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COMMENT

NONRESIDENT JURISDICTION IN WYOMING: AN ANALYSIS OF JURISDICTION IN PRODUCTS LIABILITY AND LIBEL LITIGATION

INTRODUCTION

In 1967, the Wyoming Legislature passed a long-arm statute.[1] Its stated purpose was "to increase the protection which Wyoming's courts can provide its citizens, by enlarging the personal jurisdiction of Wyoming courts over persons outside Wyoming and providing additional methods of service of process."[2] Based on the only major case[3] decided under this statutory scheme by the Wyoming Supreme Court, it is arguable whether this purpose has been fulfilled by the statute. The decision has been criticized in a prior issue of the *Land and Water Law Review*.[4]

Wyoming's long-arm statute has also been interpreted three times recently in the Federal District Court for Wyoming. In the first of these decisions,[5] it appeared that a liberal approach consonant with the purpose of the statute was being adopted. However, two later decisions involving products liability[6] and libel[7] indicate that a more restrictive analysis may also be employed at the federal level in Wyoming.

The purpose of this article is to discuss the jurisdictional problem in Wyoming. A general background is followed by an in-depth analysis of the jurisdictional problem in two contexts—products liability and libel. These two areas of concentration have been chosen because of the recent deci-

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1. WYO. STAT. §§ 5-4.1 to -4.3 (Supp. 1975).
2. Ch. 237, [1967] Sessions Laws of Wyoming 689. For a general discussion of the statutory scheme, *see* Comment, *The "Long-Arm" Statute: Wyoming Expands Jurisdiction of the State Courts over Non-Residents*, 4 LAND & WATER L. REV. 235 (1969).
3. Cozzens v. Piper Aircraft Corp., 514 P.2d 1375 (Wyo. 1973).
4. Note, *In Personam Jurisdiction over Foreign Corporations Dealing Indirectly with the State: Application*, 9 LAND & WATER L. REV. 649 (1974).
5. Leff v. Berger, 383 F. Supp. 441 (D. Wyo. 1974).
6. Prehoda v. Hines Lumber Co., 399 F. Supp. 643 (D. Wyo. 1975).
7. Whitaker v. Denver Post Inc., 401 F. Supp. 60 (D. Wyo. 1975). This case is currently on appeal to the 10th Circuit.

sions in Wyoming's Federal District Court. Additionally, the products liability and libel areas are illustrative of the varying analyses which may be attached to a jurisdictional inquiry.

As the discussion proceeds, two propositions are developed. First, it is proposed that long-arm statutes and their interpretations by courts often tend to obscure the purpose of expanding states' jurisdictional authority. This effect is due to the courts' concern with a threshold question of whether a particular statute by its terms covers the facts of the case being decided. Thus, in cases decided under a long-arm statute, a court looks first to the applicability of the statute. This inquiry gives the defendant an argument separate from constitutional due process considerations by which an escape from jurisdiction may be attempted. Second, it is proposed that the line of reasoning adopted by courts upholding jurisdiction is generally the more commendable approach. Except in extreme cases, the better approach is one in which the jurisdictional authority of a particular court is determined by a liberal analysis of relevant factors favoring the exercise of jurisdiction.

The discussion is designed to facilitate preparation of arguments by both plaintiff and defense attorneys. For the plaintiff, a declaration by the court that jurisdictional authority does not exist in his home forum may dictate extreme expense and inconvenience in maintaining a suit elsewhere and may prevent the maintenance of a suit altogether. For the defendant, the ability to avoid litigation in the plaintiff's forum may reduce expenses and inconvenience considerably, and perhaps may mean an avoidance of the suit entirely.

BACKGROUND

A. *Constitutional*

Three decisions by the United States Supreme Court have partially delineated the boundaries of expansion of personal jurisdiction. The cases have been so frequently discuss-

ed that any mention of them becomes almost automatically redundant. However, their principles are so important that a brief discussion is necessary to facilitate any further inquiry in the jurisdictional analysis. It should be borne in mind that these decisions were principally concerned with due process limitations on the exercise of jurisdiction, rather than the operation of long-arm statutes. Thus, the decisions in these cases help answer the question of whether or not it is consonant with the precepts of due process to exercise jurisdiction in a particular case.

In *International Shoe Co. v. Washington*,[8] the question was whether Washington courts could exercise jurisdiction over a Delaware corporation, with its principal place of business in Missouri, which employed 11 to 13 salesmen in Washington. In sustaining the jurisdictional power of the Washington courts, the United States Supreme Court laid out a test that jurisdiction could be exercised if the nonresident had "certain minimum contacts [with the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[9] If the requirements of minimal contact with the forum are met, then the exercise of jurisdiction over a nonresident does not deny due process of law. In assessing the contacts of the defendant, the *International Shoe* Court considered the following factors as relevant:

1. An estimate of the inconveniences which would result to the nonresident from a trial away from its "home" or principal place of business.
2. Whether the activities by the nonresident are continuous or sporadic.
3. The nature, quality and circumstances of occasional acts committed in the forum by a nonresident.
4. The jurisdictional test cannot be simply mechanical or quantitative.

8. 326 U.S. 310 (1945).
9. *Id.* at 316.

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5. The quality and nature of the activity of the defendant in relation to the fair and orderly administration of the laws is the controlling inquiry to determine whether due process is violated or upheld by the exercise of jurisdiction.

6. To the extent that a nonresident enjoys the privilege of conducting activities in the forum state, it enjoys the benefits and protections of the laws of that state and it is not unfair to expect the nonresident to answer for obligations arising out of the exercise of such privileges.[10]

Several years later, in *McGee v. International Life Insurance Co.*,[11] the Supreme Court was called upon to determine whether jurisdiction could properly be exercised in California over a Texas corporation whose only contacts with California had been through the mail in connection with an insurance policy issued to the plaintiff. In finding that the Due Process clause did not bar the exercise of jurisdiction in the case, the Court noted that the transformation of the national economy has dictated an expansion of jurisdictional authority for state courts.[12] The *McGee* Court laid out further considerations to be taken into account in the jurisdictional analysis:

1. The interest of the forum state in providing an effective means of redress for its residents.

2. The availability of witnesses who can testify to material facts or issues in the litigation.

3. Inconvenience to the defendant by itself may not amount to a denial of due process.[13]

Although it has been argued that the *McGee* decision reduced the requirements of contact with the forum to a single transaction, the Wyoming Supreme Court has dismissed such an argument as "hardly . . . tenable".[14]

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10. *Id.* at 317-19.
11. 355 U.S. 220 (1957).
12. *Id.* at 222-23.
13. *Id.* at 223-24.
14. Ford Motor Co. v. Arguello, 382 P.2d 886, 894 (Wyo. 1963).

In *Hanson v. Denckla*,[15] the Supreme Court set out what has come to be known as the "purposeful availment" test for the exercise of in personam jurisdiction. The Court stated that in order to exercise jurisdiction over a nonresident, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[16] Although recognizing that progress in interstate commerce has increased the need for jurisdiction over nonresidents[17] and that progress in communications and transportations has made the defense of a suit in a foreign forum less burdensome,[18] the Court warned that "it is a mistake to assume this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[19]

Under these United States Supreme Court cases, the constitutional principle which has emerged is often understood as meaning that in order to justify the exercise of jurisdiction in a particular case, the concern is whether or not a defendant's rights to due process of law would be violated if the defendants were forced to answer a suit in a foreign forum. The concern for the defendant's inconvenience and expense in defending in a foreign forum and the requirement that he "purposefully avail" himself of privileges in the forum state are expressions of an intent by the Court that a nonresident not be burdened unfairly. However, there also exists in these decisions an implicit recognition by the Court that a plaintiff has rights too. The Court has recognized that the plaintiff's state may well have a strong interest in providing an effective means of redress for one of its residents. And although there may be a requirement that a defendant "purposefully avail" itself of the privileges of the forum state, once this is done the plaintiff has a right to expect the defendant to answer for obligations arising out of the defendant's activities.

15. 357 U.S. 235 (1958).
16. *Id.* at 253.
17. *Id.* at 251.
18. *Id.*
19. *Id.*

Inevitably the jurisdictional inquiry has become one of weighing these rights of the plaintiff against those of the defendant. In the absence of explicit standards from the United States Supreme Court as to what activities amount to sufficient "minimum contacts" or a "purposeful availment", lower federal courts and state courts are left to their own devices to make such determinations. And although the courts studiously apply the guidelines set forth by the Supreme Court, the results are as variable as the number of cases decided.

B. *Gray v. American Radiator & Standard Sanitary Corp.*[20]

Although not a United States Supreme Court decision, the ruling in *Gray v. American Radiator & Standard Sanitary Corp.* has achieved such notoriety that an understanding of its facts and rationale is essential to understanding modern principles of nonresident jurisdiction. In the *Gray* case, the issue was whether jurisdiction could be exercised over the Titan Valve Manufacturing Company, which allegedly negligently constructed a safety valve. Titan was an Ohio corporation and had constructed the valve outside Illinois and sold the valves to American Radiator and Standard Sanitary Corporation outside Illinois. Only the injury to the plaintiff occurred in Illinois.

Illinois had recently enacted a statute[21] which subjected nonresidents who committed a tortious act in Illinois to service of process and jurisdiction. Titan argued both 1) that the statute did not apply and 2) that if it did, to apply it would be to violate Titan's rights to due process of law.

The court first decided that the statute did apply because the alleged negligence could not be separated from the resulting injury. Therefore, Titan had committed a "tortious act" in Illinois and was subject to jurisdictional authority of the Illinois courts.[22] Titan argued with this conclusion by main-

20. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
21. ILL. REV. STAT. ch. 110, § 17(1)(b) (1959).
22. Gray, *supra* note 20, at 762-63. The court partially relied on the conflict of laws concept that the place of wrong is where the last event takes place which is necessary to render the actor liable. It is interesting to note that

taining that by using the words "tortious act" rather than "tort", the Illinois Legislature intended the statute to cover only the act or conduct allegedly wrongful, separate from any consequence therefrom. The Illinois court rejected this, declaring that "to be tortious an act must cause injury."[23]

This type of argument has become the trademark of decisions under long-arm statutes. Purportedly designed to facilitate a determination as to whether jurisdiction can or should be exercised, long-arm statutes actually often tend to cloud the issue even further. Whereas the United States Supreme Court has basically limited itself to the consideration of the constitutional principle of due process of law, decisions under long-arm statutes first must address the threshold question of whether the statute by its terms is intended to cover the factual situation of the case being decided. This necessarily gives rise to various semantic interpretations of what acts or conduct amount to a "tortious act" or "commiting a tort" or "causing tortious injury". Practically, this gives the defendant an additional argument against the exercise of jurisdiction. Only when the pertinent statute or case law authorizes the exercise of jurisdiction to the constitutional limits[24] is such an inquiry avoided.

The *Gray* court went on to analyze the due process argument made by Titan which was that to exercise jurisdiction where the defendant's only contact with the forum was the injury would exceed the bounds of the due process. The court rejected this argument and effectively decided that the "contact" of causing injury in a state is sufficient to justify the exercise of jurisdiction over a nonresident.

