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Advertising Amenability: Can Advertising Create Amenability?

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ADVERTISING AMENABILITY: CAN ADVERTISING CREATE AMENABILITY?

I. INTRODUCTION

A. The Scenario

When ABC Limited enters the marketplace with its new widget, it will be operating on limited resources. Therefore, it will seek to limit expenses by distributing its product in a small region of the country, perhaps in only one part of its home state. ABC wants to continue this policy long after it is established simply because the company views itself as local in nature. In order to announce the arrival of its product in the marketplace, ABC is considering advertising in magazines, in newspapers, on the radio, and on television. However, as the company builds its reputation, some consumers may hear about the product through advertising that slips beyond ABC's intended market.

When consumers purchase ABC's product, they will expect a high quality widget. Additionally, they will expect a well designed product that will not malfunction. If those expectations are not met, and the consumer is injured because of the product, the consumer will have the option of commencing a lawsuit. If the consumer chooses to commence a lawsuit, it will be most convenient to sue in the consumer's home state where the laws are familiar, where a good attorney is within reach, and where the courtroom is not far from home. If the consumer lives outside the state ABC calls home, ABC may be subject to suit in a foreign state. ABC wants to limit the forums where it can be haled into court because it is equally interested in defending against the action in its home state where its attorneys are familiar with the laws, the courtroom is nearby, and the costs and inconvenience of defending in a foreign state are eliminated. What are the choices for ABC and its out-of-state consumers? Can ABC limit the forums in which it is amenable? Can the out-of-state consumer sue ABC in the consumer's home state?

B. The Issues

In its 1987 decision, *Asahi Metal Industry Co. v. Superior Court*,[1] the United States Supreme Court addressed the issue of haling nonresident defendant companies into the courts of foreign states. Justice O'Connor wrote in a plurality opinion that there must be some evidence of "additional conduct" beyond placing a product in the stream of a foreign

1. 480 U.S. 102 (1987).

state's commerce before that manufacturer could be haled into the courts of a foreign state.[2] Justice O'Connor identified some factors which defined such additional conduct: designing the product for the state, providing regular advice to customers in the state, marketing through a distributor in the state, or advertising in the state.[3] Many of these factors would require conscious activity on the part of the manufacturer, such as designing the product specifically for the forum state or marketing through selected distributors; however, some factors may include gray areas that could create in personam jurisdiction without the manufacturer's knowledge. Advertising is one such factor. Advertising that unintentionally crosses state lines could entice consumers to seek out a product when the manufacturer never intended to increase the size of its market. If such a product injures a consumer, both the injured party and the manufacturer have an interest in whether advertising creates amenability in foreign states.

However, additional conduct in the foreign state by the manufacturer of a product may not even be necessary to create amenability in that foreign state. Only three other justices agreed with Justice O'Connor's requirement of additional conduct in *Asahi*.[4] Justice Brennan led a second plurality of the Court that required only the placement of a product in the stream of commerce to create amenability in forums across the country.[5] In addition, placing a product into the stream of commerce is not the only way that a company may create contacts with a foreign state. A company may contract with a resident of another state to provide services, a company may engage in conduct, such as patent infringement, that injures a resident in a foreign state, or a company may attempt to resell a product, such as parts for a collector car, in a foreign state.

This comment examines the use of advertising to create amenability in state and federal courts. It also suggests how plaintiffs and defendants can determine whether a nonresident has sufficient contacts such that a foreign state may exercise personal jurisdiction over a nonresident defendant. This comment reaches beyond the factors in *Asahi* by considering a variety of situations in which advertising indicates that the advertiser has purposefully availed itself of the laws and protections of

2. *Id.* at 112.

3. *Id.*

4. Justice O'Connor was joined by Chief Justice Rehnquist and by Justices Powell and Scalia.

5. Justice Brennan was joined by Justices White, Marshall and Blackmun. Justice Stevens wrote a third opinion joined by Justices White and Blackmun.

the forum state. To exercise in personam jurisdiction over a nonresident defendant, a state must have a statutory basis on which to hale the defendant into court and the statutory basis must be consistent with due process. This comment first examines in personam jurisdiction requirements in state long-arm statutes and the due process requirements determined by the United States Supreme Court. Because *Asahi* suggested the importance advertising plays in creating amenability, the purposeful availment requirements in *Asahi* and other Supreme Court opinions, as applied by state and federal courts, are then examined. The next section of this comment focuses on advertising and how it has been used by courts as a means of justifying the exercise of in personam jurisdiction over an advertiser. Finally, this comment recommends standards to be used by courts when determining whether advertising creates sufficient contacts with a forum to justify the exercise of in personam jurisdiction.

II. IN PERSONAM JURISDICTION ANALYSIS

Jurisdiction is, very simply, the power of a court to decide a case. More specifically, in personam jurisdiction is the court's power over the person. The exercise of jurisdiction is limited by the United States Constitution's Fifth and Fourteenth Amendments' due process clauses.[6] If the defendant challenges the court's jurisdiction, the plaintiff bears the burden of establishing that the existence of in personam jurisdiction is consistent with due process.[7]

The seminal case addressing in personam jurisdiction is *Pennoyer v. Neff*.[8] In *Pennoyer*, the Court laid down the traditional circumstances under which a court could exercise power over the defendant: consent,

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6. As applied against the federal government: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. As applied against the states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

7. The plaintiff need only establish a prima facia case when the challenge is raised before trial. *See, e.g.*, Boit v. Gar-Tec Prod., Inc., 967 F.2d 671 (1st Cir. 1992); Gould v. P.T. Krakatau Steel, 957 F.2d 573 (8th Cir.), *cert. denied*, 113 S. Ct. 304 (1992); Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); Moriss v. SSE, Inc., 843 F.2d 489 (11th Cir. 1988). Once the case has gone to trial the plaintiff must show jurisdiction existed by a preponderance of the evidence. *See, e.g.*, Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1194 (9th Cir. 1988).

8. 95 U.S. 714 (1877). *Pennoyer* involved a dispute over attorney's fees. Mitchell sued Neff in Oregon for attorney's fees Neff owed. Mitchell notified Neff by publication in Oregon. Neff was a resident of California at the time. After receiving default judgment, Mitchell sold land Neff had purchased in Oregon, subsequent to Mitchell obtaining judgment, to Pennoyer. Neff then sued Pennoyer to recover possession of his land.

presence, domicile, and quasi in rem jurisdiction.[9] When a defendant's relationship with the forum state falls under one of these categories, the defendant is said to be generally amenable.[10] A defendant who is generally amenable in a state has a sufficient relationship with the state to expect to be brought into court on any matter.

If the defendant has not consented to the court's jurisdiction and has no property in the state, then a defendant's relationship with the forum must be analyzed in terms of the contacts the defendant has with the state. If the contacts are of sufficient quality, the defendant can be sued on matters related to those contacts. This form of amenability, called specific amenability, was first introduced by *International Shoe Co. v. State of Washington*,[11] where the Supreme Court held that some acts "because of their nature and quality and the circumstances of their commission," may be sufficient to create in personam jurisdiction in foreign states.[12] Since then, an analysis of a nonresident's contacts determines whether a nonresident is amenable in a foreign state.

In an action founded on diversity in the federal courts, or for any action against a nonresident defendant in state courts, a two part process is necessary to determine if the defendant has the necessary contacts to be haled into that court. In *Wuchter v. Pizzutti*,[13] the Supreme Court held that a state must have a statutory basis for exercising personal jurisdiction over nonresident defendants. Further, the exercise of personal jurisdiction by the court must be consistent with due process.[14]

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9. *Id.* at 720. In rem jurisdiction is the court's power over the property. A class of in rem jurisdiction is quasi in rem jurisdiction, which is the court's power over the person because of the existence of property in the state.

10. However, quasi in rem jurisdiction can only be exercised over a nonresident defendant when the property is related to the controversy. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).

11. 326 U.S. 310 (1945).

12. *Id.* at 318. For a discussion of the development of specific amenability and its current status see Christine M. Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 OHIO ST. L.J. 403 (1993).

13. 276 U.S. 13 (1928). In *Wuchter*, the Court ruled that a statute creating consent to jurisdiction for all motorists using the New Jersey highways must also provide for nonresident motorists to be given notice that suit has been brought against them. *See also* Hess v. Pawloski, 274 U.S. 352 (1927), where the Court ruled that such nonresident motor vehicle long arm statutes were consistent with due process.

14. In actions in federal court based on a federal question, the exercise of jurisdiction must still be consistent with due process.

A. State Long-arm Statutes

To allow state residents to sue out-of-state defendants, state legislatures have enacted long-arm statutes that provide a basis for personal jurisdiction. There are two basic types of long-arm statutes, but they can be split into three categories. The first type of statute allows jurisdiction to be exercised to the full extent of due process while the second type of statute enumerates the different bases for jurisdiction. Some states, however, have enumerated long-arm statutes that have been interpreted by their courts or have provisions which allow the state's courts to extend jurisdiction to the limits of due process. An overview of the various states' long-arm statutes is considered below.[15]

1. Long-arm statutes that go to the limits of due process.

Only seven states have long-arm statutes which extend personal jurisdiction to the limits of due process.[16] They include Arizona, California, Nevada, New Jersey, Oklahoma, Rhode Island, and Wyoming.[17] In these states, the statutory provisions for personal jurisdiction are met if the exercise of jurisdiction is consistent with due process.

2. Enumerated long-arm statutes.

The more traditional form of long-arm statute is the enumerated long-arm statute. Twenty-five states have enumerated statutes specifying each of the circumstances under which a nonresident has sufficient contacts with the state for the court to exercise in personam jurisdiction.[18] These states include Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland,

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15. Some states have other long-arm statutes, such as motor vehicle long-arm statutes, which are not considered here. The statutes cited are statutes creating personal jurisdiction over persons and corporations transacting business in each of the states.

16. A long-arm statute that goes to the limits of due process typically reads, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

17. ARIZ. R. CIV. PROC. 4.2(a); CAL. CIV. PROC. CODE § 410.10 (West 1973); NEV. REV. STAT. ANN. § 14.065 (Michie Supp. 1993); N.J. CT. R. 4:4-4(e); OKLA. STAT. ANN. tit. 12, § 2004(F) (West 1993); R.I. GEN. LAWS § 9-5-33 (1985). WYO. STAT. ANN. § 5-1-107 (Michie 1992).

18. A typical enumerated long-arm statute reads as follows:

A court may exercise personal jurisdiction over a person, who directly or by an agent:
(1) Transacts any business or performs any character of work or service in the State;
(2) Contracts to supply goods, food, services, or manufactured products in the State;
(3) Causes tortious injury in the State by an act or omission in the State;
(4) Causes tortious injury in the State or outside the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persis-

Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Texas, Washington, West Virginia, and Wisconsin.[19]

In these states, the long-arm statute must provide a basis for the court to extend personal jurisdiction over the defendant. Then the statutory basis for personal jurisdiction must be analyzed to insure that it is consistent with due process. Depending on the wording of the statute, there may be times when the exercise of jurisdiction conforms to the statute but is inconsistent with due process.[20] There may also be times when the exercise of jurisdiction is not provided for in the statute but would be consistent with due process. Some states have provided for the latter possibility by enacting an additional provision that allows the courts to exercise jurisdiction to the full extent allowed by due process.

