INTRODUCTION

In the past, there has been a great deal of uncertainty as to the constitutional limits on state court jurisdiction in cases where a nonresident's commission of an out-of-forum act causes a consequence within. However, the United States Supreme Court in *Kulko v. Superior Court* has synthesized a jurisdictional test which may infuse a welcome measure of certainty in this area of the law. Essentially, the Court's test integrates various factors determinative of jurisdiction in prior holdings into a functional two-step analysis.

Under the *Kulko* analysis, the due process clause mandates an evaluation of the quality and nature of a defendant's out-of-state act, in order to determine whether he initiated a purposeful contact with the forum state. To facilitate this evaluation, *Kulko* described three indicia of purposefulness. These indicia are a condensation of the several evidentiary indicators of purposeful activity which the Court has reiterated over the years.

Once this initial determination of purposefulness was made, the *Kulko* Court's analysis required a balance of various conflicting interests to determine the fairness of a state's assertion of jurisdiction. The interests involved in this balance are those of the state and the plaintiff which are weighed against the inconvenience to the defendant of having to appear in a foreign forum.

In establishing this cohesive two-step jurisdictional analysis,
the Kulko Court incorporated various factors from prior decisions. Evaluation of the Court's decision necessitates consideration of those factors. To lend substance to Kulko's minimum contacts analysis, this casenote will then explore its potential applications in light of prior case law.

BACKGROUND

For nearly a century, the Supreme Court engaged in an increasingly futile struggle to accommodate the states' exercise of in personam jurisdiction within the obsolete conceptual framework of Pennoyer v. Neff. However, the theoretical confusion engendered by the application of Pennoyer's territorialist theory to the complex disputes characteristic of an increasingly mobile society precipitated its virtual abandonment. With the advent of International Shoe Co. v. Washington, the focus of jurisdictional analysis shifted from a concern for the defendant's physical presence within the state to general solicitude for fairness to the defendant. While it was to mark the virtual demise of the century-old

9. Id. at 1695-1701.
11. Under the territorialist theory, the defendant's physical presence within the forum state was a prerequisite to that state's assertion of judicial jurisdiction. R. Weintraub, Commentary on the Conflict of Law 96 (1971).
13. 326 U.S. 310 (1945). According to International Shoe, a sufficient minimum contact with the forum state is established when it is "reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which [defendant] has incurred there." Id. at 320. For purposes of discussion, the abstract concept of due process will be equated with the terms fairness and reasonableness, and is most often employed in the context of the minimum contacts analysis.
14. Judge Traynor pointed out in Owens v. Superior Court, 52 Cal. 2d 822, —, 345 P.2d 921, 924-25 (1959) that "[t]he rationale of the International Shoe case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as foreign corporations." Id. Accord, Shaffer v. Heitner, 433 U.S. 186, 204 n.19 (1977). Henceforth, the term defendant will be applied without distinction to both corporations and individuals.
territorial theory of state-court jurisdiction,\textsuperscript{16} \textit{International Shoe} in reality served only to establish a skeletal framework upon which three subsequent landmark decisions were to build. In synthesizing its two-tier jurisdictional test, the \textit{Kulko} Court extracted elements from \textit{McGee v. International Life Insurance Co.},\textsuperscript{17} \textit{Hanson v. Denckla},\textsuperscript{18} and \textit{Shaffer v. Heitner}.\textsuperscript{19}

An overall view of these decisions reveals three criteria which figure prominently in the Court's jurisdictional analysis before \textit{Kulko}. All three cases involved a commission of an out-of-state act alleged to have affected persons within the forum state, an area of the law which is currently in a relative state of flux.\textsuperscript{20} Nonetheless, several factors have recurred in the Supreme Court's minimum contacts analysis, and were significant in its refusal or approval of the exercise of judicial authority. From these decisions, it would seem that considerations of "traditional notions of fairness and substantial justice"\textsuperscript{21} include the purposeful nature of the defendant's contact with the forum; the relation of the cause of action to the defendant's contacts with the forum; and the state's statutorily delineated interest in regulating the activity of the non-resident.

The determination of the presence or absence of purposeful activity is vital to the proof of some minimum contact with the forum. Through its holdings in several cases, the Supreme Court has constructed a definition of the term purposeful.\textsuperscript{22} In \textit{McGee}, where the foreign insurer had concurrently pursued an economic benefit in the stream of interstate commerce and actively sought to create a contractual relationship with a resident, the state's exercise of jurisdiction was sanctioned by the majority.\textsuperscript{23} Given the ev-

\textsuperscript{17} 355 U.S. 220 (1957).
\textsuperscript{18} 357 U.S. 235 (1958).
\textsuperscript{19} 433 U.S. 186 (1977).
\textsuperscript{20} Gorfinkel & Lavine, \textit{supra} note 1, at 1186-88. There is a basic uncertainty as to the permissible limits of state court jurisdiction in this area. In cases where the defendant did not enter the state or engage in any activity in the forum, but did affect persons or property within, the point at which he becomes subject to suit has not been clearly marked. \textit{Id.} See \textit{id.} at 1189 for a list of cases. See also Casad, \textit{Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory}, 26 KAN. L. REV. 61, 73 (1977); Reese & Galston, \textit{Doing an Act or Causing a Consequence as Bases of Judicial Jurisdiction}, 44 IOWA L. REV. 249, 254-55 (1960).
\textsuperscript{22} 98 S. Ct. at 1698-1700; 433 U.S. at 216, 357 U.S. at 253. The \textit{Hanson} case was the first decision to expressly require that the defendant's contact be purposeful. The Court held that jurisdiction was permissible only where the defendant "purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." \textit{Id.}
\textsuperscript{23} 355 U.S. at 223. In \textit{McGee}, the corporate defendant had neither engaged in
idence of intent to voluntarily associate with the forum, the Court held that long-arm jurisdiction could be premised upon a controversy arising from the mailing of a single contract to a resident of the forum. However, the Hanson defendant's mere passive acquiescence in the transfer of a contractual relationship created outside the forum prohibited that state's assertion of in personam jurisdiction. In Shaffer, the mere fact of the nonresidents' ownership of property within the state did not give rise to the inference of purposeful connection with that state. It may be concluded continuous commercial activity within the forum state, nor had its agent physically acted therein. The only connections sustained by the defendant insurance company with the state had been the direct mailing of a single reinsurance certificate to a California resident, offering to renew the insured's lapsed policy, and the subsequent receipt of premiums from that resident until his death. Id. at 221-22.

24. Id. at 223.

25. See 357 U.S. at 251-53. The controversy involved the validity of a trust agreement executed between the trustee, a trust company situated in Delaware, and the settlor, a domiciliary of Pennsylvania. Subsequent to the creation of the trust, the settlor left Pennsylvania and became domiciled in Florida. The nonresident trustee nevertheless continued to administer the trust assets, remitting the income of the trust. Following the settlor's death, various beneficiaries filed a petition in Florida to set aside the trust agreement, and sought to subject the foreign trust company to suit. Id. at 238-44, 52.

Generally, a plaintiff may not "subject a defendant to the judicial jurisdiction of a state where defendant conducts other substantial activity, by the simple device of moving to that state and thus requiring the defendant to send him communications and the like there in furtherance of a relationship entered into elsewhere." Reese & Galston, supra note 20 at 257. Accord, Comment, In Personam Jurisdiction over Nonresident Manufacturers in Products Liability Actions, 63 MICH. L. REV. 1028, 1030 (1965) [hereinafter cited as In Personam Jurisdiction over Nonresident Manufacturers].

26. 433 U.S. at 189-93, 214. In Shaffer the plaintiff, Heitner, had filed a shareholder derivative suit in a Delaware Chancery Court against 28 past and present directors of both Greyhound Corp., incorporated in Delaware, and its subsidiary, Greyhound Lines, Inc., established under the laws of California. Heitner based his allegations of breach of fiduciary duty upon activities which took place in Oregon. As Delaware had enacted no long-arm statute dealing with such out-of-state misconduct on the part of directors of native corporations, plaintiff resorted to sequestration as an alternate jurisdictional device. Id. Authorized by DEL. CODE tit. 8, § 169 (1975), which made Delaware the situs of ownership of all stock in Delaware corporations, and DEL. CODE tit. 10, § 366 (1975), which renders such intangible assets subject to sequestration, the Chancery Court seized approximately 82,000 shares and options in Greyhound which belonged to the nonresident defendants. 433 U.S. at 191-92. Typically, a state court would employ this quasi in rem procedure to force a nonresident to appear if he were not otherwise subject to its in personam jurisdiction. Carrington, The Modern Utility of Quasi-in-Rem Jurisdiction, 76 HARV. L. REV. 303, 305-06 (1962). For a discussion of the unfairness of the quasi in rem procedure, see id. at 308; Traynor, Is This Conflict Really Necessary?, 37 TEX. L. REV. 657, 663 (1959). But see Leflar, The Converging Limits of State Jurisdictional Powers, 9 J. PUB. L. 282, 286 (1960); Developments, supra note 12, at 955-56.

27. 433 U.S. at 216. The majority stated that since the contact of the nonresident with the forum was not purposeful, and that the cause of action did not arise therefrom, the state's exercise of jurisdiction was violative of due process. Id. See id. at 218-19 (Stevens, J., concurring).
from these decisions that prior to *Kulko* the Court considered purposefulness as a significant jurisdictional element.

In addition to purposefulness, the Court has frequently emphasized the importance of the causal link between the act and the litigation. In *McGee*, the Court held that the exertion of jurisdiction was permissible because the subject matter of the litigation concerned the contact, a contractual obligation, established by the nonresident defendant. In contrast, *Hanson* for the most part premised its denial of state-court jurisdiction on the fact that the plaintiff's complaint did not directly relate to an act done or transaction consummated within the jurisdiction. Likewise, in *Shaffer*, where the defendants' contacts, property ownership, bore no connection to the gravamen of the plaintiff's claim jurisdiction was precluded by the due process clause. Thus, at least in the

In contrast, Mr. Justice Brennan argued that the nonresident directors had acted purposefully with respect to Delaware, regardless of whether or not the plaintiff's cause of action arose from the alleged contact, the sequestered stock. *Id.* at 227-28. (Brennan, J., concurring in part and dissenting in part). The defendants had "voluntarily associated themselves with the State of Delaware . . . by entering into a long-term and fragile relationship with one of its domestic corporations." *Id.* (Brennan, J., concurring in part and dissenting in part). Accord, *Leathers*, supra note 12, at 23.


30. 355 U.S. at 223.

31. 357 U.S. at 251.

