BUY IT NOW: ESTABLISHING PERSONAL JURISDICTION OVER OUT-OF-STATE DEFENDANTS WHO CONDUCT BUSINESS THROUGH ONLINE INTERMEDIARIES

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I. INTRODUCTION

According to the United States Census Bureau, in 2008, e-commerce retail sales accounted for approximately 3.6% of all retail sales in the country and generated $142 billion in revenue.[1] A study by the Organization for Economic Co-operation and Development (OECD) estimates that in the same year, approximately 73% of all electronic retail sales were conducted through online retail intermediaries ("online intermediaries").[2] Online intermediaries facilitate Internet transactions for new and used goods by connecting buyers with suppliers, and they provide a range of services such as a platform for auctions, fixed prices, and transaction processing.[3] One of the largest online intermediaries is eBay.com.[4] In June 2011, 223.5 million people accounting for 16.2% of the world's Internet population visited eBay.[5] The increasing use of the Internet and online intermediaries—like eBay—by manufacturers and sellers to distribute their products across the United States has posed significant problems for courts in determining where these

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[1] *E-Stats*, U.S. CENSUS BUREAU 1 (2011), *available at* http://www.census.gov/econ/estats/2009/2009reportfinal.pdf.

[2] KARINE PERSET, ORG. FOR ECON. CO-OPERATION AND DEV., THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES 7 (2010), *available at* http://www.oecd.org/dataoecd/49/4/44949023.pdf.

[3] *See id.* at 12.

[4] *See* Dan Rowinski, *Amazon's Websites Saw 20% of the World's Internet Users in June*, N.Y. TIMES, Aug. 17, 2011, http://www.nytimes.com/external/readwriteweb/2011/08/17/17readwriteweb-amazons-websites-saw-20-of-the-worlds-inter-48335.html.

[5] *Id.*

manufacturers and sellers should be subject to personal jurisdiction when conflicts arise out of their transactions.

State and federal courts have struggled with applying the traditional personal jurisdiction analysis and the other specialized test for establishing personal jurisdiction over the Internet, the *Zippo* test, to Internet transactions through online intermediaries.[6] This Comment analyzes the various approaches to establishing personal jurisdiction over businesses and individuals that conduct business through online intermediaries. Part II discusses the development and expansion of personal jurisdiction from *Pennoyer v. Neff* to *International Shoe Co. v. Washington* to *World-Wide Volkswagen Corp. v. Woodson*. Part III explains how some courts have applied these traditional principles to personal jurisdiction with regard to Internet activity and how others have developed a specialized test for personal jurisdiction with regard to Internet activity. Part IV illustrates the problems that courts have faced in applying both the traditional principles of personal jurisdiction and the *Zippo* test for personal jurisdiction to out-of-state defendants that conduct business through online intermediaries by analyzing relevant case law on the issue. Part V establishes a new "online intermediaries test" that combines important elements of the *Zippo* test and the traditional minimum contacts analysis and is specifically tailored to Internet transactions conducted through online intermediaries. Part VI applies this new "online intermediaries test" to actual and hypothetical scenarios in order to demonstrate its practicality. Part VII concludes, urging courts to adopt this approach.

II. CREATION AND DEVELOPMENT OF THE DOCTRINAL TEST FOR ESTABLISHING PERSONAL JURISDICTION

Jurisdiction is defined as "a government's general power to exercise its authority over all persons and things within its territory."[7] This Comment focuses specifically on a court's power to exercise its authority over an individual—personal jurisdiction. A valuable explanation of the concept of personal jurisdiction in its early stage of development comes from the 1877 Supreme Court case *Pennoyer v. Neff*.[8] The Court in *Pennoyer* explained that a person would not be bound by a court's judgment unless the court had properly obtained

[6] *See* J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring) (explaining the challenges that the Internet poses to personal jurisdiction analysis).

[7] BLACK'S LAW DICTIONARY 928 (9th ed. 2009).

[8] *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

power over that individual by statute and under the Constitution.[9] In 1877, most state statutes provided that a court properly obtained power over an individual when that individual was either: (1) served with process within the territory of the state; or (2) voluntarily appeared to litigate in the state.[10] The Court in *Pennoyer* brought personal jurisdiction analysis within the confines of the Due Process Clause of the Fourteenth Amendment, stating that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[11]

As the United States began to grow and develop technologically, the expansion of interstate commerce and travel began to pose significant problems for courts trying to apply principles from *Pennoyer*.[12] Many states responded by finding creative ways to assert jurisdiction. One common example was for a state to pass a statute declaring that any individual driving on state highways consents to have the state appoint an agent for service of process.[13] In *Hess v. Pawloski*, the Supreme Court explained that in order to be valid, these statutes must be consistent with the Due Process Clause.[14] Then, in 1945, the Supreme Court clarified this principle when it articulated a test for establishing personal jurisdiction over non-consenting, out-of-state defendants in *International Shoe Co. v. Washington*.[15] The Court established this more flexible test based on a defendant's "minimum contacts" with the forum state and the reasonableness of subjecting the defendant to the forum state's jurisdiction based on those contacts.[16] It also explained that it adopted this test to get rid of the "legal fiction" that defendants were impliedly consenting to jurisdiction by their "presence in the state through the acts of its authorized agents."[17] The Court found this test to be in accordance with the Due Process Clause of the Fourteenth Amendment.[18] It

[9] *Id.* at 732.
[10] *Id.* at 729–30.
[11] *Id.* at 733.
[12] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–93 (1980) (noting that a change in personal jurisdiction jurisprudence is attributable to a "fundamental transformation in the American economy").
[13] *See* Hess v. Pawloski, 274 U.S. 352, 354 (1927); Kane v. New Jersey, 242 U.S. 160, 164 (1916).
[14] *Hess*, 274 U.S. at 355.
[15] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
[16] *Id.* at 316.
[17] *Id.* at 318.
[18] *Id.* at 319.

stated that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[19]

In *International Shoe*, the Court also introduced the concepts of general jurisdiction and specific jurisdiction without expressly using these terms.[20] The Court suggested that jurisdiction would apply to individuals and corporations with operations in a particular state that are so "continuous and systematic" that they could reasonably be subject to jurisdiction in that state, even for disputes that are distinct from those contacts.[21] Nearly forty years later, in *Helicopteros Nacionales De Colombia, S.A. v. Hall*, the Supreme Court identified this concept explicitly as "general jurisdiction."[22] Recently, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court refined the *International Shoe* standard to require that the contacts be so continuous and systematic as to render the defendant "essentially at home" in the forum state.[23] The *Goodyear* Court also explained that general jurisdiction typically exists where the individual is domiciled or the practical equivalent for a corporation.[24]

While theoretically viable, the Supreme Court has only considered the issue of whether a defendant's contacts with a forum state are so continuous and systematic as to subject him to general jurisdiction in that state in three decisions since *International Shoe*.[25] Alternatively, specific jurisdiction is the legal principle that most plaintiffs invoke to subject an out-of-state defendant to personal

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

[20] *See id.* at 318.

[21] *Int'l Shoe Co.*, 326 U.S. at 318 ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.").

[22] Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.") (citing Calder v. Jones, 465 U.S. 783, 786 (1984)); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81 (1980). *Cf.* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966).

[23] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[24] *Id.* at 2853–54.

