, William J. Baxley Applied Endowed Business Professor, Wall College of Business, Coastal Carolina University, Conway, South Carolina.

** The Law Offices of Carla F. Grabert-Lowenstein, LLC, Conway, South Carolina. Carla Faye Grabert-Lowenstein, Esq. is an attorney-at-law and principal of The Law Offices of Carla Faye Grabert-Lowenstein, LLC in Conway, South Carolina, handling both state and federal cases. A former Senior Deputy District Attorney in California, she is a member of the bars of South Carolina, California and the District of Columbia.

transactions. Because almost all such activities cross a state line in some manner, individual or class action-related disputes ultimately end up as diversity of citizenship actions in federal courts.[1] Thus, this Article will primarily confine its discussion to state law relative to application in federal *diversity* cases.

We present this topic from a practitioner/public policy perspective as the subject currently confronts businesses. The scope of this Article is primarily domestic, recognizing that international applications are more complex, comprising the subject of an Article on its own.

In its early history, personal jurisdiction was based on a state's *de facto* power over a defendant's person.[2] A business that crossed a state line to do more than "minimal" commercial contacts was considered to be subject to the jurisdiction of the non-home state sovereignty in which it was doing business.[3] But in the twentieth century with advances in telecommunications and the advent of the Internet, the "physical presence test" has become much more problematic, if not operationally inadequate.

Simone Grossi characterized the nub of the personal jurisdiction issue as a "simple and elegant" one premised on two concepts functioning concurrently: "connecting factors and reasonable expectations."[4]

> Yet, despite the simple elegance, the United States Supreme Court has proven incapable of providing a coherent vision of the law of personal jurisdiction. In essence, the Court's fact specific, case-by-case approach has produced an ever-widening doctrinal morass.[5]

Long-arm ambiguity in commerce bedevils plaintiffs, defendants, and those within the legal system as they grapple with state-to-state jurisdictional nuances in an ever-increasing multi-jurisdictional commercial cyberspace. It is a conundrum that South Carolina has yet to definitively resolve.

A number of states, including those adjacent to South Carolina, have answered the personal jurisdiction question by enacting or amending their long-arm statutes in a way that defines Internet business as more than "minimal contacts" and provides fair notice to meet concerns about due process.[6] Other

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1. U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (2012). Federal courts have jurisdiction over lawsuits between citizens of different states, between a foreign nation and citizens of different states, and between citizens of different states and a foreign nation. The amount in dispute must exceed $75,000.

2. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

3. *Id.* (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

4. Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014).

5. *Id.*

6. *See* Anne Sikes Hornsby, *Internet Transactions and Communications: Expanding or Contracting Traditional Notions of Personal Jurisdiction*, 70 ALA. L. REV. 379, 379 (2009) (explaining that "apply[ing] jurisdictional precedent to the myriad patterns created by the meteoric

states have answered the question with *stare decisis* rules by their own state supreme and appellate courts.

As one of the fastest growing states in the Union, South Carolina is a hotbed of domestic and international manufacturing, and increasingly, Internet-related businesses themselves. South Carolina's highest court is poised to face a case, sooner rather than later, that will ultimately address and define the scope of personal jurisdiction for those availing themselves of commerce in the state through the Internet.

This Article addresses the issue by first providing an overview of the evolution of personal jurisdiction in federal diversity of citizenship cases and examining how other states have handled cyber-related personal jurisdiction. Second, this Article looks at the specific situation in South Carolina, its long-arm statute, and interpretations by the state supreme court and the federal courts in the district of South Carolina.

Finally, this Article concludes with an analysis, given current South Carolina law, of how the personal jurisdiction issue would possibly be addressed in some future judicial action. Ultimately, resolving this conundrum will play a significant role in South Carolina's future e-commerce business growth and its economic development.

A. Long-Arm Jurisdiction: The Early Years

An initial historical overview of any law subject is useful in understanding the original intent, nature, and context of modern cases and the continuing controversies posed today in Internet or e-commerce jurisprudence.

Long-arm jurisdiction has long been a staple of jurisprudence going back to the English courts.[7] Simply put, it is the power of courts to assert personal jurisdiction over a non-resident ("foreign") actor to resolve some legal dispute.[8] Today, this is referenced generally as long-arm jurisdiction. The U.S. Constitution in 1789 implied long-arm jurisdiction when enacting its Full Faith and Credit Clause.[9] Yet, the tensions early in the republic, created by states asserting sovereignty of their courts and the nascent federal judicial system would soon mirror evolving judicial thought on the limits of the reach of the Commerce Clause.[10]

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rise of Internet use for business" requires an understanding of how state long-arm statutes vary in scope).

7. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1157–58 (1978) (discussing colonial American adherence to English common law regarding jurisdiction).

8. *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012) (stating that every state must enforce the judgments of every other state).

10. U.S. CONST. art. V, § 8, cl. 3. Such controversies start with *Gibbons v. Ogden*, 22 U.S. 1 (1824), and have continued to the modern day, most recently in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

Justice Kennedy took note of the constitutional construction creating lines of judicial demarcation that result in conflict and ambiguity over long-arm jurisdiction.[11]

James Smith notes in his article that Justice Kennedy in *U.S. Term Limits, Inc. v. Thornton* stated:

> the framers "split the atom of sovereignty" in creating a system with "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[12]

The issue itself becomes important as it plays a substantive role in the decision of litigants and one side or the other's preference to sue in a particular state, and, ultimately a particular judicial forum. It becomes a significant tactical business and legal decision. However, perhaps a more important public policy effect is to the question of which government has authority. As Arthur M. Weisburd stated:

> The controversy over standards of personal jurisdiction, therefore, implicates more than just selecting a courthouse; it is a dispute about how to determine when a particular state government may demand obedience from a particular person.[13]

The conflict in law and jurisdiction appeared within the Constitution's first half-century in *D'Arcy v. Ketchum*.[14] In *D'Arcy*, the U.S. Supreme Court ruled that a judgment against one party in Louisiana, for whom the trial court in New York never obtained personal jurisdiction, could not enforce the order outside New York under the Constitution's Full Faith and Credit Clause.[15] The Court held further that "the international law as it existed among the states in 1790" would determine the existence of personal jurisdiction.[16]

Nearly a quarter century later, the Court established personal jurisdiction limitations in *Pennoyer v. Neff*, in which personal jurisdiction may be set at the

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11. *See* James C. Smith, Comment, *Online Communities as Territorial Units, Personal Jurisdiction Over Cyberspace After* J. McIntyre Machinery, Ltd. v. Nicastro, 57 ST. LOUIS U. L.J. 839, 855–58 (citing McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011)) (discussing the lack of clarity in personal jurisdiction cases).

12. Smith, *supra* note 11, at 855 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995)).

13. Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L. REV. 377, 378 (1985).

14. *See* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (discussing how an out-of-state judgment against a joint-defendant was not entitled to full faith and credit because the defendant had not been personally notified of the suit).

15. *Id.* at 172.

16. *Id.* at 176.

onset of a legal action by virtue of property owned in a state or physical presence of a person within a state.[17] This established what has been a usual and customary basis for personal jurisdiction that includes: "domicile, voluntary appearance, consent to service of process, and physical presence."[18]

Both *D'Arcy* and *Pennoyer* pre-dated the modern commercial technological advances whereby a market may be entered extensively by the Internet's electronic conduit without a traditional physical presence.

A further historical attempt to expand long-arm jurisdiction is exemplified by the U.S. Supreme Court decision in the South Carolina case of *Clarke v. Clarke*.[19] Clarke family members, citizens of South Carolina, "asserted S.C. law governed" title to land in Connecticut they had inherited.[20] The Court ruled against them, noting that this violated the Full Faith and Credit Clause and that the land was beyond the subject matter jurisdiction of South Carolina courts.[21] To rule otherwise would have allowed South Carolina courts to dictate Connecticut law.[22]

As American commerce grew with the newly evolving technologies of railroads, telegraph, and telephone, the ability to extend commerce, and hence its benefits and liabilities, across state lines increased markedly.[23] Into the twentieth century, the general long-arm rule evolved to establish personal jurisdiction subject to limits set by the Due Process Clause of the U.S. Constitution, namely, the Fifth and Fourteenth Amendments, and "traditional notions of 'fair play' and substantial justice to the defendant, all of which are fact based to each case."[24] Jurisdiction, therefore, may be obtained by:

> (1) serving process on the party within the state in which the court is located, or (2) by reasonable notification to a party outside the state in those instances where a "long-arm statute" applies.[25]

Early threshold problems in defining long-arm jurisdiction involved litigants in diversity cases in federal courts in which attempts were made to assert federal

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17. *See* Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 728 (1878) ("No person is required to answer in a suit on whom process has not been served, or whose property has not been attached." (quoting Webster v. Reid, 52 U.S. (11 How.) 437, 549–60 (1850)).

18. Grossi, *supra* note 4, at 621.

19. 178 U.S. 186 (1900).

20. *Id.* at 186–88.

21. *Id.* at 195.

22. *See id.* (stating that the Connecticut law differed from the South Carolina law and that determination under the Connecticut law was proper).

23. Kevin M. Fitzmaurice & Renu N. Mody, International Shoe *Meets the World Wide Web: Whither Personal Jurisdiction in Florida in the Age of the Internet?*, FLA. B.J., Dec. 1997, at 22, 24 (discussing the impact of nationalization of commerce and modern communication and transportation on personal jurisdiction).

24. RICHARD A. MANN & BARRY S. ROBERTS, BUSINESS LAW AND THE REGULATION OF BUSINESS 55 (12th ed. 2017).

25. *Id.*

common law over and above the long-arm standard of a plaintiff's home state.[26] Could the federal court make its own decision over long-arm jurisdiction or be held to the applicable state standard? This was answered in 1938 by the U.S. Supreme Court in *Erie Railroad v. Tompkins*.[27] Here, the Court ruled that state law would control personal jurisdiction in federal diversity actions.[28] Had the Erie Rule not been established, businesses would be faced with different common law in every federal district in every federal circuit—ultimately an impediment to interstate commerce.

Likewise, the Supreme Court later ruled that where a state lacked long-arm statute jurisdiction, a federal court could not invent it.[29] A decade after *Erie*, the Court's "door closing" doctrine was stated in *Ragan v. Merchants Transfer Co*.[30] Here, the Court ruled that if a state law did not allow an action, federal courts must deny the action in diversity cases.[31]

The Supreme Court reiterated its "door closing" position in *Woods v. Interstate Realty Co*. by denying jurisdiction to a non-resident corporation where the state law disallowed it.[32] And, in *Cohen v. Beneficial Loan Corp*. the Court reasserted the principle: "a state may set the terms on which it will permit litigation in its courts."[33] Thus, the standard was set that federal rules must incorporate state law for the service of process (personal jurisdiction) and state process cannot be valid unless the state has explicit jurisdiction under its own laws.[34]

Federal courts were given clear direction to adhere strictly to state law in diversity of citizenship cases.[35] This has since been established in Federal Rule of Civil Procedure 4(k)(1)(A).[36] The issue then moved to state definitions of

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26. Joan Kessler, *The Erie Rule and Long-Arm Statutes*, 52 MARQ. L. REV. 116, 116–17 (1968).