32. 433 U.S. at 216-17. The Court noted the absence of any relationship between the defendants' ownership of the sequestered stock and their positions as corporate fiduciaries, since Delaware law does not require directors to own stock. *Id.* at 214. Thus, there is no connection between the alleged contact, the stock, and the subject matter of the litigation. Mr. Justice Marshall stated that "when claims to the property itself are the source of the underlying controversy . . . it would be unusual for the state where the property is located not to have jurisdiction in such a case." *Id.* at 207.
case of acts committed outside of the state, only affiliations between the forum, the nonresident defendant, and the underlying controversy will support the forum’s power to assert its long-arm jurisdiction over the person of the nonresident. 33

A third factor which reappears in the three post-International Shoe holdings is the Court’s requirement that the states statutorily particularize their interest in governing the rights and duties of nonresidents. 34 The minimum contacts analysis mandates an “estimate of the inconvenience” to the defendant. 35 This analysis in general involves balancing the interests of the nonresident defendant against those of the state, and in most instances, those of the plaintiff. 36 Apparently, the state’s assertion of jurisdiction will not be permitted to outweigh the inconvenience to the defendant unless it has legislatively enacted a proper regulatory concern. In McGee, where the state had expressed its intent to protect its residents from the solicitation of foreign insurers by means of a statute, the Court held that the state’s regulatory interest sufficiently counterbalanced the burden of defense on the corporate defendant. 37 Where, as in Hanson 38 and Shaffer, 39 the states failed to


37. 355 U.S. at 221, 223-24. California’s manifest interest was expressed in a comprehensive insurance statute, providing residents with an effective means of redress when nonresident insurers refused to pay valid claims. See Cal. Ins. Code §§ 1610-20 (West 1972).

38. 357 U.S. at 252. By way of comparison with McGee, the Justices noted that “[t]his case is also different from McGee in that there the state had enacted special legislation” to exercise what the state deemed its manifest interest. Id. at 252-53. See Ehrenzweig, Pennoyer is Dead-Long Live Pennoyer, 30 Rocky Mt. L. Rev. 285, 291 (1958). One writer has noted that in contrasting Hanson with International Shoe, Mullane, Watson, Travelers, and McGee, it is apparent that one reason jurisdiction was denied in the former while upheld in the latter cases was due to the lack of a Florida state statute dealing with the type of activity from which the controversy arose, and the existence of a specific state statute in these other cases. Comment, Tortious Act as a Basis for Jurisdiction in Products Liability Cases, 33 Fordham L. Rev. 671, 685 (1965) [hereinafter cited as Tortious Act as a Basis for Jurisdiction].

39. 433 U.S. at 216; Id. at 218-19 (Stevens, J., concurring); Ehrenzweig, supra
statutorily embody particularized interests in the conduct of the nonresident defendants which they sought to control, jurisdiction was denied.\footnote{38, at 291-92; \textit{Developments, supra} note 12, at 1017. \textit{Contra,} 433 U.S. at 226 (Brennan, J., concurring in part and dissenting in part). Mr. Justice Brennan rejected the majority's requirement of statutory particularization, stating that he could "not understand how the existence of minimum contacts in a constitutional sense is at all affected by Delaware's failure statutorily to express an interest in controlling corporate fiduciaries." \textit{Id.} (Brennan, J., concurring in part and dissenting in part). \textit{Accord, Casad, supra} note 20, at 75.} As noted by the \textit{Shaffer} Court, the state's assertion of a strong interest in supervising the defendant's behavior is diminished by the failure of the legislature to assert that interest it deems so compelling.\footnote{40. 357 U.S. at 252. \textit{Accord,} 433 U.S. at 214-16.}

In its most recent decision, \textit{Kulko}, the Supreme Court has further clarified and systematized its application of these three recurring jurisdictional criteria. It is the purpose of this article to analyze that application, and to discuss the Court's synthesis of these seemingly divergent factors into a single jurisdictional test.

\textbf{COURT'S OPINION}

The issue confronting the Supreme Court in \textit{Kulko} was whether the defendant's behavior outside California had given rise to sufficient contacts with that state to render him subject to its jurisdiction.\footnote{41. 433 U.S. at 214-15.} Employing the minimum contacts standard, the Court engaged in a two-step analysis. Mr. Justice Marshall, writing for a majority of six, considered first whether the defendant had purposefully sought to avail himself of the benefits and protections of the forum's laws, and second whether the inconvenience to the nonresident of conducting his defense in a foreign tribunal outweighed the interests of the plaintiff and the forum state.\footnote{42. 98 S. Ct. at 1697-1701.}

According to the facts in \textit{Kulko}, the defendant and plaintiff had married in California, but later separated in New York, the marital domicile. Under a written separation agreement executed in New York, it was decreed that the couple's two children should live with their father during the school year, and with their mother during the summer months and vacations. One child, deciding she wished to permanently live with the plaintiff in California, requested and received the defendant's permission to move. Several
years later, when the plaintiff filed suit in California seeking increased child support payments, the California Supreme Court deemed the defendant's acquiescence in his daughter's preference a sufficient minimum contact for jurisdictional purposes.44

Mr. Justice Marshall initially engaged in an evaluation of the purposeful quality of the defendant's out-of-state act, his consent to the daughter's move to California. In analyzing the nature of the defendant's behavior, the majority was unwilling to equate his acquiescence with the purposeful act mandated by Hanson.45 In the Court's view, "the mere act of sending a child to live with her mother . . . connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the state that would make fair the assertion of that state's judicial jurisdiction."46 According to the evidence, the defendant himself had not received the benefits of the forum's fire and police departments, nor of its educational and cultural facilities. Instead, the Court viewed these as essentially benefits to the child.47 Consequently, the Court held that the father's assent to his daughter's preference would not support California's efforts to enforce an obligation the defendant had incurred by virtue of the child's presence within the forum.48

Having thus rejected an inference of the defendant's purposeful intent premised upon his enjoyment of the benefits and protections of California law, the Kulko Court next considered whether his consensual act manifested an intent to obtain an eco-

44. Id. at 1697-1701. Three years after the daughter's departure from New York, the plaintiff, a resident of California, filed suit in that state against the defendant, her former husband, seeking permanent custody of the couple's two children, a concomitant increase in child support payments, and the recognition of a Haitian divorce decree which had incorporated the terms of a separation agreement previously executed by both parents in New York. Id. at 1695. Defendant Kulko, a New York resident, appeared specially to contest California's assertion of jurisdiction claiming that he did not have sufficient contacts with the forum. Id. The trial court denied the defendant's motion and he appealed. In affirming the judgment below, the California Court of Appeals held that the defendant had established sufficient contact with the state when he granted his daughter permission to live there permanently. In the court's opinion, Kulko had "caused an effect" within the state and thus the exertion of jurisdiction was proper. Kulko v. Superior Court, 63 Cal. App. 3d 262, —, 133 Cal. Rptr. 627, 628 (1976). The California Supreme Court affirmed the appellate court decision, and held that a nonresident who permits his child to reside within California has purposefully availed himself of the benefits and protections of the laws of that state. Kulko v. Superior Court, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977). Therefore, the court concluded that Kulko's acquiescence warranted California's assertion of jurisdiction. Id. at 522, 564 P.2d at 356, 138 Cal. Rptr. at 589.
45. 98 S. Ct. at 1698-99.
46. Id. at 1702.
47. Id. at 1698.
48. Id.
nomic benefit from the forum state.\textsuperscript{49} Although the defendant's household expenses had decreased in his daughter's absence, the Court refused to infer an active pursuit of financial gain from the forum on the part of the defendant from his receipt of such an indirect monetary benefit.\textsuperscript{50} Mr. Justice Marshall suggested that any such conclusion confused a substantive determination of the defendant's liability with the procedural question of the forum's power to adjudicate the matter.\textsuperscript{51} In the Court's opinion, any financial benefit which may have accrued to the defendant upon his child's departure stemmed from the plaintiff's negligent failure to petition the New York courts for an increase in support payments, not, as the California Supreme Court had supposed, from the child's presence in the forum state.\textsuperscript{52}

After concluding that the defendant had not purposefully derived benefit from any activity relating to the state of California,\textsuperscript{53} the Kulko Court proffered three distinct criteria as adequate external manifestations of a nonresident's purposeful association with the forum.\textsuperscript{54} Thus purposefulness may be inferred from: 1) the infliction of physical injury on either persons or property within the forum; 2) the defendant's active pursuit of profit in the interstate marketplace or, more specifically, his solicitation of a financial benefit from a resident of the state; and 3) the existence of a controversy arising from an agreement negotiated, signed, and executed with a reasonable anticipation of dispute in a distant forum regarding its terms.\textsuperscript{55}

The first two criteria set out by the Court were derived from the effect test found in the Restatement (Second) of Conflict of Laws\textsuperscript{56} and adopted by the California court in Kulko.\textsuperscript{57} However,

\textsuperscript{49} Id. at 1698-99.
\textsuperscript{50} Id. at 1698.
\textsuperscript{51} Id. at 1698-99.
\textsuperscript{52} Id. In the California Supreme Court's opinion, an economic benefit had accrued to the defendant by his allowing the child to live with the mother throughout the school year, since he was no longer liable for the child's support for that period. Kulko v. Superior Court, 19 Cal. 3d 514, 524-25, 564 P.2d 353, 358, 138 Cal. Rptr. 586, 591 (1977). As the United States Supreme Court observed, any such conclusion would depend upon an adjudication of defendant's liability under the support agreement, based on an alteration of its terms due to the child's new living arrangements. 98 S. Ct. at 1699.
\textsuperscript{53} Id. at 1698.
\textsuperscript{54} Id. at 1699-1700.
\textsuperscript{55} Id.
\textsuperscript{56} Restatement (Second) of Conflict of Laws § 37 (1971) provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.
the Supreme Court held that California's application of this test to the factual setting of the instant action was erroneous. After examining the evidence, the Court concluded that the defendant had not inflicted physical injury upon persons or property within the state, nor had he actively sought economic benefit through the solicitation of business from state residents. In the Court's opinion, the passive nature of the defendant's behavior could not fairly be analogized to the active pursuit of profit exhibited by the corporate defendant in \textit{McGee}.\footnote{Id. at 1699.}

Analyzing the third criterion of the Court's test, Mr. Justice Marshall noted that the New York separation agreement from which the plaintiff's claim was derived had been entered into with virtually no connection with the forum state.\footnote{Id. at 1699.} The Court observed that the defendant could not have anticipated that performance of his contractual obligations would involve California since he had in no manner sought to associate the transaction with that state.\footnote{Id. at 1699.} Therefore, the Court held that the ex parte adjudication by a foreign tribunal of a nonresident defendant's personal obligation violated the due process clause.\footnote{Id. at 1696, 1701.} In addition, the Court declared that

\begin{itemize}
\item \footnote{Id. at 1699.}
\item \footnote{Id. at 1699-1700.}
\item \footnote{Id. While the agreement directed the defendant to mail support payments to the plaintiff's California address, its terms "specifically contemplated that appel-lee (plaintiff) might move to a different state." \textit{Id.} at 1698 n.6.}
\item \footnote{Id. at 1696, 1701. In \textit{Estin v. Estin}, 334 U.S. 541 (1948), the Supreme Court decided that a Nevada divorce court, which was not vested with in personam jurisdiction over the wife, had no power to modify or terminate a husband's support obligation as delineated in a pre-existing New York separation decree. \textit{Id.} at 549. Subsequently, it was decreed in \textit{Vanderbilt v. Vanderbilt}, 354 U.S. 416 (1957), that a Nevada divorce court's termination of a nonresident wife's right to support payments, which had been established by a New York court order, constituted an invalid exercise of in personam jurisdiction. \textit{Id.} at 416-19. Professor Kurland observed that the absence of the commercial element in cases involving domestic relations
\end{itemize}
the mere fact that the plaintiff chose to relocate in California and to thus transfer the situs of the defendant's support obligations did not permit California to assert jurisdiction. Defendant's mailing of support money to California simply evidenced his passive assent to the relocation of a contractual relationship created under the laws of New York.\(^4\) Quoting Hanson, the Court declared that "[t]he unilateral activity of those who claim some relationship with a nonresident" is an inadequate substitute for the required purposeful contact with the forum.\(^5\)

Having considered the jurisdictional requirement of purposeful contact, the Court proceeded to balance the inconvenience to the defendant of a suit in a foreign court against the inconvenience to the state and the plaintiff if jurisdiction were denied.\(^6\) In assessing the burden of defending a suit in a distant forum, the Court found it significant that the defendant had resided at all times in New York, the marital domicile, and had done nothing more than acquiesce in his child's decision to move.\(^7\) Because of the passive quality of the defendant's behavior, and his inability to foresee California's assertion of jurisdiction based on such conduct, the Court held that the combined interests of the state and the plaintiff must be of paramount importance to warrant the imposition of such a "substantial financial burden and personal lessened the state's interest in exerting jurisdiction. Kurland, supra note 12, at 608-09. See 98 S. Ct. at 1700.

