



5-1-1999

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Recommended Citation

Tamara S. Brandt, *OMI Holdings v. Royal Insurance: Applying the Minimum Contacts Test to Territory of Coverage Clauses*, 74 Notre Dame L. Rev. 1311 (1999).

Available at: <http://scholarship.law.nd.edu/ndlr/vol74/iss4/8>

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CASE COMMENTS

OMI HOLDINGS *v.* ROYAL INSURANCE: APPLYING THE MINIMUM CONTACTS TEST TO TERRITORY OF COVERAGE CLAUSES

I. INTRODUCTION

The Tenth Circuit's opinion in *OMI Holdings, Inc. v. Royal Insurance Co. of Canada*¹ addressed whether a court can exercise personal jurisdiction over a foreign insurance company when its only contact with the forum is the forum's inclusion within a "territory of coverage clause" in an insurance policy. A territory of coverage clause lists the fora in which the insurance company agrees to defend claims against the insured that fall within the scope of the insurance policy. Several state and federal courts have addressed the issue of whether the mere existence of a territory of coverage clause including the forum state meets the "minimum contacts" standard that is necessary to exert personal jurisdiction over a nonresident defendant, and the resulting decisions vary tremendously—leaving a controversial and unsettled area of the law.² The *OMI* court held that the existence of a territory of coverage clause including the state of Kansas was enough to establish minimum contacts, but personal jurisdiction was improper because it would violate due process.³

A majority of courts reason that because the insurer entered into a contractual obligation regarding the indemnification and defense of the insured in that forum, it is not unreasonable to require the insurer to defend cases in the forum, even those that do not involve the defense of the insured.⁴ Today, even though several United States Supreme Court decisions have attempted to clarify the quantity and quality of minimum contacts that are necessary to establish personal

1 149 F.3d 1086 (10th Cir. 1998).

2 See discussion *infra* Part IV.

3 See *OMI*, 149 F.3d at 1095–96.

4 See *infra* notes 115–45 and accompanying text.

jurisdiction,⁵ the level of contacts needed in a specific case is still hard to gauge. Hence, courts struggle to apply the minimum contacts test in cases involving territory of coverage clauses.

This Case Comment explores the issue of specific personal jurisdiction over a foreign defendant when the only minimum contact with the forum is a territory of coverage clause that includes the forum state. Part II summarizes the evolution of the personal jurisdiction test that has emerged out of the Supreme Court's landmark decision in *International Shoe Co. v. Washington*.⁶ Part III presents the *OMI* decision and its background. Part IV surveys various approaches taken by courts in deciding whether the inclusion of a forum in a territory of coverage clause is sufficient to establish minimum contacts with the forum. Finally, Part V concludes that the *OMI* case was correctly decided. The mere inclusion of the forum in a territory of coverage clause is sufficient to satisfy the minimum contacts test, but because the overall quantity of the contacts may be low, courts should pay special attention to the reasonableness requirement of the personal jurisdiction test.

II. PERSONAL JURISDICTION AND THE MINIMUM CONTACTS TEST

Because plaintiffs have the opportunity to choose the forum in which they file a lawsuit, the doctrine of personal jurisdiction has emerged as a constitutional standard limiting the power of courts by protecting "an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"⁷ Many states have long-arm statutes that govern instances when a nonresident party can be sued in a forum within the state, but a court in such a state cannot exercise jurisdiction over the defendant if the exercise of personal jurisdiction would violate the Due Process Clause of either the Fifth or Fourteenth Amendments of the United States Constitution.⁸

The Supreme Court's decision in *International Shoe* laid the foundation for modern personal jurisdiction doctrine by establishing a two-part test for determining whether the assertion of jurisdiction

5 See *infra* notes 7-27 and accompanying text.

6 326 U.S. 310 (1945).

7 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe*, 326 U.S. at 319).

8 The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1. In federal cases, the exercise of personal jurisdiction must satisfy the requirements of the Fifth Amendment's Due Process Clause, while the state courts are bound by the Fourteenth Amendment.

over a nonresident defendant meets constitutional standards. First, the plaintiff must establish that the defendant has purposefully availed itself to the forum by establishing such minimum contacts necessary so that she should reasonably anticipate being required to appear before a court in that forum.⁹ Second, the court must conclude that the exercise of personal jurisdiction over the nonresident defendant is reasonable and does not offend "traditional notions of fair play and substantial justice."¹⁰ By establishing this minimum contacts threshold, the Court has provided some protection to defendants so that they are not required to appear before a court in a state with which they do not have a substantial connection.

A. *Establishing Minimum Contacts*

Courts must analyze a defendant's contacts with a forum state to determine whether general or specific jurisdiction is appropriate. A plaintiff can establish that the court has general jurisdiction over a defendant by showing that the defendant has had "continuous and systematic general business contacts"¹¹ with the forum. Specific jurisdiction can be found if the plaintiff shows that the defendant purposefully directed activities towards the forum and that the plaintiff's claim arose out of those minimum contacts that connected the defendant with the forum state.¹²

In *World-Wide Volkswagen Corp. v. Woodson*,¹³ the Court described the significance of the minimum contacts analysis:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.¹⁴

Whether or not the defendant could foresee the litigation is crucial because it must be established "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."¹⁵ The minimum contacts test

9 See *International Shoe*, 326 U.S. at 320.

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

11 *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984).

12 See *Burger King*, 471 U.S. at 472.

13 444 U.S. 286 (1980).

14 *Id.* at 291-92.

15 *Id.* at 297.

gives judges the power to exercise great discretion and leaves them as the "supreme arbiters"¹⁶ of jurisdictional standards.

Because the concept of minimum contacts requires a case-specific inquiry, courts have struggled to determine what level of contacts should be sufficient to meet the test.¹⁷ In *Travelers Health Association v. Virginia*,¹⁸ the Supreme Court concluded that exercising personal jurisdiction over a nonresident defendant who had solicited business by mail was sufficient to establish minimum contacts because it "create[d] continuing relationships and obligations with citizens of another state."¹⁹ However, the Court emphasized the forum state's interest in enforcing the insurance policy within its borders so that its residents were not forced to "seek redress only in some distant state where the insurer is incorporated."²⁰

In *McGee v. International Life Insurance Co.*,²¹ the Supreme Court sustained jurisdiction over a Texas-based insurance corporation in California, concluding that the minimum contacts test was satisfied by a single insurance contract. In *McGee*, the policyholder had purchased a life insurance policy from the defendant while residing in Arizona. After the policyholder moved to California, the defendant issued a reinsurance policy and continued to accept premiums from the insured until he died in California.²² As in *Travelers*, the Court expressed concern that the California resident would be severely disadvantaged if he was forced to bring a lawsuit against the insurance company in a distant state.²³ The Court stressed that because an insurance policy was involved, the defendant should have reasonably foreseen that a claim would arise in the forum.²⁴ One year after its decision in *McGee*, the Court stated that personal jurisdiction in *McGee*

16 *International Shoe Co. v. Washington*, 326 U.S. 310, 326 (Black, J., concurring); see also *id.* at 319 ("[T]he 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.").

