Personal Jurisdiction in the Post-World-Wide Volkswagen Era—Using a Market Analysis to Determine the Reach of Jurisdiction

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PERSONAL JURISDICTION IN THE POST-WORLD-WIDE VOLKSWAGEN ERA—USING A MARKET ANALYSIS TO DETERMINE THE REACH OF JURISDICTION

INTRODUCTION

The United States Supreme Court has delivered relatively few modern decisions bearing on the issue of personal jurisdiction. After the Court's 1945 decision in *International Shoe Co. v. Washington*, state courts had a fairly free rein to determine whether subjecting a defendant to jurisdiction would be consistent with "traditional notions of fair play and substantial justice." Many courts and commentators favored expanding the reach of jurisdiction to encompass an increasing number of out-of-state defendants.

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2. 326 U.S. 310 (1945).

3. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This "free rein" arose primarily because of the lack of Supreme Court decisions on jurisdiction between 1958 and 1977.

4. Several commentators have examined various means by which states should be able to acquire jurisdiction. As many commentators generally felt that "fundamental fairness" should be the touchstone of jurisdiction, they often disapproved of technical restrictions on jurisdiction, although they did not advocate removing all barriers. See, e.g., Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227 (1967); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). The court decisions encouraging an expansive notion of jurisdiction include McGee v. *International Life Ins. Co.*, 355 U.S. 220, 222–23 (1957), in which the Supreme Court referred to the fact that modern transportation and communication make it less inconvenient for a defendant to be sued in a distant forum; *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732, 735 (1966) (overruled in *Northern Propane Gas Co. v. Kipps*, 127 Ariz. 522, 622 P.2d 469 (1980)), in which the court held that jurisdiction over defendants who sent products through the stream of commerce and across state lines should not depend on a showing that the defendant "purposefully" sought some benefit from the forum state; *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), which relied extensively on *McGee*.
By 1980, however, the Supreme Court indicated its desire to restrict this trend. The Court's decision in *World-Wide Volkswagen Corp. v. Woodson* directed lower courts to look primarily at the defendant's interests in determining whether the defendant may be subjected to jurisdiction. Under *World-Wide Volkswagen*, a court must first determine that the defendant has established "minimum contacts" with the forum state; only then may the court consider the interests of the resident plaintiff or the forum state, or the interest in litigating in a convenient forum. *World-Wide Volkswagen* thus created a two-tiered test, with the defendant's interests paramount.

This two-tiered test has created particular difficulty in product liability, or "stream of commerce," cases: those cases in which a manufacturer's or dealer's products cause damage to a plaintiff in a foreign state. The difficulty arises when a court attempts to determine whether the manufacturer or dealer has established minimum contacts with the forum state. In cases where the product was brought into the forum by a consumer, some courts have denied jurisdiction because the contacts were created by the "unilateral" acts of the consumer ("consumer-based contacts"). On the other hand, courts have been much more willing to exercise jurisdiction where the contacts were "distributor-based," arising from the manufacturer's efforts to sell the product in the forum.

This Comment proposes that courts should apply a market analysis to all "stream of commerce" cases. The proper question in such cases is

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5. The Court earlier restricted the reach of jurisdiction in Kulko v. Superior Court, 436 U.S. 84 (1978), where it held that causing "effects" in the forum state is not sufficient.

6. *Id.* at 291–92.

7. *Id.* at 294.

8. Although the stream of commerce cases usually arise in the context of product liability, the same analysis often applies to cases in which the plaintiff seeks the services of defendant and later returns to the forum state. In a sense, defendant's services are placed into the stream of commerce.


whether the market for the defendant manufacturer's or dealer's products includes the forum state. If so, the defendant should be subject to jurisdiction in the forum state.

The Comment begins with a look at the recent history of the doctrine of personal jurisdiction. It then proposes a market analysis approach as an alternative to the rigid unilateral contacts test, and discusses the market analysis approach in the context of several recent consumer-based contact cases. Finally, the Comment describes how courts have applied the market analysis approach in distributor-based contact cases.

I. BACKGROUND

A. Early Supreme Court Cases Involving Personal Jurisdiction

The foundation case for modern jurisdictional analysis is *International Shoe Co. v. Washington*, in which the Court abandoned its former power-based notion of jurisdiction in favor of an equity-based, reasonableness approach. The key was whether a defendant had established minimum contacts with the forum state. This new test was a deliberately vague one; in determining whether minimum contacts existed, courts were to decide whether subjecting the defendant to jurisdiction would offend "traditional notions of fair play and substantial justice." The result was that the *International Shoe* minimum contacts doctrine permitted courts greater jurisdictional reach.

In *McGee v. International Life Insurance Co.*, the Supreme Court again gave impetus to an expansive view of personal jurisdiction. Although adhering to the *International Shoe* requirement of minimum contacts, the Court also noted that because of improvements in transportation and communication, it was becoming less burdensome and inconvenient for a defendant to litigate outside its home state. Hence, only a single, isolated contact was required for jurisdiction. Moreover, the Court

13. Pennoyer v. Neff, 95 U.S. 714 (1877), was decided on a theory of personal jurisdiction that required the forum state to have "power" over the defendant. Only if the defendant was present in the state or consented to jurisdiction could jurisdiction be exercised. These limitations were designed to protect state sovereignty. See id. at 722. *International Shoe* replaced this rigid theory of jurisdiction with the minimum contacts test. See infra note 14 and accompanying text.
15. Even before *International Shoe*, the Court recognized that the old *Pennoyer* concepts unreasonably inhibited the scope of jurisdiction. For example, in Hess v. Pawloski, 274 U.S. 352 (1927), the Court found that a nonresident motorist had, by driving on the forum state's highways, implicitly "consented" to be sued in the forum state.
17. Id. at 222–23.
18. Id. at 223.
stressed that other factors entered into the jurisdictional balance. The Court discussed the forum state’s interest, the disadvantage that resident plaintiffs would suffer were they required to litigate in a distant state, and the interest in choosing a forum in which both witnesses and evidence were present. The decision thus permitted courts to view the minimum contacts requirement more loosely.