\(^4\) 98 S. Ct. at 1700.

\(^5\) Id. at 1698. For a discussion of Hanson, see note 25 and accompanying text supra.


In Kulko and McGee, the Supreme Court incorporated the plaintiff's interest into the balance of the state's interest against the inconvenience to the defendant. 98 S. Ct. at 1700-01, 355 U.S. at 223-24. However, in Shaffer and Hanson, the Court limited the scope of its analysis to a counterbalancing of the state's and the defendant's conflicting interests. 433 U.S. at 216; 357 U.S. at 233. This is perhaps due, in the case of Shaffer, to the nature of the lawsuit, a shareholder's derivative action brought by a nonresident to redress injuries to a Delaware corporation. Thus the cause of action belonged to the corporation, not the individual plaintiff. 433 U.S. at 222 (Brennan, J., concurring in part and dissenting in part); Leathers, supra note 12, at 22.

\(^7\) 98 S. Ct. at 1700. Professor Smit noted that when the defendant has remained at home, and has not acted or has no property within the jurisdiction, his interest in not being sued away from home will normally prevail. Smit, supra note 36, at 612; See von Mehren & Trautman, supra note 33, at 1168.
strain” upon the defendant. Although the *Kulko* Court recognized that California's concern for the welfare of its minor residents and that the promotion of family harmony might support the application of its substantive law in a New York tribunal, this interest did not give California the power to assert jurisdiction over the defendant. In order for a state to overcome the traditional due process focus upon fairness to the defendant, the Court emphasized the precept that it had first enunciated in *Shaffer*; the state must particularize its interest in regulating a specific activity within the terms of a special jurisdictional statute. By way of contrast, Mr. Justice Marshall noted that the presence of a statute in *McGee* was significant in permitting the state's interest to prevail. California's jurisdictional statute failed to meet this requirement as its broad language did not demonstrate a concern for trying such cases in the courts.

The plaintiff's interest in litigating in a California court was viewed as minimal by the *Kulko* majority. In the Court's opinion, the plaintiff had a reasonable alternate form of redress in the New York courts under the Uniform Reciprocal Enforcement of Support Act, and therefore her legitimate interest in securing relief in the forum of her selection did not outweigh the severe burdens imposed upon the defendant. While the plaintiff could easily obtain relief by filing a petition in California and having the merits adjudicated in New York, the defendant, if compelled to appear, would have to bear the “substantial financial burden and personal strain of litigating a child support suit in a forum 3,000 miles

---

68. 98 S. Ct. at 1700-01.  
69. *Id.* at 1700. For a discussion of the choice of law issue, see notes 199-202 infra.  
70. 98 S. Ct. at 1700. See notes 34-40 and accompanying text *supra*.  
71. 98 S. Ct. at 1700.  
72. *Id.*  
73. *Id.*  
74. Plaintiff had recourse to an alternate and less onerous form of relief under the terms of the Uniform Reciprocal Enforcement of Support Act of 1968. Although New York is not a party to the Uniform Reciprocal Enforcement of Support Act of 1968, it is a signatory to the Uniform Reciprocal Enforcement of Support Act of 1950, which sanctions a similar procedure. *N.Y. Jud. Law* § 466 (McKinney 1975). *Accord*, 98 S. Ct. at 1701 n.14. Under the 1968 version of the Act, the obligee is able to file a petition in the appropriate court of his or her state (the initiating court) to obtain support. *Uniform Reciprocal Enforcement of Support Act* § 11. If the court finds that the petition sets forth sufficient facts to determine that the obligor owes a duty of support, it may send a copy of the petition to the responding state. *Id.* § 14. This procedure has the effect of requesting the responding state to obtain jurisdiction over the obligor. *Id.* § 18(b). Thus the responding state, of which obligor is a resident, may validly adjudicate his personal obligations.  
75. 98 S. Ct. at 1700-01.
away.

Once again, the Court warned that the advent of the flexible minimum contacts standard did not "'herald [t]he eventual de-
mise of all restrictions on the personal jurisdiction of state
courts.'"\textsuperscript{77} In instances where the defendant actively seeks an economic benefit in the stream of interstate commerce, expansive reading of the due process clause by state courts is warranted.\textsuperscript{78} However, where the underlying controversy involves personal, domestic relations and the nonresident defendant has neither emerged from his state of residence nor engaged in purposeful activity with respect to the forum, the states will be expected to demonstrate considerably more restraint in the assertion of long arm jurisdiction.\textsuperscript{79}

Mr. Justice Brennan, dissenting, applied the minimum contacts analysis to the factual circumstances and decided that the maintenance of suit did not "offend 'traditional notions of fair play and substantial justice.'"\textsuperscript{80} In a brief opinion, the dissenters failed to clarify the nature of their jurisdictional analysis, stating simply that their independent weighing of the facts led them to the conclusion that the defendant had established a substantial connection with California,\textsuperscript{81} so as to fairly compel his appearance to defend in the forum's courts.

ANALYSIS

In \textit{Kulko}, the Supreme Court harmoniously integrated several apparently unrelated factors from prior decisions into a cohesive two-step minimum contacts analysis.\textsuperscript{82} The discussion which fol-

\textsuperscript{76} Id. By way of contrast, the \textit{Kulko} Court noted that in \textit{McGee}, where the state's assertion of jurisdiction was permitted, the plaintiff's claim would be effectively precluded if he were forced to sue in the courts of the defendant's domicile. \textit{Id.} at 1701 n.15. \textit{Accord}, \textit{Travelers Health Ass'n v. Virginia}, 339 U.S. 643, 648-49 (1950); Kurland, \textit{supra} note 12, at 607-08.

\textsuperscript{77} 98 S. Ct. at 1701 (quoting \textit{Hanson v. Denckla}, 357 U.S. 235, 251 (1958)).

\textsuperscript{78} 98 S. Ct. at 1701.

\textsuperscript{79} \textit{Id. at 1700-01.}

\textsuperscript{80} \textit{Id. at 1702.} (Brennan, J., dissenting).

\textsuperscript{81} \textit{Id.} (Brennan, J., dissenting).

\textsuperscript{82} \textit{Id. at 1699-1701.} Commentators and state courts alike have constructed a three-part test. Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, ---, 436 P.2d 57, 62, 60 Cal. Rptr. 113, 118 (1969); \textit{Tyee Constr. Co. v. Dulien Steel Prods., Inc.}, 62 Wash. 2d 106, ---, 381 P.2d 245, 251 (1963). The Washington courts formulated a three-step test for exercising jurisdiction which required: 1) that there be pur-
poseful activity within the forum whereby the defendant avails himself of the benefits and protections of the forum, 2) that the cause of action arise from the activity, and 3) that upon balancing the interest of the state in providing its residents with a forum, against the potential inconvenience to the defendant, it is fair to maintain the suit locally. \textit{Id. at} ---, 381 P.2d at 251. \textit{See also} Gorfinkel & Lavine, \textit{supra} note 1,
lows will evaluate the three indicia of purposefulness delineated in *Kulko* in light of past decisions. These precedents will lend some substance to the framework of the Court's purposeful contact analysis. In addition, there will be a consideration of the interest balance suggested by the *Kulko* Court, encompassing the interests of the defendant, the plaintiff and the forum state.

**DETERMINATION OF PURPOSEFULNESS**

The requirement that the defendant's contact must be purposeful is founded on the due process clause. The due process standard of fairness requires that a nonresident defendant reasonably anticipate the consequences of his contact with the forum. Thus, the defendant may be held to account only for the predictable consequences of his purposeful act. Accordingly, a state at 1194-1201; Note, 30 Ohio St. L.J. 410, 410 (1969); Comment, 7 San Diego L. Rev. 304, 305-06 (1970); Note, *How Minimum is "Minimum Contact"? An Examination of "Long Arm" Jurisdiction*, 9 S. Tex. L.J. 184, 188 (1967).

However, the requirement that the cause of action directly concern the nonresident's contact with the forum may be effectively incorporated into the interest balance. *California Jurisdiction*, supra note 29, at 1195-60; Comment, *Personal Jurisdiction over Nonresidents—The Louisiana "Long-Arm" Statute*, 40 Tul. L. Rev. 366, 368-89 (1966) [hereinafter cited as *Personal Jurisdiction over Nonresidents*]. See generally Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. L. Rev. 599, 608-09 (1955).

Another court has virtually dispensed with the threshold determination of purposeful activity. "A rule limiting jurisdiction to defendants who 'purposefully' conduct activities within the state cannot properly be applied in products liability cases in view of the fortuitous route by which products enter any particular state." Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 251, 413 P.2d 732, 735 (1966), cited with approval in Miller v. Vitalife Corp. of American, 173 N.W.2d 91, 94 (Iowa 1969); Roche v. Floral Rental Corp., 95 N.J. Super. 555, 555, 232 A.2d 162, 166 (1967); Comment, 7 San Diego L. Rev. 304, 311 (1970). See *Tortious Act as a Basis for Jurisdiction*, supra note 38, at 886.

The determination of the existence of a purposeful contact should be the first step in any jurisdictional analysis. See 357 U.S. at 251, where the Court implied that the nonresident defendant must first sustain minimal or purposeful contact with the state before the balancing process is undertaken. *Id.* The purposeful contact formula of *Hanson* is a vital condition of jurisdiction, thus the multiplicity of factors involved in the balance of interest analysis "do not come into play unless we have made a preliminary determination that defendants' activities involve a 'purposeful activity in the forum state.'" Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 37 Ins. Counsel J. 265, 277 (1970). Accord, Comment, *Jurisdiction in Personam—The Due Process Framework and the Louisiana Experience*, 26 La. L. Rev. 351, 364-65 (1966) [hereinafter cited as *The Louisiana Experience*].


