

The Purposeful Availment Trap

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It is commonly understood in the realm of procedure that the minimum contacts test requires a showing of “purposeful availment.”¹ We think that this common understanding is wrong. The minimum contacts test requires no more than that the nonresident defendant have connections with the forum state, such that he or she would be on reasonable notice of being sued there. As we will show, purposeful availment is not implicit in this due-process driven standard. In fact, purposeful availment sometimes operates in a manner that defeats jurisdiction when the fundamental principles of due process have, in fact, been satisfied. To put it bluntly, purposeful availment is an unnecessary and sometimes pernicious appendage to due process analysis.

The idea of purposeful availment made its debut in *International Shoe Co. v. Washington*,² although the phrase itself was not used there. In that case, the Court simply noted that, because the nonresident defendant had enjoyed the “benefits and protections of the laws” of the forum state, it was reasonable for the state to exercise personal jurisdiction over that defendant:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.³

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1. See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2854 (2011); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *Kulko v. Super. Ct.*, 436 U.S. 84, 94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see also Geoffrey C. Hazard, Jr., John Leubsdorf & Debra Lyn Basset, *CIVIL PROCEDURE* 116–18 (6th ed. 2011).

2. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth With No Exit*, 47 AKRON L. REV. (forthcoming 2013).

3. *Int'l Shoe*, 326 U.S. at 319.

The Court's discussion makes it clear that the Court was not imposing purposeful availment as a prerequisite to the exercise of personal jurisdiction. Rather, as the above quotation shows, the Court was simply observing that it was reasonable for the state to exercise personal jurisdiction over someone who was purposefully benefiting from the state's laws and protections. In other words, the condition of purposeful availment was *sufficient* to validate the exercise of personal jurisdiction.

As the *International Shoe* Court explained,

[i]t is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.⁴

If we assume that the *International Shoe* Court did not intend to impose a mechanical "benefits and protection" test, we can readily see that the foundation of that decision was connecting factors and reasonable expectations, for it is the existence of these expectation-generating connections that satisfy the "traditional notions of fair play and substantial justice" to which the Court famously referred.⁵ As we will show, a reasonable expectation of being sued in the forum is not dependent on purposeful availment, but solely on meaningful contacts, which may or may not include purposeful availment.

This seemed to be clear to the Court a decade later, when it decided *McGee v. International Life Insurance Co.*⁶ In that case, the question was whether California courts could exercise personal jurisdiction over a nonresident insurance company that had entered into a single contract with a resident of the forum. The Court answered that question in the affirmative and upheld jurisdiction by simply observing that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."⁷ The Court made no reference to purposeful availment and instead based this decision on the following connecting factors:

The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died.

4. *Id.*

5. *Id.* at 316.

6. 355 U.S. 220 (1957).

7. *Id.* at 223.

It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.⁸

Under the circumstances of the case, these connecting factors created a reasonable expectation in the nonresident insurer of a suit in the forum arising out of those connections.

Similarly, years later, in *Calder v. Jones*,⁹ the Court did not consider purposeful availment as a requirement for establishing personal jurisdiction in the context of a libel suit filed against nonresident defendants. In a sense, *Calder* is more significant than *McGee*, not only because the Court did not reference purposeful availment, but also because there was absolutely no possibility of establishing it in that case. Yet the Court found that the minimum contacts test had been satisfied, based on factors connecting the defendants and the claim with the forum state, just as the Court had done in *McGee*.

Still, there remains a continuing perception that purposeful availment is a requirement of the minimum contacts test. How has this happened?

The error can be traced to *Hanson v. Denckla*,¹⁰ a case involving a nonresident trustee of a trust with significant ties to the forum state. While the *Hanson* Court correctly observed that “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State,” it then failed to examine the actual bilateral contacts of the nonresident trustee with the forum, which contacts might have established personal jurisdiction.¹¹ As Justice Black’s dissent pointed out, those contacts were indeed meaningful and, thus, the exercise of personal jurisdiction over the trustee might well have been consistent with the traditional notions of fair play and substantial justice.¹²

Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts. It chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question.¹³

The contacts described by Justice Black were strikingly similar to those that sufficed to uphold personal jurisdiction in *McGee*, a case decided

8. *Id.*

9. 465 U.S. 783 (1984).

10. 357 U.S. 235 (1958).

11. *Id.* at 253–54.

12. *Id.* at 256, 259 (Black, J., dissenting).

13. *Id.* at 259.

earlier in the same term by a unanimous Court.¹⁴ The critical difference between the cases was the absence of a purposeful availment requirement in *McGee*.