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although Wyoming has never explicitly adopted this rule in the jurisdictional context, an Iowa court has concluded that Wyoming follows the rule that an injury is a requisite to the commission of a tort. In Anderson v. National Presto Indus., Inc., 257 Iowa 911, 135 N.W.2d 639 (1965), the Iowa court quoted the Wyoming Supreme Court decision in Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309, 312 (1946), which said, "Generally speaking and without undertaking in the least an all inclusive definition, a tort has a meaning somewhat similar to wrong and is an unlawful act injurious to another independent of contract." To the Iowa court, at least, this definition meant that in Wyoming a wrong is a prerequisite to and an integral part of the commission of a tort.

23. Gray v. American Radiator & Standard Sanitary Corp., *supra* note 20, at 763.
24. For example, *see* CAL. CIV. PRO. CODE § 410.10 (West 1973); N.J. R. CIV. PRO. 4:4-4(e); R.I. GEN. LAWS ANN. § 9-5-33 (1956).

C. *Wyoming Decisions: State*

The Wyoming Supreme Court has twice considered the issue of nonresident jurisdiction in detail. The first of these cases was decided prior to the enactment of the present long-arm statute. In *Ford Motor Co. v. Arguello,*[25] the issue was whether jurisdiction could be exercised over Ford in an action for personal injuries from the negligent manufacture of an automobile. The Wyoming Supreme Court generally adopted the guidelines laid out by the United States Supreme Court in the *International Shoe, McGee,* and *Hanson* cases as discussed above and sustained the jurisdictional authority over Ford.[26]

Subsequent to the adoption of Wyoming's long-arm statute, the Wyoming Supreme Court had occasion to consider its effect in *Cozzens v. Piper Aircraft Corp.*[27] In the case, the Wyoming Supreme Court sustained a motion to dismiss an action against several nonresident defendants who were connected with a plane which had crashed in Colorado. Although all the defendants had some contacts with Wyoming, the court did not view such contacts as being substantial enough to justify the exercise of jurisdiction. The decision has been said to have "deviated from the broad standard previously announced in *Arguello* and instead employed a quantitative approach whereby the amount of actual in-state activity was the criteria for interpreting jurisdictional propriety. . . ."[28] While it may be debatable whether *Cozzens* was a proper decision on its facts, there can be little doubt that the rationale of the decision did lay the groundwork in Wyoming for more restrictive decisions under the long-arm statute.[29] It is perhaps unfortunate that in the only juris-

25. *Supra,* note 14.
26. For more detailed discussions of the *Arguello* case, *see* Comment, *The "Long-Arm" Statute: Wyoming Expands Jurisdiction of the State Courts over Non-Residents, supra,* note 2, at 240-41, and Note, *In Personam Jurisdiction over Foreign Corporations Dealing Indirectly with the State: Application, supra,* note 4, at 655-57.
27. *Supra* note 3.
28. Note, *In Personam Jurisdiction over Foreign Corporations Dealing Indirectly with the State: Application, supra* note 4, at 649.
29. Although distinguished in Leff v. Berger, *supra* note 5, the *Cozzens* decision received much consideration in Prehoda v. Hines Lumber Co., *supra* note 6, and Whitaker v. Denver Post Inc., *supra* note 7.

dictional case decided under the long-arm statute by the Wyoming Supreme Court, the cause of action definitely arose in another state. This dictated a more restrictive interpretation by the court.[30]

D. *Wyoming Decisions: Federal*

The Tenth Circuit has had occasion to consider one case arising under Wyoming's long-arm statute. In *Pullen v. Hughes*,[31] a wrongful death action, Mansfield Tire and Rubber Company, an Ohio tire manufacturer, was named as a defendant. Mansfield by affidavit demonstrated that it had no business contacts with the State of Wyoming. The Tenth Circuit dismissed Mansfield from the action on the grounds that Mansfield did not pursue a regular course of business in Wyoming, and was, therefore, not amenable to jurisdiction of the Wyoming courts under the provisions of Section 5-4.2(a)(iv) of the Wyoming Statutes.[32]

In *Leff v. Berger*,[33] the defendant Berger had entered into a 10 year lease with the plaintiffs. About a year later, he left the state and failed to make further payments under the lease. The plaintiffs instituted an action to recover proceeds due under the lease. The defendant challenged the jurisdiction of the court and service of process, claiming that he had no contacts with the State of Wyoming and was an Illinois resident. The court disagreed, and held that the defendant was subject to process and jurisdiction in Wyoming.

The reasoning in the decision in *Leff v. Berger* began with an analysis of *International Shoe* and extracted certain principles from that case:

1. Judicial jurisdiction depends upon reasonableness.

30. "However, when the cause arises in another state the activities of the foreign corporation must be substantial to satisfy the requirements of minimal contact." Cozzens v. Piper Aircraft Corp., *supra* note 3 at 1378.
31. 481 F.2d 602 (10th Cir. 1973).
32. Text quoted *infra* note 44.
33. *Supra* note 5.

2. Due process permits jurisdiction to extend to "continuous and systematic" activities within a state and also to "occasional acts" which by their nature may be deemed to be sufficient.

3. Due process requires an analysis of the quality of acts in a forum rather than their quantity, in relation to fair administration of the laws.[34]

The decision went on to refer to Wyoming's long-arm statute as a "single act"[35] statute and further stated that the statute's purpose clause[36] clearly indicated that the statute was intended "to extend state court jurisdiction to the constitutional limit."[37] *Cozzens*[38] was distinguished by recognizing that in it the cause of action arose in another state. The court found that by entering into a lease in Wyoming and organizing a business in Wyoming, the defendant had availed himself of the laws of the state and was amenable to the jurisdiction of Wyoming courts. The fact that witnesses to the transaction were likely to be in Wyoming was also considered as important. The court declared that the long-arm statute "is remedial and entitled to liberal interpretation, consonant with principles of due process," and upheld the exercise of jurisdiction.[39]

Perhaps the decision in *Leff v. Berger* was simplified by the fact that the long-arm statute expressly provided for the factual situation in the case. Section 5-4.2(a)(v) of the long-arm provisions expressly authorizes the exercise of jurisdiction over persons having an interest in or possessing real property in the state. There was little doubt that the scope of this provision included a defendant who was the lessee of property in Wyoming. Thus, the threshold question of the long-arm statute's applicability was easily disposed of in *Leff v. Berger*, and the due process analysis was not unduly burdened or confused. The court was readily inclined to adopt a relatively liberal approach to the question.

34. *Id.* at 443.
35. *Id.* at 444.
36. Ch. 237, [1967] Session Laws of Wyoming 689.
37. Leff v. Berger, *supra* note 5, at 444.
38. Cozzens v. Piper Aircraft Corp., *supra* note 3.
39. *Id.* at 445.

The situation was different in *Prehoda v. Hines Lumber Co.*[40] Raygo-Wagner, Inc., one of the defendants, was an Oregon corporation which manufactured log loaders. Raygo-Wagner had a distributorship in Oregon which did business as the Howard Cooper Company. Hines Lumber Company purchased a piece of equipment from Howard Cooper Company which was manufactured by Raygo-Wagner. While working one day, Bruce Averett was killed due to alleged defects in the machinery. His administrator brought suit to recover damages.

Raygo-Wagner moved to dismiss the case on the grounds of a lack of personal jurisdiction. Without even entering into an analysis of which provisions of the long-arm statute did or did not apply, the court agreed that there was no jurisdiction in the case. The facts that the design and construction of the machine were in Oregon, that the machine reached Wyoming through an independent distributorship, and a general paucity of contacts by Raygo-Wagner with Wyoming were said to be dispositive of the jurisdictional question. The court said that this was a single act and one injury, and that the reasoning in *Ford Motor Co. v. Arguello*[41] to the effect that a single transaction would not sustain jurisdiction was controlling, at least on the facts presented.

Shortly after the *Hines Lumber* decision, the federal district court issued its opinion in *Whitaker v. Denver Post Inc.*[42] Whitaker and Anselmi had filed separate actions for libel in state court and the cases were removed to federal court. Times Mirror Company, the publisher of the *Los Angeles Times*, was named as a defendant for publishing allegedly libelous materials in the *Los Angeles Times* about Whitaker and Anselmi. Times Mirror moved for dismissal on the grounds that the Wyoming court lacked personal jurisdiction over it.

40. *Supra* note 6.
41. *Supra* note 14. This conclusion was reached despite the court's statement in Leff v. Berger, *supra* note 5, at 444, that the statute is a "single-act" statute.
42. *Supra* note 7.

The court stated the issue as being whether Times Mirror was qualified to do business in Wyoming so as to bring it within the provisions of the long-arm statute. The circulation of the *Los Angeles Times* in Wyoming between 1971 and 1975 was at a maximum of 16 daily and 26 Sunday editions. Five reporters had been sent to Wyoming by Times Mirror Company, on different occasions, three of them in connection with the allegedly defamatory articles. Times Mirror Company had occasionally solicited advertising in Wyoming.

The court reasoned that Subsection (a) (iii) of the long-arm statute[43] did not cover the factual situation because the "act" (printing the article) occurred in California, not Wyoming. An assumption that Wyoming follows the single publication rule was utilized to reach this conclusion.

However, the court said that jurisdiction might be authorized under Subsection (a) (iv)[44] of the long-arm statute. This statutory provision was interpreted as attaching a "doing business" requisite to the assumption of jurisdiction in the case. Additionally, it was stated that in libel suits, First Amendment considerations required a greater showing of contacts. In light of these considerations, the court held that the Times Mirror Company was not subject to jurisdiction in Wyoming.

E. *Background: Review*

The foregoing discussion has set out the major authority pertaining to the exercise of jurisdiction in Wyoming over nonresidents. Undoubtedly, the state of the case law leaves many questions unanswered for the Wyoming practitioner. For that reason, the remainder of this article addresses itself to a discussion of how the nonresident jurisdiction analysis has been handled in other jurisdictions. The areas of products

43. WYO. STAT. § 5-4.2(a) (iii) (Supp. 1975) states: "causing tortious injury by an act or omission in this state."
44. WYO. STAT. § 5-4.2(a) (iv) (Supp. 1975) states: "causing tortious injury 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 in this state or derives substantial revenue from goods consumed or services used in this state."

liability and libel have been chosen due to their generally universal applicability to other problem areas.

Additionally, the principal focus of the following discussion is on the applicability of statutory provisions similar to Section 5-4.2(a)(iii) of the Wyoming Statutes which authorizes jurisdiction over nonresidents "causing tortious injury by an act or omission in this state." The reasons for choosing this area of concentration are twofold. First, the *Arguello*,[45] *Cozzens*,[46] *Berger*, *Prehoda*, and *Whitaker*[47] cases offer discussions which are relevant to other provisions in the long-arm statute. Some of these decisions have seriously constricted the effectiveness of Subsection (a)(iv) of the statute. Therefore, other bases for jurisdiction must be explored. Second, Subsection (a)(iii) offers the most potential for either an extremely liberal approach or a quite restrictive approach to the jurisdictional question in the products liability and libel areas of the law. The discussion therefore facilitates a consideration of both extremes, as well as the middle ground, in the jurisdictional debate.