27. 304 U.S. 64 (1938).

28. *Id.* at 79.

29. James W. H. Stewart, *The Federal "Door-Closing" Doctrine*, 11 WASH. & LEE L. REV. 154, 154–55 (1954) (discussing how a federal court must act when there is no forum state rule for jurisdiction).

30. 337 U.S. 530, 532 (1949).

31. *Id.* at 532–33 ("When local law qualifies or abridges it, the federal court must follow suit.").

32. 337 U.S. 535, 538 (1949).

33. 337 U.S. 541, 552 (1949).

34. Kessler, *supra* note 26, at 123.

35. *See id.* at 122 (citing Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty, 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)) (explaining that "a triumvirate of state law supremacy developed in 1949" with the Supreme Court's decision to uphold the applicability of state law in three separate challenges to the Federal Rules on the basis of contrary state law).

36. Absent a special congressional legislative act, the federal court has personal jurisdiction only if the state court in which it sits would have personal jurisdiction. FEDERAL RULE OF CIVIL PROCEDURE 4(k)(1)(A) provides:

what constitutes "sufficient contacts" to assert personal jurisdiction across state lines.[37] A clearer definition of what was meant by "contacts" was first answered in the famous Supreme Court case *International Shoe v. Washington*.[38]

International Shoe Company was a Delaware chartered business operating out of St. Louis, Missouri and selling in Washington through its traveling salesmen who entered the state.[39] The State of Washington sued the company after it failed to pay unemployment taxes required by state law.[40] Process was served on the company by mail and by personal service of one of its salesmen while in the state.[41]

The Court, recognizing the status of a corporation as a fictitious [quasi] person, stated the general rule of "sufficient contacts" necessary to establish personal jurisdiction:

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that, unlike an individual, its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands 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 the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.[42]

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(1) *In General* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.

37. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that to exercise personal jurisdiction over a non-resident defendant, he must have "certain minimum contacts" with a forum state).

38. *Id.* at 319.

39. *Id.* at 313.

40. *Id.* at 312.

41. *Id.*

42. *Id.* at 316–17 (internal citations omitted) (citing Klein v. Bd. of Tax Supervisors of Jefferson Cty., 282 U.S. 19, 24 (1930); Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

Meeting the test of "due process" to an outside entity depends upon a determination of "the quality and nature of the activity in relation to the fair and orderly administration of the laws."[43] That said, the Court went on to further state:

> But, to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[44]

International Shoe's standard still contemplated a physical presence in a state, as the concept of the Internet where no physical contact occurs remained in the distant future. An early case on point, post-*International Shoe*, was *Hanson v. Denckla*.[45] The case involved a trust purchased by a Pennsylvania citizen and perfected in Delaware.[46] The Pennsylvania citizen later moved to Florida where she died, and conflict ensued over the trust.[47] The Court ruled that there was insufficient connection with Florida to bring defendants into that jurisdiction, as they had no business in or offices within the state.[48] The Court stated that if a case is grounded on specific personal jurisdiction, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[49]

Moreover, the Court was confronted with a case involving transactions by mail but no physical presence in *McGee v. International Life Insurance Co.*[50] In *McGee*, a California-based consumer bought a life insurance policy from an Arizona-based insurance company.[51] The company was subsequently purchased by a Texas company for which a reinsurance policy on the California policy holder was issued.[52] The Texas firm later refused to pay the beneficiary's claim

43. *Int'l Shoe Co.*, 326 U.S. at 319.
44. *Id.*
45. 357 U.S. 235 (1958). South Carolina adheres to the Hanson Doctrine in practice.
46. *Id.* at 238.
47. *Id.* at 239–40.
48. *Id.* at 251.
49. *Id.* at 253 (citing *Int'l Shoe Co.*, 326 U.S. at 319).
50. 355 U.S. 220 (1945).
51. *Id.* at 221.
52. *Id.*

and suit was brought in California.[53] Here, the only contact was by U.S. mail.[54] The Court ruled that personal jurisdiction was valid.[55]

This case, however, is not as clear cut as it would seem. Insurance is state-regulated and licensed by virtue of inherent state police power.[56] Therefore, there is an implied acceptance to jurisdiction by selling insurance within a state where state licensure is required.[57] Nevertheless, *McGee* stands as an early example of establishing minimal contact without physical contact in a state.

Moving forward, the Supreme Court faced the personal jurisdiction issue in *World-Wide Volkswagen v. Woodson.*[58] Here, the Robinsons, who purchased a new Audi automobile from a New York dealership, were involved in a traffic accident while driving through Oklahoma in which the automobile's passengers were severely burned.[59] The Robinsons sued Audi and the New York car dealership in an Oklahoma federal diversity action asserting Oklahoma long-arm statute personal jurisdiction on the out-of-state defendants. Here, the Court set more stringent requirements to protect the due process rights of non-resident parties:

> A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice and the relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."[60]

The Court established a stronger "minimal contacts" threshold to perform two related but differentiated functions: (1) protect defendants from the burden

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53. *Id.* at 221–22.
54. *Id.*
55. *Id.* at 223.
56. 1 STEVEN PLITT ET AL., COUCH ON INSURANCE § 2.1 (3d ed. 2016) ("Insurance is a highly regulated industry due to its well-recognized importance to the public interest, rendering it a proper subject of regulation and control by the states through the exercise of their police powers.").
57. *See* 44 C.J.S. *Insurance* § 137 (2016) (citing Bianco v. Concepts 100, Inc., 436 A.2d 206, 291 (Pa. Super. Ct. 1981)) ("A foreign insurance company upon obtaining a certificate of authority to conduct its insurance business in the state voluntarily subjects itself to the jurisdiction of the state's courts for any cause of action which may be asserted against it.").
58. 444 U.S. 286 (1980).
59. *Id.* at 288.
60. *Id.* at 291–94 (internal citations omitted).

of litigating in distant, inconvenient forums;[61] and (2) ensure that state courts do not reach out beyond the limits imposed on them by their coequal sovereignty status in a federal system.[62] Federal courts in diversity actions must apply a rule of reason or reasonableness to such cases.[63]

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness."[64] In the Court's words:

> We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.' The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'" Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[65]

World-Wide Volkswagen arrived just four years prior to the invention of the personal computer and Internet shortly thereafter. In a foreshadowing of commerce to come, the Court recognized that changes in the electronic age would also challenge prior views of personal jurisdiction.[66] Nevertheless, the Robinsons' case was too remote, and the Court struck down Oklahoma's ruling in favor of personal jurisdiction:

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

61. *Id.* at 288.
62. *Id.* at 291–94.
63. *Id.* at 292.
64. *Id.*
65. *Id.* (internal citations omitted).
66. *Id.*

Pennoyer v. Neff to the flexible standard of *International Shoe Co. v. Washington*.[67]

The Court's jurisdictional evolution foretold in 1980 came quickly. In *Asahi Metal Industry Co. v. Superior Court*,[68] the Supreme Court set out a five-factor "traditional notion of fair play" test for personal jurisdiction over non-resident defendants.[69] The factors provide:

1. What is the burden on the defendant?
2. What is the interest of the forum state in the litigation?
3. What is the interest of the plaintiff in litigating the matter in that state?
4. Does the allowance of jurisdiction serve interstate efficiency?
5. Does the allowance of jurisdiction serve interstate policy interests?[70]

In *Asahi*, the Court found that the burden would be severe on the defendant with only slight interest being established by the other four prongs of the test.[71]

Asahi ushered the Supreme Court into the area of personal jurisdiction as applied to foreign (i.e., international) corporations to establish a rule as to when a non-U.S. company could be drawn into a diversity action within one of the U.S. federal courts, or even state courts.

Four years later, another attempt was made to bring personal jurisdiction to a transnational corporation simply by virtue of the fact that it purchased goods (helicopters) from Texas, though the company had no offices or property in the state and only had minimal contact by way of pilot training.[72] The Supreme Court held in *Helicopteros Nacionales de Colombia, S.A. v. Hall* that such contacts with Texas were insufficient to establish long-arm jurisdiction.[73] Further, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court held that the nexus between Goodyear, its foreign subsidiaries, and the state of North Carolina was not sufficient to establish personal jurisdiction.[74] This case involved North Carolina residents in a bus accident in Paris, France alleging that injury resulted from defects in Dunlop tires.[75]

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67. *Id.* at 294 (citing Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1878); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).
68. 480 U.S. 102 (1987).
69. *Id.* at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).
70. *Id.*
71. *Id.* at 116.
72. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984).
73. *Id.* at 419 (citing Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923)).
74. 564 U.S. 915, 929 (2011).
75. *Id.* (citing *Helicopteros*, 466 U.S. at 416).

Perhaps one of the most notorious jurisdiction cases, later made into the movie *Woman in Gold*,[76] was Maria Altmann's diversity action in California federal court against the Republic of Austria to return her family's Gustav Klimt paintings (particularly, *Adele Bloch-Bauer*, aka *The Woman In Gold*),[77] valued at the time at over $135 million, stolen by the Nazis then "assumed" by the Austrian government in its National Museum in Vienna at the end of World War II.[78] In *Republic of Austria v. Altmann*,[79] the Court did not delve into the nuances of personal jurisdiction, rather ruling upon the issue of Austria's sovereign immunity[80] and the fact that Austria's conduct preceded enactment of the U.S. Foreign Sovereign Immunities Act.[81] Thus, the case could proceed in the California federal district court as a diversity action. Austria ultimately settled and the paintings were returned.[82]

Finally, the most recent long-arm jurisdiction case addressed by the U.S. Supreme Court, again on the subject of an internationally-based company, was *Daimler AG v. Bauman*.[83] The case was brought by twenty-two residents of Argentina against Daimler (a German company) alleging tort claims for acts occurring in Argentina during its military dictatorship.[84] The case was brought in federal court in California even though none of the acts occurred in that state, or the U.S. itself, and the defendant's only relationship to the United States was through its Delaware-incorporated subsidiary based in New Jersey.[85] The Court firmly ruled that the California court had no jurisdiction over the case and the California long-arm statute did not extend to personal jurisdiction.[86]

Plaintiffs attempting to bring in foreign defendants often invoke "agency theory".[87] In Daimler, the plaintiffs argued that because the U.S. subsidiary was "important" to Daimler's overall organization, it is, in effect, the alter ego of the main line corporation on principal target of the case.[88] The Supreme Court in *Daimler* found the application of agency law too remote and insufficient to establish personal jurisdiction, stating that such an application would result in

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76. WOMAN IN GOLD (Origin Pictures 2015).