3. Enumerated long-arm statutes which also go to the limits of due process.

Eighteen states have extended their enumerated long-arm statutes to the extent allowed by due process. In some states the legislatures have included "catch-all" phrases which permit this extension.[21] In other states the courts have interpreted the long-arm statutes to extend to the

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tent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;

(5) Has an interest in, uses, or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless parties otherwise provide in writing.

MD. CODE ANN. CTS. & JUD. PROC. § 6-103 (1989). Some states' long-arm statutes have more provisions. *E.g.*, WIS. STAT. § 801.05 (1991-92). Other states' long-arm statutes have fewer provisions. *E.g.*, HAW. REV. STAT. § 634-35 (1985).

19. ALASKA STAT. § 09.05.015 (1983); CONN. GEN. STAT. ANN. § 52-59b (West 1991 & Supp. 1993); DEL. CODE ANN. tit. 10, § 3104 (Supp. 1992); FLA. STAT. ANN. § 48.193 (West Supp. 1993); GA. CODE ANN. § 9-10-91 (Supp. 1993); HAW. REV. STAT. § 634-35 (1985); IDAHO CODE § 5-514 (1990); IND. R. TRIAL. PROC. 4.4; IOWA CODE ANN. § 617.3 (West Supp. 1993); KAN. STAT. ANN. § 60-308 (Supp. 1993); KY. REV. STAT. ANN. § 454.210 (Baldwin 1991); MD. CODE ANN. CTS. & JUD. PROC. 6-103 (1989); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1985 & Supp. 1993); MISS. CODE. ANN. § 13-3-57 (Supp. 1993); MO. ANN. STAT. § 506.500 (Vernon Supp. 1993); MONT. R. CIV. PROC. 4B; N.H. REV. STAT. ANN. § 510:4 (1983 & Supp. 1993); N.M. STAT. ANN. § 38-1-16 (Michie 1987); N.Y. CIV. PRAC. L. & R. 302(a) (Consol. 1978 & Supp. 1993); N.C. GEN. STAT. § 1-75.4 (1983); OHIO REV. CODE ANN. § 2307.382 (Anderson 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 1986); WASH. REV. CODE ANN. § 4.28.185 (West 1988); W. VA. CODE § 56-3-33 (Supp. 1993); WIS. STAT. § 801.05 (1991-92).

20. *See infra* notes 27-34 and accompanying text.

21. A long-arm statute of this type includes a provision which states: In addition to the provisions [listed above], a court of this state may exercise personal jurisdiction over a nonres-

limits of due process. The effect of these statutes is the same as those that merely go to the limits of due process. Nevertheless, they are unique because the enumerated portion of the statute still exists, even though it is rendered obsolete by the interpretation or additional provision that allows the courts to exercise jurisdiction to the limits of due process.

Nine states have enumerated long-arm statutes with a provision that extends personal jurisdiction to the limits of due process. They include Alabama, Illinois, Louisiana, Maine, Nebraska, Oregon, Pennsylvania, South Dakota, and Tennessee.[22]

The courts of nine other states and the District of Columbia[23] have interpreted some or all of the provisions of their enumerated long-arm statutes to extend to the limits of due process. The states using this approach include Arkansas, Colorado, Michigan, Minnesota, North Dakota, South Carolina, Utah, Vermont, and Virginia.[24] The courts in these states may take one of two approaches to these statutes. In some states the courts examine the enumerated provisions to ascertain whether they are met and then proceed to determine whether jurisdiction can be extended to the limits of due process.[25] Other courts simply ignore the enumerated provisions and proceed directly to a due process analysis under the theory that if exercise of jurisdiction is consistent with

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ident on any basis consistent with the constitution of this state and of the Constitution of the United States.

22. ALA. R. CIV. PROC. 4.2; ILL. COMP. STAT. ANN. § 5/2-209(c) (Smith-Hurd 1993); LA. REV. STAT. ANN. § 13:3201 (West 1991); ME. REV. STAT. ANN. tit. 14, § 704-A (West 1980); NEB. REV. STAT. § 25-536 (1989); OR. R. CIV. PROC. 4; 42 PA. CONS. STAT. ANN. § 5322 (1981 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 15-7-2 (Supp. 1993); TENN. CODE ANN. §§ 20-2-214 (1980 & Supp. 1993).

23. D.C. CODE ANN. § 13-423 (1989); Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808 (D.C. 1976).

24. ARK. CODE ANN. § 16-4-101 (Michie 1987); Hawes Firearm Co. v. Roberts, 565 S.W.2d 620 (Ark. 1978); COLO. REV. STAT. ANN. § 13-1-124 (West 1989 & Supp. 1993); Safari Outfitters v. Superior Court, 448 P.2d 783 (Colo. 1968); MICH. COMP. LAWS ANN. §§ 600.701-600.735 (West 1981); Sifers v. Horen, 188 N.W.2d 623 (Mich. 1971); MINN. STAT. ANN. § 543.19 (West 1988); Rostad v. On-Deck, Inc., 372 N.W.2d 717 (Minn.), *cert. denied*, 474 U.S. 1006 (1985); N.D. R. CIV. PROC. 4(b); Hebron Brick Co. v. Robinson Brick & Tile Co., 234 N.W.2d 250 (N.D. 1975); S.C. CODE. ANN. § 36-2-803 (Law. Co-op. 1976); Triplett v. R.M. Wade & Co., 200 S.E.2d 375 (S.C. 1973); UTAH CODE ANN. § 78-27-24 (1993); Brown v. Carnes Corp., 611 P.2d 378 (Utah 1980); VT. STAT. ANN. tit. 12, § 855 (1973); Chittenden Trust Co. v. Bianchi, 530 A.2d 569 (Vt. 1987); VA. CODE ANN. § 8.01-328.1 (Michie 1992); Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc., 238 S.E.2d 800 (Va. 1977).

25. *See, e.g.*, Classic Auto Sales v. Schocket, 832 P.2d 233 (Colo. 1992).

due process, then the enumerated provisions of the statute are met as well.[26]

B. Due Process Analysis

After identifying a state's statutory provision for asserting personal jurisdiction over a nonresident defendant, a court must still ascertain whether asserting personal jurisdiction is consistent with due process. Defendants brought into court through long-arm statutes must have sufficient contacts with the forum state to be specifically amenable.

As noted earlier, specific amenability was introduced by the Supreme Court in *International Shoe Co. v. State of Washington.*[27] In *International Shoe*, the Supreme Court held that the "quality and nature" of a corporation's activities, to the extent that the corporation "exercises the privilege of conducting activities within a state," give rise to the enjoyment of "the benefits and protection of the laws of that state."[28] "The exercise of that privilege may give rise to obligations, . . . so far as those obligations arise out of or are connected with the activities within the state."[29] When a corporation has conducted activities in the forum state, it is not unfair for the corporation to expect to respond to a suit brought to enforce the obligations created. Therefore, when a corporation carries on "systematic and continuous" activities in a state, sufficient contacts are created "to permit the state to enforce obligations" which the corporation has incurred there.[30]

From *International Shoe*, the concept of minimum contacts developed. A defendant who has sufficient isolated contacts with a state can be sued on a claim related to those contacts.[31] If the contacts are too casual and isolated or the contacts are unrelated to the claim, there is no basis for personal jurisdiction sufficient to comply with the demands of due process.[32] Following *International Shoe*, Supreme Court cases defin-

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26. *See, e.g.*, Defoe v. Larson, 389 N.W.2d 757 (Minn. Ct. App. 1986); Parry v. Ernst Home Ctr. Corp., 779 P.2d 659 (Utah 1989).

27. 326 U.S. 310 (1945). In *International Shoe*, the State of Washington was attempting to collect unemployment compensation contributions from International Shoe. International Shoe maintained that it was not amenable in the state because it had no offices, made no sales, formed no contracts, and maintained no merchandise in the state. Salesmen employed by the company who resided in Washington were directed out of International Shoe's office in St. Louis, Missouri. The Supreme Court did not agree with International Shoe's position.

28. *Id.* at 319.

29. *Id.*

30. *Id.* at 320.

31. *Id.* at 319. *See also* Wiseman, *supra* note 12, at 419.

32. *International Shoe*, 326 U.S. at 318; Wiseman, *supra* note 12, at 419.

ing when contacts are sufficient to support the exercise of in personam jurisdiction have generally fallen into two categories: contract disputes and tort claims.[33] In each case, the Court attempted to determine if a defendant's contacts show purposeful availment of the forum's laws, or if the plaintiff's or some other third party's unilateral activity brought the defendant into contact with the forum.[34]

1. Due process analysis for contract disputes.

Two Supreme Court cases, *McGee v. International Life Insurance Co.*[35] and *Burger King Corp. v. Rudzewicz*,[36] are particularly significant when analyzing contacts in contract disputes.[37] *McGee* is significant because the Court held that International Life's solicitation of a California resident by mail, and the acceptance of his premium payments, was an instance where a contract constituted a "substantial connection with that [s]tate."[38] The Court later held in *Burger King* that when a party reaches out and creates continuing relationships and obligations with citizens of another state that party can expect to be "subject to regulation and sanctions in the other State for the consequences of [its] activities."[39] The Court looks for activities purposefully directed at a resident of a foreign

33. *But see* Burnham v. Superior Court, 495 U.S. 604 (1990) (affirming the concept of presence in the forum state as a means of general amenability); Kulko v. Superior Court, 436 U.S. 84 (1978) (holding that personal contacts with a forum state do not create amenability).

34. Hanson v. Denckla, 357 U.S. 235 (1958). In *Hanson*, a deceased mother had created a trust with a firm in Delaware while living in Pennsylvania. She subsequently moved to Florida where she died. A dispute arose over whether Florida or Delaware law controlled the disposition of the trust. The Supreme Court held that because the only contacts the trust company had were made by their client, it could not be amenable in Florida.

35. 355 U.S. 220 (1957). In *McGee*, a Texas life insurance company contacted a California resident and agreed to pick up his policy after it had bought out the policy issuer. It was the only policy the company issued in California. The Court found that the state's interest in insurance and the economic benefit the company received from the policy justified the state's exercise of jurisdiction. *See also* Wiseman, *supra* note 12, at 420-21 (discussing *McGee*).

36. 471 U.S. 462 (1985). In *Burger King*, Rudzewicz and a partner entered a twenty year contract with Burger King to establish a franchise in Michigan. Burger King, a Florida corporation, included in the contract a choice of law clause that specified that the contract would be "governed and construed under and in accordance with the laws of the State of Florida." *Id.* at 481. When Rudzewicz failed to make scheduled payments and refused to give up the franchise, Burger King sued in Florida District Court.

37. *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), where passengers on a cruise ship were held to a forum selection clause contained in a contract on the back of their ticket. The result seems to favor business for, as Justice Stevens acknowledged in his dissent, the forum selection clause was contained in an adhesion contract printed on the back of a nonrefundable ticket. *Id.* at 597 (Stevens, J., dissenting).