JURISDICTION IN PRODUCTS LIABILITY CASES[48]

The following discussion is subdivided into considerations against jurisdiction, state and federal, and considerations for jurisdiction, state and federal. It should be noted that for a state like Wyoming, with little industrial and manufacturing activity within its borders, the likelihood that products liability cases will be argued in federal court is extremely high. This is because such cases are particularly amenable to a removal proceeding even if they are initially brought in state court.

Additionally, the following discussion is intended to focus upon the type of long-arm statute involved. From this

45. Ford Motor Co. v. Arguello, *supra* note 14.
46. Cozzens v. Piper Aircraft Corp., *supra* note 3.
47. Leff v. Berger, *supra* note 5; Prehoda v. Hines Lumber Co., *supra* note 6; Whitaker v. Denver Post Inc., *supra* note 7.
48. For extensive discussions in this area, *see* Annot., 19 A.L.R.3d 13 (1968), and Annot., 24 A.L.R.3d 532 (1969).

perspective, the reader may see the variety of intrepretive approaches adopted by courts in addressing the threshold question of whether a particular long-arm statute is applicable to the facts of the case. It is suggested that the reasoning in such inquiries is often strained, regardless of whether the ultimate decision favors or rejects an assertion of jurisdiction. Rather than addressing the ultimate question of whether the exercise of jurisdiction comports with due process requisites, the courts tend to fall into a sisyphean inquiry into the meaning of the words "tort" or "tortious conduct" or "act" and sometimes resolve the case on such a determination. In cases where jurisdiction is denied, this approach negates the general long-arm purposes of expanding jurisdiction.

A. *The Case Against Jurisdiction: State*

1. Statutory Applicability

The most significant decision in the products liability area by a state court which denied jurisdiction was the "triple decision" in *Longines-Wittenauer Watch Co. v. Barnes & Reinecke, Inc.*[49] The applicable statute in that case authorized the exercise of jurisdiction over a nonresident who "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act." The factual situation in the *Longines* part of the opinion actually had to do with a contract, but the facts of the *Feathers v. McLucas* and *Singer v. Walker* cases involved torts. In *Feathers*, a tractor-drawn steel tank manufactured by a Kansas corporation, Darby Corporation, exploded near the Feathers home and caused damage. Darby had no other relevant contacts with the state of New York. The court decided on these facts that Darby did not commit a tortious act in New York and was therefore not subject to jurisdiction under the terms of the statute. The court criticized the decision in *Gray v. American Radiator & Standard Sanitary Corp.*[50] as exceeding the bounds of "sound statutory

49. 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). Also decided in the same opinion were the companion cases of Feathers v. McLucas and Singer v. Walker.
50. *Supra* note 20.

construction"[51] and said that the "mere occurrence of the injury in this state certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording."[52] Similar reasoning was employed in the *Singer* case. A young plaintiff was in Connecticut using a rock hammer which had been manufactured in Illinois and purchased for him by his aunt in New York. The court held that the tortious act occurred in Illinois and that the New York court did not have jurisdiction in the case. In response to the decision in these cases, the New York Legislature amended the long-arm statute to cover such situations more explicitly.[53]

Contrasting the *Feathers v. McLucas* and *Singer v. Walker* decisions with the decision in *Gray v. American Radiator & Standard Sanitary Corp.* illustrates the semantic battle that is often waged under the provisions of long-arm statutes. The statutory wording was very similar in all the cases. The decisions were exactly opposite. The initial concern for the practitioner in such cases therefore becomes the semantico-legal interpretation which a court will employ for the long-arm statute involved.

2. Due Process Limitations

Two recent decisions in Washington and Oregon illustrate another limitation which state courts are likely to impose on the applicability of their long-arm statutes. In *Oliver v. American Motors Corp.*,[54] the plaintiff had purchased a Rambler from a dealer in Oregon. While in Washington, a defective exhaust system on the car caused injury. The Oregon dealer moved for dismissal on the grounds that it was not subject to the personal jurisdiction of the Washington courts. The applicable statute authorized the exercise of jurisdiction over nonresidents who occasioned "the commission of a tortious act within this state."[55] Though ambiguous as to the applicability of the statute, the court reasoned

51. Feathers v. McLucas, *supra* note 49, at 79.
52. *Id.* at 77.
53. N.Y. CIV. PRAC. LAW § 302 (1966 amendment).
54. 70 Wash. 2d 875, 425 P.2d 647 (1967).
55. WASH. REV. CODE ANN. § 4.28.185(1)(b) (1961).

that jurisdiction was lacking in Washington because the defendant Oregon car dealer did not do any purposeful act in Washington. The court reasoned that to attach jurisdiction only on the basis that an out-of-state purchaser subsequently brought a car to Washington was not justified.

A similar result was reached in *Pellegrini v. Sachs & Sons.*[56] The plaintiffs had purchased a car in California from a dealer there and moved to Utah. The suit was based on a claim of negligence in dealer preparation. The statute authorized jurisdiction for "the causing of any injury within this state whether tortious or by breach of warranty."[57] Although never explicitly deciding whether the statute was applicable by its terms, the court said jurisdiction was lacking because there was no showing that the defendant California car dealer had done anything in Utah which constituted a purposeful minimum contact. The court said it was important to distinguish between a defendant who puts his products into commerce with the expectation that the products may move to other states and the defendant who expects his products to remain locally. The California car dealer, according to the court, could reasonably assume that most of the cars he sold would remain locally and therefore should not be expected to answer to a suit in Utah.

The *Oliver* and *Pelligrini* cases illustrate a part of the doctrine which has come to be known as the "stream of commerce"[58] doctrine. Under this analysis, an important consideration is whether a manufacturer could reasonably expect that his products will be utilized in foreign forums. If not, then the analysis disfavors the exercise of jurisdiction. However, if the manufacturer can reasonably expect widespread distribution, gains economically from such distribution, and/or solicits a market for his products on a widespread basis, then the analysis favors the exercise of jurisdiction.

56. 522 P.2d 704 (Utah 1974).
57. UTAH CODE ANN. § 78-27-24(3) (1953).
58. *See* discussion in Note, *In Personam Jurisdiction over Foreign Corporations Dealing Indirectly with the State: Application*, *supra* note 4, at 660-61.

B. *The Case Against Jurisdiction: Federal*

Several federal decisions have denied the exercise of jurisdiction in products liability cases on the ground that the applicable state long-arm statute did not authorize the exercise of jurisdiction by its terms. In a case decided before *Gray v. American Radiator & Standard Sanitary Corp.*,[59] an Illinois federal court in *Hellriegel v. Sears Roebuck & Co.*[60] denied jurisdiction on the basis that although the damage occurred in Illinois, the acts amounting to a "tortious act" occurred outside Illinois. The Second Circuit adopted the reasoning in the *Longines-Feathers-Singer* cases[61] to deny jurisdiction in *Harvey v. Chemie Grunenthal.*[62] In that case, the plaintiff sued a German manufacturer for injuries sustained when his wife in New York took Thalidomide pills manufactured in Germany. The court reasoned that the defendant had not committed a tortious act in New York and was therefore not subject to jurisdiction there. In *Lichina v. Futura Inc.*,[63] a Colorado district court also adopted the interpretation of the *Feathers*[64] case in denying jurisdiction under a statute providing for jurisdiction for "the commission of a tortious act within this state."[65] However, the court did authorize the exercise of jurisdiction on another theory. In *DiMeo v. Minister Machine Co.*[66] jurisdiction was denied on various grounds, including the fact that in the court's opinion, "tortious conduct" occurred at the place of manufacture, Michigan, not in the place of injury, Connecticut.

Two federal cases illustrate the importance of meticulous pleading in products liability cases when jurisdiction is likely to be questionable. In *Standard v. Meadors*,[67] the

59. *Supra* note 20.
60. 157 F. Supp. 718 (N.D. Ill. 1957).
61. *Supra* note 49.
62. 354 F.2d 428 (2d Cir. 1965), *cert. den.* 384 U.S. 1001 (1966).
63. 260 F. Supp. 252 (D. Colo. 1966). The action was against Riblet Tramway Co., a Washington corporation whose equipment caused injury in Colorado. The court stated, at 254, that "both the asserted negligent act or acts of the non-resident defendant, as well as the injury they produce, must occur within the state of Colorado", quoting from an opinion in Arter v. X-Acto, Inc., (#8976), Order of October 9, 1965.
64. Feathers v. McLucas, *supra* note 49.
65. COLO. REV. STAT. ANN. § 37-1-27-1(c) (Supp. 1966).
66. 225 F. Supp. 569 (D. Conn. 1963).
67. 347 F. Supp. 908 (N.D. Ga. 1972).

pertinent statute authorized jurisdiction over nonresident corporations who were guilty of tortious conduct in Georgia. The complaint alleged negligence in the design and manufacture of a boat which injured the plaintiff. The court reasoned that since the design and manufacture of the boat occurred outside the State of Georgia, and that viewing the complaint and the statute together jurisdiction would be denied. In *Block Industries v. DHJ Industries, Inc.*,[68] a South Dakota plaintiff had sued Block Industries for injuries sustained when a shirt he was wearing caught fire. Block moved to join four fabric manufacturers, including DHJ Industries, as third party defendants. These third party defendants moved for dismissal on the grounds of lack of personal jurisdiction. The court emphasized that in its third party complaint and in argument, Block had failed to demonstrate the extent, if any, of DHJ's contacts with South Dakota. Block had not even demonstrated that DHJ was the manufacturer of the fabric in the injurious shirt, so jurisdiction was not authorized under a statute providing for jurisdiction for "the commission of any act which results in accrual within this state of a tort action."[69] The court did give Block the opportunity to discover which manufacturer's fabric was in the shirt and to proceed accordingly later. Both the *Meadors* and *Block* cases illustrate that the pleading stage may be important in the products liability jurisdictional context. To avoid this result, the plaintiff should plead all possible theories for recovery and take care to frame the pleading in language which fits the pertinent long-arm provisions.

In spite of a series of cases decided in state court in Minnesota favoring the exercise of jurisdiction[70] over nonresidents in products liability cases, the federal district court for Minnesota has denied such jurisdiction on several occasions. The first of these, *Mueller v. Steelcase, Inc.*,[71] came before the jurisdiction-favoring state court decisions. In the case, the Minnesota plaintiff sued for injuries caused by an

68. 495 F.2d 256 (8th Cir. 1974).
69. S.D. COMPILED LAWS ANN. § 15-7-2 (1967).
70. These cases will be discussed in later sections of this article.
71. 172 F. Supp. 416 (D. Minn. 1959).

allegedly defective office chair manufactured by the defendant outside Minnesota. The pertinent statute authorized jurisdiction over the nonresident who "commits a tort in whole or in part in Minnesota against a resident of Minnesota."[72] The court dismissed the action on the grounds that the tort was not committed in Minnesota, as the defendant had manufactured the chair elsewhere and had committed no tortious act in Minnesota. Subsequently, in *Pendzimas v. Eastern Metal Products Corp.*,[73] the Minnesota federal court acknowledged that more liberal interpretations had been given to the Minnesota long-arm statute. Jurisdiction was denied, however, on the ground that when only the injury occurs in a state and there are no other relevant contacts, especially no purposeful marketing in the state, jurisdiction should be denied. And in *Uppgren v. Executive Aviation Services, Inc.*[74] the court decided that it would be inconsistent with the precepts of due process to subject a Maryland helicopter corporation whose only contact with Minnesota was the crash of a helicopter there to jurisdiction of the Minnesota courts. The court considered the fact that the crash had occurred in Minnesota as "fortuitous" and said that the manufacturer could not foresee substantial use of his product in Minnesota. The travel burden for the defendant was viewed as too inconvenient and jurisdiction was denied as violative of due process.