17 See, e.g., Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 773-74 (1995). Cameron and Johnson argue that the *International Shoe* personal jurisdiction test leads to increased litigation and "uncertainty [that] may result in serious injustice, an irony in light of the fact that fairness is one of *Shoe's* touchstones." *Id.* (citation omitted).

18 339 U.S. 643 (1950).

19 *Id.* at 647.

20 *Id.* at 649 (citations omitted).

21 355 U.S. 220 (1957).

22 See *id.* at 221-22.

23 See *id.* at 222-24.

24 See *id.* at 224.

was proper because the nonresident insurers were in a business "that the State treats as exceptional and subjects to special regulation."²⁵

McGee seemed to signal an expansion of the doctrine of minimum contacts because technological progress had increased the interaction and flow of commerce between states.²⁶ However, *McGee* left open three questions: (1) whether minimum contacts would have existed if the defendant had not reissued an insurance policy when the plaintiff was in California or had otherwise been unaware of the move;²⁷ (2) whether the exercise of personal jurisdiction would have been reasonable if the state had not possessed such a strong regulatory interest in the matter; and (3) whether the Court meant to establish a lower standard for the minimum contacts test in cases involving insurance policies.

B. Reasonableness Test

Even after a showing of minimum contacts, the court must make a due process inquiry and determine that an exercise of personal jurisdiction over the defendant comports with "traditional notions of fair play and substantial justice."²⁸ With cases involving foreign defendants, courts must pay special attention to this part of the personal jurisdiction test, balancing the defendant's right to a fair trial against the advantages the plaintiff has by litigating in the United States, such as civil juries, a broad discovery system, fairly easy access to courts, contingent fee arrangements, and the general policy against cost-shift-

25 *Hanson v. Denckla*, 357 U.S. 235, 252 (1958); see also *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 670 n.18 (1st Cir. 1980) (stating that when the defendant is an insurance company, the minimum contacts test is "somewhat less stringent than for other nonresident corporations"); Russell J. Weintraub, *A Map Out of the Jurisdictional Labyrinth*, 28 U.C. DAVIS L. REV. 531, 535 (1995) (noting the extensive reach of the *McGee* holding).

26 See *McGee*, 355 U.S. at 223. The Court noted that an expanding national economy, ability to conduct interstate commercial transactions, and improving technology had made communication exceedingly easier in the twentieth century and that the doctrine of personal jurisdiction should model the extension. See *id.* at 222-23.

Recent developments in the Internet have forced courts to reexamine personal jurisdiction in light of technological progress and to address the issue of whether a court may assert personal jurisdiction over a defendant when her only contact with the forum was through the use of the Internet. See Donnie L. Kidd, Jr., Note, *Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in Telco Communications v. An Apple a Day*, 32 U. RICH. L. REV. 505 (1998).

27 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (rejecting the assertion of personal jurisdiction over nonresident defendants when the plaintiffs unilaterally subjected the defendant's automobile to the foreign state).

28 *Id.* at 292 (citation omitted) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

ing rules.²⁹ As with the minimum contacts element of the personal jurisdiction test, the reasonableness test gives courts tremendous flexibility to look at each case on a fact-specific basis. Because courts have such discretion, it is difficult to predict whether a court will hold that the assertion of personal jurisdiction is proper,³⁰ especially in the case of foreign defendants.³¹

1. *Asahi* Factors

Courts generally approach the reasonableness part of the minimum contacts test by examining the facts of each case in light of five factors listed by the Supreme Court in *Asahi Metal Industry Co. v. Superior Court*:³² (1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in receiving

29 For a general discussion of the pros and cons of subjecting foreign defendants to personal jurisdiction in a U.S. forum, see generally Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 563 (1989) (arguing that it is often hard to convince courts to exercise personal jurisdiction over foreign defendants).

30 The Sixth Circuit made the following statement about the "elasticity" of the reasonableness component of the personal jurisdiction test:

[T]here is a downside, as well as an upside, to the judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided "on its own facts," with counsel and court sifting through each new complex of facts in search of "contacts" demonstrating that the plaintiff's choice of a forum does or does not accord with the notions of "reasonableness" and "fair play" reflected in a vast number of fact-specific judicial opinions. More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court.

LAK, Inc. v. Deer Creek Enter., 885 F.2d 1293, 1304 n.7 (6th Cir. 1989) (citation omitted).

31 See Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 504 (1993). Silberman observed:

Supreme Court decisions in the areas of both jurisdiction and forum non conveniens have left lawyers and their clients with little guidance as to when the United States will be a proper forum. Parties find it difficult to plan and structure their business so as to avoid litigation in the United States; lawyers take advantage of the various incentives for forum shopping offered by the complicated interrelationships of federal and state law, and the transaction costs of litigation on these access issues increase.

Id.

32 480 U.S. 102 (1987).

convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.³³

The *Asahi* litigation ensued after a motorcycle accident severely injured a California resident and killed his wife.³⁴ The plaintiff sued several defendants, including Cheng Shin Rubber Industrial Co. (Cheng Shin), the Taiwanese manufacturer who had made the tire tube that allegedly caused the accident.³⁵ Cheng Shin filed an indemnification claim against several codefendants, including Asahi Metal Industry Co. (Asahi), the Japanese manufacturer of the tire tube valve assembly.³⁶ Subsequently, the plaintiff settled with all of the defendants and only Cheng Shin's claim against Asahi remained. The Supreme Court granted certiorari on the issue of whether a foreign defendant, whose only contact with the state was the placement of its goods into interstate commerce, had established sufficient minimum contacts with that state to subject it to personal jurisdiction.³⁷

Although a majority of the Court did not agree on whether the placement of the goods into the stream of commerce constituted minimum contacts, a majority of the Court did conclude that "the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, [made] the exercise of personal jurisdiction by a California court over Asahi in this instance[] . . . unreasonable and unfair."³⁸

In cases involving both foreign and domestic defendants,³⁹ courts generally apply the *Asahi* factors only after concluding that sufficient

33 See *id.* at 113.

34 See *id.* at 105-07.

35 See *id.* at 106.

36 See *id.*

37 See *id.* at 105. The Court split 4-4 on the issue. Justices O'Connor, Rehnquist, Powell, and Scalia concluded that Asahi's mere awareness that the goods would reach California did not establish the requisite minimum contacts and that additional activity purposefully directed at the forum state was necessary. See *id.* at 112-13. Justices Brennan, White, Marshall, and Blackmun found in contrast that Asahi's regular and extensive sales of component parts to manufacturers, whom they knew were selling the product in California, met the threshold requirement of minimum contacts. See *id.* at 116-21.

38 *Id.* at 116. But see Russell J. Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 62-63 (1988) (criticizing *Asahi*'s "reasonableness" rationale for deciding that personal jurisdiction did not exist over the foreign defendant).

39 See Silberman, *supra* note 31, at 509 ("*Asahi* . . . cannot be read as intended for application in international cases alone."); see also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS: COMMENTARY AND MATERIALS 126 (3d ed. 1996) (discuss-

minimum contacts exist.⁴⁰ In cases involving a domestic defendant, most courts find that jurisdiction is reasonable.⁴¹ However, in cases involving foreign defendants, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."⁴² Even after the plaintiff has established that the foreign defendant had minimum contacts with the forum, it is not unusual for courts to hold that the exercise of personal jurisdiction over the foreign defendant would be unreasonable.⁴³

ing that even though *Asahi* involved a foreign defendant, courts generally apply the same due process test in cases involving both domestic and foreign defendants).