[25] *See id.* at 2846; *Helicopteros*, 466 U.S. at 408; Perkins v. Bengeut Consol. Mining Co., 342 U.S. 437 (1952).

jurisdiction in a forum state.[26] Specific jurisdiction requires that: (1) the defendant corporation or individual have sufficient minimum contacts with the forum state; (2) the claim against him must arise out of or relate to those contacts; and (3) jurisdiction over the defendant must be reasonable.[27]

Perhaps the main takeaway from *International Shoe* is that the Due Process Clause of the Fourteenth Amendment allows a state to exercise personal jurisdiction over non-resident defendants, provided that these prospective defendants have sufficient minimum contacts with that state so that bringing the suit does not offend "traditional notions of fair play and substantial justice."[28] In 1980, the Supreme Court articulated four factors for determining whether the exercise of personal jurisdiction over a non-resident defendant is fair and reasonable in *World-Wide Volkswagen Corp. v. Woodson*.[29] The factors included: (1) "the forum State's interest in adjudicating the dispute"; (2) "the plaintiff's interest in obtaining convenient and effective relief"; (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (4) "the shared interest of the several States in furthering fundamental substantive social policies."[30] In order for the court to exercise personal jurisdiction over non-resident defendants, however, it must have a statutory authority granting it the ability to reach out beyond its borders.[31] Such statutes are widely known as "long-arm statutes,"[32] and in response to *International Shoe*, all fifty states have enacted these statutes or court rules that define the circumstances under which the state may exercise jurisdiction over non-resident defendants.[33] These

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[26] *See Goodyear*, 131 S. Ct. at 2849 (explaining that most of the Court's decisions have focused on circumstances surrounding specific jurisdiction).

[27] *See Helicopteros*, 466 U.S. at 427 ("[A] court's specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum."); Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.").

[28] *See Int'l Shoe Co.*, 326 U.S. at 323–24.

[29] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[30] *Id.* at 292.

[31] *Id.* at 290–93.

[32] A long-arm statute is defined as "[a] statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect." BLACK'S LAW DICTIONARY 1027 (9th ed. 2009).

[33] *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B. U. L. REV. 492, 493–96 (2004) (explaining the history and development of long-arm statutes in response to *Int'l Shoe Co. v. Washington*).

statutes can be as expansive as extending the jurisdictional boundaries to the fullest extent allowable under the U.S. Constitution,[34] or limited to requiring either an act or omission to occur within the state[35] or business to be transacted within the state.[36]

Assuming that individuals and corporations are not subject to general jurisdiction, and provided that the state has a long-arm statute granting it jurisdiction over non-resident defendants, the next question that courts were called upon to answer was: how many contacts would be enough to satisfy specific jurisdiction under the "minimum contacts" test from *International Shoe*? The Supreme Court addressed this issue in *McGee v. International Life Insurance Co.*, in which an insurance company, through its regional office located in Texas, sold a life insurance policy to a California man.[37] When the man died, the beneficiary of the policy, Ms. McGee, sued to enforce the policy in California.[38] The Supreme Court held that *one contact*—the insurance contract—was sufficient to establish jurisdiction, even though the company had no agents in California nor solicited any business there, because the contact was substantial and the dispute arose directly from that contact.[39]

International Shoe and *McGee* were somewhat limited by the Court's ruling in *Hanson v. Denckla*.[40] In *Hanson*, a Pennsylvania woman established a trust with a Delaware corporation and subsequently moved to Florida.[41] When she died, the beneficiaries of the trust tried to sue the Delaware corporation in Florida to enforce the agreement.[42] The Supreme Court rejected the notion that Florida had personal jurisdiction over the Delaware corporation, stating that "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the

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[34] *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2010) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); N.J. CT. R. 4:4-4 (2010) ("[A]ny defendant may be served as provided by court order, consistent with due process of law.").

[35] *See* WIS. STAT. ANN. § 801.05 (West 2010) ("A court of this state having jurisdiction of the subject matter has jurisdiction over a person . . . [i]n any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.").

[36] *See* MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1993).

[37] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957).

[38] *Id.*

[39] *Id.* at 221–23.

[40] Hanson v. Denckla, 357 U.S. 235 (1958).

[41] *Id.* at 238–39.

[42] *Id.* at 240.

requirement of contact with the forum state."[43] The Court went on to add an additional feature to *International Shoe*'s minimum contacts test, requiring "some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[44]

This new requirement of purposeful availment created another issue for the courts as they tried to determine what type of conduct was sufficient to find that the defendant had purposefully availed itself of the benefits and privileges of the laws of the forum state. In *World-Wide Volkswagen*, the Supreme Court rejected the notion that a defendant purposefully avails himself of the benefits and privileges of a forum state, merely because it is foreseeable that a product he sells may end up in that state.[45]

Another mechanism for establishing personal jurisdiction over out-of-state defendants is often referred to as the "effects test" established in *Calder v. Jones*.[46] This test is relevant to this Comment because some courts have applied it to Internet transactions conducted through online intermediaries. In *Calder*, a famous singer-actor Shirley Jones filed a lawsuit in California against the *National Enquirer* and its writer—both located in Florida—for libel with regard to a story they published about her.[47] The Supreme Court found that the story "concerned the California activities of a California resident. . . . was drawn from California sources, and the brunt of the harm . . . was suffered in California."[48] The Court also found that petitioners "edited an article that they *knew* would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation."[49] The Court concluded that "[j]urisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California."[50] As a result of *Calder*, courts have found jurisdiction over out-of-state defendants when their conduct is an intentional action expressly aimed at the forum state and causes an injury or effect in the forum state.[51]

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[43] *Id.* at 253.
[44] *Id.* (emphasis added).
[45] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980).
[46] Calder v. Jones, 465 U.S. 783 (1984).
[47] *Id.* at 784.
[48] *Id.* at 788–89.
[49] *Id.* at 789–90 (emphasis added).
[50] *Id.* at 789.
[51] *See, e.g.*, IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 256 (3d Cir. 1998);

In sum, the Supreme Court has articulated several elements necessary for a state to assert personal jurisdiction over a non-resident defendant who has not consented to its jurisdiction and does not have continuous and systematic contacts that expose him to general jurisdiction. First, the state must have a statutory grant of authority, usually in the form of a long-arm statute.[52] The defendant must then have sufficient minimum contacts with the forum state such that he has purposefully availed himself of the benefits and privileges of its laws.[53] In addition, the claim against him must arise out of or relate to those minimum contacts.[54] Finally, jurisdiction over the defendant must be reasonable such that it complies with the "traditional notions of fair play and substantial justice."[55] This is essentially the framework that courts have attempted to apply to personal jurisdiction cases involving activity conducted over the Internet—an area where territorial boundaries of Internet activity are ambiguous and an individual's conduct may cause an effect in one state or every state almost instantaneously.

III. THE BEGINNING OF PERSONAL JURISDICTION AND THE INTERNET: ESTABLISHING JURISDICTION OVER OWNERS AND OPERATORS OF WEBSITES

The establishment of the Internet and e-commerce caused significant problems for courts trying to apply the minimum contacts test to individuals who post information and conduct business over the web.[56] *Inset Systems, Inc. v. Instruction Set, Inc.* was one of the first cases to address the issue of personal jurisdiction with regard to activity conducted over the Internet.[57] In this case, plaintiff Inset, a Connecticut corporation, sued defendant Instruction, a Massachusetts corporation with no employees or offices in Connecticut, for trademark infringement based on the defendant's use of the name "Inset" in its website and phone number.[58] The court

Pavlovich v. Super. Ct., 58 P.3d 2, 9 (Cal. 2002).

[52] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290–91 (1980); Pennoyer v. Neff, 95 U.S. 714, 718 (1877).

[53] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[54] *See* Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

[55] *See World-Wide Volkswagen Corp.*, 444 U.S. at 292; *Int'l Shoe Co.*, 326 U.S. at 316.

[56] *See* J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 330–31 (2002).