38. *McGee*, 355 U.S. at 223.

39. *Burger King*, 417 U.S. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

forum or for the nonresident defendant to "purposely derive a benefit" from activities with residents of a foreign state. When these requirements are met, the forum state can then exercise its "manifest interest" in providing its residents with a "convenient forum for redressing injuries inflicted by out-of-state actors."[40] In *Burger King*, the Court supported these ideas by noting that purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' "[41]

Therefore, contacts sufficient to create specific amenability in a contract dispute must demonstrate that the defendant purposefully directed activities toward a resident in the forum state, and as a result of those activities enjoyed the benefit and protection of the forum state's laws. The defendant must be the one who reaches out and creates contacts with the forum state rather than some other party who brings the defendant into contact with the forum.

2. Due process analysis for tort claims.

Purposeful availment of the forum state's laws is equally important in actions brought to the court on tort claims. Jurisdictional disputes in tort claim actions focus on the targeted effects of the defendant's actions and the defendant's attempts to "make-a-market" for its product.

Generally, the court looks for the nonresident tortfeasor to have engaged in some purposeful activity in the foreign state. In *Keeton v. Hustler Magazine, Inc.*,[42] the sale of 10-15,000 magazines each month was purposeful activity directed at the forum state.[43]

The Court also found in *Calder v. Jones*[44] that the "targeted effects" of a defendant's actions, when directed at a forum state, can create sufficient contacts for the forum to exercise in personam jurisdiction over the

40. *Id.* at 473-74 (citations omitted).

41. *Id.* at 475 (citations omitted).

42. 465 U.S. 770 (1984). In *Keeton*, an employee of *Hustler Magazine* sued for libel where her name appeared as a member of the editorial staff. Keeton brought her suit in New Hampshire because the statute of limitations in both her home state and in *Hustler*'s resident state had run.

43. *Id.* at 774.

44. 465 U.S. 783 (1984). In *Calder*, Shirley Jones sued the *National Enquirer*, a Florida Corporation, in California for libel over an article published in the paper. South had written the article in Florida, relying on phone calls to sources in California for his information. The 600,000 copies of the *Enquirer* published in California, more than in any other state, had an effect on the court's decision.

defendant.[45] The court held that when a defendant's actions are intentionally aimed at a forum state, and the injury from those actions are felt in that state, then the defendant must "reasonably anticipate being haled into court there."[46] Therefore, jurisdiction is proper over a defendant who has specifically targeted activity at a state and its effects are felt in that state.

Perhaps the most controversial theory creating a basis for in personam jurisdiction is commonly known as the "stream of commerce" theory. In *World-Wide Volkswagen Corp. v. Woodson*,[47] the Court reiterated the importance of purposeful activity on the defendant's part[48] and held that foreseeability alone is not enough to create amenability.[49] When the defendant conducts purposeful activity in the forum state, the defendant has "clear notice that it is subject to suit there. . . ."[50]

> Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[51]

The test created by the Court with this language has come to be commonly known as the "stream of commerce" theory. It is better termed the "make-a-market" theory because the manufacturer, by placing a product in the stream of commerce, is making a market for the product. The manufacturer can then expect to be sued for injuries caused by that

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45. *Id.* at 789.

46. *Id.* at 789-90 (citations omitted). "In this case, [Calder and South] are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790.

47. 444 U.S. 286 (1980). In *World-Wide*, the plaintiffs purchased an Audi in New York and drove it to Oklahoma. In Oklahoma the car was rear ended and the gas tank exploded. In Oklahoma, the plaintiffs sued the manufacturer, the importer, the regional distributor, and the retailer. The regional distributor and the retailer challenged jurisdiction. The Oklahoma Supreme Court ruled that it was foreseeable that the goods would ultimately end up in Oklahoma. *Id.* at 290-91. The U.S. Supreme Court reversed.

48. *Id.* at 297.

49. *Id.* at 295.

50. *Id.* at 297.

51. *Id.* The make-a-market test is applied by looking downstream from the point where the defendant contesting jurisdiction sits. If there is an unbroken commercial chain from that point to the point where the product is sold to the consumer, then the defendant is considered to have made a market for the product and is amenable in the states where the product is sold. For further discussion of the make-a-market test as explained in *World-Wide*, see Wiseman, *supra* note 12, at 426-29.

product in any state that the manufacturer has attempted to serve as a part of the product's marketplace.[52] When the opportunity to review the make-a-market theory came up in *Asahi Metal Industry Co. v. Superior Court*,[53] the Court split its decision. As noted earlier, Justice O'Connor, in a plurality opinion joined by Chief Justice Rehnquist and Justices Powell and Scalia, ruled that when a product is placed in the stream of commerce, additional conduct is necessary for the manufacturer to be amenable in foreign states:

> 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.[54]

Applying these factors to the case at hand, Justice O'Connor found that Asahi did not have sufficient contacts to justify the exercise of jurisdiction by the California courts.[55] Justice Brennan disagreed with Justice O'Connor and wrote separately, concurring with the judgment of the Court. Justices White, Marshall, and Blackmun joined his opinion. Justice Brennan concluded that Asahi established sufficient contacts under the make-a-market test of *World-Wide*, but agreed that the exercise of in personam jurisdiction over Asahi would not comport with "fair play and substantial justice."[56] Finally, Justice Stevens, joined by Justices White and Blackmun, also wrote separately. He concluded that the issue of minimum contacts did not need to be addressed in the case because the exercise of jurisdiction would be unreasonable and unfair.[57] Even if minimum contacts needed to be determined, Justice Stevens stated that

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52. *See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). *Helicopteros* underscores the important difference between general and specific in personam jurisdiction. In that case the majority opinion looked only at whether Helicopteros was generally amenable but Justice Brennan's dissent noted that specific in personam jurisdiction existed when general in personam jurisdiction did not.

53. 480 U.S. 102 (1987). In *Asahi*, a California resident sued Honda Motorcycle and others for injuries sustained when the tire blew out on his motorcycle. All of the parties to the suit settled except for the indemnity suit between the manufacturer of the innertube, Cheng Shin, and the manufacturer of the tube's valve, Asahi.

54. *Id.* at 112 (plurality opinion of O'Connor, J.).

55. *Id.* at 112-13.

56. *Id.* at 119-21 (Brennan, J., concurring in part and concurring in the judgment).

57. *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment).

purposeful availment should be judged by the volume, value, and hazardous character of the components.[58]

The Court's divided opinion in *Asahi* gave little guidance to lower courts on how to apply the stream of commerce theory to product liability cases. Justice O'Connor's opinion has the potential to alter the course of stream of commerce analysis, which would increase the value of advertising as an indicator of purposeful availment. Examining the use of these Supreme Court decisions by lower courts is helpful to understand the standards lower courts use when determining whether a defendant has sufficient contacts with a forum state to justify the exercise of in personam jurisdiction. Examining *Asahi* may be particularly helpful to determine what precedential force it has for these lower courts.

III. Purposeful Availment in Lower Court Opinions

In light of the foregoing Supreme Court decisions, lower courts examine the activities of defendants for signs of purposeful availment. It is important to note the general requirement that the defendant engage in some act that shows the defendant purposefully availed itself of the benefits and protections of the forum state's laws. Lower courts may either survey jurisdictional decisions in support of their finding of minimum contacts[59] or focus on particular cases appropriate to the matter at hand.[60] In practice, cases often contain more than one cause of action; therefore, both a contract and a tort analysis could be, but are not always, utilized by the lower courts.[61]

Given the splintered views of the Court that emerged from *Asahi* and the impact that *Asahi* can have on product liability cases when advertising is involved, the lower courts' use of the opinions in *Asahi* are considered in detail in this section. If state and federal courts adopt Justice

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58. *Id.* at 122.

59. *See, e.g.*, Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660 (7th Cir. 1986) (citing *World-Wide* and *Burger King*), *cert. denied*, 479 U.S. 1092 (1987); Fidelity & Casualty Co. v. Philadelphia Resins Corp., 766 F.2d 440 (10th Cir. 1985) (citing *Pennoyer, McGee,* and *World-Wide*), *cert. denied*, 474 U.S. 1082 (1986); Superior Supply v. Associated Pipe & Supply Co., 515 So. 2d 790 (La. 1987) (citing *International Shoe, McGee, Hanson, Shaffer, World-Wide, Keeton, Helicopteros, Burger King,* and *Asahi*); Splaine v. Modern Electroplating, 460 N.E.2d 1306 (Mass. App. Ct.) (citing *World-Wide, Hanson,* and *McGee*), *review denied*, 464 N.E.2d 74 (Mass. 1984); State *ex rel.* Circus Circus Reno v. Pope, 854 P.2d 461 (Or. 1993) (citing *World-Wide* and *Burger King*).

60. *See, e.g.*, Wines v. Lake Havasu Boat Mfg., 846 F.2d 40 (8th Cir. 1988) (citing *Burger King*); Aries v. Palmer Johnson, Inc., 735 P.2d 1373 (Ariz. App. 1987) (citing *Burger King*).

61. *See, e.g.*, *Aries*, 735 P.2d 1373 (relying mainly on contract cases). *But see, e.g.*, Composite Marine Propellers v. Vanderwoude, 741 F. Supp. 873 (D. Kan. 1990) (relying both on contract and tort cases).

O'Connor's opinion, it significantly alters the stream of commerce analysis.[62] Rather than require that manufacturers make a market simply by placing a product in the stream of commerce, Justice O'Connor requires additional conduct which would make it more difficult to bring a manufacturer into court, particularly component parts manufacturers who have no contact with a forum state except for components they supplied to another manufacturer.

A. Asahi *in State Courts*

State courts are as divided as the Supreme Court in ascertaining which test to apply from the *Asahi* opinions. In one instance the appellate courts of the same state have taken opposite positions when applying *Asahi*.[63] State courts have relied on the O'Connor plurality; they have retained the make-a-market test set forth in *World-Wide*; they have used both tests; and they have taken a variety of other positions.

1. Reliance on Justice O'Connor's plurality opinion.

Courts in five states, California, Michigan, Minnesota, Pennsylvania, and Utah have relied on Justice O'Connor's requirement of additional conduct in determining whether a defendant was amenable in the state. In these cases the state court may either rely on the O'Connor opinion as the holding of the court in *Asahi*,[64] they may rely on the O'Connor opinion as "instructive" for determining minimum contacts,[65] they may rely on the O'Connor opinion because it is consistent with the state precedent,[66] or, after careful consideration of *Asahi* and its use by other courts, they may simply rely on the O'Connor factors as evidence that sufficient minimum contacts did not exist.[67]

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62. Justice O'Connor's factors have also been used in contract and tort cases based on contract. *See, e.g.*, Jarvis & Sons v. Freeport Shipbuilding & Marine Repair Inc., 966 F.2d 1247 (8th Cir. 1992) (breach of contract); Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233 (7th Cir. 1990) (attorney's services), *cert. denied*, 498 U.S. 1089 (1991).

