NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 5 | Number 2 Article 9

Spring 1980

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Limiting Texas' Long-Arm Statute: *Walker v. Newgent*

Texas, like many other states, has enacted a long-arm statute extending the state's jurisdictional powers as far as constitutionally permissible.[1] This movement to extend the court's powers of process occurred in response to increased trade relations between parties from widely separated geographical locations. Recently, the Fifth Circuit Court of Appeals reexamined the exact reach of the Texas long-arm statute. In *Walker v. Newgent*[2] the court addressed the issue of whether a foreign automobile manufacturer which sold cars to General Motors for retail distribution in the United States could be deemed to be "doing business" within the state, thus rendering it amenable to service of process. In its opinion, the court reassessed traditional concepts of "doing business," the nature of the parent-subsidiary corporate relationship, and the constitutional reach of the state's long-arm statute in holding that the manufacturer was not amenable to service of process in Texas. This holding reaffirms the notions that territorial boundaries do exist and that there are limits to a long-arm statute's reach,[3] especially in the context of international commercial transactions.

In the instant case, plaintiff Walker, a passenger in an Opel Rekord automobile, was seriously injured in a collision in Germany in 1970 while serving in the armed forces. Walker sued the driver of the car, Newgent, for negligence, and eventually agreed to settle the case out of court. Walker also brought a negligence action against General Motors and the German manufacturer-distributor of the car, Adam Opel AG. The complaint alleged defective manufacture of the windshield and breach of express and implied warranties. Service of process was sought under the Texas long-arm statute on two theories.[4] First, Walker asserted jurisdic-

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[1] *See* TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon).

[2] 583 F.2d 163 (5th Cir. 1978).

[3] *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[4] The applicable provision of article 2031b concerning service of process is as follows: Sec. 1.

> When any foreign corporation, association, joint stock company, partnership, or non-resident natural person required by any Statute of this State to designate or maintain a resident agent, or any such corporation, association, joint stock company, partnership, or non-resident natural person subject to section 3 of this Act, has not appointed or maintained a designated agent, upon whom service of process can be made, or has one or more resident agents and two (2) unsuccessful attempts have been made on different business days to serve process upon each of its designated agents, such corporation, . . . or non-resident natural personal

tion against Opel in its capacity as manufacturer of the car. In the alternative, he asserted that Opel's tortious conduct in defectively manufacturing the car could be imputed to GM by piercing Opel's corporate veil and treating GM as Opel's alter ego. The district court rejected both of these approaches and granted Opel's motion to dismiss for want of personal jurisdiction. Subsequently, it granted GM's motion for summary judgment on grounds that GM had not manufactured or sold the car in question, and that its degree of ownership and control did not rise to the level necessary to impute to GM liability for acts of its subsidiary Opel.[5]

The Fifth Circuit Court of Appeals affirmed the district court's decision on both motions. With regard to its motion to dismiss for want of personal jurisdiction, the Fifth Circuit found that Opel had never maintained a place of business nor did it have any agents with sales responsibilities in the United States.[6] All Opel sales to its distributor, Buick, were at a point outside the United States, at which time title passed to Buick. Moreover, Opel sold only a small minority of its total car production to Buick; the majority of its sales went to German and other European markets.[7] Finally, the car in question was not one of those sold for export; it had been designed, manufactured, sold and operated in Germany, where the accident occurred.[8] Based on these facts, the Fifth Circuit concluded that Opel's acts did not constitute "doing business" as required by the Texas long-arm statute.[9]

The Fifth Circuit also affirmed the summary judgment order of the trial court on the grounds that Opel was operated as an independent corporation and that GM did not maintain sufficient control over Opel to permit the court to impute Opel's conduct to GM. The court held that the mere fact that GM owned 100% of Opel's stock was not sufficient to pierce Opel's corporate veil.[10]

In the process of reaching its conclusions, the Fifth Circuit reexamined the jurisdictional concept of "doing business." Historically, a state's ability to assert jurisdiction over nonresident persons and corporations was greatly limited, due mainly to Supreme Court dictum that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it's created."[11] The power of state courts was further restricted by *Pennoyer v. Neff*,[12] which deprived states of jurisdictional

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shall be conclusively presumed to have designated the Secretary of State of Texas as their true and lawful attorney upon whom service of process or complaint may be made.

