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A NEW APPROACH TO JURISDICTIONAL ANALYSIS?

Plaintiff, a Washington corporation,[1] is a general insurance broker procuring "hard-to-get" insurance exclusively for other brokers. Defendant, a California corporation, telephoned plaintiff requesting it to obtain insurance for Cisco Aircraft, Inc., a customer negotiating a crop and forest dusting contract. Plaintiff obtained high-risk, high-premium coverage through its London broker and wired defendant a binder. Cisco defaulted and coverage was cancelled. Plaintiff paid its London broker the earned premiums and sought recovery from defendant.

Defendant was served pursuant to the Washington long arm statute.[2]

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[1] Griffiths & Sprague were brokering as the Farwest General Agency.

[2] WASH. REV. CODE § 4.28.185 (1959) provides in part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

By 1965, twenty-nine states, including Washington, had enacted expanded jurisdictional statutes. For a recent compilation see 51 VA. L. REV. 719 n.4 (1965).

Some statutes have a longer reach than the Washington law. For instance, VA. CODE ANN. § 8-81.2 (Supp. 1966) enumerates acts that will subject a non-resident to forum jurisdiction:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) 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, or derives substantial revenue from goods used or consumed or services rendered, in this State;

(5) Causing tortious injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

(6) Having an interest in, using, or possessing real property in this State; or

Defendant unsuccessfully challenged the jurisdiction of the court.[3] Plaintiff received a $41,275.15 judgment because the jury found that defendant had agreed to pay the premiums.[4] On appeal, the Washington Supreme Court affirmed. *Held:* Defendant "overtly performed acts making it a party to and participant in a business transaction in Washington. . . ."[5] and was therefore subject to the jurisdiction of Washington courts under the long arm statute as to that particular transaction. *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wash. Dec. 2d 667, 430 P.2d 600 (1967).

In *Griffiths* the court admitted the necessity of a "connecting tie or link between a non-resident and the forum state" before the forum state could assert jurisdiction under the long arm statute.[6] The court felt that the increasing integration of commerce, finance, manufacturing and agriculture virtually guaranteed existence of the connecting link. Three recent Washington cases were cited to demonstrate the ease with which the connection was found and to support a finding of jurisdiction in the principal case.[7]

The court's decision in *Griffiths* examined "notions of fair play and substantial justice,"[8] and followed a long line of Washington jurisdiction cases that focused on this due process issue rather than on the meaning of the statutory phrase "transaction of any business."[9]

(7) Contracting to insure any person, property, or risk located within this State at the time of contracting.

The Arizona legislature avoided the enumerated acts approach with a broadly phrased rule. ARIZ. RULES OF CIV. PROC. 4(e)(2) provides in part:

> When the defendant . . . is a person . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state.

[3] Defendant, Bayly, Martin & Fay, Inc., appeared specially to challenge the jurisdiction of the court. The challenge denied, defendant preserved the objection to jurisdiction in the answer and renewed it at the conclusion of plaintiff's case.

[4] Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash. Dec. 2d 667, 668-69, 430 P.2d 600, 601 (1967). The jury, through a special verdict, answered "yes" to the interrogatory: "Did the defendants agree that premiums due on the policies delivered to them for use of Cisco Aircraft, Inc. were to be charged to them?" This verdict clearly settled the issue of defendant's liability. Consequently, defendant's strongest argument for reversal revolved around the jurisdiction question.

[5] *Id.* at 673, 430 P.2d at 604.

[6] *Id.* at 671, 430 P.2d at 603.

[7] Nixon v. Cohn, 62 Wn. 2d 987, 385 P.2d 305 (1963); Quigley v. Spano Crane Sales & Serv., Inc., 70 Wash. Dec. 2d 193, 422 P.2d 512 (1967); Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn. 2d 469, 403 P.2d 351 (1965).

[8] 71 Wash. Dec. 2d at 673, 430 P.2d at 604.