95. 98 S. Ct. at 1700; Currie, supra note 10, at 535. See generally 326 U.S. at 323; *Developments*, supra note 12, at 966.

96. 98 S. Ct. at 1700; 433 U.S. at 218 (Stevens, J., concurring); Comment, Juris-
court generally cannot compel a nonresident defendant's appearance until the determination has been made that the defendant has committed some act by which he has purposefully availed himself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. The initial focus of the minimum contacts test centers upon the circumstances under which the defendant will be deemed to have purposefully or intentionally invoked benefits from the forum.

When evaluating the purposeful quality of the nonresident defendant's contact, courts are forced to rely on the external manifestations of the actor's will. If a nonresident has acted while physically present within the borders of a state, courts should generally have no difficulty in holding that the defendant possessed the requisite purposeful contact with that state. However, when an out-of-state activity is alleged to have triggered an in-state consequence, this initial determination is particularly complex because it is more difficult to infer the nonresident's intent to initiate a relationship with the forum. Under these circumstances, jurisdiction over the nonresident defendant is most likely to be found where he has taken direct action in relation to the forum, thereby allowing the inference that he intended results of the act. When the defendant's actions do not so clearly reflect inferred intent to cause a consequence within the state through an out-of-state act, the jurisdictional assessment becomes even more complicated.

---

77. 357 U.S. at 253.
78. Gorfinke1 & Lavine, supra note 1, at 1182-83. Professors Gorfinke1 and Lavine, citing Hess v. Pawloski, 274 U.S. 352 (1927), pointed out that where a defendant individually or by authorized agent physically enters the forum and there commits the act which gives rise to the cause of action (e.g., assault, battery, trespass to land or conversion of chattels located within the forum) there is no jurisdictional problem. Id. Accord, Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). Cleary, The Length of the Long Arm, 9 J. Pub. L. 293, 299 (1960); Currie, supra note 10, at 539-49; Reese & Galston, supra note 20, at 249. See Developments, supra note 12, at 945.
80. Currie, supra note 10, at 549; Reese & Galston, supra note 20 at 260-61. Professors Reese and Galston observed:
The clearest situation is where an act is done in one state with the intention of causing consequences in another. Certainly, one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising out of the consequences of the shot as if he had actually fired the rifle in the state.
Id.
81. Casad, supra note 89, at 19-20; Currie, supra note 10, at 547; Gorfinke1 &
Problems inherent in evaluating the defendant's intent when his out-of-forum activity caused an effect within may be mitigated by the Kulko decision. The Kulko Court recognized three indicia from which a nonresident's intent to form a connection with the state may reasonably be inferred. Although the indicia were not explained in Kulko, prior decisional law serves as a basis for clarification and evaluation.

Physical Harm Within the Forum

The first indicia of purposeful activity specified by the Kulko Court was the defendant's commission of a wrongful out-of-state act which caused physical injury to either persons or property within the state. The Court did not indicate, however, whether the defendant's mere infliction of physical harm within the forum is alone sufficient evidence of purposefulness to support the forum's assertion of jurisdiction when the defendant acts outside the forum. Whether or not the mere occurrence of physical injury within the forum will warrant the forum's assertion of jurisdiction over the nonresident wrongdoer is questionable. Although authorities are divided on this issue, it seems clear that a plus factor in the form of a reasonable anticipation of suit is necessary before the forum may assert jurisdiction in this situation. Such antici-
ipation or expectation has been found in cases wherein the act not only caused a physical injury, but also resulted in economic benefit to the defendant.

Although the Supreme Court has not yet ruled on the issue, *McGee* has been cited as support for the proposition that the mere infliction of physical harm within the forum is sufficient evidence of the defendant's purposeful contact. However, *McGee* has also been interpreted more narrowly to require some additional showing of intent. Mr. Justice Brennan would appear to accept the latter, more narrow interpretation. Relying on *McGee*, Mr. Justice Brennan argued in *Shaffer* that "jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum." While Mr. Justice Brennan advocated the assertion of jurisdiction in a case involving an isolated act causing harm within the state, he apparently required a finding of foreseeability in addition to the infliction of harm before the state would be allowed to exercise jurisdiction.

The need for evidence of intent beyond the mere infliction of physical injury is also reflected in the provisions of the Uniform Interstate and International Procedure Act. States which have adopted the Act have limited their exercise of jurisdiction to non-
resident defendants who have derived an economic benefit from the forum. As a result of this limitation, the occurrence of harm alone does not establish a purposeful contact sufficient to support jurisdiction under the statute when the harm is caused by an out-of-state act. The purpose of this requirement is to restrict a state's assertion of jurisdiction to cases where the defendant had a reasonable anticipation of suit within the forum. This legislation appears to curb the present tendency of state judiciaries to interpret the scope of purposeful contact broadly.

In an Illinois decision, Gray v. American Radiator & Standard Sanitary Corp., where the court ostensibly predicated its assertion of in personam jurisdiction upon the injury sustained by the plaintiff, a plus factor may have figured in its analysis.

The Gray rationale would seem to permit an assertion of jurisdiction founded on an isolated personal injury within the forum due to a nonresident's single act of negligent manufacture in a distant state. However, Gray itself suggests that this generalized conclusion may be too broad. Although the Gray court purports to rely solely on the physical injury to find purposeful contact, its discussion of economic benefit implies at least a recognition of a necessity for some additional contact with the state.

Likewise, some courts purport to rely on the mere fact of the

---

101. See note 100 supra.
104. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). According to the facts, an Illinois resident was injured as a result of the explosion of a water heater, and predicated his suit against the Ohio manufacturer upon the latter's negligent manufacture of a defective safety valve. The valve had been manufactured in Ohio, sold to a Pennsylvania corporation which assembled the component into the water heater, and eventually reached the plaintiff through the stream of regular commerce. Id. at —, 176 N.E.2d at 762.
105. Id. at —, 176 N.E.2d at 766-67.
106. Id. at —, 176 N.E.2d at 766. In Gray, the court did not base its inference of the nonresident defendant's intent to form a purposeful contact with the state from the entry of the product and the subsequent injury alone, but looked to evidence of the defendant's involvement in interstate commerce as supportive of the proposition that "its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State." Id. Accord, Duple Motor Bodies Ltd. v. Hollingsworth, 417 F.2d 231, 235 (9th Cir. 1969); Metal-Matic, Inc. v. Eighth Judicial District Court, 82 Nev. 263, —, 415 P.2d 617, 619 (1966); Gorfinkel & Lavine, supra note 1, at 1190-91. See Currie, supra note 10, at 552; Tortious Act as a Basis for Jurisdiction, supra note 38, at 677 n.34. Contra, O'Brien v. Comstock Foods, Inc., 123 Vt. 461, —, 194 A.2d 568, 571 (1963).
plaintiff's injury in evaluating the defendant's purposefulness. In fact, these courts also look to the commercial nature of the defendant's actions in making this determination.\(^{107}\) Other courts require even more, holding that physical injury, in conjunction with interstate activities fail to provide adequate contact to support exercise of the long arm.\(^{108}\) Thus despite the Court's broad language in *Kulko*, prior legislation and case law may limit the application of this language by requiring that something more than the infliction of physical harm be necessary to support the inference of a purposeful contact.

### Commercial Activity in Interstate Commerce

The *Kulko* Court's second indicia also alluded to the independent importance of the defendant's commercial activity in determining purposefulness. In the Court's opinion, purposeful activity might be found if "the cause of action arise[s] from the defendant's commercial transactions in interstate commerce."\(^{109}\) The significance of financial motivation was foreshadowed in *McGee* where the defendant actively solicited economic benefit from the forum.\(^{110}\) In fact economic activity has been equated with purposeful activity in circumstances where the defendant has been engaged in interstate commerce.\(^{111}\)

While the *Kulko* Court recognized that a defendant's activities in interstate commerce are demonstrative of purposefulness, it failed to delineate a functional test for inferring purposefulness from such activity. In addition, it did not indicate whether this indicia should be applied indiscriminately to both corporate and individual defendants.\(^{112}\) However, current trends in state court decisions provide guidance in interpreting the Court's broad language.

---


\(^{109}\) 98 S. Ct. at 1699-1702.

\(^{110}\) 355 U.S. at 222-23; Kurland, supra note 12, at 608-09.

\(^{111}\) Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, —, 438 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969). The *Buckeye* court equated "engaging in economic activity within this state as a matter of commercial actuality with Hanson's requirement of purposeful activity within the state." *Id. Accord, California Jurisdiction, supra* note 29, at 1156.

\(^{112}\) 98 S. Ct. 1690 (1978).
Although Kulko did not specify the bases for inferring the defendant's intent from his interstate transactions, some guidance can be found in the state courts' development of a reasonable expectation test in this area. This test was devised by various state legislatures and judiciaries in an effort to alleviate the strictures Hanson has placed on state adjudication of products liability actions. In these cases, a nonresident manufacturer may not have intentionally solicited profit within the particular forum, yet may fairly be held to have anticipated the creation of a risk of harm anywhere his defective product might be marketed in the stream of commerce. Consequently the requirement of purposeful activity has been considered satisfied where a defendant actively seeks to obtain an economic benefit from the distribution and sale of his defective product in interstate commerce. As a result, a defendant need merely participate in interstate commerce to render himself amenable to suit in virtually any state from which

113. Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, —, 438 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969). A manufacturer engages in purposeful activity “within a state . . . whenever the purchase or use of his product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negate the existence of an intent on the manufacturer’s part to bring about this result.” Id. For a list of cases employing the “reasonable expectation” analysis, see note 121 infra. Several state legislatures have articulated this reasonable expectation rationale. See, e.g., Conn. Gen. Stat. § 33-411(c)(3) (1976), which is limited in application to nonresident corporations:

   c.) Every foreign corporation shall be subject to suit in this state . . . on any cause of action arising as follows:

      3.) out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that such goods are to be used or consumed in this state and are so used and consumed, regardless of how or where the goods were produced, manufactured, marketed or sold whether or not through the medium of independent contractors or dealers.

   Id. Accord, N.C. Gen. Stat. § 55-145(a)(3) (1975). See Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, —, 124 N.W.2d 824, 827 (1963); State v. Campbell, 250 Or. 262, —, 442 P.2d 215, 220 (1969). Although this judicial analysis of a defendant’s conduct under these circumstances is typically associated with the field of products liability, it is capable of broader application to any tort liability not requiring direct physical confrontation between the plaintiff and the defendant. Gorfinkel & Lavine, supra note 1, at 1186-88. However, this expansion of jurisdiction may simply be incidental to the current trend toward strict liability in tort, as “this vital principle, with all the enhanced protection it affords consumers in an industrial society, would remain a dead letter in practice unless complemented by procedural statutes.” Id. at 1185. See also Note, 30 Ohio St. L.J. 410, 413-16 (1969).

