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# A Constitutional Analysis of the Delaware Director-Consent-to-Service Statute

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## A Constitutional Analysis of the New Delaware Director-Consent-to-Service Statute

In *Shaffer v. Heitner*<sup>1</sup> the United States Supreme Court defined the boundaries the due process clause imposes on the power of states to control the activities of nonresident corporate directors. In *Shaffer* the Court struck down Delaware's sequestration method of obtaining jurisdiction over nonresident directors of its corporations.<sup>2</sup> The Delaware sequestration statute permitted a court to seize a nonresident defendant's property located within the state, thereby forcing the defendant either to appear and contest the merits of the suit or to default and incur liability for the value of the seized assets.<sup>3</sup> The Court held that assertion of such jurisdiction violated due process because the nonresident directors lacked minimum contacts with the state.<sup>4</sup> Thus, *Shaffer* effectively restricted the Delaware courts' jurisdiction over nonresident directors of Delaware corporations.<sup>5</sup>

In an attempt to regain state court jurisdiction over nonresident corporate directors, the Delaware legislature enacted a statute providing that a nonresident who accepts a position as a director of a Delaware corporation thereby consents to jurisdiction over him in any action arising out of his activities as a director.<sup>6</sup> The Delaware Supreme Court, in *Armstrong v. Pomerance*,<sup>7</sup> addressed the constitutionality of the new director-consent-to-service statute in light of *Shaffer's* due process limitations<sup>8</sup> and determined that it complied with the due process clause.<sup>9</sup> Such statutes nevertheless pose serious due process problems when they are construed to permit state courts to exercise jurisdiction over nonresidents who have no contact with the forum other than their directorships of state-chartered corporations.

This note examines the limits the due process clause imposes on state court jurisdiction in order to determine whether the Delaware statute is constitutional. The note begins by analyzing both *Shaffer* and the Delaware statute. By tracing the evolution of the minimum contacts requirement, the note demonstrates that minimum contacts analysis requires the court to make a threshold finding that the individual acted purposefully to create a contact with the forum before considering whether the state has a sufficient interest in the matter to warrant its exercise of jurisdiction. The note then analyzes the Delaware statute in light of this minimum contacts test and concludes that the statute is unconstitutional because acceptance of a directorship does not constitute a purposeful act sufficient to create minimum contacts. The note examines

1. 433 U.S. 186 (1977).

2. 433 U.S. at 212 (invalidating DEL. CODE ANN. tit. 10, § 366 (1974)).

3. DEL. CODE ANN. tit. 10, § 366 (1974).

4. 433 U.S. at 212.

5. The sequestration procedure had been the principal means of obtaining personal jurisdiction over nonresident corporate directors. Ratner & Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 BROOKLYN L. REV. 641, 643 (1979).

6. DEL. CODE ANN. tit. 10, § 3114 (1980).

7. 423 A.2d 174 (Del. 1980).

8. *Id.* at 176.

9. *Id.* at 179.

*Armstrong v. Pomerance*, in which the Delaware Supreme Court upheld the statute, and argues that it does not provide an alternative rationale for upholding the statute. Finally, the note recognizes the need for a limited exception to the minimum contacts requirement, but proposes that the principal place of business, rather than the state of incorporation, should be the forum for such exceptional cases.

### I. SHAFFER AND THE LEGISLATIVE RESPONSE

In *Shaffer v. Heitner* the plaintiff filed a shareholder derivative suit in Delaware Chancery Court alleging that the directors of Greyhound Corporation had violated their fiduciary duties to the corporation.<sup>10</sup> Greyhound was incorporated in Delaware, with its principal place of business in Phoenix, Arizona.<sup>11</sup> None of the directors lived in Delaware, and none of the actions in question had occurred in Delaware.<sup>12</sup> Unable to obtain personal jurisdiction over the nonresident directors because of these circumstances, the plaintiff obtained an order sequestering the defendants' stocks.<sup>13</sup> The sequestration of their stocks compelled the nonresident directors to appear, and the court exercised quasi in rem jurisdiction over them.<sup>14</sup>

The Delaware Chancery Court rejected the defendants' arguments that Delaware could not assert jurisdiction over them because they lacked minimum contacts with the state.<sup>15</sup> Affirming the Chancery Court's decision, the Delaware Supreme Court held that the defendants' contacts with the forum state were relevant only when the plaintiff sought in personam jurisdiction.<sup>16</sup> The Delaware Supreme Court thus viewed contacts as irrelevant when, as here, the plaintiff sought quasi in rem jurisdiction based on the presence of the defendants' stock in Delaware,<sup>17</sup> rather than in personam jurisdiction.

10. 433 U.S. 186, 189-90 (1977). The plaintiff alleged that the defendant directors breached their duties by causing Greyhound Corporation and a Greyhound subsidiary to engage in actions that resulted in liability for substantial damages in a private antitrust suit and a large fine in a criminal contempt action. *Id.* at 190.

11. *Id.* at 189.

12. *Id.* at 190-91.

13. *Id.* The purpose of the sequestration procedure was to compel a nonresident defendant to enter a personal appearance. *Id.* at 193 (quoting Delaware Chancery Court letter opinion in *Greyhound Corp. v. Heitner*). If the non-resident did not appear to defend on the merits, his sequestered property could be used to pay a default judgment. DEL. CODE ANN. tit. 10, § 366 (1974). Under Delaware law, the situs of the corporation's stock is the state of incorporation. *Id.* at tit. 8, § 169. Thus, the directors' stock in Greyhound was statutorily present in the forum, and the court could seize it.

14. 433 U.S. at 194. Traditionally, a state court must rely on one of three bases for any exercise of jurisdiction. If the court's power stems from authority over the defendant's person, the action and judgment are in personam. *Id.* at 199. Courts with in personam jurisdiction can issue judgments affecting all the property of the defendant. Jurisdiction based on a court's power over a defendant's property within the state is in rem or quasi in rem. *Id.* In such cases, the judgment is limited to the value of the property on which the court has based its jurisdiction. *Id.* The basis of in rem jurisdiction is property present in the state that is the subject of the suit and is owned by the defendant. In rem judgments affect the interests of all persons in the designated property. *Id.* at 199 n.17. Quasi in rem jurisdiction arises when the defendant has property unrelated to the subject matter of the suit in the forum and the judgment affects only the interests of the parties in that property. *Id.*

15. *Id.* at 193 (quoting Court of Chancery letter opinion in *Greyhound v. Heitner*). The defendants had entered a special appearance and disputed the sequestration order's validity. *Id.* at 192-93.

16. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976), *rev'd sub nom. Shaffer v. Heitner*, 433 U.S. 186 (1977).

17. *Id.*

On appeal, the United States Supreme Court reversed the Delaware court's decision, and held that all assertions of state court jurisdiction, whether in personam, in rem, or quasi in rem, must be evaluated according to the minimum contacts standard of *International Shoe Co. v. Washington*.<sup>18</sup> Under the minimum contacts test established in *International Shoe*, a state may exercise jurisdiction over a nonresident if the person has "contacts, ties, and relations" with the forum state sufficient to render the exercise of jurisdiction fair.<sup>19</sup> The *Shaffer* Court reasoned that because the sequestered property was not the subject matter of the suit and was not related to the cause of action, it did not provide contacts sufficient to support jurisdiction.<sup>20</sup> The Court then examined the defendants' relationship with Delaware and stated that the defendants' acceptance of directorships in a Delaware corporation did not, without more, satisfy the minimum contacts requirement of *International Shoe*.<sup>21</sup>

The Court rejected the contention that Delaware's strong interest in supervising the management of Delaware corporations justified its assertion of jurisdiction over corporate directors.<sup>22</sup> Instead, the Court questioned the interest itself, noting that Delaware had not enacted a statute embodying the interest.<sup>23</sup> Even if such an interest did exist, the Court went on, such an interest would support the application of Delaware law to the controversy, but could not supply those minimum contacts that would justify the state's exercise of jurisdiction over the nonresidents.<sup>24</sup> The Court also mentioned that because the state had not provided notice of its intent to assert jurisdiction over nonresidents through a long-arm statute,<sup>25</sup> the defendant directors had no reason to expect

18. 326 U.S. 310 (1945), cited in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). For a discussion of the justifications for a lower contacts requirement for quasi in rem jurisdiction than for in personam jurisdiction, see Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 67-79 (1978).