Less than one year after McGee came the decision in Hanson v. Denckla in which the Court emphasized that restrictions still existed on jurisdictional reach. In Hanson, a resident of Pennsylvania executed a trust instrument in Delaware, naming a Delaware bank as trustee but rezerving for herself a power of appointment over the remainder of the trust. She subsequently moved to Florida, where a suit was later brought by legatees of the will. The legatees sued, among others, the Delaware bank in a Florida court, claiming that they held the rights to the remainder of the trust. The Supreme Court overturned Florida’s exercise of jurisdiction over the defendant bank.

The Court explained that it was not enough that the defendant had contacts with the forum state; rather, the defendant must “purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” This requirement of “purposeful availment” had a logical corollary: “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” After Hanson, convenience alone would not support jurisdiction.

But Hanson did not overrule McGee, nor did it entirely contradict McGee’s general philosophical approach. As a result, the Supreme Court created a choice of precedents in jurisdictional analysis. This ambiguity characterized the state of jurisdictional doctrine for nearly twenty years, as the Supreme Court decided no personal jurisdiction case from the late 1950’s to the late 1970’s.

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19. Id. at 223–24.
21. Id. at 238–43.
22. Id. at 253.
23. Id.
24. See id. at 254. The Court stated that a state “does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation.”
25. The Court distinguished the facts in McGee. See id. at 251–52. McGee involved a suit against a Texas corporation which had executed a life insurance contract with a California resident. Suit was successfully brought in California, as the “minimum contacts” requirement was met. McGee, 355 U.S. at 220.
26. The first Supreme Court case decided after Hanson was Shaffer v. Heitner, 433 U.S. 186 (1977). During the period between 1958 and 1977, courts could cite to McGee if upholding
Market Analysis and Personal Jurisdiction

B. The Problem of “Portable Torts”

The development of the minimum contacts doctrine meant that jurisdiction could encompass an increasing number of defendants. The potential for overexpansion was especially great in the stream of commerce cases—those cases in which a dealer allegedly creates a jurisdictional contact by providing products or services to nonresidents, who later sue him in another forum. Dealers needed some guarantee that they would not be subjected to “portable torts,” a situation in which jurisdiction travels with the product. 27 This problem was illustrated by a well-known hypothetical in the case of Erlanger Mills v. Cohoes Fibre Mills:

To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California tire dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. 28

The Erlanger Mills court thus warned that jurisdiction should not spring from the mere general foreseeability that a dealer’s actions may cause effects in some other state, through the movements of a consumer over whom the dealer has no control. 29

jurisdiction, or to Hanson if denying jurisdiction. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966) (overruled in Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 622 P.2d 469 (1980)), provides a good illustration of a court choosing the doctrine and philosophical approach it believed most appropriate. In Phillips, the court held that the purposeful availment test of Hanson, which limited jurisdictional reach, could not be applied literally to stream of commerce product liability cases without creating some inequitable results. 413 P.2d at 735.

27. “Travelling jurisdiction” used to be a classic problem in cases involving in rem jurisdiction. If the “res” was a debt, then jurisdiction would be present wherever the debtor was found, as a debt could have no situs in the abstract. The Supreme Court originally upheld travelling in rem jurisdiction in Harris v. Balk, 198 U.S. 215 (1905); but in Shaffer v. Heitner, 433 U.S. at 186, the Court held that in rem jurisdiction was subject to the minimum contacts rule to the same extent as in personam jurisdiction.

28. 239 F.2d 502, 507 (4th Cir. 1956).

29. This notion of general foreseeability places almost no limits on the forum state’s ability to assert jurisdiction over the defendant. This was one evil that the Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), wished to eliminate. For a discussion of World-Wide Volkswagen, see supra Part I C. Compare the Oklahoma Supreme Court’s decision in the World-Wide Volkswagen case, in which the court held that an automobile “is by its very design and purpose so mobile that petitioners can foresee its possible use in [the forum state].” World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978), rev’d, 444 U.S. 286 (1980). The Oklahoma Supreme Court essentially allowed jurisdiction to travel with the product, albeit a special type of product.
C. World-Wide Volkswagen Corp. v. Woodson

The language in *Hanson*, requiring that jurisdiction be based on a defendant’s purposeful availment of the benefits of the forum state, seemingly eliminated the danger of a defendant being haled into a state merely because it was “generally foreseeable” that a consumer might take his products into that state. Nonetheless, the Supreme Court faced this situation in *World-Wide Volkswagen v. Woodson*, a stream of commerce case decided in 1980.

*World-Wide Volkswagen* presented a fact situation involving a potential portable tort. Plaintiffs were New York residents who bought an automobile from a New York dealer. The next year they moved to Arizona; however, while passing through Oklahoma, the car was involved in an accident resulting in injuries. Plaintiffs sued both the New York dealer and the automobile distributor. Jurisdiction hinged on the nature of the contacts that the defendants had established with Oklahoma.

The Supreme Court first emphasized that only the defendants’ contacts could be considered, at least preliminarily. The fact that Oklahoma was likely the most convenient forum for access to witnesses and evidence, that Oklahoma had a significant interest in the case, and that the plaintiffs preferred to litigate in Oklahoma, was deemed insufficient to confer jurisdiction.

The Court found that the only contacts between the defendants and Oklahoma were created by the “unilateral” actions of the plaintiffs. Referring to *Hanson*, the Court held such unilateral contacts to be insufficient for jurisdiction. Otherwise, jurisdiction could be premised on the mere general foreseeability that a consumer would take a product to any of the fifty states. In the Court’s words, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.”