40 See, e.g., *Donatelli v. National Hockey League*, 893 F.2d 459, 471 (1st Cir. 1990) (finding that if the plaintiff fails to meet its burden of showing that the defendant had minimum contacts with the forum, then a "resort to the secondary criteria . . . is unnecessary").

41 See Silberman, *supra* note 31, at 510.

42 *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

43 See, e.g., *St. Jarre v. Heidelberger Druckmaschinen*, No. 93-1848, 1994 U.S. App. LEXIS 5604 (4th Cir. March 25, 1994) (per curiam) (holding that the exercise of personal jurisdiction over a German manufacturer was unreasonable when a third party had intervened in a foreign sales market and brought the German product into the forum); *Core-Vent Corp. v. Nobel Indus.*, 11 F.3d 1482 (9th Cir. 1993) (finding that foreign doctors had established minimum contacts with the forum by publishing allegedly false and defamatory articles about the plaintiff's product in a professional journal that was distributed world-wide, but holding that jurisdiction over the foreign individuals would be unreasonable); *Lichon v. Aceto Chem. Co.*, 538 N.E.2d 613 (Ill. App. Ct. 1989) (holding that minimum contacts existed where an English manufacturer shipped hazardous chemicals into the United States, but finding that personal jurisdiction would be unreasonable and detrimental to foreign relations). But see, e.g., *Tobin v. Astra Pharm. Prods.*, 993 F.2d 528 (6th Cir. 1993) (holding that the exercise of jurisdiction over a Dutch drug manufacturer who marketed its product in the U.S. through the use of American distributors was reasonable, since there were sufficient contacts with the forum state); *Vermeulen v. Renault U.S.A.*, 985 F.2d 1534 (11th Cir. 1993) (holding that the exercise of personal jurisdiction over the French defendant Renault was reasonable when the defendant had established minimum contacts by authorizing nationwide advertising and marketing efforts that included the forum state of Georgia where the plaintiff allegedly suffered injuries as a result of a defect in the defendant's product); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1989) (granting personal jurisdiction over a Yugoslavian supplier of asbestos who had sold asbestos to a freight forwarder for shipment to Texas); *Mason v. F. LLI Luigi & Franco Dal Maschio Fu*, 832 F.2d 383 (7th Cir. 1987) (holding that an Italian manufacturer who frequently shipped products to Maryland was subject to personal jurisdiction in Illinois because the defendant knew the product frequently made its way to Illinois).

III. *OMI HOLDINGS v. ROYAL INSURANCE*

A. *Background*

Between 1985 and 1992, OMI Holdings, Inc. (OMI) manufactured and sold large-granule wheat starch (LGS) used by paper mills in the making of carbonless copy paper.⁴⁴ OMI was a subsidiary of the Canadian Corporation of John Labatt, Ltd. (Labatt) and was incorporated in Iowa, maintaining its principal place of business in Minnesota.⁴⁵ Manildra Milling Corporation (Manildra), OMI's chief competitor in the LGS market, was incorporated in Kansas and filed suit against OMI in the United States District Court for the District of Kansas on November 6, 1986 (Manildra lawsuit). Manildra sought a declaration that OMI's patents for producing and processing LGS for use in carbonless paper were invalid,⁴⁶ and even if the patents were valid, Manildra had not infringed OMI's patents.⁴⁷ Manildra also alleged that OMI had violated federal antitrust laws, the Lanham Act,⁴⁸ and state laws forbidding unfair competition and tortious interference with another company's prospective business.⁴⁹

Before the Manildra lawsuit went to trial in 1991,⁵⁰ OMI conducted extensive discovery and held numerous settlement discussions.⁵¹ OMI retained new trial counsel on November 5, 1990, who asked whether OMI's insurers had been notified of the pending lawsuit and if any of OMI's insurance policies covered the legal costs of the defense in the Manildra lawsuit.⁵² Even though OMI's parent company, Labatt, had an in-house risk management department that reviewed OMI's claims for potential insurance coverage and had the

44 See *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1089 (10th Cir. 1998).

45 See *id.*

46 The patents in dispute were U.S. Patent Nos. 3,901,725 (covering the process for making LGS) and 4,280,718 (covering carbonless paper made using LGS). See *OMI Holdings, Inc. v. Chubb Ins. Co. of Canada*, No. 95-2519-KHV, 1997 U.S. Dist. LEXIS 22341, at *5 (D. Kan. January 7, 1997), *rev'd on other grounds sub nom.* *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998).

47 See *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 797 F. Supp. 874, 878-79 (D. Kan. 1992), *aff'd in relevant part*, Nos. 92-1462, 92-1480, 1993 WL 217173 (Fed. Cir. June 22, 1993).

48 15 U.S.C. § 1125 (1994).

49 See *Manildra*, 797 F.Supp. at 878-79.

50 The Manildra lawsuit was first tried on March 4, 1991, but juror misconduct led to a mistrial on March 28, 1991. The second trial commenced on August 26, 1991 and ended on February 26, 1992. See *OMI*, 1997 U.S. Dist. LEXIS 22341, at *28 n.9.

51 See *OMI*, 149 F.3d at 1089.

52 See *id.*

responsibility of notifying insurance companies of claims under each policy,⁵³ OMI did not notify Royal Insurance Company of Canada (Royal) and Seaboard Surety Company of Canada (Seaboard) about the potential claims until nearly four years after the commencement of the Manildra lawsuit.⁵⁴ The insurance companies denied that Labatt's policies covered the claims underlying the Manildra lawsuit.⁵⁵ In the alternative, they argued that because OMI had violated the notice provisions in the contracts,⁵⁶ coverage was not required even if the claims were covered under the insurance policies.⁵⁷

The Manildra lawsuit went to trial in 1991, and at its conclusion the district court upheld the jury's verdict, which awarded Manildra \$2,250,000 in compensatory damages and \$2,500,000 in punitive damages, and granted Manildra's motion for attorney's fees.⁵⁸ OMI then filed suit in the United States District Court for the District of Kansas against five Canadian insurance companies seeking indemnification for costs, attorney fees, and postjudgment interest incurred⁵⁹ in defending the Manildra lawsuit.⁶⁰ Royal and Seaboard—both Canadian insurance companies that were not registered to transact business in Kansas—moved to have OMI's complaint dismissed for lack of personal jurisdiction.⁶¹ OMI argued that personal jurisdiction over the

53 See *OMI*, 1997 U.S. Dist. LEXIS 22341, at *7–8.

54 See *id.*

55 See *OMI*, 149 F.3d at 1090.

56 Defendant Royal's policy contained a provision requiring OMI to provide notice of any potential claims and the claim's particulars "as soon as practicable." *OMI*, 1997 U.S. Dist. LEXIS 22341, at *10. Defendant Seaboard's policy required that the insured provide notice of a potential claim "as soon as practicable" and file copies of any papers "with reasonable promptness." *Id.* at *15.