19. 326 U.S. 310, 319 (1945); see notes 40-48 *infra* and accompanying text (discussing *International Shoe*).

20. 433 U.S. at 213.

21. *Id.* at 216-17. Justice Brennan dissented from the portion of the Court's opinion in which the Court held that the nonresident directors lacked minimum contacts. *Id.* at 220-28 (Brennan, J., concurring in part and dissenting in part). Justice Brennan believed that the Court should not have reached the question of minimum contacts because the State of Delaware had not purported to base jurisdiction on the defendants' contacts with the state. *Id.* at 220-22. In his view, the issue was not ripe, and the Court's opinion was thus only advisory. *Id.* Justice Brennan also argued that state courts generally should have jurisdiction to adjudicate shareholder derivative actions involving the conduct and policies of directors and officers of a corporation chartered by that state. *Id.* at 222.

22. *Id.* at 214.

23. *Id.*

24. *Id.* at 215. Nevertheless, some commentators have remarked that the contacts requirement for choice of law purposes should be greater than that for jurisdiction because choice of law has a greater impact on the substantive rights of the parties. See Ratner & Schwartz, *supra* note 5, at 656 (paradoxical that Delaware interest based on stock ownership insufficient to justify Delaware forum, but act of incorporating sufficient to apply Delaware law); Silberman, *supra* note 18, at 82, 88 (if contacts sufficient to require application of forum's law, forum should also exercise jurisdiction); see also notes 64-70 *infra* and accompanying text (discussing relationship between defendant's contacts with forum and state's interest in minimum contacts analysis). Justice Brennan, in his *Shaffer* dissent, stressed that the jurisdictional inquiry and the choice of law inquiry are more closely related than the *Shaffer* opinion indicated. 433 U.S. at 224-25 (Brennan, J., concurring in part and dissenting in part).

25. 433 U.S. at 224-25 (Brennan, J., concurring in part and dissenting in part). In noting Delaware's failure to enact such a statute, the Court specifically referred to long-arm statutes enacted by other states which provided that a director consents to the incorporating state's jurisdiction when he accepts the directorship. *Id.* at 216 n.47; see note 39 *infra* (citing pre-*Shaffer* cases upholding constitutionality of state long-arm statutes reaching nonresident corporate directors).

that they might be haled before a Delaware court.<sup>26</sup>

*Shaffer* thus invalidated Delaware's primary method of obtaining jurisdiction over nonresident directors of its corporations.<sup>27</sup> The Delaware General Corporation Law Committee of the Delaware Bar Association saw the situation created by *Shaffer* as a vacuum that needed to be filled by legislation restoring jurisdiction.<sup>28</sup> The Committee also viewed the Court's references to other states' director-consent statutes as an invitation to enact a nonresident director-consent-to-service statute.<sup>29</sup>

The Committee's primary justification for the statute was the internal affairs rule, which provides that a chartering state's law generally governs the fiduciary duties of the corporation's directors.<sup>30</sup> The Committee anticipated that without some means of securing jurisdiction over nonresident directors, jurisdiction rules would generally preclude Delaware courts from adjudicating cases arising under that law, although choice of law considerations would dictate the application of Delaware law.<sup>31</sup> Thus, tribunals chosen by plaintiffs would be forced to speculate about how the Delaware courts would resolve the dispute.<sup>32</sup> Moreover, the Committee anticipated that aggrieved shareholders would be deprived of the opportunity to bring all corporate defendants together in one forum.<sup>33</sup>

The Delaware General Assembly enacted the recommended statute without dissent.<sup>34</sup> The new statute treats the acceptance of a position as a director of a Delaware-chartered corporation as implied consent to Delaware jurisdiction in causes of action arising from the director's duties to the corporation.<sup>35</sup> The

26. 433 U.S. at 216.

27. Jacobs & Stargatt, *The New Delaware Director Consent-to-Service Statute*, 33 BUS. LAW. 701, 701 (1978).

28. *Id.* The authors of the article were members of the Committee. *Id.* at 701 n.3.

29. *Id.* at 705.

30. *See id.* at 703 n.33 (except when federal law preempts field, state law governs internal affairs) (citing *Cort v. Ash*, 422 U.S. 66 (1975)). The internal affairs rule provides that a chartering state's laws govern the fiduciary duties of corporate directors unless a different state has greater interest in the matter. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1979); *see notes 138-41 infra* and accompanying text (discussing choice of law principles that might indicate application of law other than chartering state).

31. Jacobs & Stargatt, *supra* note 27, at 605; *see Ratner & Schwartz, supra* note 5, at 650 (if Delaware long-arm statute unconstitutional, choice of law rules usually would dictate application of Delaware law by non-Delaware courts).

32. Jacobs & Stargatt, *supra* note 27, at 705.

33. *Id.* (without director-consent statute, shareholder would have to sue different directors in different states or select a target director; defendant selected could not implead other directors not in same forum); *see Ratner & Schwartz, supra* note 5, at 650 (if Delaware long-arm statute unconstitutional and shareholder unable to bring derivative suit anywhere else, shareholder might be denied remedy).

34. Jacobs & Stargatt, *supra* note 27, at 705.

35. *Id.* The statute provides in part:

[e]very nonresident of [Delaware] who . . . accepts election or appointment as a director . . . of a corporation organized under the laws of [Delaware] or who . . . serves in such a capacity . . . shall, by such acceptance or by such service, be deemed to have consented to the appointment of the registered agent of the corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in all civil actions or proceedings against such director for violation of his duty in such capacity. . . . Such acceptance or service as a director . . . shall be a signification of the consent of such director . . . that any process so served shall be of the same legal force and validity as if served upon such director within [Delaware].

DEL. CODE ANN. tit. 10, § 3114 (1980).



statute vastly expands the Delaware courts' ability to reach nonresident corporate directors by permitting Delaware courts to exercise in personam jurisdiction over all nonresident directors of Delaware-chartered corporations. Under the sequestration method of obtaining jurisdiction, on the other hand, Delaware courts had been able to reach only those directors who owned stock in the corporations they directed.<sup>36</sup> The statute thus reasserts the jurisdictional authority the *Shaffer* Court destroyed when it invalidated the sequestration method of obtaining jurisdiction over nonresident corporate directors.

## II. THE LAW OF MINIMUM CONTACTS AND THE ROLE OF THE LONG-ARM STATUTE

Delaware's enactment of the director-consent statute presupposes that a long-arm statute can provide sufficient contacts between a defendant and a forum to render the forum's assertion of jurisdiction constitutional.<sup>37</sup> Although the Delaware legislature viewed the *Shaffer* Court's reference to other director-consent statutes as an invitation to enact a similar statute,<sup>38</sup> this language is open to other interpretation.<sup>39</sup> Whether the absence of the statute was crucial to the decision that Delaware lacked in personam jurisdiction over the defendants depends on the role a long-arm statute plays in the minimum contacts analysis.