63. Kohn v. La Manufacture Francaise, 476 N.W.2d 184 (Minn. Ct. App. 1991) (relying on Justice O'Connor's opinion); Stanek v. A.P.I., Inc., 474 N.W.2d 829 (Minn. Ct. App. 1991) (relying on *World-Wide*), *cert denied*, 112 S. Ct. 1603 (1992).

64. Felix v. Bomoro Kommanditgesellschaft, 241 Cal Rptr. 670 (Cal Ct. App. 1987); Graham v. Machinery Distribution, 599 A.2d 984 (Pa. Super. Ct. 1991), *appeal denied*, 607 A.2d 253 (Pa. 1992).

65. *Kohn*, 476 N.W.2d at 184.

66. Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 448 (Mich. 1987) (citing Hapner v. Wehr, 273 N.W.2d 822 (Mich. 1978)).

67. Parry v. Ernst Home Center Corp., 779 P.2d 659 (Utah 1989).

2. Reliance on all of the opinions in *Asahi.*

Two state courts, Alabama and Illinois, have relied on all of the opinions in the *Asahi* decision.[68] The Supreme Court of Illinois noted the uncertain value of *Asahi* and said, "[I]t is not possible to determine from *Asahi* whether the broad or the narrow version of the stream of commerce theory is correct."[69] Therefore, the court looked at both Justice O'Connor's and Justice Brennan's opinions to show that the requirements of neither test could be met by the facts in the case at hand.[70] The Alabama court followed a similar tack.

3. Retention of the make-a-market test from *World-Wide Volkswagen.*

Five state courts, those in Georgia, Minnesota, Ohio, North Carolina, and Washington, have rejected the *Asahi* decision and retained the make-a-market test from *World-Wide.*[71] These courts have retained the test set forth in *World-Wide* because it was not overruled by *Asahi,*[72] because the test set forth in *World-Wide* was consistent with state precedent,[73] or because the "splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue."[74]

4. Other approaches to the *Asahi* decision.

States have also taken a variety of other approaches. The Supreme Court of West Virginia relied on *Asahi* generally without adopting a specific test,[75] the Supreme Court of Texas set *Asahi* aside and relied on its

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68. *Ex parte* Pope Chevrolet Trans., Inc., 555 So. 2d 109 (Ala. 1989); Wiles v. Morita Iron Works Co., 530 N.E.2d 1382 (Ill. 1988).

69. *Wiles*, 530 N.E.2d at 1389.

70. *Id.*

71. The Ohio court in its opinion gives no reason for adopting the *World-Wide* test. In fact, the Ohio court adopts the language of *World-Wide* as quoted in Justice Brennan's opinion in *Asahi.* Chace v. Dorcy Int., Inc., 587 N.E.2d 442, 447 (Ohio Ct. App. 1991).

72. Stanek v. A.P.I., Inc., 474 N.W.2d 829, (Minn. Ct. App. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); Cox v. Hozelock, 411 S.E.2d 640 (N.C. Ct. App.), *review denied*, 414 S.E.2d 752, and *cert. denied*, 113 S. Ct. 78 (1992); Warzynski v. Empire Comfort Sys., 401 S.E.2d 801 (N.C. Ct. App. 1991).

73. Grange Ins. Ass'n v. State, 757 P.2d 933 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989).

74. Continental Research Corp. v. Reeves, 419 S.E.2d 48, 53 (Ga. Ct. App. 1992) (quoting Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989)); *accord* Showa Denko K.K. v. Pangle, 414 S.E.2d 658 (Ga. Ct. App. 1991), *cert. denied*, 1992 Ga. Lexis 188 (Ga. 1992).

75. Hill by Hill v. Showa Denko, K. K., 425 S.E.2d 609 (W.Va. 1992), *cert. denied*, 113 S. Ct. 2338 (1993).

own test to determine minimum contacts,[76] and the Supreme Court of Mississippi merely used the facts in *Asahi* to show that the exercise of in personam jurisdiction was warranted.[77]

The New Jersey Supreme Court, in an attempt to avoid "areas of unsettled jurisprudence," stayed with the basics and did not "predicate" its result on the stream of commerce theory.[78] Finally, in perhaps the most unusual move of all, the Court of Appeals of Kentucky ruled that the stream of commerce theory was "rejected by a plurality of the U.S. Supreme Court in its consideration of the constitutional implications involved."[79]

B. Asahi *in Federal Courts*

The lower federal courts have been equally divided on how to approach stream of commerce contacts following *Asahi*; however, the clear trend is toward Justice O'Connor's opinion. Only a few of the courts of appeals have made decisions that have been followed by other courts, which gives little indication of the courts' willingness to adopt a single standard.[80] Some courts adopt the O'Connor plurality view, some courts address all three opinions in *Asahi*, and other courts continue to follow *World-Wide Volkswagen* because no majority opinion emerged altering the stream of commerce theory.

The Ninth Circuit provides a good example of how confused the lower courts are. In 1988, the Ninth Circuit Court of Appeals affirmed a judgment of the court in the Central District of California which held that a Switzerland clinic's efforts to advertise and solicit business through an agent were sufficient contacts to make it amenable in California.[81] The court of appeals relied on Justice O'Connor's requirement of additional conduct in order to determine whether the defendants had sufficient contacts.[82] In 1989, the court in the Central District of California used both Brennan's and O'Connor's test to show that sufficient contacts

76. Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990).

77. Wilkinson v. Mercantile Nat'l. Bank, 529 So. 2d 616 (Miss. 1988).

78. Lebel v. Everglades Marina, 558 A.2d 1252, 1254 (N.J. 1989); *accord* Davis Kidd Booksellers v. Day-Implex, Ltd., 832 S.W.2d 572 (Tenn. Ct. App. 1992).

79. Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270, 274 (Ky. Ct. App. 1991).

80. *E.g.*, Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989). This may also give the Supreme Court a good reason to review *Asahi* in order to speak with a unified voice.

81. Sinatra v. National Enquirer, Inc., 854 F.2d 1191 (9th Cir. 1988). Sinatra sued the *Enquirer* and the Switzerland Clinic when the Enquirer published an article that said Sinatra had visited the clinic. *Id.* at 1193.

82. *Id.* at 1197.

existed.[83] Later in 1989, the District Court of Oregon, holding that the placement of a product into the stream of commerce was enough to create amenability, ruled that a prior case relying on the logic laid out in *World-Wide* was not overruled by *Asahi* and therefore was still viable.[84] Based on that conclusion, the court concluded that the exercise of jurisdiction was proper under the make-a-market test.[85] In 1990, in an amended decision on *Shute v. Carnival Cruise*,[86] the court of appeals again relied on O'Connor's factors of additional conduct to find sufficient contacts.[87] Finally, in 1992 an opinion from the Central District of California finding that a Michigan bank did not have sufficient contacts with California also relied on O'Connor's factors for determining contacts.[88]

The pattern developing in the Ninth Circuit surrounding the use of the *Asahi* decision could be indicative of several things. It could reflect sloppy research on the part of law clerks in the district courts. It could reflect an acknowledgment that no single theory has been mandated by the Supreme Court; therefore, either the make-a-market theory advanced in *World-Wide* or the additional conduct theory laid out in *Asahi* are available to the lower courts for their use.[89] As a result, when a case appears to warrant a more permissive means of determining contacts, courts use the make-a-market test. When a more restrictive test is warranted, courts use the additional conduct test. The variety of approaches could simply reflect how uncertain the courts are when applying *Asahi*.

Among the other courts of appeals that have encountered *Asahi*, there is equal dissension. The First Circuit has relied on O'Connor in two opinions.[90] In the Fourth Circuit's encounter with *Asahi*, the court

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83. Meyers v. Asics Corp., 711 F. Supp. 1001, 1006 (C.D. Cal. 1989). "No matter which test from *Asahi* is used, Asics has purposefully availed itself of the protection of this jurisdiction." *Id.* at 1006.

84. Western Helicopters v. Rogerson Aircraft Corp., 715 F. Supp. 1486 (D. Or. 1989). Rogerson Aircraft heat treated the helicopter forks used by Western Helicopters.

85. *Id.*

86. 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

87. *Id.* at 382. This time Brennan's opinion is acknowledged in a footnote but is not deemed controlling because O'Connor's qualifications are met. *Id.* at 382 n.3.

88. Resolution Trust Corp. v. First of Am. Bank, 796 F. Supp. 1333 (C.D. Cal 1992). The court found that the Michigan bank, which had inadvertently received transferred funds as part of a national clearing house for bank checks, had engaged in no intentional acts in California. *Id.* at 1338.

89. In one case, a district court used both theories alternately in finding jurisdiction. *In re* San Juan DuPont Plaza Hotel Fire Litig., 742 F.Supp. 717 (D.P.R. 1990).

90. Boit v. Gar-Tec Prods. Inc., 967 F.2d 671 (1st Cir. 1992); Benitez-Allende v. Alcan Alumino Do Brasil, S.A., 857 F.2d 26 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989).

showed that none of the three opinions' tests could be satisfied.[91] The Fifth Circuit has rejected *Asahi* and retained the standard from *World-Wide*.[92] The Sixth Circuit relied on O'Connor's test.[93] The Eighth Circuit has merely adopted the purposeful availment and fairness tests from *Asahi*,[94] and in one case the Eighth Circuit Court of Appeals relied only on the facts from *Asahi*.[95] Finally, the Eleventh Circuit has been reluctant to take a position. In its first encounter with *Asahi* it relied on O'Connor's test but noted that "if personal jurisdiction exists under the narrower O'Connor test, it exists under the broader Stevens and Brennan tests."[96] In its second encounter the Eleventh Circuit applied the same logic noting that because "jurisdiction . . . [was] consistent with due process under the more stringent" test, the court did not need to "determine which standard actually controll[ed] this case."[97]

If sheer numbers are any indication, however, the O'Connor opinion is leading. The O'Connor opinion has been relied on in over fifteen district courts in more than twenty cases.[98] Six federal district courts have attempted to satisfy all of the opinions, or at least both the O'Connor opinion and the Brennan opinion.[99] Three federal district courts have

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91. Federal Ins. Co. v. Lake Shore, Inc., 886 F.2d 654 (4th Cir. 1989).

92. Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989).

93. Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).

94. Jarvis & Sons v. Freeport Shipbuilding, 966 F.2d 1247 (8th Cir. 1992); Austad Co. v. Pennie & Edmonds, 823 F.2d 223 (8th Cir. 1987).

95. Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990).