114. Long-Arm and Quasi in Rem Jurisdiction, supra note 103, at 312-13.

115. Homburger, supra note 89, at 81; The New England Experience, supra note 33, at 413; In Personam Jurisdiction over Nonresident Manufacturers, supra note 25, at 1033-34.
he has received remuneration for the sale of his product. This relieves the plaintiff of the burden of demonstrating the defendant's intent to derive revenue from the isolated sale of the defective item which caused the injury. Therefore, if the Hanson requirement of purposeful behavior may be met by evidence of widespread commercial activity, Kulko's second indicia could be satisfied by similar proof. This hypothesis is further supported by the language in Kulko which resembled that employed by state courts engaged in the reasonable expectation analysis.

This premise should be qualified, however, by recognition of the intrinsic differences among types of defendants. Several states which have enacted long-arm statutes providing for jurisdiction on the basis of interstate activity have confined their application to suits against foreign corporations. Where such a

118. Compare 98 S. Ct. at 1699-1700 with Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, —, 124 N.W.2d 824, 827 (1963); and State v. Campbell, 250 Or. 262, —, 442 P.2d 732, 736 (1961). Arguably, the language of several state statutes may distinguish between classes of defendants in terms of their ability to reasonably anticipate suit arising from interstate activity. N.Y. CIV. PRAC. LAW § 302(a)(3)(ii) (McKinney 1976) states that a nonresident may be subjected to suit based on an out-of-state act causing an effect within where he "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate and international commerce." Id. Accord, CONN. GEN. STAT. § 33-411(c)(3) (1978); N.C. GEN. STAT. § 55-145(a)(3) (1975). Professors von Mehren and Trautman have noted that such a statutory provision applies more stringently to a multistate than a localized nonresident defendant. von Mehren & Trautman, supra note 33, at 1176. See Note, Jurisdiction in New York: A Proposed Reform, 69 COLUM. L. REV. 1412, 1421 (1969), wherein the observation is made that N.Y. CIV. PRAC. LAW § 302(a)(3)(ii) (McKinney 1976) would permit jurisdiction over the manufacturer who engages in widespread interstate commerce, but not in the case of a local dealer, though in both instances potential liability was foreseeable. Id. at 1421. See Homburger & Laufer, Expanding Jurisdiction over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute, 16 BUFFALO L. REV. 67, 71-72 (1967).

According to Professor Ehrenzweig, "in a modified sense, the old differences between jurisdiction over corporations and individuals may gain new meaning . . . . Nonresident absent individuals not transacting business in the state will have
defendant is involved, it is not unreasonable for a particular forum to infer a purposeful contact from the defendant's active participation in interstate commerce.\footnote{121}

Various factors warrant a state's assertion of jurisdiction over a corporate defendant engaged in interstate commerce without requiring specific proof of his intent to associate with the particular forum. Where a corporation initiates a contact with a great number of states by distributing its products in the stream of interstate commerce, its overriding purpose is to have these products purchased.\footnote{122} The precise location of this purchase would appear relatively insignificant, in view of the defendant's goal of obtaining profit through trade in an interstate marketplace.\footnote{123} Consequently, such large enterprises may reasonably expect potential litigation and take measures to insure against it.\footnote{124} A nonresident who anticipates receiving or actually does receive a pecuniary benefit from the forum state should accept the expense of defending in

to remain exempt from jurisdiction with specific exceptions to be established from case to case." Ehrenzweig, supra note 38, at 292. In Shaffer, some distinction among classes of defendants was noted. Although

the International Shoe Court believed that the standard it was setting forth governed actions against natural persons as well as corporations . . . \footnote{121} the differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes State jurisdiction over one type of defendant but not over the other.


122. Currie, supra note 10, at 545, 557-58; Seidelson, supra note 96, at 228.


that state as a cost of doing business.\textsuperscript{125}

While the application of the reasonable expectation test is consistent with due process when applied to corporate defendants, it may not be fairly applied to individuals in all situations.\textsuperscript{126} For example, where an individual sells a defective tire to a tourist residing in a distant state, he can theoretically foresee the possibility of suit in that state under the reasonable expectations test. However, employment of this analysis to compel the individual seller's appearance in the buyer's state would not be consonant with due process in all cases.\textsuperscript{127} In order to satisfy the \textit{Hanson} purposefulness requirement, it is unlikely that mere foreseeability of a foreign suit is enough.\textsuperscript{128} This foreseeability must arise from the defendant's extensive activities in interstate commerce before an inference of purposeful contact can be drawn.\textsuperscript{129}

In addition, practical considerations render the application of the reasonable expectation test less equitable when individuals are involved. Individuals, as a class, may be less equipped to calculate the potential danger of litigation arising from a particular form of conduct, and to financially insure against such an eventuality.\textsuperscript{130} Moreover, they may have consciously sought to limit the scope of their activities in order to diminish the generalized risk of suit associated with extensive participation in interstate commerce.

\textsuperscript{125} \textit{Developments, supra} note 12, at 928.

\textsuperscript{126} Professors von Mehren and Trautman distinguished classes of defendants in terms of extent of activity. "Tests in terms of defendant's activities having substantial consequences in the state are appropriate with respect to defendants whose activities are pervasively multistate. . . . On the other hand, such jurisdictional bases should not be available against defendants whose activities are essentially confined to a single community." von Mehren & Trautman, \textit{supra} note 33, at 1176.

For purposes of discussion, the generalized conclusion will be drawn that in most cases multistate defendants will be corporations, whereas localized defendants will be individuals. \textit{See note 119 supra. See also} Homburger, \textit{supra} note 89, at 82 (small local defendant operator should not be held to reasonably expect litigation in another jurisdiction when the defective item was sold \textit{within} his home state).


\textsuperscript{128} Casad, \textit{supra} note 89, at 40.

\textsuperscript{129} Tilley v. Keeler Truck & Implement Co., 200 Kan. 641, —, 438 P.2d 128, 134 (1968); Gorfinkel & Levine, \textit{supra} note 1, at 1169; von Mehren & Trautman, \textit{supra} note 33, at 1169; \textit{Erosion of the Power Theory}, \textit{supra} note 86, at 736 n.51; \textit{Contours of State Court Jurisdiction, supra} note 98, at 117.

\textsuperscript{130} Kurland, \textit{supra} note 12, at 597; \textit{Developments, supra} note 12, at 936.
merce. Ultimately, "[i]t seems quite likely that courts will be influenced by this class differentiation although it probably will seldom be articulated." In evaluating the expansive language of *Kulko*'s second indicia, it is not clear what the Court considered to be the proper analysis of the defendant's interstate activity. However, the reasonable expectation test delineated by state courts provides an analytical framework upon which to base a determination of purposefulness where the defendant is engaged in interstate commercial transactions. Although the second indicia may provide state judiciaries with a useful guide for inferring purposefulness, the propensity of some courts for resorting to easily applied jurisdictional labels may tend to obscure the due process concern for fairness to the defendant.

**Contractual Contact with the Forum**

Mr. Justice Marshall's third indicia of purposeful contact required that the controversy arise from an agreement evincing a substantial connection with the forum. In the Court's opinion, an inference of intent to associate with the forum may be drawn where the parties contemplate a relationship between the contract

---


133. *Twerski*, supra note 83, at 270-71. Some courts have asserted jurisdiction based solely on a finding that the defendant was engaged in multistate activity, however, this analysis is not always sufficient. For example, if a defendant conducts business within a region which encompasses several states, such activity could be denominated as multistate. But it would appear inconsistent with *Hanson* to infer that the defendant established a purposeful contact with any state beyond this circumscribed area. *See id. at 271-72, Long-Arm and Quasi in Rem*, supra note 103, at 314-15, indicating that due process will not permit a blanket rule gauging a defendant's expectations in all cases dealing with involvement in interstate commerce. *See also Dorenbos v. Kroger Co.*, 9 Mich. App. 515, 157 N.W.2d 498 (1968), wherein the court applied the *Gray* rationale, exercising jurisdiction over a nonresident defendant who had solicited business and was licensed by the ICC to enter only four states, none of which was Michigan. *Id. at —*, 157 N.W.2d at 501. Under these circumstances, the defendant should not have been charged with an expectation of defense in the forum. "In the interstate setting, one who markets in a particular region, which is composed of all or parts of several states, cannot be, ipso facto, presumed to have broadened the scope of his economic venture to the point that national service of process becomes fair." *Twerski*, supra note 83, at 272 n.43. *See Currie*, supra note 10, at 551.

Thus, a mere finding that the defendant participated in multistate activity is probably not a sufficient basis for an assertion of jurisdiction absent a showing that the forum is within the geographical limits of the defendant's multistate activity. *See Twerski*, supra note 83, at 271-75; *Long-Arm and Quasi in Rem*, supra note 103, at 314-15.

134. 98 S. Ct. at 1699-1700.
and the forum.\textsuperscript{135}

This inference of intent from the creation of a contract often satisfies Hanson’s mandate that the defendant initiate some purposeful contact with the forum.\textsuperscript{136} Where a nonresident plans to execute a contract which is substantially affiliated with the forum, he has volitionally acted with full awareness of the possibility of litigation within the forum stemming from the agreement’s terms.\textsuperscript{137} This foreknowledge permits the contracting party to provide for this contingency by express stipulation in the contract as to the forum for litigation.\textsuperscript{138} In addition, the nonresident is entitled to access to the forum's courts to redress any grievance arising from the transaction when the plaintiff is a resident of the forum.\textsuperscript{139} Therefore, the nonresident defendant may fairly be held subject to the forum’s long-arm jurisdiction since he has purposefully derived benefits and protections from the forum state.

The practical application of this third indicia of purposefulness is illustrated by the similar factual settings of Kulko and Hanson. In both cases the performance of contractual duties within the forum had not been a reasonably foreseeable contingency at the time the agreement was executed.\textsuperscript{140} Where neither defendant had voluntarily agreed to a transfer of the situs of his contractual duties, the mere fact that each of the other contracting parties had at a later date changed her residence was inadequate grounds for finding jurisdiction.\textsuperscript{141} From these decisions, it may be concluded that the requisite purposeful intent may not be inferred where the defendant has passively acquiesced in the plaintiff’s relocation of a contractual obligation to the forum.

