

11-1-1993

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Recommended Citation

Martin B. Louis, *Jurisdiction over Those Who Breach Their Contracts: The Lessons of Burger King*, 72 N.C. L. REV. 55 (1993).Available at: <http://scholarship.law.unc.edu/nclr/vol72/iss1/5>

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JURISDICTION OVER THOSE WHO BREACH THEIR CONTRACTS: THE LESSONS OF *BURGER KING*

MARTIN B. LOUIS*

The minimum contacts test announced in International Shoe Co. v. Washington requires that a defendant have "certain minimum contacts" with a forum state for that state to assert personal jurisdiction under the due process clause of the Fourteenth Amendment. Although this minimum contacts inquiry into personal jurisdiction has been in effect since International Shoe was decided almost fifty years ago, there has been little explication from the Supreme Court about how this test should be applied in contract cases.

In this Article, Professor Martin Louis first challenges the conventional wisdom that jurisdiction in contract cases is doctrinally different than in cases involving torts. Professor Louis then argues that any different treatment can be explained by the factual relationship the defendant has with the forum state rather than the legal theory of the claim. Employing a "functional analysis" of jurisdiction over promisors in a variety of paradigms, he then establishes that courts will act similarly when faced with analogous fact patterns and situations. Professor Louis concludes by observing that the principal "lesson of Burger King" may be that it leaves personal jurisdiction jurisprudence in contract cases with more uncertainties than answers.

I. INTRODUCTION

In *International Shoe Co. v. Washington*,¹ the United States Supreme Court introduced the minimum contacts test for personal jurisdiction over corporations.² In apparent explication of this new test, the Court reviewed its treatment of a few familiar jurisdictional paradigms under its former—

* Paul B. Eaton Professor of Law, University of North Carolina School of Law. A.B. 1956, Princeton University; LL.B., 1959, LL.M., 1965 Harvard University.

In the course of writing this article, I received many helpful comments and suggestions from my civil procedure colleagues. I thank Wendy Coleman for her dedicated research assistance.

1. 326 U.S. 310 (1945).

2. *Id.* at 316. The minimum contacts test was designed, of course, to illuminate the constitutional limitations upon state judicial jurisdiction contained in the due process clause of the Fourteenth Amendment to the Constitution of the United States. The test requires that the defendant have "certain minimum contacts" with the state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.*

but now recognized as fictitious—"presence" test.³ Presence—and now presumably minimum contacts—existed, the Court stated, if a corporation's activities within the forum state were "continuous and systematic" and gave rise to the liabilities sued on.⁴ Presence did not necessarily exist, however, if a corporation committed "some single or occasional [liability creating] acts" within the forum state.⁵ Nonresident motor vehicle torts, said the Court, were examples of single acts constituting presence;⁶ the local contractual activity of a nonresident corporate buyer, however—whose orders were sometimes placed by mail and sometimes by a local representative—was a single act that would not create minimum contacts.⁷

This first look at the minimum contacts test was quite conservative. Today the test includes natural persons, as well as corporations,⁸ and can be satisfied by some single contracts,⁹ as well as by most single, local torts.¹⁰

3. *Id.* at 317-19. Preliminarily, the Court had noted that its traditional reference to a corporation's "presence" was a fiction that merely symbolized those authorized activities of the corporation's agents and servants within the state sufficient to satisfy the demands of due process and make it reasonable to require the corporation to defend there. *Id.* at 316-17. Hence, cases which found that a corporation's activities amounted to a "presence" presumably became precedent for a finding that minimum contacts existed.

4. *Id.* at 317.

5. *Id.* at 318.

6. The Court cited cases upholding jurisdiction under nonresident motor vehicle acts and then explained that the language of consent employed in these cases was merely another, now superseded, legal fiction. *Id.*

7. *Id.* (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923)). *Rosenberg* also was the principal citation in *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 417-18 (1984). In *Helicopteros* the question was whether substantial business purchases within the forum would support an assertion of general jurisdiction—that is, jurisdiction over a cause of action that did not arise within the forum or out of the purchases. *Id.* at 418 n.12. Noting that *Rosenberg*, as interpreted by *International Shoe*, had held that local purchases would not even support specific jurisdiction—that is, jurisdiction over a cause of action arising out of the purchases—the Court in *Helicopteros* properly concluded such activity obviously could not support general jurisdiction. *Id.* Today, a nonresident retailer who regularly purchases from a local manufacturer or wholesaler, whether by telephone, mail order, or through a buyer who visits the seller's place of business, probably would be subject to specific jurisdiction in the seller's state. See *infra* text accompanying note 142. *Rosenberg*, therefore, may not possess continuing validity on the question of specific jurisdiction—a question the *Helicopteros* Court wisely noted that it was not deciding. 466 U.S. at 418 n.12. Curiously, neither the Supreme Court's decision in *Rosenberg* nor the opinion below, 285 F. 879 (W.D.N.Y. 1921), states that plaintiff's cause of action arose out of the defendant's purchases. Thus, it is unclear whether *Rosenberg* was a case of specific or general jurisdiction. Cf. William B. Rudenko, Note, *The Adoption of the Liberal Theory of Foreign Corporations*, 79 U. Pa. L. Rev. 956, 970 (1931) (asserting without citation or other documentation that the cause of action arose out of a contract consummated in New York).

8. Although *International Shoe*'s first statement of the minimum contacts test was general, and not specifically limited to corporations, 326 U.S. at 316, thereafter the opinion spoke only of corporations. Years later, when the Court finally decided cases involving individual defendants, the applicability of the minimum contacts test to them was assumed without discussion. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466 (1985).

9. *Burger King*, 471 U.S. at 478 (upholding jurisdiction over individuals party to a single

Nevertheless, *International Shoe's* tentative jurisdictional distinction between tortfeasor defendants and defendants who breach their contracts has persisted,¹¹ in part because the Supreme Court never directly addressed the distinction. Indeed, before the decision in *Burger King Corp. v. Rudzewicz*¹² in 1985, the Court had considered the application of the minimum contacts test to promisors only twice.¹³ Although both decisions suggested that jurisdictional assertions in contract cases would be generously reviewed,¹⁴ both involved the heavily regulated business of insurance,

franchise agreement); *Compania de Astral, S.A. v. Boston Metals Co.*, 107 A.2d 357, 366-69 (Md. 1954) (upholding local jurisdiction over a nonresident company that agreed to purchase several ships and then defaulted).

10. *Nelson v. Miller*, 143 N.E.2d 673, 676-80 (Ill. 1957); *Smyth v. Twin State Improvement Corp.*, 80 A.2d 664, 666-69 (Vt. 1951).

11. In *Smyth*, the court avoided discussion of *International Shoe's* alleged distinction between contract and tort by limiting its discussion to single torts. *Smyth*, 80 A.2d at 666. In *Erlanger Mills, Inc. v. Cohoes Fibre Mills*, 239 F.2d 502, 507-08 (4th Cir. 1956), a single contract case, the court declined to respond to the plaintiff's argument that single contract defendants should be as amenable to jurisdiction as single tort defendants already were, and held only that the contacts in the case before it were less impressive than the contacts found in the single contract and tort cases that the plaintiff had cited. An early consideration of the distinction is found in *Developments In The Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 926-28 (1960) [hereinafter *Developments*] (pointing to the greater difficulty of localizing a contract that could be negotiated, executed, and performed in different states). The strongest recent judicial affirmation of the distinction is found in *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., Inc.*, 597 F.2d 596, 603 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980), a single contract case denying local jurisdiction over a nonresident purchaser of an expensive, custom-made item. In explaining its result, the court examined the "effects" test adopted by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 37, 50 (1971) (asserting specific jurisdiction over a person who "causes effects in the state by an act done elsewhere"). The court first noted that comment a to § 37 stated that where the effects "are not of a sort highly dangerous to persons or things, the question whether the state may exercise jurisdiction over the defendant is likely to depend at least in part upon whether the defendant has other relationships to the state." *Lakeside Bridge*, 597 F.2d at 602. The court went on to explain as follows:

[T]he forum state has a greater interest in protecting its citizens by providing a local forum in cases which involve effects "of a sort highly dangerous to persons and things" The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's borders.

Id. at 602-03 n.11 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971)).

12. 471 U.S. 462, 466 (1985).

13. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-24 (1957) (upholding jurisdiction over an insurance company that had assumed through merger a single policy covering a resident of the forum state); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648-49 (1950) (upholding the state's regulatory jurisdiction over the defendant insurance company, which did local business only through the mails, and suggesting it also would uphold jurisdiction in local claims actions by the policy holders).

14. Indeed some commentators have suggested that *McGee* itself was authority for upholding jurisdiction in routine single contract cases. See, e.g., Mark J. Gentile, Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contract?*, 61 B.U. L. REV. 375, 384-87 (1981).

which many people consider to be jurisdictionally special.¹⁵ Hence, the impact of these two decisions on unregulated promisors, particularly parties to single contracts, was uncertain.

From 1959 to 1976, the Supreme Court did not decide a single personal jurisdiction case despite the fact that the states were busily enacting and aggressively applying their long-arm statutes.¹⁶ The Court finally broke its silence in 1977¹⁷ and since then has handed down one or more jurisdictional decisions in almost every term. None of the earliest of these cases involved contracts. Indeed, over persistent dissents the Court denied certiorari in several single contract cases despite an alleged conflict among the circuits in this area.¹⁸ Finally in 1985, the Court handed down *Burger King Corp. v. Rudzewicz*,¹⁹ which technically was a single contract case, but was strongly influenced by its special facts—the substantial, long-term franchise relationship out of which the dispute arose.²⁰ *Burger King* is also one of the few recent Supreme Court decisions upholding a state's assertion of jurisdiction²¹ and the only majority opinion authored by Justice Brennan, the Court's strongest pro-jurisdictional voice.²² Consequently, *Burger King*

15. See, e.g., *Lakeside Bridge*, 597 F.2d at 600 (suggesting that *McGee* was limited to insurance cases); *Developments*, *supra* note 11, at 928 (same); see also *Vencedor Mfg. Co. v. Gougler Indus., Inc.*, 557 F.2d 886, 890 (1st Cir. 1977) (suggesting *McGee*'s sweep was also limited by the more conservative general approach to jurisdiction announced in *Hanson v. Denckla*, 357 U.S. 235 (1958)).

16. See generally Martin B. Louis, *The Grasp Of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment On World-Wide Volkswagen Corp. v. Woodson And Rush v. Savchuk*, 58 N.C. L. REV. 407, 408-22 (1980) (noting the Court's seventeen-year period of silence and reviewing the cases that broke this silence).

17. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

18. *Baxter v. Mouzavires*, 455 U.S. 1006 (1982); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907 (1980). In each of these cases, which involved attempts to obtain jurisdiction over nonresident buyers, Justice White dissented from the denial of certiorari. Justice Powell joined Justice White in all three dissents; Chief Justice Burger joined in the *Chelsea House* dissent.

19. 471 U.S. 462 (1985).

20. See *infra* text accompanying notes 178-83.

21. The only other recent Supreme Court cases upholding a state's assertion of jurisdiction are *Burnham v. Superior Court*, 110 S. Ct. 2105, 2119 (1990), a tag jurisdiction case, and two companion libel cases, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), and *Calder v. Jones*, 465 U.S. 783, 789-91 (1984). A partisan might point out that the Court recently returned to its anti-plaintiff ways in *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991) (upholding a choice of forum clause against a consumer plaintiff). Moreover, the cynic might note that in most of these recent Supreme Court decisions upholding jurisdiction, the defendant was an individual; the only corporate defendant to lose was *Hustler Magazine*.

22. Justice Brennan joined in the dissenting opinion of Justice Black in *Hanson v. Denckla*, 357 U.S. 235, 259 (1958), in which they first set forth their interest analysis approach to jurisdiction. Justice Brennan has reasserted this jurisdictional approach in numerous dissenting opinions to Supreme Court decisions striking down a state's assertion of jurisdiction. E.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *World-Wide Volkswagen Corp. v. Wood-*

is not the definitive contract decision we had hoped for, and it sheds only a little more light on the basic problem than its predecessors, the aforementioned insurance cases.²³

Those seeking further judicial²⁴ explication of this question might look to the many decisions of the lower federal courts and state appellate courts. A thorough distillation of these cases, however, would demand a Herculean effort given the number of cases and courts and the variety of long-arm provisions involved. Moreover, jurisdictional opinions are uniquely opaque. Many rely heavily upon the cut-and-paste style of opinion writing and some are so chock-full of familiar jurisdictional quotes and clichés that often one must look hard to find an original sentence, let alone an original idea.

In the absence of an obvious starting point, I shall begin with the alleged distinction between single contract and tort cases. After demonstrating that the distinction is more factual than doctrinal, I shall develop, and apply to a number of familiar paradigms, a functional analysis of jurisdiction over promisors. I shall conclude with an examination of the *Burger King* decision and its potential impact upon the general field.