96. Morris v. SSE, Inc., 843 F.2d 489, 493 n.5 (11th Cir. 1988).

97. Vermueulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993).

98. *E.g.*, Thorn EMI North America v. Micron Technology, 821 F. Supp. 272 (D. Del. 1993); Redwine v. Franz Plasser Bahnbaumachinen Industriegesellschaft, 794 F.Supp 1062 (D. Kan. 1992); Narco Avionics, Inc. v. Sportsman's Mkt., Inc., 792 F. Supp. 398 (E.D. Pa. 1992); Eugene Iovine Inc. v. Rudox Engine & Equip. Co., 786 F. Supp. 236 (E.D.N.Y. 1992); Yates v. Turzin, 786 F. Supp. 594 (S.D. Miss. 1991); Gould v. Empire Steel Trading Co., 765 F. Supp. 980 (E.D. Ark. 1991), *aff'd*, 957 F.2d 573 (8th Cir.), and *cert. denied*, 113 S. Ct. 304 (1992); Smith v. Intex Recreation Corp., 755 F. Supp. 712 (M.D. La. 1991), *aff'd*, 15 F.3d 180 (5th Cir. 1994); Bond v. Octagon Process, Inc., 745 F. Supp. 710 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir.), and *cert. denied*; 501 U.S. 1232 (1991); Williamson v. Consolidated Rail Corp., 712 F. Supp. 48 (M.D. Pa. 1989); Cartwright v. Fokker Aircraft U.S.A., Inc., 713 F. Supp. 389 (N.D. Ga. 1988); Tomashevsky v. Komori Printing Mach. Co., 691 F. Supp. 336 (S.D. Fla. 1988); Andrews Univ. v. Robert Bell Indus., 685 F. Supp. 1015 (W.D. Mich. 1988); Walker v. Carnival Cruise Lines, Inc., 681 F. Supp. 470 (N.D. Ill. 1987); Mead Corp. v. Stuart Hall Co., 679 F. Supp. 1446 (S.D. Ohio 1987); Warren v. Honda Motor Co., 669 F. Supp. 365 (D. Utah 1987); Sollinger v. Nasco Int'l, Inc., 655 F. Supp. 1385 (D. Vt. 1987).

99. Ensign-Brickford Co. v. ICI Explosives USA Inc., 817 F. Supp. 1018 (D. Conn. 1993); Abel v. Montgomery Ward Co., Inc., 798 F. Supp. 322 (E.D. Va. 1992); Lister v. Marangoni Meccanica S.p.A., 728 F. Supp. 1524 (D. Utah 1990); Wilson v. Kuwahara Co., 717 F. Supp.

rejected *Asahi* in favor of *World-Wide*.[100] Note, however, that a few federal district courts have stuffed the ballot box, spreading votes among various candidates.[101]

The variety of lower court opinions applying the *Asahi* decision as precedent demonstrates that the stream of commerce theory is in a state of flux. Even though a majority of the opinions cite Justice O'Connor's plurality opinion, that tally is not ultimately controlling.[102] At some point, the Supreme Court will need to review the stream of commerce plus additional conduct and the make-a-market theories and take a solid stance on the tests so that lower courts may feel confident in the law they apply.

IV. ADVERTISING AS PURPOSEFUL ACTIVITY EXTENDING AMENABILITY

Despite the lack of universal agreement with Justice O'Connor's opinion in *Asahi*, advertising remains an important factor in determining whether a defendant has sufficient minimum contacts to create amenability in a foreign state.[103] Considering the many forms advertising can take, businesses have thousands of options in choosing the type of advertising for their products. This section discusses advertising in today's markets and how courts have used advertising in determining contacts.

A. Advertising in Practice

For many companies, advertising is a source of business. It is a way of communicating that the company has something to offer, and it is a way to get the consumer to want that product. Today's market is complex, but it is also carefully analyzed. Nationwide and local surveys tell businesses what is selling and what is not.[104] New businesses are en-

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525 (W.D. Mich. 1989); Rose v. Franchetti, 713 F. Supp. 1203 (N.D. Ill. 1989), *aff'd*, 979 F.2d 81 (7th Cir. 1992); Dittman v. Code-A-Phone Corp., 666 F. Supp. 1269 (N.D. Ind. 1987).

100. DeMoss v. City Mkt., Inc., 762 F. Supp 913, 918 (D. Utah 1991); Curtis Mgt. Group v. Academy of Motion Picture Arts & Sciences, 717 F. Supp. 1362 (S.D. Ind. 1989); Wessinger v. Vetter Corp., 685 F. Supp. 769 (D. Kan. 1987).

101. *See, e.g.*, *Redwine*, 794 F. Supp. at 1062; *Wessinger*, 685 F. Supp. at 769; *DeMoss*, 762 F.Supp at 913; *Lister*, 728 F.Supp. at 1524; *Warren, Ltd.*, 669 F.Supp. at 365; *Wilson*, 717 F. Supp. at 525; *Andrews Univ.*, 685 F. Supp. at 1015.

102. Another poll might be taken of the law reviews, which have published over forty articles, most of them negative, discussing the *Asahi* decision.

103. Indeed, many of the cases which were decided after 1987, discuss advertising contacts, and cited *infra*, notes 113-77, do not cite *Asahi*.

104. Volumes are available giving demographics for a variety of interests. *See* MARGARET AMBRY, THE ALMANAC OF CONSUMER MARKETS (1990) (charting the growth and

couraged to seek a "niche" in the market and to watch changing currents in consumer needs.[105] The concept for business is simple. Identify the product, identify its market, consult the demographics, and identify the advertising method that reaches that market and use it.[106] Of course, the actual process can be much more complex.

Marketing consultants are quick to note that advertising is changing. Consumers are now able to tune out many forms of advertising through channel surfing or through the fast forward button on the video recorder's remote.[107] The best way to adapt to these changes, advertisers are told, is to de-mass their marketing by "fine-tuning . . . advertising to tightly specific groups of consumers" and to think "innovatively about newspapers, magazines and radio."[108]

Because of these innovations, advertisers are increasingly selective about where and when they advertise. First, advertisers are looking for new places and new ways to advertise. Rather than just relying on regular commercials between television programs, advertisers are searching for ways to get on those programs or even for their product to become the program.[109] Rather than running the same ad on television at different times, advertisers are running different ads that match the style of the program. For example, Coca-Cola is creating "weird, quick-cutting commercials to show on MTV [and] wholesome heart-tuggers for adult fare like *Murder, She Wrote*."[110]

Advertisers are also more selective when choosing media. Advertising in a magazine is not just about choosing a national magazine because of its readers, it is about choosing a particular magazine because the readers are most likely to purchase the product given the age, interests

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decline of age groups and their wealth, education, income, line of work, and expenditures); THE MILWAUKEE JOURNAL, CONSUMER ANALYSIS 1991 (an annual marketing guide to the Milwaukee metro area covering the purchasing habits of Milwaukeans). Simmons Market Research Bureau completes regular surveys of American buying habits. *See* SIMMONS MARKET RESEARCH BUREAU INC., 1992 STUDY OF MEDIA AND MARKETS.

105. *See, e.g*, SHAWN MCKENNA, THE COMPLETE GUIDE TO REGIONAL MARKETING 3-5 (1992); William Sunn, *Survival by the Numbers*, NATION'S BUS., August 1991, at 14.

106. *See, e.g.*, JAMES S. NORRIS, ADVERTISING, 25-35 (4th ed. 1990); MCKENNA, *supra* note 105, at 3-22.

107. Patricia Sellers, *The Best Way to Reach Your Buyers*, FORTUNE, Autumn/Winter 1993, at 14.

108. *Id.*

109. *Id.* at 16.

110. *Id.* at 15.

and income of the magazine's readers.[111] Consider the following statement by *Yankee Magazine*'s advertising director:

> *Yankee* has invested 56 years in understanding and coddling our consumer to the ultimate degree. We love our subscribers and we have an intimate relationship with them. . . . We may not be able to help you sell a lot of your product in Arizona, but if you want to sell more product in the Northeast, then hop on. . . . [I]f your consumer and our reader are one in the same, then your advertising investment should reap rewards.[112]

A business that knows its consumers should know how to target those consumers in order to increase the effective reach of its advertising.

A plaintiff alleging the existence of personal jurisdiction through advertising should be just as aware of marketing, demographics, and the reach or coverage of the advertising.[113] There are a number of sources available to assess the focus of a particular medium. The first and most valuable source for information is the advertising director of the medium itself. Circulation figures are available from newspapers, magazines, and journals. Relatively innocuous ads in local newspapers or on local television may be reaching people in bordering states.[114] Every radio and television station has a coverage map usually handed out to potential advertisers boasting the power of its signal.[115] These maps are based on those prepared by each station's engineers for the Federal Communication Commission.[116]

Other sources are also available for the same information. The Standard Rate and Data Service (SRDS) publishes monthly volumes detailing circulation and audience data for magazines, newspapers, television,

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111. These statistics can be provided by Simmons. See M1 SIMMONS MARKET RESEARCH BUREAU.

112. MCKENNA, *supra* note 105, at 118 (quoting Kevin Scully).

113. Reach expresses the number of "different people actually exposed only once to a media vehicle" and coverage expresses "the potential audience of a broadcast medium or the actual audience of a print medium." JACK Z. SISSORS & LINCOLN BUMBA, ADVERTISING MEDIA PLANNING 96 (4th ed. 1992).

114. *See, e.g.*, Erikson *ex rel.* Erickson v. Spore, 618 F. Supp. 1356 (D. Minn. 1985) (Wisconsin newspaper circulated 30-40 copies in Minnesota).

115. SUSAN TYLER EASTMAN & ROBERT A. KLIEN, PROMOTION & MARKETING FOR BROADCASTING & CABLE 316 (2nd Ed. 1991). The coverage map of KCCI-TV located in Des Moines, Iowa is reproduced for reference. *Id.* at 318. A coverage map can be a persuasive means of determining jurisdiction. *See, e.g.*, Holmes v. TV-3, Inc., 141 F.R.D. 692, 696 (W.D. La. 1991).

116. EASTMAN & KLIEN, *supra* note 115, at 316.

and radio.[117] These guides can prove invaluable when determining the impact of particular advertising choices. The *Spot Television and Cable Source* provides a market profile for each of the top markets in the country.[118] The market profile includes a map of the market area, provides a demographic profile, ranks the sales of merchandise, provides the Arbitron ratings for local television stations, lists the names of radio stations, and lists the names of newspapers published in the market.[119] The market profile also identifies the Area of Dominant Influence (ADI) ranking of the market. Arbitron identifies for each market the ADI.[120] ADIs cover all the counties in the country whose viewing area is dominated by the television signals from a particular city. Every county within the range of a television station's signal belongs to one and only one ADI.[121]

Circulation in magazines and newspapers can also be determined through SRDS publications. The *Consumer Magazine & Agri Media Source* contains circulation information audited by independent companies and the rate schedules for advertisements placed in particular magazines.[122] Inspection of these materials can reveal many magazines' policies for regional advertising as well as circulation figures for the magazine overall and in specified markets.[123] Through the use of these materials, a plaintiff can show that an advertisement placed in a magazine with national circulation actually appeared in a regional edition of that magazine which targeted only a relatively small area.[124]

These sources can be invaluable tools for attributing the actual audience targeted by a defendant. Combined with copies of advertisements

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117. SRDS, SPOT T.V. & CABLE SOURCE (Dec. 1993); SRDS, CONSUMER MAGAZINE & AGRI MEDIA SOURCE (Jan. 1994); SRDS, BUSINESS PUBLICATION ADVERTISING SOURCE (Jan. 1994); SRDS, NEWSPAPER ADVERTISING SOURCE (Jan. 1994).