But instead of attending to the facts and the fundamental principles of due process, the *Hanson* Court imposed an additional requirement to the minimum contacts test: “[I]t is *essential* in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”¹⁵ As authority for this proposition, the Court cited *International Shoe*, referencing the exact language from *International Shoe* quoted above,¹⁶ language that did not treat purposeful availment as an essential element of the minimum contacts test. By adding the word “essential” to the *International Shoe* Court’s description of what constituted a meaningful contact, the *Hanson* Court transformed a sensible description of the circumstances confronting the *International Shoe* Court into a fiction that was inconsistent with that description, unnecessary, and confusing.

The purposeful availment trap caught the Court again in *Shaffer v. Heitner*.¹⁷ After determining that the minimum contacts test should apply in quasi-in-rem jurisdiction cases, the Court addressed the question of whether the directors of a forum-based corporation had purposefully availed themselves of the benefits and protections of the laws of the forum. The Court concluded that they had not:

[T]his line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of [the directors] to Greyhound and its stockholders. It does not demonstrate that [the directors] have “purposefully avail[ed themselves] of the privilege of conducting activities in the forum State,” in a way that would justify bringing them before a Delaware tribunal. [The directors] have simply had nothing to do with the State of Delaware.¹⁸

The best that can be said of the Court’s reasoning is that it is dicta. The minimum contacts test was actually resolved in *Shaffer* on relatedness grounds. But dicta from the Supreme Court can be damaging. If a director of a forum-based corporation is not deriving benefits and protections from the laws of that state, it is difficult to see when that standard would be satisfied. In *Shaffer*, the purposeful availment requirement was both

14. See *supra* text accompanying note 6.

15. *Hanson*, 357 U.S. at 253 (emphasis added).

16. See *supra* text accompanying note 3.

17. 433 U.S. 186 (1977).

18. *Id.* at 216 ((citations omitted) quoting *Hanson*, 357 U.S. at 253).

unnecessary and unnecessarily confusing.

One of the most surprising things about the above quotation from *Shaffer* is that it served as the sole reason for the Court in *Kulko v. Superior Court*¹⁹ to hold that a nonresident father “can hardly be said to have ‘purposefully availed himself’ of the ‘benefits and protections’ of California’s laws” by sending his daughter to live there.²⁰ The *Kulko* Court was further ensnared in the purposeful availment trap when it imported purposeful availment into the effects test as an essential element: “In light of our conclusion that [the father] did not purposefully derive benefits from any activities relating to the state of California, it is apparent that the California Supreme Court’s reliance on [the father’s] having caused an ‘effect’ in California was misplaced.”²¹ The effects test to which the Court referred was the Restatement (Second) of Conflict of Laws § 37 (1971):

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.²²

As is evident from the text of § 37, the effects test does not include a purposeful availment requirement. In fact, it is designed to apply to circumstances where there has been no purposeful availment, an obvious point that seemed to have eluded the *Kulko* Court.²³ Six years after the decision in *Kulko*, the Court in *Calder* sensibly upheld jurisdiction in an effects-test context without requiring any showing of purposeful availment, and by not even mentioning the concept.²⁴ As we will see, however, purposeful availment still raises its head in effects-test cases,²⁵ particularly those involving the stream of commerce.

In addition, the Court in *Kulko* made the same mistake the Court had made in *Hanson*, specifically, it did not consider whether the non-resident

19. 437 U.S. 84 (1978).

20. *Id.* at 94 (citing *Shaffer*, 433 U.S. at 216).

21. *Id.* at 96.

22. Restatement (Second) of Conflict of Laws § 37 (1971).

23. As the commentary to the Restatement explains:

There are three possible situations: (1) [t]he act was done with the intention of causing the effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so.

Id. at comment a.

24. *Calder v. Jones*, 465 U.S. 783 (1984).

25. *See, e.g., Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869, 885 (Kan. 2012).

defendant's contacts with the forum were meaningful from the perspective of fundamental due process principles, focusing instead on the "non-essential" purposeful availment requirement. Thus, purposeful availment again distracted the Court from the basic due process inquiry. Certainly a case can be made that a father who sends his child to live in a state with her mother shares in the benefits and protections of the laws enjoyed by the child or, at least, has meaningfully affiliated himself with the forum.

The confusion over the purposeful availment "requirement" is evident in *Burger King Corp. v. Rudzewicz*.²⁶ In that opinion, the Court variously described the minimum contacts test as premised on whether the nonresident defendant "purposefully established 'minimum contacts' in the forum State,"²⁷ "purposefully directed" his activities at residents of the forum,²⁸ or "purposefully avail[ed] itself of the privilege of conducting activities within the forum State."²⁹ In addition, the *Burger King* Court cited *Hanson* for the proposition that purposeful availment is an essential requirement of the minimum contacts test,³⁰ and also cited *Calder* as an example of constitutionally acceptable purposefulness despite the absence of purposeful availment in that case.³¹ Hence, under *Burger King*, purposeful availment is both required and not required. Yet, in that case, ironically there was really no need to discuss purposeful availment since, without question, the non-resident defendant had significantly affiliated himself with the forum state.