Although Kulko and Hanson provide an excellent illustration,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{135} Id. Accord, Long-Arm and Quasi in Rem, supra note 103, at 322.
\item \textsuperscript{136} Currie, supra note 10, at 565-66; Gorfinke \& Lavine, supra note 1, at 1213; Towe, supra note 127, at 19.
\item \textsuperscript{137} Casad, supra note 89, at 23; Personal Jurisdiction over Nonresidents, supra note 82, at 384.
\item \textsuperscript{138} National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964); Long-Arm and Quasi in Rem, supra note 103, at 322.
\item \textsuperscript{139} Nelson v. Miller, 11 Ill. 2d 378, —, 143 N.E.2d 673, 680 (1957); Dahlberg v. Western Hearing Aid Center, 259 Minn. 330, —, 107 N.W.2d 381, 385 (1961); Towe, supra note 127, at 17.
\item \textsuperscript{140} In Kulko, the terms of the separation agreement did not contemplate the plaintiff’s unilateral transfer of the situs of defendant’s contractual obligation to California. 98 S. Ct. at 1696 n.6. Accord, 357 U.S. at 252-53. See generally Casad, supra note 89, at 24; Currie, supra note 10, at 582.
\item \textsuperscript{141} 98 S. Ct. at 1694-96; 357 U.S. at 252-53. Professor Currie pointed out that a “State to which one spouse has moved after separation has no power to enter a judgment terminating support payments” set forth in the terms of an agreement administered under the laws of another state. Currie, supra note 10, at 536. Accord, Reese \& Galston, supra note 20, at 257.
\end{enumerate}
\end{footnotesize}
these opinions failed to consider certain problems inherent in this indicia. For example, unlike a single tort, which can generally be localized, it is often difficult to determine the situs of a contract since it may involve several states in its negotiation, execution, and performance.\textsuperscript{142} The McGee decision, in which the Court held that the receipt of economic benefit from a state resident pursuant to the express terms of a single contract constituted a jurisdictionally significant contact with the forum, provides some guidance.\textsuperscript{143} Yet despite McGee, this issue has continued to be a source of controversy.\textsuperscript{144}

Problems also arise when this indicia is applied in particular factual settings. The Kulko Court's expansive terminology encompasses some circumstances in which a state's assertion of jurisdiction may be deemed unconstitutional. According to Professor Currie, the mere fact that both parties execute a contract within the forum does not provide a sufficient jurisdictional basis where the contact's terms contemplate performance elsewhere, and neither party resides within the forum.\textsuperscript{145} While the parties in this hypothetical were certainly aware that they had established some connection between the contract and the forum, Professor Currie did not consider the contract a sufficient jurisdictional contact within the meaning of the due process clause.\textsuperscript{146} Although this discussion does not directly confront the issue of purposeful contact, the argument could be made that despite the third indicia's broad language, this hypothetical contract, though made within the forum, would not give rise to an inference of purposefulness under the Hanson analysis.

That execution of a contract within the forum does not always constitute an indicia of purposeful contact is supported by several state court opinions. These opinions highlight the importance of identifying the aggressor or initiating party when considering the

\textsuperscript{142} Development, supra note 12, at 926; The Louisiana Experience, supra note 83, at 376-77; Personal Jurisdiction over Nonresidents, supra note 82, at 378. See also Currie, supra note 10, at 568.

\textsuperscript{143} See 355 U.S. at 223.

\textsuperscript{144} Auerbach, The "Long Arm" Comes to Maryland, 26 Md. L. Rev. 13, 34-35 (1966) Casad, supra note 89, at 34-35; Currie, supra note 10, at 569 n.214. See also Gorfinkel & Lavine, supra note 1, at 1213-16.

\textsuperscript{145} Currie, supra note 10, at 573. See Kaye-Martin v. Brooks, 267 F.2d 394, 397-98 (7th Cir. 1959). Although the question of the situs of the contract's execution had not been resolved, the Kaye-Martin court declared that the only reason for the Illinois meeting place was mere convenience. Id. at 397-98. Thus it may be inferred that the meeting would not have established a sufficiently purposeful contact with the state if the contract had been made therein. Currie, supra note 10, at 573. See Baughman Mfg. Co. v. Hein, 44 Ill. App. 2d 373, 194 N.E.2d 664 (1963). But see Cleary, supra note 88, at 301.

\textsuperscript{146} Currie, supra note 10, at 573.
jurisdictional significance of a contractual tie with the forum. If the resident plaintiff solicits the creation of a contract which requires the nonresident defendant's performance within the forum state, the defendant's consent to the situs of his obligation may not support a state's assertion of jurisdiction.

The Utah Supreme Court justified its refusal to enforce an Illinois judgment because of lack of jurisdiction, pointing out that "it was not the defendant Utah resident who took the initiative by going into Illinois to transact business, nor did he engage in any activity resulting in injury or damage there. Quite the contrary, it was the plaintiff resident of Illinois who proselyted for business in Utah."

A similar analysis would seem appropriate in the application of the Court's third indicia of purposefulness. Where the nonresident does not initiate the formation of a contractual relationship and thus does not seek the establishment of a connection between his contract duties and the forum, the mere performance of these duties within the forum may not be an accurate indicia of purposefulness, despite Kulko's language.

INTEREST BALANCE

Having completed its threshold evaluation of the nonresident defendant's purposeful behavior, the Kulko Court proceeded to the second stage of its minimum contacts analysis. This stage in-

---


148. Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, —, 117 N.W.2d 732, 736 (1962). This situation arises out of an effort by the nonresident defendant to accommodate the plaintiff. Fixing the place of payment at plaintiff's business residence is hardly the kind of commercial benefit to defendant that must be balanced by a countervailing capitation to jurisdiction . . . . For these reasons we believe that less than the minimum contacts required by "traditional notions of fair play and substantial justice" have here been proved.

Id.


150. Although the contract may have a substantial connection with the state, the state's exercise of jurisdiction may violate the due process clause. For example, if the facts of the McGee case were reversed, the insurer's efforts to sue the resident insured on the policy would seem unfair, where the plaintiff insurer had initiated the contractual relationship. Casad, supra note 89, at 34. See Oswalt Indus., Inc. v. Gilmore, 297 F. Supp. 307, 313 (D. Kan. 1969) (plaintiff seller sought out defendant buyer, forum's assertion of long-arm jurisdiction held unconstitutional); Conn v. Whitmore, 9 Utah 2d 250, —, 342 P.2d 871, 874 (1959); Auerbach, supra note 144, at 35.
volves a balancing of the inconvenience to the defendant of adjudicating in a foreign forum against the combined interest of the plaintiff and the state.  

**Defendant's Interest**

Although the Court in *Kulko* recognized the significance of both forum and plaintiff interests, it emphasized that the focus of the due process clause is upon fairness to the defendant. In assessing fairness or inconvenience to the defendant, the Court utilized the negative results of its evaluation of the purposefulness of the defendant's contacts. As a result the Court concluded that the passive nature of these contacts prevented the defendant from reasonably anticipating "being 'haled before a [California] court.'" Thus, the defendant's lack of purposeful contacts with the forum rendered the potential burden of defense within the forum state unforeseeable. This lack of foreseeability greatly increased the defendant's burden of litigating in the forum, and figured prominently in the interest balance.

From the *Kulko* Court's analysis of the defendant's interest, it would appear that the Court has linked its initial evaluation of purposeful activity with its subsequent balancing of the participant's interests. For example, if the nonresident has initiated a purposeful contact with the forum, there is present a degree of foreseeability which can be balanced against the interests of the plaintiff and the forum. Therefore, in balancing the interests of

151. 98 S. Ct. at 1700-01. *See generally* Smit, *supra* note 36, at 608-10. The International Shoe Court first set forth the framework of a reasonableness test, which was to entail a process of balancing the various interests involved. *Developments, supra* note 12, at 924. However, the Court failed to define the interests to be balanced in reaching a fair result in each case. Comment, *In Personam Jurisdiction over Foreign Corporations: An Interest Balancing Test*, 20 U. FLA. L. REV. 33, 35 (1967) [*hereinafter cited as An Interest Balancing Test*]. In *McGee*, the Court ultimately identified the conflicting interests as those of the defendant, the state, and the plaintiff. 355 U.S. at 223-24.

152. 98 S. Ct. at 1697. *See* 433 U.S. at 204; 326 U.S. at 316-17.

153. 98 S. Ct. at 1700.

154. *Id*.

155. *Id*. Basic considerations of fairness mandate an evaluation of the defendant's burden before it may be balanced against the interests of the state and the plaintiff.

156. *Id*. According to the *Kulko* Court, elements of this burden include inconvenience, expense and foreseeability. *Id*.


158. 98 S. Ct. at 1700. *See* 433 U.S. at 213-16.
the parties, fairness to the defendant of litigating in the forum state is expressed in terms of his ability to foresee litigation.\textsuperscript{159} This foreseeability is a direct consequence of his contacts with the forum, and is dependent on the Court's finding of a purposeful contact from which the requisite foreseeability must arise.\textsuperscript{160} Unless the defendant has acted purposefully and thus has anticipated suit in the forum, the burden of defense will generally outweigh the interests of the plaintiff and the state, and jurisdiction will be inappropriate.\textsuperscript{161} Yet where the defendant has established a purposeful contact, the resultant foreseeability will alleviate his burden, and will be employed in the interest balance in determining whether an assertion of jurisdiction is fair.\textsuperscript{162}

Perhaps the \textit{Kulko} Court's increased concern with the defendant's ability to reasonably foresee potential litigation is a consequence of the state courts' reasonable expectation test which has diluted \textit{Hanson}'s purposeful act requirement.\textsuperscript{163} Under this reasoning, state judiciaries have viewed evidence of the defendant's expectation of suit as proof of his commission of a purposeful act.\textsuperscript{164} In light of the Court's holdings in both \textit{Kulko} and \textit{Shaffer} this analysis would appear to place the cart before the horse. Under these decisions, foreseeability of suit must be a consequence of a purposeful act,\textsuperscript{165} and may not be utilized by the lower courts as the sole measure of purposeful contact.\textsuperscript{166}

An example of an unconstitutional application of the reasonable expectation test is found in the California Supreme Court's decision in \textit{Kulko v. Superior Court}.\textsuperscript{167} In effect, the California court interpreted the nonresident defendant's anticipation of indi-
rect receipt of economic gain from the state as demonstrative of a purposeful contact with the forum.168 This determination was made without considering the essentially passive, acquiescent nature of the defendant's behavior.169 For all practical purposes, the California court had substituted what it termed the defendant's expectations of economic benefit, which arose from his non-purposeful connection with the forum, for the purposeful contact mandated by Hanson.170 In so doing, the court had virtually dispensed with Hanson's requirement of purposeful contact.171

In reversing the California court's opinion, the Kulko Court admonished the state courts that a defendant's passive consent to another's establishment of contact fails to provide evidence of the defendant's instigation of a purposeful contact with the forum.172 Although foreseeability is an essential element of the minimum contacts analysis, the Kulko Court has indicated that this factor will not support jurisdiction under the Court's interest balance unless it is first shown to have arisen from a purposeful contact.173

Plaintiff's Interest

In evaluating the fairness of an assertion of jurisdiction, Kulko's interest balance requires an assessment of the plaintiff's