In an attempt to answer this question, this section examines the genesis and growth of the minimum contacts analysis. The section demonstrates that minimum contacts analysis requires a threshold finding of the defendant's purposeful acts in connection with the forum before the state's interests in asserting jurisdiction become relevant. This section applies this analysis to nonresident corporate directors whose only connection with the forum state is acceptance of a directorship in a state-chartered corporation and argues that because acceptance of a directorship does not constitute a purposeful act, the statute is unconstitutional.

### A. THE GENESIS OF MINIMUM CONTACTS

The United States Supreme Court initially defined the role of minimum

36. DEL. CODE ANN. tit. 10, § 366 (1974). Because Delaware law does not require corporate directors to own stock in the corporations they direct, *id.* tit. 8, § 141(b) (Supp. 1976), some directors of Delaware corporations do not own stock in their corporations. The *Shaffer* plaintiff asserted jurisdiction only over those directors who owned stock in the corporation. 433 U.S. at 192 n.8.

37. Jacobs & Stargatt, *supra* note 27, at 705; see Jacobs, *Personal Jurisdiction Over Corporate Officers and Directors: Recent Developments*, 4 DEL. J. CORP. L. 690, 693 (1979) (*Shaffer* court indicated result might have been different if there had been applicable long-arm statute); notes 71-78 *infra* and accompanying text (discussing effect of statute on due process analysis).

38. Jacobs & Stargatt, *supra* note 27, at 705.

39. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 161 (1977) (*Shaffer* holding implicitly rejects fictitious consent as sufficient minimum contacts, leaving constitutionality of such statutes in doubt). In decisions prior to *Shaffer*, courts had upheld director-consent-to-service statutes. See *Wagenberg v. Charleston Wood Products, Inc.*, 122 F. Supp. 745, 748 (E.D.S.C. 1954) (upholding constitutionality of South Carolina consent-to-service statute; acts complained of occurred within forum); *Weil v. Beresth*, 26 Conn. Supp. 428, 428, 225 A.2d 826, 827 (Super. Ct. 1966) (defendant who uses state for economic benefit cannot avoid jurisdiction by virtue of nonresidency; opinion fails to enumerate contacts with state). These decisions, however, did not apply a minimum contacts analysis to these statutes. See notes 49-70 *infra* and accompanying text (discussing minimum contacts analysis).

contacts analysis in *International Shoe Co. v. Washington*.<sup>40</sup> In *International Shoe*, the Court established that a nonresident defendant's contacts with the forum could warrant the forum's exercise of jurisdiction and that the defendant's activities within the state could create such contacts.<sup>41</sup> The Court rejected the defendant corporation's contention that because the corporation was not located within the forum, the assertion of jurisdiction over it violated due process.<sup>42</sup> The Supreme Court ruled that the corporation's regular solicitation of business<sup>43</sup> provided "such contacts, ties and relations" between the defendant and the forum that made the forum's exercise of jurisdiction reasonable and just.<sup>44</sup> The Court gave no examples of other ways in which such contacts might be established,<sup>45</sup> and its decision did not preclude the possibility that other factors, such as a state's interest in adjudicating the matter, might be equally capable of creating the necessary minimum contacts.<sup>46</sup>

Because the *International Shoe* Court did not delineate the boundaries of the minimum contacts analysis, it left room for speculation about the nature and components of the minimum contacts test.<sup>47</sup> Although the Court stated that

40. 326 U.S. 310 (1945).

41. *Id.* at 316.

42. *Id.* at 315. The State of Washington initiated the suit to collect contributions the corporation allegedly owed to Washington's unemployment compensation fund. *Id.* at 311. The defendant was a Delaware corporation, with its principal place of business in St. Louis, Missouri. *Id.* at 313. The defendant relied on an earlier Supreme Court decision, *Pennoy v. Neff*, 95 U.S. 714 (1877), which held that a state can exercise in personam jurisdiction only over residents of that state. *Id.* at 721-22. The *International Shoe* decision effectively overruled *Pennoy*. See 326 U.S. at 316 (in determining whether exercise of jurisdiction over nonresident defendant comports with due process notions of fair play and substantial justice, courts should examine relationship of defendant to forum state).

43. 326 U.S. at 313-14. The corporation's salesmen lived in Washington and did most of their work for the corporation in Washington. *Id.*

44. *Id.* at 320. Although *International Shoe* purportedly changed the focus of a court's jurisdictional inquiry from the physical boundaries of a state to the relationship between the defendant and the forum, a court still must examine the territorial limits of the state in determining whether jurisdictional assertions comport with due process requirements. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980).

45. See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of the State Courts—From Pennoy to Denckla: A Review*, 25 U. CHI. L. REV. 569, 623 (1958) (Court's use of terms "reasonableness" and "fair play" is conclusory). The Court did indicate that factors other than the defendant's activities in the state were relevant to the analysis, e.g., the amount of money the defendant earned through transactions with the state's citizens, 326 U.S. at 315; the amount of inconvenience the defendant would experience in defending a suit away from home, *id.* at 317, and the benefits the defendant received from the state's laws. *Id.* at 319. Nevertheless, the Court did not make clear whether the defendant's in-state activities in *International Shoe* were a prerequisite to jurisdiction or just one of several factors that could warrant jurisdiction. The Court did establish two distinct levels of contacts: the minimal contacts that support jurisdiction in suits arising out of the activities that underlie the claim, and the greater quantum of contact required to support jurisdiction over the defendant in an unrelated cause of action. *Id.* at 317; see notes 68-70 *infra* and accompanying text (discussing general and specific jurisdiction).

46. 326 U.S. at 319.

47. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 443, 176 N.E.2d 761, 766 (1961) (due process satisfied when jurisdiction asserted by forum where both parties can most conveniently settle their dispute) and Note, *Personal Jurisdiction: A New Look at Old Tests*, 65 CALIF. L. REV. 257, 266 (1977) (logic of *International Shoe* demands balancing of all relevant interests rather than merely looking at defendant's contacts with forum to determine jurisdiction) and Note, *The Growth of the International Shoe Doctrine*, 16 U. CHI. L. REV. 523, 524 (1949) (*International Shoe* requires balancing of interests to determine reasonableness of asserting jurisdiction) with *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 899, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969) (*International Shoe* established two-step analysis; after determining that defendant has acted purposefully within forum state, court must balance inconvenience to defendant against plaintiff's interest in suing

factors other than the defendant's activities within the state were relevant to the minimum contacts inquiry,<sup>48</sup> it did not explain the relative significance of these factors. The Court thus left open the question whether the minimum contacts analysis requires a threshold finding of purposeful acts, such as those present in *International Shoe*, or permits a strong and properly expressed state interest to compensate for a paucity of the defendant's purposeful acts.

#### B. CLARIFICATION OF THE MINIMUM CONTACTS TEST

The Court clarified the minimum contacts test in *McGee v. International Life Insurance Co.*<sup>49</sup> and *Hanson v. Denckla*.<sup>50</sup> Under *McGee* and *Denckla*, a court may consider the interest of the state in asserting jurisdiction over the nonresident only in those cases where the court finds that the defendant has acted purposefully and unilaterally to create a contact with the state. The analysis thus clearly defines the role of the state's interests in determining whether an individual has minimum contacts with the forum.