[57] Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

[58] *Id.* at 163 (noting that the defendant listed its website as www.inset.com and used the toll-free phone number 1-800-US-INSET).

applied the traditional minimum contacts analysis and found that the defendant had sufficient minimum contacts with Connecticut because the defendant advertised over the Internet and through its toll-free number, which "reach[ed] as many as 10,000 Internet users within Connecticut alone."[59] The court's holding received harsh criticism and many courts chose not to apply this test because the underlying implication was that anyone advertising over the Internet could be subject to jurisdiction anywhere the website could be accessed.[60]

The next case to address the issue of personal jurisdiction with regard to Internet communications and transactions was *Zippo Manufacturing. Co. v. Zippo Dot Com, Inc.*, which adopted a more restrictive approach.[61] In *Zippo*, a Pennsylvania manufacturing company sued a California Internet news service in Pennsylvania for trademark infringement based on its use of the name "Zippo" for its websites.[62] The court aptly articulated the issue before it, stating, "we must decide the Constitutionally permissible reach of Pennsylvania's Long Arm Statute . . . through cyberspace."[63] The court then reviewed the traditional principles of personal jurisdiction and found that "the likelihood that personal jurisdiction can be constitutionally exercised is *directly proportionate* to the nature and quality of commercial activity."[64]

In its decision, the court articulated a sliding-scale test for determining whether an individual purposefully avails himself of a forum state based on his or her conduct over the Internet.[65] On one end of the spectrum are active websites where individuals enter into contracts and conduct business with residents of foreign jurisdictions.[66] On the other end are passive websites where individuals merely post information that is accessible to others in foreign jurisdictions.[67] In the middle lie "interactive websites" where information is exchanged between the host computer and users of

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[59] *Id.* at 165.

[60] *See, e.g.*, Vinten v. Jeantot Marine Alliances, S.A., 191 F. Supp. 2d 642, 647 n.10 (D.S.C. 2002); Digital Control, Inc. v. Boretronics, Inc., 161 F. Supp. 2d 1183, 1186 (W.D. Wash. 2001).

[61] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

[62] *Id.* at 1121.

[63] *Id.* at 1120–21.

[64] *Id.* at 1123–24 (emphasis added).

[65] *Id.* at 1124.

[66] *Id.*

[67] *Zippo*, 952 F. Supp. at 1124.

the website.[68] The court indicated that jurisdiction over out-of-state defendants who maintain "active" websites would be proper, whereas jurisdiction over out-of-state defendants who maintain "passive" websites would not.[69] With regard to "interactive" websites, courts would determine jurisdiction "by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[70]

The court explained that personal jurisdiction jurisprudence supports the notion that when individuals and corporations intentionally reach out to conduct business with residents of other states, jurisdiction in those states is proper, and this rationale should not change simply because the business is conducted over the Internet.[71] Conversely, the court stated that an out-of-state defendant does not "purposefully avail" himself of the benefits and privileges of the laws of the forum state because users must take it upon themselves to act upon that information, by calling the number on the site, for example.[72] Additionally, the court cited *Maritz, Inc. v. Cybergold, Inc.* as an example of a case involving an "interactive website," and relied on that court's reasoning that the defendant's website's active solicitations, promotional activities, and responses to users accessing the site made jurisdiction proper.[73]

Applying this test to the case before it, the district court found that the defendant's Internet news service websites were akin to "active" websites because they conducted substantial business over the Internet and provided passwords to "approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with Internet access providers . . . in Pennsylvania."[74] Next, the court concluded that the claim arose out of the defendant's conduct in Pennsylvania because "both a significant amount of the alleged infringement and dilution, and resulting injury . . . occurred in Pennsylvania."[75] Lastly, the court held that jurisdiction was reasonable in Pennsylvania because of Pennsylvania's interest in adjudicating disputes over infringement of trademarks owned by its residents and the plaintiff's interest in

[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
[72] *Id.* at 1125 (citing Bensusan Res. Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996)).
[73] *Zippo*, 952 F. Supp. at 1124–25.
[74] *Id.* at 1126.
[75] *Id.* at 1127.

choosing to seek relief in the state.[76] Accordingly, the court found that Pennsylvania had specific jurisdiction over the defendant.[77]

Many district and circuit courts have embraced some variation of the sliding-scale test articulated in *Zippo*, and some have even gone further to incorporate the requirement that defendants "expressly aim" or "target" the forum state through their Internet activities.[78] Other courts have criticized the *Zippo* sliding-scale test or declined to apply it in favor of traditional personal jurisdiction analysis.[79] Admittedly, the Pennsylvania District Court's holding in *Zippo* was generally tailored to entities that run their own websites and use those websites to conduct business or to post information and advertisements.[80] The question that still remains, which has haunted courts since the beginning of the twenty-first century, is what happens when the entity does not own the website itself, but instead conducts business or posts information over a website owned and operated by a third-party intermediary, such as eBay?

IV. THE ISSUE OF ONLINE INTERMEDIARIES: ESTABLISHING PERSONAL JURISDICTION OVER INDIVIDUALS WHO CONDUCT BUSINESS OVER EBAY

This Part will discuss cases that have used the *Zippo* sliding-scale test, the traditional minimum contacts test, or a variation of the *Calder* effects test to determine whether personal jurisdiction is appropriate over entities that conduct business through eBay as a third-party intermediary. When individuals and corporations conduct business through online intermediaries like eBay, it is especially difficult for courts to determine when a state will have personal jurisdiction over these entities. The conventional problems—such as lack of territorial boundaries for where the online activity or effect thereof takes place and the ability of an entity to make contact with every state instantaneously—are also present when entities choose to conduct business via online intermediaries.[81]

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[76] *Id.*

[77] *Id.*

[78] *See, e.g.*, ALS Scan Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); *see also* A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to the Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 74 (2006) (analyzing cases that have applied the *Zippo* sliding-scale test to establish personal jurisdiction over the Internet).

[79] *See, e.g.*, Instabook Corp. v. Instantpublisher.com., 469 F. Supp. 2d 1120, 1124–25 (M.D. Fla. 2006); Howard v. Mo. Bone and Joint Ctr., Inc., 869 N.E.2d 207, 212 (Ill. App. Ct. 2007).

[80] *See Zippo*, 952 F. Supp. at 1125–26.

[81] *See* Arthur R. Miller, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 995–96

Additionally, since these entities do not own the websites through which they conduct their business, they pose separate problems for courts trying to apply the *Zippo* sliding-scale test. Courts that have addressed the issue of whether personal jurisdiction exists over out-of-state defendants conducting business through online intermediaries usually do so in the context of breach of contract, fraud, or misrepresentation claims.[82]

The archetypical eBay controversy is as follows: seller S puts a listing up on eBay indicating that a particular item is for sale for a particular period of time.[83] Along with this listing, S provides a brief description of the item, usually indicating the quality of its condition, any special features the product might have, and anything else a potential buyer might wish to know about the product.[84] Buyers B, C, and D then all post "bids" on the item indicating how much they are willing to pay for the item.[85] At the end of the sale period, buyer B has the highest bid on the item and wins the auction.[86] S and B then arrange to have the product delivered to B's home, or alternatively, B agrees to travel to S to pick up the item.[87] When B takes possession of the item, the product is not as B expected it to be, based on S's description (or misrepresentation).[88] B files a lawsuit against S for breach of contract (or fraud) in B's home state and S argues that the court lacks personal jurisdiction.[89] State and district courts throughout the United States have addressed this situation specifically, and others very similar to it, and have either tried to apply the traditional minimum contacts approach, the sliding-scale test in *Zippo*, or the effects test articulated in *Calder*.

(2004).

[82] *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1015 (9th Cir. 2008); Metcalf v. Lawson, 802 A.2d 1221, 1224 (N.H. 2002). *But cf.* Winfield Collection Ltd. v. McCauley, 105 F. Supp. 2d 746, 747 (E.D. Mich. 2000) (providing an example of a copyright infringement case based on an eBay transaction).