[9] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 381 P.2d 245 (1963); Nixon v. Cohn, 62 Wn. 2d 987, 385 P.2d 305 (1963); Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn. 2d 469, 403 P.2d 351 (1965); Quigley v. Spano Crane Sales & Serv., Inc., 70 Wash. Dec. 2d 193, 422 P.2d 512 (1967); Oliver v. American Motors Corp., 70 Wash. Dec. 2d 845, 425 P.2d 647 (1967); Calla-

But *Griffiths'* approach to long arm jurisdiction was unique in one respect. The court restricted its due process analysis to a single factor—defendant's overt self-involvement in a Washington contract. Other Washington decisions resolved the due process issue only after consideration of a multiplicity of factors such as the relative convenience of the parties,[10] defendant's compliance with state administrative regulations,[11] the extent of defendant's past activity in the forum,[12] and the state's interest in the litigation.[13]

With the possible exception of *Griffiths,* the Washington court has never compared the relative merits of the factors comprising due process analysis.[14] *Tyee Constr. Co. v. Dulien Steel Products, Inc.,*[15] the initial case construing RCW 4.28.185, laid the groundwork for this undifferentiated analysis. After reviewing *International Shoe Co. v. Washington*[16] and the decisions it spawned,[17] the *Tyee* court concluded that "there are three basic factors which must coincide" to support jurisdiction. First, there must be a purposeful act. Second, the cause of action must arise from that act. And third, notions of due process must be observed—

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han v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967).

The statutory language is found in WASH. REV. CODE § 4.28.185 (1)(a)(1959). *See* note 2, *supra.*

[10] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 117, 381 P.2d 245, 252 (1963); Nixon v. Cohn, 62 Wn. 2d 987, 997-98, 385 P.2d 305, 311-12 (1963); Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn. 2d 469, 472, 403 P.2d 351, 354 (1965); Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 829, 435 P.2d 626, 636 (1967).

[11] Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 829, 435 P.2d 626, 636 (1967).

[12] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 116-17, 381 P.2d 245, 252 (1963); Quigley v. Spano Crane Sales & Serv., Inc., 70 Wash. Dec. 2d 193, 198, 422 P.2d 512, 515 (1967); Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 828-29, 435 P.2d 626, 636 (1967).

[13] Nixon v. Cohn, 62 Wn. 2d 987, 998, 385 P.2d 305, 311 (1963) Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 828, 435 P.2d 626, 635-36 (1967).

[14] The failure to compare the relative merits of the factors comprising due process analysis is a shortcoming evident in the decisions of many courts other than that of Washington. *See, e.g.,* Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Jenkins v. Dell Publishing Co., 130 F. Supp. 104 (W.D. Pa. 1955); S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954), *appeal dismissed per stipulation,* 348 U.S. 983 (1955).

For excellent criticism of courts' tendency to ignore the comparative value of due process factors, see Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH. L. REV. 227 (1967); Note, *In Personam Jurisdiction Over Foreign Corporations: An Interest-Balancing Test,* 20 U. FLA. L. REV. 33 (1967).

[15] 62 Wn. 2d 106, 381 P.2d 245 (1963).

[16] 326 U.S. 310 (1945).

[17] Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

For a comprehensive analysis of *International Shoe* and subsequent cases, see Note, *Developments in the Law: State-Court Jurisdiction,* 73 HARV. L. REV. 909 (1960).

consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[18]

The *Tyee* opinion implies that the court must always consider every factor relevant to the jurisdictional issue.[19] Thus, the *Tyee* court denied jurisdiction after it listed nine "pertinent facts" and "balanced" seven resolving factors.[20]

The outcome of *Tyee* was probably in accord with "the traditional notions"[21] but, since the court failed to discuss the comparative im-

[18] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 116, 381 P.2d 245, 251 (1963).

[19] The *Tyee* court reached this often quoted conclusion after studying all the due process factors discussed by the United States Supreme Court. The court's footnotes to these federal cases indicated that its conclusion was a single distillation and combination of all elements of jurisdictional due process previously stressed by the Supreme Court.

[20] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d at 116-17, 381 P.2d at 252 (1963):