*McGee* involved a suit by the beneficiary of a life insurance policy issued by the nonresident defendant insurance company.<sup>51</sup> The defendant's only contact with the forum was a solicitation of an insurance policy renewal from the plaintiff's decedent, who had lived in the forum.<sup>52</sup> The Supreme Court upheld jurisdiction over the nonresident despite the paucity of contacts between the defendant and the forum.<sup>53</sup> In reaching its holding, the Court weighed a variety of factors, including the forum's explicit interest in providing effective means of redress for its residents when their insurers refused to pay claims.<sup>54</sup>

*McGee* indicates that when a defendant's acts connecting him with the forum state are few, a state's interests in protecting its citizens may compensate for that deficiency.<sup>55</sup> Although the *McGee* defendant had never entered the state and had performed only one act related to the forum, he had, by that act, purposefully connected himself with a resident of the forum state.<sup>56</sup> Only after

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locally and state's interest in assuming jurisdiction) and Gorfinkel & Lavine, *Long Arm Jurisdiction in California under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1200 (1970) (no balancing of interests required; *International Shoe* suggests that jurisdiction is reasonable when defendant has sufficient contacts with state). For a discussion of some of these theories and a recommendation that the various factors in the analysis be relegated to the position of considerations, rather than requirements, see Comment, *Minimum Contacts Confused and ReConfused—Variations on a Theme by International Shoe—Or, Is This Trip Necessary?*, 7 SAN DIEGO L. REV. 304 (1970).

48. See note 45 *supra* (discussing other factors Supreme Court indicated were relevant to determination of jurisdiction).

49. 355 U.S. 220 (1957).

50. 357 U.S. 235 (1958).

51. 355 U.S. at 221.

52. *Id.*

53. *Id.* at 223.

54. *Id.* at 222-24. The Court identified other factors that supported jurisdiction in the case. First, the Court noted the general increase in the number of commercial transactions by mail. *Id.* at 223. Thus, the defendant's physical absence from the state did not rule out jurisdiction. The Court also pointed out that improvements in transportation reduce the burdens to the nonresident defendant required to defend in a distant forum. *Id.* Finally, the Court stated that in suits arising from insurance contracts, important witnesses were most likely to be in the insured's state. *Id.* Inconvenience to the defendant, therefore, was not enough to violate due process. *Id.* at 224.

55. See *id.* at 223-24 (implying that contact sufficient because state has manifest interest in providing forum for citizens in such cases; state had expressed interest explicitly in statute).

56. See *id.* (contract delivered in forum, premiums mailed from forum, and insured resided in forum when he died).



establishing the defendant's purposeful act did the Court consider the state's interests in adjudicating the suit. *McGee* thus represents the first step in the Court's creation of a threshold purposeful act requirement.

The Supreme Court's decision in *Hanson v. Denckla*<sup>57</sup> further clarified the threshold requirement. The *Hanson* plaintiffs attempted to rely on *McGee* to obtain jurisdiction over a trustee who did not reside within the forum.<sup>58</sup> The disputed trust had been created in the trustee's state, and the settlor had subsequently moved to the forum state.<sup>59</sup> The Court, however, distinguished *McGee*, pointing out that the trustee in *Hanson* had not performed any acts in the forum comparable to the *McGee* defendant's solicitation.<sup>60</sup> The Court rejected the argument that the interests of the state in settling estates<sup>61</sup> and of the parties who would be affected by the resolution of the suit could compensate for the trustee's failure to conduct business in connection with the state.<sup>62</sup> Rather, the issue had to be resolved by evaluating the nonresident trustee's acts before considering the interests of the state and the other parties.<sup>63</sup>

The Court's decisions in *McGee* and *Hanson* demonstrate that minimum contacts analysis requires a threshold determination that the defendant acted purposefully to create a contact with the forum state.<sup>64</sup> When the defendant's activities in connection with the state are sufficient to constitute a purposeful act, but are insufficient, without more, to permit the forum to exercise jurisdiction, state interests may compensate for the defendant's minimal contacts.<sup>65</sup>

57. 357 U.S. 235 (1958).

58. *Id.* at 250-51.

59. *Id.* at 238. Several years after moving to the forum, the settlor died. *Id.* at 239. The suit involved a dispute between the trust beneficiaries and those who would take the trust assets under the residuary clause of the settlor's will if the trust were declared invalid. *Id.* at 240.

60. *Id.* at 252.

61. *Id.* at 253-54.

62. *Id.* at 254. In a dissenting opinion, Justice Black argued that the state's interest in resolving disputes concerning the settlor's estate should weigh in favor of jurisdiction over the trustee. He emphasized that the trustee had voluntarily chosen to maintain a business relationship with the settlor for eight years after the settlor moved to the forum. *Id.* at 258-59.

63. *Id.* at 253.

64. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (fortuitous circumstances connecting defendant with forum do not provide required contacts; defendant's acts must cause contacts); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (sufficient contacts are established only by acts of defendant); Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 798-99 (1973) (Supreme Court has held nonresidents may be subject to suit when defendant's activities of particular interest to state); Gorfinkel & Lavine, *Long Arm Jurisdiction in California under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1192 (1970) (defendant, and not some third party, must initiate the contacts between the state and himself; no balancing test required); Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 422 (1980) (from *Hanson* to *World-Wide Volkswagen*, Court developed bifurcated jurisdiction inquiry, requiring threshold finding of defendant's contacts with the forum); Note, *The Long-Arm Shrinks: The Supreme Court and the Problem of the Nonresident Defendant in World-Wide Volkswagen v. Woodson*, 58 DEN. L.J. 667, 674 (1981) (conduct of defendant creates necessary affiliating circumstances for jurisdiction).

65. Cf. Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modern Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 883 (1978) (legitimate state interest may be additional prerequisite to jurisdiction); *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960) (inconvenience to defendant weighed against state and plaintiff's interests to determine whether assertion of jurisdiction fair); Note, *Personal Jurisdiction: A New Look at Old Tests*, 65 CALIF. L. REV. 257, 266 (1977) (*International Shoe* requires courts to balance interests in determining whether defendant has sufficient contacts); Note, *Measuring the Long Arm after Shaffer v. Heitner*, 53 N.Y.U. L. REV. 126, 127 (1978) (*Shaffer* court suggests long arm statute may enable otherwise insufficient contacts to satisfy due process).

State interests, however, may not supplant completely the purposeful acts requirement.<sup>66</sup>

Once the defendant's acts meet the threshold test, the quality and quantity of those acts may be placed on a continuum.<sup>67</sup> At one end of the continuum are contacts sufficient to warrant general jurisdiction.<sup>68</sup> At the other end are contacts that pass the threshold test, but are so meager that other compelling interests must be present to justify the assertion of jurisdiction.<sup>69</sup> When the defendant's contacts with the forum are minimal, a strong and properly expressed state interest may permit the court to assert jurisdiction.<sup>70</sup>

In sum, the Supreme Court has established a minimum contacts requirement for state court assertions of jurisdiction over nonresidents. In order to find such contacts, a state court must first determine whether the defendant's acts connecting him with the state are sufficient to meet the threshold purposeful act requirement. If they are, the court may go on to weigh the quantity and quality of the defendant's purposeful acts against the other relevant interests.

#### C. APPLICATION OF THE MINIMUM CONTACTS TEST TO NONRESIDENT CORPORATE DIRECTORS

Two aspects of *Shaffer's* minimum contacts analysis indicate that Delaware's enactment of the director-consent statute does not overcome the due process problems that resulted in the Court's invalidation of the sequestration procedure. First, *Shaffer* follows the minimum contacts analysis developed in *McGee* and *Hanson*. Application of this analysis to the nonresident corporate directors who have no other connection with the forum state reveals that Delaware's enactment of a long-arm statute does not cure the absence of the threshold requirement of a purposeful act. Second, the Delaware legislature misinterpreted the *Shaffer* Court's discussion of Delaware's failure to enact a

66. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (although forum has strong interest in applying its law to controversy, due process divests state of power to assert jurisdiction when defendant has no contacts with state); *Kulko v. Superior Court*, 436 U.S. 84, 100 (1978) (although forum has substantial interests in protecting resident children in action for support, state cannot assert jurisdiction over nonresident father who derives no benefit from children's presence in state and who has no other contact with state).