The Court indicated that if the contacts with the forum state had arisen not out of the actions of the consumer, but rather “from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for

31. Id. at 288. Plaintiffs also sued the automobile manufacturer and importer; however, these two parties did not challenge the district court's jurisdiction. Id. n.3.
32. Id. at 294.
33. Id. at 298.
34. Id. at 296. For a discussion of general foreseeability, see supra note 29. The dissents in *World-Wide Volkswagen* by both Justices Blackmun and Marshall emphasized that the unique mobility of an automobile should be considered in assessing the jurisdictional reach over a nonresident automobile manufacturer. 444 U.S. at 314-16 (Marshall, J., dissenting); id. at 318-19 (Blackmun, J., dissenting). See also the lower court opinion in *World-Wide Volkswagen*, 585 P.2d 351, 354 (Okla. 1978).
its products in other states," such contacts would have sufficed for jurisdiction. Arguably, the Court was creating a bright-line test to distinguish cases involving consumer-based contacts from those involving distributor-based contacts.

The Court added that the forum state could assert jurisdiction over a corporation (and presumably, any business) that "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." Supposedly then, a consumer could not create a jurisdictional contact by purchasing a product from an out-of-state dealer and then bringing it into the forum state. This furthers the argument that the Court was making the jurisdictional question dependent on whether the contacts with the forum are consumer- or distributor-based.

However, the Court never explicitly adopted such a test for jurisdiction. Moreover, it muddied its opinion by stating that jurisdiction will lie whenever a corporation "purposefully avails itself of the privilege of conducting activities within the forum state." If the contact with the forum state is an "isolated occurrence," on the other hand, jurisdiction will not lie. What result if several consumers (rather than a single consumer) buy products from an out-of-state dealer and bring them into the forum state? Even though the contacts created would be consumer-based rather than distributor-based, they might satisfy the Court's purposeful availment test, since they would not be isolated occurrences. Jurisdiction might lie in this situation.

In short, while the Court has made it clear that distributor-based contacts are more likely to be sufficient for jurisdiction, it has not completely ruled out jurisdiction premised on consumer-based contacts. Lower courts must sift through the language in World-Wide Volkswagen to determine the reach of jurisdiction in each fact situation.

35. World-Wide Volkswagen, 444 U.S. at 297.
36. Id. at 297–98. The Court approvingly cited Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), as an example. In Gray, the defendant shipped its products into the forum state through distributors rather than consumers, unlike the World-Wide Volkswagen defendant. The Court arguably drew a sharp distinction between consumer-based contacts and distributor-based contacts, with only the latter sufficing for jurisdiction. This Comment argues that such an arbitrary distinction frequently leads to inequitable results.
37. Justice Marshall's dissent (joined by Justice Blackmun) does indicate a belief that the majority in World-Wide Volkswagen held that jurisdiction will never be upheld where the contacts with the forum state are consumer-based. World-Wide Volkswagen, 444 U.S. at 315 (Marshall, J. dissenting).
38. Id. at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
39. 444 U.S. at 297.
II. ANALYSIS

A. The Unilateral Contacts Doctrine and Consumer-Based Contacts

The Supreme Court first developed the doctrine of "unilateral contacts" in *Hanson v. Denckla*, a case involving neither manufacturers, consumers, nor products flowing through the stream of commerce. Only later did courts extend the language in *Hanson* to stream of commerce cases. Removed from its original context, the *Hanson* doctrine was transformed into an awkward tool for restricting jurisdiction in cases of consumer-based contacts.

In *Hanson*, the defendant's alleged contacts with Florida, the forum state, arose solely because plaintiff's decedent moved from Pennsylvania to Florida. The defendant, a Delaware bank, made no purposeful contacts with Florida. In effect, the plaintiffs were attempting to thrust jurisdiction on a defendant who received no benefit at all from the forum state. The Court correctly refused to exercise jurisdiction, as the only contacts in the case stemmed from the unilateral actions of plaintiff's decedent.

The concepts of unilateral contacts and of purposeful availment of the forum state, while relevant to the *Hanson* fact situation, are much more difficult to apply, however, in stream of commerce cases. How does one determine if a product's dealer has created purposeful contacts with a forum state? Since the product's consumer may initiate the contact by taking the product into the forum state, it may be difficult to show that the dealer purposefully created the contact. This problem exists no matter how many out-of-state consumers frequent the dealer's business.

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41. For the facts of *Hanson*, see *supra* text accompanying note 21.
43. In *Hanson*, jurisdiction truly was "thrust" on a defendant who had no desire to have any contacts with the forum state. A recent case that has distinguished *Hanson* from *World-Wide Volkswagen* is *Waterval v. District Court*, 620 P.2d 5, 9-10 (Colo. 1980). The subtle distinction between attempting to "thrust" jurisdiction on a defendant (as in *Hanson*) and attempting to predicate jurisdiction on a consumer-based contact is significant. In the *Hanson*-type situation, it would clearly be inequitable for a court to uphold jurisdiction. In a case of consumer-based contacts, the answer is not so clear. In *World-Wide Volkswagen*, the consumer drove the automobile from New York to Oklahoma, a distant state. The contact created between the New York distributor and Oklahoma, the forum state, was arguably insufficient to justify jurisdiction in Oklahoma. But in other instances the defendant will expect and hope that the consumer will take his product into other states, thereby expanding the defendant's product market. In this case an exercise of jurisdiction would be equitable. The point is that jurisdiction should be denied only when plaintiff has "thrust" contacts with the forum state on a defendant.
45. In *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732, 735 (1966), the Arizona Supreme Court discussed the difficulty of applying *Hanson*’s requirement of purposeful availment to cases involving consumer-based contacts. See also *Woods, supra* note 4, at 871-72.
A court may simplify the problem by holding that the requirement of purposeful contacts can never be met in this situation and that the consumer's actions are per se unilateral. But this would incorrectly treat all cases of "consumer-based" contacts as members of a monolithic class.\footnote{One commentator has urged that a sharp distinction be drawn between distributor-based and consumer-based contacts, with the latter insufficient to support jurisdiction. See Note, \textit{Long-Arm Jurisdiction and Products Liability: Beyond World-Wide Volkswagen}, II Mem. St. U.L. Rev. 351, 378 (1981). While such a formula is workable, its application can lead to inequitable results.\footnote{Rush v. Savichuk, 444 U.S. 320, 327 (1980) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).}}