TEX. REV. CIV. STAT. ANN. art. 2031(b)(1).

5 583 F.2d at 165.

6 *Id.* at 168.

7 *Id.* at 165.

8 *Id.* at 166.

9 *Id.* at 166-67.

10 *Id.* at 167.

11 Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

12 95 U.S. 714 (1877).

powers over persons not found within their geographical limits or who did not owe their allegiance to the forum state. Due to the increase of interstate and transcontinental business transactions, courts began to realize such limited rules were not feasible and needed to be extended to permit courts to assert jurisdiction over foreign corporations that were significantly involved in business within their forum. Several theories developed to justify these necessary assertions of jurisdiction, although none proved to be totally satisfactory.[13] First, courts used the legal fiction of "consent," stating that because a corporation had engaged in activities within the state, it had impliedly consented to subject itself to personal jurisdiction.[14] Other courts held a corporation amenable to service of process if it were engaged in business transactions within the state in a way to warrant an inference of "presence."[15] Judge Learned Hand pointed out the circular definition of the presence theory by defining presence as "such deals which will subject it to jurisdiction."[16] Rejecting the implied consent and presence theories as unworkable, some courts adopted a "doing business" approach. Despite the fact that this test found much popularity as a measure of the court's power over foreign corporations,[17] critics of the doing business test maintained that it was basically a merger of the implied consent and presence theories of jurisdiction.

In the landmark case of *International Shoe Co. v Washington*,[18] the Supreme Court rejected all three of these tests and established the modern standard for obtaining jurisdiction over nonresident defendants. The Court required the defendant to "have certain minimum contacts with the state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice."[19] Strictly interpreting this test in *Hanson v. Denckla*,[20] the Supreme Court held that states were not authorized to exercise in personam jurisdiction where the defendant did not solicit business in the forum nor purposefully avail itself of the privilege of conducting activities within the state. The Court thus reaffirmed the vital concept of territorial limitations on state powers of process. No matter how minimal the burden on a defendant to appear in the forum, he may not be required to do so unless the prerequisite minimum contacts exist.[21]

Plaintiff in the instant case predicated the existence of personal jurisdiction over Opel on the Texas long-arm statute, which includes the

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[13] *See* Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of the State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958).

[14] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855).

[15] Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917).

[16] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

[17] *See* Kurland, *supra* note 13, at 584.

[18] 326 U.S. 310 (1945).

[19] *Id.* at 316.

[20] 357 U.S. 235 (1958).

[21] *Id.* at 251.

"doing business" phrase as a measure of amenability to suit, but clarifies the concept somewhat by specifying particular situations in which one will be seen as "doing business." For example, entering a contract with a Texas resident or committing a tortious act within the state constitutes "doing business" under the statute.[22] In addition, the statute includes a catch-all clause that states "including other acts that may constitute doing business." This clause has been interpreted as an expansion of the statute to its constitutional limits.[23]

In *Walker* the Fifth Circuit examined whether Opel was doing business under either the tort, contract or catch-all clauses of the statute. When examining either the tort or contract clause, the court, under *International Shoe*, must first examine whether the statute reaches defendant's conduct.[24] If it does, the court must then determine whether the assertion of jurisdiction is violative of the fourteenth amendment due process clause.[25] The catch-all clause is easier to apply since it expands the statute to its constitutional limits.[26] When applying the catch-all clause, the court need only determine whether such assertion of jurisdiction is compatible with due process. Why the Fifth Circuit and other Texas courts continue to employ the tort and contract clauses rather than simply resorting to the catch-all clause is unclear. Exclusive use of the catch-all clause would eliminate the need to employ the first prong of the *International Shoe* two-part test and thus facilitate application of the statute. Whatever the court's reason for examining all three aspects of the statute, it is clear that the tort and contract provisions of the statute did not reach defendant's activities. Moreover, jurisdiction may not be founded on the catch-all clause because defendant lacks the requisite minimum contacts with the forum under *International Shoe*.

