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# Vishay Intertechnology, Inc. v. Delta International Corp.: The Reach of North Carolina's Long-Arm Statute

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## *Vishay Intertechnology, Inc. v. Delta International Corp.* The Reach of North Carolina's Long-Arm Statute

The question whether an out-of-state corporation's contacts with a state are sufficient to permit that state's courts to exercise jurisdiction consistent with due process under the state long-arm statute requires a careful application of complex factors. The interstate character of modern commercial transactions and recent United States Supreme Court pronouncements on the reach of long-arm jurisdiction<sup>1</sup> complicate the analysis. In *Vishay Intertechnology, Inc. v. Delta International Corp.*<sup>2</sup> the United States Court of Appeals for the Fourth Circuit held that, in limited circumstances, telephone and written communications between California and North Carolina were sufficient to satisfy the requirements of both the North Carolina long-arm statute and federal due process.

The *Vishay* court was faced with a defendant whose routine commercial practices involved little contact with North Carolina. The government of Korea unwittingly laid the foundation for multiple litigation when it solicited bids for sixty units of a measurement device. Vishay Intertechnology, Inc. (Vishay), a Delaware corporation that manufactures and sells such measurement devices through its North Carolina office, submitted the next-to-lowest bid on the devices through its agent in Korea. The bid was based on its foreign list price.<sup>3</sup> Delta International (Delta), a California corporation, submitted the lowest bid on the devices. Delta's bid was based on an oral quotation of Vishay's *domestic* price for the instruments that allegedly was obtained deceptively.<sup>4</sup>

The alleged misrepresentation arose out of a complex series of events. Delta's vice-president had telephoned Vishay requesting one measurement device. He allegedly misrepresented himself as an agent of "Delta Corporation" and a Vishay order clerk mistakenly quoted the unit's domestic price. A Vishay supervisor who was preparing the written quotation, however, recognized Delta as an exporter. At his supervisor's request the order clerk notified Delta that the foreign price would apply.<sup>5</sup> Delta insisted that the domestic price should apply, and Vishay withdrew the oral quotation. Delta next sent Vishay a purchase order for sixty units of the device at the domestic price;

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1. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (Oklahoma court's exercise of jurisdiction offended minimum contacts requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). See generally 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 (1980).

2. 696 F.2d 1062 (4th Cir. 1982).

3. Vishay charges higher prices in foreign markets than in domestic markets because overseas marketing involves greater sales commission, promotion, service, warranty, and technical assistance costs. *Id.* at 1064.

4. Although Vishay informed the Korean government that Delta's bid was obtained deceptively, Delta's bid was not disqualified because of the government's bidding policy. *Id.*

5. The order clerk contacted Delta's vice-president, who initially denied that Delta was an exporter. *Id.*

Vishay rejected the purchase order.<sup>6</sup> In subsequent communications, Delta demanded that Vishay supply the devices at the domestic price, and threatened to sue if Vishay did not comply. Eventually, Delta did file suit against Vishay in a California federal district court, but the complaint was dismissed on the merits following a hearing. Delta eventually obtained similar devices from a competitor of Vishay, and sold them to the Korean government.<sup>7</sup>

Vishay then filed suit against Delta in the United States District Court for the Eastern District of North Carolina. Vishay sought damages for unfair and deceptive business practices, tortious interference with contractual relations, and abuse of process. The district court dismissed the complaint for lack of sufficient contacts between Delta and the State to satisfy the requirements of personal jurisdiction under North Carolina's long-arm statutes.<sup>8</sup> The court of appeals reversed.<sup>9</sup> The court concluded that Delta's contacts with North Carolina—three letters and five telephone calls to Vishay's North Carolina office—satisfied the requirements of the North Carolina long-arm statutes and federal due process.<sup>10</sup>

At the outset, the *Vishay* court noted that the North Carolina long-arm statutes<sup>11</sup> should be construed liberally, permitting the assertion of jurisdiction to the full extent allowed by due process.<sup>12</sup> Foreign corporations not transact-

6. The purchase order allegedly represented the first time that Delta indicated a need for more than one unit. Delta admitted that the 60 units were to be offered for resale to the Korean government. *Id.*

7. *Id.*

8. *Id.* at 1065.