67. See *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 899, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969) (after establishing that defendant engaged in activity of requisite quality and nature in forum state and that cause of action connected sufficiently with activity, court should balance inconvenience to defendant against interests of plaintiff to determine whether to assert jurisdiction).

68. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952) (if defendant's contacts are substantial, but cause of action unrelated to contacts, jurisdiction constitutional); *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (in some cases defendant's continuous operations in state so substantial and of such a nature as to justify jurisdiction in suits unrelated to activities).

69. See *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (if defendant's activities in state give rise to liabilities involved in suit, defendant deemed present for jurisdictional purposes); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (when state has expressed by statute regulatory interest in particularly dangerous activity, defendant subject to state's jurisdiction under long-arm statute). See generally *Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82-88 (discussing difference between jurisdiction based on continuous activity unrelated to suit and contacts related to suit).

70. See *McGee v. International Life Ins. Co.*, 355 U.S. at 223 (state has manifest interest in providing residents with forum for redress against insurers refusing to pay claims); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (statute resulting from strong state regulatory interest in highway safety warrants state jurisdiction in suits arising from nonresidents' use of highways).

long-arm statute; the Court did not indicate that such a statute would compensate for the virtual absence of the defendants' purposeful acts.

The enactment of the director-consent statute does not affect the *Shaffer* Court's minimum contacts analysis. The Court rejected the contention that Delaware's interest in supervising the management of its corporations justified Delaware jurisdiction.<sup>71</sup> Further, the Court determined that a nonresident's acceptance of a directorship in a Delaware corporation did not constitute a sufficient purposeful act.<sup>72</sup> The Court's refusal to consider state interests as a justification for asserting jurisdiction without a threshold finding of the defendant's purposeful act is thus consistent with the *McGee-Hanson* analysis. Because a long-arm statute merely reflects the state's interests in asserting jurisdiction, the statute does not alter the due process requirement that led the *Shaffer* Court to invalidate the sequestration procedure.<sup>73</sup> Proof of the state's interest in adjudicating a matter does not substitute for the constitutional requirement of a purposeful act.

Neither of the two contexts in which the *Shaffer* Court mentioned the absence of a statute supports the Delaware legislature's view that the opinion invited enactment of the long-arm statute. The Court first discussed the failure to enact a long-arm statute in refuting the contention that Delaware's strong

71. 433 U.S. at 215.

72. *Id.* at 215-16. The Court reasoned that although Delaware corporation law might provide substantial benefits to corporate directors, the directors "simply had nothing to do with the State of Delaware." *Id.* at 216.

Justice Brennan dissented from Part IV of *Shaffer*, in which the Court held that acceptance of a directorship in a Delaware corporation did not constitute a purposeful act sufficient to create minimum contacts. 433 U.S. at 216-17 (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated that the defendants' voluntary relationship with a Delaware corporation should constitute sufficient minimum contacts with Delaware. *Id.* at 227-28. The lower courts have disagreed on whether acceptance of a directorship is a sufficient contact with the forum state. See *Miller v. American Tel. & Tel. Co.*, 394 F. Supp. 58, 63 n.4 (E.D. Pa. 1975) (statute permitting jurisdiction over persons whose out-of-state acts cause harm in state may not permit jurisdiction over nonresident director whose breach of fiduciary duty causes indirect harm to shareholder), *aff'd mem.*, 530 F.2d 964 (3d Cir. 1976); *Lawson v. Baltimore Paint & Chem. Corp.*, 298 F. Supp. 373, 377-79 (D. Md. 1969) (because nonresident directors' decisions carried out within forum, forum may exercise jurisdiction over directors; open question whether defendants' status as directors of corporation chartered by forum would be sufficient); *cf. Eliwein v. Sun-Rise, Inc.*, 295 Minn. 109, 110, 203 N.W.2d 403, 405 (1972) (long-arm statute adequate to permit assertion of personal jurisdiction over nonresident directors of corporation with home in forum; fact that defendants never entered forum not decisive when no more convenient forum exists).

73. Couching the Delaware statute in terms of consent adds nothing to the due process analysis. See, e.g., *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340-41 (1953) (implied consent has no constitutional significance absent minimum contacts); *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (when corporations held amenable to suit based on implied consent, corporations' acts justify fiction of consent); *Schreiber v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1085-89 (D. Kan. 1978) (exercise of jurisdiction based on governmentally imposed consent cannot be sustained absent minimum contacts). But see *Jacobs, supra* note 37, at 696 (consent is independent basis for asserting state court jurisdiction; no difference between signing consent form and accepting directorship with knowledge of consequences).

Voluntary consent to jurisdiction would legitimize an assertion of jurisdiction in the absence of minimum contacts. *Cf. D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (consent valid when defendant voluntarily, intelligently, and knowingly waived rights). A person's waiver of his constitutional right not to be subjected to the jurisdiction of a state with which he lacks minimum contacts, however, is not voluntary when the state has elicited the waiver by offering a benefit otherwise to be withheld. *Cf. Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (when state offers benefit conditioned on relinquishment of constitutional right, relinquishment not truly voluntary); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (state may not apply eligibility provisions for unemployment benefits to compel worker to abandon religious convictions).

interest justified its assertion of jurisdiction.<sup>74</sup> The Court pointed to the absence of a long-arm statute as an indication that Delaware's interest in adjudicating suits involving nonresident corporate directors was not as strong as claimed.<sup>75</sup> The court went on to emphasize that, even if Delaware did have a strong interest in such litigation, that interest might warrant the application of Delaware law to the controversy, but could not justify the assertion of jurisdiction over nonresident directors.<sup>76</sup>

The Court also referred to the absence of a long-arm statute in rejecting the argument that acceptance of a directorship satisfied the minimum contacts requirement.<sup>77</sup> The Court observed that the defendants had not "purposefully avail[ed themselves] of the privilege of conducting activities within the forum state."<sup>78</sup> They not only had failed to perform any act in connection with Delaware, but they also "had no reason to expect to be haled before a Delaware court" because Delaware had not enacted a director-consent statute.<sup>79</sup> Thus, the state's attempt to exercise jurisdiction over the nonresidents posed the additional problem of lack of notice. The reference to the absence of a long-arm statute was an afterthought, not an implication that providing notice would remedy the absence of minimum contacts.

*McGee, Hanson, and Shaffer* make clear that the state's interests do not enter into minimum contacts analysis until the defendant's acts meet this threshold requirement. *Shaffer* also clearly indicates that a nonresident's acceptance of a directorship in a corporation chartered by the forum does not satisfy the threshold purposeful act requirement. Unless, contrary to the Supreme Court's finding in *Shaffer*, acceptance of a directorship does constitute the requisite purposeful act, the Delaware statute suffers from the same constitutional infirmities as the sequestration procedure.

### III. THE DEFINITION OF PURPOSEFUL ACT

In *Shaffer*, the Supreme Court did not articulate why acceptance of a directorship did not constitute a sufficient purposeful act.<sup>80</sup> The Court's silence leaves room for speculation about the essential ingredients of the required act. This section therefore examines the nature of the purposeful act requirement and argues that *Shaffer* correctly concluded that acceptance of a directorship was not a sufficient purposeful act.

Courts usually characterize purposeful acts in terms of their results. For ex-

74. 433 U.S. at 214-15.

75. *Id.* The Court stated: "If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest." *Id.*

76. *Id.* at 216.

77. *Id.* at 215-16.

78. *Id.* at 215.

79. *Id.* at 216.

80. *Cf. The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 161 (1977) (*Shaffer* Court implicitly rejected defendant's voluntary association with state-created entity and state interest in supervising affairs of its corporations as bases for upholding nonresident director-consent-to-service statutes).