II. COMPARING JURISDICTION OVER TORTFEASORS AND PROMISORS

A few examples demonstrate that the supposed difference between jurisdiction over tortfeasors and promisors is more factual than doctrinal and that analogous situations normally lead to identical results. In the first ex-

son, 444 U.S. 286, 299 (1980). The focal point of Justice Brennan's disagreement with the majority was the importance assigned to the interests of the plaintiff and the forum state in asserting jurisdiction over the defendant. *E.g.*, *World-Wide Volkswagen*, 444 U.S. at 299-300 (setting forth the interest of the forum state and the injured plaintiff in obtaining jurisdiction over the foreign sellers of an allegedly defective product involved in a local accident). Justice Brennan would have balanced these interests against the defendants' contacts with the forum. *Id.* The majority insisted first on a finding of minimum contacts by the defendants. *Id.* at 299. The interests of the plaintiff and the forum state then became relevant as a way of confirming or rejecting, but never creating, jurisdiction. *Asahi*, 480 U.S. at 116 (1987) (unanimously denying jurisdiction on the basis of these other interests).

23. See *supra* text accompanying notes 12-15.

24. Despite the wealth of academic writing about jurisdiction, most of it is theoretical and very little addresses the contract question directly. Only a small group of law review notes that appeared about a decade ago in response to the Supreme Court's denial of certiorari in a few single contract cases, see *supra* note 18, have attempted to treat the subject directly or systematically. See, e.g., Gentile, *supra* note 14; Matthew Schultz, Note, *Minimum Contacts in Contract Cases: A Forward Looking Evaluation*, 58 NOTRE DAME L. REV. 635 (1983); Lynne F. Siegel, Note, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser*, 75 N.W. U. L. REV. 345 (1980). A broader contemporaneous treatment of jurisdictional issues, including contracts, is found in Mark P. Gergen, Comment, *Constitutional Limitations on State Long-Arm Jurisdiction*, 49 U. CHI. L. REV. 156 (1982). An earlier treatment of contracts is found in *Developments*, *supra* note 11, at 926-28.

ample, a homeowner living near the state line discovers several leaks in his roof just as he receives news of an approaching storm. By telephone he engages a nearby, out-of-state roofing company to make the necessary repairs, but the work is done poorly and his home suffers water damage from the storm. Courts in the homeowner's state clearly can obtain jurisdiction over the nonresident roofing company—regardless of whether the claim sounds in negligence, breach of warranty, or breach of the contract to repair—principally because the claim arose out of the defendant's liability-creating activity within the forum state.²⁵ The decisive jurisdictional factor, then, is not the legal theory of the claim but its factual relationship to the forum state.²⁶

Consider instead that the roofing company broke its promise to come and fix the roof, that the homeowner could not obtain a substitute roofer in time, and that again his home was damaged by the storm. The roofing company's amenability to local jurisdiction is now less certain, not because the claim must sound in contract but because the claim does not arise out of local activity. Jurisdiction in this case must be founded on the defendant's unfulfilled promise to perform a contract within the state.²⁷ Some long-arm

25. This example is based on the facts of *Smyth v. Twin State Improvement Corp.*, 80 A.2d 664, 665 (Vt. 1951), which upheld local jurisdiction against an out-of-state roofing company under a long-arm statute purporting to reach both local single torts and contracts. Because of *International Shoe's* distinction between single torts and contracts, see *supra* text accompanying notes 6-7, the Vermont Supreme Court limited its discussion to the former. *Smyth*, 80 A.2d at 666. The Court's jurisdictional justifications, however—local evidence, witnesses, and interest—are equally applicable to a claim in contract. Curiously, there is no well known early case specifically founding jurisdiction upon a deficient local performance of a single contract, but several early contract cases go even farther. Thus, in *Compania de Astral, S.A. v. Boston Metals Co.*, 107 A.2d 357, 367, 369 (Md. 1954), local jurisdiction was upheld over a nonresident buyer who breached a contract to purchase ships located in Baltimore Harbor after viewing the ships there, negotiating there, and partially performing there by opening an escrow account in a local bank. In *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472, 475 (7th Cir. 1959), *cert. denied*, 361 U.S. 959 (1960), a Swedish corporation was subjected to jurisdiction in Chicago for its breach of an executory contract, in large part because its engineer had twice gone to Chicago to sell the plaintiff on the deal.

Today many long-arm statutes assert jurisdiction over those who perform a contract within the forum state. *E.g.*, N.C. GEN. STAT. § 1-75.4(5)b (1992) (providing that jurisdiction "[a]rises out of services actually performed for the plaintiff by the defendant within this State").

26. As previously noted, some courts and commentators apparently would extend jurisdiction a little more liberally in cases of injury to persons or property. See *supra* note 11. Other courts and commentators find the distinction to be specious or to justify, at best, only a thumb on the scale in close cases. See Siegel, *supra* note 24, at 355; Note, *Revision of the Maryland Foreign Corporation Law: An Advance*, 38 COLUM. L. REV. 1060, 1078 (1938) (concluding that in serving the state interest in giving jurisdictional protection to its residents, "there could surely be no distinction between the causing of tort or of contractual harm").

27. In *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 708-09, 716 (4th Cir. 1966), the court held that the long-arm statute did not reach a foreign corporation that defaulted on a single contract to manufacture an expensive machine for local plaintiffs, despite some visits by defendant's agents to the forum state to negotiate the contract. *Id.* at 709. Some cases suggest that one who inten-

statutes specifically cover this situation,²⁸ even though due process arguably requires that a defendant have additional forum contacts—e.g., other local customers or local solicitation for such business.²⁹ Many tort long-arm provisions analogously require additional contacts when the wrongful act took place outside the state.³⁰

The difficulty of obtaining jurisdiction over those who break a promise to perform locally may be a reason for the perception that jurisdiction over promisors in general is especially difficult to establish. The difficulty, however, is more factual than doctrinal. From outside a forum—and without

tionally enters into a contract with a resident of the forum state thereby submits to local jurisdiction, even though she has no other contacts with the forum state. *E.g.*, *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494-96 (5th Cir. 1974) (upholding Texas jurisdiction over a foreign corporation that had entered into a single contract with a Texas resident, even though the defendant's performance took place outside of Texas and the defendant had no other local contracts). Such courts apparently would ignore the fact that the defendant had defaulted on the contract before performance occurred. Other courts have rejected this broad jurisdictional approach, which apparently would reach even mail-order, consumer buyers, and small businesses calling in single orders from inventory. *See In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 227 n.13 (6th Cir. 1972). In *Burger King*, Justice Brennan stated that "[i]f the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985).

28. *E.g.*, KAN. STAT. ANN. § 60-308(b)(5) (1992) (asserting jurisdiction over any party "[e]ntering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state"); N.C. GEN. STAT. § 1-75.4(5) (1992) (asserting jurisdiction "[i]n any action which . . . [a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant to perform services within this State"); TENN. CODE ANN. § 20-2-214(5) (1993) (asserting jurisdiction over any person "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state"); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(1) (West 1993) (providing that the state has jurisdiction when the defendant "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state"); WIS. STAT. ANN. § 801.05(5) (West 1993) (using same language as North Carolina statute).

29. *See supra* note 2. The fact that the out-of-state roofing company was called and agreed to do the work suggests that it had undertaken other local work previously and had advertised locally. Suppose that the company neither had solicited nor done local work, that the homeowner had called in desperation because he could not obtain the timely services of a local roofer, and that as a favor the company had agreed in good faith to come, but failed to do so when the only available truck broke down. In an extreme fact situation such as this, in which there is a broken promise to perform locally by a non-aggressor promisor having no other contacts with the forum, the existence of local jurisdiction against the company is most questionable. Indeed, a claim of jurisdiction on these facts almost amounts to an assertion of the now rejected proposition that the mere making of a contract with a forum resident constitutes a consent to jurisdiction. *See supra* note 27.

30. For example, the Oklahoma long-arm statute applied in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 n.7 (1980), provided that for a tortious injury caused by "an act or omission outside this state" to constitute grounds for jurisdiction, the wrongdoer must have "regularly do[ne] or solicit[ed] business or engage[d] in any other persistent course of conduct, or derive[d] substantial revenue from goods used or consumed or services rendered, in this state." OKLA. STAT. tit. 12, § 1701.03(a)(4) (1971) (repealed 1984).

sending goods or things therein—it is probably easier and more common to make and breach a contract than to commit a tort.³¹ Hence, these more problematic jurisdictional cases more often will involve promisors than tortfeasors.

In a second example of conduct that can generate both tort and contract claims, a nonresident seller sends into the state goods that the buyer alleges to be defective, non-conforming, unfit for their intended use, or not as specifically warranted. Such sellers normally are amenable to local jurisdiction, regardless of whether the goods caused personal injury, property damage, or economic loss or the claim asserted against the seller sounds in contract or tort.³² Exceptions may arise when only a single item or shipment of goods is involved and its arrival is outside the normal course of the defendant's business,³³ but such exceptions are a function of the paucity of jurisdictional contacts rather than the legal theory of the plaintiff's claim for relief. In these more difficult jurisdictional cases, a claim for breach of contract and economic loss naturally might attract somewhat less judicial sympathy than a claim for personal injury. From an analytical perspective, however, the two situations are essentially the same and ordinarily should be treated alike.³⁴

Conversely, purchasers of goods shipped to them from outside the state often refuse the goods or fail to pay for them and eventually are sued for breach of contract in the seller's home state. Jurisdiction over these purchasers, who typically order by mail or telephone, is sometimes upheld and sometimes denied. The results seem to turn on such factors as the size, scope, frequency, and source of the transaction(s), on whether the goods were specially manufactured or obtained for the buyer, on whether the buyer is a consumer or a business person, and on whether the buyer entered

31. Jurisdictional theorists posit the example of persons who fire bullets or other missiles across state lines, who release pollutants into the air near state borders or into interstate rivers, or who knowingly send fraudulent or defamatory papers or dangerous objects into another state. Although such persons have not entered the forum, they have committed an act that intentionally causes actionable effects within the forum state. Such an act is regarded as a sufficient contact to sustain local jurisdiction. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 37 cmt. a (1971); see *Calder v. Jones*, 465 U.S. 783, 785-91 (1984) (upholding local jurisdiction over authors of a libelous publication intentionally and expressly aimed at plaintiff's forum); cf. *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (distinguishing these intentional tort paradigms from, and rejecting the application of the effects test to, a father who sent his child into the forum state, which then might provide governmental services to the child). The application of the effects test to contract cases is difficult because the conduct, although intentional, does not produce a tangible missile or pollutant that physically enters the forum. At worst, the breach of contract produces rippling economic effects that do not require a specific physical presence within the forum state.

32. See *infra* text accompanying notes 113-14.

33. See *infra* text accompanying notes 115-19.

34. See *supra* note 26.

the state in connection with this or related transactions.³⁵ The willingness of courts to deny jurisdiction over the purchaser in many of these cases is probably another major source of the perception that jurisdiction over promisors is more difficult to obtain. Again, the explanation is not found in the legal theory of the claim, which of necessity is breach of contract, but in the fact that such cases frequently involve single transactions and nonresident purchasers, both commercial and consumer, who have not personally entered the forum state.³⁶

In sum, jurisdiction over the person in both tort and contract cases is readily established when the claim arises out of the personal activities of the defendant within the forum state or out of the regular shipment of defendant's goods into, or the plaintiff's goods out of,³⁷ the forum state. Jurisdiction is much more difficult to establish if the defendant has not personally entered the state, the defendant's contacts with the state are few or irregular, and the defendant is a purchaser, particularly a consumer-purchaser.³⁸ These conclusions should put to rest any lingering notions that jurisdiction over promisors is doctrinally different or more demanding. They also suggest that although jurisdictional contacts may arise out of almost any commercial activity, the strongest contacts are those provided by the local performance of a contract, the natural starting point for the promised functional analysis.

III. A FUNCTIONAL ANALYSIS OF CONTRACTUAL JURISDICTIONAL PARADIGMS

A. *Personal Performance by the Promisor Within the Forum State*

The strongest case for jurisdiction over a promisor is a local, personal performance that allegedly fell short of what was promised.³⁹ Such a per-

35. See *infra* text accompanying notes 106-12 (suggesting that regular commercial buyers are subject to jurisdiction in the seller's forum, that mail-order consumer purchasers are not, and that one-shot commercial buyer cases divide the courts); see also Russell J. Weintraub, *An Objective Basis For Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625-26 (1991) (suggesting jurisdiction over buyers in the seller's home state turns on such questions as whether the goods were "a catalogue item or custom made"; whether "an officer of the buyer entered the forum to negotiate the contract or supervise manufacture; "whether the buyer or seller was the aggressor or first person to solicit the business; whether the "contract require[d] manufacture" within the forum state; and whether the buyer previously had purchased from the seller).