All this confusion comes to a crescendo in the context of the stream-of-commerce test. One must keep in mind that the stream-of-commerce test is simply a specific instance of the effects test where, as the Court makes clear in *Calder*, purposeful availment should play no role.

As is well known, the Court in *Asahi Metal Industry Co., v. Superior Court*³² was split between those members of the Court who endorsed the stream-of-commerce-plus test and those who endorsed a pure stream-of-commerce test. Justice O'Connor's opinion for a four-person plurality focused on the purposeful availment requirement, insisting that jurisdiction could not be exercised unless the non-resident defendant had purposefully availed itself of the forum market by taking some action to promote the sale of its product in the forum.³³ On the other hand, Justice Brennan, also

26. 471 U.S. 462 (1985).

27. *Id.* at 474.

28. *Id.* at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

29. *Id.* at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

30. *Id.*

31. *Id.* at 473.

32. 480 U.S. 102 (1987).

33. *Id.* at 112 (plurality opinion).

writing for four members of the Court, did not refer to purposeful availment and focused solely on the “regular and anticipated flow of products from manufacture to distribution to retail sale.”³⁴ For Justice Brennan, “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”³⁵ Essentially, Justice Brennan endorsed a version of the effects test under which out-of-state commercial activity having a foreseeable effect in the state constitutes a meaningful contact with the state. The basic point here is that the purposeful availment “requirement” made it impossible to achieve a majority on the scope of the stream-of-commerce test.

This purposeful-availment-driven split remained unresolved when the Court revisited stream of commerce in *J. McIntyre Machinery, Ltd. v. Nicastro*.³⁶ Justice Kennedy, writing for a four-person plurality, insisted that in product-liability cases purposeful availment was a requirement of the minimum contacts test.³⁷ In this way, his opinion mirrored that of Justice O’Connor in *Asahi* by failing to take into account the effects test and imposing an additional requirement on that test. In fact, Justice Kennedy’s opinion appears to impose a standard stricter than one endorsed by Justice O’Connor’s plus test: “The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum . . .”³⁸ Moreover, as in *Hanson*, the plurality used the cover of purposeful availment to disregard those facts that might have established a meaningful connection with the forum state, such as the nonresident defendant’s nationwide marketing of heavy machinery, intent to serve the entire US market, and the fact that the forum state was a significant economic player in the targeted market.³⁹

By way of contrast, the *McIntyre* dissent, although it seemed to be endorsing a novel approach to personal jurisdiction, avoided the purposeful availment trap and focused directly on the meaningfulness of the contacts. In Justice Ginsburg’s words:

In sum, McIntyre UK’s regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products “anywhere in the United States.” At least as purposeful was McIntyre UK’s engagement of McIntyre America as the conduit for

34. *Id.* at 117 (Brennan, J., concurring in the judgment).

35. *Id.*

36. 131 S.Ct. 2780 (2011).

37. *Id.* at 2787 (plurality opinion).

38. *Id.* at 2788 (emphasis added).

39. See Allan Ides, *Foreward: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 368–70 (2012).

sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged. On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?⁴⁰

Indeed, one could say that the dissent offered an assessment of the facts that showed how the exercise of jurisdiction would have been consistent with the traditional notions of fair play and substantial justice. Even if one disagrees with the dissent's conclusions in this regard, Justice Ginsburg's method of assessing facts was consistent with the standards established in *International Shoe* and avoided the purposeful availment trap.

Most importantly, no majority was achieved, in part, because of the pernicious presence of the purposeful availment requirement.

We have shown that the *International Shoe* standard did not impose a purposeful availment requirement and that the Court has not always considered that requirement when upholding personal jurisdiction. We have also shown that in *Hanson*, *Kulko*, *Asahi*, and *Nicastro*, by applying the purposeful availment standard in a manner that was inconsistent with the fundamental principles of due process, the Court, or some members of the Court, have discounted and overlooked meaningful contacts that would have otherwise satisfied the *International Shoe* minimum contacts test and led the Court to uphold personal jurisdiction. It is also fair to say that the Court is confused as to whether there is any purposeful availment requirement.

We believe that the personal jurisdiction formula should merely focus on *meaningful connections* with the forum state and the *reasonable*

40. *McIntyre*, 131 S.Ct. at 2797 (Ginsburg, J., dissenting).

expectations to which those connections give rise. This fundamental-principles approach would avoid traps and results that are inconsistent with the traditional notions of fair play and substantial justice.