9. *Id.* at 1063. The court first set forth the process for determining jurisdiction under a long-arm statute:

To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the applicable North Carolina law would allow the exercise of long-arm jurisdiction over Delta. If so, the court must determine if such an exercise of jurisdiction comports with due process.

*Id.* at 1064.

10. *Id.* at 1067-69.

11. North Carolina's comprehensive long-arm statute, N.C. GEN. STAT. § 1-75.4 (1983), was modeled after Wisconsin's long-arm statute. *See* WIS. STAT. ANN. § 801.05 (West 1977 & Supp. 1983). North Carolina General Statutes § 1-75.4(2) provides for the exercise of jurisdiction under any state statute that specifically confers jurisdiction. Thus, N.C. GEN. STAT. §§ 55-143 to -145 (1982), enacted in 1955 and redesignated as part of the North Carolina Business Corporation Act, remain in effect to provide alternative grounds for asserting jurisdiction over corporations. *See* 1 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§ 937.5-937.20 (2d ed. Supp. 1970); R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE §§ 32-1 to -9 (3d ed. 1983). N.C. GEN. STAT. § 55-145 (1982) grants jurisdiction over foreign corporations not transacting business in the State; it is the "most far-reaching of the statutes asserting jurisdiction over foreign corporations." 1 A. MCINTOSH, *supra* § 937.20, at 180 n.98.73. Section 55-145 had been called "the minimum contact statute" prior to the adoption of § 1-75.4. *See* Note, *Corporations—Jurisdiction over Foreign Corporations Not Qualified to Transact Business in North Carolina*, 44 N.C.L. REV. 449, 543 (1966). *See generally* Comment, *Jurisdiction over Foreign Corporations Not Transacting Business in North Carolina—A Changing Attitude*, 2 WAKE FOREST INTRA. L. REV. 1 (1966) (tracing development of North Carolina law under § 55-145).

12. "There is a clear mandate that the North Carolina long-arm statute be given a liberal construction." *Vishay*, 696 F.2d at 1065. N.C. GEN. STAT. § 1-75.1 (1983) provides: "This Article shall be liberally construed to the end that actions be speedily and finally determined on their merits." Furthermore, the drafters of the Business Corporation Act provide insight into the legislature's intent in adopting N.C. GEN. STAT. § 55-145 (1982).

ing business in the State also are subject to suit on any cause of action arising out of "tortious conduct" within the State under North Carolina General Statutes section 55-145(a)(4).<sup>13</sup> Because Delta's initial solicitation of a price quotation and the resulting oral and written communications formed the facts necessary to prove Vishay's claims of unfair business practices and interference with contractual relations, the court of appeals concluded that these telephonic and written communications constituted "tortious conduct" within North Carolina. The court relied on *Murphy v. Erwin-Wasey, Inc.*,<sup>14</sup> in which the United States Court of Appeals for the First Circuit had recognized the modern business practice of using mail service rather than personal messengers, and stated that "[w]here a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."<sup>15</sup> The

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Foreign corporations are by Section 145 made subject to local suits by residents of North Carolina in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority. *International Shoe Co. v. State of Washington* is thought to have removed the constitutional barriers against such an extension of jurisdiction over a foreign corporation which is not so transacting business as to come within the domestication requirements. Provision is also made for substantial service in this situation. It is thought that wise policy favors subjecting such foreign corporations to suit here for the convenience of residents of this state where it is constitutionally possible, since the alternative is to force our residents to bring their actions in foreign jurisdictions.

Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26, 54 (1954) (emphasis added). Thus, "[e]ach of these statutes was apparently intended to extend the jurisdiction of the North Carolina courts over foreign corporations to what was on each occasion believed to be the ultimate limits allowed by due process." R. ROBINSON, *supra* note 11, § 32-1, at 477.

13. N.C. GEN. STAT. § 55-145(a)(4) (1982):

(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

.....

(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

In *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366, 1379 (M.D.N.C. 1973) the court stated, "[W]hen seeking to acquire personal jurisdiction under G.S. § 55-145(a)(4) a plaintiff must show: (1) that the cause of action arose in North Carolina; and (2) the defendant committed one or more acts which gave rise to the cause of action in this State."

14. 460 F.2d 661 (1st Cir. 1972). The long-arm statute applicable in *Murphy* allowed the court to obtain personal jurisdiction in a cause of action arising out of the person's "causing tortious injury by an act or omission in this commonwealth." MASS. GEN. LAWS ANN. ch. 223A, § 3(c) (West Supp. 1984). In *Murphy* the court stated that the delivery in Massachusetts by mail or telephone of a false statement originating outside the state, followed by reliance on the statement in Massachusetts, was an act within Massachusetts. *Murphy*, 460 F.2d at 664. This statement was not necessary to the court's holding, however, since false statements also were made face-to-face within the state.

15. *Murphy*, 460 F.2d at 664. The *Murphy* court relied on *Buckley v. New York Post Corp.*, 373 F.2d 175, 179 (2d Cir. 1967), in which the court stated that "damage to a person's reputation caused by sending a libel into the state where he lives could still be considered as arising from 'tortious conduct' in that state," because "it could well be said that that publisher directly inflicts damage on the intangible reputation just as the frequently hypothesized but rarely encountered gunman firing across a state line does on the body." After paraphrasing from the above-quoted passage, the *Murphy* court concluded:

We believe the same is true of the mailing of a fraudulent misrepresentation into a state. We would be closing our eyes to the realities of modern business practices were we

*Vishay* court rejected defendant's arguments that *Murphy* was questionable authority,<sup>16</sup> and noted that the *Murphy* rationale has been followed more often than rejected.<sup>17</sup>

In determining whether causing process to be served on *Vishay* also constituted "tortious conduct" within North Carolina for purposes of section 55-145, the court looked to comparable cases in other federal courts.<sup>18</sup> The court

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to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal messenger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger.

*Murphy*, 460 F.2d at 664.

16. *Vishay*, 696 F.2d at 1066. The only two cases relied on by Delta that rejected the *Murphy* rationale were *Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973) and *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). Although both cases can be distinguished from *Murphy*, they both rejected *Murphy*.

*Margoles* was distinguishable because it involved a different type of long-arm statute than that at issue in *Murphy*. Nevertheless, the *Margoles* court criticized the apparent distinction drawn in *Murphy* between intentional acts causing a "tortious injury" within the state and negligent acts creating a condition from which damage might later arise. Referring to the *Murphy* court's reasoning, the *Margoles* court remarked: "Evidently an intentional act . . . is a type of continuing wrong which carries its perpetrator mysteriously along and thrusts him, constructively of course, into the domain of the injurious consequences. The law regarding jurisdictional matters is confusing enough; it needs less legal fictions, not more." *Margoles*, 483 F.2d at 1220.

*Weller* was distinguishable from *Murphy* on the basis that *Weller* subjected officers of a corporation to jurisdiction. Disregarding this distinction, the *Weller* court observed that "*Murphy* . . . was rejected by the Court of Appeals for the District of Columbia in *Margoles v. Johns*." *Weller*, 504 F.2d at 930. The court concluded "the decision in *Margoles* is sound, and we will follow it." *Id.* at 931.