> A review of the affidavits ... reveals the following pertinent facts: (1) Belyea's principal place of business is in New Jersey, and it has never solicited, qualified or registered to do, or previously done, any business in the state of Washington, or kept or maintained any office, personnel, advertising, telephone list, goods or property here; (2) Dulien solicited Belyea to buy or obtain a buyer for Dulien's electrical generators located in the state of Washington; (3) Negotiations between Dulien and Belyea, leading to the ultimate sale of the generators, were conducted by telephone, correspondence, and inspection trips by an agent or agents of Belyea; (4) Negotiations between Belyea and National Carbon Company, the ultimate purchaser, were conducted out of state; (5) Under the terms of sale negotiated by Belyea, Dulien was required to dismantle and load the generators for shipment, subject to direction and supervision by an electrical engineer designated by National Carbon Company; (6) Dulien, of its own volition, selected and contracted with Tyee to perform the dismantling and loading operation for a stipulated price; (7) Tyee's claim for added labor costs revolves around whether it was entitled, under the terms of its contract with Dulien, to "shoot" or "gad" out certain concrete beams in the dismantling operation; (8) An agent or agents of Belyea's entered the state of Washington during dismantling and loading operations, and participated in discussions regarding such operations; and (9) Belyea's services in connection with the sale of the generators were essentially those of a broker.
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> ....
>
> In resolving the problem presented, we have considered and balanced the following: (a) Belyea's principal place of business is in New Jersey; (b) the generator transaction represented an isolated business excursion into this state by Belyea; (c) Belyea's participation in the transaction was solicited by Dulien; (d) the transaction involved no systematic or continuing service by Belyea; (e) the presence of any agents of Belyea in this state was incidental, rather than essential, to the transaction; (f) the primary action rests upon the Dulien-Tyee contract; and (g) the probable inconvenience and expense incident to Belyea's defense in this state.

Though the court states that it "balanced" the seven factors, it is clear that the factors are not balanced; rather, all seven factors mitigate against jurisdiction. This aspect of the decision appears conclusory.

[21] Since "the traditional notions of fair play and substantial justice" are exceedingly vague *(see* p. 837 *infra* and note 23 *infra)* and since the facts of the case are not exceptionally persuasive in either direction, the *Tyee* court could have asserted

portance of specific facts, its reasoning was unenlightening.[22] This shortcoming is not inherent in due process analysis. Admittedly, jurisdictional due process is a vague notion and the natural tendency is for a court to take every fact into consideration and draw a conclusion according to the equally vague notion of "natural justice."[23] But the United States Supreme Court has discussed factors which comprise justice in the context of jurisdictional controversies, and has been able to distinguish the relative merits of the various factors.[24]

The *Griffiths* court seems to depart from Washington's usual undifferentiated due process analysis. The court based its decision on a single factor—defendant's act of seeking out plaintiff. Other factors, particularly defendant's substantial past activity in the state,[25] were ar-

jurisdiction as easily as denied it. Because of changes in the court's perspective it is possible that the *Griffiths* court would have decided the *Tyee* case differently than did the court in 1963. *See* discussion of the past activity factor, pp. 840-42 *infra*.

[22] Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 567-68. The author briefly discusses the *Tyee* case and specifically refrains from approving since he is uncertain what the court held.

Another example of this amorphous reasoning is Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967). In that case the Washington court considered, at length, eight factors determinative of the due process issue. No one factor was deemed more significant than another. *Id.* at 828-30, 435 P.2d at 635-36.

[23] Mr. Justice Black in his dissent in *International Shoe* criticises the Court for conditioning state jurisdiction upon "vague Constitutional criteria." He feels that the Constitution, "without any 'ifs' or 'buts,'" leaves to each state the power to open the doors of its courts for its citizens to sue corporations whose agents do business in those states. The "due process" standard is particularly offensive, according to Black, "[f]or application of this natural law concept, whether under the terms 'reasonableness,' 'justice,' or 'fair play,' makes judges the supreme arbiters of the country's laws and practices." International Shoe Co. v. Washington, 326 U.S. 310, at 323-26 (dissent).

[24] *International Shoe* formulated a test of reasonableness and fairness based on an analysis of "minimum contacts" but failed to explain which "contacts" were most important. The only due process factor mentioned in the opinion was convenience to the corporate defendant. Subsequent Supreme Court decisions, however, have attempted to recognize and balance underlying interests.

There have been two major interpretations of the minimum contacts test since *International Shoe*. In both the Court demonstrated that it would not discuss every relevant factor of due process; and, that it considered some factors more important than others. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court, in approving jurisdiction, made clear that the decisive factor was California's interest in providing governmental redress for its citizens when their insurers refused to pay claims. Much less important was the factor of inconvenience to the corporate defendant. "Modern transportation and communications" the Court stated, "have made it less burdensome for a party sued to defend himself in a state where he engages in economic activity." *Id.* at 223.

In Hanson v. Denckla, 357 U.S. 235 (1957), the court again stressed one factor—the absence of a purposeful act in the forum. In denying jurisdiction, the Court carefully distinguished between choice-of-law issues and jurisdictional questions. It minimized the facts that the forum was the domicile of many parties and was the most convenient location for litigation.