Consider, for example, a variation on the \textit{Erlanger Mills} hypothetical. Instead of a California dealer selling tires to the owner of a car with Pennsylvania license plates, assume that the car has Nevada license plates. These two situations may fundamentally differ, since the dealer in the second situation may derive a sizeable portion of its income from the Nevada market. Yet it is difficult to differentiate the two situations by using a purposeful contact analysis, and it is impossible to differentiate them if consumer-based contacts are treated as unilateral per se. Another, more flexible criterion for jurisdiction must therefore be applied in these cases.

\section*{B. Use of a Market Analysis Approach in Cases Involving Consumer-Based Contacts}

In a companion case to \textit{World-Wide Volkswagen}, the Supreme Court noted that the critical focus in any jurisdictional analysis must be on "the relationship among the defendant, the forum, and the litigation."\footnote{The question of who initiates the contact, and its impact on the jurisdictional issue, is more relevant in contract cases than in product liability cases where products or services are placed in the stream of commerce and cross state lines. In contract cases, a court may sometimes be able to determine which party sought out the other, and hold that party responsible for initiating the contact. This would be one factor to consider in determining the jurisdictional question. For example, in Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959), plaintiff was an Illinois mail order business that actively solicited a Utah defendant, and later successfully sued the defendant for breach of contract in Illinois. Since the plaintiff clearly initiated the contract, the Utah court refused to give full faith and credit to plaintiff's Illinois judgment. In a sense, plaintiff had tried to thrust jurisdiction on the defendant.\footnote{Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959).}} The question that logically follows is: precisely what type of relationship is necessary?

When a consumer enters another state to buy the products or services of a dealer in that state, the consumer undoubtedly initiates the contact. Yet this fact alone should not preclude the consumer from suing the dealer in the consumer's home state.\footnote{Rush v. Savichuk, 444 U.S. 320, 327 (1980) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).} A dealer goes into business with the expectation (indeed, the hope) that many different consumers will frequent his business. Some business locations are chosen precisely to attract
consumers from other states. For purposes of asserting jurisdiction, the significant factor often is not whether the dealer "purposefully" conducts activities in another state, but rather whether the dealer receives a sizeable benefit from the connection with the other states.

The concept of "benefit" is the core of the market analysis that courts should apply to cases of consumer-based contacts. The market analysis approach conforms to the notion that courts should decide jurisdictional issues on equitable grounds, a notion that has been followed ever since the *International Shoe* decision was rendered nearly forty years ago. 49 Furthermore, the market analysis approach offers sufficient safeguards to protect a defendant dealer from unexpected claims of jurisdiction.

1. Where Jurisdiction Would Lie Under the Market Analysis Approach

There are two ways in which a dealer may establish a relationship with another state sufficient to allow the exercise of jurisdiction by the state. First, the dealer may actively solicit business from customers in another state. This method of establishing jurisdictional contacts was recognized in *World-Wide Volkswagen* and subsequent lower court decisions. 50 If a dealer solicits business "either through salespersons or through advertising reasonably calculated to reach [the forum] State." 51 the size of the profit that the dealer ultimately derives from the state should be immaterial. As the dealer has chosen to enter the market in another state, it is fair to subject it to jurisdiction there. Thus, in market analysis terminology, active solicitation plus a benefit of any size should suffice for jurisdiction.

The second situation in which jurisdiction should lie is where the dealer derives a sizeable benefit from the market in another state, despite making no overt effort to initiate contacts with the state. If some form of demonstrated purposeful contact were required, there might be no basis for jurisdiction in such cases. 52 The better solution, therefore, is to find jurisdiction regardless of whether one can prove that the dealer actually knew that it was receiving a sizeable benefit. Constructive knowledge (an assumption that the dealer "should have known" it was receiving this benefit from the forum state) should be sufficient.

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49. The *International Shoe* court emphasized that jurisdiction should be exercised only where to do so would conform with "traditional notions of fair play and substantial justice." 326 U.S. 310. 316 (1945).
In order to define "sizeable benefit," both the nature and the frequency of the dealer's contacts with the forum state must be evaluated. Traditionally, courts have spoken of only two degrees of jurisdictional contacts—"isolated" or "continuous and systematic." The former standard is obviously easy to meet; the latter, however, has been likened to a requirement of "pervasive presence" in the forum, and is rarely met. In cases of consumer-based contacts, an isolated contact—for example, one customer crossing the state line to buy one product in a neighboring forum—should not, in fairness to the dealer, suffice for jurisdiction. On the other hand, the "continuous and systematic contacts" test would force the consumer to show that a dealer receives a substantial benefit from the market in the forum state. This is too great a burden.

A more realistic approach would be to create a new threshold standard, or "middle ground," between the "isolated" and "continuous and systematic" standards. This is what is meant by the requirement of a "sizeable benefit" as a basis for jurisdiction. Use of this standard would expand the reach of jurisdiction in cases involving consumer-based contacts without leading to inequitable results. Refusal to employ such an

54. This scheme originated in International Shoe, see id. at 317, and was elaborated in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). Courts use the two-level scheme to determine whether jurisdiction may be exercised over a non-resident defendant, in cases where the cause of action is unrelated to defendant's activities in the forum state. If defendant's contacts are isolated, the cause of action must be related to those contacts for jurisdiction to lie. If defendant's contacts are continuous and systematic, the cause of action may be wholly unrelated to those contacts.