In another case cited by Delta, *Kolikof v. Samuelson*, 488 F. Supp. 881 (D. Mass. 1980), the court distinguished *Murphy*. *Kolikof*, 488 F. Supp. at 883. *Kolikof* also gave one of the best explanations of the *Murphy* rationale: "In a misrepresentation case such as *Murphy*, the nature of the information transmitted across state lines is a crucial element of the alleged tort since it is the words themselves which are intended to bring about the injury." *Id.*

17. *Vishay*, 696 F.2d at 1066-67 (citing *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979)). See also *Brown v. Flowers Indus.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1275 (1983); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974); *J.E.M. Corp. v. McClellan*, 462 F. Supp. 1246 (D. Kan. 1978).

In addition to the cases cited by *Vishay*, the most telling case is *Burtner v. Burnham*, 13 Mass. App. Ct. 158, 430 N.E.2d 1233 (1982), in which the Massachusetts appellate court followed *Murphy*'s interpretation of the Massachusetts long-arm statute. *Burtner* concerned a misrepresentation, perpetrated by mail and telephone, of the acreage in a land sale. Plaintiffs relied on the misrepresentation. The appellate court found that jurisdiction existed "particularly in the light of Federal cases in the First Circuit," then outlined the cases both following and rejecting the *Murphy* cases. *Burtner*, 430 N.E.2d at 1236-37. The Oregon Supreme Court also has cited the *Murphy* rule with approval. See *State ex rel. Academy Press, Ltd. v. Beckett*, 282 Or. 701, 581 P.2d 496 (1978); *BRS, Inc. v. Dickerson*, 278 Or. 269, 563 P.2d 723 (1977); *State ex rel. Advanced Dictating Supply v. Dale*, 269 Or. 242, 524 P.2d 1404 (1974).

18. *Vishay*, 696 F.2d at 1067. In *Simon v. United States*, 644 F.2d 490 (5th Cir. 1981), the alleged tortious injury was based upon defendant's wrongful acts in influencing an Atlanta trial judge to issue a bench warrant for plaintiff's arrest. The subpoena was served on plaintiff by federal marshals in Louisiana. The United States Court of Appeals for the Fifth Circuit held that "the service in Louisiana of the subpoena ticket, improperly issued at the direction of Neal, was a cause-in-fact, or substantial factor, in the tort by Neal alleged as a cause of action in Simon's complaint," and thus was within the Louisiana long-arm statute. *Id.* at 499. See LA. REV. STAT. ANN. § 13:3201(c) (West 1968) ("causing injury or damage by an offense or quasi offense committed through an act or omission in this state"). In *Hamilton, Miller, Hudson & Fayne Travel Corp. v. Hori*, 520 F. Supp. 67 (E.D. Mich. 1981), the court held that service of an Illinois summons and complaint in Michigan constituted a tortious act under the Michigan long-arm statute. See MICH. STAT. ANN. § 27A.705(2) (Callaghan 1976) ("the doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort"). Since both statutes contain an

deduced the following general rule from these opinions: "[I]f an out-of-state defendant causes process to be served upon an in-state plaintiff, and the plaintiff subsequently sues the defendant in plaintiff's state, the state wherein the alleged abusive process was served, on a cause of action arising out of such abusive service of process," then personal jurisdiction exists over the defendant.<sup>19</sup> The court applied this rule and concluded that the service of process on Vishay in North Carolina subjected Delta to North Carolina jurisdiction for purposes of Vishay's claim of abusive service.

North Carolina General Statutes section 1-75.4(4)<sup>20</sup> provides that state courts may exercise jurisdiction over a local injury arising out of a defendant's act occurring outside the state if certain business activities are being carried on by the defendant within the state.<sup>21</sup> In determining whether Delta's conduct satisfied the section 1-75.4(4)(a) solicitation requirement, the court relied on two federal district court cases interpreting that section.<sup>22</sup> The court held that

express causation standard in the statutory language, a finding that abusive service of process falls within the statutes is easier than in the case of the North Carolina "tortious conduct in this State" requirement. To exercise personal jurisdiction in North Carolina, a court must employ *Murphy*-type fictions to conclude that an out-of-state act was within the state for jurisdictional purposes.