[25] Defendant's past activity in the forum is revealed in the appellate briefs. Defendant conceded that for seven years prior to the suit it had maintained a reciprocal agreement with plaintiff to handle and service customer accounts. On several occasions, defendant's officers and agents entered the state for that purpose and from

gued to the court[26] but ignored in the opinion. The court could have intentionally ignored the past activity in order to highlight the singular importance of the "overt" act.[27] Or, the court could have felt that the one reason mentioned was sufficient justification for the decision.[28]

Exact determination of the rationale for the court's approach is impossible; however, the court's reasoning may reveal a new view of jurisdictional due process. One could conclude from *Griffiths* that it is unnecessary for a court to discuss every factor relevant to a just resolution of the issue.[29] The court may finally have recognized that some factors are more important than others. If this is so the court may, in some cases, still engage in "balancing" but may weigh factors unequally. In other cases, like *Griffiths,* the court may completely abandon the scales and rely on a single persuasive fact.[30] While the weight of the factors will vary with changing factual situations, *Griffiths* may stand for the proposition that in cases where a foreign cor-

"time to time" plaintiff, for a commission, had procured insurance for customers of the defendant. From 1958 through 1964, defendant's name was listed in the Seattle telephone directory, though plaintiff had paid for the listing and the listed number was answered on plaintiff's switchboard. Brief for Appellant at 3, 10-11, Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash. Dec. 2d 667, 430 P.2d 600 (1967).

[26] Defendant's past activity in Washington was argued to the court at length by both parties. *See* Brief for Respondent at 1-3, 11; Brief for Appellant at 3, 10-11, Griffiths & Sprague Sevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash. Dec. 2d 667, 430 P.2d 600 (1967).

[27] Since the court does not say explicitly why it restricted its analysis to the one factor, observers are unable to assess the degree to which the court was emphasizing the purposeful act. Certainly, an outright comparison of the importance of the overt act, defendant's past activity, and other factors would have been preferable.

[28] Defendant's purposeful act and substantial past activity, plus the convenience of Washington as a location for the litigation demonstrate the fairness of asserting Washington jurisdiction. Apparently, the court determined that lengthy analysis was unnecessary.

[29] When all the due process factors point in one direction, either for or against jurisdiction, there is no reason for the court to belabor the issue by casually mentioning every relevant factor. *See, e.g.,* Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 381 P.2d 245 (1963); Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967). In such cases, the court's opinion would be more meaningful if one or two of the most important factors were highlighted.

[30] Just as the *Griffiths* court emphasized the purposeful act, the *Callahan* court could have emphasized the hazardous nature of defendant's product. Even if Keystone had not overtly submitted to jurisdiction (in the *Griffiths'* schema) by selling $6,696.85 worth of fireworks to a Washington distributor, there would have been another and equally compelling reason to assert jurisdiction. Defendant was trafficking in a very hazardous commodity and its sale in Washington evoked strong governmental interest. The Washington legislature had recognized the inherently dangerous characteristics of fireworks and had enacted WASH. REV. CODE §§ 70.77.380-525 (Supp. 1967) to regulate their sale and distribution. Keystone sought and received a license to sell fireworks from the Washington State Fire Marshal. Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967). As in McGee v. International Life Ins. Co., 325 U.S. 220 (1957), a single, even minor, isolated excursion into the forum state submits defendant to jurisdiction where the item involved is regulated by the forum.

poration knowingly and purposefully establishes contact with the forum it will be very difficult to deny jurisdiction.[31]

The purposeful act factor was first discussed by the United States Supreme Court in *Hanson v. Denckla.*[32] In *Hanson,* jurisdiction was refused because of the absence of a purposeful act.[33] Although the Washington Supreme Court recognized the factor in *Tyee,*[34] it was the *Griffiths* decision that suggested that a purposeful act would be the key factor in the jurisdictional due process analysis of contract disputes.

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[31] Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash. Dec. 2d 667, 672-73, 430 P.2d 600, 604 (1967).

[32] 357 U.S. 235 (1958).

[33] Citing *International Shoe,* the Court said: "[I]t 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...." The Court concluded: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 253.

Mr. Justice Goldberg commented on the *Hanson* requirement (in denying an application for a stay in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1, 4 (1965)) by referring to Currie, *supra* note 22, at 549, saying: "Currie has interpreted and generalized the Hanson test as a requirement 'that the defendant must have taken voluntary action calculated to have an effect in the forum state.'"

[34] Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 115, 117, 381 P.2d 245, 251, 252 (1963). In *Tyee* the manner of reference implies that the purposeful act is a statutory requirement. Indeed, Belyea's overt acts in the state are not considered along with other factors of due process. *Tyee's* approach to the purposefulness factor helps explain why the purposeful act was not emphasized in the early cases.