57 See *OMI*, 149 F.3d at 1090.

58 See *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 797 F. Supp. 874, 887–88 (D. Kan. 1992), *aff'd in relevant part*, Nos. 92-1462, 92-1480, 1993 WL 217173 (Fed. Cir. June 22, 1993).

59 OMI contended that it accrued costs of over seven million dollars defending the Manildra lawsuit. See Appellee's Opening Brief at 1, *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998) (Nos. 97-3022, 97-3041, 97-3042) (copy on file with author).

60 OMI notified five insurers of possible coverage: Royal, Seaboard, Chubb Insurance Company of Canada (Chubb), Royal Indemnity Company (Royal Indemnity), and Zurich Insurance Company of Canada (Zurich). Chubb, Royal Indemnity, and Zurich settled with OMI after the court ruled on the cross-motions for summary judgment. Therefore, this Case Comment addresses only the issues between OMI, Royal, and Seaboard. See Appellee's Opening Brief, *OMI* (Nos. 97-3022, 97-3041, 97-3042) at 1; *OMI*, 1997 U.S. Dist. LEXIS 22341.

61 See *OMI Holdings, Inc. v. Chubb Ins. Co. of Canada*, No. 95-2519-KHV, 1996 U.S. Dist. LEXIS 21999 (D. Kan. November 22, 1996), *rev'd sub nom.* *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998).

insurance companies had been established for two reasons: (1) it had included Kansas in the territory of coverage clauses; and (2) it had contracted to defend OMI in Kansas for claims within the insurance policies.⁶²

The district court held that OMI had "produced sufficient evidence to establish the existence of possible liability under the contracts in question, and that through such contractual relationships, minimum contacts with the State of Kansas may be attributed to the defendants such that their appearance here does not offend due process."⁶³ On cross-motions for summary judgment, Royal and Seaboard asserted that their respective insurance policies did not provide coverage for OMI based on the allegations in the Manildra lawsuit, and that even if the policies did provide coverage, they were under no duty to indemnify OMI due to its late notice of the pending lawsuit.⁶⁴ The district court granted the summary judgment motion in favor of Royal and Seaboard, holding that, although it was possible that the insurance policies covered the allegations underlying the Manildra lawsuit, OMI's four-year delay in notifying the insurance companies violated the notice provisions in the policies, and the insurers did not have a duty to defend OMI.⁶⁵

B. *The Tenth Circuit Decision*

OMI appealed the district court's determination that Royal and Seaboard were prejudiced by OMI's late notice and argued that the issue was one of material fact, which the district court had improperly

62 See *id.* at *7-8. Royal's insurance policy provided coverage for personal injury liability that covered libel, slander, and defamation claims. See *OMI*, 1997 U.S. Dist. LEXIS 22341, at *8-9. Seaboard's insurance policy provided advertising liability protection and obligated the company to defend Labatt and its subsidiaries from claims arising from libel, slander, defamation, copyright infringement, invasion of privacy, and unfair competition. See *id.* at *12-14. In the Manildra lawsuit, Manildra alleged, among other things, that OMI had made "false and unjustified statements to Manildra's potential customers." *Id.* at *8. OMI alleged that statements such as these were the foundation of many of Manildra's claims and that Royal and Surety's policies therefore covered the lawsuit. See *id.* at *8.

63 *OMI*, 1996 U.S. Dist. LEXIS 21999, at *13. The district court also denied the defendant's motion to dismiss or transfer under forum non conveniens. See *id.* at *15-16.

64 See *OMI*, 1997 U.S. Dist. LEXIS 22341, at *18-24.

65 See *id.* at *23. The district court determined that OMI's late notice constituted a breach of the insurance policies' notice provisions and prejudiced Royal and Seaboard and that OMI's justification that "it did not occur to OMI or Labatt to consider whether coverage was available" was inadequate. *Id.* at *28.

decided on summary judgment.⁶⁶ Royal and Seaboard cross-appealed, arguing that the district court erroneously denied their motion to dismiss for lack of personal jurisdiction. However, they asked the court not to address the personal jurisdiction issue unless it concluded that OMI's late notification of the Manildra lawsuit obligated them to indemnify OMI.⁶⁷ The court concluded that it needed to consider the insurers' cross-appeal regarding personal jurisdiction before reaching the merits of OMI's appeal "[b]ecause a court without jurisdiction over the parties cannot render a valid judgment."⁶⁸

1. Applying the Minimum Contacts Test

In *OMI*, there was no dispute that the territory of coverage clauses contained in the policies between OMI, Royal, and Seaboard included the state of Kansas.⁶⁹ According to the terms of the territory of coverage clauses, the defendants were required to hire an attorney to defend OMI in Kansas for claims arising under the policies so long as OMI complied with the notice provisions in the policies. However, the crucial issue the *OMI* court faced was whether the existence of the territory of coverage clauses established sufficient minimum contacts to exercise personal jurisdiction over the defendant Canadian insurance companies when OMI sued Royal and Seaboard for breaching the conditions in the insurance contracts.⁷⁰

Kansas, like most states, has a statutory provision establishing personal jurisdiction over insurers who include the state in their territory of coverage clauses and thereby agree to defend the insured in that forum.⁷¹ After taking into account the applicable statute, the *OMI* court still faced the task of determining whether the exercise of per-

66 See *OMI*, 149 F.3d at 1090.

67 See *id.*

68 *Id.* (citing *Leney v. Plum Grove Bank*, 670 F.2d 878, 879 (10th Cir. 1982)).

69 Seaboard had issued Labatt an advertiser's liability policy extending coverage to "legal proceedings brought in . . . the Courts of any of the states of the United States." *OMI Holdings, Inc. v. Chubb Ins. Co. of Canada*, No. 95-2519-KHV, 1996 U.S. Dist. LEXIS 21999, at *9-10 (D. Kan. November 22, 1996), *rev'd sub nom.* *OMI Holdings, Inc. v. Royal Ins. of Canada*, 149 F.3d 1086 (10th Cir. 1998). Royal had issued a comprehensive general liability policy to Labatt agreeing to defend "on behalf of the Insured [OMI] any claim or civil suit against the Insured, . . . [to] pay all costs taxed against the Insured in any legal proceeding, . . . [and] to pay interest accruing after entry of judgment." *Id.* at *10.

70 OMI sued the defendants for indemnification for the costs of defending the Manildra lawsuit. The OMI court recognized that "a number of State courts and several of our sister circuits" had addressed the same issue and that the resulting decisions were "difficult to reconcile." *OMI*, 149 F.3d at 1092.