118. *See, e.g.*, SPOT T.V. & CABLE SOURCE, *supra* note 117, at A264-65 (showing the Milwaukee, WI market).

119. *Id.*

120. HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, THIS BUSINESS OF TELEVISION 300 (1991). Nielsen also identifies a Designated Market Area (DMA) that operates on the same concept as Arbitron's ADI except that Nielsen will split counties where viewing patterns vary due to "unusual terrain or the reception of peripheral signals." *Id.*

121. *Id.*

122. CONSUMER MAGAZINE & AGRI MEDIA SOURCE, *supra* note 117; ANTHONY F. MCGANN & J. THOMAS RUSSELL, ADVERTISING MEDIA: A MANAGERIAL APPROACH 241 (1988).

123. For example, the information for *People Weekly* identifies 18 circulation figures for separate editions, 8 of which identify Metro markets (e.g. New York, Chicago, San Francisco). CONSUMER MAGAZINE & AGRI MEDIA SOURCE, *supra* note 117, at 486-89.

124. *People Weekly*'s circulation data for the Chicago Metro area identifies only 17 counties in Illinois and Indiana. *Id.* at 489. *See also* SISSORS & BUMBA, *supra* note 113, at 248 (surveying the different possibilities offered by *Time*).

from the appropriate media, a better argument can be made that placement of the advertisement was purposeful activity in the forum state by the defendant. Unfortunately, there is little indication that circulation and audience statistics have been introduced as evidence in support of the exercise of jurisdiction.[125]

B. Advertising in Courtrooms

Personal jurisdiction opinions which look to advertising as a means of determining minimum contacts have relied simply on the existence of the advertising in the forum state and the different forms that advertising takes. But courts have often failed to consider who the advertising is targeted at, whether the advertising reaches a large portion of the state population, or if it was targeted particularly to the state with no intention of crossing state lines. Because advertising is being used to create specific amenability in the foreign state, it is important to determine whether the cause of action arose out of advertising for purposes of deciding if in personam jurisdiction can be exercised over the defendant.[126] While advertising alone is not sufficient to confer jurisdiction,[127] advertising to the extent of solicitation, or advertising with additional contacts, such as a contract or tortious injury, is sufficient.[128] Advertising can be grouped into three target ranges: national, regional, and local.[129] Each range represents a choice by the advertiser to target a particular market, and the closer to the forum state the advertiser gets, the more likely such advertising and additional contacts will confer jurisdiction. An additional concern is the judgments made by courts asked to enforce a judgment from another jurisdiction. Courts seem more willing to refuse to enforce the judgment of another court for lack of jurisdiction on collateral attack.

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125. *But see, e.g.*, Holmes v. TV-3, Inc., 141 F.R.D. 692, 696 (W.D. La. 1991) (television coverage map); State *ex rel* Miller v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371 (Iowa) (newspaper circulation), *cert. denied*, 498 U.S. 998 (1990); Erickson *ex rel.* Erickson v. Spore, 618 F. Supp. 1356 (D. Minn. 1985) (newspaper circulation).

126. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

127. Brokemond v. Marshall Field & Co., 612 N.E.2d 143, 146 (Ind. Ct. App. 1993); *but see* Gavigan v. Walt Disney World Inc., 646 F. Supp. 786, 789 (E.D. Pa. 1986).

128. *See, e.g.*, Aries v. Palmer Johnson, Inc., 735 P.2d 1373 (Ariz. Ct. App. 1987).

129. One anomaly: An Arkansas citizen, who worked for a New York corporation that had contracted with an Indonesian corporation, tried to sue an Indonesian corporation based on a single advertisement in an international trade journal. Gould v. P.T. Krakatau Steel, 957 F.2d 573 (8th Cir.), *cert. denied*, 113 S. Ct. 304 (1992). The Eighth Circuit Court of Appeals held that the advertisement was an insufficient contact with the forum state to satisfy due process requirements. *Id.* at 576.

1. National advertising.

Advertising alone in nationally circulated magazines does not constitute purposeful availment and is not sufficient to confer jurisdiction over a nonresident.[130] However, the existence of further contacts suggesting the development of a relationship with the forum state flowing from the advertisement is usually sufficient to confer jurisdiction. But the number of additional contacts necessary to confer jurisdiction with national advertising varies widely. The nature of the claim appears to have some relation to the probability that in personam jurisdiction will exist.

A dispute over a contract in addition to national advertising is not likely to confer jurisdiction. In *Droukas v. Divers Training Academy*,[131] advertisements in two nationally circulated magazines and a contract dispute were not sufficient to confer jurisdiction because the nonresident defendant was not transacting business under the state long-arm statute.[132] Advertisements in nationally distributed newspapers, the *New York Times* and the *Wall Street Journal*, were not sufficient to confer jurisdiction.[133] Advertisements in national trade magazines, which target a more selected group of consumers, were also not sufficient to confer jurisdiction in a contract dispute.[134] In *Now Foods Corp. v. Madison Equip. Co.*, the magazines *Prepared Foods*, *Food Engineering*, and *Food Processing*, targeted businesses engaged in food preparation but was not enough to confer jurisdiction. However, in *Aries v. Palmer Johnson, Inc.*,[135] an advertisement in the nationally circulated *Sailing* magazine followed by the mailing of brochures, promotional literature, plans and boat specifications was sufficient to confer jurisdiction over a nonresident defendant.[136] In *Aries*, the court found that the defendant's adver-

130. Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 445 (Mich. 1987); Now Foods Corp. v. Madison Equip. Co., 386 N.W.2d 363, 367 (Minn. Ct. App. 1986), *review denied*, 395 N.W.2d 926 (Minn. 1986); Hankins v. Somers, 251 S.E.2d 640 (N.C. Ct. App. 1979), *cert. denied*, 254 S.E.2d 920 (N.C. 1979).

131. 376 N.E.2d 548 (Mass. 1978).

132. *Id.* (Massachusetts has an enumerated long-arm statute. MASS. GEN. LAWS. ANN. ch. 223A, § 3 (West 1985 & Supp. 1993)); *accord* A-Connoisseur Transp. Corp. v. Celebrity Coach, Inc., 742 F. Supp. 39 (D. Mass. 1990); Excel Energy v. Pittman, 606 N.E.2d 637 (Ill. App. Ct. 1992).

133. Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539 (3rd Cir. 1985).

134. *Now Foods*, 386 N.W.2d at 363. The same result has been reached in a number of tort cases. *E.g.*, Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128 (10th Cir. 1991); Dalmau Rodriguez v. Hughes Aircraft Co., 781 F.2d 9 (1st Cir. 1986); Fidelity & Casualty Co. v. Philadelphia Resins, 766 F.2d 440 (10th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

135. 735 P.2d 1373 (Ariz. Ct. App. 1987).

136. *Id.* at 1378-79. The court also thought the $1.25 million purchase price was significant. *Id.* at 1379.

tising had risen to the level of solicitation.[137] On the other hand, placing a toll free number in advertisements appearing in nationally circulated magazines, thereby facilitating contact with the advertiser, still may not bring the advertisement to the level of solicitation.[138]

In contrast, courts are more likely to find jurisdiction based on tort claims, particularly personal injury claims.[139] In one case, for example, an advertisement for fireworks in the nationally distributed *American Rifleman*, the purchase of those fireworks, and the subsequent injury from the fireworks was sufficient to confer jurisdiction.[140] However, in another personal injury case, *Witbeck v. Bill Cody's Ranch Inn*,[141] an advertisement in an American Automobile Association (AAA) guidebook and a telephone call to make reservations at the ranch were not sufficient to create jurisdiction.[142] In contrast to *Witbeck*, the Colorado Supreme Court, in *Classic Auto Sales v. Schocket*,[143] held that advertisements in nationally circulated magazines and a telephone call were sufficient to create jurisdiction in a claim for damages from misrepresentation.

Whether a claim is related to the advertisement is of equal importance to a determination of minimum contacts. Specific amenability requires that the claim be related to defendant's contacts with the forum state.[144] Therefore, where a claim is directly related to the advertisement, such as misrepresentation, the court is likely to find that there were sufficient contacts, even if the only contacts were advertising and a phone call.[145] But, where claims do not relate to the advertising, and the advertising is the only basis for contacts, the lack of a related claim is fatal. In *Arguello v. Industrial Woodworking Mach. Co.*,[146] the Utah

137. *Id.*

138. Composite Marine Propellers, Inc. v. Vanderwoude, 741 F. Supp. 873 (D. Kan. 1990).

139. *But see* Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40 (8th Cir. 1988).

140. Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660 (7th Circ. 1986), *cert. denied*, 479 U.S. 1092 (1987). The court of appeals based its ruling on "the much greater economic benefit of multiple sales" but did not say how many multiple sales the defendant had made in the forum state. *Id.* at 667.

141. 411 N.W.2d 439 (Mich. 1987). In *Witbeck*, a visitor to the ranch fell off a horse, was encouraged to remount by ranch staff, and fell off again.

142. *Accord* O'Reilly v. Prat's Travel Agency,Inc., 457 So. 2d 24 (La. Ct. App.), *cert. denied*, 461 So. 2d 319 (La. 1984); Blessing v. Prosser, 359 A.2d 493 (N.J. Super. Ct. App. Div. 1976).

143. 832 P.2d 233 (Colo. 1992); *accord* Rose v. Franchetti, 713 F. Supp. 1203 (N.D. Ill. 1989), *aff'd*, 979 F.2d 81 (7th Cir. 1992).

144. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

145. *See Classic Auto Sales*, 832 P.2d at 233.

146. 838 P.2d 1120 (Utah 1992).

Supreme Court ruled that advertisements for replacement parts placed in national trade magazines and sales of parts in state were not related to a claim for injuries sustained from a machine manufactured by the same company.[147] A Massachusetts court also found that an injury sustained in a hotel could not have arisen from an advertisement listing a toll free number and a subsequent room reservation made on the toll free number.[148]

2. Regional Advertising.

Regional advertising is particularly significant because it recognizes intermediate markets. Radio and television signals often cross state lines, thus stations which use these advertising mediums clearly create a multi-state market for their products. Many metropolitan areas are situated on state lines, thus there would be little doubt that a company advertising in Kansas City, Missouri would be amenable to the courts in Kansas City, Kansas. Disputes may arise, however, in situations where the television or radio station is farther from the state line, or when regional papers with significant interstate circulation bring consumers across the border.[149]

In *Ex parte Pope Chevrolet, Inc.*,[150] the Alabama Supreme Court ruled that advertising in a regional newspaper, the *Atlanta Constitution*, and advertising on WTBS, "whose programming is broadcast in other states," as well as car sales totaling over $100,000 a year to Alabama residents were sufficient to confer jurisdiction.[151] In a similar case, this time involving Alabama's border with Mississippi, the Alabama Supreme Court ruled that advertisements placed on Mississippi radio and television stations whose signals crossed into Alabama were sufficient to conclude that the defendants were soliciting business from Alabama.[152] However, when the amount of advertising crossing the border is not significant, the courts are not as willing to extend jurisdiction. In a personal injury case where the only advertising placed by the defendant

147. *Id.* at 1123.