77. Carol Vogel, *Lauder Pays $135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006.

78. *Id.*

79. 541 U.S. 677 (2004).

80. *Id.* at 699–700.

81. 28 U.S.C. §§ 1330, 1602 (1976).

82. *See* Press Release, Neue Galerie, Neue Galerie New York Agrees to Acquire Spectacular Klimt Painting, "Adele Bloch-Bauer I" (June 19, 2006) (stating that the painting is now on permanent display at the Neue Galerie: Museum for German and Austrian Art in New York City).

83. 134 S. Ct. 746 (2014).

84. *Id.* at 750–51.

85. *Id.* at 752.

86. *Id.* at 761–62.

87. Keri Martin, *What Remains of Vicarious Jurisdiction for Establishing General Jurisdiction Over Corporate Defendants After Daimler AG v. Bauman?*, 12 SETON HALL CIR. REV. 1, 19 (2015).

88. *Daimler*, 134 S. Ct. at 758.

"an outcome that would sweep beyond even the 'sprawling view of general jurisdiction.'"[89] The Court, for now, has put a halt to this expansive view of general long-arm statute jurisdiction.

One other interesting jurisdictional aspect is the Court's allowance of personal jurisdiction if a non-resident is voluntarily found within the borders of a state and is served within that state.[90] This "tag or transient jurisdiction" from *Burnham v. Superior Court of California*[91] holds even if the presence was transient, brief, and unrelated to litigation.[92] While that appears to contradict other established prongs in establishing long-arm jurisdiction, for now it preserves an ancient aspect of law that a person physically in a jurisdiction and served therein is subject to that sovereign's laws.[93]

The Court's guidance on long-arm statute application for the most part has preceded the Internet age. All of its precedent cases to date involved actual physical presence in states and defined what type of such contacts were casual versus substantive.[94] Other cases involved use of the U.S. mail and/or were complicated by state licensure statutes [implicit acceptance of the state's jurisdiction], which provided *prima facie* evidence of personal jurisdiction.[95]

But the Internet poses a unique context yet to be explored by the Supreme Court. Today virtually any product or service may be purchased online. Indeed, the Internet also provides a dark conduit by which torts such as defamation, privacy, trespass, tortious interference, and infringement of intellectual property may take place outside the reach of the forum state. Some products such as software and information are actually delivered online. Hence, no physical presence or even "technically" physical delivery to a state from a remote location occurs.

A business may be located anywhere in the world and enter through a web portal. That Internet connection itself, being outside of the state's jurisdiction, may be covered by interstate commerce and, later, Federal Communications

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89. *Id.* at 760 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011)).

90. *See* Burnham v. Superior Court of California, 495 U.S. 604, 610–11 (1990) (explaining that a state can retain jurisdiction over an individual if the individual was found within its borders and was properly served with process).

91. *See id.* at 628 (holding that transient jurisdiction does not impede the due process rights of the defendant).

92. *Id.* at 612.

93. *Id.* at 621.

94. *See, e.g.*, *id.* at 616–18 (applying the concepts of continuous and systematic contacts and physical presence to the personal jurisdiction analysis); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (applying the concept of isolated contacts to the personal jurisdiction analysis).

95. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481 (1985) (stating that the defendant and plaintiff "carried on a continuous course of direct communication by mail and by telephone" and using this in the personal jurisdiction analysis).

Commission regulations.[96] Also, to the extent the connection is international, it may well be outside the limits of the judicial power of the United States altogether.[97] Physical products may be ordered online and delivered in interstate commerce by conventional methods of U.S. mail or express services. Other Internet issues involve disputes over intellectual property rights, contracts or torts such as defamation, privacy, and trespass of personal property.[98]

States are beginning to pass specific laws as to Internet trespass,[99] but while the statutes clarify the violations, the ability to bring non-resident violators into the jurisdiction of its courts remains problematic. Consider these three statutes from Georgia as examples:

> Ga. Code Ann. § 16-9-93(b) Computer Trespass: Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of: (1) deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network; (2) obstructing, interrupting, or in any way interfering with the use of a computer program or data; or (3) altering, damaging, or in any way causing the malfunction of a computer . . . .[100]

> Ga. Code Ann. § 16-9-93(c) Computer Invasion of Privacy: Any person who uses a computer with the intention of examining any employment, medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of computer invasion of privacy.[101]

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96. U.S. CONST. art. I, § 8, cl. 3; Communications Act of 1934, Federal Communications Act (1944 as amended), 47 U.S.C. § 151 *et seq.* (2012 & Supp. 2016); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. (6 Otto) 1, 1 (1877).

97. "Privacy and trespass of personal property" here involves the growing litigation via the Internet of a non-resident online hacking into a private computer to obtain personal information or installing malicious software on a non-consenting individual's computer. More recently, the commercial tactic of placing a tracking "cookie" on the computers of those who access a website is being struck down as a form of personal property trespass or other legal violation. Just recently, Verizon agreed to a consent order fine of $1.3 million by the Federal Communications Commission for such a violation. *In re* Cellco Partnership, 31 F.C.C. Rcd. 1843, 1854 (2016).

98. *Id.*

99. *See Computer Crime Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 12, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx (listing state's crime laws, including computer trespass).

100. GA. CODE ANN. § 16-9-93(b) (2011); Candace M. Williams & John R. Coleman, Jr., *Computer Trespassing: What You Should Know?*, COLEMAN, CHAMBERS, ROGERS & WILLIAMS, LLP, http://www.colemanchambers.com/Articles/Computer-Trespassing-What-You-Should-Know.shtml.

101. GA. CODE ANN. § 16-9-93(c).

> Ga. Code Ann. § 16-9-93(a) Computer theft: Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of: (1) taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession; (2) obtaining property by any deceitful means or artful practice; or (3) converting property to such person's uses in violation of an agreement or other known legal obligation to make a specified application of such property shall be guilty of the crime of computer theft.[102]

Internet purchases are no longer simple items such as books, movies, or general office supplies. They include sophisticated commercial, industrial, and consumer products such as appliances, machinery, automobiles, prescription drugs, and other products that, if defective, may result in tort damage claims and lawsuits.

Longstanding state franchise and dealership laws are being challenged in the automobile industry as the nascent "green" manufacturer, Tesla Motors, seeks to sell its cars exclusively over the Internet.[103] In a class action status, such cases would become classic diversity of citizenship federal actions. The questions then arise as to personal jurisdiction, state law, and application of the *Asahi Test*[104] posed to each federal judge on a case-by-case basis.[105]

Tesla Motors presents a yet-to-be-seen case in point. Tesla is a cutting edge auto manufacturer producing high-end electric automobiles.[106] Tesla is incorporated in Delaware and based in Palo Alto, California.[107] Unlike main-line auto manufacturers (e.g. General Motors, Ford, Chrysler, Toyota, etc.), Tesla

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102. GA. CODE ANN. § 16-9-93(a).

103. *See, e.g.*, Callum Borchers, *Automaker Tesla Looks to Bypass Car Dealers*, BOS. GLOBE MEDIA PARTNERS, LLC (Nov. 20, 2013), https://www.bostonglobe.com/business/2013/11/20/tesla-battles-auto-dealers-direct-sales-consumers/3f1xBFN21xH8QqQc3jijTP/story.htm; Stephen Edelstein, *Tesla Wins the Battle to Sell In Massachusetts. Which States are 'Pro-Tesla?,'* CHRISTIAN SCI. MONITOR (Sept. 18, 2014), http://www.csmonitor.com/Business/In-Gear/2014/0918/Tesla-wins-the-battle-to-sell-in-Masachusetts.-Which-states-are-pro-Tesla (describing the Massachusetts Supreme Judicial Court decision to uphold the lower court's dismissal of a suit against Tesla Motors brought by the state's automobile dealers association because the association did not have standing to sue Tesla Motors for operating a company-owned store).

104. Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113 (1987) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

105. *See id.* (explaining that the reasonableness of exercising jurisdiction depends upon the court's evaluation of several factors, such as the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief).

106. *See e.g.*, About Tesla, TESLA MOTORS, https://www.tesla.com/about (explaining that the founders of Tesla Motors wanted to prove that electric cars could be better than gasoline-powered cars and that Tesla is a company that focuses on energy innovation in addition to being an automaker).

107. SEC Filings, TESLA MOTORS, http://ir.tesla.com/secfiling.cfm?filingID=1564590-16-23024&CIK=1318605.

sells its cars exclusively through Internet orders.[108] It does not have physical dealerships or service centers but rather, "galleries" to display its cars in twenty-two states and the District of Columbia.[109] Customers can see the automobile but must still order online for home delivery.[110]

Suppose a Tesla customer in South Carolina purchased an automobile. (South Carolina has no Tesla Galleries).[111] The automobile proved to be defective and caused an actionable injury. Where would the plaintiff go to get relief? Would merely shipping a Tesla car into the state be sufficient contacts to file in state court or federal court? Or, are the Internet circumstances such that a South Carolina consumer would be forced into California jurisdiction?

There is no established immediate answer because neither the South Carolina General Assembly, by statute, nor the South Carolina Supreme Court, by opinion, has addressed a relevant Internet case on point to the applicability of its long-arm statute to non-resident Internet businesses.[112]

To help address this hypothetical question, this Article will look at how other states have handled personal jurisdiction over the Internet. Then it will address the potential situation in South Carolina.

II. LONG-ARM STATUTES AND THE INTERNET AMONG THE STATES

Over the years, while the Supreme Court grappled with the application of the long-arm statutes and personal jurisdiction of those in some form of physical presence in states, technology was making a monumental, transformational change establishing the world-wide online electronic marketplace we know today as the Internet. The Internet's origins go back to the 1960s in academic and military applications,[113] but with the advent of the personal computer (PC), advances in computing, and wireless and fiber optic transmission, by the early 1990s and fully by 1996, it had evolved into a global system that interconnects servers, mainframes, personal, and commercial computer networks, including shared cloud storage. The Internet allows instantaneous and interactive

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108. *See* Support, TESLA MOTORS, https://www.tesla.com/support/how-ordering-works (describing how ordering a Tesla is just like any other buying experience on the Internet).

109. *See* US Tesla Stores and Galleries, TESLA MOTORS, https://www.tesla.com/findus/list/stores/United% (listing galleries in the United States by state).

110. *See* Support: Test Drive, TESLA MOTORS, https://www.tesla.com/support/test-drive (explaining that Tesla vehicles are available to test drive at several locations and that each Tesla vehicle is custom built for each customer).