[83] *See, e.g.*, Foley v. Yacht Mgmt. Grp., Inc., No. 08-7254, 2009 WL 2020776, at *1 (N.D. Ill. July 9, 2009).

[84] *See, e.g.*, *Boschetto*, 539 F.3d at 1014.

[85] *See, e.g.*, Karstetter v. Voss, 184 S.W.3d 396, 400 (Tex. App. 2006) (explaining that out of fifty-seven bids, plaintiff was the highest bidder).

[86] *See, e.g.*, Hinners v. Robey, 336 S.W.3d 891, 893 (Ky. 2011).

[87] *See Boschetto*, 539 F.3d at 1014 (noting that plaintiff hired a transport company to deliver car from defendant's home state of Wisconsin to plaintiff's home state of California); *Metcalf*, 802 A.2d at 1224 (noting that plaintiff buyer traveled to defendant's home state of New Jersey to purchase excavator).

[88] *See, e.g.*, *Boschetto*, 539 F.3d at 1015.

[89] *See, e.g.*, *id.* at 1014; Erwin v. Piscitello, 627 F. Supp. 2d 855, 857 (E.D. Tenn. 2007); Crummey v. Morgan, 965 So. 2d 497, 499 (La. Ct. App. 2007), *writ denied*, 967 So. 2d 509 (La. 2007).

A. *Courts Applying the* Zippo *Sliding-Scale Test*

In *Dedvukaj v. Maloney*, the District Court for the Eastern District of Michigan applied the *Zippo* sliding-scale test to answer the question of when personal jurisdiction is proper over an out-of-state defendant who conducted business through an online intermediary, such as eBay.[90] In *Dedvukaj*, the plaintiff, a resident of Michigan, sued the defendant, a resident of New York and sole member of "Mr. Markdown L.L.C.," for breach of contract after the plaintiff successfully bid on two pieces of artwork that defendant failed to provide.[91] In the defendant's listing under the general information heading, he listed the "item location" as "Upstate NY, United States" and under the "ships to" heading, he listed "United States, Canada, Europe, Asia, [and] Australia."[92] The defendant also provided a toll-free number in the listing for interested buyers to call for more information.[93] The auctions lasted several weeks, and during this time, the plaintiff received email updates about the status of the items and the bids entered.[94] Additionally, the plaintiff spoke with the defendant using the toll-free number posted on the listing about the authenticity of the paintings.[95]

The court determined that Michigan's long-arm statute allowed for jurisdiction and applied the sliding-scale test articulated in *Zippo* to establish the purposeful availment prong of the minimum contacts analysis.[96] The court prefaced its analysis by explaining the need for an expansive view of personal jurisdiction with regard to transactions through online intermediaries[97]:

> Internet forums such as eBay expand the seller's market literally to the world and sellers know that, and avail themselves of this greatly expanded marketplace. It should, in the context of these commercial relationships, be no great surprise to sellers—and certainly no unfair burden to them—if, when a commercial transaction formed over and through the internet does not meet a buyer's expectations, they might be called upon to respond in a legal forum in

[90] Dedvukaj v. Maloney, 447 F. Supp. 2d 813 (E.D. Mich. 2006). The plaintiff sued the individual defendant and his business, however, for the purposes of this Comment, they will be referred to as one singular defendant.

[91] *Id.* at 816–17.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 817.

[95] *Id.* at 816.

[96] *Dedvukaj*, 447 F. Supp. 2d at 820.

[97] *Id.*

> the buyer's home state. Sellers cannot expect to avail themselves of the benefit of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it.[98]

The court then explained why the sliding-scale test in *Zippo* is appropriate to establish the purposeful availment element of the minimum contacts test.[99] It determined that online-intermediary sites could be categorized as *interactive*, because sellers can determine the terms of the sale and post descriptions and pictures of the items for sale.[100] Additionally, buyers can communicate with other buyers and sellers by posting on the listing, and buyers make payments to the seller in exchange for the item.[101]

Applying this test to the case before it, the court found that the defendant had purposefully availed himself of the benefits and privileges of conducting business in Michigan.[102] The court reasoned that the defendant communicated with plaintiff frequently via email and telephone about the listing, uploaded pictures and descriptions of his items, indicated that he would sell anywhere in the United States and in many countries, accepted payment from Michigan, and was a sophisticated and extensive user of eBay.[103] The court then went on to find that the remaining elements of the minimum contacts test were met.[104] The court determined that the lawsuit arose out of and was related to the eBay transaction, and jurisdiction over the defendant was reasonable because the defendant's connection with Michigan was substantial and the state had an interest in protecting its citizens from fraud and misrepresentation.[105] Accordingly, the court found that Michigan had personal jurisdiction over the defendant.[106]

A review of other decisions where courts have applied the sliding-scale test from *Zippo* provides insight as to relevant factors that go toward determining the level of interactivity needed to establish the purposeful availment element and whether jurisdiction over the defendant is reasonable. Federal and state courts applying the *Zippo*

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98 *Id.*
99 *See id.*
100 *Id.* at 821.
101 *Id.*
102 *Dedvukaj*, 447 F. Supp. 2d at 821.
103 *Id.* at 822.
104 *Id.* at 823.
105 *Id.*
106 *Id.*

sliding-scale test to determine whether personal jurisdiction is appropriate in these situations have ruled both for and against defendants.[107] First, in *Crummey v. Morgan*, a Louisiana appellate court found that the defendant's interactivity through electronic communications was sufficient to establish jurisdiction in Louisiana, where the defendant accepted payment from a Louisiana credit card, provided potential buyers with a telephone number, engaged in additional conversations with buyers, and used the post to "advertise, puff, negotiate, and accept payment."[108] The court also indicated an important public policy rationale for finding that personal jurisdiction exists over these defendants.[109] The court theorized that holding otherwise would have a chilling effect on e-commerce because buyers, wary of having to litigate in the home courts of out-of-state sellers, "will refrain from purchasing goods on eBay . . . should the merchandise they considered purchasing be defective or otherwise not conform to the advertised online representations."[110]

Second, in *Hinners v. Robey*, the Supreme Court of Kentucky also applied the sliding-scale test from *Zippo*, but it determined that it could *not* establish personal jurisdiction over a defendant eBay seller from Missouri.[111] In *Hinners*, a Kentucky plaintiff bid on and ultimately won the auction for a Cadillac Escalade that the Missouri defendant had put up for sale.[112] The defendant's listing stated that the Cadillac had no prior accident damage, no electrical problems, and was in good condition.[113] The plaintiff traveled to Missouri to complete the deal and acquire possession of the vehicle.[114] Shortly after returning to Kentucky with the vehicle, the plaintiff began having problems with the electrical system and took it to a mechanic who discovered that there had been extensive work done on the car due to prior collisions.[115] The plaintiff filed suit against the defendant in Kentucky for fraudulent misrepresentation and breach of

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[107] *See infra* Part IV.A.

[108] Crummey v. Morgan, 965 So. 2d 497, 504 (La. Ct. App. 2007), *writ denied*, 967 So. 2d 509 (La. 2007).

[109] *See id.*

[110] *Id.*

[111] Hinners v. Robey, 336 S.W.3d 891, 901 (Ky. 2011) (the court considered the issue under both the sliding-scale test articulated in *Zippo* and under the traditional minimum contacts analysis and came to the same conclusion; however, for the purpose of this Part only the *Zippo* analysis is discussed).

[112] *Id.* at 893.

[113] *Id.*

[114] *Id.* at 894.