36. E.g., *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232 (6th Cir. 1972) (asserting the need to protect passive mail-order purchaser-consumers from assertions of jurisdiction by nonresident corporate mail-order sellers).

37. Of course if the buyer has made only a single purchase or is a mail-order purchaser-consumer, her amenability to jurisdiction is more doubtful. See *supra* text accompanying notes 35-36.

38. See *supra* note 30; *infra* notes 115-19 and accompanying text.

39. See *supra* note 25 and accompanying text.

formance should support jurisdiction even though the plaintiff is not a local resident,⁴⁰ and the defendant has no other dealings with the plaintiff or others within the forum state. To explain or justify this result, it is not necessary to develop a coherent, overall theory of personal jurisdiction,⁴¹ particularly a theory centering on the importance of territoriality.⁴² On the other hand, it would not be sufficient to assert merely that the defendant accepted the benefits and protection of the forum state by performing there.⁴³ Perhaps it is sufficient to note that (1) in most cases it will be less burdensome for a nonresident promisor who performed locally to return to answer for the performance's alleged shortcomings⁴⁴ than for the promisee to sue the promisor elsewhere;⁴⁵ (2) the performance often will occur in a commercial context in which the parties can anticipate and budget for out-of-state litigation; (3) evidence and witnesses to the alleged inadequacy of the defendant's performance most likely can be found where the performance occurred;⁴⁶ and (4) the law of the jurisdiction in which the performance occurred typically will supply the legal framework against which the performance's alleged inadequacy will be measured.⁴⁷ In short, it generally will be fairer and more efficient to require the promisor to defend her

40. In most single contract cases the plaintiff is a local resident, a fact that should be legally irrelevant. *E.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Long-arm provisions asserting jurisdiction over persons who perform services for the plaintiff within the state do not require a connection between the plaintiff and the forum state. *E.g.*, N.C. GEN. STAT. § 1-75.4(5)(b) (1992) (asserting jurisdiction when a contact "[a]rises out of services actually performed for the plaintiff by the defendant within this State"). Such statutes, and the cases, *see supra* note 25, make it clear that a single local performance will supply the minimum contacts.

41. The Supreme Court's current interest in jurisdiction predictably has generated a spate of scholarly discourse, most of which has sought to develop a coherent theory of personal jurisdiction. *See, e.g.*, Symposium, *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 *RUTGERS L.J.* 559 (1991). Despite the size of this effort and the academic pedigrees of most of the participants, neither success nor consensus has been achieved. No theory, point of view, article, or scholar has emerged as the leader or the first among equals. By contrast, recall Professor Ely's belated, but triumphant, entry into the great *Erie* debate. John Hart Ely, *The Irrepressible Myth of Erie*, 87 *HARV. L. REV.* 693 (1974).

42. *See* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 *WASH. U. L.Q.* 377, 378-79 (1985) (offering a territorial view of personal jurisdiction).

43. The "benefits and protection" cliché, which so permeates threshold levels of jurisdictional discussion, was thrust upon an obviously receptive world at the end of *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Almost a half century later, the cliché was prominently featured in Justice Brennan's concurring opinion in *Burnham v. Superior Court*, 495 U.S. 604, 637-38 (1990). Ultimately, this cliché implies that anyone who is in a position to, or may have a need to, make use of a state's laws, institutions, or services—most of which the state cannot constitutionally deny an American citizen anyway—is thereby amenable to, or impliedly has consented to, the jurisdiction of the state. Either the cliché suggests too much, or nothing at all.

44. *Smyth v. Twin State Improvement Corp.*, 80 A.2d 664, 667 (Vt. 1951).

45. *Id.* at 668.

46. *Id.*

47. *Id.*

performance in the state in which it occurred than to require the disappointed promisee to litigate elsewhere, typically in a state that enjoys general jurisdiction over the promisor but otherwise has no connection with the subject matter of the dispute.

Technology has created its own set of jurisdictional issues in this context. The mails and modern electronic communication devices like the telephone, fax, television, and videotape make it increasingly possible to perform locally without personally entering the forum state. For example, speakers, pollsters, fund-raisers, lawyers, lobbyists, and public relations practitioners can sometimes perform from afar electronically or by mail. These persons probably would be subject to local jurisdiction if their remote performances were part of a larger commercial enterprise with other local contacts.⁴⁸ Moreover, the forum state will probably apply its own law to measure the adequacy of the performance⁴⁹ and should be home to important witnesses, particularly the persons whom the defendant addressed or contacted. But what if the performance in question consisted of only a few interstate letters or telephone calls? Such a limited local effort does not strongly suggest that the defendant can, or fairly must, return to answer for this performance.

An analogous situation occurs when a nonresident arranges to bid at a local auction through an open, long distance telephone line, submits, but later reneges on, the winning bid, and is sued locally by the auction house. In *Parke-Bernet Galleries, Inc. v. Franklyn*⁵⁰ the New York Court of Appeals upheld jurisdiction over this kind of promisor, even though the auction house had initiated the dealings by mailing the defendant an auction catalog, only a single transaction was involved, and the defendant had not personally entered the state. The court reasoned that this case fell between those in which the defendant was physically present within the state, cases in which jurisdiction generally is upheld, and those in which the defendant telephoned a single order for goods into the state, cases in which jurisdic-

48. In *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039 (D.N.J. 1981), the court, in upholding jurisdiction over a nonresident corporation that had breached a substantial commercial contract, stated: "I see little to distinguish a corporation's using the telephone and mail to solicit and negotiate a contract the size of that at issue here from that same corporation sending an agent into the state in pursuit of the identical contract from the identical buyer." *Id.* at 1050. In *Alchemie*, the telephone and mail were used to solicit or negotiate the contract. Cases in which such devices are the means by which the contract is performed are much rarer. *E.g.*, *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 509 (N.Y. 1970) (upholding jurisdiction over a non-resident defendant who had made a successful auction bid over the telephone).

49. Long ago the Supreme Court held that a forum whose law applies does not ipso facto also have jurisdiction over the person. *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). Nevertheless, the choice of law question remains a relevant jurisdictional factor once minimum contacts are found to exist. See *Louis*, *supra* note 16, at 421.

50. 256 N.E.2d 506, 508 (N.Y. 1970).

tion often is denied.⁵¹ The court then distinguished the single-order telephone buyer from the defendant auction bidder on the ground that the latter had projected himself by telephone into the auction room and affected those present.⁵² This distinction is not persuasive. The single-order telephone buyer achieves the same result as a buyer personally present in the store, but is not equally amenable to local jurisdiction.⁵³ The telephone buyer, however, often can initiate and complete a purchase in a few moments, whereas a person who seeks to bid by telephone at an auction presumably must make complicated arrangements in advance. The latter's contacts with the forum state, therefore, appear to be more substantial than the contacts of the former. Moreover, although the auction bidder may be a consumer, he is likely to be affluent and sophisticated and understand the legal consequences of his actions.

Parke-Bernet offered an alternative justification for upholding jurisdiction. The court noted that an auction house employee had been assigned to the defendant's open line during the bidding and that this employee not only had made the defendant's bids but also had advised the defendant of the bids of others.⁵⁴ This employee, therefore, acted as a borrowed servant or agent whose activities within the forum state had effectively located the defendant there.⁵⁵ This mechanical, but not unpersuasive, approach serves to introduce a line of cases in which a defendant is subject to jurisdiction because of a local performance by an agent or servant who also happens to be the plaintiff in the action. In these cases the plaintiff typically is a local agent for the defendant⁵⁶ or is engaged by the defendant to perform a local service.⁵⁷ When the plaintiff fails to receive his salary, commissions, or

51. *Id.* at 507-08. The court cited *Katz & Son Billiard Prod., Inc. v. Correale & Sons, Inc.*, 232 N.E.2d 864 (N.Y. 1967), as its single telephone order case. However, the single order in that case was part of a continuing business relationship between a New Jersey telephone-ordering defendant and a New York seller. *Id.* at 864-65. Many courts today presumably would find jurisdiction on such facts. See *supra* note 7. A more likely situation for denying jurisdiction is when the buyer is a consumer making a single order for goods by mail or telephone. Courts tend to agree that jurisdiction over this type of buyer should be denied. See *supra* note 37.

52. *Parke-Bernet*, 256 N.E.2d at 507-08.

53. See *supra* note 37; *infra* note 85.

54. *Parke-Bernet*, 256 N.E.2d at 509.

55. *Id.*

56. *E.g.*, *Goldman v. Parkland of Dallas, Inc.*, 176 S.E.2d 784, 785-86, 788-89 (N.C. 1970) (upholding jurisdiction over a nonresident dress manufacturer sued for commissions by its local sales representative).

57. *Gualtieri v. Bursleson*, 353 S.E.2d 652, 654-56 (N.C. App.), *disc. review denied*, 358 S.E.2d 50 (N.C. 1987) (holding that a nonresident attorney who hired a local physician by telephone to be expert witness in foreign litigation is now subject to local jurisdiction in an action by the physician, who prepared locally, to collect his fee); *Forman & Zuckerman, P.A. v. Schupak*, 228 S.E.2d 503, 504-06 (N.C. App. 1976) (holding that nonresident attorneys who hired local attorneys to bring a lawsuit are subject to local jurisdiction in an action to recover legal fees for

fees for the agreed-upon local performance, he sues the defendant locally, claiming that his performance within the forum state at the defendant's request and for her benefit subjects the defendant to jurisdiction there. Jurisdiction is typically upheld in such cases. It is not unfair to make a defendant answer for a performance within the forum state for which she contracted and from which she sought to benefit.⁵⁸ In addition, local law and local witnesses are again likely to be important, if not decisive. Moreover, in many of these cases the underlying transaction is substantial, continuing, and commercial, and the parties, particularly the defendant, are not unsophisticated consumers. All this serves to make the promisor's connection with the state so substantial and purposeful that it does not offend due process to make her litigate there. Crowning that conclusion with the argument that she performed within the state through her agent may be forensically appealing but adds very little to the argument's real weight.

B. *Failure to Perform as Promised Within the Forum*

Earlier in this Article I discussed the jurisdictional exposure of an out-of-state roofing company that broke a single promise to perform locally.⁵⁹ That discussion introduced most of the general conclusions that can be drawn from this paradigm. First, jurisdiction cannot be founded solely on the fact that the promisee was a resident of the forum state⁶⁰ or that the contract could have been accepted and therefore "made" within the forum state.⁶¹ Second, a promise to perform within the forum state normally does not occur in isolation. Typically, the promise is locally negotiated or solic-

the litigation), *appeal dismissed*, 233 S.E.2d 391 (N.C.), *appeal dismissed*, 434 U.S. 804 (1977); *Zerbel v. H.L. Federman & Co.*, 179 N.W.2d 872, 874 (Wis. 1970) (holding that a nonresident defendant who asked a local plaintiff to prepare a financial report was thereby subject to local jurisdiction), *appeal dismissed*, 402 U.S. 902 (1971). *But see* *Anderson v. Shiflett*, 435 F.2d 1036, 1037-38 (10th Cir. 1971) (concluding that an Oklahoma architect who performed substantial preliminary professional services in Oklahoma with respect to Texas projects for a Texas defendant cannot obtain local jurisdiction over the Texan); *Orton v. Woods Oil & Gas Co.*, 249 F.2d 198, 199-202 (7th Cir. 1957) (holding that a local attorney and business consultant cannot obtain local jurisdiction over a foreign corporation for locally-performed professional services); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 761-64 (Tex. 1977) (finding that an Oklahoma business which arranged for highway advertising displays in Texas while still in Oklahoma was not subject to jurisdiction in Texas for abandoning the contract), *cert. denied*, 434 U.S. 1063 (1978).

58. The North Carolina long-arm statute specifically provides for jurisdiction in any action that arises "out of a promise, made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the plaintiff." N.C. GEN. STAT. § 1-75.4(5)(a) (1992).