71 The applicable statute states in part:

sonal jurisdiction over the foreign defendants met the constitutional standards of the Fourteenth Amendment's Due Process Clause. *OMI* conceded that Royal and Seaboard did not have the contacts necessary to establish general jurisdiction.⁷² The *OMI* court concluded that Royal and Seaboard had established the requisite minimum contacts necessary to satisfy specific jurisdiction by including Kansas within the scope of the territory of coverage clauses.⁷³ In coming to this determination, the *OMI* court surveyed several appellate cases addressing the territory of coverage clause issue.⁷⁴

2. Applying the Reasonableness Test

The *OMI* court concluded that the existence of the territory of coverage clause in Royal and Seaboard's policies was enough to establish minimum contacts with Kansas; however, the court warned that the contacts were "qualitatively low on the due process scale."⁷⁵ Although courts have struggled with deciding the precise relationship between the two parts of the personal jurisdiction test,⁷⁶ the *OMI* court followed the majority in viewing the relationship as a "sliding scale" in which the quantity of the defendant's contacts determines the amount of weight given the second part of the personal jurisdiction test—the due process or reasonableness inquiry.⁷⁷ The *OMI*

Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:

(1) Transaction of any business within this state;

...

(4) contracting to insure any person, property or risk located within this state at the time of contracting;

...

(9) serving as the insurer of any person at the time of any act by the person which is the subject of an action in a court of competent jurisdiction within the State of Kansas which results in judgment being taken against the person.

KAN. STAT. ANN. § 60-308(b)(1), (4), (9) (1994).

⁷² See *OMI*, 149 F.3d at 1091 (citing Appellant's Reply Brief at 35, *OMI* (Nos. 97-3022, 97-3041, 97-3042) (copy on file with author)).

⁷³ See *id.* at 1095.

⁷⁴ See *infra* Part IV.B.

⁷⁵ *OMI*, 149 F.3d at 1095.

⁷⁶ See generally Silberman, *supra* note 31, at 505-13.

⁷⁷ See *OMI*, 149 F.3d at 1091-92 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); see also Linda J. Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22

court favorably noted the First Circuit's approach describing the relationship between the two parts of the personal jurisdiction test:

We think . . . that the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of unreasonableness may serve to fortify a borderline showing of [minimum contacts].⁷⁸

In deciding that the exercise of personal jurisdiction would be unreasonable, the *OMI* court applied the *Asahi* factors.⁷⁹ Because the *Asahi* factors were critical in influencing the *OMI* court's decision that the exercise of personal jurisdiction over Royal and Seaboard would be unreasonable, it is important to look at each factor separately.

a. Burden on Defendant to Litigate in the Forum

As noted in *Asahi*, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."⁸⁰ The burden on the defendant "is of primary concern in determining the reasonableness of personal jurisdiction"⁸¹ and "great care and reserve should be exercised"⁸² before a court may exercise personal jurisdiction over a foreign defendant.

In *OMI*, there was a significant burden on the defendant insurance companies to litigate the dispute in Kansas. Royal and Seaboard did not have agents or offices in Kansas, did not insure any Kansas residents, and did not have licenses to conduct business in Kansas.⁸³ The insurance policies in dispute were issued in Canada by Canadian

RUTGERS L.J. 569, 576-83 (1991) (arguing that the present reasonableness test for personal jurisdiction is unworkable).

78 *OMI*, 149 F.3d at 1092 (quoting *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994)).

79 See *supra* text accompanying note 33.

80 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

81 *OMI*, 149 F.3d at 1096 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)); see also *id.* at 1096 n.3 (quoting *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981) ("If the burdens of trial are too great for a plaintiff, the plaintiff can decide not to sue, or, perhaps, to sue elsewhere. A defendant has no such luxury.")).

82 *Asahi*, 480 U.S. at 114.

83 See *OMI*, 149 F.3d at 1096.

insurance companies and were governed by Canadian law.⁸⁴ Additionally, Royal and Seaboard would need to travel to a distant forum in order to litigate a matter covered by the law of their own country, which would constitute a substantial burden.⁸⁵ After examining the facts in the *OMI* case, the court concluded that this factor heavily favored the defendants.⁸⁶

b. Forum State's Interest in Adjudicating the Dispute

Courts generally evaluate the forum state's interest in the underlying lawsuit by examining whether it has a need to protect the interest of one of its own citizens or an interest in the interpretation and application of its law.⁸⁷ The factor weighs heavily for the resident plaintiff when she has suffered an injury in the forum state as a result of the nonresident's contacts with the forum⁸⁸—especially in the case of defective products⁸⁹—and when she seeks to enforce a contractual obligation.⁹⁰

OMI argued that the state of Kansas had a significant interest in resolving the dispute within its borders because the Manildra lawsuit originated there, and the indemnification claim included fees accrued by Kansas attorneys.⁹¹ The *OMI* court rejected the argument

84 See *id.*

85 See *Asahi*, 480 U.S. at 114. For some examples of when courts have concluded that although the burden on the defendant to litigate in the foreign forum might be great, it is likely the burden on the plaintiff to litigate overseas or in a foreign country is equally as great, see *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988), *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 398 (9th Cir. 1983), and *Karsten Manufacturing Corp. v. United States Golf Association*, 728 F. Supp. 1429, 1435 (D. Ariz. 1990).

86 See *OMI*, 149 F.3d at 1096.

87 See, e.g., *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988).

88 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482–83 (1985) (noting that the forum state had a manifest interest in providing its citizens with a convenient forum when they had been injured by a nonresident in that state).

89 See, e.g., *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990); *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 668 (7th Cir. 1986).

90 Compare *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir. 1990) (holding that a breach of contract action involving a forum resident gave the state a significant interest in the dispute), with *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330–31 (9th Cir. 1985) (finding that when the contract was neither negotiated nor performed in the forum, then the forum state's interest in the litigation taking place in that state was minimal).

91 See *OMI*, 149 F.3d at 1096–97 (“The record contains no evidence showing that the attorneys have lost or are in danger of losing their fees.”).

and concluded that the state's interest in the litigation was minimal because the parties involved were not Kansas residents, they were not licensed to conduct business there, and there had not been a tortious act committed in the state.⁹²

c. Plaintiff's Interest in Convenient and Effective Relief

When the plaintiff has a much greater chance of recovery in the chosen forum because of that forum's laws⁹³ or when the plaintiff would be at a severe disadvantage if she must bring suit against a corporate defendant in a forum where she is not a resident,⁹⁴ this factor heavily favors the plaintiff. When the parties are both corporate entities who are not residents of the forum and have minimal interest in that forum, this factor does not weigh very heavily for the plaintiff.⁹⁵ In such instances, the plaintiff must convince the court that litigating the issue in another forum is not a viable option.⁹⁶

OMI, an Iowa corporation with its principal place of business in Minnesota, did not conduct business in Kansas and had very few contacts with the state.⁹⁷ OMI failed to give the court an adequate rationale for the need to litigate the dispute in Kansas rather than Canada—where the policies, governed by Canadian law, were negotiated and issued. Additionally, OMI's parent company, Labatt, maintained its risk management office in Canada, and the employees involved in the procurement and renewal of the policies were also located in Canada.⁹⁸ Of the ninety-four witnesses listed as having relevant testimony to the dispute, forty-five were from Canada and only seven were from

92 See *id.* at 1096.

93 See *id.* at 1097 (citing *Pacific Atlantic*, 758 F.2d at 1331).

94 See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

95 See, e.g., *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984).

96 Compare *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir. 1990) (holding that the physical and financial burdens on a Washington resident would be great if forced to pursue the lawsuit in Florida), *rev'd on other grounds sub nom. Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), and *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986) (deciding that the costs of requiring the resident to litigate outside of his home forum would be significant), with *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1445 (9th Cir. 1987) (deciding that the burden on the plaintiffs of litigating is small when they are involved in litigation in the foreign forum as to a different dispute).