19. *Vishay*, 696 F.2d at 1067.

20. N.C. GEN. STAT. § 1-75.4(4) (1983) provides that jurisdiction may be asserted in the following circumstances:

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

- a. Solicitations or services activities were carried on within this State by or on behalf of the defendant; or
- b. Products, materials or things processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

By separating the foreign act/local injury grounds from the "wholly local" tort grounds, the legislature intended to avoid two problems encountered by other state statutes. 1 A. MCINTOSH, *supra* note 11, § 937.10 at 166 n.53. The first problem the statute was designed to avoid was having to decide whether "tortious acts" applies only to wholly local torts. *Id.* The second problem has been described as follows:

The second is the constitutional problem, which to some courts has seemed formidable when jurisdiction is asserted on the basis of a single tortious activity occurring in substantial part outside the forum state . . . . The North Carolina statutory assertion is not this liberal in favor of plaintiffs and specifically requires an amount of contemporaneous bolstering activities which some courts have thought constitutionally required to support jurisdiction in the foreign act-local consequences cases. The degree of bolstering activities required will of course have to be decided on a case by case basis.

*Id.*

21. *Vishay's claims* of injury suffered in North Carolina were sufficient for jurisdictional purposes because a plaintiff need not *prove* injury under section 1-75.4(4)(a). *Vishay*, 696 F.2d at 1067-68.

22. *Id.* at 1068. The first case on which *Vishay* relied, *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366 (M.D.N.C. 1973), held that the scouting of basketball players in North Carolina satisfied the "solicitation" requirement of § 1-75.4(4)(a), but did not satisfy the minimum contacts requirement of the due process standard. Noting that § 1-75.4 was intended to be construed liberally, the court stated:

Accordingly, there is no need to engage in a laborious analysis of the meanings of key terms in the two alternative requirements in the provisos set forth in § 1-75.4(4). To strictly construe the terms as set forth in those subsections so as to defeat in personam jurisdiction when such jurisdiction would be constitutionally permissible would conflict with the legislative and judicial mandate. Rather, it is concluded that the activities of the defendant, which include preliminary contacts with North Carolina basketball players

"Delta's written communications, especially the mailing of the purchase order, and telephone conversations with Vishay satisf[ie]d the solicitation requirement."<sup>23</sup> Thus, the court concluded that Delta's conduct fell within two provisions of the North Carolina long-arm statutes.

Having satisfied the first prong of the jurisdictional inquiry, the court of appeals turned to the due process prong.<sup>24</sup> The court quoted the applicable standard established in *International Shoe Co. v. Washington*:<sup>25</sup>

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>26</sup>

The court, however, refused to apply the quantitative analysis suggested by Delta, and instead focused on Delta's initiation of contacts with Vishay. The court concluded that, by initiating contact with Vishay Delta intended to avail itself of the benefits and protections of North Carolina laws.<sup>27</sup> Once again, the court of appeals relied on *Murphy*, in which the United States Court of Appeals for the First Circuit stated that:

[T]he element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction over the out-of-state sender of a fraudulent misrepresentation, for such a sender has thereby "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>28</sup>

The intentional character of Delta's contact with Vishay also met the foresee-

with some expectation of future contract negotiations, and the knowing participation in athletic contests, at least some of which will be shown on television throughout the United States, including North Carolina, can reasonably be included within the solicitation and marketing activities embodied in the subject statutory provisions.

*Id.* at 1371-72.

In contrast, "Delta's contacts were more contractual in their intent than were the 'preliminary contacts' considered in *Munchak*." *Vishay*, 696 F.2d at 1068 (quoting *Munchak*, 368 F. Supp. at 1372). For an analysis of the *Munchak* decision, see Note, *Munchak Corp. v. Riko: Putting a Little Polish on International Shoe*, 52 N.C.L. Rev. 809, 850 (1974).