59. See *supra* text accompanying notes 27-30.

60. See *supra* note 27.

61. In *Burger King*, Justice Brennan stated that "[t]he Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic . . . theories of the place of contracting or of performance.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (alterations in original) (citations omitted).

ited, either specifically or as part of a general effort to obtain such local business, or it involves business that the promisor previously has done with the promisee or similarly situated persons.⁶² In such cases the true basis of jurisdiction is the actual or attempted transaction of business within the state, rather than the mere making of a promise to perform within the state. Third, when a nonresident's promise to perform locally does occur in isolation or outside the promisor's regular course of business, it may still fall within the terms of many long-arm provisions,⁶³ but arguably it does not itself provide the constitutionally necessary minimum contacts.⁶⁴ Such a result is consistent with foreign act, local injury long-arm provisions, which typically require a transactional nexus with the forum state beyond the mere local presence of the injury-causing product, and with contract cases holding that a single, isolated shipment of goods into the state does not subject the seller to jurisdiction there.⁶⁵ In these two analogous situations, the cause of action arises from a local physical contact, the shipment by a non-resident defendant of the offending product into the state. If that physical act does not itself provide the minimum contacts, even when personal injury results, then the mere making of a promise to perform locally also should not. This is true even though both the shipment and the promise are directed specifically at the forum state.⁶⁶ Perhaps the promise to perform locally suggests more readily than a single shipment of products that a journey to the forum to litigate would not be onerous. Due process, however, requires more than a lack of inconvenience; it requires that a defendant have minimum contacts with the forum—which a single, isolated broken promise to perform locally arguably cannot supply.

62. In the out-of-state roofer hypothetical, for example, it was likely that the defendant served other local customers and solicited local business through advertisements, listings in local directories, and word-of-mouth recommendations. Thus, what appeared at first blush to be just a broken promise by the defendant to come and repair a roof was, in fact, a representative part of the defendant's transaction of local business.

63. See *supra* note 28.

64. See *supra* text accompanying notes 28-30. But see *Gardner Eng'g Corp. v. Page Eng'g Co.*, 484 F.2d 27, 28-32 (8th Cir. 1973) (finding defendant subject to jurisdiction in Arkansas for anticipatory breach of a contract to supply goods to a construction project there).

65. See *infra* text accompanying notes 115-19 (single contract cases); *supra* note 30 (foreign act, local injury statute).

66. Third persons acting independently sometimes send or carry goods into a state in which the goods normally are not sold and with which the manufacturer or original seller of the goods otherwise has little or no contact. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (involving a car that was sold to the plaintiff by the defendant in New York, and was driven to Oklahoma where a defect caused injury to plaintiff); *Buckeye Boiler Co. v. Superior Court*, 458 P.2d 57, 61, 67 (Cal. 1969) (involving a defective pressure tank manufactured by defendant that somehow arrived in California, where eventually it exploded; jurisdiction was upheld only because defendant regularly sold a different model of pressure tank to another California buyer). In such situations the defendant obviously has a much stronger case against the assertion of local jurisdiction.

C. Jurisdiction Over Promisors Who Perform Outside the Forum

For additional insight into the question of performance within the forum state, a claim of jurisdiction by a forum in which performance clearly did not or was not to occur should be considered. In *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*,⁶⁷ the plaintiff, Helzberg's, a Missouri corporation, operated a chain of jewelry stores including one in the defendant's Iowa shopping mall. Helzberg's sought to enjoin the defendant in a Missouri court from leasing space in the Iowa mall to another jewelry store named Lord's in violation of a restrictive covenant in the plaintiff's lease.⁶⁸ The trial court denied the defendant's motion to dismiss for failure to join Lord's as an indispensable party not subject to jurisdiction in Missouri and granted the plaintiff's motion for a preliminary injunction. The defendant appealed the grant of the injunction⁶⁹ and unsuccessfully challenged the ruling on its indispensable party contention. The case is of interest because the basis for the Missouri court's assumption of jurisdiction over the defendant is less than obvious⁷⁰ and a holding that jurisdiction—or venue⁷¹—was absent, or that a transfer of venue was appropriate,⁷² easily would have obviated the indispensable party problem. Unfortunately, the opinion of the court of appeals neither mentions a jurisdictional challenge by the defendant nor sets forth the factual basis for the trial court's assumption of jurisdiction.

The lack of a real factual basis for jurisdiction over Valley West's person invites fictive speculation. Let us assume that Valley West, which sought tenants for its mall and knew that a midwestern chain store operation like Helzberg's was a prospect, initially solicited Helzberg's in Missouri by mail or telephone. Thereafter representatives of Valley West came to Missouri to persuade, to negotiate, and finally to sign the lease. Thus, the defendant solicited and negotiated in Missouri by mail, telephone, and personal entry, "made" and personally signed the contract in Missouri, and entered into a substantial and continuing commercial relationship with a

67. 564 F.2d 816 (8th Cir. 1977).

68. *Id.* at 817.

69. *Id.* at 817-18.

70. Except for its contractual relationship with a Missouri corporation, Valley West had no reported or apparent connection whatsoever with the state of Missouri.

71. Venue in federal district court over this foreign corporation presumably was founded on the allegation that the defendant corporation was "doing business" in Missouri. 28 U.S.C. § 1391(c) (1976) (repealed 1976). An allegation that the claim "arose" in Missouri under 28 U.S.C. § 1391(a) (1976) (amended 1990) was unlikely since the allegedly offending lease to Lord's was made in and to be performed in Iowa.

72. "[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988).

Missouri corporation. Many courts would view these contacts together as easily exceeding the requisite minimum, even though the lease was to be performed primarily in Iowa.⁷³

What is most intriguing about this jurisdictional hypothetical is not the sum of the possible contacts—although that represents the easiest and most popular approach to such jurisdictional questions—but their individual significance. For example, many courts historically have placed great jurisdictional emphasis on the place where the contract technically was “made.”⁷⁴ Although that circumstance alone no longer can be a sufficient basis for jurisdiction,⁷⁵ it continues to be a likely forum if solicitation, negotiation, or part performance also occurred there. If that forum is not also the place of performance, it becomes an alternative forum where disputes about the quality of a contract’s performance may be litigated. Moreover, the choice of forum then could be the result of a race to the courthouse door.⁷⁶ The

73. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (emphasizing the substantial and continuing commercial relationship between the contracting parties). The comment to the California all-purpose long-arm provision contains the following relevant statement:

So, for example, a state may not exercise judicial jurisdiction over an individual as to a cause of action for breach of contract merely because he happened to affix his signature to the contract within its territory. There is a stronger case for the exercise of such jurisdiction if the signing of the contract was the culmination of a series of acts carried on by the individual in its territory. And the state clearly may exercise jurisdiction if the signing of the contract resulted from activities of a sufficient intensity to amount to the doing of business.

CAL. CIV. PROC. CODE § 410.10 cmt. 8 (West 1973).

74. *E.g., Goldman v. Parkland of Dallas, Inc.*, 176 S.E.2d 784, 788-89 (N.C. 1970) (emphasizing the technical making of the contract within the state while noting that defendant’s performance also had taken place within the state).

75. *Burger King*, 471 U.S. at 478 (rejecting the notion that personal jurisdiction might turn on a technical determination of where the contract was made); *see also Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., Inc.*, 597 F.2d 596, 603-04 (7th Cir. 1979) (rejecting as not controlling the “formalities of contract execution”; also rejecting as not controlling a contract term providing that the goods were to be shipped F.O.B. sellers plant and that title, therefore, had passed to the defendant buyer within the forum state), *cert. denied*, 445 U.S. 907 (1980). Some cases have suggested, however, that F.O.B. shipping point clauses locate a defendant’s property within the forum state, the benefits and protection of which the defendant thereby enjoys. *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583, 588-89 (2d Cir. 1965). *But see Gentile, supra* note 14, at 386-87.

76. When several forums potentially have jurisdiction over a contract dispute and equity or a declaratory judgment statute makes it possible for the promisor, who ordinarily would be the defendant, also to initiate the litigation, then whoever sues first will get to choose the forum. If this person chooses his home forum, he could face, but would probably expect to defeat, a motion by the defendant to transfer the action’s venue, *see supra* note 72, or to dismiss because of an inconvenient forum. *E.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981) (holding that an American court was an inconvenient forum to litigate wrongful death actions arising out of an airplane crash in Scotland). Because federal courts may transfer an action’s venue to another state, they dismiss on grounds of forum non conveniens only when the convenient forum is in another country or, in very unusual circumstances, in a state court. *Id.*

Helzberg's case is different because the dispute therein arose outside the forum state and involved a third person, probably an indispensable party, with no connection to the forum state.⁷⁷ The difficulty could have been eliminated, however, by a venue transfer motion, or its equivalent. On the other hand, local courts are not inclined to transfer or dismiss local plaintiffs,⁷⁸ and few cases have held that a less desirable forum with which the defendant has minimum contacts should be constitutionally compelled to surrender jurisdiction to a more desirable forum.⁷⁹

In our fictive scenario, Valley West also was the aggressor in the events that brought the parties together and employed the telephone, the mails, and locally present agents or employees to solicit, negotiate and sign the lease. Many courts are quick to name the party who initiated the transaction the aggressor,⁸⁰ even though the choice is sometimes less than obvious.⁸¹ A buyer often will appear to have made the first contact, even though he acted in response to an earlier solicitation or advertisement by the

77. *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 817 (8th Cir. 1977); see also Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1090, 1094-96 (1985) (arguing that the *Helzberg's* case is one of the few in which a missing defendant properly should be regarded as an indispensable party).

78. As suggested above, see *supra* note 76, local judges generally are not inclined to transfer cases brought by resident plaintiffs. See CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3848 (2d ed. 1986) (noting the frequent statement by courts that a plaintiff's choice of venue is to be respected and that the defendant must meet the burden of establishing that another forum would be more convenient). However, in *Igloo Prods. Corp. v. The Mounties, Inc.*, 735 F. Supp. 214, 218 (S.D. Tex. 1990), the court ordered transfer from the plaintiff's forum, which had jurisdiction under *Burger King* pursuant to a substantial, commercial contract between the parties, to the forum in which the defendant's disputed performance had occurred and the defendant had already filed a prior parallel action. And in *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902, 908 (D. Minn. 1971), the court denied local jurisdiction over a New York purchaser of expensive air conditioning equipment manufactured and sold by the Minnesota plaintiff. As an afterthought the court stated that it might also have transferred the venue of the case to New York because the dispute centered around the defendant-purchaser's claim that the installed equipment was defective and the witnesses and evidence were in New York. *Id.*

79. Cf. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14 (1987) (holding unanimously that a California court could not constitutionally exercise jurisdiction over a foreign third party defendant because the principal claim had been dismissed, the third party plaintiff was a foreign corporation, and the third-party claim arose out of a contract made outside the country).

80. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., Inc.*, 597 F.2d 596, 598-99 (7th Cir. 1979) (rejecting jurisdiction over an out-of-state buyer whom the local seller had solicited in person at the buyer's place of business), *cert. denied*, 445 U.S. 907 (1980); *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 117 N.W.2d 732, 736 (Minn. 1962) (rejecting jurisdiction over an out-of-state buyer whom the plaintiff had solicited); *Conn v. Whitmore*, 342 P.2d 871, 874 (Utah 1959) (same). But see *Siegel, supra* note 24, at 357 (noting that other courts have not found initiation of a business transaction to be jurisdictionally dispositive).

81. In *Fourth N.W. Nat'l Bank*, 117 N.W.2d at 736, the nonresident buyer had initially mailed an inquiry to the resident seller who, the court said, then seized the initiative and became the aggressor.

seller. Thus, a mail-order seller who blankets a region with advertisements or catalogs should be regarded as the aggressor, even though the buyers initiate the individual transactions. Moreover, the buyers frequently are consumers, persons who generally are not subject to jurisdiction in the forums to which their orders are sent.⁸² The aggressor's identity, therefore, may well affect, but ordinarily should not control, the jurisdictional determination.⁸³

The use of the mails or electronic communications to solicit or negotiate a contract or facilitate its performance also must be regarded as a relevant, but not decisive, jurisdictional contact.⁸⁴ Many cases suggest that a personal appearance in the forum to solicit, negotiate or facilitate a contract is a very significant contact.⁸⁵ Logically, the accomplishment of such pur-

82. Numerous cases have asserted the necessity of protecting mail-order, consumer purchasers from jurisdiction in the states to which their orders are mailed or telephoned, lest such persons become the victims of unscrupulous sellers. *E.g.*, *Conn.*, 342 P.2d at 875 (articulating threat of suits by mail order houses); *see Siegel, supra* note 24, at 359.

83. *But see Lakeside Bridge*, 597 F.2d at 598-99 (denying jurisdiction over a nonresident buyer of a single, expensive custom-made item, largely because the local seller had aggressively solicited the purchase by traveling to the buyer's place of business).

84. *Compare Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (holding that, as modern business is often transacted across state lines by mail and wire communications without physical presence, the absence of physical presence is not fatal to jurisdiction if defendant has "purposefully directed" efforts towards residents of the forum state) *with Lakeside Bridge*, 597 F.2d at 604 (holding that use of interstate telephone and mail service to communicate with local forum would unfairly give jurisdiction to any place into which communications were directed). The difference in tone between these two opinions is in part a reflection of their differing outcomes. In *Burger King*, the Court upheld jurisdiction over a nonresident who had not personally entered the forum state; in *Lakeside Bridge*, the court denied jurisdiction over such a person. Together the cases suggest that mail and electronic communications are important, but not decisive, jurisdictional factors.