While it is true that the purposeful act may be a statutory prerequisite it is also clear that the purposeful act is a factor vital to due process analysis. In *Hanson,* the factor is characterized as an element of due process analysis. 357 U.S. at 253. In Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967), the Washington court first refers to the purposeful act as a statutory requirement and then as a due process factor. *Id.* at 826, 829, 435 P.2d at 634, 636.

In applying the purposeful act factor the Washington court uses the term "purposeful" in the context of an overt and voluntary contact with the forum. The court has avoided spawning a new label that could be mechanistically applied. Since the ultimate test is fairness, not "purposefulness," reference to "purposefulness" is merely a way of characterising the contact.

There remains the danger, however, that some courts might resort to labeling. The grafting of fictitious meanings on the label would be the next step. Unfortunately, the history of state jurisdictional expansion is replete with such developments. For instance, personal jurisdiction was once based on the common law doctrines of consent and presence. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). However, the need for expanded state court jurisdiction led to the notions of "fictitious presence" and "implied consent." *See* International Harvester Co. v. Kentucky, 234 U.S. 579 (1914) (doing business in Kentucky was said to be presence within the state); Simon v. Southern Ry., 236 U.S. 115 (1915) (a corporation failing to designate a process agent required by law consents by implication to appointment of the Secretary of State as its agent for suits arising in the forum); Hess v. Pawloski, 274 U.S. 353 (1927) (operation of an automobile on Massachusett's highways implied consent to appointment of the Secretary of State as a process agent for causes of action arising from any accident in the state).

A recent Massachusetts decision suggests that courts are already beginning to strain the meaning of "purposefulness." Wolfman v. Modern Life Ins. Co.,—Mass.—, 225 N.E.2d 598, *appeal dismissed,* 36 U.S.L.W. 3203 (U.S. Nov. 14, 1967) (where a New York insurer issued policy in New York and insured assigned replacement policy to Massachusetts' resident, the insurer "purposefully" transacted business in Massachusetts in servicing the policy).

The purposeful act factor is most relevant in contract situations because contracts are, by their nature, consensual.[35] Obviously, a manufacturer or insurance broker who participates in a business transaction in a foreign jurisdiction is acting purposefully, and the consequences of his acts are foreseeable. Since the out-of-state corporation enters the forum for its advantage, it seems "fair play" to require the non-resident to submit to forum justice in controversies arising from its profit seeking. It would not be persuasive for a foreign corporation which has knowingly made contact with the forum to argue that it would be inconvenient to defend a suit in the forum state.[36]

A comparison of *Tyee* and *Griffiths* reveals the shift in emphasis toward the purposeful act factor and suggests that the past activity factor may have been misunderstood and overrated. In *Tyee,* the

[35] The purposeful act factor has only minor significance in tort cases. Since torts or consequences of tortious conduct are, in essence, accidents it is much less likely that purposefulness will be involved. It is at this point that a foreseeability test assumes importance in jurisdictional analysis as well as tort analysis.

In products liability cases, the foreseeability of tortious consequences of products distribution may reach such a stage that the consequences may be characterized as purposeful. Economic integration has reached the point that any manufacturer who introduces a product into the stream of commerce would find it difficult to deny anticipation that it would arrive in a foreign jurisdiction. *See* Levin, *The "Long Arm" Statute and Products Liability,* 4 WILLAMETTE L.J. 331 (1967).

In most tort cases past activity is a relevant factor for balancing. Specifically, it is useful to determine whether a manufacturer or retailer intends his products to find their way into another jurisdiction. Thus, in a recent Washington case, the court denied jurisdiction over an Oregon retailer who had sold an automobile to a local Oregon resident who was subsequently injured by defective equipment while on a trip in Washington. The court sustained jurisdiction over the national manufacturer. Oliver v. American Motors Corp., 70 Wash. Dec. 2d 845, 425 P.2d 647 (1967).

[36] While emphasized in *International Shoe,* inconvenience to the corporate defendant has become less significant in the modern economic setting of corporations actively seeking expanded multistate markets. Conversely, there has been increased emphasis on the plaintiff's inconvenience in suing out-of-state. Courts now seem more concerned with the relative amount the plaintiff and corporation have at stake. *See* discussion of *McGee v. International Life Ins. Co., supra* note 24. Because the cost of defending foreign suits is an inevitable expense in our integrated economy, this expense should be accepted as a cost of doing business and should be spread among the ultimate national consumers. But the plaintiff's convenience issue too may have only minimal value when balanced with other factors. As one commentator observes: after *Hanson* the "status of... additional balancing factors of convenience to the plaintiff and location of witnesses seems to be in considerable doubt." 51 VA. L. REV., *supra* note 2, at 727.