97 See *OMI*, 149 F.3d at 1097.

98 See Appellee's Reply Brief at 21, *OMI* (Nos. 97-3022, 97-3041, 97-3042) (copy on file with author).

Kansas.⁹⁹ For these reasons, the *OMI* court concluded that the “[p]laintiff may receive convenient relief in an alternative forum.”¹⁰⁰

d. Interstate Judicial System’s Interest in Obtaining Efficient Resolution

Factors that courts use in determining whether the forum in question is the most efficient place to litigate the dispute include the following: the location of witnesses;¹⁰¹ the location of the underlying dispute;¹⁰² the substantive law governing the case;¹⁰³ and whether denying personal jurisdiction in that forum would require the dispute to be litigated in several forums.¹⁰⁴

The *OMI* court concluded that it was inefficient to litigate the matter in Kansas, a forum with which both parties had little contact, rather than Canada, where the insurance policies in dispute were negotiated, drafted, and executed, and the law of which governed the dispute.¹⁰⁵

99 See *OMI*, 149 F.3d at 1097.

100 *Id.* Courts often find that as the distance increases between where the witnesses reside and the forum where the court is located, it becomes more difficult to secure witnesses’ voluntary testimony. Compare *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985) (holding that requiring the defendant to litigate the lawsuit in a California forum when most of the witnesses were Malaysian constituted a considerable burden), with *Horne v. Adolph Coors Co.*, 684 F.2d 255, 260 (3d Cir. 1982) (finding that the burden on the defendant is minimal when the witnesses are not from a particular locality).

101 See *OMI*, 149 F.3d at 1097 (citing *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996)); see also *Brown v. Flowers Indus.*, 688 F.2d 328, 334 (5th Cir. 1982) (finding that jurisdiction over the nonresident defendant is reasonable in the forum where all the witnesses live).

102 See *OMI*, 149 F.3d at 1097 (citing *Carteret Savings Bank v. Shushan*, 954 F.2d 141, 148 (3d Cir. 1992); see also *Pacific Atlantic*, 758 F.2d at 1331 (holding that the forum is unreasonable when the underlying claim arose in Malaysia).

103 See *OMI*, 149 F.3d at 1097 (citing *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987)); see also *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 399 (9th Cir. 1983) (“The court most competent to interpret the applicable law should normally try the case.”) (citation omitted).

104 See *OMI*, 149 F.3d at 1097 (citing *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 850–51 (11th Cir. 1988)). The *Delong* court noted that in “litigation involving numerous defendants from diverse geographic locations, it would be onerous and cumbersome to require the plaintiff to proceed separately against each defendant in the defendant’s home forum, particularly given the strong federal interest in allowing for efficient conduct of a complex lawsuit.” *Delong*, 840 F.2d at 850–51.

105 See *OMI*, 149 F.3d at 1097.

e. Shared Interest of Several States in Furthering
Fundamental Substantive Social Policies

The Supreme Court noted in *Asahi* that the importance of the fifth factor hinges on the degree to which the exercise of personal jurisdiction over a foreign defendant will affect both substantive social policy interests within the United States and the "Federal interest in Government's foreign relations policies."¹⁰⁶ However, the mere existence of a conflict with the foreign nation's sovereignty will "not [be] dispositive because, if given controlling weight, it would always prevent suit[s] against a foreign national in a United States court."¹⁰⁷ Significant factors courts consider when evaluating this fifth factor are as follows: (1) whether any of the defendants are citizens of a foreign nation;¹⁰⁸ (2) whether a foreign nation's law governs the dispute;¹⁰⁹ and (3) whether a foreign defendant made a conscious decision to conduct business with the resident of the forum.¹¹⁰

In *OMI*, the court concluded that this factor weighed heavily in the defendants' favor and that exercising personal jurisdiction over Royal and Seaboard in Kansas would seriously conflict with Canada's interest in resolving and interpreting disputes regarding contacts negotiated and entered into in Canada.¹¹¹

3. The *OMI* Court's Decision

After analyzing the five *Asahi* factors, the *OMI* court concluded that exercising personal jurisdiction over the Canadian defendants would violate the notions of fairness implicated by the Due Process Clause and held:

Examining the above factors in their entirety, we conclude that to subject Defendants to the rigors of litigating in Kansas, which has no genuine interest in the dispute and with which Defendants have only tenuous contacts, would be unreasonable and inconsistent with the notions of "fair play and substantial justice" which form the bedrock of our due process inquiry.¹¹²

106 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

107 *OMI*, 149 F.3d at 1097 (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984)).

108 *See id.* at 1098 (citing *FDIC*, 828 F.2d at 1444).

109 *See id.*

110 *See id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Grand Entertainment Group v. Star Media Sales*, 988 F.2d 476, 484 (3d Cir. 1993)).

111 *See id.* (citing *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1065 (9th Cir. 1985)).

112 *Id.*

The court emphasized that Royal and Seaboard were both Canadian corporations that negotiated the insurance policies with OMI in Canada and that the dispute would be governed by Canadian law.¹¹³ Additionally, the defendants did not have licenses to conduct business in Kansas, did not have offices or agents in Kansas, and had not agreed to insure any Kansas residents.¹¹⁴

IV. TERRITORY OF COVERAGE CLAUSES AND THE MINIMUM CONTACTS TEST

A. *Background*

Insurance policies generally contain territory of coverage clauses which state the geographical range of fora in which the insurer agrees to defend the insured when disputes covered by the policy arise. A territory of coverage clause generally contains "broad" language in which the insurance company agrees to defend the insured in any forum in the United States or even worldwide. Insurance companies often have numerous contacts with the fora, such as agents and offices, but sometimes the insurance company, especially in the case of a foreign company, does not have any contacts with the state other than the fact that the state is included in a territory of coverage clause. Disputes between the insured and the insurer about whether the claim falls within the coverage of the insurance policy are common. In these cases, the insured often files a lawsuit against the insurer so that the court can determine whether there is a duty to defend or if indemnification is appropriate for any matters already litigated or settled. If the insurance company's only contact with the forum is the forum's inclusion within the territory of coverage clause, the insurance company often moves to dismiss the case for a lack of personal jurisdiction, arguing that it lacks sufficient minimum contacts with the forum.