111. See US Tesla Stores and Galleries, *supra* note 109 (showing no gallery listings for South Carolina).

112. *But see* Brown v. Geha-Werke GmBH, 69 F. Supp. 2d 770, 775 (1999) (applying the long-arm statute of South Carolina to an Internet defendant).

113. *See* Ian Peter, *The Beginnings of the Internet*, NET HISTORY, http://www.nethistory.info/History%20of%20the%20Internet/beginnings.html (describing the Internet's beginning as an "unanticipated result" of an unsuccessful component of academic and military research).

connection with millions of people and businesses World-Wide. Messages are "e-mail" and purchases are often made via an electronic "shopping basket."

> The Internet has created an entire business function commonly referred to as e-business or e-commerce. E-business represents the use of Internet and business technology in a company's operations. Most companies in the business environment have implemented some form of Internet or business technology into their business operations. While some companies faced the major changeover when developing an e-business function, other companies may have been on the edge of this technology before the widespread use of the Internet.[114]

The spectacular growth of e-commerce may be demonstrated by the results of the U.S. Census Bureau's Fourth Quarter 2015 report for e-commerce sales.[115] Total e-commerce for the quarter was $107.1 billion, up 32% over 2014 compared with the overall sales market up only 1.6%.[116] For the year 2015, total e-commerce sales were estimated to be $341.7 billion, up 14.6%, compared to overall sales growth of 1.4%.[117] E-commerce represents 7.5% of total sales and is growing at an extremely large rate such that its proportion of the sector is estimated to double in three years.[118]

Retail figures pale in comparison with the volume of business-to-business (B2B) e-commerce. Estimates suggest that by 2020 over $6.7 trillion in sales and economic transactions will occur by Internet means.[119] But with all this volume of business transiting the Internet, disputes are bound to occur on contract, tort, product liability, intellectual property, and all manner of commercial law historically handled by federal courts in diversity lawsuits.

In fact, such disputes have been growing parallel to the growth of the Internet from the late 1990s.[120] To date, the issue of long-arm statutes and personal jurisdiction has been left to interpretation in state courts and federal districts, along with a few federal circuit court rulings.[121] However, twenty years

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114. Osmond Vitez, *The Effect of the Internet on Modern Businesses & Corporations*, HOUSTON CHRONICLE, http://smallbusiness.chron.com/effect-Internet-modern-businesses-corporations-896.html (last visited Oct. 20, 2016).

115. Press Release, U.S. Census Bureau, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER (2015).

116. *Id.*

117. *Id.*

118. *Id.*

119. Sarwant Singh, *B2B eCommerce Market Worth $6.7 Trillion by 2020; Alibaba & Amazon: China the Front Runners*, FORBES, Nov. 6, 2014.

120. *See* Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 12 DUKE L. & TECH. REV. 1, 7 (2011) (explaining the positive correlation between the increase of commercial activity through the Internet and the increase in legal disputes).

121. *Long-Arm Statutes: A Fifty-State Survey*, VEDDER PRICE (2003), http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf.

into the Internet, the U.S. Supreme Court has yet to take a decisive Internet case on par with *stare decisis* provided in *International Shoe* or *World-Wide Volkswagen.* States are thus left to their own devices to adjudicate jurisdictional issues.

> Courts addressing this issue today generally ask two questions: (1) Does a state or federal procedural rule or statute exist that provides for jurisdiction under the alleged facts and circumstances of the case? and (2) If so, are the procedural due process requirements of the respective state and federal constitutions sufficiently met?[122]

State approaches may be generally portrayed in two categories.[123] The first category is *passive* Internet websites.[124] These are informational or web portals in which individuals may obtain information and direction for transactions, but are not necessarily "interactive."[125] They may be considered the web page version of the phone book, yellow pages, or, more precisely, an "electronic" version of a highway billboard.[126] To date, courts have fairly consistently ruled that a mere web presence alone is insufficient to meet the "minimum contacts" test of *International Shoe.*[127] Along with due process concerns, such cases usually fail to meet long-arm standards.[128]

A. Passive Web Presence

For example, in Arkansas' *Smith v. Hobby Lobby Stores, Inc.* a manufacturer who placed an advertisement on the Internet was found to have insufficient minimal contact with the state to invoke personal jurisdiction.[129] Likewise, in Delaware's *Kane v. Coffman*, a posting made outside the state on the Internet but received by a person inside the state of Delaware failed to justify minimal contact for personal jurisdiction.[130]

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122. *Id.* at i.

123. Christopher Wolf, *The Evolving Test for Jurisdiction*, PROSKAUER ROSE LLP, http://cyber.law.harvard.edu/ilaw/Jurisdiction/Evolving_Test_for_Jurisdiction_Full.html.

124. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

125. *See id.* (explaining that passive websites do little more than provide information, but interactive websites allow users to exchange information with the host computer).

126. *See* Butler v. Beer Across Am., 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000) (describing a passive Internet site as "little more than an electronic billboard for the posting of information").

127. *See Zippo Mfg. Co.*, 952 F. Supp. at 1124 (explaining that because a passive website does little more than provide information, it is not a ground for the exercise of personal jurisdiction).

128. *See* Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 923 (D. Or. 1999) (stating that due process requires that personal jurisdiction be based on fairness; therefore, if the defendant does not have a "fair warning" that his activities on the Internet will subject him to the jurisdiction of a state, then personal jurisdiction is improper).

129. Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997).

130. Kane v. Coffman, No. 00C-08-236, 2001 WL 914016, at *5 (Del. Super. Ct. Aug. 10, 2001).

In some cases, even when a vendor offered business over the Internet, courts have shown a tendency toward denying personal jurisdiction.[131] Such was the case in Kansas in *D.J.'s Rock Creek Marina, Inc. v. Imperial Foam & Insulation Manufacturing Co.*[132] In this case, a supplier maintained an interactive website that could be accessed by Kansas residents, offering 122 products in forty-eight categories.[133] Customers could order via an online toll-free number and inquire for a price quote.[134] Nevertheless, because the supplier had no "traditional" forms of business contacts in Kansas,[135] and, the supplier had no actual Internet-based contacts with Kansas citizens within that state,[136] the court denied personal jurisdiction.[137]

B. Interactive Web Presence

If merely having a static presence on the Internet is insufficient "minimal contacts" and fails to meet the standard of "substantial and continuous local activity," then what about the contemporary e-commerce model in which web presence is fully interactive? Here, many state examples exist representing different degrees of definition and application.[138]

A number of states, including South Carolina, still have had no precedent-setting Internet jurisdiction cases. For those states that have, the general trend is to assert long-arm jurisdiction if the entity has an interactive website available to residents of the state in which those residents may access and do active business with the out-of-state business online.[139]

For example, in Connecticut a more aggressive trial court ruling in *Gates v. Royal Palace Hotel* held that concentrated online advertising within the state, active booking of reservations for Connecticut citizens, even by travel agents, and the invitation to state residents to make online reservations constituted in-

131. *See* Grimaldi v. Guinn, 895 N.Y.S.2d 156, 166–67 (2010) (stating that appellant-seller's website was "thoroughly passive in nature" and would not alone provide a basis for the assertion of personal jurisdiction).

132. *See* D.J.'s Rock Creek Marina, Inc. v. Imperial Foam & Insulation Mfg. Co., No. 01-4139-JAR, 2002 U.S. Dist. LEXIS 13470, at *16 (D. Kan. June 10, 2002).

133. *Id.* at *10.

134. *Id.*

135. *Id.*

136. *Id.* at *13.

137. *Id.* at *16.

138. Thomas A. Dickerson et al., *Personal Jurisdiction and the Marketing of Goods and Services on the Internet*, 41 HOFSTRA L. REV. 31, 51 (2012).

139. *See* Nelson v. Myrtle Beach Collegiate Summer Baseball League, LLC, No. 3:12CV1655 (JBA), 2013 WL 6273890, at *1, *3–4 (D. Conn. Dec. 4, 2013) (holding that the defendant's website contemplated interactivity on several levels, including commercial transactions, which supported a finding of personal jurisdiction).

forum state transactions of business on which personal jurisdiction was appropriately based.[140]

In Illinois, the court in *Aero Products International, Inc. v. Intex Corporation* (a case dealing with issues of federal patent and trademark law and state law deceptive trade practices and consumer fraud) allowed a finding of personal jurisdiction where the corporation sold products to Illinois residents over the Internet as well as in stores located in the state.[141]

In North Carolina, the basis for asserting legitimate personal jurisdiction over an out-of-state company was not only the website, but also the conduct of the parties by telephone and mail together with the online activity.[142] In *Replacements, Ltd. v. MidweSterling* (a case involving a charge of misappropriated trade secrets by a Missouri corporation), North Carolina's Appeals Court found that the Missouri firm had maintained a longstanding business relationship,[143] there was evidence of business transaction phone calls to the North Carolina business, and direct mail was sent to at least fifty residents of the state.[144] Moreover, the company advertised in media circulated throughout North Carolina in addition to its website, all available to state citizens.[145] The court considered this activity to be sustained and continuous enough to constitute more than minimal contact on which personal jurisdiction was properly based.[146]

In Oklahoma, the Tenth Circuit held in *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.* that the conduct of the Internet provider was sufficient to assert long-arm jurisdiction.[147] A defendant who suffered a marked slowdown in his e-mail running through plaintiff's server, even with knowledge of the effect, was sufficient to establish minimal contacts for personal jurisdiction.[148]

In New York, the Second Circuit upheld personal jurisdiction in a trademark infringement case, *Chloe v. Queen Bee of Beverly Hills, LLC*.[149] Here, a California resident online merchant was selling fake Chloe-branded handbags to residents of New York.[150] The court ruled that the seller's act of conducting substantial business activity with New York was more than sufficient to establish long-arm jurisdiction.[151]

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140. Gates v. Royal Palace Hotel, No. CV 9866595S, 1998 Conn. Super. LEXIS 3740, at *10 (Conn. Super. Ct. Dec. 30, 1998).

141. Aero Prods. Int'l v. Intex Corp., No. 02 C 2590, 2002 U.S. Dist. LEXIS 17948, at *24 (N.D. Ill. Sept. 19, 2002).

142. Replacements, Ltd. v. MidweSterling, 515 S.E.2d 46, 50 (1999).

143. *Id.* at 50.

144. *Id.* at 51.

145. *Id.*

146. *Id.*

147. Intercon, Inc. v. Bell Atl. Internet Sols., Inc., 205 F.3d 1244, 1249 (10th Cir. 2000).

148. *Id.* at 1248–49.

149. Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 165 (2d Cir. 2010).

150. *Id.* at 162.