The factor of relative convenience to the parties was considered by the Washington court in *Tyee, Nixon, Golden Gate* and *Callahan.* In *Tyee,* the "probable" inconvenience to Belyea of litigating in this state mitigated against jurisdiction. 62 Wn. 2d at 117, 381 P.2d at 252. In *Nixon,* on the other hand, it was found more convenient for the nonresidents to defend in Washington than for the plaintiffs to sue in Oregon. 62 Wn. 2d at 997-98, 385 P.2d at 311-12. In *Golden Gate,* the court noted "in passing" that Washington was the most convenient forum, 66 Wn. 2d at 472, 403 P.2d at 354; and, in *Callahan,* the court apparently dismissed the factor in terms of foreseeability. 72 Wash. Dec. 2d at 829, 435 P.2d at 636. In no case does the court discuss the merits of this factor in terms of others.

court noted that the defendant had purposefully consummated a business transaction in Washington but refused to assume jurisdiction because, in part, the "transaction represented an isolated business excursion into this state . . . and . . . involved no systematic or continuing service. . . ."[37] In contrast, the *Griffiths* decision turned solely on the purposeful act and omitted even a mention of past activity.

The language in *Tyee*[38] and the court's reliance in that case on the absence of defendant's past activity suggests that the court used "doing business" notions in interpreting the then new statutory language: "the transaction of any business."[39] Four years later, the court refined its analysis. In *Quigley v. Spano Crane Sales & Serv., Inc.*[40] the court stated that the "standard described in the phrase 'transaction of any business within the state'" was "far broader and more widely inclusive" than traditionally narrow concepts of doing business. While prior to the enactment of the long arm statute, a continuous and regular course of business within the state was necessary to assert jurisdiction—now, said the court, "a solitary business deal" would suffice to meet the statute's requirement as to the transaction of any business.[41] Following *Quigley,* past activity has

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[37] 62 Wn. 2d at 117, 381 P.2d at 252. The *Tyee* court considered the purposeful act and past activity factors as matters in different planes of analysis. *See* note 34, *supra.*

[38] *See* note 20, *supra.*

[39] Appellate briefs reveal the likelihood that the court was persuaded by defendant that "the portions of that statute (WASH. REV. CODE § 4.28.185 (1959)) germane to this proceeding raise no issues other than those contained in the general concept of 'doing business!'" Defendant argued ably that Washington decisions (obviously prior to the long arm statute) showed "that single or isolated transactions do not constitute doing business in Washington." Turning to decisions of other jurisdictions (especially Illinois) construing similar statutes, defendant urged that prior activity in the forum was a prerequisite of "transacting business" just as it was for "doing business." Brief for Respondent at 16, 17, 25-36, Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wn. 2d 106, 381 P.2d 245 (1963).

In retrospect, defendant's arguments appear based on a faulty interpretation of the long arm statute. Looking at the same Illinois decisions as did defendant, Professor Currie reached the opposite conclusion. Currie, *supra* note 22, at 563-66. Discussing the irrelevance of past activity, he concluded:

> That the defendant has also conducted other and unrelated activities in the State may or may not make it more convenient for him to defend here, but the basic requirement that he make voluntary contact with the State is satisfied without such additional contacts.

Id. at 566.

Another source of confusion for the *Tyee* court might have been a scholarly comment on the Washington long arm statute published shortly after its enactment. In this brief review of the new law "transaction of business" is explained in terms of "doing business," leaving the impression that the concepts are identical. Trautman, *Procedure, 1959 Survey of Wash. Law,* 34 WASH. L. REV. 323, 326 (1959).

[40] 70 Wash. Dec. 2d 193, 422 P.2d 512 (1967).