The problem of "related" or "unrelated" contacts is not covered in this article. This Comment deals only with those cases in which the cause of action is related to defendant's contacts with the forum state. For example, if defendant is sued for selling a defective car to a nonresident from a different forum state, the Comment considers only those instances in which defendant's contacts with the forum involved other sales of automobiles or repairs to automobiles. It does not consider contacts that are wholly unrelated to the cause of action.

Nonetheless, the "isolated" and "continuous and systematic" scheme still enters into play. For in the case of consumer-based contacts, an "isolated" contact (e.g., defendant dealer sells one car to nonresident plaintiff) has not been found to be sufficient to support jurisdiction, even though the cause of action is related to that contact. This is because the contact is deemed "unilateral," and hence, of no jurisdictional significance. See e.g., World-Wide Volkswagen, 444 U.S. at 298. Does this mean that the rigorous "continuous and systematic" level of contacts must be satisfied to support jurisdiction in cases of consumer-based contacts? This Comment argues that a middle ground, between "isolated" and "continuous and systematic," is the appropriate standard.

55. This notion of a pervasive presence requirement is discussed in Seidelson, Recasting World-Wide Volkswagen as a Source of Longer Jurisdictional Reach, 19 TULSA L. REV. 1, 18 (1983).
56. The idea of a middle ground is discussed in Seidelson, supra note 55, at 29. Seidelson argues for the middle ground as a basis for jurisdiction in cases where the contacts are unrelated, though similar, to the cause of action.

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approach, as some post-*World-Wide Volkswagen* decisions have demonstrated, can produce such inequities.57

2. Where Jurisdiction Would Not Lie Under the Market Analysis Approach

Where the dealer merely has knowledge of a possible jurisdictional contact, but does not actively solicit the contact and derives only a slight benefit from the contact, jurisdiction should not lie. This is a variation on the *World-Wide Volkswagen* fact situation, in which the New York dealer had only a vague notion of the "general foreseeability" that it was selling an automobile to a New York resident who intended to pass through Oklahoma en route to Arizona.58

In a more recent case, *Northern Propane Gas Co. v. Kipps*, the customer, an Arizona resident, brought his mobile home to Michigan to be serviced. The customer also specifically informed the dealer that he intended to return to Arizona. Relying on language in *World-Wide Volkswagen*, the customer later sued in Arizona, asserting jurisdiction because the dealer, a corporation, “deliver[ed] its products into the stream of commerce with the expectation that they [would] be purchased by consumers in the forum state.”59 Refusing to interpret the *World-Wide Volkswagen* opinion so literally, the Arizona Supreme Court denied the customer’s claim. The court declared, “We do not believe that the plaintiff’s notice of intended use to . . . [the] retailer changes the local character of that retailer’s business.”60

Mere knowledge of a contact with another forum should not suffice for jurisdiction.61 Upholding jurisdiction on this basis would subject a dealer to unfair hardship, since it would have only two options available. The dealer could carry out the sale and prepare itself for a possible trip to another forum should a lawsuit later arise, or it could simply refuse to


58. For the facts of *World-Wide Volkswagen*, see *supra* text accompanying note 31.


61. *Id.* at 473 (quoting Granite Sales Volkswagen, Inc. v. District Court, 492 P.2d 624, 626 (Colo. 1972)).

62. The court in *Northern Ins. Co. of N.Y. v. B. Elliot Ltd.*, 323 N.W.2d 683, 688 (Mich. App. 1982), pointed out that the majority opinion in *World-Wide Volkswagen* did not make clear whether actual knowledge of a contact with the forum makes a difference in the jurisdictional analysis. The court concluded that actual knowledge is not necessarily sufficient to confer jurisdiction. 323 N.W.2d at 688.
serve out-of-state customers. Forcing the dealer to choose between these two options would be patently unreasonable.

3. Predictability of the Market Analysis Approach

The World-Wide Volkswagen opinion stressed that there must be "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." In cases where a dealer actively solicits the market in another forum (as by advertising in the forum), the market analysis approach provides the required predictability. The dealer in this situation will be subjected to the jurisdiction of the forum state because it has taken the initiative to establish contacts with that state. The reach of jurisdiction is thus well within the dealer's control.

On the other hand, where jurisdiction is based on a dealer's receipt of a sizeable benefit from the forum state, it may be more difficult to meet the "predictability" requirement. First, the dealer in such cases is subjected to jurisdiction even if one cannot show that the dealer actually knew that it was receiving a sizeable benefit from the forum. Moreover, a court and a defendant may differ as to their interpretations of what is meant by "sizeable benefit," since that term is difficult to quantify. With a flexible notion of sizeable benefit, some predictability is necessarily lost.

Nevertheless, predictability is not completely eliminated. Courts may look to such factors as (1) actual dollar revenues, (2) numbers of consumers from the forum state who frequent the defendant's business, and (3) percentages of the defendant's revenues attributable to the market in the forum state, in determining the jurisdictional question. All of these factors are within the dealer's knowledge.

Furthermore, modern jurisdictional analysis has generally involved a weighing of equities. Rather than look for clear-cut rules, courts have examined the facts of each case to decide what result comports with "traditional notions of fair play and substantial justice." While a bright-line rule declaring all consumer-based contacts void for jurisdictional purposes would be easy to apply, it would lead to inequitable results, as illustrated by an analysis of the following cases.