[115] *Id.*

warranty, and the Supreme Court of Kentucky granted certification.[116]

The Kentucky Supreme Court applied the sliding-scale test from *Zippo* and found that the defendant did not purposefully avail himself of the privileges of Kentucky.[117] The court explained that the defendant "did not limit the auction to bidders from Kentucky or target his advertisement to Kentucky residents, and in fact could not know the resident state of the successful bidder until the auction was complete."[118] It stated that the eBay listing was akin to a "passive Internet website" that "does little more than make information available to those who are interested."[119] Also relevant to its conclusion was the fact that the delivery of the item was concluded outside of Kentucky.[120] Based on this analysis, the court ultimately concluded that to exercise personal jurisdiction over the defendant would be constitutionally improper.[121]

Perhaps the most important thing to take away from these cases is their use of the sliding-scale test to assess the purposeful availment aspect of the minimum contacts test. As discussed *supra* in Part II, combining the analysis from *McGee v. Int'l. Life Ins. Co.* and *Hanson v. Denckla*, one contact may be sufficient to establish personal jurisdiction over an out-of-state defendant if the contact is substantial, and the defendant purposefully avails himself of the benefits and privileges of the forum state through that contact.[122] These cases also illustrate that courts can apply the *Zippo* sliding-scale test to transactions conducted over online intermediaries to establish the purposeful availment prong of the traditional minimum contacts test, while still maintaining the other traditional elements of establishing personal jurisdiction.[123] Each of these cases also required that the claim arise out of or relate to the eBay transaction and for jurisdiction over the defendants to be reasonable.

Importantly, in *Hinners* the court listed relevant factors in

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[116] *Id.* at 893.

[117] *Hinners*, 336 S.W.3d at 899.

[118] *Id.*

[119] *Id.* at 901.

[120] *See id.* at 894 n.3 ("There is some indication in the record that delivery and execution of the paperwork may have occurred in Illinois; however, the relevant point is that the delivery was completed beyond the borders of Kentucky, and whether it was in Missouri or Illinois is of no significance.").

[121] *Id.* at 903.

[122] *See* discussion *supra* Part II; s*ee also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221–23 (1958); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[123] *See* Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 819 (E.D. Mich. 2006); *Hinners*, 336 S.W.3d at 898; Crummey v. Morgan, 965 So. 2d 497, 501–02 (La. Ct. App. 2007).

considering whether the defendant had purposefully availed himself of the benefits and privileges of Kentucky.[124] The court stated that since the seller did not "limit the auction to bidders from Kentucky," could not know that the winning bidder was a resident of the state of Kentucky, did not select the winning bidder, and completed the delivery outside of Kentucky, the defendant did not purposefully avail himself of the benefits and privileges of conducting business in Kentucky.[125] Similarly, in *Crummey* the court listed relevant factors supporting its finding that the defendant had purposefully availed himself of the benefits and privileges of Louisiana.[126] The court found that since the defendant expanded his market by using eBay as an intermediary, accepted an original down payment for the vehicle with a credit card sent from Louisiana, and provided the plaintiff with a telephone number to engage in additional communications with the defendant, he purposefully availed himself of the protections of Louisiana law.[127]

Again, in *Dedvukaj* the court also listed the factors it considered relevant to determining that defendant had purposefully availed himself of the benefits and privileges of Michigan.[128] In making its decision, the court considered the fact that the defendant stated that he would deliver his paintings anywhere in the United States, that the defendant provided the plaintiff with a phone number and email address in order to contact him, and that he provided his own terms and conditions, logos, and marketing information in the listing.[129] These cases effectively illustrate which factors courts will consider as relevant to determining whether an out-of-state defendant who conducts business through an online intermediary has purposefully availed himself of the benefits and privileges of a forum state in order to establish personal jurisdiction over that defendant.[130]

B. Courts Applying Traditional Minimum Contacts Analysis

Some courts, however, have refused to abandon the traditional approach in resolving the issue of whether personal jurisdiction exists over an out-of-state defendant conducting business through an online intermediary. The Ninth Circuit applied traditional personal

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[124] *See Hinners*, 336 S.W.3d at 894 n.4, 899–900.
[125] *Id.*
[126] *See Crummey*, 965 So. 2d at 504.
[127] *Id.*
[128] *Dedvukaj*, 447 F. Supp. 2d at 822.
[129] *Id.*
[130] *See* discussion *infra* Part V.

jurisdiction analysis in resolving this issue in *Boschetto v. Hansing*.[131] In *Boschetto*, the plaintiff, a California resident, used eBay to purchase an antique car from the defendant, a resident of Wisconsin.[132] The parties communicated through email and arranged to deliver the car to California from Wisconsin.[133] Upon receiving the car, Boschetto realized that the car was not the specific "R Code" model that the defendant advertised and found other significant problems with the engine and body of the car.[134] Boschetto subsequently sued the defendant in California for breach of contract and fraud.[135] The court expressly stated that the sliding-scale test articulated in *Zippo* was inapplicable in this type of situation because the defendant did not own or operate the eBay website.[136]

The court equated the eBay listing to an advertisement, stating that "the eBay listing was not part of broader e-commerce activity; the listing temporarily advertised a good for sale and that listing closed once the item was sold, thereby extinguishing the Internet contact for this transaction within the forum state (and every other forum)."[137] Thus, the court applied the traditional minimum contacts analysis articulated in *International Shoe* to the online transaction and found that defendant's one sale over eBay to the California plaintiff was not a sufficient contact to allow the court to exercise personal jurisdiction over the defendant.[138] The court did note, however, that a defendant who conducts business over eBay might be subject to personal jurisdiction in a forum state when he uses eBay "as a means for establishing regular business with a remote forum such that finding personal jurisdiction comports with traditional notions of fair play and substantial justice."[139]

One potential benefit of the Ninth Circuit's holding in *Boschetto* is that it is consistent with traditional long-range transactions that do not involve the Internet, and courts can look to case law that addressed these situations for support and guidance as to how much contact with the forum state is sufficient. The court's holding, however, poses a number of potential problems as well. First, if the defendant was actually wrong and made a number of

[131] Boschetto v. Hansing, 539 F.3d. 1011 (9th Cir. 2008).
[132] *Id.* at 1014.
[133] *Id.*
[134] *Id.* at 1015.
[135] *Id.* at 1014–15.
[136] *Id.* at 1018.
[137] *Boschetto*, 539 F.3d at 1018.
[138] *Id.* at 1020.
[139] *Id.* at 1019 (internal quotations omitted).

misrepresentations in the description of the vehicle, the plaintiff may have no recourse, as the cost of traveling to Wisconsin to litigate may be too burdensome for the individual plaintiff. Additionally, the court failed to address the significance, if any, of the communication via email that the parties exchanged in arranging the delivery of the car to California and whether or not that communication may contribute towards the defendant's minimum contacts with California.

Once again, reviewing other courts that have applied the traditional minimum contacts tests in these types of situations reveals relevant factors that these courts consider in deciding whether the defendant's contacts with the state are sufficient and whether it is reasonable to subject the defendant to jurisdiction. Federal and state courts in other jurisdictions following this approach have generally found that the contacts through the online intermediaries were insufficient to establish jurisdiction, describing them as attenuated, random, and fortuitous.[140] Notably, many of these courts rely on the fact that the defendant has "no control over the winning bidder," and as a result, the contact with the forum state is random and fortuitous.[141] This view, however, ignores reality. In fact, sellers *are* able to control who (or at least where) the winning bidder will be. Sellers are able to control the information that is posted in the "description" and "shipping and payments" sections of their listings on eBay.[142] Sellers may choose which forum states they will agree to ship to and with whom they will conduct business.[143] Most sellers, however, seek to maximize the number of potential buyers and increase the sale price of their item, intentionally choosing to avail themselves of the benefits of conducting business with every state.

At least one court has applied the traditional minimum contacts test to an out-of-state defendant conducting business over eBay and found that personal jurisdiction was appropriate.[144] In *Malcolm v. Esposito*, the plaintiff, a Virginia resident, won an auction to purchase a car on eBay from the defendants, agents of a car dealership located

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[140] *See, e.g.*, Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000); Foley v. Yacht Mgmt. Grp., Inc., No. 08-7254, 2009 WL 2020776, at *3–4 (N.D. Ill. July 9, 2009); MacNeil v. Trambert, 932 N.E.2d 441, 446 (Ill. App. Ct. 2010).