85. *E.g.*, *Republic Int'l Corp. v. Amco Eng'rs*, 516 F.2d 161, 167 (9th Cir. 1975) (upholding jurisdiction where several of defendant's engineers visited the forum to work with plaintiff); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084 (1st Cir. 1973) (upholding jurisdiction where there were frequent visits to the forum state by defendant purchaser's servants); *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472, 475 (7th Cir. 1959) (upholding jurisdiction where the defendant foreign corporation allegedly breached an executory contract, largely because defendant's engineer had twice visited the forum to sell plaintiff on the deal), *cert. denied*, 361 U.S. 959 (1960); *Harry Winston, Inc. v. Waldfogel*, 292 F. Supp. 473, 480-83 (S.D.N.Y. 1968) (upholding local jurisdiction over a nonresident individual who allegedly purchased an expensive diamond ring after making several local visits to the plaintiff's place of business); *American Continental Import Agency v. Superior Court*, 30 Cal. Rptr 654, 657 (Cal. Ct. App. 1963) (upholding jurisdiction where a director of the foreign corporate purchaser visited the forum on four separate occasions); *Compania de Astral, S.A. v. Boston Metals Co.*, 107 A.2d 357, 367 (Md. 1954) (upholding jurisdiction over a nonresident buyer who had visited the forum to negotiate and to view the ships that were the subject of the purchase agreement), *cert. denied*, 348 U.S. 943 (1955). *But see Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1031-32 (5th Cir. 1983) (denying jurisdiction over the defendant purchaser of custom-manufactured machinery, even though defendant's agents had visited plaintiff's Texas plant), *cert. denied*, 466 U.S. 962 (1984); *Oswalt Indus., Inc. v. Gilmore*, 297 F. Supp. 307, 313 (D. Kan. 1969) (denying jurisdiction over defendant purchaser who used the mail and telephone and who for unspecified purposes made a single

poses by mail or electronic communications should be jurisdictionally important. These forms of communication have made it much easier to contract at a distance without a personal appearance. Denying jurisdiction in all such cases could improperly immunize persons who do business in, or have significant commercial relations with, the forum state.⁸⁶ On the other hand, upholding jurisdiction on the basis of a single letter or electronic communication sent into the state obviously would sweep too far in the other direction,⁸⁷ particularly in cases involving mail-order consumer-purchasers.⁸⁸ Even an electronic performance within the state, if based on a single letter or telephone call, constitutes a very slender thread upon which to hang a claim of jurisdiction.⁸⁹

Mail and electronic communications also are an essential and inevitable part of a substantial and continuing interstate business relationship.⁹⁰ If the relationship ruptures and litigation ensues in either party's home forum, local jurisdiction will probably be sustained in terms that include a prominent mention of the interstate communications.⁹¹ Because such communications are an inevitable outgrowth of a substantial and continuing commercial relationship, the relationship ought to be regarded as the principal contact.⁹²

visit to the forum "initiated by plaintiff"). In *Darby v. Superior Supply Co.*, 458 S.W.2d 423, 427 (Tenn. 1970), the court denied jurisdiction over a nonresident consumer purchaser who had ordered an expensive shipment of lumber from stock by mail and telephone and then hired a truck to pick up the lumber in the forum state. *Darby* was limited to its facts in *Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560, 562-63 (Tenn. 1981) (limiting *Darby* to cases involving consumers), *cert. denied*, 455 U.S. 994 (1982).

Most of these cases involved purchasers of goods or services. Such purchasers often escape jurisdiction if the purchase is single and did not involve a personal entry into the forum. *E.g.*, *Lakeside Bridge*, 597 F.2d at 598 (denying jurisdiction when the defendant purchaser never personally visited the forum state and was solicited by the seller elsewhere). Thus, a personal visit to solicit, negotiate, or supervise preparation of the purchase has become a significant factor in upholding jurisdiction in these difficult cases. *See infra* text accompanying notes 101-02.

86. *Burger King*, 471 U.S. at 476.

87. *See supra* note 84; *see also Oswalt Indus.*, 297 F. Supp. at 313 (holding that negotiations by mail and telephone are of "no significant weight" in determining whether defendant was transacting business in the seller's home state).

88. *See Oswalt Indus.*, 297 F. Supp. at 313 (basing jurisdiction upon mail and telephone contacts would subject out-of-state consumers and mail-order buyers of every type to the risk of local jurisdiction).

89. *See supra* text following note 49.

90. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 467-68 (1985) (noting the existence of frequent communications between the parties).

91. *Id.*

92. In *Burger King*, the Court prominently mentioned the communications, but continuously referred to the substantial and continuing relationship between the parties. 471 U.S. at 473, 476, 480, 487. If the relationship's connection with the forum is otherwise insubstantial, the presence of telephone and mail communications between a defendant and the forum are "precisely the sort of 'random,' 'fortuitous' and 'attenuated' contacts that the *Burger King* court rejected." *Lak, Inc.*

A nonresident who personally enters a forum to solicit, negotiate, or sign a contract, in effect, consents to general jurisdiction,⁹³ provided service is personally made during the entry period.⁹⁴ When the breach of contract finally occurs, however, the promisor is typically long gone from the forum. Her former entry remains a significant jurisdictional contact, though.⁹⁵ That result is very defensible. If personal presence during the commission of a tort or the performance of a contract is jurisdictionally conclusive, then personal presence to solicit or negotiate a contract at the least should be jurisdictionally significant. In both situations, the defendant's prior entry suggests that travel to the forum state is neither prohibitively expensive nor inconvenient.⁹⁶ On the other hand, local performance may require a much more substantial involvement with the forum state than mere negotiation or solicitation. In addition, the difference in cost and inconvenience between local litigation and sending a salesperson to another state to solicit or negotiate can be enormous, even though modern technology has made it easier to litigate away from home today.⁹⁷ Finally, the dispute may arise out of a performance that occurred far from the place in which the contract was negotiated and signed. That place may not be a desirable or convenient forum, even though the defendant personally appeared there once during the contracting process.⁹⁸

Despite the possible differences, courts tend to treat these two kinds of

v. Deer Creek Enters., 885 F.2d 1293, 1301 (6th Cir. 1989) (holding that where Indiana partnership negotiated with plaintiff over purchase of Florida land, some substantial communications between defendants and Michigan representatives of plaintiff were not sufficient to subject defendants to Michigan jurisdiction), *cert. denied*, 494 U.S. 1056 (1990).

93. *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990) (upholding unanimously the validity of "tag" jurisdiction).

94. Traditionally, a corporation was present only where it was incorporated and, therefore, could not be served elsewhere simply because of the presence or activities of corporate officers, agents, or servants. *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 508-09 (4th Cir. 1956) (holding that isolated entry into forum by defendant's general manager to discuss plaintiff's claim not a basis for jurisdiction over defendant corporation); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 103 (1985). Eventually it was held that a corporation could be present elsewhere through the activities—and now the contacts—of its servants, but this was primarily a species of specific jurisdiction, and not the general jurisdiction created by service upon an individual found within the forum. *Id.* at 112 (citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930)).

95. See cases cited *supra* note 85.

96. See *supra* text accompanying note 44.

97. Justice Brennan attributes the difference to improvements in the speed and reliability of interstate travel and communications. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 303 n.5 (1980) (Brennan, J., dissenting). He fails to note, however, that these improvements also make it easier for plaintiffs to litigate away from home and that plaintiffs, as a class, are perhaps less helpless than they once were. See *Louis*, *supra* note 16, at 429 n.159 (noting financial changes—like insurance and the contingent fee arrangement—that reduce the financial pressure upon poor plaintiffs to settle early and cheaply).

98. See *supra* text accompanying notes 73-79 for a discussion of the fictive *Helzberg's* scenario in which a contract negotiated in Missouri produced a dispute over a performance in Iowa.

personal local appearance almost identically—a local performance *almost always* results in jurisdiction,⁹⁹ whereas local solicitation or negotiation *usually* results in jurisdiction.¹⁰⁰ Although judicial explanations of or justifications for the latter result are scarce, there is one obvious explanation. Single contract cases are difficult and have evenly divided the courts.¹⁰¹ Add to any one of these cases a significant additional contact, a personal appearance by the defendant in the forum state to negotiate, solicit, or facilitate the deal, and most courts will immediately breathe a sigh of relief and uphold jurisdiction.¹⁰² In so doing, courts need not also decide how weighty a contact a personal appearance to solicit or negotiate is, or whether it is as significant a contact as a personal local performance. They only need conclude that both contacts are sufficient to resolve the jurisdictional question.

Finally, I should note that the lease between Helzberg's and Valley West, like the franchise agreement in *Burger King*, created an ongoing commercial enterprise or integration by contract between the contracting parties.¹⁰³ Substantial commercial players like these generally have the resources and experience to deal with predictable adversities such as litigation away from home, the sophistication to anticipate the possibility of such an event, and the bargaining power to assure fair jurisdictional treatment in the contract itself.¹⁰⁴ When these parties enter into such contracts, they should understand that each typically will have a substantial jurisdictional claim at home against the other. Thus, even the party with the weaker jurisdictional claim—not surprisingly the plaintiff in both *Burger King* and *Helzberg's*¹⁰⁵—often will be able to show enough contacts to establish jurisdiction. That result is more the product of the substantial, continuing,

99. See *supra* notes 25, 40 and accompanying text.

100. See *supra* note 85 and accompanying text.

101. See *infra* note 144 and accompanying text.

102. E.g., *Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676, 677 (7th Cir. 1980) (upholding jurisdiction over a buyer in a single contract situation and distinguishing *Lakeside Bridge and Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 495 U.S. 907 (1980), the leading case denying jurisdiction in such situations, simply because agents of defendant had made several visits to the forum).

103. See *supra* note 92.

104. Contract terms may attempt to give locality to the contract by specifying where the contract was accepted or made or where title to the goods passed. See generally *Gentile*, *supra* note 14, at 394-97 (discussing jurisdictional impact of various contract terms). Contract terms also may specify governing law, see *Burger King v. Rudzewicz*, 471 U.S. 462, 481-482 (1985) (holding that choice-of-law provision cannot alone create jurisdiction but should not be ignored when other contacts are present), or select a specific forum in which litigation must occur, see *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1524-25 (1991) (upholding a forum selection clause against a consumer-plaintiff).

105. *Rudzewicz* clearly could have sued *Burger King* in Michigan, where it had granted many other, similar franchises and maintained a local office. *Burger King*, 471 U.S. at 466, 488.

commercial relationship than the proffered list of contacts. The list of contacts—e.g., the volume of interstate mail and telephone calls, the local personal visits to solicit and negotiate, the place of contracting, and agreements as to governing law—is obviously not irrelevant. But most substantial long-term contractual arrangements will generate enough contacts to sustain local jurisdiction in either home forum. If that is so, the true source of jurisdiction is the relationship out of which the list of contacts inevitably arose.

D. *Selling to or Buying from the Forum State*

1. In General

Interstate and international transactions in merchandise generate many lawsuits and jurisdictional questions as disappointed sellers and buyers each seek to obtain local jurisdiction against the other. Sellers are particularly susceptible to local jurisdiction wherever their goods are regularly shipped to or sold.¹⁰⁶ Nonresident commercial buyers are similarly subject to local seller actions in states where the buyers make regular purchases.¹⁰⁷ Hence, the most difficult cases are those in which the defendant is a consumer-purchaser,¹⁰⁸ or the purchase or sale is single, isolated, random, or out of the ordinary course of business and was arranged without personal entry by the defendant into the forum state.¹⁰⁹ Thus, jurisdiction usually is denied in local seller actions against nonresident mail-order consumer-purchasers,¹¹⁰ occasionally is denied in local buyer actions against nonresident, one-shot sellers,¹¹¹ and often is denied in local seller actions against one-shot, nonresident commercial buyers.¹¹²

Helzberg's, which leased premises and operated a jewelry store in Iowa, clearly was amenable to suit there by the lessor, Valley West. *See supra* text accompanying notes 67-68.

106. *See infra* notes 113-14.

107. Courts once expressed doubts about jurisdiction over nonresident commercial buyers, even those who made regular purchases. *E.g.*, *M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc.*, 232 N.E.2d 864, 865 (N.Y. 1967) (holding that a New Jersey firm regularly purchasing from a New York firm was not transacting local business within the meaning of the New York long-arm provision); *see supra* notes 7, 51. Today, courts often uphold jurisdiction even over commercial buyers making only single purchases. *See infra* note 144 and accompanying text. The implication of this deep judicial division with respect to single commercial purchases is that jurisdiction over regular commercial purchasers, including those who do not personally enter the forum, would almost always be upheld today. *See supra* note 7.