Turning first to the statute's tort provision, the Fifth Circuit found that jurisdictional power may be properly asserted if a defendant commits a tort in whole or in part in the state of Texas. A literal interpretation of this test would lead to an immediate dismissal of the instant case because the tortious act (either the accident or defective manufacture of the car) occurred in Germany. The instant case must be distinguished from "stream of commerce" cases[27] where courts have asserted jurisdic-

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[22] The "doing business" section of article 2031b provides:

> Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any . . . non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

[23] *See* Thode, *In Personam Jurisdiction: Article 2031b, the Texas "Long-Arm" Jurisdiction Statute, and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 307 (1964).

[24] *See* U-Anchor Advertising, Inc. v. Burt, __ Tex. __, 544 S.W.2d 500 (Ct. App. 1976), *aff'd*, 553 S.W.2d 760 (1977), *cert. denied*, 434 U.S. 1063 (1978).

[25] *Id.* at 502.

[26] *See* Thode, *supra* note 23, at 307-08.

[27] *See, e.g.*, Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970).

tion over manufacturers who produce defective goods and place them into service in distant states. Courts have consistently held that when a manufacturer distributes goods that it knows or has reason to know will be distributed in the state where the injury occurs, it may be amenable to process in that forum.[28] The operative conditions involved are: one, that the defendant foreign corporation has elected to engage in widespread economic activity; two, that its acts are deliberate and not fortuitous; and three, that it is reasonably foreseeable that the defendant will need to invoke the law of the state where its product might cause injury.[29]

An important Texas case employing the stream of commerce rationale is *Eyerly Aircraft Co. v. Killian*.[30] In *Eyerly*, plaintiff was injured on an amusement park ride manufactured by the defendant Oregon corporation. Plaintiff brought suit in Texas where the accident occurred. In upholding jurisdiction, the court stated that even though defendant had never entered Texas, he had reason to know that the ride would be brought into the state, and that this knowledge was sufficient to maintain jurisdiction.[31] Similarly, in *Coulter v. Sears, Roebuck & Co.*,[32] the Fifth Circuit held that a nonresident television manufacturer who had sold goods to a retailer over an extended period of time and knew that a portion of its products would be shipped to Texas for resale could be subjected to personal jurisdiction. Citing *Eyerly* as precedent, the court stated that the defendant had established a pattern of distribution over a period of time and that this pattern constituted geographic foreseeability.[33] Hence, these two cases are distinguishable from the instant case because they involved goods which the manufacturers could foresee reaching the forum state and accidents the manufacturers could foresee happening within the forum state.

Two Texas courts that reviewed accidents occurring outside the state declined to assert jurisdiction under the tort clause of the statute. In *Odom v. Thomas*[34] plaintiff brought an action in Texas against an Alabama interstate trucking corporation for a collision that occurred in Arkansas. The complaint alleged a simple tort, rather than a products liability claim, and consequently the district court decided it was best adjudicated in the state where the accident occurred. Likewise, in *Reich v. Signal Oil & Gas Co.*,[35] the Fifth Circuit held that an action could not be brought in Texas for a tort claim arising from a helicopter crash in

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[28] Jetco Electric Industries, Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973). *But see* World-Wide Volkswagen Corp. v. Woodson, 48 U.S.L.W. 4079 (1980).

[29] *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 496 (5th Cir. 1974).

[30] 414 F.2d 591 (5th Cir. 1969).

[31] *Id.* at 596.

[32] 426 F.2d 1315 (5th Cir. 1970).