[41] *Id.* at 196, 422 P.2d at 414.

become a less important factor in the jurisdictional due process analysis of contract disputes.[42]

Despite the growing importance of the purposeful act factor and the relative decline of convenience and past activity as components in the due process analysis, it would be precipitous to conclude that one need only prove a purposeful act to assure jurisdiction in contract litigation.[43] Obviously, where a non-resident knowingly and purposefully participates in a "business deal" in the forum, he will fall within the purview of the statute as to acts arising from his forum involvement.[44] But there are contract situations wherein it is conceivable that a single, isolated act may fit the "purposeful act" test and still be insufficient to sustain jurisdiction.[45] In such a case, other due process

[42] The *Quigley* court demeaned the importance of past activity and the *Griffiths* court apparently ignored it. It appears significant that after *Quigley, Griffiths* was the next "transaction of any business" case and followed *Quigley* by less than seven months.

[43] The purposeful act factor is always necessary (*see* note 33 *supra*) but the presence of the purposeful act might not always sustain jurisdiction.

[44] WASH. REV. CODE § 4.28.185(1)(3)(1959) expressly limits long arm jurisdiction to suits arising from the transaction. However, there is no reason why personal jurisdiction could not be founded on doing business notions in situations where the cause of action is unrelated to a non-resident's contacts with the forum. In such cases, continuous and systematic past activity in the state would be a prerequisite and the state court has discretion, for reasons of state policy, to entertain or dismiss the suit. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

In Washington, the doing business statute (WASH. REV. CODE § 4.28.080 (1959)) has remained in force despite enactment of the long arm statute. The doing business statute has been interpreted by a long series of decisions, two as recent as 1963 (four years after passage of the long arm statute). The most notable interpretation of the statute is International Shoe Co. v. State, 22 Wn. 2d 146, 154 P.2d 801, *aff'd*, 326 U.S. 310 (1945).

In at least two jurisdictions, a doing business clause functions as both a doing business statute and a long arm statute. Justice Traynor, writing for the California Supreme Court, argues that the California doing business statute (CAL. CIVIL PRO. CODE § 411, subd. 2 (West 1954)) can be extended to the modern limits of the due process clause. Fisher Governor Co. v. Superior Ct. City & County San Francisco, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959). This approach to jurisdictional analysis makes a long arm statute unnecessary. In Traynor's view this result is desirable for several reasons, one reason being the avoidance of problems of statutory construction. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 662 (1959).

Similarly, New Jersey law (N.J.R.R. 4:4-4(d)) permits out-of-state service of process subject only to the limits of due process. According to the New Jersey court:

> Our rule contains no definitions, limitations or exceptions.... [A]nything any state can do under the Federal Constitution we can do.... Hence, we do not need to struggle with the oft difficult problems of statutory construction faced by courts in states with detailed 'long arm statutes.'

Roland v. Modell's Shopper's World, Inc., 92 N.J. Super. 1, 222 A.2d 110, 113 (App. Div. 1966). *See generally* Note, *In Personam Jurisdiction Over Foreign Corporations: An Interest-Balancing Test*, 20 U. FLA. L. REV. 33 (1967).

Obviously, accurate judicial analysis, supplemented by legislative amendment (*e.g.* N.Y. CIV. PRAC. § 302(a) (McKinney Supp. 1967)) eliminates many constructional problems. Cases like *Griffiths* provide strong rebuttal to arguments that long arm statutes are clumsy and should be abandoned.

[45] Consider the hypothetical in which an individual from a southeastern state writes to a large Washington corporation to make a small purchase. The buyer has never had any previous contact with either the corporation or this state. After the

factors would be relevant and the court might resort to a balancing or weighing of each factor. Thus, the presence or absence of past activity could be critical in some cases.[46] Or, intense governmental interest in the suit might be the determinative factor.[47] *Griffiths* has not ruled out all balancing, but has made clear that in most instances where there is a purposeful act the absence of past activity or other factors may not preclude jurisdiction.

The *Griffiths* decision is both a clarification and expansion of long arm jurisdiction.[48] *Tyee* and its progeny, using an undifferentiated balancing approach, have failed to articulate clearly the reasons for deciding jurisdictional questions. The *Griffiths* court's *implied* selec-

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merchandise is sent to the buyer he defaults. Though the buyer acted purposefully and knowingly it might seem contrary to a sense of fairness to assert Washington jurisdiction over the individual. *See* discussion of relative convenience, *supra* note 36.

[46] A recent decision in which the court found the immediate contacts with the forum insufficient for jurisdiction, and refused to consider past activity as a cure for the insufficiency is criticised in 52 MINN. L. REV. 723 (1968).