108. *See supra* note 36.

109. *See supra* text accompanying notes 99-102; *infra* text accompanying notes 115-19.

110. *See supra* notes 37, 82.

111. *See infra* note 119.

112. *See infra* note 144.

2. Jurisdictional Assertions Against Sellers

A state may constitutionally assert jurisdiction over claims for economic loss arising out of the defendant's regular sale or shipment of merchandise into the forum state.¹¹³ Indeed few defendant sellers apparently even bother to contest jurisdiction.¹¹⁴ A jurisdictional challenge is possible, however, if the shipment is single and outside the ordinary course of the seller's business. Thus, in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*,¹¹⁵ a federal appellate court denied jurisdiction over a foreign corporation that, at the plaintiff buyer's request, had shipped a single order of allegedly defective yarn into the state.¹¹⁶ Although this well-known, often criticized¹¹⁷ decision apparently has not been followed by a *single* appellate court,¹¹⁸ its result has been seconded by a handful of lower court decisions involving the same atypical, extreme set of facts—a single sale solicited by the local buyer from a nonresident seller who does no other business within the forum state.¹¹⁹ Even this narrow exception can be questioned, as the

113. *E.g.*, *Electro Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d 365, 368-69 (8th Cir. 1969) (upholding Minnesota jurisdiction over a Texas seller even though the local buyer made the first contact and the seller attempted to structure the transaction to stay out of Minnesota). Most long-arm statutes have provisions asserting jurisdiction over sellers. *E.g.*, UNIF. INTERSTATE AND INT'L PROC. ACT § 1.03(2), 13 U.L.A. 361-62 (1986) (providing that a state has jurisdiction when a party "contract[s] to supply services or things in this state"); N.C. GEN. STAT. § 1-75.4(5)(e) (1992) (asserting jurisdiction when the contract "relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred").

114. There are few recent appellate cases involving defendant sellers. In one significant case, however, a federal appellate court denied jurisdiction in Iowa over a nonresident corporate seller that had reneged on its long-term contract to supply uranium to the local power company, but in that instance the seller had delivered the uranium to Illinois for additional processing by a third company, which then delivered the processed uranium to Iowa. *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1305-06 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

115. 239 F.2d 502 (4th Cir. 1956).

116. *Id.* at 508-09.

117. *E.g.*, *Williams v. Connolly*, 227 F. Supp. 539, 547-48 (D. Minn. 1964) (noting its disagreement with *Erlanger Mills* and citing other critical authorities).

118. Although *Erlanger Mills* recently was cited by the United States Supreme Court, it was cited for the separate proposition that a seller would not be subject to jurisdiction in states in which it made no sales but in which one of its products taken there by a purchaser caused injury. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). In *Choon Young Chung v. NANA Dev. Corp.*, 783 F.2d 1124 (4th Cir.), *cert. denied*, 479 U.S. 948 (1986), the court of appeals, citing *Erlanger Mills*, denied Virginia jurisdiction over an Alaskan seller, but in this instance the Virginia plaintiff had gone to Alaska to place the single order, which was to be delivered to the plaintiff at the airport in Alaska. *Id.* at 1124-26. Because of a delay with respect to part of the order, however, the parties agreed that the plaintiff would depart without it and the defendant would ship the balance of the order to Virginia. *Id.* at 1126. On these unusual facts, the court concluded that the defendant had made no effort to serve the Virginia market. *Id.* at 1128.

119. *See Wells Am. Corp. v. Sunshine Elecs.*, 717 F. Supp. 1121, 1127-29 (D.S.C. 1989) (denying jurisdiction over Illinois corporation that did no local business but which on request sent one order of circuit boards to plaintiff); *Interstate Paper Corp. v. Air-O-Flex Equip. Co.*, 426 F.

criticism of *Erlanger Mills* demonstrates.¹²⁰ Courts often maintain that a defendant who sells within the forum state impliedly waives objections to local jurisdiction by competing for local sales and profits.¹²¹ A seller who elects to fill a single, unsolicited interstate order from a new market—and who presumably would have no objection to filling additional orders from this market—perhaps also should be deemed to have consented to jurisdiction over claims arising out of the order.¹²² Perhaps an exception could be made for a seller who fills a single order primarily to accommodate the nonresident buyer, rather than to profit from or gain a foothold in the buyer's market.¹²³ These situations would be so rare, however, that a seller claiming such an exception should have to prove it.

The consistency of the decisions suggests that most sellers should not even bother to raise the defense of lack of jurisdiction over their person. The plurality opinion in *Asahi Metal Industry Co. v. Superior Court*¹²⁴ gave new jurisdictional hope, however, to one group of sellers—those who sell

Supp. 1323, 1324-27 (S.D. Ga. 1977) (denying jurisdiction over a nonresident parts supplier that on request sold parts to plaintiff); *Golden Belt Mfg. Co. v. Janler Plastic Mold Corp.*, 281 F. Supp. 368, 370-71 (M.D.N.C. 1967) (denying jurisdiction over a nonresident manufacturer that did no local business but on request sent an order to the local plaintiff), *aff'd*, 391 F.2d 266 (4th Cir. 1968); *J.P. Morgan v. Heckle*, 171 F. Supp. 482, 483, 486 (E.D. Ill. 1959) (denying jurisdiction over a nonresident defendant who did no local business but on request sent 25 bags of grass seed, now claimed to contain noxious weed seeds, to plaintiff's agent in Illinois).

120. See *supra* note 117.

121. *E.g.*, *Electro-Craft Corp. v. Maxwell Elecs. Corp.*, 417 F.2d 365, 368 (8th Cir. 1969) (explaining why courts more readily assert jurisdiction over nonresident sellers than buyers).

122. This would seem to be a fair description of the defendants in *Erlanger Mills* and the cases cited *supra* in note 119.

123. No case to my knowledge involves such an accommodation. One can imagine a situation in which a seller in one state sells an experimental product to a buyer in another state at the request of a mutual friend and then is sued locally by the buyer because the product is defective or causes injury.

124. 480 U.S. 102 (1987). *Asahi*, a Japanese manufacturer, had sold valve assemblies to defendant Cheng Shin Rubber Indus. Co., a Taiwanese company that manufactured motorcycle tire tubes. *Id.* at 106. One such tube incorporating an *Asahi* valve ended up inside a Honda motorcycle tire, which burst in California. *Id.* at 105-06. The injured rider of the motorcycle sued several companies, including Cheng Shin, which pleaded *Asahi*. *Id.* at 106. In her plurality opinion upholding *Asahi*'s jurisdictional challenge, Justice O'Connor concluded that *Asahi* had simply sold its valve assemblies to Cheng Shin and had not sought to serve the California market, even though its products were regularly sold and used there. *Id.* at 112. The other justices either rejected or refused to consider this approach. *Id.* at 116.

Because of changes in the Supreme Court's membership since 1987, a majority may support this view today. Lower federal courts have tried to avoid taking sides. Those upholding jurisdiction often note that the facts satisfy both the traditional approach as well as the more demanding *Asahi* approach. *E.g.*, *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 29-30 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). Those courts denying jurisdiction on the basis of *Asahi* must, of course, endorse Justice O'Connor's approach. *E.g.*, *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374-76 (8th Cir. 1990) (denying jurisdiction over foreign firm manufacturing a custom, expensive component known to be designed for use in America).

their goods or component parts to or through other manufacturers or such market intermediaries as distributors, wholesalers, fabricators, repackagers, and assemblers,¹²⁵ and thereby relinquish all interest in where, how, and with what success their goods subsequently are marketed.¹²⁶ These initial sellers,¹²⁷ the plurality said, should not always be subject to jurisdiction in forums in which their goods are regularly sold to consumers, even if the goods cause personal injury. To maintain this jurisdictional immunity, however, the goods in their original form ideally should not be branded, trademarked, or otherwise differentiated, lest these source designations manifest a desire for notoriety in distant forums.¹²⁸ The original sellers

125. Although *Asahi* dealt with a manufacturer of component parts, its potential applicability to manufacturers of final products that distribute through intermediaries uniformly has been recognized by lower federal courts. *E.g.*, *Soo Line R.R. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526, 528-29 (8th Cir. 1991) (denying jurisdiction in Minnesota when defective railroad car made by defendant in Canada caused personal injury); *Benitez-Allende*, 857 F.2d at 28-30 (upholding jurisdiction over foreign manufacturer of pressure cookers after careful consideration of *Asahi*).

126. In *Asahi* the plurality opinion stated:

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Asahi, 480 U.S. at 112.

127. A defendant seller of goods who deals anonymously and through intermediaries with the forum state, and who may thereby claim jurisdictional immunity under *Asahi*, will ordinarily not establish privity of contract with, or extend express warranties to, local plaintiffs. Local plaintiffs who suffer personal injury or property damage from these goods still may assert against the defendant seller valid substantive claims of strict tort liability. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965). However, those local plaintiffs who suffer only economic loss—the persons whose jurisdictional needs this discussion addresses—and who lack privity of contract may assert a substantively valid claim for the implied warranty of merchantability in only a minority of jurisdictions. *E.g.*, *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289-92 (Alaska 1976) (upholding warranty claim for economic loss from defects in a mobile home against remote manufacturer). *See generally* JAMES V. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-5 (3d ed. 1988); BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 10.03[3][d] (1984). Thus, although *Asahi* questions will arise most often in products liability actions involving claims of personal injury or property damage, such questions can also arise in actions seeking only damages for economic loss.

128. The cases have not yet specifically addressed this issue. Differentiating the goods through trademarks, trade dress, or distinctive packaging, all of which are designations of a common source, evidences a desire on the defendant-manufacturer's part to be known wherever the goods are sold at retail. This desire is inconsistent with, if not fatal to, a claim of *Asahi* immunity. Manufacturers, however, sometimes discretely and inconspicuously place their name on their goods, even though that act normally is not required by law. Thus, *Asahi* valve stems are marked with the circled letter "A," which apparently is *Asahi*'s trademark. *Asahi*, 480 U.S. at 107. *Asahi*'s intent presumably is to facilitate identification, rather than to create local sales appeal. Such a discrete, limited use of the manufacturer's name or trademark, without more, should not constitute the additional purposeful contact with the forum that dissolves *Asahi* immunity.

must also refrain from advertising,¹²⁹ marketing, or servicing¹³⁰ the goods in the forum state either directly or through dealers. It may even prove fatal to sell to an intermediary known to serve a specific geographic market.¹³¹ In effect, the seller must appear to be ignorant of and totally indifferent to what happens to the goods after they leave her possession.

Manufacturers of component parts requiring periodic replacement face additional problems under *Asahi*. Replacement stocks of these parts normally are kept for sale within many states. In addition the manufacturers often place their name and identifying marks indicating the model, type, or size upon the parts or their containers. Should such business activity, which tends to identify and locate the parts manufacturer within the forum and increase its earnings therein, amount to a surrender of its *Asahi* defense, even though someone other than the manufacturer is wholly responsible for both the original and the replacement business? Recall that in *Asahi* the component part in question was a valve that bore Asahi's trademark and was incorporated into a motorcycle tire tube manufactured by defendant Cheng Shin.¹³² Replacement stocks of Cheng Shin tire tubes, many of which employed Asahi valves, were maintained in many American motorcycle stores.¹³³ Although Cheng Shin apparently did not challenge local jurisdiction,¹³⁴ *Asahi* persuaded four justices that despite the foreseeable presence of its valves in tubes sold locally both as original equipment and in replacement, it was not involved in this business and had not sought to

129. See *supra* note 126.

130. See *Morris v. SSE, Inc.*, 843 F.2d 489, 491-94 (11th Cir. 1988) (holding a manufacturer of parachute activation devices subject to a products liability, wrongful death suit in a state in which manufacturer had no dealers but at the request of a local seller of skyjumping equipment had serviced the device involved in the accident and returned it to the forum state).

131. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir. 1989) (upholding jurisdiction over a foreign trading company that sent regular shipments of asbestos to a Texas-based distributor), *cert. denied*, 493 U.S. 823 (1989); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 29-30 (1st Cir. 1988) (upholding jurisdiction in products liability actions over a foreign manufacturer that chose a sales agent to represent it within the forum), *cert. denied*, 489 U.S. 1018 (1989).

132. See *supra* notes 124, 128.

133. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106 (1987) (noting that Cheng Shin used Asahi valves frequently, but not exclusively). In one cycle store in Solano County, California, approximately half its replacement stock of 115 tire tubes was found to have been manufactured by defendant Cheng Shin. *Id.* at 107. If Cheng Shin was involved in this replacement business, packaged the tubes in boxes containing its name, and also provided the local retail store with advertising or promotional materials, it had clearly surrendered any claim to *Asahi* immunity, even though the tube involved in the accident was part of the motorcycle's original equipment and had not been sent to the United States by Cheng Shin.