---

168. 19 Cal. 3d 514, 521, 564 P.2d 353, 356, 138 Cal. Rptr. 586, 589 (1977); Fischer, supra note 147, at 405-07.
170. 98 S. Ct. at 1698. See 19 Cal. 3d at 522, 564 P.2d at 356, 138 Cal. Rptr. at 589.
171. Fischer, supra note 147, at 405. See notes 127-129 and accompanying text supra.
172. 98 S. Ct. at 1698-700.
173. Id. See 433 U.S. at 216. However, the Shaffer Court qualified this ruling. "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." Id. at 211 n.37. In other words, the Court may not require evidence of the defendant's purposeful contact with the state in instances where the plaintiff has no alternate forum, and may thus permit the state courts to predicate jurisdiction on the basis of a non-purposeful contact. It would appear that the Court would sanction the assertion of jurisdiction based on such involuntary contact only in rare cases, where the potential defendant is a citizen of a foreign country. Vernon, State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner, 63 IOWA L. REV. 997, 1008-10 (1978). Accordingly, the generalized conclusion may be drawn that the Court, with rare exception, will demand evidence of the defendant's purposefulness before engaging in its task of balancing his interests against those of the state and the plaintiff. Referring to Shaffer, it has been observed that "it is unclear whether the Court's exception is based on an imprecise 'fairness' standard authorizing a court to exert jurisdiction in certain limited situations or whether it simply creates an exception to Shaffer in the no-alternative-forum cases." Silberman, supra note 159, at 76. For a discussion of state court jurisdiction in circumstances where the plaintiff has no available alternate forum, see notes 179-190 and accompanying text infra.
interest. Traditionally, the plaintiff's interest has merited little consideration in jurisdictional analysis. As a rule, the plaintiff's interest consists primarily of the desire to avoid the hardship and expense of a suit in the defendant's domicile and therefore will exert a minimum of influence in any jurisdictional interest balance. For example, in Shaffer, where the plaintiff was merely suing on behalf of the corporation in a derivative action suit, his interests were wholly superseded by the Court's discussion of the state's interest. Similarly, the Kulko Court has intimated that where the plaintiff may resort to a reasonably available alternate forum for redress, his interest in compelling the defendant's appearance will be given little weight in the Court's interest balance.

The plaintiff's interest, however, may be considered of greater significance in those cases where there is a danger that his claim would not be litigated if jurisdiction over the nonresident defendant were unavailable. In this situation, the only forum in which the plaintiff may pursue his claim lacks sufficient contacts with either the cause of action or the defendant. Terms "jurisdiction by necessity," the constitutionality of a state's assertion of jurisdiction in this factual setting remains uncertain.

Some commentators argue that the unavailability of an alternate forum should be accorded significant weight in assessing the constitutionality of a state's exercise of jurisdiction. However, it is uncertain how unavailable the alternate forum must be to war-

---

174. 98 S. Ct. at 1700-01. 
175. Accord, Smit, supra note 162, at 351; Sunderland, The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act, 1 U. CHI. L. REV. 188, 192 (1933); Contours of State Court Jurisdiction, supra note 97, at 98. But see 355 U.S. at 223; Silberman, supra note 159, at 87; An Interest Balancing Test, supra note 151, at 38. 
176. Smit, supra note 36, at 611. "It is reasonable that the plaintiff who institutes litigation—and thus acts contrary to the social policy that discourages litigation—be required to pursue the defendant at the latter's home." Id. at 608. 
177. 433 U.S. at 213-16; Assertions of in Rem Jurisdiction, supra note 157, at 792 n.165. See note 173 and accompanying text supra. 
178. 98 S. Ct. at 1700-01. The plaintiff could easily have obtained redress under the Uniform Reciprocal Enforcement of Support Act, without the necessity of either party having to leave their respective domiciles. Id. 
179. See id. at 1701 n.15; 355 U.S. at 223. See generally note 173 and accompanying text supra. 
181. Casad, supra note 20, at 76-77; Fischer, supra note 147, at 391; Friedenthal, A Comment on the Impact of Shaffer v. Heitner in the Classroom, 1978 WASH. U.L.Q. 319, 323. See also Contours of State Court Jurisdiction, supra note 97, at 116-17. 
182. Casad, supra note 20, at 76; Kurland, supra note 12, at 602; Vernon, supra note 173, at 1009-10. See generally Note, Shaffer v. Heitner: The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction, 35 WASH. & LEE L. REV.
rant the state’s assertion of its long-arm jurisdiction over a cause of action unrelated to the defendant’s forum activity. The Court has added to the confusion through its avoidance of the issue of whether jurisdiction could be based on the plaintiff’s interest when a denial of jurisdiction would effectively bar redress of plaintiff’s grievance.

Despite the absence of a definitive ruling on this issue, the Court’s declaration that due process requires a nexus among the defendant, the forum, and the litigation has cast some doubt on the constitutionality of jurisdiction by necessity. In addition to mandating a relationship between the defendant and the litigation, this due process requirement dictates the additional finding of a purposeful contact between the defendant and the forum and between the forum and the litigation. It is questionable whether due process standards will permit the predication of jurisdiction over a cause of action unrelated to the forum, despite the defendant’s substantial activity within the forum state. As a result of the Court’s emphasis on the connection among the litigation, the forum, and the defendant, the plaintiff’s interest in finding any forum will rarely outweigh the defendant’s interest where the cause of action bears no relation to the defendant’s forum contacts. Under these circumstances, jurisdiction is

131, 144-45 (1978) [hereinafter cited as Uniform Approach to State Court Jurisdiction].
183. Casad, supra note 20, at 76; Vernon, supra note 173, at 1009-10.
185. 433 U.S. at 204.
186. Fischer, supra note 147, at 391 n.17.
187. Contours of State Court Jurisdiction, supra note 98, at 118. “[T]he defendant and the litigation will invariably be related.” Id.
188. 98 S. Ct. at 1698-1700. The Supreme Court has repeatedly emphasized the necessity of the defendant’s establishment of purposeful contact with the forum. Id. Accord, 433 U.S. at 216; 357 U.S. at 251; Assertions of in Rem Jurisdiction, supra note 157, at 793.
189. Contours of State Court Jurisdiction, supra note 98, at 118. The litigation must arise from the defendant’s contacts with the state, thus creating a nexus between the forum and the lawsuit. Id. In Shaffer, the Court premised its denial of Delaware jurisdiction in part on the fact that the subject matter of the litigation dealt with activities which had no connection with the forum, 433 U.S. at 190. Accord, Aanestad v. Beech Aircraft Corp., 521 F.2d 1298, 1300 (9th Cir. 1974). For a discussion of Shaffer’s forum-defendant-litigation nexus, see Sedler, Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner, 1978 WASH. U.L.Q. 329, 331-335. But see Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (where the continuous and systematic contacts of the defendant with the forum permitted the state’s assertion of jurisdiction on a cause of action unrelated to those contacts).
190. Fischer, supra note 147, at 391 n.17; von Mehren & Trautman, supra note 33, at 1144.
191. See note 181 and accompanying text supra.
likely to be denied, even where the plaintiff's interest is reinforced by a substantial state interest.\footnote{192}

\textit{State's Interest}

The final interest weighed in the \textit{Kulko} Court's balance is that of the state in adjudicating a controversy within its courts.\footnote{193} State interests considered jurisdictionally relevant include the state's interest in providing a forum for resident plaintiffs,\footnote{194} avoiding multiple litigation,\footnote{195} protecting the health and welfare of its residents,\footnote{196} and applying its substantive laws to the litigation.\footnote{197} Despite the legitimacy of these concerns, the Court has limited their jurisdictional significance in two ways. First, the Supreme Court has made it clear that a state's interest in adjudicating a cause of action governed by its laws is not a sufficient basis for jurisdiction.\footnote{198} The issue of which state's substantive law applies is governed by conflict of laws rules and is independent of jurisdictional considerations. While recognizing the forum's interest in applying its own laws to resolve a dispute, the \textit{Kulko} Court nonetheless reaffirmed \textit{Hanson}'s declaration that the mere fact that the forum is the "center of gravity" for choice of law purposes does not necessarily warrant its assertion of jurisdiction.\footnote{199} In the Court's opinion, the state's interest in adjudicating a controversy under its law did not render it a "fair forum" in which to conduct the litigation.\footnote{200} The implication of the Court's holdings on this issue in \textit{Kulko}, \textit{Shaffer}, and \textit{Hanson} is that "more contacts with the forum state are needed for jurisdiction than for choice of

\footnotesize{192. Silberman, supra note 159, at 84; Contours of State Court Jurisdiction, supra note 98, at 119 n.186.}

\footnotesize{193. 98 S. Ct. at 1700-01.}

\footnotesize{194. 355 U.S. at 223; Casad, supra note 89, at 8; Sutton, supra note 91, at 103.}


\footnotesize{196. Olberding v. Illinois Cent. R.R., 346 U.S. 335, 341 (1953); An Interest Balancing Test, supra note 151, at 39; Developments, supra note 12, at 929.}

\footnotesize{197. 433 U.S. 225-26 (Brennan, J., concurring in part and dissenting in part); Selder, Judicial Jurisdiction and Choice of Law: The Consequences of \textit{Shaffer v. Heitner}, 63 IOWA L. REV. 1031, 1032 (1968); Silberman, supra note 159, at 88-89. See also Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977).}

\footnotesize{198. 98 S. Ct. at 1700-01; 433 U.S. at 215, 357 U.S. at 254; Leathers, supra note 12, at 34-35.}

\footnotesize{199. 98 S. Ct. at 1700. The \textit{Shaffer} Court indicated that the state's interest in applying its laws is insufficient for jurisdictional purposes, as its authority may not be properly invoked unless the defendant has initiated some purposeful contact with the state. "[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." 433 U.S. at 215.}

\footnotesize{200. 98 S. Ct. at 1701. Accord, 433 U.S. at 215.}
The Court's position on the choice of law question has been criticized by those who maintain that the applicability of state law to a suit would support a state's exercise of judicial authority. Where the defendant's contacts give rise to a controversy which will be governed by a state's laws, it is argued that those contacts should provide a sufficient jurisdictional basis. However, it seems unlikely that the Court will permit the forum's interest in applying its own laws to outweigh the inconvenience to the defendant of suit in a foreign tribunal.

The second limitation of judicial recognition of a state's interest is the requirement that the state's concern be particularized in a long-arm statute. The *Kulko* decision marked the culmination of a trend evinced in Court opinions toward limiting assertions of in personam jurisdiction to cases in which the state has legislatively enacted its regulatory concerns. For example, the *Hanson* Court found the absence of a jurisdictional statute relevant in declaring jurisdiction inappropriate. Similarly, the *Shaffer* Court, in more emphatic terms, premised its denial of jurisdiction in great part upon the state's failure to statutorily express a specific interest in resolving the controversy. Adopting this rationale, the *Kulko* Court accorded little weight to the state's interest in the absence of a special jurisdictional statute. Thus, *Kulko*'s requirement of statutory particularization may be viewed as the completion of the trend begun in *Hanson*.