[33] The court stated: "[Defendant] unquestionably knew that its products were being regularly marketed in Texas." *Id.* at 1318.

[34] 338 F. Supp. 877 (S.D. Tex. 1971).

[35] 409 F. Supp. 846 (S.D. Tex. 1974), *aff'd*, 530 F.2d 974 (5th Cir. 1976).

Ghana. The court found insufficient connections with the state of Texas for jurisdictional purposes since the helicopter was owned by a British corporation, and its Italian manufacturer had merely introduced it into the stream of international commerce. In noting that due process was not satisfied here because the helicopter was never put into service in the United States, the court implicitly found that had it been placed into the United States' stream of commerce, jurisdiction might have been appropriate.[36] The Opel Rekord in the instant case, however, was neither introduced into international commerce nor put into service in the United States. It was manufactured, sold and used exclusively in Germany.

One Texas federal district court, under rather unique circumstances, did uphold jurisdiction for a tortious activity which did not occur in Texas. In *Williams v. Brasea, Inc.*,[37] the defendant Alabama corporation sold approximately forty fishing vessels to Texas residents knowing they would be operated out of Texas ports. The accident, in which plaintiff was injured when a winch was activated while his hands were entangled in the line, occurred in international waters off the Texas coast. The *Odom* court distinguished this case as upholding jurisdiction over an accident that took place in international waters, as opposed to a foreign state or country, because jurisdiction was most logical in the state nearest where the accident occurred.[38] Moreover, on its facts, *Williams* is closely related to the *Eyerly* line of stream of commerce cases. The fishing vessels in *Williams* were sold to Texas residents and used in Texas, while the car in the instant case was neither sold nor operated in Texas. Consequently, the Fifth Circuit rejected *Williams* as precedent for asserting jurisdiction over Opel in the instant case and concluded that the defendant's activity did not satisfy the tort provision of the Texas long-arm statute.

Next, the court rejected any notion that jurisdiction could be predicated on the contract portion of the Texas statute. It noted that to obtain jurisdiction under this clause the plaintiff must make a prima facie showing that a contract existed between the parties and that it was performed at least partially in Texas.[39] Since the record revealed no evidence of the existence of any contract, the court ruled this portion of the statute inapplicable.[40]

Finally, after rejecting the tort and contract theories as a basis for asserting jurisdiction, the court addressed plaintiff's contention that the Texas long-arm statute reached defendant's conduct because the statute extended the power of jurisdiction to the limits of due process. The Fifth Circuit examined the standards that have emerged from the decisions of Texas courts for determining jurisdictional authority under the mini-

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[36] *Id.* at 850.
[37] 320 F. Supp. 658 (S.D. Tex. 1970).
[38] 338 F. Supp. at 879.
[39] *See* 495 F.2d at 491.
[40] 583 F.2d at 166.

mum contacts test.[41] The District Court for the Southern District of Texas, in *Lone Star Import, Inc. v. Citroen Cars Corp.*,[42] stated that the factors it would consider included: "[the] nature and character of [the defendant's] business . . . , [the] number and type of acts within the forum . . . , whether such acts give rise to the cause of action . . . , whether the forum has a special interest in granting relief . . . , [and the] relative convenience of the parties."[43] Similarly, the Texas Supreme Court in *O'Brien v. Lanpar Co.*[44] recognized three elements that must exist in order to uphold jurisdiction over a nonresident defendant:

> (1) The non-resident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; [and] (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice . . . .[45]

The restrictivenesss of this test, which requires the cause of action to be connected with an act or transaction occurring in the forum, makes it impossible to uphold jurisdiction in the instant case since the accident was totally unrelated to the forum.