151. *Id.*

Likewise, in *Penguin Group (USA), Inc. v. American Buddha*, Penguin, a New York-based publishing company, sued Buddha, an Oregon corporation with its principal place of business in Arizona, for copyright infringement.[152] The New York court, referencing New York's particular long-arm statute, found that for the purposes of a case on copyright infringement, New York could assert personal jurisdiction on *situs* grounds.[153] That is, the Internet is deemed the "situs of injury."[154] The court expounded that when one commits a tortious act over the Internet, he should expect consequences in the state from which the non-resident actor attains revenue.[155]

C. Sliding Scale Standards: The Zippo Test and the Calder Effects Test

An oft-cited case from Pennsylvania is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[156] In *Zippo*, the District Court for the Western District of Pennsylvania ruled that the mere conduct of e-commerce in the state with its residents constituted "personal availment" of doing business in the state.[157] The evidence included downloading messages and other commercial transaction interactions.[158] The case involved issues of trademark dilution, trademark infringement, and false designation.[159]

The Zippo Sliding Scale Test, as it is now known, calls for an analysis of a sliding scale which at one extreme finds a non-resident defendant actively doing business over the Internet in a forum state, while on the other extreme are non-resident defendants with simply a "passive" website or presence.[160] The mid-point of the scale is an interactive website that is primarily for the exchange of information.[161]

The court then determines the extent of "active business" that would qualify for personal jurisdiction in the forum, as well as the extent of "passive business" that would result in no personal jurisdiction.[162] The decision on personal jurisdiction in the middle part of the scale is a function of fact-based analysis as to the level of interactivity of the website, the nature and extent of information exchanged, and commercial activity conducted over the Internet in the forum state.[163]

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152. Penguin Grp. (USA) Inc. v. American Buddha, 946 N.E.2d 159, 165 (2011).
153. *Id.* at 165.
154. *Id.* at 161–62.
155. *Id.* 162. *See also* R. Michelle Boldon, *Long-Arm Statutes and Internet Jurisdiction*, 67 BUS. LAW 313, 314 (2011).
156. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).
157. *Id.* at 1125–26.
158. *Id.* at 1126.
159. *Id.* at 1121.
160. *Id.* at 1124.
161. *Id.*
162. *Id.*
163. *Id.*

(1) *Substantial* Internet business (personal jurisdiction is proper)

(2) *Interactive* Internet (personal jurisdiction may be proper depending on factual basis)

(3) *Passive* Advertising Internet (personal jurisdiction is never proper)

The *Zippo* Test has not subsequently been considered by federal circuit courts or the Supreme Court and remains persuasive authority when used in jurisdictional cases elsewhere.[164]

The Supreme Court in *Calder v. Jones* created another form of a sliding scale test, the *Calder Effects Test*.[165] Although the case and its precedent are primarily confined to matters in tort,[166] a number of states have developed "effects tests" with a common law "sliding scale" standard.[167] Yet, Smith has found that the test has little use in peer-to-peer transaction cases and libel cases over the Internet.[168] The standard, as established, while not specific to Internet cases, has been referenced in cyber cases to recognize Internet businesses.[169]

Nevertheless, the Supreme Court established three elements in the *Calder* Test on which personal jurisdiction findings are to be based.[170] Such elements would have particular applicability when applied to e-commerce cases: (1) intentional conduct; (2) expressly aimed at the forum state; and (3) with the defendant's knowledge that the effects would be felt in the forum state.[171]

An example of an "effects test" was employed in Texas in *Riviera Operating Corp. v. Dawson* in which the sliding scale approach was used to establish that the non-resident defendant's only contact with the state was by way of the Internet, which involved no business transactions or contracts.[172] Hence, personal jurisdiction was denied.[173]

Likewise, in Louisiana's *Crummey v. Morgan*, a purchaser of a recreational vehicle (RV) over eBay encountered defects in the RV for which the Texas seller

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164. Eric Hawkins, *General Jurisdiction and Internet Contacts: What Role, If Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 FORDHAM L. REV. 2371, 2385–88 (2006) (showing that no court has overruled the *Zippo* test and that many courts still apply it in their analyses).

165. 465 U.S. 783, 787 n.6 (1984).

166. *See id.* at 785 (stating that Respondent brought the suit against Petitioners "for libel, invasion of privacy, and intentional infliction of emotional harm").

167. *See, e.g.*, Erin F. Norris, *Why the Internet Isn't Special: Restoring Predictability to Personal Jurisdiction*, 53 U. ARIZ. L. REV. 1013, 1024 (2011) (citing *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 557–65 (M.D. Pa. 2009) (discussing how the "effects test" is one of the tests used to determine whether or not a state may exercise personal jurisdiction over a defendant).

168. Smith, *supra* note 11, at 852.

169. *See* Emissive Energy Corp. v. Spa-Simrad, Inc., 788 F. Supp. 2d 40 (2011); Abdouch v. Lopez, 829 N.W.2d 662 (2013); Young v. New Haven Advocate, 315 F.3d 256 (2002).

170. Norris, *supra* note 167, at 1020.

171. *Id.*

172. Riviera Operating Corp. v. Dawson, 29 S.W.3d 905, 911 (Tex. App. 2000).

173. *Id.*

would not assume responsibility.[174] Consequently, in response to the lawsuit, the sellers claimed Louisiana lacked personal jurisdiction over them.[175] The court ruled that because the sellers had regularly and continuously used eBay as an e-commerce means of doing business, personal jurisdiction was appropriate.[176]

One final test that has appeared in courts is the *Targeting Test or Approach*, which finds personal jurisdiction based on evidence that a non-resident defendant specifically targeted a forum state for online activities, commercial or otherwise.[177] This test has not been widespread and is controversial, but it is another attempt to craft some reasonable, defining criteria for personal jurisdiction at trial court levels.[178] Smith articulates the difficulty in providing a clear test:

> The fact that online activities are not fixed at a particular point in space frustrates attempts to analyze online interactions as if they take place in a forum state.[179]

With all the swirling activity of state court rulings and federal court decisions in diversity cases on long-arm jurisdiction, where are the limits of South Carolina's long-arm and potential handling of the ever-increasing e-commerce ongoing within the state?

D. Tax Jurisdiction Approach

The conventional interpretations of *International Shoe* and *World-Wide Volkswagen* have left wide ambiguities in the application of long-arm statutes to e-commerce, now left to the nuances of state-by-state interpretation.[180] But, one potential approach to resolving jurisdictional definition may come from an unlikely source: sales tax law policy and its attendant theories of tax jurisdiction. Ironically, *International Shoe*'s subject was tax jurisdiction.

In a case long before the advent of the Internet, the Supreme Court set the parameters for which states could assert jurisdiction on taxing non-resident entities within the limits of the Due Process Clause and interstate commerce. The Court in *Moorman Manufacturing Co. v. Bair*, consistent with *International*

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174. Crummey v. Morgan, 965 So. 2d 497, 499 (La. Ct. App. 2007).

175. *Id.*

176. *Id.* at 504.

177. Annie Soo Yeon Ahn, Note, *Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The Zippo Test and Pleading of Personal Jurisdiction*, 99 MINN. L. REV. 2325, 2325–2337 (2015).

178. *Id.* at 2337.

179. Smith, *supra* note 11, at 848.

180. *See* Richard A. Rochlin, *Cyberspace, International Shoe, and the Changing Context for Personal Jurisdiction*, 32 CONN. L. REV. 653, 654 (2000) (stating that "issues are being decided at the district court level with very little guidance" from the Supreme Court and that "courts have been forced to adapt to the *Shoe* framework" independently of one another).

Shoe, ruled: "(1) No tax may be imposed on interstate business unless there is minimal connection between the activities taxed and the taxing state, and (2) Income subject to the state tax must be rationally related to 'values connected with the taxing state.'"[181]

In opening the door to a vast electronic marketplace, the Internet also opened the door to buyers and sellers to transact business without paying sales tax in forty-seven of the fifty states.[182] The inability of states to enforce sales taxes on online purchases entering their states arises from a pre-Internet Supreme Court ruling dealing with catalog sales in *Quill Corp. v. North Dakota*.[183] *Quill* essentially further defined the *Moorman* Rule.[184]

In the nearly twenty-five years since *Quill*, e-commerce has exploded. The National Conference of State Legislatures (NCSL) estimates the annual loss of sales tax revenue to states by out-of-jurisdiction sales to state citizens is approximately $23.3 billion, of which approximately $11.4 billion is from e-commerce and grows each year.[185]

For the purposes of taxes, the Supreme Court ruled that the Due Process Clause did not require a physical presence in the state.[186] The fact that *Quill* intentionally directed its activities to residents of the state was sufficient to assert personal jurisdiction over a non-resident business:

> The Due Process Clause does not bar enforcement of the State's use tax against Quill. This Court's due process jurisprudence has evolved substantially since *Bellas Hess*, abandoning formalistic tests focused on a defendant's presence within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of the federal system of government, to require it to defend the suit in that State. Thus, to the extent that this Court's decisions have indicated that the clause requires a physical presence in a State, they are overruled. In this case, Quill has purposefully directed its activities at North Dakota residents, the magnitude of those contacts are

181. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978).

182. Alaska, Oregon, and Montana have no sales taxes but do have municipal option sales taxes. Michael J. Fleming, *States with No Sales Tax*, SALESTAXSUPPORT.COM, http://www.salestaxsupport.com/blogs/issues/sales-tax-basics/states-with-no-sales-tax/.

183. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

184. *See id.* at 308 (stating that the Due Process clause did not bar enforcement of the state's use of a tax against Quill because Quill had "purposefully directed its activities at North Dakota residents" and that the "magnitude of those contacts [was] more than sufficient for due process purposes").

185. *Collecting E-Commerce Taxes: Fairness Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL) (Nov. 14, 2014) http://www.ncsl.org/research/fiscal-policy/collecting-e-commerce-taxes-an-interactive-map.aspx.

186. *Quill*, 504 U.S. at 317.

> more than sufficient for due process purposes, and the tax is related to the benefits Quill receives from access to the State.[187]

However, the Court went on to further rule that North Dakota's sales tax was unconstitutional as a burden on interstate commerce, which is the exclusive jurisdiction of Congress under the Commerce Clause.[188] Thus, the Court delineated a jurisdictional "Catch-22":

> Contrary to the State's argument, a mail order house may have the "minimum contacts" with a taxing State as required by the Due Process Clause, and yet lack the "substantial nexus" with the State required by the Commerce Clause. These requirements are not identical and are animated by different constitutional concerns and policies. Due process concerns the fundamental fairness of governmental activity, and the touchstone of due process nexus analysis is often identified as "notice" or "fair warning." In contrast, the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy.[189]

In the end, the Court relied upon precedent from *Complete Auto Transit, Inc. v. Brady*, its Four-Part Test, and guidance from *National Bellas Hess, Inc. v. Department of Revenue of Illinois* in determining interstate commerce burden.[190] The *Complete Auto* Test factors to satisfy compliance with the Commerce Clause are:

(1) the tax must be applicable to substantial nexus with the taxing state;
(2) is fairly apportioned;
(3) does not discriminate against interstate commerce; and,
(4) is fairly related to services provided by the state.[191]

Bellas Hess requires, "sharp distinction . . . between mail-order sellers with . . . [a physical presence in the taxing] State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."[192]

The Court, at that time cognizant of the complexities of application to catalog sales, could not have imagined the even greater complications that would be posed over twenty years later by the advent of the Internet and e-commerce.