As Justice Brennan noted, in concluding that acceptance of a directorship did not constitute a sufficient purposeful act, the Court was "unable to draw upon a proper factual record" because the trial court had not considered the minimum contacts issue. 433 U.S. at 220 (Brennan, J., concurring in part and dissenting in part).



ample, a corporation may commit purposeful acts by availing itself of the benefits and protections of the incorporating state's laws and reaping significant economic returns.<sup>81</sup> Another result of purposeful acts is that the defendant can reasonably foresee being haled before the tribunals of the state.<sup>82</sup> The primary results of purposeful acts thus include economic gain, reliance on and benefit from state law, and foreseeability of suits within the forum. Arguably, any act that has these results is, by definition, a purposeful act.

Whether a nonresident defendant benefits from the laws of the forum is a question that arises most often in cases involving foreign corporations rather than individuals.<sup>83</sup> State laws conducive to successful business enterprises confer benefits on foreign corporations that do business in the forum.<sup>84</sup> Foreign corporations also benefit from laws that grant access to state courts to enforce corporate rights against a resident.<sup>85</sup> Fairness requires, therefore, that a state's citizens have recourse to the state's courts to redress wrongs committed by a nonresident corporation.<sup>86</sup> When a foreign corporation gains significant economic and legal benefits from conducting activity within the state, it is reasonable to infer from these results the corporation's purposeful act in obtaining such benefits.

Directors of corporations also may derive substantial benefits from a state's laws without ever entering the state or dealing directly with its residents. Although a director may conduct his business activities in another state, he derives his power from the laws of the state of incorporation.<sup>87</sup> Delaware's laws in particular give broad powers,<sup>88</sup> as well as many personal advantages,<sup>89</sup> to its corporations' directors. Because such benefits are the result of the act of accepting a directorship, such an act arguably could constitute a purposeful act sufficient to validate a chartering state's assertion of jurisdiction.<sup>90</sup>

81. See *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (to extent corporation conducts activities in state, it enjoys benefits and protections of state laws; fair to require it to defend suit based on such benefits); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 902, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969) (defendant corporation's economic benefit from state supports finding that it has purposefully engaged in economic activity in forum).

82. Cf. *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) (no jurisdiction when defendant could not have foreseen being haled into forum).

83. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 227 (1957) (defendant out-of-state insurance company solicited contract renewal from state resident); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 646 (1950) (defendant out-of-state insurance company solicited insurance contract from state resident); *International Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945) (defendant out-of-state shoe manufacturer's agents solicited orders from state residents).

84. See note 81 *supra* (discussing financial benefits that accrue to nonresident corporation). But cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (financial benefits accruing to defendant from collateral relation to forum do not support jurisdiction if they do not stem from constitutionally cognizable contacts with the state).

85. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

86. See *id.* (discussing fairness of state enforcement of foreign corporation's obligations to state residents).

87. See DEL. CODE ANN. tit. 8, § 141(a) (1974) (directors have power to manage affairs of corporation).

88. See Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U. L. REV. 126, 132-33 & n.50 (1978) (Delaware law pro-management because management allowed broad power and permits shareholders to increase management's authority).

89. See DEL. CODE ANN. tit. 8, § 143 (1974) (directors allowed interest-free, unsecured loans from corporation); *id.* § 145 (indemnification in actions arising from activities as director).

90. See Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U. L. REV. 126, 132-33

The legal and financial benefits directors receive as a result of incorporation in a particular state, however, do not justify the inference that acceptance of a directorship is a purposeful act. Corporate directors often do not choose the state of incorporation; many directors do not even join the board until after the corporation's organizers have chosen a chartering state.<sup>91</sup> The financial benefits and legal protections that directors receive are collateral benefits that accrue from an indirect relationship with the forum state.<sup>92</sup> As the Court in *World-Wide Volkswagen Corp. v. Woodson*<sup>93</sup> observed, such indirect benefits are insufficient to satisfy the purposeful act requirement.<sup>94</sup> Rather, directors must deliberately avail themselves of the benefits of the forum state.

The foreseeability that one may be called into the courts of a particular forum is also insufficient, without more, to meet the purposeful act requirement. By enacting a long-arm statute, Delaware provided the foreseeable result that nonresident corporate directors might be called into Delaware courts. A state's assertion of jurisdiction, however, is not valid merely because the defendant can foresee the possibility of suit in that forum.<sup>95</sup> If this were the case, states could obtain jurisdiction over all nonresidents simply by enacting long-arm statutes purporting to authorize personal jurisdiction over all nonresidents.

Although purposeful acts often are defined by their results, not all behavior that results in financial gain, legal benefit and foreseeability of suits within the forum state constitute a purposeful act. The Supreme Court rejected this contention in *World-Wide Volkswagen*.<sup>96</sup> A sound basis thus exists for the Court's conclusion in *Shaffer* that acceptance of a directorship does not constitute a sufficient act for the minimum contacts test.<sup>97</sup> A purposeful act is a required component of the minimum contacts analysis, and acceptance of a directorship does not qualify as such a purposeful act. Thus, the Delaware nonresident

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(1978) (benefits and protections corporate directors knowingly reap should provide constitutionally sufficient basis for jurisdiction).

91. Directors, of course, sometimes may be responsible for deciding to reincorporate in another forum.

92. In *World-Wide Volkswagen*, the Court stated that an Oklahoma court could not assert jurisdiction over an automobile dealer who did business in New York, New Jersey, and Connecticut. 444 U.S. at 298. The Court concluded that although the defendants received "substantial revenue" as a result of sales of automobiles that could travel to Oklahoma and be serviced by Volkswagen service facilities, such financial benefits were the result of a "collateral relation" to the forum state. *Id.* at 299. Because such benefits did not stem from a "constitutionally cognizable contact" with Oklahoma, they could not support jurisdiction. *Id.* Similarly, when a nonresident corporate director accepts a directorship in a Delaware corporation, he obtains legal and financial benefits as a result of a collateral, indirect relationship with the forum state. Thus, the benefits that directors receive are "too attenuated a contact to justify [a] State's exercise of *in personam* jurisdiction over them." *Id.*

93. 444 U.S. 286 (1980).

94. See *id.* at 299 (financial benefits accruing to defendant from collateral relation to forum do not support jurisdiction if they do not stem from constitutionally cognizable contacts with forum); *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (father who merely acquiesces in daughter's decision to live with mother in forum state does not purposefully avail himself of benefits and protections of forum's laws).

95. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (foreseeability alone is not sufficient benchmark for personal jurisdiction); Silberman, *Shaffer v. Heitner: the End of an Era*, 53 N.Y.U. L. REV. 33, 66 (1978) (reasonable expectations of the parties have always been element of *International Shoe* test, but statute has never defined expectations).

96. See notes 92-94 *supra* and accompanying text (discussing *World-Wide Volkswagen*).

97. 433 U.S. at 215-16; see note 21 *supra* and accompanying text (discussing *Shaffer* Court's finding that acceptance of directorship does not constitute purposeful act under minimum contacts analysis).

director-consent-to-service statute is unconstitutional in its application to non-resident directors who have no other ties with the state.

#### IV. *ARMSTRONG V. POMERANCE*: DELAWARE SUPREME COURT UPHOLDS THE CONSENT-TO-SERVICE STATUTE

The Delaware Supreme Court reviewed the consent-to-service statute in *Armstrong v. Pomerance*.<sup>98</sup> In *Armstrong*, the court determined that the statute remedied the minimum contacts problems posed by the sequestration procedure.<sup>99</sup> Contrary to the clear implication in *Shaffer* that acceptance of a directorship does not constitute a purposeful act, the Delaware court held that by accepting directorships in Delaware corporations, the defendants had purposefully availed themselves of the benefits of Delaware's laws.<sup>100</sup> An analysis of *Armstrong* reveals that its reasoning is at odds with the Supreme Court's minimum contacts analysis.