148. Rye v. Atlas Hotels, Inc., 566 N.E.2d 617 (Mass. App. Ct. 1991).

149. *See generally* Robert T. Mills, Comment, *Personal Jurisdiction Over Border State Defendants: What Does Due Process Require?*, 13 S. ILL. U. L.J. 919 (1989) (discussing solicitation by border state defendants as a means of creating sufficient minimum contacts).

150. 555 So. 2d 109 (Ala. 1989).

151. *Id.* at 113-14. The court does not consider that the rebroadcast of WTBS generally occurs over cable TV which may decrease the audience size, that local cable companies may not carry WTBS, or that local broadcasters may run their own ads over local ads run by WTBS.

152. Lowry v. Owens, 621 So. 2d 1262, 1265-67 (Ala. 1993).

that crossed the state line on a regular basis was in thirty to forty newspapers, the court held that the papers were not sufficient contacts.[153]

The fact that the cause of action arose directly from the advertising is again a significant factor when the court determines whether the defendant's contacts are sufficient to confer jurisdiction. In *State ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*,[154] the State of Iowa sued Omaha, Nebraska car dealers for false advertising.[155] The court ruled that advertisements placed in the *Omaha World Herald* and on Omaha television stations were sufficient contacts to justify the extension of jurisdiction over the auto dealers.[156] Particularly significant were the circulation figures provided to the court which showed that over 30,000 Iowans subscribed to the Sunday *World Herald.*

In many of the cases where there is regional advertising it is likely that there will also be advertising in mediums within the forum state. In these cases there can be little doubt that the defendant engaged in purposeful activity in the forum state. For example, in *Harriman v. Demoulas Supermarkets*,[157] the defendant advertised on four New Hampshire radio stations with signals that reached Maine, advertised in New Hampshire and Massachusetts newspapers with circulation in Maine, and advertised in the *York County Coast Star* published in Kennebunk, Maine.[158]

Some regional advertising, however, will not extend jurisdiction beyond the targeted region, even when the targeted region borders the state where the plaintiff is seeking jurisdiction over the defendant. In *Camelback Ski Corp. v. Behning*,[159] a Pennsylvania ski resort devoted its advertising budget to Pennsylvania, New York, and New Jersey. Maryland newspapers, on their own initiative, printed information carried on the wire services regarding the snow conditions at the ski resort. Maryland ski shops were supplied with brochures from the resort, often re-

153. Erickson *ex rel* Erikson v. Spore, 618 F.Supp. 1356 (D. Minn. 1985).

154. 456 N.W.2d 371 (Iowa), *cert. denied*, 498 U.S. 998 (1990).

155. Omaha, Nebraska is directly across the border from Council Bluffs, Iowa. The two cities are considered a Standard Metropolitan Statistical Area by the U.S. Census Bureau. *Id.* at 374 n1.

156. *Id.* at 377.

157. See Harriman v. Demoulas Supermarkets, Inc., 518 A.2d 1035 (Me. 1986), *cert. denied*, 481 U.S. 1048 (1987).

158. *Accord* Soares v. Roberts, 417 F. Supp. 304 (D.R.I. 1976). In *Soares*, the defendant advertised in Boston newspapers that circulated in Rhode Island, advertised on Boston television stations with signals that reached Rhode Island, and advertised in the Providence, Rhode Island Sunday *Journal.*

159. 539 A.2d 1107 (Md.), *cert. denied*, 488 U.S. 849 (1988).

questing them. The resort also maintained a toll free number for Maryland because it was included in a package deal the resort purchased. The Maryland toll free number was included on the brochures.[160] The Maryland court held that these contacts were insufficient to confer jurisdiction.

In *Harold Howard Farms v. Hoffman*,[161] a livestock breeder advertised in a national quarter horse journal and in a Michigan journal, both of which the plaintiff received. The Indiana court ruled that "to hold that an advertiser in a Michigan publication has made a significant contact with an Indiana subscriber through the advertisement stretches the bounds of due process."[162] These cases show that when the plaintiff removes the advertising from its intended market, the courts will not extend the borders of the market to create amenability.

3. Local advertising.

When nonresidents advertise in another state, they are clearly attempting to create a market in that state, especially when they have chosen a medium that focuses on the state's residents: a state newspaper, a radio station, or a television station. The biggest bar to the exercise of in personam jurisdiction occurs when the nonresident advertises in the forum state, but the cause of action does not arise out of the advertisement.

Even when the advertisement appears in state, courts are still reluctant to base jurisdiction on the advertisement alone. Thus, Marshall Field's advertisements in Indiana were not sufficient to support a tort claim for injuries caused in Illinois.[163] An advertisement for employment outside of Alabama was not sufficient to confer jurisdiction.[164] A Massachusetts hospital's yellow page advertisement in Connecticut was not a sufficient contact to confer jurisdiction.[165] The state long-arm statute may also stand in the way of jurisdiction. Despite advertisements in the *Chicago Tribune* and the Chicago yellow pages, Cunard Cruise Lines was found not to be transacting business in Illinois.[166]

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160. *Id.* at 1108-09.

161. 585 N.E.2d 18 (Ind. Ct. App. 1992).

162. *Id.* at 21.

163. Brokemond v. Marshall Field & Co., 612 N.E.2d 143 (Ind. Ct. App. 1993); *accord* Bayles v. K-Mart Corp., 636 F. Supp. 852 (D.D.C. 1986).

164. Johnston v. Frank E. Basil, Inc., 802 F.2d 418 (11th Cir. 1986).

165. Cote v. Gordon, 478 A.2d 631 (Conn. Super. Ct. 1984); *contra* Hull v. Gamblin, 241 A.2d 739 (D.C. 1968).

166. Wiedemann v. Cunard Line Ltd., 380 N.E.2d 932 (Ill. App. Ct. 1978).

When a business regularly advertises in the state, courts have found jurisdiction to be proper. Therefore, when a Wisconsin bar advertised in a monthly newspaper, the *Illinois Entertainer*, and maintained an Illinois phone number for the bar, the court found sufficient contacts for its exercise of jurisdiction.[167] When a Colorado truck dealer advertised in an Oregon sales catalog and misrepresented the truck's features, an Oregon court found sufficient contacts for jurisdiction.[168] An Arizona school was found to be amenable in Texas based on advertisements in Texas phone books, advertisements in a number of national magazines, and a policy of immediately sending out information packets with applications to people who contacted the school.[169] Walt Disney World's four page advertisement in the *Philadelphia Inquirer* with a toll free number provided for reservations, advertisements run on local television stations, and the presentation of honorary Disney World citizenship to the Mayor of Philadelphia were sufficient to confer jurisdiction.[170] Finally, a full scale campaign to open a market in the state creates sufficient contacts for jurisdiction. An Indiana boat company that advertised in national magazines, displayed its boats at a Chicago boat show, and sold its boats through Illinois retailers had sufficient contacts for Illinois courts to exercise in personam jurisdiction.[171]

If the claim is not related to the advertising upon which jurisdiction is based, the courts still have no power to hear the case. Therefore, when a Kansas resident got sick from the food served on her Carnival cruise, the court ruled that the negligent preparation of the food did not arise from Carnival Cruise's advertisements in Kansas because the duty to exercise due care did not arise until after she became a passenger on the ship.[172] In the State of Washington, a contract with a Louisiana company to recondition a boat was held not to arise out of advertisements in regional and national magazines.[173] When a bar patron had too much to drink in

167. Wimmer v. Koenigseder, 470 N.E.2d 326 (Ill. App. Ct. 1984), *rev'd on other grounds*, 484 N.E.2d 1088 (Ill. 1985).

168. Marvel v. Pennington GMC, Inc., 780 P.2d 760 (Or. Ct. App. 1989).

169. Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434 (Tex. 1982).

170. Gavigan v. Walt Disney World Co., 630 F. Supp. 148 (E.D. Pa.), *aff'd on reh'g*, 646 F. Supp. 786 (E.D. Pa. 1986).

171. Clements v. Barney's Sporting Good Store, 406 N.E.2d 43 (Ill. App. Ct. 1980).

172. Dirks v. Carnival Cruise Lines, 642 F. Supp. 971 (D. Kan. 1986); *accord* Pizarro v. Hoteles Concorde Int'l, C.A., 907 F.2d 1256 (1st Cir. 1990); Szakacs v. Anheuser-Busch Cos., 644 F. Supp. 1121 (N.D. Ind. 1986); State *ex. rel.* Circus Circus Reno v. Pope, 854 P.2d 461 (Or. 1993); *contra* Shute v. Carnival Cruise Lines, 897 F.2d 377, 383-86 (9th Cir. 1990) (finding that but for the advertisements, the Shutes would not have gone on the cruise), *rev'd on other grounds*, 499 U.S. 585 (1991).

173. MBM Fisheries v. Bollinger Mach., Shop, 804 P.2d 627 (Wash. Ct. App. 1991).

a Canadian bar, a Michigan court held that the resulting injuries did not arise out of advertisements placed in Michigan newspapers.[174] Nonetheless, when a Mississippi farmer saw an ad in a local paper for feed made by a Louisiana company, the court found that the subsequent injury did arise out of the advertisement.[175] Similarly, an Ohio resident's injuries due to the negligence of a doctor at the City of Faith Hospital in Oklahoma were held to arise out of endorsements made on Oral Robert's "Expect a Miracle" show.[176]

4. Collateral attack.

Jurisdiction can also be challenged on collateral attack. After a court in a foreign state has entered default judgment, the defendant can challenge the court's verdict when the plaintiff tries to enforce the judgment. Usually, such a challenge will happen in the defendant's home state. Because the courts in these actions are trying to determine whether the court in another state had jurisdiction, it must apply the laws of the other jurisdiction to its determination.[177] However, courts have difficulty applying the laws of other states in these determinations.

In *Kleinfeld v. Link*,[178] an Ohio resident challenged the judgment of an Alaska court. Link had placed an advertisement in the nationally circulated *Shutterbug News*. He sold a camera to Kleinfeld, but when the camera arrived in Alaska it was damaged. The Ohio court held that jurisdiction was improperly based on the single contact of the advertisement. The court never attempted to apply or interpret Alaska law. In *Splaine v. Modern Electroplating*,[179] a Massachusetts court found that the exercise of jurisdiction by a Michigan court was improper based on an advertisement in a nationally circulated magazine, *Hemming's Motor News*. In this case, the Massachusetts court considered Michigan law in making its determination. Finally, in *A.A.A., Inc. v. Lindberg*,[180] a Georgia court, applying Illinois law, reviewed a default judgment from an Illinois court. A.A.A. was in the business of selling "wrecked, exotic cars" and advertised in the *New York Times*, *Car & Driver*, *Auto Week*, *Road*

174. Mozdy v. Lopez, 494 N.W.2d 866 (Mich Ct. App. 1992).

175. Rippy v. Crescent Feed Commodities, Inc., 710 F. Supp. 1074 (S.D. Miss. 1988).

176. Creech v. Roberts, 908 F.2d 75 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

177. The question is not whether the reviewing court would or could exercise jurisdiction, the question is whether the court that entered the default judgment would or could exercise jurisdiction.