The majority of courts facing the issue of whether the minimum contacts threshold has been met, based exclusively on the inclusion of the forum in a territory of coverage clause, have concluded that sufficient minimum contacts do exist because the insurer could foresee being required to appear in court in that forum.¹¹⁵ Recently, courts have placed great reliance on the fact that territory of coverage dis-

113 See *id.* at 1096.

114 See *id.*

115 See generally William C. Hoffman, *Personal Jurisdiction over Alien Insurance Companies: The Territory-of-Coverage Rule*, 26 TORT & INS. L.J. 703, 712-16 (1991) (observing that most courts infer the necessary minimum contacts from policy language defining the territory of coverage).

putes involve an insurance contract in which the insurance company had the opportunity to specify which fora were included in the policy—therefore eliminating unreasonably expensive or burdensome fora.¹¹⁶

B. Facing the Territory of Coverage Clause Issue

1. Automobile Insurance Policies

Most cases addressing the question of exercising personal jurisdiction over an insurance company whose only contact with the forum is a territory of coverage clause involve automobile insurance policies. The Ninth Circuit's decision in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*¹¹⁷ involved a car accident in Montana. The driver responsible for the accident had insurance with Farmers Insurance (Farmers), a California company, but was driving a car owned by Canadian residents and insured by the Canadian insurer Portage La Prairie Mutual Insurance Company (Portage).¹¹⁸ Portage refused coverage under the policy and Farmers settled the claim.¹¹⁹ Farmers then filed a lawsuit in the United States District Court for the District of Montana against Portage, seeking declaratory relief and damages because Portage had refused to reimburse Farmers for its share under the car owner's policy.¹²⁰ The Ninth Circuit reversed the district court's dismissal of the case for lack of personal jurisdiction, finding that Portage had established minimum contacts with Montana because the insurance policy contained a territory of coverage clause including Montana.¹²¹ The court elaborated on its minimum contacts analysis, determining that Portage had purposefully connected itself with the forum state by entering into a contractual obligation that in-

116 See *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986) (reasoning that insurance companies will estimate the potential liability risks of defending the insured in a certain forum and adjust the policy premiums to reflect that risk).

117 907 F.2d 911 (9th Cir. 1990).

118 See *id.* at 912.

119 See *id.*

120 See *id.*

121 See *id.* at 915. The *Farmers* decision has been cited by many courts as persuasive authority for a similar finding of personal jurisdiction over a nonresident automobile insurer when the insurer has included the state in a territory of coverage clause. See, e.g., *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455-56 (6th Cir. 1993); *Szalay v. Hancock*, 819 S.W.2d 684, 686-87 (Ark. 1991). But cf. *Coughenour v. State Auto Property & Cas. Ins. Co.*, No. 94-55008, 1995 WL 470821, at *3-4 (9th Cir. Aug. 9, 1995) (denying personal jurisdiction over nonresident defendant in a forum listed in the territory of coverage clause because the insured event did not occur in the forum).

cluded the duty to indemnify and defend its insured for accidents that could possibly occur in Montana.¹²² The *Farmers* court, like the Supreme Court in *McGee*, emphasized that the case involved an insurance contract and stated:

Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product"—the indemnification and defense of claims—will travel.¹²³

The court in *Farmers* relied heavily on the Fourth Circuit's decision in *Rossman v. State Farm Mutual Automobile Insurance Co.*,¹²⁴ which held that personal jurisdiction over an Illinois automobile insurer existed solely on the basis of the issuance of a territory of coverage clause that included the forum.¹²⁵ The *Rossman* court stressed the fact that automobiles are inherently mobile and that the defendant should have foreseen the possibility of a lawsuit in that forum.¹²⁶ This analysis seems to place an overemphasis on the foreseeability factor given the Supreme Court's warning in *World-Wide Volkswagen* that a defendant's ability to foresee a lawsuit in that forum is not itself sufficient to establish the minimum contacts necessary for a valid exercise of personal jurisdiction.¹²⁷

The *OMI* court cautioned against focusing on what the defendant did not do—exclude the forum from the territory of coverage clause—instead of focusing on the defendant's positive, affirmative actions that created a connection with the forum state.¹²⁸ The *OMI* court criticized *Farmers* and *Rossman* because "the insurers received no premiums from the forum state and neither insurer attempted to reach into the forum state to renegotiate the insurance agreement."¹²⁹ These factors distinguish this line of cases from the

122 See *Farmers*, 907 F.2d at 913–14.

123 *Id.* at 914 (citation omitted) (footnote omitted).

124 832 F.2d 282 (4th Cir. 1987).

125 See *id.* at 286–87.

126 See *id.*

127 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

128 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The Supreme Court stated that a defendant had not purposefully availed herself to the forum state on the basis of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Id.* (citations omitted).

129 *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1094 (10th Cir. 1998).

Supreme Court's decision in *McGee*. The *McGee* court found that a single insurance contract with a resident in the forum was enough to establish minimum contacts, but also relied heavily on the fact that the insurance company had reissued the policy and received premiums from the policyholder when he resided in the state.¹³⁰

The Tenth Circuit addressed an automobile coverage case in *Rambo v. American Southern Insurance Co.*,¹³¹ in which an insurance company issued car insurance to an Alabama resident. Initially, the policy covered a truck located in Alabama. The insured then moved to Oklahoma without notifying the company and filed a claim. The Tenth Circuit concluded that the insured's unilateral act of moving to Oklahoma—a state which was included in the territory of coverage clause of the insurance policy—was not enough to satisfy the minimum contacts standard to require the insurance company (having no other contacts with Oklahoma) to appear in court in Oklahoma.¹³²

Most courts, however, follow the line of reasoning found in *Farmers* and *Rossmann* and conclude that the inclusion of a forum in a territory of coverage clause satisfies the threshold of minimum contacts needed to establish personal jurisdiction. While the automobile cases are instructive in examining the issue found in *OMI*, they differ in that, normally, the forum involved is the state where the accident took place, giving the state a significant interest in the dispute being decided in that forum—a factor that weighs heavily towards the plaintiff when applying the reasonableness part of the personal jurisdiction test.

2. General Liability Insurance Policies

General liability insurance policies, like those at issue in *OMI*, also include territory of coverage clauses. In *Domtar, Inc. v. Niagara*

130 See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221–22 (1957).

131 839 F.2d 1415 (10th Cir. 1988).

132 See *id.* at 1418; accord *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248–49 (9th Cir. 1984) (finding that personal jurisdiction would be improper when the defendant's only contact with the forum state was its inclusion in a territory of coverage clause and the plaintiff had failed to produce additional evidence showing that the defendant had purposefully availed herself to the forum state); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 736 P.2d 2, 6–8 (Ariz. 1987) (holding that foreseeability of insured being injured in any state in the U.S. is insufficient to establish the requisite minimum contacts needed for a valid exercise of personal jurisdiction). For more examples of automobile liability insurance cases where the court concluded that the inclusion of the forum in a territory of coverage clause was not alone enough to satisfy personal jurisdiction, see *Tennessee Farmers Mutual Insurance Co. v. Harris*, 833 S.W.2d 850, 852 (Ky. Ct. App. 1992), *Meyer v. Auto Club Insurance Ass'n*, 492 So. 2d 1314, 1316 (Fla. 1986), and *Hall v. Scott*, 416 So. 2d 223, 230 (La. Ct. App. 1982).