Another variation of the test for due process was formulated in *Product Promotions, Inc. v. Cousteau*,[46] where the Fifth Circuit determined that there must be some minimum contact with the state which results from an "affirmative act" of the defendant, and that it must be fair and reasonable to require the defendant to come into the state to defend the action. This test is more liberal than its predecessors in not requiring the cause of action to arise from the same acts which form the basis for the defendant's contacts with the forum. However, defendant's conduct in the instant case did not satisfy the *Product Promotions* test because all of defendant's affirmative acts occurred in Germany, and "unilateral activity by the plaintiff cannot produce the minimum contacts necessary to satisfy due process"[47] without some act on defendant's part.

Concluding that Opel's activity did not fulfill the requirements of either the contract, tort or catch-all clauses of the Texas long-arm statute, the fifth circuit affirmed the district court's dismissal of Opel for want of personal jurisdiction.[48] The fifth circuit then examined the trial court's summary judgment order and plaintiff's assertion that jurisdiction could be based on the relationship between Opel and General Motors, which admittedly was doing business within the forum. If the court

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[41] For a discussion of the minimum contacts standards of the Texas courts, *see* Nelson, *Long-Arm Jurisiction: Rule 108 as an Alternative to "Doing Business" under Article 2031b*, 30 BAYLOR L. REV. 99, 102 (1978).

[42] 185 F. Supp. 48 (S.D. Tex. 1960).

[43] *Id.* at 56.

[44] 399 S.W.2d 340 (Tex. 1966).

[45] *Id.* at 342 (quoting Tyee Const. Co. v. Pulien Steel Prods., Inc., 62 Wash. 2d 106, 115, 381 P.2d 245, 251 (1963)).

[46] 495 F.2d 483 (5th Cir. 1974).

[47] Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1268 (5th Cir. 1978).

[48] 583 F.2d at 168.

determined that the status of the parent corporation, General Motors, could be imputed to the subsidiary, Opel, appropriate jurisdictional grounds would be found.[49] However, before the corporate fiction could be disregarded and the subsidiary subjected to process as the parent's "alter ego," plaintiff had to prove that the subsidiary corporation was simply a guise under which the parent conducted business.[50]

The District Court for the Southern District of Texas, in *Bay Sound Transport Co. v. United States*,[51] listed a number of factors[52] to be considered in determining whether a subsidiary is a mere instrumentality of the parent corporation. These factors include common stock ownership; common directors, and specific instances in which a parent exercises such control as to make the subsidiary a mere instrumentality.[53] Other states have developed similar requirements to establish the alter ego relationship. Under California law, it must be shown that there is such a unity of interest that individuality and separateness of the two corporations have ceased and that adherence to the fiction of a separate corporate existence would promote injustice or further a fraud.[54] Thus, the Fifth Circuit cited a Florida Supreme Court case holding that:

> Those who utilize the laws of this state in order to do business in the corporate forum have every right to rely on the rules of law which protect them against personal liability unless it can be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil.[55]

No illegal or fraudulent motive was alleged in the instant case, and the only factor that tended to show parent control was GM's ownership of 100% of Opel's stock. However, numerous cases have established that this fact alone is insufficient to create an agency relationship.[56] For example, in *Reul v. Sahara Hotel*,[57] the District Court for the Southern District of Texas held that a parent's ownership of 100% of its subsidiary's stock *and* the presence of directors in the forum were not sufficient to pierce the corporate veil. Similarly, in *Turner v. Jack Tar Grand Bahama,*

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[49] *See* Reul v. Sahara Hotel, 372 F. Supp. 995, 997 (S.D. Tex. 1974).

[50] *See* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975).

[51] 350 F. Supp. 420 (S.D. Tex. 1972).

[52] The complete list of factors includes:

> (1) common stock ownership; (2) common directors or officers; (3) financing of the subsidiary by the parent; (4) the incorporation of the subsidiary being caused by the parent; (5) grossly inadequate capital for the subsidiary; (6) payment by the parent of the salaries and other expenses or losses of the subsidiary; (7) the subsidiary receiving no business except that given to it by the parent; (8) the parent using the subsidiary's property as its own, and; (9) the directors or officers of the subsidiary acting independently in the interest of the subsidiary but taking their orders from the parent in the latter's interest.