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63. 444 U.S. at 297.
64. This has been true ever since International Shoe, 326 U.S. at 310.
C. Post-World-Wide Volkswagen Decisions Involving Consumer-Based Contacts

Two recent cases illustrate both the inequitable results obtained under the current approach to jurisdiction and the better results available under the market analysis approach. In *West American Insurance Company v. Westin, Inc.*, \(^{65}\) two residents of Minnesota drove to a Wisconsin tavern located near the border between the two states. As they were eighteen years old and could not legally drink in Minnesota, they wanted to take advantage of Wisconsin's lower drinking age. On the return trip, just as their car crossed back over the border into Minnesota, an accident occurred and the two Minnesota residents sustained both personal injuries and property damage. Their insurance company, the plaintiff in the case, sued the Wisconsin tavern in a Minnesota court for common-law negligence in making an illegal sale of alcohol. \(^{66}\) The plaintiff had a strong interest in the site of jurisdiction; not only would Minnesota be a more convenient forum, but because of differences in the dram-shop laws of Minnesota and Wisconsin, the plaintiff could obtain a remedy only in Minnesota. \(^{67}\)

The Minnesota Supreme Court held there was no jurisdiction. In doing so, the court expressly overruled two similar cases decided prior to *World-Wide Volkswagen*, \(^{68}\) in which jurisdiction had been premised on three factors: (1) the foreseeability that the sale of liquor by a border city tavern would result in an accident in Minnesota; (2) Minnesota's strong interest in providing a forum; and (3) the insignificance of any inconvenience to the defendant from litigating in Minnesota. \(^{69}\) The *West American Insurance* court held these factors irrelevant, since they did not point to the defendant's contacts with Minnesota. \(^{70}\) The court deemed the contacts to be merely "unilateral" and hence insufficient to support jurisdiction. \(^{71}\) The court stated that the critical relationship was "defined by defendant's contacts with the forum state, not by defendant's contacts with the residents of the forum." \(^{72}\)

The result in *West American Insurance* seems inequitable. If residents of a forum state patronize a defendant's business to any significant extent,
there is no reason to apply the unilateral contacts rule and deny jurisdiction. The plaintiff's interest, as well as the forum state's interest, should not be overridden by an overly restrictive characterization of the defendant's contacts with the forum.

Under the market analysis approach, however, jurisdiction would lie. It appears that no evidence was introduced at trial concerning whether the Wisconsin tavern received a sizeable benefit from Minnesota customers, but the court apparently could have remanded the case for discovery on this issue. Most likely a sizeable benefit would have been uncovered. First, the Wisconsin tavern was located fifteen miles from Minneapolis-St. Paul, a huge market. Second, the lower drinking age in Wisconsin surely attracted many eighteen-year-old drinkers from Minnesota, and any tavern owner would be aware of this. In fact, police officers could have testified that, of all the drinking-and-driving accidents occurring in the vicinity of the accident, seventy-five percent were caused by persons drinking at the Wisconsin tavern. By refusing jurisdiction, the Minnesota court only encouraged negligent or even illegal behavior on the part of such defendants.

Another recent case, Markby v. St. Anthony Hospital System, dealt with unilateral contacts in a slightly different context. In Markby, liability was not related to sale of a product, but rather to defective services rendered by the defendant to the plaintiff. The defendant was a Denver, Colorado hospital; the plaintiff was a Wyoming resident who went to the hospital for surgery. Due to alleged negligence on the part of hospital employees, the plaintiff suffered a severe head injury. Though the plaintiff temporarily recovered and returned to Wyoming, five months later she died because of the injury. Plaintiff's representative sued in a Wyoming court for wrongful death.

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73. West American Insurance, 337 N.W.2d at 681 (Scott, J., dissenting). The majority stated, in a footnote, that "we must take the limited record as it comes to us." Id. n.4. In any event, there is no indication that the Minnesota Supreme Court would evaluate the jurisdictional question by analyzing sizeable benefit, as recommended in this Comment.

74. In a similar case involving an Iowa border city tavern, the Minnesota Supreme Court had earlier upheld jurisdiction where the tavern made eight percent of its sales to Minnesota residents. Id. at 679, referring to Anderson v. Luitjens, 247 N.W.2d 913, 916 (Minn. 1976). By expressly overruling that case, in West American Insurance, the court implied that this level of contacts was insufficient. Yet eight percent is indeed a sizeable benefit, especially in this factual context. The tavern in Anderson was surely established with the expectation that it would attract Minnesota residents. The same reasoning applies to West American Insurance with even greater force. See infra text accompanying notes 75-76.

75. See West American Insurance, 337 N.W.2d at 677.

76. Id. at 678.

77. 647 P.2d 1068 (Wyo. 1982).

78. Id. at 1069.
Among the contacts the defendant hospital had with Wyoming were the following: (1) over 300 Wyoming residents had used the Colorado hospital during the years 1980–81, and many Wyoming residents had used the hospital prior to 1980; (2) Wyoming doctors referred patients to the hospital, and the hospital had telephone conversations with those doctors concerning the patients; (3) the defendant hospital received money from the State of Wyoming and Blue Cross of Wyoming for services rendered; and (4) the defendant hospital advertised in Wyoming about its air ambulance service, which flew patients from Wyoming to Colorado.79

The Wyoming Supreme Court held that no jurisdiction existed. The court found that only the last contact mentioned—advertising an air ambulance service—met the requirement, developed in Hanson and restated in World-Wide Volkswagen, that the defendant "purposefully avail [itself] of the privilege of acting in the forum state or of causing important consequences in that state."80 The court evidently determined that all the other contacts were merely unilateral. Finding only an isolated contact, the court concluded that jurisdiction could extend only to causes of action having a nexus with the contact. Since the plaintiff’s cause of action did not arise from the operation of the air ambulance service, there was no nexus, and hence no jurisdiction.81

By dismissing the defendant’s other contacts with Wyoming as insufficient for jurisdiction, the court permitted the defendant to reap sizeable financial benefits without being subjected to out-of-state jurisdiction for its negligent acts.82 The court created an inflexible rule—easy to apply, but leading to inequitable results.