The second case relied on by *Vishay*, *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd mem.*, 473 F.2d 909 (4th Cir. 1973), concluded that magazine advertisements were solicitations "by or on behalf of" the manufacturer under § 1-75.4(4). *Id.* at 856. These advertisements, however, were in conjunction with a state-wide network of distributorships and service centers. "The cumulative result of Piper's activity is an established program in North Carolina of solicitation of customers, sales of Piper aircraft, and the provision of a network of authorized service facilities for local Piper owners." *Id.*

23. *Vishay*, 696 F.2d at 1068.

24. See *supra* notes 9, 12 and accompanying text.

25. 326 U.S. 310 (1945).

26. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

27. *Vishay*, 696 F.2d at 1068. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

28. *Murphy*, 460 F.2d 661, 664 (1st Cir. 1972) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

ability test enunciated in *World-Wide Volkswagen Corp. v. Woodson*.<sup>29</sup> Delta could reasonably have expected to be haled into court in North Carolina to answer Vishay's claims arising out of the contacts initiated by Delta.

Among other factors relevant to the due process determination, the court noted that Vishay's cause of action arose out of Delta's contacts with North Carolina.<sup>30</sup> This fact distinguished several cases cited by Delta.<sup>31</sup> The court also noted several state interests in determining whether the minimum contacts requirement had been satisfied.<sup>32</sup> Finally, the court weighed the relative conveniences to the parties, concluding that the inconvenience to Delta in defending suit in North Carolina did not deny it due process.<sup>33</sup>

The *Vishay* decision represents a logical approach to modern commercial transactions that is consistent with the policy expressed in the North Carolina long-arm statutes.<sup>34</sup> When telephone calls and written communications form an integral part of a tort claim, those communications may be said to be "tor-

29. 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.")

30. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). "[I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single, or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action *unconnected* with the activities there." *Id.* at 317.

31. See, e.g., *Munchak Corp. v. Riko Enters.*, 368 F.Supp. 1366 (M.D.N.C. 1973) (Defendant's contacts were insufficient to meet due process standards for personal jurisdiction.). In *Munchak* "[a]n important factor in the court's decision was the fact that the alleged contacts with North Carolina were unrelated to the claim for relief asserted." Note, *supra* note 22, at 856.

32. The interests of North Carolina that the court listed were: (1) plaintiff was a North Carolina resident; (2) plaintiff sought relief under the North Carolina unfair trade practices statute; (3) the cause of action centered on the production of \$130,000 worth of goods that would have been manufactured in North Carolina; and (4) the Delta contacts with North Carolina were essential elements of Vishay's claims. *Vishay*, 696 F.2d at 1069. By including the state's interest in the litigation in its determination whether the minimum contacts requirement was met, the court erroneously caused a "subtle shift in focus from the defendant to the plaintiff." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). In *Rush* the Supreme Court cautioned against this shift in focus by stating:

Such an approach is forbidden by *International Shoe* and its progeny. If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice."

*Id.* at 332 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "In other words, these other factors may confirm or defeat jurisdiction, but they may not create it." *Louis*, *supra* note 1, at 421. Thus, the *Vishay* court should have stated that the interest of North Carolina is a relevant factor in determining whether the exercise of jurisdiction is fair, only *after* determining that sufficient contacts were present.

33. "While the defendant's witnesses are located in California, since Delta initiated the contested series of events, its inconvenience in transporting those witnesses to North Carolina when weighed against the inconvenience that would result to Vishay if it had to file suit in California" does not deny due process. *Vishay*, 696 F.2d at 1069.

34. For a discussion of the legislative intent behind N.C. GEN. STAT. § 1-75.4 (1983) and *id.* § 55-145 (1982), see *supra* notes 11-12.