C. *The Case Favoring Jurisdiction: State*

1. Committing a Tort "In Whole or in Part" in the Forum

Jurisdiction has frequently been upheld in states which have statutes authorizing the exercise of jurisdiction over a defendant who "commits a tort in whole or in part" in the forum state. Two such cases come from the state of Iowa. In *Anderson v. National Presto Industries, Inc.*,[75] a Wisconsin based coffeemaker manufacturer was sued by an Iowa resident. The court reasoned that a tort occurs where

72. MINN. STAT. ANN. § 303.13(3) (1957 Amendment).
73. 218 F. Supp. 524 (D. Minn. 1961). The case was a suit for negligence in the manufacture of a deep fryer.
74. 304 F. Supp. 165 (D. Minn. 1969).
75. *Supra* note 22.

the last necessary act (the injury) occurs and that jurisdiction was therefore authorized under the Iowa statute.[76] A similar conclusion was reached in *Tice v. Wilmington Chemical Corp.*,[77] a case against an Illinois water repellant manufacturer whose product exploded while being used by the plaintiff. Another case favoring jurisdiction under such a statute was decided in Missouri.[78]

Minnesota cases decided under a statute authorizing the exercise of jurisdiction for the commission of a tort in whole or in part in Minnesota also support the exercise of jurisdiction over the nonresident in products liability cases.[79] The most interesting of these cases is *Ehlers v. U.S. Heating & Cooling Manufacturing Corp.*,[80] in which a boiler purportedly caused a fire damaging the plaintiff's property. The defendant boiler manufacturer was a Delaware corporation with its principal place of business in Ohio, where the boiler was manufactured. The defendant had absolutely no contacts with Minnesota—even the boiler at issue had arrived in Minnesota through intermediate parties. The court held that on these facts the defendant had committed a tort in whole or in part in Minnesota because the damage had occurred there. No due process problems were found in exercising jurisdiction, the court noting that since the defendant had not raised an argument as to the lack of foreseeability that its product might end up in Minnesota, there was no due process bar to the exercise of jurisdiction.

Whether these cases decided under statutes referring to the commission of a tort in whole or in part in the forum state have any extrapolative authoritative value in Wyoming is debatable. Wyoming's statute, as it will be recalled, authorizes jurisdiction over those causing tortious injury by an act or omission in this state. It could well be argued that

76. IOWA CODE § 617.3 (1963) ("commits a tort in whole or in part in Iowa against a resident of Iowa").
77. 141 N.W.2d 616 (Iowa 1966).
78. State *ex rel.* Deere & Co., 454 S.W.2d 889 (Mo. 1970).
79. Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960); Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W.2d 607 (1961); Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963).
80. *Supra* note 79.

literally interpreted, this Wyoming statutory provision requires both the injury and the act producing it to occur in Wyoming. The "tort in whole or in part" statutes may be, by their own terms, somewhat broader. However, the cases decided under such statutes do indicate a desire by state courts to have their statutes include a broad range of factual settings.

2. "Committing a Tortious Act" in the Forum

Cases decided under statutes authorizing the exercise of jurisdiction for "the commission of a tortious act" within the forum state illustrate more strongly the general desire of state courts for their long-arm statutes to apply to an expansive factual range. Such cases offer more compelling authority for an argument in favor of jurisdiction in Wyoming.

In *Foye v. Consolidated Bailing Machine Co.,*[81] a New York manufacturer was sued for the negligent manufacture of a paper press. The court validated jurisdiction under a statute authorizing jurisdiction for the commission of a tortious act within the state even though the defendant had no contacts with the state of Maine except sending the paper press there. The court declared that a vendor, who by direct shipment places a dangerous instrumentality in a state which causes injury in the state, commits a tortious act there. The court refused to accept the proposition that to exercise jurisdiction would be violative of due process, mainly because of the purposeful shipment of the article into Maine.

In *Vandermee v. District Court,*[82] the plaintiff instituted an action for the district court to show cause why an order quashing service should not be vacated. The plaintiff had been injured by a crane manufactured by Pettibone Mulliken Corporation, a Delaware corporation. The statute authorized jurisdiction over a nonresident guilty of "the commission of a tortious act within this state."[83] In ordering that

81. 229 A.2d 196 (Me. 1967).
82. 433 P.2d 335 (Colo. 1967).
83. COLO. REV. STAT. ANN. § 37-1-26(1)(c) (Supp. 1966).

jurisdiction be exercised, the court noted the similarity of Colorado's statute and the Illinois statute in *Gray v. American Radiator & Standard Sanitary Corp.*[84] and said that the phrase "tortious act" implies "the total act embodying the cause and the effect through the continuum of time."[85] Rejecting an argument that the tortious act occurred outside the state of Colorado where the defective design was accomplished, the court said that the defective design was not a tortious act but an "unclassified nonentity".[86] The court reasoned that when the defect caused injury in Colorado "the act that caused the defect at that time became a tortious act, and in our view, it had situs in Colorado."[87] With regard to a due process argument, the court reasoned that since Pettibone was connected with an independent distributor in Colorado, this indicated that Pettibone had set up channels for marketing in Colorado and should be expected to answer a suit there.

Two cases decided in Tennessee have upheld jurisdiction over nonresidents under a statute authorizing jurisdiction over a nonresident for "any tortious act or omission by it within this State."[88] In *Hanvy v. Crossman Arms Co.*[89] the plaintiff sued the New York corporate manufacturer of an air rifle which had been shipped loaded and went off when the plaintiff unloaded it at a warehouse. The defendant had no other contacts with Tennessee. The Tennessee court noted the similarity of the Tennessee statute to the statute in *Gray v. American Radiator & Standard Sanitary Corp.*[90] and assumed that the Tennessee Legislature expected a similar interpretation. The court noted that Tennessee was the place and society in which the plaintiff's injuries must be fixed and that the overall economics of the suit dictated that Tennessee should be the place where the suit was maintained. Later, in *Jasper v. McCollum Aviation, Inc.*,[91] the Tennessee court extended its reasoning even further. The parties in the

84. *Supra* note 20.
85. Vandermee v. District Court, *supra* note 82, at 337.
86. *Id.*
87. *Id.* at 337-38.
88. TENN. CODE ANN. § 20-235(b) (Cum. Supp. 1975).
89. 466 S.W.2d 214 (Tenn. 1971).
90. *Supra* note 20.
91. 497 S.W.2d 240 (Tenn. 1972).

case were involved in a misrepresentations dispute and all the acts amounting to the alleged misrepresentations had probably occurred outside Tennessee. In holding that the Tennessee statute authorized the exercise of jurisdiction, the court stated "for even if all the tortious acts in a case were committed outside the State of Tennessee, as in *Hanvy*, but the resulting tortious injury was sustained within the state, then the tortious acts and the injury are inseparable and jurisdiction lies in Tennessee."[92]

The Washington Supreme Court has decided several cases in favor of exercising jurisdiction under a statute authorizing jurisdiction over nonresidents accountable for "the commission of a tortious act within this state."[93] It is evident that the Washington court subscribes to the theory that a tortious act is committed in the state where the injury occurs.[94] The Washington Supreme Court has laid out a rather extensive list of factors to be considered in making a due process determination in a recent case upholding nonresident jurisdictional authority in the Washington courts:

> 1) The nonresident defendant must purposefully do some act or consummate some transaction in the forum state.
> 2) The cause of action must arise from such act or transaction.
> 3) The assumption of jurisdiction must not offend traditional notions of fair play and substantial justice, considering:
>   a) The quality, nature, and extent of activities in the forum,
>   b) The relative convenience of the parties,
>   c) The benefits and protections of the laws of the forum extended to both parties, and
>   d) The basic equities of the situation.[95]

92. *Id.* at 242.
93. WASH. REV. CODE ANN. § 4.28.185(1)(b) (1962).
94. Nixon v. Cohn, 62 Wash. 2d 987, 385 P.2d 305, 307 (1963). Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wash. 2d 649, 403 P.2d 351, 353 (1965).
95. Smith v. York Food Mach. Co., 81 Wash. 2d 719, 504 P.2d 782, 784 (1972). The court derived many of the guidelines from Tyee Constr. Co. v. Dulien Steel Prod. Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963), and Deutsch v. West Coast Mach. Co., 80 Wash. 2d 707, 497 P.2d 1311, 1314 (1972). The *Smith* case also comments on the stream of commerce doctrine.

The Oregon Supreme Court has also upheld the exercise of jurisdiction under a similar statute.[96] In *State ex rel. Western Seed Production Corp. v. Campbell,*[97] the Oregon plaintiff sued an Arizona seed manufacturer for defects in seeds which caused crop damage. The court indicated a desire that the statute apply to its outer limits and reasoned that manufacturers who desire a nationwide market should be prepared to defend suits anywhere. The court said the manufacturer should have foreseen the possibility that the seeds would be utilized in Oregon and that jurisdiction was therefore properly exercisable in the case.

3. Other Statutes

Although considering a different type of statute,[98] the Arizona Supreme Court in *Phillips v. Anchor Hocking Glass Corp.*[99] made some particularly interesting comments on the subject of nonresident jurisdiction. In the case, the plaintiff was injured when a baking dish manufactured by the Ohio defendant broke. Due to defects in the plaintiff's pleadings, the court framed the issues on the assumptions that:

1) before the injury, the defendant's sole contact with Arizona was the presence of a single defective product, and
2) the product was sold to the plaintiff outside Arizona, and
3) after the injury, the defendant had other products in Arizona.

The court upheld the exercise of jurisdiction. It commented that the "purposeful availment" test must be relaxed in tort cases because the tortfeasor rarely considers the effect of a state's law to guide its actions there. The court stated that a manufacturer should almost always be able to foresee that its products will be used anywhere, although in the

96. ORE. REV. STAT. § 14.035(1)(b) (1974), "The commission of a tortious act within this state."
97. 250 Ore. 262, 442 P.2d 215 (1968).
98. ARIZ. R. CIV. P. 4(e)(2) provides that Arizona courts can exercise jurisdiction over nonresidents who have "caused an event to occur in this state out of which the claim which is the subject of the complaint arose."
99. 100 Ariz. 251, 413 P.2d 732, 19 A.L.R.3d 1 (1966).

court's opinion foreseeability by the manufacturer of such use is not a prerequisite to due process fairness.