Fire Insurance Co.,¹³³ the Minnesota Supreme Court upheld jurisdiction over a Canadian insurance company based on the inclusion of Minnesota in a territory of coverage clause. Domtar, a Canadian corporation, owned a tar processing plant on the St. Louis River in Duluth, Minnesota until 1955.¹³⁴ The Minnesota Pollution Control Agency (MPCA) investigated the site and determined that the groundwater had become contaminated due to the release of hazardous substances.¹³⁵

Domtar sought a judgment in a Minnesota court declaring that the Canadian General Insurance Company (Canadian General) had a duty to defend Domtar against the MPCA under general liability insurance policies Canadian General had issued Domtar. Canadian General moved to dismiss Domtar's claims, arguing that a Minnesota court could not exercise personal jurisdiction over it.¹³⁶ The *Domtar* court concluded that Minnesota could assert specific jurisdiction over Canadian General based on its issuance of the general liability policies to Domtar and its inclusion within the scope of the territory of coverage clauses. In reaching this conclusion, the court also relied on the fact that Canadian General knew that Domtar operated a site in Minnesota.¹³⁷ The court held "that a court may assert specific personal jurisdiction over a nonresident insurer when (1) the insurer knows of its insured's contact with the forum; (2) the risk insured against transpires in the forum state; and (3) the forum state is not excluded from the geographic coverage of the insurance policy."¹³⁸ Although the court concluded that the nonresident insurer had purposely directed its activities toward the forum to sufficiently establish personal jurisdiction,¹³⁹ the court did question the soundness of holding that the mere presence of a territory of coverage clause could establish sufficient minimum contacts to exercise personal jurisdiction over the Ca-

133 533 N.W.2d 25 (Minn. 1995).

134 *See id.* at 28.

135 *See id.*

136 *See id.* at 28-29.

137 *See id.* at 31-35; *accord* *Armada Supply, Inc. v. Wright*, 858 F.2d 842 (2nd Cir. 1988); *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980). *But see* *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 833 (5th Cir. 1986) (holding that a foreign insurance company that issued insurance on vessels that sometimes entered the forum's waters did not constitute minimum contacts and that the plaintiff had not offered "evidence that any [contacts of the London company] were either based in Louisiana or [that the foreign defendant] engaged in [activities] other than strictly international commerce"), *modified on other grounds*, 836 F.2d 850 (1988).

138 *Domtar*, 533 N.W.2d at 31.

139 *See id.* at 32-33.

nadian defendant if the accident underlying the lawsuit had not occurred in Minnesota.¹⁴⁰

Recently, courts reaching the territory of coverage issue in personal jurisdiction contexts have begun to rely heavily on the D.C. Circuit's decision in *Eli Lilly & Co. v. Home Insurance Co.*¹⁴¹ There, the court upheld the district court's decision to exercise personal jurisdiction over a nonresident insurance carrier which had issued an insurance policy with a territory of coverage clause including the forum state. The court concluded that due to the insurer's agreement to defend the insured in that forum, it was reasonable to foresee the exercise of personal jurisdiction in that forum.¹⁴² The court reasoned that by including a territory of coverage clause in an insurance policy, the insurer had already calculated the risk involved with each forum and should have excluded troublesome fora; thus in some sense it had "waived" its right to assert a personal jurisdiction argument.¹⁴³ The court emphasized this reasoning:

Insurers must carefully gauge the riskiness of the products they insure The broader the distribution the greater the risk—and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the insured manufacturer distributes its products. Moreover, an insurer has a commercial interest in knowing how, and to what degree, an insured manufacturer has contacts with a forum state.¹⁴⁴

The *Lilly* decision can be interpreted as providing an economic rationale supporting the finding of minimum contacts in cases where a defendant's only contact with the forum is its inclusion in a territory of coverage clause.¹⁴⁵

140 See *id.* at 31 n.4 ("It is difficult to understand how a court could conclude that specific jurisdiction over a nonresident defendant exists when the forum is not the situs of the injury, because in such a case, the plaintiff's claim would not arise from or relate to the defendant's forum contacts.").

141 794 F.2d 710 (D.C. Cir. 1986).

142 See *id.* at 720–21; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.").

143 See *Eli Lilly*, 794 F.2d at 721.

144 *Id.*

145 See Hoffman, *supra* note 115, at 713 ("[If] an insurer has not excluded the forum state from the territory of coverage, the *Lilly* decision eliminates entirely the need to search any further than the four corners of the policy for evidence to support a finding of 'purposeful availment.'"). For examples of courts applying the economic approach to personal jurisdiction as seen in *Eli Lilly*, see *Southeastern Express Systems v. Southern Guaranty Insurance Co. of Georgia*, 40 Cal. Rptr. 2d 216, 221–22 (1995) and

The *OMI* court criticized *Lilly* because the decision placed so much emphasis on the ability of the defendant to foresee being required to appear in court in a forum when "foreseeability alone is an insufficient basis on which to establish minimum contacts."¹⁴⁶ Additionally, the *OMI* court cautioned that relying only on the fact that the defendant did not exclude the forum from its territory of coverage clause in the policy focuses on inaction of the defendant instead of its positive actions that purposefully availed it to the forum state.¹⁴⁷

In *OMI*, the court concluded, with little explanation as to its reasoning, that by "contracting to defend the insured in the forum state, the insurer creates some contact with the forum state."¹⁴⁸ The court qualified its conclusion by stating that, while the inclusion of the forum within the territory of coverage clauses was sufficient to establish minimum contacts, the contacts were "qualitatively low"¹⁴⁹ on the due process scale. The court, therefore, put greater emphasis on the second part of the personal jurisdiction test—the reasonableness element—using the *Asahi* factors.¹⁵⁰

V. CONCLUSION

The *OMI* court came to the correct conclusion in holding that the inclusion of a forum within a territory of coverage clause establishes sufficient minimum contacts for the proper exercise of personal jurisdiction. The *OMI* decision is consistent with both the Supreme Court's holding that one contact, in the form of an insurance contract, can be sufficient to satisfy the minimum contacts test¹⁵¹ and the majority of courts which take a *Lilly*-type approach to territory of coverage clauses, viewing an insurance policy as the final product of negotiations between the insured and the insurer where fora in which the insured did not wish to appear should have been eliminated.¹⁵²

Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 232 (Tex. 1991).

146 *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1095 (10th Cir. 1998) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

147 See *id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987)).

148 *Id.*

149 *Id.*

150 See *supra* notes 79–114 and accompanying text.

151 See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

152 See *Hoffman*, *supra* note 115, at 716–17. *Hoffman* stresses the need for insurance companies to consider the consequences of establishing the requisite minimum contacts with a forum so that the court has the power to exercise personal jurisdiction over them, such as the power of the court to enter a default judgment if the defendant fails to reply to a properly served complaint, and the likelihood that the defend-

After determining that sufficient minimum contacts existed, the *OMI* court properly put more weight on the reasonableness part of the personal jurisdiction test. Several of the *Asahi* factors hinge on the degree of interest the forum state has in the dispute, and *Farmers*, *Rossmann*, *Domtar*, and *Lilly* all dealt with situations where some type of accident or damage occurred in the forum state and involved residents of the forum state; therefore, the forum state had a substantial interest in the lawsuit being litigated within its borders. In contrast, the *OMI* court faced a case where Kansas' interest in the lawsuit was minimal and where the contract in dispute involved the interpretation and application of Canadian law. The *OMI* court correctly held that the exercise of personal jurisdiction over the Canadian defendants would be unreasonable and violate the Due Process Clause found in the Fourteenth Amendment.

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ant will be required to follow the procedural and substantive law of that forum in the absence of a choice of law clause in the insurance policy. *See id.*

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