[141] *See Payment & Shipping*, EBAY.COM, http://pages.ebay.com/help/pay/shipping-costs.html (last visited Mar. 11, 2013).

[142] *See id.*

[143] *See id.*

[144] Malcolm v. Esposito, 63 Va. Cir. 440, 446 (Va. Cir. Ct. 2003).

in Connecticut.[145] After the auction ended, the parties contacted each other by email and phone and the defendants arranged to ship the car from California to Virginia.[146] Before the defendants shipped the car, the plaintiff discovered a manufacturing defect with the car and tried to cancel his purchase of the vehicle, but the defendants refused to allow the plaintiff to revoke the agreement.[147] The plaintiff subsequently sued the defendants in Virginia for fraud and breach of warranty.[148]

The court first concluded that the Virginia long-arm statute allowed the court to exercise jurisdiction over the defendants because the "formation of the contract for sale of the [car] occurred in Virginia."[149] Turning to the constitutional inquiry, the court found that the *Zippo* sliding-scale analysis was not "particularly instructive" because it primarily dealt with defendants who operate and conduct transactions through their own website.[150] Accordingly, the court applied the traditional minimum contacts analysis.[151] The court listed several factors that were relevant to its decision: (1) the defendants were commercial sellers of the item and had conducted over 213 transactions to many different states through eBay; (2) the defendants represented that they had eBay customers locally, nationally, and internationally; (3) the defendants anticipated transactions with out-of-state buyers because they sent an email to the plaintiffs requesting a copy of the plaintiff's driver's license if he was an out-of-state resident; and (4) the nature of the product, an automobile, was intended to be delivered to and driven in Virginia.[152] Based on an analysis of these factors under the traditional minimum contacts test, the court found that jurisdiction over the defendants in Virginia was proper.[153]

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[145] *Id.* at 441.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 442–43 ("The Virginia long-arm statute provides, in pertinent part, that "(A) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . (2) Contracting to supply services or things in this Commonwealth.").

[150] *Malcolm*, 63 Va. Cir. at 445.

[151] *Id.* at 444–46.

[152] *Id.* at 446.

[153] *Id.* at 444, 446.

C. *Courts Applying the* Calder *Effects Test*

At least one court has attempted to apply an effects test similar to the one in *Calder* to determinations of personal jurisdiction over out-of-state defendants who conduct business through online intermediaries.[154] In *Erwin v. Piscitello*, the plaintiff, a resident of Tennessee, purchased a classic automobile advertised as being in "mint condition" from the defendant, a resident of Texas.[155] The plaintiff and the defendant made and received several calls about the car, during which the defendant reinforced the quality and condition of the car.[156] The defendant ultimately delivered the car to the plaintiff in Tennessee through his own driver and car hauler.[157] Two days after the plaintiff received the car, he discovered it was not in mint condition and several of the original parts had been replaced, contrary to the defendant's representations.[158]

The court first explained that Tennessee's long-arm statute allowed for personal jurisdiction to the full extent allowable under the United States Constitution and as a result merged the constitutional and statutory analyses.[159] The court then applied an effects test and concluded that the defendant had purposefully availed himself of the benefits and privileges of Tennessee's laws.[160] The court found that the defendant "knowingly interacted with a Tennessee resident" and persuaded the plaintiff to purchase the vehicle based on representations about the vehicle that were ultimately discovered to be untrue.[161] In doing so, the court emphasized that "[the defendant's] knowing and intentional conduct caused foreseeable ill effects in-state."[162] Based on these factual determinations, the court concluded that it was "reasonably foreseeable for Defendant to be haled into court in Tennessee when the transaction soured."[163]

Most courts have chosen not to discuss whether an effects test is applicable in the context of Internet transactions through online intermediaries like eBay.[164] Instead, these courts have chosen to

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[154] *See generally* Calder v. Jones, 465 U.S. 783 (1984).
[155] Erwin v. Piscitello, 627 F. Supp. 2d 855, 856–57 (E.D. Tenn. 2007).
[156] *Id.* at 856.
[157] *Id.* at 857.
[158] *Id.*
[159] *Id.* at 858–59.
[160] *Id.* at 860.
[161] *Erwin*, 627 F. Supp. 2d at 860.
[162] *Id.* at 861.
[163] *Id.*
[164] *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1018–20 (9th Cir. 2008);

address this issue under the *Zippo* sliding-scale analysis or under the traditional minimum contacts analysis.[165] At least one court has explicitly declined to follow the analysis set forth in *Erwin* in the context of establishing personal jurisdiction over an out-of-state defendant who conducts business through an online intermediary.[166] Additionally, the court in *MacNeil v. Trambert* discussed the difficulty of trying to apply the effects test to Internet transactions over online intermediaries like eBay.[167] First, the court indicated that the "effects doctrine" is generally applied to intentional tort cases, and thus is inapplicable to breach-of-contract cases in the eBay context.[168] This means that the effects test would only be applicable to fraud and misrepresentation cases.[169] Next, the court pointed out the difficulty in establishing the location of the tortious act in a multi-state transaction, whether it occurs when the defendant accepts payment for the defective good or when the plaintiff obtains possession of the defective good.[170] Consequently, if the plaintiff chooses to pick up the defective good in the defendant's state, or authorizes an agent to do so, the location of the acceptance of payment and deliverance of possession would both be in the defendant's state.[171] As a result, the plaintiff would have no recourse in his own state and would have to travel to the defendant's state to file his lawsuit.

Currently, *Erwin* is the only case that has used the effects test to find personal jurisdiction over an out-of-state defendant conducting business through online intermediaries. Although it is only one case, *Erwin* illustrates that an effects test remains a viable option for courts to consider in determining whether personal jurisdiction exists over an individual who conducts business over eBay or some other online intermediary. But as the court in *MacNeil* pointed out, applying this test in the context of Internet transactions through online intermediaries can be problematic. Until courts adopt a more uniform standard for establishing personal jurisdiction under these circumstances, courts will continue to struggle in determining which analysis to apply and which factors are relevant to assessing the reasonableness of jurisdiction.

Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 819–21 (E.D. Mich. 2006); Crummey v. Morgan, 965 So. 2d 497, 503–04 (La. Ct. App. 2007).

[165] *See supra* Part IV.A–B.

[166] *See* Hinners v. Robey, 336 S.W.3d 891, 903 (Ky. 2011).

[167] *See* MacNeil v. Trambert, 932 N.E.2d 441, 447–48 (Ill. App. Ct. 2010).

[168] *Id.* at 447.

[169] *Id.*

[170] *See id.* at 447–48.

[171] *See id.* at 448.

V. THE "ONLINE INTERMEDIARIES TEST"

A review of the existing commentary on this issue illustrates that, just like the courts, scholars and commentators disagree about what the proper test should be under these circumstances.[172] Some commentators argue that courts should stick to the traditional minimum contacts analysis for long-range transactions and not get distracted by the fact that the business was conducted over the Internet on the eBay website.[173] One commentator suggested that state legislatures should amend their respective state's long-arm statutes to preclude personal jurisdiction over out-of-state residents who conduct business over third-party websites such as eBay and Amazon.[174] Other commentators have suggested that general jurisdiction could apply to the actual websites of eBay or Amazon.[175] In line with this argument is the question of whether these websites' most prominent users could also be subject to general jurisdiction if through these online intermediaries, they have continuous and systematic contacts with every state in the United States. This would mean that jurisdiction would be proper over these "super-sellers" in any state where a buyer files a claim against them. No commentator, however, has argued in favor of creating a specific test for online intermediaries by incorporating a modification of the *Zippo* sliding-scale test along with elements of the traditional minimum contacts test.