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187. *Id.* at 308.
188. *Id.*
189. *Id.* at 312, 313.
190. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1997).
191. *Id.* at 279.
192. *Quill*, 504 U.S. at 307.

Unwilling to make new law, the Court deferred the matter to be resolved by Congress:

> This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.[193]

While the *Quill* Court in explaining the *Bellas Hess* decision did not necessarily establish a "bright line" rule of physical presence, the reality of the application of *Quill* ever since, and its precedent basis of *Bellas Hess*, together with *Complete Auto*, effectively established not only a *bright line*, but a virtual insurmountable wall to states' attempts to assess sales tax jurisdiction on e-commerce absent a "physical" presence in a particular state.[194] Since 1992 states have attempted to impose voluntary use taxes upon its own citizens who buy over the Internet with scant voluntary taxpayer compliance. Congress has taken no action to date to enact legislation resolving or developing a national policy on e-commerce sales taxes.

After nearly a quarter century of losing tax jurisdiction and substantial revenue to e-commerce, states are fighting back in open defiance to force the Supreme Court to revisit *Quill* in light of the changed Internet marketplace. Effective January 1, 2016, Alabama enacted a law requiring out-of-state vendors to collect sales taxes if they have over $250,000 of e-commerce to citizens of Alabama.[195] The state asserts the theory that this level of volume constitutes "economic presence" for the purposes of jurisdiction.[196] A dozen states, which include Utah, Nebraska, Mississippi, and Louisiana are considering such laws,[197] and the NCSL is writing model legislation, all of which seeks to force the tax jurisdictional issue.[198]

This, too, presents its own complications. With local options by states, there are over 10,000 separate sales taxing districts in the U.S.[199] Nevertheless, if state

193. *Id.* at 318.

194. Hamilton Davison, *How State Revenuers Are Going After E-Commerce*, WALL ST. J., Mar. 11, 2016.

195. *Id.*

196. ALA. CODE § 40-23-1 (2015) ("a transaction shall not be closed or a sale completed until the time and place when and where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent, and for the purpose of determining transfer of title, a common carrier or the U. S. Postal Service shall be deemed to be the agent of the seller, regardless of any F.O.B. point and regardless of who selects the method of transportation, and regardless of by whom or the method by which freight, postage, or other transportation charge is paid.").

197. Davison, *supra* note 194.

198. *Id.*

199. *Id.*

challenges are successful at the Supreme Court level, such transformational definition will inure beyond taxes to liability, tort and other legal issues related to e-commerce activity.

III. SOUTH CAROLINA: HOW LONG IS ITS ARM?

South Carolina, not unlike other states, maintains a statutory long-arm statute.[200] The statutory application of personal jurisdiction arose from the revision of the Uniform Sales Act out of the National Conference of Commissioners in 1902.[201] The statute was subsequently introduced as part of South Carolina's adoption of the Uniform Commercial Code in 1962.[202] South Carolina Code section 36-2-803 states:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
>
> (2) contracting to supply services or things in the State;
>
> (3) commission of a tortious act in whole or in part in this State;
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he 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; or
>
> (5) having an interest in, using, or possessing real property in this State; or
>
> (6) contracting to insure any person, property or risk located within this State at the time of contracting;
>
> (7) entry into a contract to be performed in whole or in part by either party in this State; or

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200. S.C. CODE ANN. § 36-2-803 (2012).

201. *See* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 82 (1995) (showing that not all states were on board with the new revisions, so there was no uniformity among jurisdictions).

202. § 36-2-803 (previously appearing under § 10.2–803).

> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.
>
> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100 (3).[203]

While the plain reading of the statute would suggest a fit with application to e-commerce/Internet activity, the state judiciary has yet to make such an interpretation and remains a strict adherent to due process concerns: "South Carolina enacted its version of the long-arm statute in 1966 and it has been interpreted to extend to the outer limits of the Due Process Clause."[204]

South Carolina courts have interpreted the long-arm statute as it applies to businesses in the state and those with a physical presence of more than *minimal contacts*, which provides a glimpse at possible application should the South Carolina Supreme Court ultimately take a precedent-setting case. That likelihood increases over time as South Carolina, and the rest of the nation, experiences continued rapid growth of e-commerce over the Internet.[205] A further elaboration of personal jurisdiction was enacted to clarify jurisdiction based upon "an enduring relationship:"

> A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.[206]

South Carolina, with a population of over 4,000,000 people (about 1% of the U.S. population),[207] is one of the fastest growing states in the Union. It has attracted substantial Internet businesses to locate in the state, such as Monster.com (Florence),[208] Amazon.com (Lexington),[209] and STARTEK

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203. *Id.*

204. Meyer v. Paschal, 330 S.C. 175, 181, 498 S.E.2d 635, 638 (1998) (citing S.C. CODE ANN. § 36-2-803 (1976)).

205. *See* Frank A. Rainwater & Gordon O. Shuford, *South Carolina E-Commerce Sales and Use Tax Revenue Estimates for FY2014-2015*, S.C. BOARD OF ECONOMIC ADVISORS 1 (Dec. 3, 2013) http://www.rfa.sc.gov/files/E-Commerce_sales_tax_analysis_for_FY_2014-15_with_cover_page.pdf. (discussing South Carolina's economic growth through e-commerce).

206. S.C. CODE ANN. § 36-2-802 (2012).

207. U.S. CENSUS BUREAU, AMERICAN FACT FINDER ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR SELECTED AGE GROUPS BY SEX FOR THE UNITED STATES, STATES, COUNTIES AND PUERTO RICO COMMONWEALTH AND MUNICIPIOS (2015).

208. Press Release, S.C. Dep't of Commerce, Monster Begins Recruitment for Customer Service Center in Florence, South Carolina (July 21, 2008).

209. Press Release, S.C. Dep't of Commerce, Amazon Announces New Facility in Spartanburg County, South Carolina (Jan. 23, 2012).

(Myrtle Beach),[210] among other Internet entrepreneurial businesses.[211] South Carolina citizens are active-continuous users of e-commerce, spending an estimated $5.1 billion via the Internet.[212] One would be hard-pressed to find any bank or credit union in the state that does not provide business or personal customers with online account transaction capacity. The state has become a center of national and international manufacturing including BMW, Boeing, Volvo, Daimler-Benz, Michelin, Bridgestone, and Continental Tire (all whom engage in business-to-business e-commerce).[213] Amazon.com, perhaps *the* leading Internet sales and distribution business, now has a distribution center (and thus physical presence) in Lexington, South Carolina, with over 1,200 jobs and is in the process of building a second e-commerce distribution center in Spartanburg, South Carolina.[214]

A. South Carolina Personal Jurisdiction Application

Both the South Carolina General Assembly and the South Carolina Supreme Court have maintained a relatively strict adherence and interpretation of long-arm statute jurisdiction.[215] The statute itself signals such intent. For example, the legislature stated in section 2 of the Act that the eight enumerated instances of personal jurisdiction were the sole basis for applying personal jurisdiction to an out-of-state person.[216] Further, the General Assembly expressed that a change of jurisdiction cannot be created simply for the convenience of parties or witnesses.[217]

In the wake of *International Shoe* and *World-Wide Volkswagen*, South Carolina courts have followed the established tests set by the U.S. Supreme Court. Shortly before *World-Wide Volkswagen*, however, the South Carolina Supreme Court ruled in favor of long-arm-jurisdiction in a case of a non-resident seed company shipping products into the state, finding no violation of due process. Ruling in *Jenkinson v. Murrow Brothers Seed Co., Inc.*, the court noted:

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210. Press Release, S.C. Dep't of Commerce, StarTek, Inc. Selects Horry County for Customer Service Center (Dec. 16, 2013).

211. *See generally* S.C. DEP'T OF COMMERCE, DISTRIBUTION CENTERS AND LOGISTICS COMPANIES (2014), http://sccommerce.com/sites/default/files/document_directory/distribution_and_logistics_companies_nov_2014.pdf. (detailing the distribution and logistics centers, including those of Internet entrepreneurial businesses, located in South Carolina).

212. Rainwater, *supra* note 205.

213. Jeff Wilkinson, *Auto Industry Expansion Across South Carolina Causing Economic Tidal Wave*, THE STATE, (S.C.), Mar. 7, 2015.

214. Press Release, S.C. Dep't of Commerce, Amazon Announces New Facility in Spartanburg County, South Carolina (Jan. 23, 2012).

215. *See generally* Timothy Clardy, *Nonresident Defendants Don't Deserve Convenience or Justice in South Carolina?*, 55 S.C. L. REV. 443 (2004) (discussing South Carolina's application of long-arm statute jurisdiction).

216. S.C. CODE ANN. § 36-2-803 (2012).

217. *Id.*

> It is inferable from the complaint that Murrow certified the seed and shipped them to South Carolina ". . . with the reasonable expectation that these goods are to be used and consumed in this State . . . and that they are so to be used. Accordingly, the activity of the defendant comes within the provision of the [long-arm] statute, and jurisdiction exists unless the assumption of jurisdiction would violate due process.[218]

While *Jenkinson* would seem to provide good precedent for Internet jurisdiction to those shipping into the state, South Carolina courts later cautioned such cases do not normally set a general rule.[219] The South Carolina Supreme Court articulated in *Moosally, et. al. v. W.W. Norton & Co., Inc.* that each case must be viewed on merits and its own fact basis.[220]

State courts, however, in evaluating the *minimal contacts* prong and the *sustained and continuous* prong of personal jurisdiction, simultaneously evaluate these factors together with its due process analysis to reach the outer bounds permitted by due process.[221] The Fourth Circuit, of which South Carolina is a member, reiterated this principle in *ESAB Group, Inc. v. Centricut, Inc.*[222] In establishing jurisdiction of a personal or general nature, the court instructed that "the defendant's actions must be directed at a forum state in more than a random, fortuitous, or attenuated way."[223]

The court in *Cockrell v. Hillerich & Bradsby Co.* provided additional guidance from the South Carolina Supreme Court:

> because South Carolina treats its long-arm statute as coextensive with the Due Process Clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.[224]

Citing *World-Wide Volkswagen*, the court further stated:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather it is that the defendant's conduct and connection with the forum state are

218. Jenkinson v. Murrow Bros. Seed Co., 272 S.C. 148, 151, 249 S.E.2d 780, 781 (1978).

219. Moosally v. W.W. Norton & Co., 358 S.C. 320, 332, 594 S.E.2d 878, 884–85 (Ct. App. 2004) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Sec. Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000)).