Id. at 426.

[53] *Id.*

[54] Pan Pacific Sash & Door Co. v. Greendale Park, Inc., 166 Cal. App. 2d 652, 333 P.2d 802, 807 (1958).

[55] Robert's Fish Farm v. Spencer, 53 S.2d 718, 721 (Fla. 1963).

[56] *See, e.g.*, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965).

[57] 372 F. Supp. 995 (S.D. Tex. 1974).

Ltd.,[58] an action for personal injuries sustained by the plaintiff at defendant's hotel in the Bahamas, the Fifth Circuit found insufficient connections to fuse the parent and subsidiary corporations even though the defendant corporation solicited business, held management conferences, and owned common stock with the forum corporation.[59]

In light of these holdings, it would appear that in the instant case Opel's activities did not reach the level necessary to impute GM's business to Opel. No facts sufficient to make a prima facie case of actual control by GM over Opel were shown. The two corporations did not share corporate offices, registered agents, or have mutual officers and directors.[60] Opel maintained its own operations and functioned independently of GM. In fact, the only bonds between the two were the 100% stock ownership by GM previously mentioned and the customer-manufacturer trade relationship. Moreover, even this relationship was not extensive; at most, only elevent percent of Opel's total output was ever sold to GM in any year.[61] In *Gottesman v. General Motors Corp.*,[62] the District Court for the Southern District of New York noted that while corporate "control" is hard to define, it includes considerable patronage and the power to direct corporate policy.[63] The supplier in that case provided GM with thirteen to twenty-four percent of its requirements; however, these percentages were found to be insufficient to constitute "considerable patronage."[64] Likewise, the Fifth Circuit apparently found that a total of eleven percent of Opel's sales to GM was insufficient and affirmed the district court's summary judgment.

The Fifth Circuit's decision in *Walker v. Newgent* is supported by strong policy considerations. Were the court to hold Opel, a foreign corporation with very slight contacts with the United States, amenable to service of process, foreign countries using American goods obtained through somewhat indirect means might require U.S. corporations to appear in their courts to adjudicate products liability claims. This result would defeat the purposes served by permitting enterprises to segregate their activities as they extend into less developed countries. Indeed, "harmful extensions of the doctrine in this area will easily lend themselves to reciprocal manipulation against American enterprises operating through subsidiaries or affiliates in other countries,"[65] with possibly stifling effects on international trade relations if carried to an extreme. In *Walker* the Fifth Circuit recognized that a limit must be placed on states'

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[58] 353 F.2d 854 (5th Cir. 1965).

[59] *Id.* at 956.

[60] 583 F.2d at 167.

[61] *Id.*

[62] 279 F. Supp. 361 (S.D.N.Y. 1967), *aff'd*, 436 F.2d 1205 (2d Cir. 1971), *cert. denied*, 403 U.S. 911 (1971).

[63] *Id.* at 367.

[64] *Id.* at 381.

[65] *See* Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 546, 227 N.E.2d 851, 859, N.Y.S.2d 41, 52 (1967) (dissenting opinion).

jurisdictional powers in order to promote international trade and preserve the integrity of the due process clause.

In addition to promoting international trade, the court's decision in *Walker* eliminates the problem of forum shopping. Plaintiff's suit had no rational nexus with Texas. Opel's activities were confined to Germany and had no foreseeable effects in Texas because the automobile in question was sold for exclusive use in Germany. As a matter of fact, all of the activity in the case—the manufacture of the car, the sale of the car, and the accident itself—occurred in Germany. It was the court's conclusion that the only reason plaintiff brought suit in Texas was that he subsequently came to reside there,[66] certainly insufficient grounds alone to justify an assertion of jurisdiction. The court wisely decided that these policy considerations were more significant than plaintiff's convenience and refused to allow the plaintiff to maintain his suit in Texas.

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[66] 583 F.2d at 168.