An explanation of the Court's imposition of this particularization requirement may be found in its recently expressed concern that the defendant foresee the threat of litigation resulting from his purposeful contact with the forum. Although *Kulko* did not expressly recognize a correlation between foreseeability and the existence of a particularized long-arm statute, the connection was

---

202. *Casad*, *supra* note 20, at 75; *Fischer*, *supra* note 147, at 393; *Leathers*, *supra* note 12, at 37; *Sedler*, *supra* note 189, at 339.
203. 98 S. Ct. at 1700. Where the state had failed to enact a statute expressing its interest, jurisdiction was denied. *E.g.*, 433 U.S. at 216; 357 U.S. at 252.
204. 98 S. Ct. at 1700; 433 U.S. at 216; 357 U.S. at 252.
205. 357 U.S. at 252.
206. 433 U.S. at 214.
207. 98 S. Ct. at 1700.
208. *Id.*; 433 U.S. at 216.
drawn in Shaffer. In the Shaffer Court's opinion, the defendant had no reason to expect being haled before a state's court in the absence of a particularized jurisdictional statute. Therefore, Kulko and Shaffer suggest that in applying the Court's interest balance, a state's interest in litigating a suit will not outweigh the defendant's interest unless the threat of litigation is made foreseeable by the terms of a particularized long-arm statute.

If this particularization requirement is interpreted in light of foreseeability, broad jurisdictional statutes, such as that of California, may fail to satisfy this prerequisite, since such a statute does not give adequate notice of potential litigation. Thus, a state's valid interest in securing jurisdiction over a nonresident defendant exerts little influence in the Court's interest balance, in the absence of a particularized statute.

209. 433 U.S. at 216; Casad, supra note 20, at 76; Silberman, supra note 159, at 65-66; Assertions of in Rem Jurisdiction, supra note 157, at 781-86. See Developments, supra note 12, at 1016-17.

210. 433 U.S. at 216.

211. California permits the exercise of jurisdiction "on any basis not inconsistent with the constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). Rhode Island will assert jurisdiction "in every case not contrary to the provisions of the constitution or laws of the United States." R.I. GEN. LAWS § 9-5-33 (1970). In applying long-arm provisions to particular factual situations, courts must determine first whether the statutory language encompasses the disputed jurisdictional activity of a nonresident, and then consider whether the exercise of judicial authority falls within the permissible scope of the due process clause. Rebozo v. Washington Post Co., 515 F.2d 1208, 1211 (5th Cir. 1975); Homburger, supra note 89, at 62. While both requirements must be considered, they are premised upon two entirely distinct forms of analysis, as a state need not assert its power to the "outer" due process will allow. Reese & Galston, supra note 20, at 265; Smit, supra note 36, at 607 n.35. In practice, courts have experienced great difficulty in distinguishing the process of statutory construction from the evaluation of the constitutional limits of long-arm power. In instances where the legislature has explicated its intent to assert jurisdiction to the limits of due process, the two standards tend unavoidably to merge and hinder clear-cut procedural analysis. See Gorfinkel & Lavine, supra note 1, at 1186. Seeking to avoid the imposition of judicial restrictions, California has dispensed with particularized jurisdictional precepts in hopes of escaping such interpretive confusion. Fischer, supra note 16, at 37-38; Gorfinkel & Lavine, supra note 1, at 1167.

212. Silberman, supra note 159, at 66-67; Smit, supra note 36, at 606-07. The defect of vagueness characteristic of California's long-arm statute is reflective of the widespread confusion concerning the meaning of due process. Gorfinkel & Lavine, supra note 1, at 1181. The California legislature delegated to the state's courts the task of defining the limits of due process when interpreting the statute; however, the California Supreme Court has failed to do so. Fischer, supra note 147, at 387. Thus, "both nonresidents and residents [are] unable to gauge the probable resolution of a jurisdictional controversy with any meaningful certainty." Id. at 387-88.

213. See 98 S. Ct. at 1700; 433 U.S. at 216-17. In Shaffer, the state had statutorily expressed a general interest in regulating the activities of nonresidents, but this failed to meet the Court's expectations requirement. Id. at 213-17. Accord, Contours of State Court Jurisdiction, supra note 98, at 107 n.119. If the state has a valid interest, it should legislatively express it. Sedler, supra note 197, at 1039-40. Accord,
Another problem which Kulko's particularization requirement might alleviate is the virtual eradication of the purposeful contact requirement by state court interpretation of expansive long-arm statutes which provide no guidance for jurisdictional decision making. Under such a statute, the California court had freely predicated jurisdiction upon the nonresident's mere acquiescence in another's conduct, and had thereby read its own constitutionally impermissible version of the Hanson precept into the statute's vague terms. Absent particularization, California's open-ended legislation allowed the courts to exercise broad discretion. However, it would seem apparent that this unrestrained judicial discretion will be somewhat restricted by Kulko's particularization requirement.

Particularization of a state's interests in a jurisdictional statute may limit the possibility of undue interference, through the exercise of jurisdiction, in the affairs of a sister state.

Uniform Approach to State Court Jurisdiction, supra note 182, at 150-52. But see 433 U.S. at 226-27 (Brennan, J., concurring in part and dissenting in part).

Some commentators are of the opinion that the state need not express a regulatory concern by statute in order to compel the nonresident defendant's appearance. Casad, supra note 20, at 75; Assertions of in Rem Jurisdiction, supra note 157, at 787-88. Furthermore, it has been observed that while "the reasonable expectations of the parties have always been an element of the International Shoe test, they have never been made to turn solely on the existence of a particularly worded statute." Silberman, supra note 159, at 68. Accord, Casad, supra note 20, at 76.

Having been granted total freedom by the legislature to interpret the due process clause when exercising jurisdiction, the California Supreme Court had essentially reformulated the purposeful contact requirement of Hanson. In Kulko v. Superior Court, 19 Cal. 3d 514, 521-22. 564 P.2d 353, 356, 138 Cal. Rptr. 586, 589 (1977), the California Supreme Court premised jurisdiction on the nonresident defendant's foreseeability of economic benefit. This relaxed version of Hanson's mandate of purposeful contact was ultimately declared unconstitutional by the United States Supreme Court, as it permitted the state court to subject the defendant to suit regardless of the acquiescent nature of his act outside the forum. 98 S. Ct. at 1698, 1701.

The courts, virtually unbridled in their application of minimum contacts analysis, were required only to base jurisdiction on a sense of reasonableness in a particular case. Fischer, supra note 147, at 411. The end result of this potential for unrestrained exercise of judicial discretion by California courts was the "practical emasculation" of the purposeful contact standard. Id. at 412.

The courts apparently restricted long-arm jurisdiction to those cases in which the state has a particularized interest. Such a requirement necessarily restrains the proper scope of state court jurisdiction. Id. This restraint has been embodied in Professors Carrington and Martin's internal affairs doctrine. The historic reluctance of the states to intervene in the administration of foreign trusts and estates, or corporate shareholder litigation may be reflective of a due
Traditionally, due process embodied not only concepts of fairness, but also general notions of the limits of state sovereignty. Without restrictions on such interference, a state is unable to protect its citizens from the encroaching long-arm power of a sister state, because of its obligation to enforce that state's judgments. Therefore, the former may retaliate by exerting judicial power to the outermost boundaries of the due process clause. As one commentator has observed, "since the enforcing state cannot protect its own resident, there is little reason not to afford its own residents the broadest scope of jural power consistent with the Constitution and the states' own legitimate interests." An example of jurisdictional interference in the internal affairs of a sister state is found in the California Supreme Court's *Kulko* decision. In that case, the California Supreme Court held that California's sweeping long-arm statute permitted the state court to interfere in a "personal domestic" controversy which was the proper concern of the marital domicile. Perhaps the United States Supreme Court is in some fashion exerting a check upon such expansionist tendencies, first suggested by Hanson. Carrington & Martin, *supra* note 66, at 234-35. While the Court has not explicitly set forth such a rationale, it has emphasized that territorial restrictions on state court power are still a vital component of due process analysis. 357 U.S. at 251. To the extent that statutory particularization reduces the potential for a state's undue interference with a foreign relationship which is the proper concern of a sister state, it may impose some restraint on state long-arm jurisdiction.

---


"[T]his is a means of recognizing the importance of foreign relationships which might be disrupted by the application of the local judicial power over parties who may be disabled from meeting obligations to others not subject to the court's powers, or who may be subjected to overlapping and conflicting claims or obligations."

Carrington & Martin, *supra* note 66, at 235.

219. Fischer, *supra* note 147, at 413 n.92. The full faith and credit clause, U.S. Const. art. IV, § 1, requires the enforcing state to recognize a foreign judgment entered against its residents if the forum state exercised jurisdiction within constitutional constraints. *Id.* However, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971), points out that:

> "a" judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister states. *Id.*

220. Fischer, *supra* note 147, at 413 n.92.

221. 98 S. Ct. at 1699-1700.
cies by mandating that the states specifically enumerate their jurisdictional interests. Thus, the potential danger of state infringement upon foreign relationships may be lessened by precise legislative draftsmanship.

The balancing test employed by the *Kulko* Court aids in the fulfillment of due process notions of fairness by supplementing the purposeful act requirement. In addition, this test provides a framework for considering the interests of the plaintiff and the state.

**CONCLUSION**

Characteristically vague minimum contacts analysis has been clarified by *Kulko*’s delineation of a two-part jurisdictional test. Initially, due process requires an evaluation of the nonresident defendant’s intent to initiate some purposeful contact with the forum state. Once this initial step has been completed, the conflicting interests of the parties and the state must be weighed, in accordance with the balancing process mandated by fundamental tenets of fairness and reasonableness.

In cases where the defendant’s commission of an out-of-state act is alleged to have caused an effect within, this initial determination of purposefulness becomes increasingly complex. Lacking the clear-cut evidence of voluntary association that is presumably present when the nonresident physically acts within the state, courts are forced to infer the requisite intent from his activities. By setting forth three indicia of purposeful contact, the *Kulko* decision may well alleviate the confusion in this area. The Court has thus indicated that it is essential in every case for the defendant to have acted purposefully with respect to the forum state. This may be attributed in great part to the Court’s recently manifested concern that the defendant foresee the potential consequences of his connection with that state.

Once this primary stage of analysis has been completed, fairness demands that the competing interests of the defendant, the state and the plaintiff be balanced. It would seem that the interests of the plaintiff merit little consideration except in situations where his claim is in danger of virtual preclusion if jurisdiction were to be denied. Furthermore, the valid regulatory concern of the state may never compel the nonresident defendant’s appearance within its courts unless expressed in a particularized long-arm statute. In examining the current trend evinced in Court opinions, it appears that the concerns of the state and plaintiff will
never outweigh the defendant's inability to foresee litigation within the forum.

The two steps of the *Kulko* analysis are thus inextricably linked since both requirements of purposefulness and fairness must be fulfilled before due process will sanction the state's assertion of long-arm power. The quantum of foreseeability which may only arise from the nonresident defendant's purposeful act determines the fairness or reasonableness of permitting the combined interests of the state and the plaintiff to counterbalance the inconvenience to the defendant.

*Catherine T. Dixon*—'80