220. *Moosally*, 358 S.C. at 327, 594 S.E.2d at 888 (stating that each case must be decided on its own merits) (citing Engineered Prods. v. Cleveland Crane & Eng'g, 262 S.C. 1, 201 S.E.2d 921 (1974)).

221. Fed. Ins. Co. v. Lake Shore Inc., 886 F.2d 654, 657 n.2 (4th Cir. 1989).

222. ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617 (4th Cir. 1997).

223. *Id.* at 625.

224. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005).

> such that he should reasonably anticipate being hauled into court there.[225]

Therefore, the test articulated by South Carolina's Supreme Court for fairness is:

> (1) the duration of the activity of the nonresident within the state;
> (2) the character and circumstances of the commission of the non-resident's acts;
> (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and
> (4) the State's interest in exercising jurisdiction.[226]

Likewise, the Fourth Circuit's test is similar to that of *Hansen*, *International Shoe*, and *World-Wide Volkswagen*:

> (1) the extent the defendant purposefully avails [him or herself] of the privilege of conducting activities in South Carolina;
> (2) whether the plaintiff's claims arise out of those activities directed at South Carolina; and,
> (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.[227]

The facts posed in *Cockrell* proved too remote to justify personal jurisdiction in South Carolina. The subject of the case was a student injured by an aluminum baseball bat manufactured out-of-state.[228] However, *Moosally* provides a potential foretelling of the application of law to a similar Internet case in the future. *Moosally* involved a libel action against an author, CBS *60 Minutes*, and the publisher.[229] While the court found no personal jurisdiction for the author or CBS network (both "merely providing information"),[230] it did find long-arm jurisdiction applying to the book publisher, W. W. Norton:[231]

> The book had been distributed throughout the United States, including South Carolina . . . the Court of Appeals found that the court had personal jurisdiction over the book publisher because it conducted business in the state, selling books in approximately 315 bookstores in the state, and probably selling at least one copy of each title in South

225. *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
226. *Id.* (citing Clark v. Key, 304 S.C. 497, 501, 405 S.E.2d 599, 601 (1991)).
227. ALS Scan, Inc. v. Dig. Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002).
228. *Cockrell*, 363 S.C. at 489, 611 S.E.2d at 507.
229. *Moosally*, 358 S.C. at 326, 594 S.E.2d at 881.
230. *Id.* at 333, 594 S.E.2d at 885.
231. *Id.* at 336, 594 S.E.2d at 887.

> Carolina, in addition to conducting other business activities that amounted to directing its activities at South Carolina residents.[232]

The *Moosally* standard would appear to hold well to many Internet/e-commerce providers. But, even here the element of some "physical presence" plays a critical role in the court's judicial thinking. Perhaps it might well apply to Amazon.com who now has physical presence in the state. But, what about major online retailers who have physical presence in other states, but not South Carolina? These include department store giants such as Macy's and Lord & Taylor, as well as large, national catalog companies like LLBean. Thus, now comes the proverbial question about personal jurisdiction for online automobile sellers such as Tesla.

Federal courts in the District of South Carolina have followed the lead of the South Carolina Supreme Court,[233] though fine differences have arisen in a number of cases. For example, in *Magic Toyota, Inc. v. Jones*, the court found that while the defendants had very little evidence of committing any unlawful actions themselves in South Carolina, their agency relationship as corporate officers evidenced personal involvement in decisions and actions that had a causal relationship to South Carolina, for which their responsibility was foreseeable.[234] Hence, personal jurisdiction was allowed.

Nevertheless, South Carolina federal judges, cognizant of precedent and Federal Rule of Civil Procedure 4, do not normally deviate from South Carolina's current strict personal jurisdictional practice.

IV. THE INTERNET'S UNKNOWN JURISDICTION IN SOUTH CAROLINA

A fundamental tenet in effective business management and planning is the ability to assess risk in order to make reasoned business judgments on behalf of business owners and investors. *Risk* is a function of uncertainty.[235] *Uncertainty* in business is not a benign, theoretical concept nor a free good. Rather, it is a business condition that underlies insurance and, hence, a significant cost of doing business is the procurement of general liability, directors and officers, and other insurance/risk management products necessary to protect the organization in the modern, highly litigious and regulatory legal environment.

One survey of major corporations found among other things:

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232. *Id.* at 335–36, 594 S.E.2d at 886 (citing Engineered Prods. v. Cleveland Crane & Eng'g, 262 S.C. 1, 201 S.E.2d 921 (1974)).

233. *See, e.g.*, Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc., 784 F. Supp. 306 (D.S.C. 1992) (ruling in adherence to previous South Carolina Supreme Court decisions).

234. *Id.* at 315.

235. Kyra Sheahan, *Business Risk Assessment*, HOUSTON CHRONICLE, http://smallbusiness.chron.com/business-risk-assessment-97.html (last visited Oct. 20, 2016).

- The average outside litigation cost per respondent was nearly $115 million in 2008, up 73% from $66 million in 2000. This represents an average increase of 9% each year.
- For the twenty companies providing data on this issue for the full survey period, average outside litigation costs were $140 million in 2008, an increase of 112% from $66 million in 2000.
- Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78% for the fourteen companies providing data on average litigation costs as a percent of revenues for the full survey period.
- For the thirty-six surveyed companies total 2008 litigation costs were $4.1 billion.[236]

Key among business risks in the modern day environment of e-commerce is the ability to recognize and make contingency for legal risk exposure when entering markets in each U.S. state, as well as in global transnational business. After all, this is the essence of the *fair notice* requirements of due process. Long held since the Supreme Court's ruling in *Mullane v. Central Hanover Bank & Trust Co.*, notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[237]

But what state, what standard, and what interpretation? As Denis T. Rice points out, the Internet transcends geographical bounds and, for the first time, presents the legal environment with actors who operate outside the long-arm of one state, but through technology enter the state electronically with more than "minimal contacts" for "sustained and continuous business," yet may have absolutely no physical presence nor nexus outside the Internet pipeline.[238]

> The Internet, as a novel medium of commerce and communication, raises two fundamental jurisdictional issues. First, the Internet diminishes the significance of the physical location of parties involved in a transaction. Such diminution results from the fact that transactions in cyberspace, strictly speaking, do not take place in any particular geographic location or jurisdiction. Second, the Internet alters the balance of power between buyer and seller. It arms buyers with masses of information and new analytical tools, such as cyberagents known as "bots." Also, by rendering geographical limitations almost entirely

236. Lawyers for Civil Justice et al., Address at Duke Law School Conference on Civil Litigation: Litigation Cost: Survey of Major Corporations 2–3 (May 10–11, 2010).

237. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

238. Denis T. Rice, *Jurisdiction in Cyberspace: Which Law and Forum Apply to Securities Transactions on the Internet?*, 21 U. PA. J. INT'L ECON. L. 585, 598 (2000).

irrelevant, the Internet shifts the balance of power between buyer and seller.[239]

South Carolina is surrounded by adjacent states who have established personal jurisdiction standards for Internet/e-commerce under particular conditions.[240] This Article previously discussed North Carolina's status in the *Replacements Ltd.* case where the courts ruled that interactive web presence was sufficient contacts to establish long-arm jurisdiction.[241]

In Georgia, the Georgia Court of Appeals in *Aero Toy Store, LLC v. Grieves* found that since the defendant, Aero, operated an interactive website through which it reached out to and did business with persons in Georgia, personal jurisdiction was established.[242] The small amount of revenue generated was irrelevant to the fact that the Internet site was active and available to Georgia residents.[243]

In Florida, the question of cyber jurisdiction was answered by way of a certified question to the Eleventh Circuit Court of Appeals in *Internet Solutions Corp. v. Marshall*, a case involving a tortious act committed over the Internet.[244] The Court affirmed that presence in the state is not necessary to establish long-arm jurisdiction.[245] Citing its decision in *Renaissance Health Publishing LLC v. Resveratrol Partners, LLC*, Florida's high court held that the selling of books through an active website was sufficient evidence of more than minimal contacts and continuous interaction with Florida residents relevant to personal jurisdiction.[246] Hence, an interactive website accessible in Florida to Florida residents is sufficient.[247]

Tennessee takes a stricter approach more analogous to South Carolina, but with a three-prong test that provides greater clarity for when an Internet-related

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239. *Id.* at 585.

240. *See generally* Replacements, Ltd. v. MidweSterling, 515 S.E.2d 46, 51 (N.C. Ct. App. 1999) (determining that North Carolina courts may have jurisdiction over companies that advertise through mail and on websites that are available to North Carolina citizens). *See also* Internet Solutions v. Marshall, 39 So. 3d 1201, 1203 (Fla. 2010) ("Because the Florida Supreme Court concluded that Marshall committed a tortious act in Florida by posting allegedly defamatory material about ISC that was accessible in Florida . . . she is accordingly subject to the Florida long-arm statute."); Aero Toy Store, L.L.C. v. Grieves, 631 S.E.2d 734, 741 (Ga. Ct. App. 2006) (holding that Georgia courts have personal jurisdiction over disputes arising between a Georgia citizen and an out-of-state seller concerning a disputed Internet auction).

241. *Replacements, Ltd.*, 515 S.E.2d at 51.

242. Aero Toy Store, LLC v. Grieves, 631 S.E.2d 734, 741 (Ga. Ct. App. 2006).

243. *Id.* at 740–41.

244. *Internet Sols.*, 39 So. 3d at 1215 (answering certified question of whether defamatory posts about a Florida corporation on an out-of-state website constitute a tortious act within Florida's long-arm statute).

245. *Id.* at 1215–16.

246. *Id.* at 1211 (citing Renaissance Health Publ'g, LLC v. Resveratrol Partners, LLC, 982 So. 2d 739, 742 (Fla. Dist. Ct. App. 2008)).