All of the cases just discussed indicate an inclination by state courts to have their long-arm statutes apply despite any semantic interpretation that might be attached to the literal wording of the statute. Although the statutory provisions read "tortious act within the state," the courts were satisfied to uphold jurisdiction when only the injury occurred in the forum state. It was of no consequence where the defect-producing act occurred. It is desirable that a similar interpretation be given to Section 5-4.2(a)(iii) of the Wyoming Statutes, which reads "causing tortious injury by an act or omission in this state." Admittedly, the literal reading of this provision indicates that perhaps "tortious injury" and "act" are separate entities. However, an interpretation of this statutory provision to include all situations where injury occurs in Wyoming would be consistent with other states' interpretations and with the legislative purpose[100] of Wyoming's long-arm statute.

D. *The Case Favoring Jurisdiction: Federal*

1. Committing a Tort "In Whole or in Part" in the Forum

A substantial number of federal court decisions have upheld the exercise of jurisdiction in cases decided under statutes authorizing jurisdiction for the "commission of a tortious act in whole or in part" in the forum state.[101] Most of these cases employ similar rationales as in state court decisions, though usually exploring the due process question in somewhat more detail.

The federal courts are generally no more restrictive in their due process analyses than state courts. In *Gill v.*

100. Ch. 237, [1967] Session Laws of Wyoming 689.
101. Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963); Hutchinson v. Boyd & Sons Press Sales, Inc., 188 F. Supp. 876 (D. Minn. 1960); Gill v. Fairchild Hiller Corp., 312 F. Supp. 916 (D.N.H. 1970); Look v. Hughes Tool Co., 367 F. Supp. 1003 (D.N.H. 1973); Higginbotham v. United Iron & Metal Co., 228 F. Supp. 513 (W.D. Mo. 1964); Williams v. Vick Chem. Co., 279 F. Supp. 833 (S.D. Iowa 1967); Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Texas 1963).

Fairchild Hiller Corp.,[102] the issue revolved around a plane crash in New Hampshire. The court reasoned that airplane manufacturers are chargeable with knowledge that airplanes travel around, so there was no justification for a suggested requirement that the plaintiffs be forced to demonstrate that the defendants were likely to have foreseen that the plane would be in New Hampshire. The court reasoned that for such products, the risk of suit anywhere is a risk that manufacturers must bear. In *Look v. Hughes Tool Co.*,[103] the court reasoned that the fact that a utility pole hole digger was mounted on wheels gave the Delaware corporate defendant a reasonable expectation that the machine would be used in New Hampshire. Finally, in *Williams v. Vick Chemical Co.*,[104] the only allegations relevant to the defendant's contact with the Iowa forum made in the plaintiff's complaint were that the defendant (somewhere) made pills taken by the plaintiff's decedent and that the pills were sold in Iowa. The court said that such allegations "though minimal, are sufficient to give this court jurisdiction over the defendants under the requirements of due process."[105]

2. "Committing a Tortious Act" in the Forum

Similarly, federal courts have often upheld a court's jurisdictional authority under statutes providing for jurisdiction for the "commission of a tortious act" within the forum.[106] Some United States Supreme Court authority for such a proposition is found in *Rosenblatt v. American Cyanamid Corp.*,[107] a case decided by Mr. Justice Goldberg on an application for a stay filed by Rosenblatt. A New York stat-

102. *Supra* note 101.
103. *Supra* note 101.
104. *Supra* note 101.
105. *Id.* at 837.
106. Fullmer v. Sloan's Sporting Goods Co., Inc., 277 F. Supp. 995 (S.D. N.Y. 1967); McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961); Anderson v. Penncraft Tool Co., 200 F. Supp. 145 (N.D. Ill. 1961); Keckler v. Brookwood County Club, 248 F. Supp. 645 (N.D. Ill. 1965); Fayette v. Volkswagen of America, Inc., 273 F. Supp. 323 (W.D. Tenn. 1967). Although under a slightly different statute, MONT. R. CIV. P. 4 (B)(1)(b), which provides "The commission of any act which results in accural within this state of a tort action," the federal district court for Montana has also upheld nonresident jurisdiction in Bullard v. Rhodes Paramacol Co., Inc., 263 F. Supp. 79 (D. Mont. 1967), and Continental Oil Co. v. Atwood & Morrill Co., 265 F. Supp. 692 (D. Mont. 1967).
107. 86 S.Ct. 1 (1965), *appeal denied,* 382 U.S. 110 (1965).

ute authorizing jurisdiction over the nonresident who committed a tortious act within the state was held to adequately cover Rosenblatt, who was living in Italy but had been in New York for the purpose of making a purchase connected with a conspiracy to convert trade secrets. Mr. Justice Goldberg rejected Rosenblatt's argument that to subject him to the jurisdiction of New York courts would deny him due process of law. He reasoned that the rationale of *International Shoe Co. v. Washington*[108] supports statutes like the one in New York. It is fair, according to Mr. Justice Goldberg, to subject a person to a state's jurisdiction when he goes there for the purpose of committing a tort. The overall authoritative value of this decision and its extrapolative effect are questionable, but it does give some indication of one former Supreme Court justice's attitude toward such statutes.

In general, federal decisions relating to statutes based on the "commission of tortious act" within the forum also follow the same rationales as similar state court decisions. The decision in *Keckler v. Brookwood County Club*[109] is interesting due to its discussion of the jurisdictional analysis vis-a'-vis the products liability theory of strict liability. The case actually sustained a motion to quash service for lack of personal jurisdiction but gave the plaintiff five days in which to amend its complaint to contain allegations sufficient to sustain jurisdiction in accordance with the opinion. The court required allegations sufficient to demonstrate that the defendant engaged in a distribution pattern or volume of business from which an inference that the defendant benefitted from national commerce could be drawn.

3. "Due Process" Statutes

New Jersey[110] and Rhode Island[111] have statutes which authorize the exercise of jurisdiction to the constitutional

108. *Supra* note 8.
109. *Supra* note 106.
110. N.J. R. CIV. P. 4:4-4(e).
111. R.I. GEN. LAWS ANN. § 9-5-33 (1956) provides:

> Every foreign corporation . . . that shall have the necessary minimum contacts with the State of Rhode Island, shall be subject to the jurisdiction of the State of Rhode Island and the courts of

limits of due process. Under such provisions, the federal district court for New Jersey has upheld the jurisdiction of its courts in products liability cases.[112] The decision in *Reilly v. Phil Tolkan Pontiac, Inc.*[113] is notable because it contrasts with the state court opinions in *Oliver v. American Motors Corp.*[114] and *Pellegrini v. Sachs & Sons.*[115] In the *Reilly* case, the plaintiff had purchased a car in Wisconsin from the defendant. The plaintiff then moved to New Jersey and was injured by a malfunction of the car's jack. The court reasoned that the defendant could easily have foreseen that the car would go to other states and that it was therefore not violative of due process for the New Jersey court to exercise jurisdiction over the Wisconsin defendant. The court also considered the facts that the accident and witnesses were in New Jersey and the relative convenience of the parties in arriving at its decision.

The sparsity of the defendant's contact with the forum state is also notable in *Rosen v. Savant Instruments,*[116] a case decided under the provisions of the Rhode Island "limits of due process statute".[117] The Rosens sued Savant for the death of their son who was electrocuted while performing a laboratory experiment utilizing equipment manufactured by Savant's corporate predecessor.

The case was originally filed in New York and Savant moved for a transfer of the case to Rhode Island. The New York court was prepared to grant the transfer if Rhode Island had proper juisdiction. The only contact which Savant had with the State of Rhode Island was that its corporate predecessor, Servo-Nuclear Corporation, had sold the equipment at issue to Brown University several years earlier. Under these facts, the New York court allowed the transfer,

this state shall hold such foreign corporations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution of laws of the United States.

112. Reilly v. Phil Tolkan Pontiac, Inc., 372 F. Supp. 1205 (D.N.J. 1974); Reilly v. P. J. Wolff & Sohne, 374 F. Supp. 775 (D.N.J. 1974).
113. *Supra* note 112.
114. *Supra* note 54.
115. *Supra* note 56.
116. 264 F. Supp. 232 (E.D.N.Y. 1967).
117. Text quoted *supra* note 111.

declaring that although under the New York jurisdictional standards jurisdiction would probably be lacking, under the Rhode Island statute extending jurisdiction to its full constitutional limits there was a sufficient basis for exercising jurisdiction consonant with due process of law.

These New Jersey and Rhode Island cases are somewhat indicative of how due process limitations on jurisdiction may well be less restrictive than when the additional parameter of a long-arm statute's literal applicability is added to the jurisdictional matrix. It is perhaps ironic to the plaintiff's attorney that long-arm statutes, ostensibly designed to expand personal jurisdiction, often limit it somewhat by adding an additional barrier of statutory applicability. However, this factor may well be the best and only hope for a defendant faced with a burdensome suit in a distant forum.

E. *Jurisdiction in Products Liability Cases: Review*

Decisions which deny jurisdiction in products liability cases often turn upon the court's interpretation of the applicability of a long-arm statute. Such dispositions of cases are not desirable because they do not satisfy the general long-arm purpose of expanding jurisdiction. Resolution of a case on this basis also means that the court never reaches the basic question— the due process analysis for the exercise of jurisdiction. Limitations on the exercise of jurisdiction should stem from the due process analysis, not from an interpretation of statutory applicability per se.

On the other hand, there are legitimate due process considerations which may justify the denial of jurisdiction. For example, requiring a distant car dealer to answer a suit in a state to which the automobile purchaser has moved may well impose too stringent a burden upon the defendant. In cases decided upon considerations of due process, the denial of jurisdiction is unfortunate to the plaintiff, but it is at least grounded in what is proposed as the most legitimate concern in the jurisdictional inquiry.

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Decisions which uphold the exercise of jurisdiction in products liability cases more accurately reflect the commercial and judicial realities of the modern American system. The desirability or necessity of a plaintiff maintaining a suit in his home forum is sustained by such cases. The judicial trend of expanding the substantive legal causes of action in products liability cases should also be accompanied by a liberal approach to the jurisdictional question. It does a plaintiff little good, for example, if his state follows a theory of strict liability if he cannot avail himself of that protection by suing in his home forum.

A state is likely to have a significant interest in providing a forum for redress of claims for injury brought by its residents. This is particularly true for a state like Wyoming, which has little manufacturing industry but does have industry which utilizes "foreign" manufactured equipment to a great extent and has consumers heavily dependent upon products produced elsewhere.

In the products liability situation, the likely presence of witnesses and medical personnel in the plaintiff's home forum also heavily favors the exercise of jurisdiction in that forum. In fact, important defense witnesses who might testify to the issues of contributory negligence or negligent maintenance are also likely to be in the plaintiff's forum.

It is suggested that the exercise of jurisdiction in products liability cases should become the rule rather than the exception. That is, a court should be predisposed to exercise jurisdiction in the absence of a demonstration of extreme hardship or unfairness by the defendant.

JURISDICTION IN DEFAMATION CASES

There has been a substantial amount of litigation concerning the extent to which a person allegedly defamed by a publication may expect the nonresident publisher to come to the person's home forum and defend a suit there. This

litigation is interesting not only because of its applicability to libel and slander suits themselves, but also because of the potental extrapolative authoritative value of such decisions into other areas of law such as products liability litigation. Although cases involving jurisdiction in libel suits are often clouded by technical considerations of the single or multiple publication rules and sometimes by a purported effect of the First Amendment, jurisdictional decisions in this field of the law are quite illustrative of the general problems encountered in the jurisdictional inquiry.