An analysis of the relevant case law on establishing personal jurisdiction over out-of-state defendants who conduct business through online intermediaries makes clear that the best test for establishing personal jurisdiction is one that combines and implements the most important elements of the prevalent cases.[176] The following online-intermediary test combines many elements from the cases previously mentioned.[177] First, it applies principles from the *Zippo* sliding-scale test and looks at the interactivity and features of the bid, post, or listing on the online intermediary to determine whether the defendant has purposefully availed himself of

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[172] *See* discussion *infra* Part V.

[173] *See, e.g.*, *Personal Jurisdiction—Minimum Contacts Analysis—Ninth Circuit Holds that Single Sale on eBay Does Not Provide Sufficient Minimum Contacts with Buyer's State.*—Boschetto v. Hansing, *539 F.3d 1011 (9th Cir. 2008)*, 122 HARV. L. REV. 1014, 1021 (2009).

[174] Ryan T. Holte, *What is Really Fair: Internet Sales and the Georgia Long-Arm Statute*, 10 MINN. J. L. SCI. & TECH. 567, 589 (2009).

[175] *See* Miller, *supra* note 81.

[176] *See* discussion *supra* Parts IV.A–C.

[177] *See* discussion *supra* Part IV.

the forum state.[178] Then, it maintains the requirements of the minimum contacts test that the conflict must (1) arise out of or relate to the transaction; and (2) that jurisdiction over the defendant must be reasonable.[179]

The most fluent articulation of this test, derived from *Dedvukaj*,[180] *Hinners*,[181] and *Crummey*[182] is as follows: an out-of-state defendant who conducts business over a third-party intermediary, such as eBay or Amazon, is subject to personal jurisdiction in a forum state when: (1) that defendant has sufficient minimum contacts whereby he purposefully avails himself of the benefits and privileges of the state as determined by the level of interactivity available to potential buyers in the forum state through the listing; (2) the claim against him arises out of those contacts; and (3) after an analysis of the relevant factors, jurisdiction over the defendant is reasonable such that it complies with the traditional notions of fair play and substantial justice. The unique aspect of this approach derives from determining whether the defendant purposefully avails himself of the forum state by looking at the interactivity of the post or listing on the online intermediary itself. As previously mentioned, eBay users and users of similar online intermediaries have a significant amount of control over the information they post in their listing and how the transaction is ultimately concluded.[183] The more passive the seller is in posting information, arranging for shipping, and soliciting potential buyers in various states through his or her listing, the less likely the defendant will have purposefully availed himself of a forum state where his product is ultimately sold and vice versa.

In all of the cases where courts have struggled to determine whether personal jurisdiction can be established over an out-of-state defendant that conducts business through an online intermediary, these courts have mentioned several factors that are considered relevant to the inquiry.[184] After reviewing these cases, it is now possible to determine which factors courts cite most frequently and

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[178] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[179] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–19 (1945).

[180] Dedvukaj v. Maloney, 447 F. Supp. 2d 813 (E.D. Mich. 2006).

[181] Hinners v. Robey, 336 S.W.3d 891 (Ky. 2011).

[182] Crummey v. Morgan, 965 So. 2d 497 (La. Ct. App. 2007).

[183] *See* discussion *supra* Part IV.B.

[184] *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1018–20 (9th Cir. 2008); Erwin v. Piscitello, 627 F. Supp. 2d 855, 860–61 (E.D. Tenn. 2007); MacNeil v. Trambert, 932 N.E.2d 441, 446–47 (Ill. App. Ct. 2010); Malcolm v. Esposito, 63 Va. Cir. 440, 446 (Va. Cir. Ct. 2003).

give the most weight to in reviewing this issue. These factors are intended to serve as a guide for future courts reviewing this issue. Courts that have applied one of the three articulated personal jurisdiction tests have come to different conclusions in factually similar cases because they differ on one or two of the factors listed below.[185]

The following factors that courts should consider in determining whether the defendant's bid is sufficiently interactive such that he or she purposefully avails himself or herself of the forum state are: (1) the number of transactions between the seller and the forum state through the online intermediary;[186] (2) whether and to what extent the defendant coordinates and pays for the product to be shipped to the buyer's home state, physically or through an agent who delivers the product to the buyer's state, or whether the defendant requires the buyer to come to the defendant's state to take possession of the product;[187] (3) whether the defendant posts contact information such as an email address, website, or telephone number in the bid and intends to make contact with buyers in the forum state in ways other than through the listing on the intermediary;[188] (4) whether the defendant knows the buyer's location, establishing that he has knowledge that he is conducting business with the forum state;[189] and (5) whether the defendant is an individual or corporation who frequently conducts business through online intermediaries.[190] Courts addressing the issue of out-of-state defendants conducting business through online intermediaries have cited these factors most frequently as relevant to its determination of personal jurisdiction.

The "reasonableness" element of the test is also an important inquiry that courts should not overlook. The online-intermediaries test borrows the traditional factors from *World-Wide Volkswagen* in determining whether jurisdiction over the defendant would be reasonable as to comply with the "traditional notions of fair play and substantial justice."[191] These factors include: (1) the burden that

[185] *See, e.g.*, *Boschetto*, 539 F.3d at 1018–20; *Erwin*, 627 F. Supp. 2d at 860–61; *Dedvukaj*, 447 F. Supp. 2d at 819–21; *Hinners*, 336 S.W.3d at 899–902; *MacNeil*, 932 N.E.2d at 446–47; *Crummey*, 965 So. 2d at 503–04; *Malcolm*, 63 Va. Cir. at 446 (2003).

[186] *See, e.g.*, *Boschetto*, 539 F.3d at 1018–19; *Hinners*, 336 S.W.3d at 902.

[187] *See, e.g.*, *Erwin*, 627 F. Supp. 2d at 860–61; *Dedvukaj*, 447 F. Supp. 2d at 822.

[188] *See, e.g.*, *Dedvukaj*, 447 F. Supp. 2d at 822; *MacNeil*, 932 N.E.2d at 447; *Crummey*, 965 So. 2d at 503–04.

[189] *See, e.g.*, *Erwin*, 627 F. Supp. 2d at 860–61; *Dedvukaj*, 447 F. Supp. 2d at 822; *Crummey*, 965 So. 2d at 503; *Malcolm*, 63 Va. Cir. at 446.

[190] *See, e.g.*, *Dedvukaj*, 447 F. Supp. 2d at 822; *Malcolm*, 63 Va. Cir. at 446.

[191] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (internal

litigation will have on the defendant; (2) the forum state's interest in the litigation; (3) the plaintiff's interest in obtaining relief; and (4) the national judicial interest in securing an efficient resolution of the dispute.[192] The value of the product that forms the basis of the transaction should also be relevant to this inquiry. The statutory requirement that a matter must exceed $75,000 for federal diversity jurisdiction will prevent many claims from reaching federal courts; however, state courts should be hesitant to require a defendant to travel across the country to defend himself over an inexpensive contract dispute.[193]

VI. APPLYING THE ONLINE INTERMEDIARIES TEST IN REAL AND HYPOTHETICAL SCENARIOS

The following example illustrates the practicality and feasibility of the online-intermediaries test. Consider the facts of *Erwin v. Piscitello*.[194] The issue of whether personal jurisdiction exists over the defendant in *Erwin* can be resolved with the same outcome under the online-intermediaries test. In *Erwin*, the plaintiff viewed the defendant's eBay post for a car for sale and used the information in the post to email the defendant to inquire about that car, to which the defendant responded.[195] Had that been the full extent of the defendant's communications with the plaintiff, he would not have purposefully availed himself of Tennessee law under the online-intermediaries test. The defendant, however, chose to re-initiate contact with the plaintiff and sent a number of emails and phone calls to the plaintiff seeking to gauge his interest in the car.[196] Additionally, when the defendant discovered that the plaintiff would not be able to pick the car up in Texas as previously believed, the defendant arranged for a car hauler to deliver the car to the plaintiff's home in Tennessee.[197] From the communications and the fact that the seller arranged to deliver the car to Tennessee, it is evident that the defendant *knew* he was dealing with a plaintiff from Tennessee.[198]

Based on these facts, the defendant in *Erwin* purposefully availed

quotation marks omitted).