247. *Id.* at 1214.

case may incur long-arm statute jurisdiction. To meet this burden a plaintiff must show:

(1) defendant availed himself of the privilege of acting in the forum state or causing consequences in the forum state;
(2) the cause of action arises from defendant's activities there; and,
(3) the acts of the defendant must have substantial enough connection to the forum state to make the exercise of jurisdiction over the defendant reasonable.[248]

Finally, should the states challenging *Quill* prevail in the U.S. Supreme Court, the South Carolina Sales and Use Tax Act may work well in establishing a judicial basis long-arm jurisdiction in other cases. The Act's definitions establishing tax jurisdiction clearly presume business conduct of a non-resident business, as opposed to simply a physical presence.[249] This is explicitly the case as enumerated in 1(f) and 2(b) of the Act. Thus, no change in legislation would be needed if *Quill* were overturned all or in part. South Carolina Code section 12-36-70 states:

> "Retailer" and "seller" include every person: (1)(a) selling or auctioning tangible personal property whether owned by the person or others; (b) furnishing accommodations to transients for a consideration, except an individual furnishing accommodations of less than six sleeping rooms on the same premises, which is the individuals place of abode; (c) renting, leasing, or otherwise furnishing tangible personal property for a consideration; (d) operating a laundry, cleaning, dyeing, or pressing establishment for a consideration; (e) selling electric power or energy; (f) selling or furnishing the ways or means for the transmission of the voice or of messages between persons in this State for a consideration. A person engaged in the business of selling or furnishing the ways or means for the transmission of the voice or messages as used in this subitem (f) is not considered a processor or manufacturer; (2)(a) maintaining a place of business or qualifying to do business in this State; or (b) not maintaining an office or location in this State but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter or by any other means, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in this State. The department, when necessary for the efficient administration of this chapter, may treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or

248. LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 4.4 (2005 ed.).
249. South Carolina Sales and Use Tax Act, S.C. CODE ANN. § 12-36-5 (2016).

> other person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The department may also treat the dealer, distributor, supervisor, employer, or other person as a retailer for purposes of this chapter.[250]

V. CONCLUSION

South Carolina remains a personal jurisdiction legal "donut hole" among the Southeastern states regarding application of long-arm statutes to non-resident Internet actors. For those actors entering the budding industrial and consumer market in South Carolina via the Internet, legal uncertainty remains a certainty.

The issue of providing clear rules for personal jurisdiction in Internet commerce is not merely a theoretical issue confined to the annals of legal journals and law reviews. It is, to be sure, a bottom-line cost, risk, and management diversion in doing business that impedes effective interstate commerce and ultimately, the cost and availability of products. Annie Ahn sums this issue succinctly:

> [T]he lack of clarity in the rules for personal jurisdiction and jurisdictional discovery creates problems for businesses and sellers who are uncertain about the kinds of activities that might subject them to jurisdiction in a particular state and the burdens that may follow. This uncertainty discourages businesses that are worried about the costs of litigation from using the Internet to share information and engage in business transactions, thus inhibiting their growth and ability to compete.[251]

Indeed, South Carolina could provide clarity to those entering the state by way of e-commerce as to their exposure to its forum and long-arm personal jurisdiction for doing business in South Carolina. Such action would put the state squarely in line with the Supreme Court's ruling in *Burger King Corp. v. Rudzewicz*. The case established that when a non-resident has *fair notice* that its substantial and continuing business relationship in a state may subject the non-resident to suit and personal jurisdiction in the forum state, the test of fairness in

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250. *Id.* § 12-36-70.

251. Ahn, *supra* note 177, at 2327 (citing Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189–90 (1998)) (describing the minimum contacts test's lack of clarity).

due process has been met.[252] Indeed, South Carolina's sales tax statute carries that implication insofar as tax jurisdiction is concerned.[253]

Thus, the issue of "fair notice" may arise in one of three ways:

(1) test case involving a certified question to the South Carolina Supreme Court from the U.S. Fourth Circuit Court of Appeals;
(2) case ruling by the South Carolina Supreme Court, itself; or
(3) statutory action by the South Carolina General Assembly.

VI. IS THERE AN "EFFECTS" TEST IN THE JURISDICTIONAL FUTURE?

What does the future look like for personal jurisdiction long-arm statutes? This Article predicts that the courts and/or Congress will be compelled by the very nature and extent of Internet e-commerce to move from the current *Presence* standard to some form of *Effects* standard in defining jurisdiction for the future. Using *Effects* or *commercial impact* as a basis fits well with the Internet and its longstanding federal jurisprudence, particularly in commerce and anti-trust cases.

In the nation's earliest commerce case, *Gibbons v. Ogden*, the Supreme Court recognized local commercial "intercourse" that substantially affects interstate commerce and is thus subject to Congress' interstate commerce power.[254] A half-century later in *Munn v. Illinois*, the Supreme Court established that local commerce having a "close and substantial" effect on interstate commerce was sufficient to establish federal interstate commerce jurisdiction.[255]

Almost a century after *Gibbons*, railroads were a precursor of the current Internet issue having the ability to transcend state lines or operate totally within state lines. *Houston, East & West Texas Railway Co. v. United States*, part of *The Shreveport Rate Cases*, again established the multi-state effects of local activity that leads to federal jurisdiction:

> [I]n all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance . . . [and when] the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule,

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252. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985).

253. *See* S.C. CODE ANN. § 12-36-5 to -150 (1990) (defining "transient construction property" to include machinery and other construction-related property brought into the state of South Carolina for construction projects in the state for use in the South Carolina Sales and Use Tax Act).

254. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

255. Munn v. Illinois, 94 U.S. (4 Otto) 113 (1876).

> for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the nation would be supreme within the national field.[256]

Finally, an example is the famous case of *Wickard v. Filburn*.[257] A farmer who engaged strictly in intrastate commerce with no tangible effect beyond even his own farm was nonetheless deemed to be under federal interstate commerce jurisdiction.[258] The Court, in preserving President Roosevelt's Second Agricultural Adjustment Act, invented the concept of "Hypothetical Close and Substantial Effect."[259] That is, if every small farmer were to collectively engage in the same behavior, then there would be a close and substantial effect on interstate commerce.[260]

Both the nineteenth and twentieth century cases universally involved states placing impediments by state regulation or state tax policy on interstate commerce. The courts asserted Congress as the sole arbiter of appropriate jurisdiction.[261] To be sure, in the twenty-first century, which is characterized by a well-established and growing system of e-commerce, the tables have turned. Federal interstate commerce jurisprudence, primarily following *Quill*, has usurped traditional state police and taxing powers over its citizens, and provided an unintended safe harbor to non-resident businesses.[262]

Toward the end of the twentieth century, the Court provided a glimpse of bright line boundaries to federal jurisdiction overreach into classic state police powers. In *United States v. Lopez* and *United States v. Morrison*, the Court eschewed attempts to use the Commerce Clause as a means to federalize traditional state crimes.[263] Nevertheless, the legal principles that currently remain hold that federal commercial jurisdiction will be limited to economic or commercial activities that, in the aggregate, have a substantial effect on interstate commerce, thus precluding state jurisdiction.

An *Effects Test* basis for establishing personal jurisdiction has arisen in some state courts and federal circuit courts. In *CompuServe, Inc. v. Patterson*, the Sixth Circuit stated, "if a defendant's contacts with the forum state are related to

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256. Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914).

257. Wickard v. Filburn, 317 U.S. 111 (1942).

258. *Id.* at 127–28.

259. *Id.*

260. *Id.* ("Home-grown wheat in this sense competes with wheat in commerce . . . [and] would have a substantial effect in defeating and obstructing" the purpose of the Act).

261. *Gibbons*, 22 U.S. at 1.

262. *Houston*, 234 U.S. at 351–52.

263. *See generally* United States v. Morrison, 529 U.S. 598 (2000) (invalidating the civil remedy provision of the Violence Against Women Act as exceeding Congress' Commerce Clause powers since gender-motivated crimes of violence were not economic activity that substantially affected interstate commerce). *See also* United States v. Lopez, 514 U.S. 549 (1995) (overturning a federal statute that made possession of a firearm in a school zone a felony as exceeding Congress' Commerce Clause powers since possession of a firearm in a school zone was not economic activity that substantially affected interstate commerce).

the operative facts of the controversy, then an action will be deemed to have arisen from those contacts."[264]

In *Kauffman Racing Equip., LLC v. Roberts*, a case that fits precisely within the jurisdictional issue posed by e-commerce, Ohio's Supreme Court ruled that "[g]eneral jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state."[265]

Bit by bit, Effects-based long-arm cases proceed in various jurisdictions. However, the Supreme Court has yet to rule on the applicability of this line of legal reasoning extending long-arm jurisdiction beyond the parameters of the Court's previous cases. South Carolina's Supreme Court has followed likewise.

Jurisdictional theories at this time remain just that—theories—that provide good fodder for legal discourse and discussion. Such theories rest on the doorstep of Congress for legislators to address or for the Supreme Court to resolve in light of the substantial change in business practices since the 1940s posed by the operation of the Internet.

South Carolina's federal courts remain strictly adherent to precedents discussed previously in this Article. Indeed, a recent case, *Power Beverages, LLC v. Side Pocket Foods Co.*, presents an object example. Power Beverages, a South Carolina company, contracted with Side Pocket, an Oregon company to produce Ying Yang vodka.[266] A dispute arose in which Power Beverages alleged breach of contract, fraud and unfair trade practices.[267] As a diversity of citizenship case, Power Beverages filed in U.S. District Court of South Carolina alleging jurisdiction based upon application of an *Effects* test:

(1) Side Pocket committed an intentional tort;
(2) Power Beverage felt the brunt of the harm in South Carolina, thus the focal point of the matter; and
(3) Side Pocket's conduct was aimed as such at the forum that it could be said South Carolina was the focal point.[268]

Power Beverage also asserted that Side Pocket shipped goods into the state to be consumed in the state, maintained inventory in South Carolina, and appointed a distributor as its agent in the state.[269]

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264. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).

265. Kauffman Racing Equip., LLC v. Roberts, 930 N.E.2d 784, 792 (2010).

266. Power Beverages, LLC v. Side Pocket Foods Co., No. 6:12-CV-00931-TMC (D.S.C. Jan. 22, 2013) (opinion and order) (following precedential standards to determine that the court had no personal jurisdiction in this action and transferring the case to another jurisdiction).

267. *Id.* at *3.

268. Lee E. Berlik, *Feeling the Effects of Out-of-State Conduct Won't Guarantee Personal Jurisdiction Over Nonresident*, VIRGINIA BUSINESS LITIGATION BLOG (Feb. 1, 2013), https://www.virginiabusinesslitigationlawyer.com/2013/02/feeling-the-effects-of-out-of.html.

269. *Power Beverages*, at *5.

Notwithstanding these assertions, the district court found that the parties' contact was primarily negotiated, executed, and mainly to be performed in Oregon.[270] Factors normally found to show a physical presence in the state were absent (official agent, employees, business license, incorporation, and facilities) and the court held that minimum contacts could not be established.[271] The court dismissed the case, transferring it to the District of Oregon.[272]

Until the South Carolina Supreme Court issues a ruling defining personal jurisdiction requirements in the cyber context or the South Carolina General Assembly enacts specifically-tailored language defining non-resident actors in Internet/e-commerce and establishes "fair notice" of exposure to forum and jurisdiction, the question of, "*How Long Is South Carolina's Arm*?" will remain unanswered. Internet commercial uncertainty will remain a business certainty and a prohibitive cost of doing business in the Palmetto state.

270. *Id.* at *8.
271. *Id.*
272. *Id.* at *11.