134. There is no mention in *Asahi* of a jurisdictional challenge by defendant Cheng Shin. Such a challenge would have had little chance for success, in part because of Cheng Shin's involvement in the sale of replacement tubes. See *supra* note 133.

serve the California market.¹³⁵

A final issue involving sellers warrants discussion. The regular shipment of goods into the forum state normally will subject a seller to local jurisdiction with respect to claims for defects or deficiencies in the goods. Will these shipments also expose a seller to local jurisdiction with respect to other claims arising out of the relationship with the buyer? For example, suppose that a foreign seller, at a local firm's behest, agrees outside the forum to supply the latter with goods. Eventually the seller terminates the relationship by refusing to fill new orders or violates an allegedly exclusive relationship by dealing with a competitor of the local firm, who sues locally. In a number of these cases New York courts have denied jurisdiction¹³⁶ on the sole ground that the defendant was not transacting local business or the contacts were minimal. These cases are distinguishable from *Burger King*, which involved a business relationship that was continuous and substantial and was evidenced by a lengthy, written franchise agreement.¹³⁷ The "relationship" in the New York decisions was either oral or was committed to a brief writing and amounted only to an expression by the seller of a present willingness to fill the plaintiff's orders.¹³⁸ This "relationship" would have enhanced the local forum's right to adjudicate a claim that the goods actually shipped to the forum by the defendant were defective or deficient.¹³⁹ However, the relationship was too thin to support jurisdiction over claims with respect to the relationship itself—i.e., that the defendant wrongfully supplied others in competition with the plaintiff or simply stopped dealing with the plaintiff.¹⁴⁰ To support jurisdiction over what amounts to a foreign breach of contract, a more substantial *Burger King*-style relationship is required. "[If] the affiliating acts are limited in scope . . . the jurisdictional risk will be correspondingly limited to claims

135. *Asahi*, 480 U.S. at 112-13.

136. *McKee Elec. Co. v. Rauland-Borg Corp.*, 229 N.E.2d 604, 607-08 (N.Y. 1967) (refusing jurisdiction in a case involving termination of an unwritten, year-to-year distributorship agreement); *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 228 N.E.2d 367, 368-69 (N.Y. 1967) (denying jurisdiction over a Scottish maker of Bombay gin who gave New York plaintiff an exclusive agency but did not stop a Pennsylvania agent from reselling in New York); *Kramer v. Vogl*, 215 N.E.2d 159, 160-62 (N.Y. 1966) (holding that Austrian corporation was not subject to jurisdiction in New York for selling to plaintiff's competitor in violation of an alleged promise to supply plaintiff exclusively).

137. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466-67 (1985).

138. *E.g., Kramer*, 215 N.E.2d at 160-61 (involving a defendant Austrian leather supplier who orally agreed in Paris to supply New York plaintiff, confirmed the arrangement by letter, and thereafter filled plaintiff's orders, shipping F.O.B. European ports).

139. See *supra* note 113 and accompanying text.

140. Recall the difficulty of asserting local jurisdiction over nonresidents who break promises to perform locally. See *supra* text accompanying notes 27-30, 59-65. Here a nonresident defendant allegedly has broken a promise to continue supplying the local plaintiff with goods either exclusively or at all. *Kramer*, 215 N.E.2d at 160.

arising specifically from them"¹⁴¹ The principal affiliating acts herein are shipments of goods to the plaintiff in the forum. The only claims arising specifically from these acts would be those asserting defects or deficiencies in the goods shipped.

3. Jurisdictional Assertions Against Buyers

A nonresident commercial buyer who regularly orders goods from a local seller should be subject to local jurisdiction in an action arising out of the cancellation or rejection of an order or a failure to pay for it.¹⁴² However, a nonresident consumer who fails to pay for goods ordered by mail or telephone from a local seller normally is not subject to local jurisdiction.¹⁴³ Thus, it appears that a forum's power to assert jurisdiction over buyers in actions by sellers depends on the frequency of the buying and the identity or nature of the buyer. The difficult cases are those in which a nonresident commercial buyer places a single order with a local seller. Many decisions fit this pattern. The results are divided,¹⁴⁴ and no rule, test, or formula has emerged. For now one can only identify those additional factors that seem to move courts to deny or uphold jurisdiction.¹⁴⁵ Modern courts are not moved by the fact that the contract was made or accepted or that title to the goods passed in the seller's state,¹⁴⁶ or that the seller's actions in filling the

141. *Louis*, *supra* note 16, at 428. In support of this assertion, I cited two well known early cases, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *Hanson v. Denckla*, 357 U.S. 235 (1958). In *McGee* the Court upheld jurisdiction over an insurance company defendant in a state where it did no local business. 355 U.S. at 221-23. The defendant, however, had reinsured the life of a single local resident who had been insured by another company acquired by defendant. *Id.* The *McGee* claim at least arose directly out of that one insurance policy. *Louis*, *supra* note 16, at 428 n.149. In *Hanson*, where jurisdiction over an out-of-state trust company was denied, the trust company had sent trust income to a beneficiary in the forum but was sued there by others seeking to determine the validity of the entire trust. 357 U.S. at 238-40, 254.

142. See *supra* notes 7, 51, 107 and accompanying text.

143. See *supra* notes 36, 82.

144. In *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 601-02 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980), the leading decision denying jurisdiction, the court cited many of the cases dividing on this question. Many additional cases are cited and discussed in *Gentile*, *supra* note 14, at 384-87, and *Siegel*, *supra* note 24, at 356-61. Some additional interesting cases include *Galgay v. Bulletin Co., Inc.*, 504 F.2d 1062, 1064-66 (2d Cir. 1974) (denying local jurisdiction against a nonresident commercial purchaser of expensive, custom-made machine); *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902, 903-07 (D. Minn. 1971) (same); *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 528 P.2d 1248, 1250-53 (Kan. 1974) (denying jurisdiction over a nonresident repeat purchaser of goods that had been specially ordered and made for the buyer outside state); *Darby v. Superior Supply Co.*, 458 S.W.2d 423, 424 (Tenn. 1970) (denying jurisdiction over nonresident consumer-purchaser of an expensive order of lumber from seller's stock, even though purchaser hired a truck to pick up the lumber shipment in the forum state).

145. See *Weintraub*, *supra* note 35, at 625-26.

146. See *supra* note 75.

order arguably amounted to a local performance of the contract as specified in the applicable long-arm provision.¹⁴⁷ Many courts are very likely to be influenced by the fact that the buyer personally entered the forum state in connection with the solicitation, negotiation, or performance of the purchase agreement.¹⁴⁸ Conversely, courts are reluctant to assert jurisdiction in the seller's forum over passive purchasers who simply order and await delivery.¹⁴⁹

Courts are more sympathetic to a buyer who orders goods from a seller's inventory than to one who orders goods that the seller must specially acquire or manufacture.¹⁵⁰ In the much discussed and criticized¹⁵¹ decision in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*,¹⁵² jurisdiction over the nonresident defendant buyer of custom-made goods was denied. While acknowledging that the goods were specially made for the defendant,¹⁵³ the court noted that the contract did not specify that the goods were to be produced in the seller's forum, although that was the likely place of manufacture.¹⁵⁴ The court relied too heavily on this minor distinction, though; instead, it might have relied more on the fact that to

147. See *Lakeside Bridge*, 597 F.2d at 599-600.

148. See *supra* note 85.

149. *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084-85 (1st Cir. 1973) (distinguishing between passive and active commercial purchasers of specialized materials); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir. 1972) (distinguishing between passive buyers and those who become actively involved in a transaction). Needless to say, most mail order consumer-purchasers are passive purchasers. See Gergen, *supra* note 24, at 178, for the suggestion that passive purchasers deserve protection because they usually lack awareness, opportunity, and financial incentive to structure the transaction jurisdictionally.

150. *E.g., In-Flight Devices Corp.*, 466 F.2d at 232 (affirming jurisdiction over a buyer who entered into a contract "calling for substantial production of goods . . . to take place entirely within the forum state"); *Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560, 561, 564-65 (Tenn. 1981) (affirming jurisdiction over nonresident who ordered custom book binding in the forum state), *cert. denied*, 455 U.S. 994 (1982). But see *Galgay v. Bulletin Co., Inc.*, 504 F.2d 1062, 1064-66 (2d Cir. 1974) (denying jurisdiction over buyer of expensive, custom-made machine); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1027, 1029 (5th Cir. 1983) (denying jurisdiction over buyer of custom-made product), *cert. denied*, 466 U.S. 962 (1984); *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 528 P.2d 1248, 1250-53 (Kan. 1974) (denying jurisdiction over sporadic nonresident purchaser from local seller, who had the goods specially made for the buyer by a nonresident third party). In many of the cases denying jurisdiction, the goods were rejected as defective or non-conforming by the buyer on receipt. Some courts seem sympathetic to the buyer's claim that she did not get what she ordered and should not be compelled to litigate this question elsewhere, particularly if the evidence of the defect is in the buyer's state. See, *e.g., McQuay, Inc., v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902, 908 (D. Minn. 1971) (denying local jurisdiction over nonresident purchaser of allegedly defective expensive machinery where witnesses to defect are in buyer's forum).

151. See Siegel, *supra* note 24 *passim*.

152. 597 F.2d 596, 597 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

153. *Id.* at 598.

154. *Id.* at 603.

obtain the business the seller personally had sought out the buyer in the latter's home state.¹⁵⁵ Perhaps the court felt that the seller's willingness to travel interstate to obtain the business was more jurisdictionally significant¹⁵⁶ than the contract's requirement of custom manufacture by the seller.

For this reason I am not a critic of the court's result, but I also would not oppose a contrary rule specifying that the custom manufacture or procurement of expensive goods for a commercial buyer normally will support jurisdiction over the buyer in the seller's forum.¹⁵⁷

Suppose that the seller in *Lakeside Bridge* had solicited the business by mail or telephone and had not personally entered the buyer's home state for that purpose. What significance, if any, should follow from the fact that the seller initiated the transaction or that the buyer did not? This assumes, of course, that the aggressor clearly can be identified.¹⁵⁸ Some cases purport to attach significance to this fact; others downplay it.¹⁵⁹ Thus, one critic of *Lakeside Bridge* has noted that although the plaintiff was the aggressor, the defendant thereafter placed the purchase order, provided design specifications, engaged in telephone and mail communication, and paid part of the purchase price.¹⁶⁰ If these activities of the defendant buyer had clearly constituted "purposeful availment," then its failure to make the first contact obviously should not have mattered jurisdictionally. On the other hand, had the question of sufficient contacts been close, then proof that the defendant was, or was not, the aggressor perhaps would have been significant.

One commentator has suggested that the difference between the consumer buyer, who is not subject to jurisdiction, and the one-time commer-

155. *Id.* at 598. But see *Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560, 561, 563-66 (Tenn. 1981) (upholding jurisdiction over nonresident purchaser of custom binding even though seller's agents had visited the purchaser's place of business to arrange the transaction), *cert. denied*, 455 U.S. 994 (1982).

156. The seller's trip to the buyer's forum also would have been a significant contact if the buyer had sought to obtain jurisdiction over the seller there. See *supra* note 85. The trip would have pointed to the seller as the aggressor or the party who had initiated the transaction—a fact courts often find relevant in close cases involving assertions of jurisdiction over buyers. See *infra* text accompanying notes 158-60. Thus, one can visualize the attorney for the buyer arguing to the court as follows:

Plaintiff came to us and offered to supply the necessary structural assemblies, which eventually arrived but were partially defective; and so we withheld a portion of the purchase price. Why should we now have to litigate in Wisconsin when they manifested a willingness to do business with us here?

157. See Siegel, *supra* note 24, at 357, 359-60; Gergen, *supra* note 24, at 179 (arguing that for large transactions, defendant's awareness of the jurisdictional risk is greater and the transaction costs of dealing with the risk are proportionally smaller).

158. See *supra* text accompanying notes 80-82.

159. See *supra* text accompanying notes 80-83; see also Siegel, *supra* note 24, at 357 (citing cases that minimize the significance of the aggressor's identity).

160. Siegel, *supra* note 24, at 357.

cial buyer, who should be, is that the latter has the knowledge, resources, and incentive to structure the transaction and change the result through devices such as forum selection and choice-of-law clauses.¹⁶¹ However, commercial sellers possess equivalent incentives, knowledge and resources. What then is the result if the contract is silent as to jurisdiction? Apparently the writer believes—for reasons not specifically stated—that the commercial buyer presumptively should be subject to jurisdiction in the commercial seller's forum, just as the commercial seller presumptively is subject to jurisdiction in the buyer's forum.¹⁶² In other words, both bear the onus of freeing themselves contractually from the presumption.¹⁶³ Many purchase contracts, however, are more the result of a battle of forms between the parties than of specific negotiations. It is not self-evident that the absence of jurisdictional provisions in the form actually used should resolve the jurisdictional question automatically because automatic solutions are not the anticipated end product of efficient private ordering.