Interestingly, the court in Markby noted that parts of Wyoming are within the trade areas of out-of-state metropolitan centers (such as Denver and Salt Lake City), that Wyoming consumers often go to businesses in those areas to shop for goods and services, and that the entire transaction takes place outside Wyoming. The court stated that to hold these businesses subject to jurisdiction in Wyoming would merely "encourag[e]

79. Id. at 1069–70.
80. Id. at 1073 (citing State ex rel. White Lumber Sales, Inc. v. Sulmonetti, 448 P.2d 571, 574 (Or. 1968)).
81. Id. at 1074.
82. Perhaps the case could have been decided on a broader policy ground: that hospitals should be immune from many out-of-state jurisdictional claims, since these institutions provide essential services and should not be discouraged from treating any patient (assuming that insurance could not alleviate this problem). Many courts have denied jurisdiction in cases involving defendant hospitals or doctors. See, e.g., Ballard v. Fred E. Rawlins, M.D., Inc., 101 Ill. App. 3d 601, 428 N.E.2d 532 (1981); Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (1980). But this is a special consideration, and does not justify a per se finding of no minimum contacts. Nonetheless, the court’s opinion in Markby appears to have broad application, even where defendant is an ordinary provider of goods and services.
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litigation in this state which would do a disservice to the residents of those other states." 83

But it is precisely because consumers are within the trade areas of out-of-state business establishments that those establishments should be subject to jurisdiction in the forum state. The problem of the portable tort, where liability travels with the product or service rendered, simply does not exist in these situations. As long as the "unilateral contacts" doctrine is rigidly applied, however, businesses and corporations will continue to be inequitably shielded from the consequences of their actions.

D. Use of the Market Analysis Approach in Cases Involving Distributor-Based Contacts

In contrast with the inflexible unilateral contacts doctrine used in cases like West American Insurance and Markby, many courts have employed a flexible market analysis approach in cases involving distributor-based contacts. 84 In such cases, a manufacturer delivers products into the stream of commerce via distributors or middlemen operating in the forum state. To decide whether jurisdiction should lie, courts have examined (1) the degree of control that the manufacturer exercises over its distributors, (2) the manufacturer's knowledge that its products will be delivered to the forum state, (3) the benefit that the manufacturer receives from the forum state, and (4) whether the manufacturer initiated any contacts with the forum state by choosing to use product distributors. 85

As in the consumer-based contact cases, no precise formula can be derived to determine whether a particular state is within the manufacturer's market. Nor is such a formula desired, because the use of mechanical formulas often produces inequitable results. It is sufficient that courts tie the question of personal jurisdiction to an analysis of the manufacturer's market.

I. World-Wide Volkswagen v. Woodson and Gray v. American Radiator

*World-Wide Volkswagen* encouraged the use of the market analysis

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85. See cases cited *supra* note 84.
approach in distributor-based contact cases. The Court contrasted the consumer-based contacts alleged in *World-Wide Volkswagen* with the fact situation in the landmark Illinois case of *Gray v. American Radiator*. In *Gray*, the defendant manufactured component parts for water heaters. One of these parts was sent from Ohio to Pennsylvania and finally to Illinois, via several distributors. The water heater containing the defective part was sold to an Illinois consumer, who was injured when the heater subsequently exploded. The Illinois Supreme Court exercised jurisdiction over the manufacturer. 

The Court in *World-Wide Volkswagen* cited the *Gray* decision favorably as an instance of "efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other states." In addition, the manufacturer "deliver[ed] its products into the stream of commerce with the expectation that they [would] be purchased by consumers in the forum State." 

The Illinois Supreme Court in *Gray* determined that the defendant received a substantial benefit from its relationship with Illinois. The court reasoned that most manufacturers would not use product distributors to obtain only an isolated benefit from another state, since this would not be economical. The Illinois court thus engaged in a market analysis approach to determine jurisdiction instead of the rigid unilateral contacts formula often used in consumer-based contact cases.

2. Recent Decisions Involving Distributor-Based Contacts

Determining the scope of a manufacturer's market for jurisdictional purposes requires a consideration of several factors. A recent Florida decision succinctly described the proper analysis. In *Life Laboratories v. Valdes*, the Florida Supreme Court dismissed a complaint that failed to make any showing that the manufacturer "purposefully avail[ed itself] of the privilege of conducting activities within the forum state." The *Life Laboratories* opinion indicated some of the possible reasons for holding an out-of-state manufacturer subject to jurisdiction on the basis of

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86. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
87. Id. at 762.
89. Id. at 297–98.
90. The *Gray* court held this to be a "reasonable inference." *Gray*, 176 N.E.2d at 766. Since the court inferred that the defendant reaped a substantial benefit from the forum state, the defendant also necessarily reaped a sizeable benefit from the forum state (because sizeable benefit, as defined in this Comment, is a lower threshold than substantial benefit).
91. 387 So. 2d 1009 ( Fla. App. 1980).
92. Id. at 1010 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
distributor contacts. First, a manufacturer may have specific knowledge that its product will reach a forum state. In other words, the forum state may be one of the target areas for the manufacturer, evidencing an intent to serve the market. Second, access to the forum state via distributor-based contacts may provide a sizeable economic benefit for the manufacturer. This finding alone should be sufficient to uphold jurisdiction, on the theory that the manufacturer had constructive knowledge of the benefit. Third, the manufacturer may control the decisions made by the distributor. If so, then it would be fair to attribute the distributor’s contacts with the forum state to the manufacturer.  