A. *The Case Against the Exercise of Jurisdiction*

1. The Case Law

In 1959, prior to the decision in *Gray v. American Radiator & Standard Sanitary Corp.,*[118] the Seventh Circuit was faced with a jurisdictional challenge in a libel suit and had to consider the applicability of Section 17(1)(b) of Chapter 110 of the Illinois Statutes.[119] In *Insull v. New York, World-Telegram Corp.,*[120] the Illinois plaintiff sued a number of publishers, none of whom had any contacts with the state of Illinois except sending from 37 to 38 copies of their respective papers into Illinois daily, and none of whom printed the papers in Illinois. After deciding that such activities did not constitute "doing business" in Illinois, the court went on to consider whether the papers had committed a tortious act in Illinois. The court reasoned that since none of the defendants had been present in Illinois, they had not committed a tortious act in Illinois. The court further declared that in Illinois, the technical rule as to publication in libel was that Illinois followed the single publication rule. A prior Illinois case had held that for multistate materials, publication (the act necessary to render the printer liable) was complete upon the first printing of the materials. Therefore, the commission of the tortious act occurred outside Illinois.[121]

118. *Supra* note 20.
119. ILL. REV. STAT. ch. 110, § 17(1)(b) (1959). The statute provided for jurisdiction for "The commission of a tortious act within this state."
120. 273 F.2d 166 (7th Cir. 1959).
121. This rationale may no longer be valid after the decision in Gray v. American Radiator & Standard Sanitary Corp., *supra* note 20. A federal district court for Illinois has refused to follow the *Insull* doctrine. Process Church of the Final Judgment v. Sanders, 338 F. Supp. 1396 (N.D. Ill. 1972).

Jurisdiction was denied in the case. Although the *Insull* case is generally not followed, it has had the effect of making the issue of whether a forum abides by the single or multiple publication rule an issue of controversy in the jurisdictional determination.

There have been proportionately a large number of libel jurisdiction cases decided by the Fifth Circuit. In several such cases,[122] the Fifth Circuit has denied the existence of a sufficient basis for the exercise of jurisdiction. Two of the cases[123] involved an analysis of whether the publisher's activities constituted "doing business" in the forum state of Mississippi. In another of these cases,[124] the court framed the issue as whether the defendant's business activities constituted "minimum contacts". The court, noting other decisions, agreed that the circulation of newspapers in a forum and engaging in newsgathering activities in the forum did not constitute "doing business" and denied jurisdiction.

Curtis Publishing Co. v. Birdsong[125] is notable primarily because it illustrates that a forum with no interest in the outcome of the libel litigation should probably not exercise jurisdiction. In the case, Birdsong (who was the Commander of the Mississippi State Highway Patrol) and others sued Curtis Publishing and the Saturday Evening Post in Alabama on the basis of an article describing Mississippi Highway Patrol involvement in the James Meredith incident. None of the alleged incidents had occurred in Alabama, none of the plaintiffs were from Alabama, all the witnesses were outside Alabama, and the author and publishers had no contacts with Alabama except the distribution of the article

122. Walker v. Savell, 335 F.2d 536 (5th Cir. 1964); Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964); Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966); New York Times Co. v. Connor, 365 F.2d 167 (5th Cir. 1966); Talcott v. Midnight Publishing Corp., 427 F.2d 1277 (5th Cir. 1970).
123. Walker v. Savell, *supra* note 122. This case also laid the foundation for later cases requiring greater showings of contact due to First Amendment considerations when the court stated, at 544, that "we think there is a peculiar significance in the application of this rule [doing business] to foreign corporations or parties that may be clothed with some of the constitutional protections dealing with freedom of the press." *See also* Talcott v. Midnight Publishing Corp., *supra* note 122.
124. Buckley v. New York Times Co., *supra* note 122.
125. *Supra* note 122.

there. Under this factual setting, the Fifth Circuit denied jurisdiction in Alabama. A concurring opinion indicated that had the aggrieved parties been Alabama residents, jurisdiction might have been authorized. But in the absence of such facts, there was no Alabama state interest in the outcome of the litigation.

The most notable decision denying jurisdiction in the Fifth Circuit was *New York Times Co. v. Connor.*[126] The applicable statute[127] in that case authorized the exercise of jurisdiction "as broad as the permissible limits of due process." At issue was an article written by Harrison Salisbury, a reporter who had been in Alabama for five days researching the allegedly libelous article. The New York Times Co. had no offices in Alabama, obtained from 25/1000 to 46/1000 of one percent of its advertising revenue from Alabama, and had an average circulation of 395 daily and 2455 Sunday newspapers in Alabama.

The Fifth Circuit had previously disposed of the *Connor* case[128] by assuming that Alabama followed the single publication rule and that therefore the publication of the libel and its concomitant tortious conduct did not occur in Alabama. Shortly thereafter, the Alabama Supreme Court announced that it followed the multiple publication rule.[129] The Fifth Circuit responded by vacating its original *Connor's* decision and rehearing the case.

Additionally, the Fifth Circuit had previously held that the commission of a single tort in Alabama satisfied the requisites of due process for the exercise of jurisdiction in *Elkhart Engineering Corp. v. Dornier Werke.*[130] Faced with the Alabama Supreme Court ruling on the multiple publication rule and the *Elkhart* decision, the Fifth Circuit sought to resolve the *Connor* libel issue. The court resolved the issue

126. *Supra* note 122.
127. ALA. CODE tit 7, § 199(1) (1958).
128. New York Times Co. v. Connor, 291 F.2d 492 (5th Cir. 1961).
129. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964).
130. 343 F.2d 861 (5th Cir. 1965). The case involved the propriety of exercising jurisdiction in the context of a single airplane crash in Alabama.

by adopting a rule that the First Amendment requires a greater showing of contact in libel cases in order that jurisdiction may be exercised.[131] The propriety of this rule has often been challenged and will be discussed in a later section of this article. Nevertheless, the effect of this decision and its rule with regard to the First Amendment has been to make such considerations another issue of controversy in the libel jurisdictional determination.[132]

The Tenth Circuit has twice considered the question of libel in the jurisdictional context.[133] At issue in both cases was whether an Oklahoma statute[134] authorizing the exercise of jurisdiction over foreign corporations "doing business" in Oklahoma authorized jurisdiction over the defendants. The court dismissed both cases, deciding that sending a syndicated column into a state and that sending 26 daily copies of a newspaper into a state does not constitute "doing business" in the state.

There has also been a libel jurisdiction case decided under the Rhode Island "minimum contacts" statute discussed in a previous section of this article.[135] In *Riverhouse Publishing Co. v. Porter*,[136] Riverhouse sued Sylvia Porter, a

131. "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." New York Times Co. v. Connor, *supra* note 122, at 572.
132. *See also* Margoles v. Johns, 333 F. Supp. 942 (D.D.C. 1971) for a decision employing this rationale to deny jurisdiction in a slander case under a statute providing for exercising jursdiction for "causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent cause of conduct, or derives substantial revenue from goods used or consumed, or services rendered in the District of Columbia." D.C. CODE ANN. § 13-423(a)(4) (1967). The case also decided that jurisdiction did not attach to one outside the District of Columbia who made slanderous phone calls into the District of Columbia under D.C. CODE ANN. § 13-423(a)(3) (1967), which provided "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia."
133. Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963); Walker v. Field Enterprises, 332 F.2d 632 (5th Cir. 1964). Both cases arose out of the same factual situation. The plaintiff Walker was suing for an allegedly defamatory article which appeared in the *Oklahoma City Times*. General Features Corp. was a syndication organization from New York which was connected with the article which appeared in the *Oklahoma City Times*. Field Enterprises was the publisher of the *Chicago Daily News* which also circulated copies of the article in Oklahoma City.
134. OKLA. STAT. ANN. tit. 18, § 1.204a (1961).
135. R. I. GEN. LAWS ANN. § 9-5-33 (1956). Text quoted *supra* note 111.
136. 287 F. Supp. 1 (D.R.I. 1968).

columnist, and her syndicator, Hall Syndicate, for an article they published condemning phony awards schemes. Riverhouse was the publisher of a book called *Leading Men in the United States of America* and claimed that the article damaged them as publishers of the book. The only contact which Sylvia Porter had with Rhode Island was that she had visited there once in 1951 to receive an honorary degree. Hall Syndicate was a New York corporation which had no contacts with Rhode Island except sending syndicated features there and sending agents there two or three times a year to solicit sales of its syndicated features. The contracts for these transactions were consummated in New York. Under these facts, the court denied jurisdiction in the case, reasoning that Sylvia Porter's one visit to Rhode Island could not subject her to jurisdiction there and that Hall Syndicate's solicitation of business was also an insufficient contact.

2. The Case Against Jurisdiction: Review

Based on these authorities concerning jurisdiction in libel suits, the potential plaintiff can be seen to have four obstacles to overcome in asserting jurisdiction over the nonresident publishers. Not only must he fit his case into the statutory scheme and demonstrate that the exercise of jurisdiction would comport with due process; he must also overcome libel "publication" rules and meet the argument that the First Amendment adds further constraints to the exercise of jurisdiction.

As in the products liability cases, the fact that the libel plaintiff faces additional burdens such as statutory applicability, publication rules, and First Amendment constraints tends unnecessarily to obscure the ultimate due process analysis. The publication rules of libel have been intertwined with the statutory applicability inquiry with the result that a court declares that the statute by its terms does not authorize the exercise of jurisdiction. As the subsequent discussion in this article demonstrates, many courts have rejected this approach which effectively resolves a case without reference to considerations of fairness under the due process analysis.

Similarly, the First Amendment constraints sometimes attached to the libel jurisdictional analysis increase the plaintiff's burden in the due process context. Subsequent discussion demonstrates that this approach has been widely criticized and rejected by courts which adopt a more desirable approach by relegating the effect of the First Amendment to the substantive issues in a libel suit.