A different argument can be made for treating commercial buyers the same as commercial sellers—that is, presumptively subject to jurisdiction in the other's home state. Both activities generally are undertaken for profit.¹⁶⁴ If a seller in effect must consent to jurisdiction as the cost of pursuing profitable sales in the forum,¹⁶⁵ then arguably so must a commercial buyer seeking to make profitable local purchases. Both presumably are equally able to litigate away from home, to budget for the expense and inconvenience, and to anticipate and sometimes deal with the jurisdictional problem contractually. Admittedly, greater personal effort normally is required for successful selling than for buying. Consequently, buyers typically will have fewer contacts with the forum than sellers and perhaps more often will be able to escape the presumption of jurisdiction through a showing that the transaction was minimal, aberrational, or out of the ordinary course of business. These escape possibilities are not wide enough, however, to undermine the basic validity of the presumption in its application to buyers.

161. Gergen, *supra* note 24, at 178-79.

162. *Id.*

163. Different questions are raised when a commercial seller seeks contractual alteration of the presumption that it is subject to jurisdiction in the consumer buyer's home state. Recently, the United States Supreme Court suggested that in the absence of clear fraud or overreaching, the seller's use of such clauses might be upheld. *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522, 1528 (1991) (upholding a forum selection clause in a consumer contract requiring an injured cruise passenger to sue defendant cruise line at its principal place of business).

164. Siegel, *supra* note 24, at 357.

165. See *supra* text accompanying note 121.

E. Continuing Commercial Relationships—The Burger King Case

In 1979, Burger King Corporation, one of the world's largest restaurant organizations, entered into a twenty-year agreement with two individuals for the operation of an existing franchise restaurant in Michigan.¹⁶⁶ The two franchisees paid a substantial initial fee, agreed to monthly payments covering royalties, fees, and rent,¹⁶⁷ and submitted to extensive regulation of their operation.¹⁶⁸ Although the franchisees initially had applied to, and apparently dealt primarily with, Burger King's district office in Michigan, they also dealt directly with the company's home office in Miami, Florida.¹⁶⁹ Within a year the business faltered and the franchisees, who fell behind in their franchise payments, entered into extensive negotiations by mail and telephone with officials of Burger King in Miami.¹⁷⁰ Finally, Burger King canceled the franchise and ordered the two individuals to vacate the premises.¹⁷¹ Upon their refusal, Burger King sued in federal court in Miami, alleging breach of the franchise agreement and infringement of its trademarks.¹⁷² The defendants unsuccessfully challenged the jurisdiction of the Florida federal court over their persons, reversed that result in the court of appeals,¹⁷³ but ultimately lost in the United States Supreme Court.

Writing for the Court, Justice Brennan noted that, contrary to statements in the opinion of the court of appeals,¹⁷⁴ the defendants often had dealt directly by mail and telephone with the plaintiff's Miami office,¹⁷⁵ and that Rudzewicz was an experienced, sophisticated business person who was clearly aware of his Florida connection.¹⁷⁶ Hence, the facts did not compel a prophylactic result designed to protect consumers and small-time

166. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466-67 (1985). Rudzewicz, a successful Detroit accountant, put up the money for the franchise; MacShara, a younger man, was to manage the restaurant; the two were to divide the profits evenly. *Id.*

167. For the twenty-year franchise period, Rudzewicz personally obligated himself to payments exceeding one million dollars. *Id.* at 467.

168. *Id.* at 465.

169. *Id.* at 466-67.

170. *Id.* at 468.

171. *Id.*

172. *Id.* at 468-69.

173. *Burger King Corp. v. Macshara*, 724 F.2d 1505 (11th Cir. 1984). The majority opinion relied heavily on cases denying jurisdiction over one-shot commercial purchasers and mail-order consumer purchasers, *id.* at 1510, asserted that the defendants had dealt almost exclusively with the plaintiff's district office in Michigan and could not foresee litigation in Florida, *id.* at 1511-12, and expressed concern that a contrary result could subject small-time, "mom and pop" style franchisees to unfair litigation in the franchisor's forum, *id.* at 1512.

174. See *supra* note 173.

175. *Burger King*, 471 U.S. at 467-68, 481.

176. *Id.* at 485.

franchisees.¹⁷⁷ In upholding Florida's assertion of jurisdiction, Justice Brennan emphasized the length and substantiality of the commercial relationship between the parties,¹⁷⁸ the amount of money and interstate communications that regularly flowed from Michigan to Florida,¹⁷⁹ and the existence of a Florida choice-of-law clause in the contract.¹⁸⁰

The impact of the choice-of-law provision on the result in *Burger King* was insignificant. Whether and to what extent the presence of such clauses might affect closer cases remains to be seen.¹⁸¹ Moreover, because the interstate flow of money and communications is an inevitable byproduct of a continuing, substantial, interstate commercial relationship, the latter circumstance should be seen as the centerpiece of the Court's jurisdictional result.¹⁸² In effect, the Court seemed to say that whenever two business persons enter into a substantial, continuing contractual relationship, each ordinarily will be subject to jurisdiction in the other's home forum.¹⁸³ Although the Court left open the possibility that exceptions might be made for "mom and pop" franchisees unfairly subjected to litigation in the other party's home forum,¹⁸⁴ its unsympathetic response to consumers subject to

177. *Id.* at 486-87 (responding to the fears expressed by the court of appeals; see *supra* note 173).

178. *Id.* at 487 (noting that Rudzewicz had "established a substantial and continuing relationship with Burger King's Miami headquarters").

179. *Id.* at 465-66, 468, 481.

180. *Id.* at 481-82 (concluding that although a choice-of-law provision "would be insufficient to confer jurisdiction," it should not be ignored in considering whether purposeful availment was present).

181. Some of the commentary following *Burger King* opined that the Court had given substantial significance to the choice-of-law provision. See, e.g., Phyllis J. Towzey, Comment, 17 *RUTGERS L.J.* 683, 696-97 (1986); John J. Carey, Note, *Asserting in Personam Jurisdiction Over Parties to a Contract: Burger King Corp v. Rudzewicz*, 31 *ST. LOUIS U. L.J.* 453, 469 (1987). However, the Court employed the clause only as a makeweight argument. Indeed, I once believed that, except for the closest cases, the clause would have little jurisdictional significance. In *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991), however, the Court upheld the use of a more drastic forum selection clause in a consumer form contract. Consequently, the Court's willingness to give jurisdictional significance to a choice-of-law provision perhaps must be taken more seriously.

182. See Duncan E. Barber, Note, *Minimum Contacts in Single Contract Cases: Burger King Has Its Way*, 1986 *B.Y.U. L. REV.* 505, 521 ("[T]he franchise agreement contemplated long-term, continuing, and wide-reaching contacts with Burger King in Florida."); Carey, *supra* note 181, at 468 (emphasizing the long-term relationship).

183. Franchisors clearly are amenable to jurisdiction in local actions by franchisees. Thus, the significance of *Burger King* is its approval of jurisdiction over franchisees in local actions by franchisors. That is the more difficult case because of the already recognized danger of unfairness to small-time franchisees. See *supra* notes 173, 177. Furthermore, since the home forums of the parties to a substantial, continuing commercial relationship automatically have jurisdiction over the parties with respect to disputes arising out of the relationship—and most jurisdictions have declaratory judgment statutes—the danger of a race to the courthouse door, or parallel litigation in both forums, arises.

184. See *supra* note 177.

forum selection clauses¹⁸⁵ suggests that it will condemn only truly blatant jurisdictional overreaching.¹⁸⁶ Perhaps state courts, which are free to declare their own jurisdictional rules,¹⁸⁷ will take a less one-sided approach.

Although *Burger King* is regularly cited and followed,¹⁸⁸ its impact upon promisors is still a question of conjecture or educated guess. The decision's principal contribution is its admonition that courts resolving jurisdictional challenges should ignore or downplay technical considerations,¹⁸⁹ and focus instead upon the contractual relationship between the parties and the extent to which that relationship brought the defendant in contact with the forum state.¹⁹⁰ Although *Burger King*'s identification of the proper focal point cannot be doubted, its principal effect unfortunately will be to subject to local jurisdiction those contracting parties with the

185. See *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991).

186. In *Carnival Cruise Lines*, the Court upheld a forum selection clause that required two Washington State cruise passengers to sue in Florida for an accident that occurred in the Pacific Ocean off the coast of Mexico. *Id.* at 1528. *Carnival* suggests that other consumers could be required to sue a commercial seller in the seller's place of business, even though jurisdiction over the seller usually exists in the buyer's home forum. Whether the Supreme Court would extend *Carnival* to allow, as a matter of federal law, a clause exposing the consumer to suit by the seller in the seller's home forum is unclear. In *Burger King* the Court upheld jurisdiction over the franchisees in Florida. Hence, the Court presumably would uphold a forum selection clause mandating that result. However, *Burger King* franchises typically are not "mom and pop" operations. Thus, the question remains whether the persons involved in small franchise operations would be subject to jurisdiction in local franchisor actions, either because of *Burger King* or because a forum selection clause in the agreement so provides.

187. *Carnival Cruise Lines* was an admiralty case governed by federal law, which will be applicable to other federal causes of action. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw. U. L. Rev. 700, 704 (1992) (noting that *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a previous admiralty case upholding a forum selection clause, had been followed in other cases involving federal causes of action). However, federal law is not binding on state courts adjudicating state causes of action. *Id.* at 705 n.28 (citing state cases that considered whether to follow *M/S Bremen*). *Carnival Cruise Lines*'s application to federal courts adjudicating state causes of action is unclear. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (holding that federal court in diversity considering transfer venue motion may take account of forum selection clause which is disfavored under local state law).

188. In *North Penn Gas Co. v. Corning Nat. Gas Corp.*, 897 F.2d 687, 689 (3d Cir. 1990), cert. denied, 498 U.S. 847 (1990), the court upheld jurisdiction over a nonresident purchaser of natural gas from a local plaintiff. The purchaser also had contracted with plaintiff for local storage of gas at substantial minimum rates and had paid millions of dollars to plaintiff pursuant to these rates, even though no gas actually was stored. The purchaser defendant repudiated the storage arrangement before its termination. See *Cottman Transmission Sys., Inc. v. Metro Distrib., Inc.*, 796 F. Supp. 838, 843-44 (E.D. Pa. 1992) (upholding jurisdiction over nonresident franchisee pursuant to a long-term agreement containing a choice-of-law provision); *Igloo Prods. Corp. v. The Mounties, Inc.*, 735 F. Supp. 214, 216 (S.D. Tex. 1990) (same).

189. See *supra* note 75 (identifying unimportant considerations, to which courts sometimes have paid great heed, such as the place where the contract was made, or technically was to be performed, or where title to the goods passed).

190. See Barber, *supra* note 182, at 508.

weaker bargaining position.¹⁹¹ Whether that will ever include those defendants who currently enjoy some degree of jurisdictional immunity—consumer purchasers, one-shot commercial purchasers, and promisors who commit anticipatory breaches of single contracts—remains to be seen. Thus, I have previously described cases in which a simple agreement to supply a local firm with goods does not result in local jurisdiction to contest the agreement's termination or adjudicate a claim that the agreement, now described as a "franchise" or "distributorship," was exclusive.¹⁹² Although at will supply arrangements are too insubstantial to satisfy the requirements of *Burger King*,¹⁹³ an arrangement that lasts several years and generates many shipments, substantial payments, and a volume of interstate communications does provide at least a colorable jurisdictional claim. Given the local bias inherent in jurisdictional decisionmaking,¹⁹⁴ some misapplication of *Burger King* to these and other less substantial commercial relationships must be anticipated.

IV. CONCLUSION

More than a half century ago Judge Learned Hand put the jurisdictional question in the following words:

We are to inquire whether the extent and continuity of what [the defendant corporation] has done in the state in question makes it reasonable to bring it before one of its courts This does not indeed avoid the uncertainties . . . but at least it puts the real question, and that is something. In its solution we can do no more than follow the decided cases.¹⁹⁵

Burger King asks the same question for contract cases but it similarly fails to "avoid the uncertainties." The uncertainties are inherent in the factual variations among the cases and cannot be banished from the decision-making process. For that reason I have heeded Judge Hand's admonition to "follow the decided cases." In that way one at least can predict what most courts will do in a variety of repetitive patterns and situations, "[a]nd that is something."

191. See *supra* note 183.

192. See *supra* text accompanying notes 136-38.

193. See *supra* text accompanying note 137.

194. See *Louis*, *supra* note 16, at 431.

195. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930).