The *Armstrong* defendants were directors of a Delaware corporation whose principal place of business was in Boise, Idaho.<sup>101</sup> None of the directors lived or conducted business in Delaware.<sup>102</sup> In asserting that Delaware had jurisdiction, the plaintiff relied solely on the defendants' election as directors of the Delaware corporation.<sup>103</sup> The defendants maintained that the statute was unconstitutional as applied to them.<sup>104</sup> Relying on *Shaffer*, they argued that mere status as a director is not a sufficient contact to support in personam jurisdiction.<sup>105</sup>

The Delaware Supreme Court upheld the consent-to-service statute.<sup>106</sup> Although articulated in terms of fairness rather than minimum contacts, the Delaware Court's reasoning appeared to follow the Supreme Court's purposeful act and state interest balancing analysis.<sup>107</sup> Under the court's reasoning, by accepting directorships in a Delaware corporation and receiving significant benefits and protections under Delaware law, the defendants committed the purposeful acts necessary to support in personam jurisdiction.<sup>108</sup> The court next concluded that because Delaware had a significant interest in actively overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations, the exercise of jurisdiction was fair.<sup>109</sup>

In reaching its conclusion, the court emphasized that Delaware law empowered the defendants to act in their capacity as directors, and that the transac-

98. 423 A.2d 174 (Del. 1980).

99. *Id.* at 178-79.

100. *Id.* at 176.

101. *Id.* at 175.

102. *Id.*

103. *Id.* The court dismissed the suit against those defendants who had accepted their positions before the effective date of the consent-to-service statute. *Id.*

104. *Id.* at 176.

105. *Id.*

106. *Id.* at 178-79.

107. See notes 64-70 *supra* and accompanying text (discussing purposeful act requirement and significance of state interest in minimum contacts analysis).

108. 423 A.2d at 176.

109. See *id.* at 176-77 (requirement that defendants impliedly consent to Delaware jurisdiction not unreasonable provided that consent requirement serves legitimate purpose).

tion challenged in the suit arose from their activities as directors.<sup>110</sup> In addition, unlike the *Shaffer* defendants, the directors in *Armstrong* had explicit notice through the consent statute that Delaware courts could exercise jurisdiction over them in suits that involved their acts as directors.<sup>111</sup> The court thus asserted that the defendants' acts satisfied the purposeful act requirement and balanced the state's interests in asserting jurisdiction.

The *Armstrong* court, however, failed to follow the Supreme Court's minimum contacts analysis in holding the statute constitutional. The Delaware court balanced state interests without actually satisfying the purposeful act requirement. The court rejected *Shaffer's* conclusion that acceptance of a directorship does not constitute a purposeful act sufficient to satisfy minimum contacts.<sup>112</sup> The *Armstrong* court instead implied that because the directors derived their power from state law and took advantage of the pro-management slant of Delaware's laws,<sup>113</sup> the exercise of jurisdiction was fair.<sup>114</sup> The *Shaffer* Court took note of these same factors, but nonetheless concluded that the purposeful act requirement was not satisfied because the directors "simply had nothing to do with the state of Delaware."<sup>115</sup> The court thus rested its conclusion primarily on the strength of Delaware's interest in adjudicating shareholder derivative suits involving directors of its corporations.

Even assuming that the plaintiff met the threshold test, however, the constitutional significance of the state interests that the court identified is questionable.<sup>116</sup> The court observed that Delaware has a legitimate interest in developing its law through careful judicial interpretation of its statutes<sup>117</sup> and in providing a judicial forum for aggrieved shareholders.<sup>118</sup> The other interests identified by the court as justifications for Delaware jurisdiction, however, are suspect. These interests include providing a forum for redress of injuries suffered by the corporation and ensuring that Delaware law defines the fiduciary duties of Delaware directors.<sup>119</sup>

110. *Id.* at 176.

111. *Id.*

112. 433 U.S. at 216; see note 22 *supra* and accompanying text (discussing *Shaffer*).

113. 423 A.2d at 178 (quoting Ratner & Schwartz, *supra* note 5, at 650-51).

114. 423 A.2d at 176. The court also argued that *Shaffer's* conclusion that acceptance of a directorship is not a sufficient purposeful act to create minimum contacts was "pure dicta" because the minimum contacts issue had not been presented to the lower court. *Id.* at 179; see note 21 *supra* (discussing Justice Brennan's conclusion that the part of *Shaffer* dealing with purposeful acts was merely an "advisory opinion"). The court, however, proceeded to argue that there were "obvious and substantial distinctions" between *Shaffer* and *Armstrong*. 423 A.2d at 179. First, the court observed that the director-consent statute was unlike the sequestration statute in *Shaffer*, which based jurisdiction on the defendants' status as shareholders. The director-consent statute derived jurisdiction over actions involving the directors' duties to the corporation from the defendants' activities as directors. *Id.* at 179-80. Second, the statute provided notice to directors that they could be subject to suits in the incorporating state. *Id.* at 180.

115. 433 U.S. at 215-16.

116. See Brilmayer, *supra* note 69, at 105-07 (discussing problems with using state interests as basis for jurisdiction); Ratner & Schwartz, *supra* note 5, at 649 (analyzing Delaware's claimed interest in supervising corporations).

117. 423 A.2d at 177-78; see Ratner & Schwartz, *supra* note 5, at 649-50 (Delaware's real interest, attracting corporations through pro-management statutes interpreted by pro-management courts, may serve incidental constitutionally significant purpose of ensuring consistent and knowledgeable interpretation of the laws).

118. 423 A.2d at 178; Ratner & Schwartz, *supra* note 5, at 650.

119. 423 A.2d at 176 n.5.



The *Armstrong* court noted that the corporation was a resident of Delaware and that the nonresident directors had injured the corporate resident by breaching their fiduciary duties.<sup>120</sup> The court thus suggested that the state's interest in providing a forum for shareholder derivative litigation paralleled its interest in providing a forum for residents harmed by nonresidents.<sup>121</sup> This logic fails, however, because the corporation conducted business in Idaho, not in Delaware.<sup>122</sup> The corporation was a resident of Delaware in only the most technical sense.<sup>123</sup>

The legitimacy of Delaware's interest in ensuring that Delaware law governs suits against Delaware directors poses greater difficulties. *Armstrong* rejected *Shaffer's* conclusion that although state interests might require the application of Delaware law to controversies over the directors' activities, such interests did not necessarily permit Delaware to assert jurisdiction.<sup>124</sup> The court suggested instead that Delaware should have personal jurisdiction over the defendant in the controversy because of the danger that another state might apply choice of law principles mandating the use of laws other than Delaware's.<sup>125</sup> For instance, choice of law considerations may lead a state to apply its own law governing the fiduciary duties of directors to foreign corporations doing business in the state.<sup>126</sup> The only constitutional limitation on a state court's ability to apply its own law is the requirement that a state with no interest must apply the law of an interested state.<sup>127</sup> Thus, Delaware's interest in keeping the case out of forums that might not apply Delaware law is of little, if any, constitutional significance.

#### V. NONRESIDENT DIRECTORS: THE CASE FOR AN EXCEPTION TO THE MINIMUM CONTACTS REQUIREMENT

The *Armstrong* court feared that if the director-consent statute were declared unconstitutional, and Delaware courts could not obtain jurisdiction over nonresident corporate directors, aggrieved shareholders might be deprived completely of a forum in which to conduct derivative litigation.<sup>128</sup> Moreover, the *Shaffer* Court specifically reserved the question whether a forum with which the defendant lacked minimum contacts could exercise jurisdiction if no other

120. *Id.* at 176.