Prior to *Vishay*, the federal courts construed North Carolina's long-arm statutes more narrowly than the North Carolina Supreme Court. It was noted that "the North Carolina Supreme Court is more ready to grant jurisdiction to protect North Carolina residents, quite naturally, and . . . it has taken the supposedly liberal interpretation offered by *International Shoe* more to heart than have federal courts." Note, *supra* note 11, at 457-58. *Vishay* brought the federal court's approach to § 55-145 into line with the State court's view.

tious conduct" within the state and may satisfy the minimum contacts test.<sup>35</sup> Similarly, characterizing a purchase order and other communications as "solicitation activities" is appropriate given the policy underlying section 1-75.4. Although no North Carolina appellate court has adopted such a broad interpretation of the solicitation requirement, language in several cases supports this construction.<sup>36</sup>

In finding Delta's conduct to be within the reach of the North Carolina long-arm statutes and sufficient to satisfy due process requirements, the United States Court of Appeals for the Fourth Circuit adequately protected unwilling defendants from the burdens of litigating in a distant forum. The *Vishay* approach permits courts to assert jurisdiction only in cases in which the communications in issue form an essential part of the plaintiff's tort claim. The *Vishay* holding, however, does not permit a court to exercise jurisdiction if communications unrelated to the tort claim were transmitted to North Carolina because the due process requirements of foreseeability and purposeful conduct would not be satisfied.

Thus, the *Vishay* court recognized the realities of modern commercial practice. Routine interstate solicitations and purchase orders may provide insufficient contacts to justify one state's assertion of personal jurisdiction over an out-of-state defendant in a typical breach-of-contract suit. Fraudulent or misrepresentative communications, however, are not routine commercial practices. The *Vishay* decision recognized that when fraudulent or misrepresentative communications form the basis of a plaintiff's claim, they also may justify a court's assertion of personal jurisdiction. Denying jurisdiction in such circumstances would allow defendants to act irresponsibly with relative impunity, knowing that they would not be held accountable for their actions in the forum state.

The *Vishay* court's expansive reading of the provisions of the North Carolina long-arm statute represents a thoughtfully reasoned analysis, and should

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35. These communications are to be distinguished from situations in which the cause of action sounds in contract, not tort. In such situations, the same telephone calls may not constitute "tortious conduct" in the State, and may not fall within that provision of the long-arm statute.

36. The following cases emphasized, among other factors, defendant's solicitations in North Carolina in finding due process contacts sufficient: *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977) (defendant actively solicited orders for its coins from North Carolina residents through several mass mailings to North Carolinians); *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963) (foreign corporation sent list of available rides through mails to operators of amusement parks in North Carolina, thereby soliciting orders); *Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 251, 273 S.E.2d 509, 513 (1981) (solicitation of employment through advertisement in a newspaper of wide circulation in North Carolina, long distance telephone conversations by defendant's agent with an undetermined number of residents, and approximately 28 mailed letters containing "conditional offers of employment" that North Carolina residents received at their homes), *disc. rev. denied*, 302 N.C. 398, 279 S.E.2d 352 (1981); *Delprinting Corp. v. C.P.D. Corp.*, 49 N.C. App. 449, 271 S.E.2d 548 (1980) (written memoranda on Illinois corporation's stationery requested plaintiff corporation to ship books to churches in five states); *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29 (insurer had sent letter to plaintiff's counsel, and policy was mailed in an envelope bearing insurer's trademark), *disc. rev. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). Two federal district court cases have construed § 1-75.4(4) broadly. *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366 (M.D.N.C. 1973); *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd mem.*, 473 F.2d 909 (4th Cir. 1973). Both cases are discussed *supra* note 22.

give adequate guidance to other courts in applying the provisions to particular activities of corporations. The North Carolina courts should adopt the *Vishay* holding because its interpretation of the North Carolina long-arm provisions implements the express legislative policy of protecting the interests of North Carolina residents.

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