B. *The Case Favoring the Exercise of Jurisdiction*

1. Statutes and Due Process

Probably the most widely recognized opinion upholding jurisdiction in a libel action is the decision in *Buckley v. New York Post Corp.*[137] The plaintiff, a Connecticut resident, sued the New York Post Corporation, a Delaware corporation with its principal place of business in New York, to recover damages for libel. The pertinent Connecticut statute allowed jurisdiction for causes of action arising "out of tortious conduct in this state."[138] The New York Post Corporation sent approximately 1707 daily and 2100 weekend editions of its papers into Connecticut. In the opinion, Judge Friendly reasoned that distributing copies of a libelous article in a state amounted to tortious conduct in the state and that the statutory provision was therefore applicable. Recognizing that the "last necessary event" theory of the *First Restatement of Conflicts* has fallen into disregard for choice of law problems, Judge Friendly said the doctrine nonetheless has an application in the jurisdictional context in libel suits and supports the notion that jurisdiction may be exercised in the forum where the damage is done to the plaintiff. With regard to due process considerations, Judge Friendly noted that in the nondefamation context, even if a tort committed had been a wholly isolated event, this would be sufficient to sustain the exercise of jurisdiction. A different rule was not adopted for this libel case. The effect of the First Amendment was dismissed as not applicable and jurisdiction was upheld, the court declaring that "inflicting harm within a state would appear to meet whatever further constitutional

137. 373 F.2d 175 (2d Cir. 1967).
138. CONN. GEN. STAT. ANN. § 33-411(c)(4) (1959).

requirement may arise from 'territorial limitations on the power of the respective states'."[139]

Despite several cases denying jurisdiction in libel suits,[140] the Fifth Circuit has also upheld such jurisdiction on some occasions. The decision in *Curtis Publishing Co. v. Golino*[141] is interesting because it makes a distinction between newspaper libels and magazine libels. Decided under a Louisiana statute which had been interpreted by Louisiana courts to permit the exercise of jurisdiction to the "constitutionally permissible limits",[142] the court reasoned that magazine publishers, unlike newspaper publishers, often seek to exploit a national market for their publications. For this reason, the court felt that a magazine published may more reasonably be expected to defend suits on a nationwide basis. For the same reason, the court rationalized that First Amendment considerations surrounding jurisdiction in libel cases did not apply as strictly to a magazine publisher because due to his nationwide market the magazine publisher is less likely to be affected by a "chilling effect" of a suit in a foreign forum.

The most recent Fifth Circuit decision in this area is *Edwards v. Associated Press*,[143] a case involving a dispute over an Associated Press wire dispatch. The news release originated in Louisiana and was channeled to Mississippi, where the plaintiff was a county sheriff. The applicable statute[144] authorized jurisdiction over those "who shall commit a tort in whole or in part [in Mississippi] against a resident [of Mississippi]." The court said that the language of the statute clearly encompassed the acts involved. With regard to due process, the court noted that the defendant had a fairly substantial amount of contacts with Mississippi,[145] and reasoned that Mississippi, as the home state of

139. Buckley v. New York Post Corp., *supra* note 137, at 181.
140. *See* cases cited, *supra* note 122.
141. 383 F.2d 586 (5th Cir. 1967).
142. *Id.* at 589 n.4.
143. 512 F.2d 258 (5th Cir. 1975).
144. MISS. CODE ANN. § 13-3-57 (1972 Cum. Supp.).
145. Associated Press had five correspondents and one maintenance person in Mississippi and maintained an office there. The court also considered the fact that the news release was apparently aimed exclusively at Mississippi, which indicated a purposeful connection by AP with the State of Mississippi.

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the plaintiff, had a strong interest in giving its residents a forum in which to vindicate their claims.

Other federal courts have also upheld the exercise of jurisdiction in libel cases on the theory that the distribution of libelous materials in a state amounts to "the commission of a tortious act" within the state,[146] or gives rise to a cause of action arising "out of tortious conduct in this state,"[147] or amounts to committing "a tort in whole or in part" in a state against a resident of the state.[148] In one of these decisions, substantial weight was given to the plaintiff's rights in the due process context when the court declared:

> It makes infinitely more sense to convene a libel trial where the damage has occurred, i.e., where the witnesses of the plaintiffs reputation and the damage thereto are available. The burden for travel and litigation expense should be on the party that has caused the damage, especially in the case where the defendant is a national distributor and should foresee a possibility of litigation arising from its activities.[149]

State courts have also adhered to the notion that causing libelous or slanderous materials to be distributed in a state is an adequate basis for jurisdiction. In *Thiry v. Atlantic Monthly Co.*,[150] a Seattle, Washington, architect sued Atlantic Monthly in federal district court for damages from a libelous magazine article which was distributed in Washington. The jurisdictional question was certified to the Washington Supreme Court which held that the distribution of the defamatory material in Washington satisfied the requirements of a statute conferring jurisdiction over those guilty of "the commission of a tortious act within this state."[151] The court

146. The Process Church of the Final Judgment v. Sanders, *supra* note 121, at 1400. Here, the court found that on the basis of the Illinois interpretation of the Illinois statute in Gray v. American Radiator & Standard Sanitary Corp., *supra* note 20, the causing of injury in Illinois was sufficient to sustain the exercise of jurisdiction. The court rather emphatically rejected the rationale in Insull v. New York, World-Telegram Corp., *supra* note 120.
147. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).
148. Casano v. WDSU-TV, Inc., 313 F. Supp. 1130 (S.D. Miss. 1970).
149. The Process Church of the Final Judgment v. Sanders, *supra* note 146, at 1400.
150. 445 P.2d 1012 (Wash. 1968).
151. WASH. REV. CODE ANN. § 4.28.185(1)(b) (1961).

reasoned that because the damage occurred in Washington, that was also where the tortious act occurred. Under a statute with the same wording,[152] the court in *State ex rel. Advanced Dictating Supply, Inc. v. Dale*[153] said that jurisdiction must be exercised over a nonresident defendant who called by telephone and mailed into Oregon slanderous and libelous statements. With regard to due process considerations, the court adopted the rationale of *Murphy v. Erwin-Wasey, Inc.*,[154] to the effect that a person who knowingly sends a false statement into a state "purposefully avails" himself of the privileges of a state and "acts" there for jurisdictional purposes.

The *Murphy v. Erwin-Wasey*[155] case is an interesting case for the libel jurisdictional analysis, although it actually involved an issue of a nonresident sending a fraudulent misrepresentation into Massachusetts. The pertinent statutory provision authorized jurisdiction over nonresidents "causing tortious injury by an act or omission in this commonwealth."[156] The court phrased the issue as "whether the delivery in Massachusetts by mail or telephone of a false statement originating outside the state, followed by reliance in Massachusetts, is an 'act... within this commonwealth'."[157] The following quotation represents the court's decision in the case, as well as its due process analysis:

> [W]here a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has for jurisdictional purposes, acted within that state. The element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction over the out-of-state sender of a fraudulent misrepresentation, for such a sender has thereby "purposefully availed" itself of the privilege of conducting activities within the

152. ORE. REV. STAT. § 14.035(b) (1974).
153. 524 P.2d 1404 (Ore. 1974).
154. 460 F.2d 661 (1st Cir. 1972).
155. *Id.*
156. MASS. GEN. LAWS ANN. ch. 223A, § 3(c) (1974). This provision is the same as WYO. STAT. § 5-4.2(a)(iii) (Supp. 1975).
157. Murphy v. Erwin-Wasey, Inc., *supra* note 154, at 664.

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forum state, thus invoking the benefits and protections of its laws.[158]

The case of *St. Clair v. Righter*[159] adopted a novel and far-reaching approach in upholding jurisdictional authority in a libel action in Virgina. The plaintiff, president of Jewell Ridge Corporation, sued other members of the corporation for mailing letters charging him with a violation of his fiducary duties to the corporation. The plaintiff was a Virginia resident; the letters were mailed from outside Virginia. The pertinent statute[160] was the same as Wyoming's statute, authorizing jurisdiction over those causing tortious injury by an act or omission in Virginia or those causing tortious injury by an act or omission outside Virginia if they met additional requirements of contact. The court decided that the statute by its terms did not authorize the exercise of jurisdiction in the case.

However, jurisdiction was exercised in the *St. Clair* case on a different rationale. The court reasoned that long-arm statutes merely represent legislative approval for the exercise of jurisdiction—and that jurisdiction may be exercised beyond the boundaries of the long-arm statute if to do so would be consistent with due process of law. Even though a long-arm statute does not authorize jurisdiction, it is within the scope of judicial power to confer jurisdiction in a case if to do so comports with due process. Under this rationale, the *St. Clair* court upheld the exercise of jurisdiction, considering the following factors in the due process determination:

1. Virginia's strong state interest in and relation to the factual situation.
2. The plaintiff's Virginia residency.
3. The sending of the letters into Virginia was a voluntary action.
4. Virginia was the place where the injury occurred and it should be able to apply its own laws to protect its residents.

158. *Id.*
159. 250 F. Supp. 148 (W.D. Va. 1966).
160. VA. CODE ANN. § 8-81.2(3) and (4) (Supp. 1975).

Other courts have not been inclined to step outside the boundaries of their respective long-arm statutes as did the *St. Clair* court. The opinion in that case, however, does provide more insight into the notion that in other cases, long-arm statutes may well be "jurisdiction-limiting" rather than "jurisdiction-expanding".

2. Libel Publication Rules

As discussed in a prior section of this article, the technical rule as to the publication of a libel which a jurisdiction follows will arguably influence the jurisdictional determination. Definitionally, it is useful to distinguish between the "single" and "mulitple" publication rules for libel. The "single publication rule" has been defined as:

> [T]he cause of action for libel is absolutely complete at the time of the first publication; subsequent appearances or distribution of the periodicals are of no consequence whatsoever to the creation or existence of a cause of action but are only relevant in computing damages.[161]

The "multiple publication rule" has been described as:

> [T]hat each time a libelous article is brought to the attention of a third person a new publication has occurred . . . each publication is a separate actionable tort; . . . and . . . each time a . . magazine containing libelous material is sold or distributed, a new publication has occurred and a fresh tort has been committed.[162]

Whether Wyoming follows the single or multiple publication rule for libel is a question which has never been directly ruled upon by the Wyoming Supreme Court.[163] The propo-

161. Insull v. New York, World-Telegram Corp., *supra* note 120, at n.1.
162. Hartmann v. Time, Inc., 166 F.2d 127, 134 (3d Cir. 1947).
163. By inference, the rule in Wyoming is probably that of the multiple publication rule. The multiple publication rule was the common law rule. *See* RESTATEMENT OF TORTS § 578, Comment b; PROSSER, LAW OF TORTS 769 (4th ed. 1971); Lewis v. Reader's Digest Ass'n, Inc., 512 P.2d 702 (Mont. 1973) and cases and authorities cited therein. By statute, Wyoming has adopted the common law when there is an absence of contrary legislation or rules, WYO. STAT. § 8-17 (1957).
In addition, *see* Spriggs v. Associated Press, 55 F. Supp. 385 (D. Wyo. 1944) where the court adopted a rule to the effect that the initial publisher of a libel is jointly liable with other parties for any re-publication of a

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sition that the single publication rule should have any effect on a jurisdictional determination has been rejected by several courts, as the subsequent discussion will demonstrate.

The Montana Supreme Court was recently asked to decide whether Montana would follow the single or multiple publication rule. In *Lewis v. Reader's Digest Association, Inc.*,[164] the federal district court certified that question to the Montana Supreme Court. Whether Montana followed the single or multiple publication rule was viewed as determinative of whether the federal court could exercise jurisdiction over the nonresident publishing firm which had distributed libelous material printed elsewhere in Montana. The Montana Supreme Court adopted the multiple publication rule, citing a number of reasons for its decision. First, the multiple publication rule was the common law rule. Second, the single publication rule is judge-made, designed for judicial expediency, and does not even fulfill that purpose properly. Third, adopting the single publication rule and its concomitant bar to suit except in the place of printing would be to give the press an "unconscionable" advantage over the public. Finally, the court said that it preferred a rule which would allow a plaintiff to sue in his home forum where the damage had occurred. The court adopted the multiple publication rule and mandated the exercise of jurisdiction in the case. Other cases have also recognized that the multiple publication rule effectuates the exercise of jurisdiction under statutes providing for jurisdiction over nonresidents for causes of action arising "out of tortious conduct in this state."[165]

Many cases have held that even if a jurisdiction follows the single publication rule, that rule is not pertinent to and should have no effect on the jurisdictional inquiry. In *Buck-*

libel. The inference to be drawn from this case is that there are potentially several causes of action for repeated publications of a libel, and this may support the proposition that the multiple publication rule is the rule in Wyoming. However, the court in Whitaker v. Denver Post Inc., *supra* note 7, assumed that Wyoming follows the single publication rule.