121. *Id.* at 178-79.

122. *Id.* at 175; see Ratner & Schwartz, *supra* note 5, at 648 (concept of personhood of corporation stretched beyond reasonable bounds when corporation suffered injury in Delaware because manager in another state made decision affecting business operations in third state).

123. *Cf.* Ratner & Schwartz, *supra* note 5, at 648 (corporation in *Shaffer* was not a "victimized local corporation").

124. 423 A.2d at 177 (citing *Shaffer v. Heitner*, 433 U.S. 186, 215-16 (1977)).

125. 423 A.2d at 177.

126. See Oldham, *Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multistate Contracts*, 5 DEL. J. CORP. L. 181, 202 (1980) (local law sometimes applies to suits involving foreign corporations doing business in state).

127. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 76 (1959) (full faith and credit clause requires court of state which has no interest in controversy to apply law of interested state).

128. 423 A.2d at 177-78. The court identified the possibility that shareholders might be deprived of any forum at all as one of the "significant ramifications which would undeniably (and unfortunately) flow from a conclusion that § 3114 cannot constitutionally be applied to corporate directors in shareholder derivative actions." *Id.*

forum were available.<sup>129</sup> Necessity, therefore, may warrant an exception to the minimum contacts requirement.<sup>130</sup>

An exercise of jurisdiction, without purposeful contacts by the defendant, may be constitutional when denial of jurisdiction would effectively deny the plaintiff any forum at all.<sup>131</sup> As the *Armstrong* court noted, plaintiffs in shareholder derivative suits may be deprived completely of a forum if the chartering state cannot exercise jurisdiction.<sup>132</sup> Directors often lack minimum contacts with other states in which the corporation can also be sued.<sup>133</sup> Thus, the special attributes of shareholder derivative litigation frequently may pose circumstances in which practical necessity requires an exception to the minimum contacts requirement.

Although practical necessity may legitimize an exception to the minimum contacts requirement, it does not necessarily render the nonresident director-consent-to-service statute constitutional. Exceptions to constitutionally mandated jurisdictional requirements should be granted only in specific cases when necessity actually exists.<sup>134</sup> Necessity does not exist in all cases in which the Delaware statute would permit the exercise of jurisdiction. Although a general exception to the minimum contacts requirement in the cases of all nonresident corporate directors would supply certainty and simplicity, nevertheless, it would be unsatisfactory. As the *Shaffer* Court observed, "the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high."<sup>135</sup>

Although the necessity exception may permit a state to exercise jurisdiction over a defendant who lacks minimum contacts with the state, it does not follow that the state of incorporation is the proper state to assert jurisdiction. Choice

129. 433 U.S. at 211 n.37; see *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950) (state should be permitted to maintain suit when maintenance elsewhere might be impossible).

130. 433 U.S. at 211, n.37. See Dillport, *Jurisdiction over Nonresident Directors, Officers, and Shareholders: "Director" Consent Statutes after Shaffer v. Heitner*, 32 RUTGERS L. REV. 255, 287 n.161 (1979) (*Shaffer* Court's reservation of issue whether jurisdiction based on property in state would satisfy due process when no other forum available and approval of status as basis for jurisdiction support notion that minimum contacts not required in every case).

Another possible exception to the minimum contacts requirement might be based on the absence of inconvenience to defendant nonresident corporate directors. Delaware corporations may indemnify directors for expenses, thereby mitigating the inconvenience and expense of defending suits in distant forums. DEL. CODE ANN. tit. 8, § 145 (1975) (allowing corporation to repay expenses of officers incurred in defending suits resulting from their corporate activities); see Dillport, *supra* at 289 (discussing indemnification as factor mitigating inconvenience to defendant). Although one of the goals of the minimum contacts requirement is fairness to the defendant, *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), the Court has rejected the argument that a forum may exercise jurisdiction over a defendant who lacks minimum contacts with the forum as long as the forum is a convenient one for the defendant. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (even if defendant would suffer no inconvenience from being forced to litigate before tribunals of another state, the due process clause may divest forum of jurisdiction where defendant has no minimum contacts). Convenience to the defendant, therefore, is an inadequate justification for an exception to the minimum contacts requirement.

131. Dillport, *supra* note 130, at 262.

132. 423 A.2d at 178 (citing Ratner & Schwartz, *supra* note 5, at 650-51).

133. Dillport, *supra* note 130, at 262. The corporation is usually an indispensable party in shareholder derivative suits. *Id.*

134. *Cf.* Brilmayer, *supra* note 69, at 108-10 (if exception to minimum contacts requirement granted, should be narrowly drawn exception).

135. 433 U.S. at 211; *cf.* Oldham, *supra* note 126, at 202 (absurd to sacrifice policy concerns for certainty in area of corporate choice of law).

of law considerations, such as the state's interest in adjudicating the suit,<sup>136</sup> do not require that the incorporating state exercise jurisdiction. Moreover, considerations of fairness and convenience may point to the corporation's principal place of business as a more appropriate forum.<sup>137</sup>

Although choice of law considerations may result in the application of the incorporating state's law, such considerations do not always point to the state of incorporation as the forum by necessity. As the *Armstrong* Court noted, the incorporating state's law does not necessarily apply to suits arising from breaches of fiduciary duties by corporate directors.<sup>138</sup> Choice of law principles may require instead that the court apply to such actions the substantive law of the state where the corporation conducts its business.<sup>139</sup> The general rule that the incorporating state's law governs the duties of directors to the corporation is based on the need for a uniform and certain standard, rather than on the state's interests in the litigation.<sup>140</sup> Choice of law principles, therefore, do not justify a constitutional requirement that the incorporating state be the forum by necessity, especially if other factors enable prospective defendants to anticipate applicable law.<sup>141</sup>

Convenience to corporate directors also supports the principal place of business as the forum by necessity. Many corporate boards are composed of insiders who are executives employed by the corporation.<sup>142</sup> Because many directors work for the companies they direct, jurisdiction by necessity in the principal place of business is likely to deprive fewer directors of due process than would jurisdiction in the state of incorporation in which none of the directors may live or work.

#### CONCLUSION

Because the minimum contacts test has evolved into a two-stage analysis with a threshold purposeful act requirement, a state's interest in adjudicating alone cannot support a finding of minimum contacts. The act of accepting a directorship does not qualify as a purposeful act and thus cannot move the analysis to its second tier. Delaware's nonresident director-consent-to-service statute is therefore unconstitutional because it does not satisfy the minimum contacts requirement when a defendant's only purposeful act connecting him with the state is the acceptance of a directorship. Shareholder derivative suits, however, present a need for an exception to the Court's minimum contacts

136. See text accompanying note 76 *supra* (discussing *Shaffer* Court's analysis of choice of law principles).

137. Cf. *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527-28 (1947) (under modern conditions, corporations obtain charters from states where they do no business; place of corporate domicile in such circumstances entitled to little consideration under doctrine of *forum non conveniens*).

138. 423 A.2d at 177.

139. See Oldham, *supra* note 126, at 202-04 (commercial domicile has greater interest in corporation than chartering state has and therefore should apply its own law).

140. *Shaffer v. Heitner*, 433 U.S. 186, 215 n.44 (1977).

141. Cf. Oldham, *supra* note 126, at 202 (uncertainty as to which law will apply rectified by reincorporating in state of principal place of business).

142. See Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293, 302-03 (1979) (corporations continue to fill their boards with insiders). But cf. Dillport, *supra* note 130, at 264 (trend toward increase in outsiders on corporate boards).

requirement because plaintiffs may be deprived of a forum unless courts permit such an exception. Considerations of fairness and convenience to nonresident directors suggest that the forum by necessity should be the corporation's principal place of business rather than the state of incorporation.

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