Three other recent cases illustrate how courts have applied the market analysis approach in distributor-based contact cases. In *Svendsen v. Questor Corporation*, the Iowa Supreme Court considered a fact pattern similar to that in *Gray*. The defendant was a manufacturer of pool tables with its principal place of business in Missouri. One of the pool tables was sent to a Nebraska distributor, who in turn sold it to an Iowa bowling center. The pool table collapsed and injured the plaintiff’s foot. The plaintiff sued in an Iowa court, and the jurisdictional question concerned the extent and nature of the defendant’s contacts with Iowa.  

To answer this question, the *Svendsen* court considered whether the defendant had purposefully availed itself of the Iowa market. Even though the record mentioned only one contact, the manufacturer did not claim that the use of its pool table in Iowa was an isolated instance. In addition, the court noted the geographical proximity of both the manufacturer and the distributor to Iowa, the forum state. Given these facts, the court concluded that “it is reasonable to infer that their commercial transactions resulted in more than insubstantial use and consumption in the state.” Thus the exercise of jurisdiction was proper.  

*Martinez v. American Standard* indicates how courts can use the market analysis approach to deny jurisdiction in distributor-based contact cases. In *Martinez*, a man was injured when an air conditioner malfunctioned in a New York hotel. The man sued the manufacturer, which in turn filed a third-party indemnification action against the component manufacturer of the terminal pins for the air conditioner. The component manufacturer was a Rhode Island corporation, and the question was
whether the component manufacturer had established sufficient contacts with New York.99

The New York appellate court found no such contacts. The court first noted that the component manufacturer had no control over the distributor. Furthermore, aside from the single contact represented by the defective air conditioner, the evidence showed only that the component manufacturer shipped its products to a distributor “in the midwest” and received “substantial revenue from interstate commerce.” The evidence showed no intent specifically to serve New York; nor could the court conclude that the component manufacturer should have known that its products would go to New York, aside from the general knowledge that its products conceivably could end up anywhere in the country. Finally, the court implicitly concluded that the single contact with New York, coupled with the general evidence of “substantial revenue from interstate commerce,” did not indicate that the component manufacturer received a sizeable benefit from New York. After weighing these factors, the court decided that it lacked jurisdiction.100

Svendsen and Martinez both involved domestic manufacturers. The market analysis approach to determine jurisdiction has also been applied to cases involving foreign manufacturers. One such case is Oswalt v. Scripto.101 In that case Tokai-Seiki, a Japanese manufacturer of cigarette lighters, sold its products to Scripto, its exclusive United States distributor. A customer bought a lighter in a Texas retail store; the lighter later malfunctioned, causing injury. There was no question that Tokai-Seiki was serving the United States market in a general sense. The question was whether the manufacturer had purposefully availed itself of the benefits of the Texas market.102

The Oswalt court did not construe the term “purposeful availment” in an overly rigid way. It focused on the manufacturer’s control over the distribution system. Although the record showed that only twelve to fifteen lighters had positively appeared in Texas, Tokai-Seiki had distributed three to four million overall, to “many [unnamed] states of the United States.”103 So, while the manufacturer did not precisely determine the number of lighters allocated to each state, its “distribution system was not structured to gain some ‘minimum’ assurance . . . that the lighters would not be sold in Texas.”104

99. 457 N.Y.S.2d at 98.
100. Id. at 98–99.
101. 616 F.2d 191 (5th Cir. 1980).
102. Id. at 196–98.
103. Id. at 197–98.
104. Id. at 200 (citation omitted).
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The court also implied that Tokai-Seiki derived a sizeable benefit from sales in Texas. The court found that the manufacturer should have known that its products would reach Texas. In effect, the court charged the manufacturer with constructive knowledge of this fact. The court could not have taken this stance without assuming that substantially more than twelve to fifteen lighters had entered the Texas market. Hence, the court implicitly concluded that the manufacturer received a sizeable benefit from the Texas market. Cases like Svendsen, Martinez, and Oswalt demonstrate that courts have been willing to sift and analyze various market factors—control, intent to serve the market, and resulting benefit—in determining whether to subject manufacturers to jurisdiction because of their distributor-based contacts. Properly applied, such an approach leads to equitable results. The same approach should also be used in cases involving consumer-based contacts.

III. CONCLUSION

A market analysis approach to jurisdiction can be applied within the framework of the two-tiered World-Wide Volkswagen test, which requires a court to determine that the defendant’s contacts with the forum state are sufficient before it may consider such factors as the plaintiff’s interests, the interests of the forum state, and the interest in overall convenience. Certainly the defendant’s interests can be adequately protected without requiring jurisdiction over the defendant to hinge on a literal showing of purposeful contacts with the forum state. In addition, the market analysis approach allows the second tier of factors in the World-Wide Volkswagen test to retain some vitality. Where the contacts between the defendant and the forum are consumer-based, these second tier factors may well tip the overall balance in favor of jurisdiction. But if courts simply characterize consumer-based contacts as unilateral and hence, insufficient for jurisdiction, the second-tier factors never come into play. Rigid application of the purposeful contacts test produces inequitable results and is inappropriate.

105. Id. at 200. The court in Oswalt made it clear that actual knowledge on the part of the manufacturer need not be proven. Citing dictum from World-Wide Volkswagen, it noted that Tokai-Seiki had "delivered its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." Oswalt, 616 F.2d at 200 (citing World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)). "The instant case fits like a glove the commercial context and the manufacturer's distribution plan for the marketing of its product contemplated by the World-Wide Volkswagen dictum." Oswalt, 616 F.2d at 200.

The court also ruled that "sufficient other contacts" need not be conclusively proven as a prerequisite to exercising jurisdiction over the manufacturer. Id. at 201. The court was willing to make a "reasonable inference" that other jurisdictional contacts (i.e., other sales of lighters to Texas consumers) in fact existed, using the approach of Gray v. American Radiator. Id. at 201–02.
in stream of commerce cases. The market analysis approach represents a better solution to the problem of jurisdiction in such cases.

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