164. *Supra* note 163.

165. N.C. GEN. STAT. § 55-145(a)(4) (1975); see Johnston v. Time, Inc., *supra* note 147.

ley v. New York Post Corp.,[166] the court recognized three purposes of the single publication rule—to protect against a multiplicity of suits, to protect against endless tolling of the statute of limitations, and to protect from a diversity in applicable substantive law. The court reasoned that none of these purposes is furthered by an extension of the effect of the single publication rule to a jurisdictional level and stated that the rule should not be used to deprive a plaintiff of the right to sue in the state where he is defamed.

In a case where the single publication rule was explicitly effective due to the state's adoption of the Uniform Single Publication Act, the court declared that in the libel context, "The Uniform Act clearly was not intended as a limitation upon a state's jurisdiction including its long-arm jurisdiction."[167] In *Edward v. Associated Press*,[168] the court recognized that Mississippi had adopted the single publication rule for venue purposes. However, the court was not willing to rule that Mississippi would incorporate the rule into its jurisdictional decisions and denied the defendant's contention that the single publication rule barred jurisdiction in the case.

3. First Amendment Considerations

As noted in prior discussion, there has developed in the libel jurisdiction area a concern that the First Amendment requires a greater showing of contact with the forum to justify the exercise of jurisdiction. This was the rationale for the Fifth Circuit decision in the *New York Times Co. v. Connor*[169] case. This First Amendment aspect of the libel jurisdiction was weakened slightly by the Fifth Circuit decision in *Curtis Publishing Co. v. Golino*[170] in the case of a nationally distributed magazine. Arguably, this First Amendment concern has been watered down further by the state-

166. *Supra* note 137.
167. The Process Church of the Final Judgment v. Sanders, *supra* note 146.
168. *Supra* note 143.
169. *Supra* note 122.
170. *Supra* note 122.

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ment by the Fifth Circuit in *Edwards v. Associated Press*[171] that, "*Connor* indicates not so much a rule as it expresses a cautionary note."

Other courts have flatly rejected any purported effect of the First Amendment upon a jurisdictional determination. In *Buckley v. New York Post Corp.*,[172] Judge Friendly reasoned that there are significant substantive legal defenses in libel suits emanating from the First Amendment[173] and that these substantive defenses adequately extend the appropriate First Amendment protections to the libel defendant. The decisions in *Johnston v. Time, Inc.*[174] and *Cordell v. Detective Publications*[175] also follow this rationale. The cases hold that free speech considerations are best accommodated once the substantive issues of the case are on trial—but that the defendant should not be able to escape a trial of the issues by imputing a jurisdictional effect to the First Amendment. The Montana Supreme Court has recently declared that the exercise of jurisdiction over a nonresident publisher does not have a "chilling effect" upon the First Amendment guaranties of free speech and press and declared that, "we believe that any protection given the press under the First Amendment of the United States Constitution must be balanced against a citizen's right to protect his reputation and good name in the community in which he resides against printing and publication of false defamatory statements."[176]

4. The Case for Jurisdiction: Review

From the foregoing discussion, it is apparent that some courts are willing to interpret their long-arm statutes broad-

171. *Supra* note 143, at 266. The court also acknowledged, at 266 n.29, that its decision in *Connor* "has not been greeted with enthusiasm," and stated that First Amendment considerations in the case were mitigated by the fact that Associated Press was able "to apportion the costs of defending suits like this among a number of its subscribers. Thus, the hazard of encountering lawsuits upon entry into a particular news market is diluted." At 268 n.41.
172. *Supra* note 137.
173. "Hazards to publishers from libel actions have recentely been much mitigated by the development of substantive principles under the First Amendment, notably in New York Times v. Sullivan, 376 U.S. 254 (1964). . . ." Buckley v. New York Post Corp., *supra* note 127, at 182.
174. *Supra* note 147.
175. 307 F. Supp. 1212 (E.D. Tenn. 1968).
176. Lewis v. Reader's Digest Ass'n. Inc., *supra* note 163, at 706.

ly enough to encompass a variety of factual situations. One court was even inclined to disregard the applicable statute altogether and proceeded to sustain an assertion of jurisdiction on purely constitutional grounds. However, as prior discussion in this article indicates, not all courts are willing to give their statutes a broad enough application to include the libel case in every instance. The plaintiff's attorney will regard this as unfortunate; the defense attorney may have little other hope of avoiding an extremely inconvenient suit.

The effect of the single publication rule is necessarily intertwined with the applicability of a long-arm statute. It is probably fortunate that utilizing this technical rule to escape jurisdiction is a technique which has fallen into disfavor with the courts. Neither the purposes of the single publication rule nor of long-arm statutes is likely to be fulfilled by an approach which utilizes the single publication rule to deny jurisdiction.

The cases are variable as to the requirements they make in the due process context. The contacts of some defendants with a forum state are substantial enough so as to make this determination relatively easy. It is in cases where only a few defamatory articles are circulated in the forum that this determination becomes difficult. In this context, the controlling factor should probably be the plaintiff's right to defend his reputation in the forum where it exists—a consideration approved by many courts.

The effect of the First Amendment on jurisdiction is also linked to the due process determination. But the doctrine, born of a court determined to justify a prior holding, and distinguished partly into obscurity by its creating court, should have little influence on the jurisdictional determination. In this context, the plaintiff's right to defend his reputation at home should probably receive the most weight and consideration.

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SUMMARY AND CONCLUSION

The jurisdictional issue is most properly resolved by reference to the due process guidelines as set forth by the United States Supreme Court in the *International Shoe*,[177] *McGee*,[178] and *Hanson*[179] cases. Resolution of a jurisdictional issue on the basis of an interpretation of a long-arm statute's applicability per se often results in a case being disposed of without a consideration of due process fundamental fairness to the parties. Rather than focusing upon the relative rights of the plaintiff and the defendant, the court which disposes of a case through a restrictive perception of what the purported scope of a long-arm statute is does not serve the purpose of such statutes which is to expand the jurisdictional authority of the court.

Nevertheless, courts generally cannot simply disregard the terms of a long-arm statute. Few courts are likely to be willing to disregard the terms of an applicable statute and simply proceed with a due process analysis as did the court in the *St. Clair v. Righter*[180] case discussed earlier in this article. However, this approach to the problem may be commendable in jurisdictions with statutes restrictive by their terms or case law which constricts the applicability of the statutory terms. The notion that a long-arm statute is merely an authorization to exercise jurisdiction but that jurisdiction may be exercised beyond the limits of the statute if doing so would comport with due process is an analytic approach which facilitates the purpose of expanding jurisdiction to protect litigants in the home forum.

Another way to avoid excessive restrictiveness in the jurisdictional analysis is to adopt a liberal interpretation of the terms of the long-arm statute. In general, this line of analysis has been adopted by a large number of courts in products liability and defamation litigation. The principal feature of this analysis is that the causing of an injury in

177. International Shoe Co. v. Washington, *supra* note 8.
178. McGee v. International Life Ins. Co., *supra* note 11.
179. Hanson v. Denckla, *supra* note 15.
180. *Supra* note 159.

a forum is interpreted as satisfying any statutory requirements of doing an "act" within the forum. Thus, regardless of the wording of the applicable statute, causing an injury in a forum is regarded as an act sufficient to trigger the coverage of the long-arm statute. This analysis is preferrable to any analysis which divides the "acts" of making a defective product (or printing a libel) and the subsequent injury, because it permits the inquiry to proceed directly to considerations of due process. It is proposed that a similar liberal reading should be given to Subsection (a)(iii) of Wyoming's long-arm statute in order to facilitate the purpose of the statute.

In the absence of such a liberal interpretation of statutory terms, it is proposed that legislative action is necessary to protect the interests of Wyoming's citizens adequately. In place of the current statutory provisions, it is proposed that the legislature adopt a jurisdictional statute which authorizes the exercise of jurisdiction to the constitutionally permissible limits. Decisions in states which have such statutory provisions are made strictly on due process considerations and tend to afford an analysis most mindful of the relative rights of all parties concerned.

Regardless of how the court arrives at the point of making a due process analysis of the jurisdictional issue, it is further proposed that a liberal approach be adopted in this regard as well. Due to social and demographic factors somewhat unique to Wyoming, the jurisdictional due process analysis in Wyoming should be broad in regard to these social factors.

In the products liability context, courts always studiously apply the guidelines propounded by the United States Supreme Court, although the results are variable. Additionally, special attention is often given to the volume of business done by the foreign manufacturer in the forum and the foreseeability that a product might find its way to the forum. These factors of volume of business and forseeability should be analyzed in relation to factors unique to Wyoming,

such as Wyoming's sparse population and industrial practices. It is a mistake, for example, to use as a guideline the quantitative volume of business done by a foreign corporation in New York or Connecticut adequate to sustain jurisdiction in such states as a comparison for a state like Wyoming. It is hardly likely that a foreign corporation's business volume in Wyoming will be nearly as high as it would be in the more populous states. Similarly, Wyoming's consumers are a "captive audience" for foreign manufacturers due to the relative dearth of products industry in Wyoming. Whether the product is heavy industrial machinery or a small home appliance, the commercial reality is that it was probably manufactured outside the state of Wyoming. It is also likely that any products have arrived in Wyoming through a complicated series of commercial channels; distributorships, wholesalers, and the like. A restrictive due process analysis which concentrates on the small quantitative amount of business done by a foreign corporation in Wyoming or the fact that an instrumentality arrived in the state through intermediate channels disregards social and commercial realities and does not fulfill the purpose of expanding court protection to Wyoming citizens.

In the defamation context, a liberal approach to the jurisdictional due process analysis is also required by social and demographic characteristics. As a sparsely settled state with many small communities, Wyoming citizens are still dependent upon out-of-state news sources originating in population centers such as Denver, Salt Lake City, and Billings. This is particularly true for the electronic media, and generally true for newspapers and other news sources. Concomitantly, it is unlikely that these out-of-state news sources have substantial quantitative contacts with the state of Wyoming, because their major markets are likely to be in their own immediate vicinities. These facts, however, do not lessen the damage done to a Wyoming resident by a defamatory publication or broadcast. It is a harsh result to force a defamed plaintiff to prove his reputation far away from his home to a jury ignorant of the plaintiff's social setting

simply because the defendant has few quantitative contacts with the plaintiff's home forum.

A liberal approach to the nonresident jurisdictional issue in Wyoming is suggested by legal authority and social commercial conditions in the state. An analytic approach which focuses upon due process considerations rather than statutory terminology is recommended. Through such an approach, the protection of the courts may be effectively extended to Wyoming citizens.

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