[192] *Id.*

[193] 28 U.S.C. § 1332 (2006).

[194] *See supra* Part IV.C.

[195] Erwin v. Piscitello, 627 F. Supp. 2d 855, 856 (E.D. Tenn. 2007).

[196] *Id.* at 857.

[197] *Id.*

[198] *See id.*

himself of the benefits and privileges of Tennessee by interacting with the plaintiff buyer on multiple levels. The next inquiry, whether the claim arises out of the transaction, is easily satisfied because the claim arises out of the dispute over the condition of the car.[199] Finally, looking at whether jurisdiction over the defendant would be reasonable, the facts show that Tennessee has a strong interest in protecting its citizens from fraudulent misrepresentations, that the defendant was easily able to secure transportation for the car to Tennessee, and that the car was worth a substantial amount.[200] As a result, under the online-intermediaries test, personal jurisdiction over the defendant for the dispute regarding the car would be appropriate in Tennessee.

An alternative hypothetical example illustrates when personal jurisdiction would not be appropriate over an out-of-state defendant conducting business through an online intermediary. Suppose a seller lists a bullwhip[201] on eBay that Harrison Ford used to portray the character "Indiana Jones" in the movie *Raiders of the Lost Ark*.[202] The defendant is a resident of New Jersey, an attorney by profession, and has only used eBay once before to sell his mother's fine china to a buyer from New York. In his eBay listing, he includes a brief description of the whip, indicating that Harrison Ford used it in the film and stating that the buyer is responsible for pickup or delivery and must pay all shipping costs from New Jersey. The potential buyer is an avid movie buff who lives in Idaho and is always on the lookout for movie relics on eBay and other auction sites. The buyer sees the listing and decides he must have the whip. The buyer then submits a bid for $15,000 and after one week, he wins the auction. When the buyer receives the whip, he questions its authenticity after watching the movie with his whip in hand. The buyer brings a lawsuit against the seller in Idaho for breach of contract and fraud based on the alleged misrepresentations in the eBay listing.

Through an application of the online intermediaries test, a court in Idaho would not be able to establish personal jurisdiction over the seller. The seller never made a sale to Idaho through eBay before, and his previous sale of fine china to New York is not sufficient to establish that the he is engaged in the business of selling movie relics or fine dishware through online auction sites. The seller did not post

[199] *See id.* at 860.

[200] *See id.* at 856.

[201] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 151 (10th ed. 1998) (A bullwhip is "a rawhide whip with a very long plaited lash").

[202] RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

any contact information in the post indicating that he would attempt to contact individuals by other methods other than through the eBay listing. Additionally, he indicated that the plaintiff was responsible for the pickup or delivery and subsequent costs of the item from New Jersey. Even though the seller chose not to limit his sale to any specific state but instead allowed his bullwhip to be sold anywhere in the United States, this factor alone is not sufficient to overcome the other factors that indicate he has not purposefully availed himself of the benefits and privileges of Idaho. Thus, through this passive conduct, the seller never purposefully availed himself of the benefits and privileges of conducting business in Idaho, and therefore, he cannot reasonably expect to be haled into court in Idaho to defend against this lawsuit.

These examples show that courts can practically apply the online-intermediaries test to different factual scenarios involving transactions conducted through eBay or other online intermediaries with relative uniformity. The more sellers choose to engage buyers in a particular forum state through their listing and communication and negotiation outside of the listing, the more likely they will be subject to personal jurisdiction in that state. Conversely, the more passive they are in listing and soliciting communication and interest from potential buyers outside of the posts by only responding to buyer inquiries, the less likely they will be subject to personal jurisdiction. This test still allows sellers to exploit the benefits of selling their products through an online intermediary such as eBay and to protect themselves from liability in a foreign jurisdiction. It provides, however, that if they choose to actively solicit and target customers in a foreign state or conduct a significant amount of business with a foreign state through that intermediary, then they cannot claim that it is unreasonable for them to be called into court in that state. As a result, this online intermediaries test strikes an appropriate balance of reasonableness and fairness.

VII. CONCLUSION

Upon reviewing the relevant case law regarding personal jurisdiction over out-of-state defendants who conduct business with the forum state over online intermediaries, it is clear that there is a lack of uniformity amongst courts. Notably, almost all courts have maintained some or all of the elements of the traditional minimum contacts analysis for determining personal jurisdiction in these

cases.[203] Some courts have maintained all of the elements from *International Shoe Co.* and applied them to these situations, with the majority of these courts finding that one or two sales with the forum state is insufficient to establish minimum contacts to establish personal jurisdiction over the defendant seller.[204] Others have applied the sliding-scale test in *Zippo* based on the interactivity of the commercial business to satisfy the purposeful availment element of the minimum contacts analysis.[205] These courts have found both for and against establishing personal jurisdiction over these defendants based on the level of interactivity they provide in their listings and advertisements. One court has found that if the actions of these defendants conducting business through these online intermediaries caused an effect in the forum state, then even one contact with the forum state might be sufficient to establish personal jurisdiction.[206]

This Comment argues for an analytical test, which combines the two major approaches to this issue. Courts should apply the sliding-scale test articulated in *Zippo* to determine whether the defendant has purposefully availed himself of the benefits and privileges of the forum state through his contacts of the sale listing. Next, courts should determine whether the claim arises out of or relates to the contact. Finally, these courts should determine whether jurisdiction over the defendant would be reasonable such that it would comply with "traditional notions of fair play and substantial justice" based on the factors articulated in *World-Wide Volkswagen*.[207]

Courts and commentators have struggled with the issue of how to assert personal jurisdiction over individuals who conduct business over online intermediaries since immediately after the creation and increase in popularity of third-party intermediary sites like eBay and Amazon. This approach is a push toward uniformity in an area of much disparity and disagreement. This "online intermediaries test" seeks to provide guidelines for buyers and sellers conducting business

[203] *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1018–20 (9th Cir. 2008); Erwin v. Piscitello, 627 F. Supp. 2d 855, 860–61 (E.D. Tenn. 2007); MacNeil v. Trambert, 932 N.E.2d 441, 446–47 (Ill. App. Ct. 2010); Malcolm v. Esposito, 63 Va. Cir. 440, 446 (Va. Cir. Ct. 2003).

[204] *See, e.g.*, *Boschetto*, 539 F.3d at 1018–19; Foley v. Yacht Mgmt. Grp., Inc., No. 08-7254, 2009 WL 2020776, at *3–4 (N.D. Ill. July 9, 2009); Winfield Collection Ltd. v. McCauley, 105 F. Supp. 2d 746, 748–49 (E.D. Mich. 2000); *Malcolm*, 63 Va. Cir. at 444–46.

[205] *See, e.g.*, Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 821–22 (E.D. Mich. 2006); Metcalf v. Lawson, 802 A.2d 1221, 1225–27 (N.H. 2002); Crummey v. Morgan, 965 So. 2d 497, 503–05 (La. Ct. App. 2007), *writ denied*, 967 So. 2d 509 (La. 2007).

[206] *Erwin*, 627 F. Supp. 2d at 860–62.

[207] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

over online intermediaries to know exactly where they may be called upon in a court of law to address issues with regard to their purchases and sales.