[47] In light of *McGee,* the governmental interest factor is clearly one of significant weight. *See* discussion of *McGee, supra* note 24. The Washington court first recognized the governmental interest factor in *Nixon.* The court did not, however, assess its relative significance. 62 Wn. 2d at 998, 385 P.2d at 311. The factor was again mentioned without discussion of its importance in *Callahan.* 72 Wash. Dec. 2d at 828, 435 P.2d at 636. *See* discussion of governmental interest factor in *Callahan, supra* note 30.

Governmental interest is a factor nearly as determinative as the purposeful act. However, since the purposefulness factor is present in most cases and governmental interest seems limited to unusual cases involving a "special regulatory" interest, the purposeful act will remain more important in jurisdictional analysis. Professor Currie argues that governmental interest should not be restricted to "special regulatory" matters. Currie, *supra* note 22, at 540-41,549-50. Herein, lies the future of the factor.

[48] An argument can be posed that Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. Dec. 2d 814, 435 P.2d 626 (1967), suggests a course for the future that may restrict jurisdiction. In *Callahan,* the court injects into the decision a long quotation from Fisher Governor Co. v. Superior Ct. City & County San Francisco, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959). In this statement Justice Traynor lists six factors relevant to jurisdictional analysis. It is Traynor's position that these factors also constitute *forum non conveniens* tests. Traynor, *supra* note 44, at 663-64.

The Washington Supreme Court has held that the doctrine of *forum non conveniens* is not a part of the law of this state. Lansverk v. Studebaker-Packard Corp., 54 Wn. 2d 124, 338 P.2d 747 (1959). Once a Washington court has assumed jurisdiction it cannot then dismiss on the jurisdictional ground that a more appropriate forum is available. *See* Trautman, *Forum Non Conveniens In Washington—A Dead Issue?,* 35 WASH. L. REV. 88 (1960).

If the *Callahan* court was approving Traynor's analysis of the closing gap between jurisdiction and *forum non conveniens,* the court could merge the two doctrines, call them both jurisdictional analysis, and sub silentio reverse its holding in *Lansverk.* It would then be possible for the court to reject jurisdiction at the outset of a case for reasons more relevant to *forum non conveniens.* [Quaere whether Washington has already reached this result? *Cf.* Oliver v. American Motors Corp., 70 Wash. Dec. 2d 845, 425 P.2d 647 (1967) (dissent).] Obviously, jurisdiction would be restricted in the process. It would seem more appropriate to overrule *Lansverk* directly and adopt a two step analysis even though some factors in the analysis are similar. As the United States Supreme Court suggested in *Hanson,* the interests underlying a choice-of-law ruling may differ from those justifying assertion of jurisdiction over a non-resident defendant. 357 U.S. at 253.

tive approach may preview a new clarity in jurisdictional analysis. In future opinions the court should give *explicit* recognition to the relative values of various due process factors. Such action would assure greater predictability and promote orderly legal development.

Even without an explicit differentiation among due process factors, *Griffiths'* sole reliance on the purposeful act may produce a significant expansion of jurisdiction. The court may be saying that it need only find some intentional course of conduct upon which an inference of submission to jurisdiction may be rationally based.[49] The court's willingness to find such conduct in our integrated economy suggests a more certain remedy for forum businessmen in their contract disputes with foreign corporations.[50]

A CONSTITUTIONAL DILEMMA FOR LOITERING STATUTES?

Defendant was stopped on a public sidewalk by a police officer and asked to identify himself and account for his presence. He refused to comply with this request, and was arrested and charged with disorderly conduct.[1] On appeal to the California District Court of Appeals, the lower court's dismissal was reversed. *Held:* One who loiters or wanders upon the streets or from place to place without apparent reason or business has no constitutional right to remain silent when the surrounding circumstances are such as to indicate to a peace officer as a reasonable man that the public safety demands

[49] The Washington court expressed this notion while commenting on Gray v. Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Oliver v. American Motors Corp., 70 Wash. Dec. 2d 845, 858, 425 P.2d 647, 655 (1967).

[50] Critics have suggested that exposure of businessmen to foreign suits will discourage casual interstate commerce. *See* Fourth N.W. Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, 117 N.W.2d 732, 736 (1961); Conn. v. Whitmore, 9 Utah 2d 250, 342 P.2d 871, 874 (1959); Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196, 204-06 (1957). A more likely inhibiting factor would be the uncertainty engendered by "essays in jurisdictional analysis." Businessmen who can anticipate the legal consequences of foreign transactions are able to seek appropriate protection.

[1] The relevant portion of CAL. PEN. CODE § 647(e) (West Supp. 1967) reads as follows:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> ....
>
> (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.