178. 457 N.E.2d 1187 (Ohio Ct. App. 1983).

179. 460 N.E.2d 1306 (App. Ct.), *review denied*, 464 N.E.2d 74 (Mass. 1984).

180. 324 S.E.2d 480 (Ga. Ct. App. 1984).

& Track, the *Atlanta Constitution*, and the *Chicago Tribune*.[181] Lindberg had purchased a wrecked Mercedes and sued for breach of contract and fraud when he determined that the damage to the car was more substantial than A.A.A. had told him. Focusing on facts that indicated these were all nationally circulated publications, the Georgia court ruled that the advertisements, subsequent phone calls to arrange a purchase, and the contract for purchase were not sufficient contacts to confer jurisdiction. Illinois courts might view the case differently.[182]

These cases tend to show that a nonresident defendant without substantial contacts may be more likely to win a challenge to jurisdiction in the defendant's home state. A plaintiff seeking to enforce a default judgment in another state should be well armed with precedent supporting the existence of in personam jurisdiction in the plaintiff's home state. A judgment that may not hold up for lack of jurisdiction in the plaintiff's home state will not be enforced in the defendant's home state.

V. The Future of Advertising Amenability

Given the variety of holdings by courts, it may be difficult to determine when advertising, combined with other contacts, creates sufficient grounds for a court to exercise in personam jurisdiction over a defendant. The problem with personal jurisdiction is that there are no bright lines. Each defendant's contacts must be examined separately to determine whether the contacts are sufficient for the forum court to exercise jurisdiction. However, there are certain factors that courts routinely consider when determining whether advertising rises to a level sufficient to confer jurisdiction. The more significant the contacts under each of these factors, the more likely the court will find the defendant amenable. The following factors are or should be considered by courts in making their determinations: The target of the advertising, the amount of advertising placed in the forum state, how the advertising arrived in the forum state, the amount of business resulting from the advertisement in the forum state, the extent of the other contacts, and how closely related the advertising is to the claim.

Where the advertisement was placed is an indication of the advertisement's target. When an advertiser places an ad in a national magazine, the advertiser is creating a national market for its product or service. However, an advertisement may appear to be a nationwide ad when it is

181. *Id.* at 481.

182. See Rose v. Franchetti, 713 F. Supp. 1203 (N.D. Ill. 1989), *aff'd*, 979 F.2d 81 (7th Cir. 1992).

actually a local ad.[183] The advertisement and the medium should be carefully scrutinized to determine if the advertisement is more targeted than it appears. Some national magazines have regional editions, and the ad in question may have been placed only in the regional edition. Some magazines have national circulation but have particular regional appeal. An ad placed in *The New Yorker* may be a more persuasive contact in states surrounding New York than in Colorado. A television ad for a nationally recognized name like Walt Disney World may have been run by the network, or it may have been run by the local affiliate.[184] If the ad focuses on the locale, it may have been specially placed for that market. The mention of the forum state, a city in the forum state, or the depiction of a local landmark are good indications that the ad is targeting the forum state.

The amount and frequency of advertising in a forum state can equal solicitation of the forum's residents.[185] A single ad placed in a national magazine will not have much effect on a single state's residents. Ads that reach thirty to forty state residents on a regular basis will not have as much effect as ads that reach 30,000 residents every week.[186] An ad that is run daily is much more effective for a finding of jurisdiction than an ad that is run monthly, and an ad that is run monthly is more effective than an ad that is run yearly.[187] The more ads that are run in a forum state, the greater the likelihood that the ads with other contacts will confer jurisdiction, but without circulation or audience statistics courts have little basis for their determinations.

How an advertisement arrived in the forum state should also be considered. An advertisement which is unilaterally brought into the state by the plaintiff carries little weight. A good example is newspaper circulation. With the exception of a few papers with national circulation, such as the *New York Times*, *USA Today*, or the *Wall Street Journal*, most papers are targeted at a specific market. But a person planning a move may subscribe to a paper in order to get to know the new area before the

183. *See* Gavigan v. Walt Disney World Inc., 646 F. Supp. 786, 788 (E.D. Pa. 1986) (Ads for Disney World were placed with local CBS affiliate).

184. *Id.*

185. *See* Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1132 (10th Cir. 1991) (holding that a record containing no information regarding the extent of advertising leaves no basis for determining whether the advertising establishes minimum contacts.)

186. *Compare* State *ex rel.* Miller v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371 (Iowa), *cert. denied*, 498 U.S. 998 (1990) *with* Erickson *ex rel.* Erickson v. Spore, 618 F. Supp. 1356 (D. Minn. 1985).

187. *See, e.g.*, Wimmer v. Koenigseder, 470 N.E.2d 326 (App. Ct. 1984), *rev'd on other grounds*, 484 N.E.2d 1088 (Ill. 1985).

move. Many colleges, as a service to their students, also subscribe to newspapers that have little national circulation. Because it was not the intention of the advertiser to create a market beyond the usual market for some advertising mediums, advertisements circulated outside their intended market through the unilateral activity of the plaintiff should be given no weight when determining contacts.[188]

The amount of business resulting from the advertisement in the forum state will increase the likelihood that the advertising creates sufficient contacts.[189] Therefore, when a business derives hundreds of sales from the advertising,[190] has established ties with retailers in the state,[191] has taken in over $100,000 from sales after advertising,[192] or has made a sale for a substantial amount of money, a finding of jurisdiction is more likely.[193] On the other hand, when no sales have been made as a result of the advertising, jurisdiction is less likely.[194] A defendant should be prepared to answer questions about the volume of business resulting from advertising that was calculated to reach a forum state. The resulting figures may help courts determine whether a substantial market has been created or if the market created has resulted in random sales.

Because advertising alone is not sufficient to confer jurisdiction,[195] the extent of additional contacts are also important. The amount of additional contacts needed depending on the extent of the advertising. If there is only one ad in national media, then additional contacts will need to be substantial. The existence of only one ad, however, may be sufficient if the additional contacts constitute tortious conduct such as misrepresentation.[196] If the number of advertisements placed rise to the level of solicitation, then additional contacts may not have to be as great.[197] The need for additional contacts is relative to the extent of the advertising in the forum state.

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188. *See, e.g.*, Harold Howard Farms v. Hoffman, 585 N.E.2d 18 (Ind. Ct. App. 1992); Camelback Ski Corp. v. Behning, 539 A.2d 1107 (Md. 1988), *cert. denied*, 488 U.S. 849 (1988).

189. *See Williams*, 927 F.2d at 1131 (holding that a record containing no information regarding how much business was derived from advertising gives no basis for determining whether the advertising establishes minimum contacts).

190. Vault Corp. v. Quaid Software, Ltd., 775 F.2d 638, 639 (5th Cir. 1985).

191. Clements v. Barney's Sporting Goods Store, 406 N.E.2d 43, 45 (Ill. App. Ct. 1980).

192. *Ex parte* Pope Chevrolet, Inc., 555 So. 2d 109, 113 (Ala. 1989).

193. Aries v. Palmer Johnson, Inc., 735 P.2d 1373 (Ariz. Ct. App. 1987).

194. MBM Fisheries v. Bollinger Mach. Shop, 804 P.2d 627 (Wash. Ct. App. 1991).

195. Brokemond v. Marshall Field & Co., 612 N.E.2d 143 (Ind. Ct. App. 1993); *but see* Gavigan v. Walt Disney World Inc., 646 F. Supp. 786, 789 (E.D. Pa. 1986).

196. Rose v. Franchetti, 713 F. Supp. 1203 (N.D. Ill. 1989), *aff'd*, 979 F.2d 81 (7th Cir. 1992).

197. *Aries*, 735 P.2d at 1379.

The final bar to a finding of jurisdiction is when the cause of action does not arise out of the advertising. Courts read this requirement differently, and those differences are best illustrated by tort cases involving hotels and other service establishments. In some cases the courts rule that the tortious activities of the hotel staff do not arise out of or relate to the advertising activities in the forum.[198] These courts may also note that the duty to the patron does not arise until the patron arrives at the establishment.[199] However, some courts use a more permissive test: If but for the advertising the cause of action would not have existed, then the claim is related to the contacts.[200] In these situations, if the advertisements induced the patron to go to the hotel, then the claim is related to the advertisements. It is important to know which test is appropriate in the forum where jurisdiction is being contested.

If a plaintiff can show substantial advertising in the forum state that successfully produced sales for the defendant and was related to the cause of action, then the plaintiff should have no trouble meeting the burden of proof. It is important for the plaintiff to clearly present both the evidence and the nature and extent of the advertising to the court.[201] If the advertising appears to be national, a court will most likely assume, absent evidence to the contrary, that the advertising is indeed national. Ultimately, a finding for the plaintiff rests on how well the evidence is presented.

VI. CONCLUSION

Whatever the outcome of the United States Supreme Court's review of *Asahi Metal Industry Co. v. Superior Court*,[202] courts will continue to rely on advertising as a means of determining whether sufficient contacts exist for the court to exercise jurisdiction over the defendant. With new and ingenious ways to advertise being created every day, it is important for plaintiffs to be attentive when researching the defendant's advertising and for possible defendants to be aware of the risks inherent in vari-

198. State *ex. rel.* Circus Circus Reno v. Pope, 854 P.2d 461, 466 (Or. 1993).

199. Dirks v. Carnival Cruise Lines, 642 F. Supp. 971 (D. Kan. 1986).

200. Shute v. Carnival Cruise Lines, 897 F.2d 377, 383-86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

201. A poor example is Meyers v. Hamilton Corp., 693 P.2d 904 (Ariz. 1984), where the court was presented with only the advertisement. There was no indication of where and when the ad ran other than the fact that the fare from Phoenix, Arizona was listed.

202. 480 U.S. 102 (1987). Given the fact that many of the lower courts look to the defendant's additional conduct in order to determine whether the exercise of jurisdiction is reasonable, it is not unlikely that the Supreme Court will retain Justice O'Connor's test requiring additional conduct.

ous ad campaigns. Today a promotion for a product is as likely to be on an athlete's hat as on a full page ad in a magazine.[203] Whatever the form, there are a number of ways that advertising can create amenability. When the amount of advertising rises to the level of solicitation, when the advertising is related to the commission of a tort in the forum state, or when the advertising is related to substantial other contacts, the exercise of in personam jurisdiction is justified.

As for ABC Limited and its attempt to limit liability, it is likely that if ABC plans its ad campaign carefully it will not be subject to suit in a foreign state. Limiting its liability will mean limiting both its market and sales. ABC must be certain that its advertising does not cross into states where it does not want to be amenable. This strategy requires checking the signal strength of the radio stations and television stations and checking the circulation of newspapers and magazines it advertises in. An injured party must be equally scrupulous to determine whether the defendant's advertisements are more than just random, fortuitous acts.

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203. *See* Gavigan v. Walt Disney World Inc., 646 F. Supp 786 (1986) (discussing the various promotional campaigns for Disney World).

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