

9-2017

Milky Whey, Inc. v. Dairy Partners, LLC: Transacting Business Under Montana's Long-Arm Statute to the Full Constitutional Limit

Victoria Dettman

J.D. Student, University of Montana, Alexander Blewett III School of Law

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Civil Procedure Commons](#), and the [Jurisdiction Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Victoria Dettman, *Milky Whey, Inc. v. Dairy Partners, LLC: Transacting Business Under Montana's Long-Arm Statute to the Full Constitutional Limit*, 78 Mont. L. Rev. (2017).

Available at: <https://scholarworks.umt.edu/mlr/vol78/iss2/6>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

MILKY WHEY, INC. V. DAIRY PARTNERS, LLC:
TRANSACTIONING BUSINESS UNDER MONTANA’S
LONG-ARM STATUTE TO THE FULL
CONSTITUTIONAL LIMIT

Victoria Dettman*

I. INTRODUCTION

A Montana court must properly exercise personal jurisdiction over a nonresident defendant pursuant to the Constitution’s Due Process Clause and Montana’s long-arm statute.¹ In *Milky Whey, Inc. v. Dairy Partners, LLC*,² the Montana Supreme Court performed a fact-intensive inquiry to determine that Montana did not have personal jurisdiction over nonresident defendant Dairy Partners.

This note discusses how the Court correctly followed precedent in holding that Montana did not have personal jurisdiction over the nonresident defendant, Dairy Partners, in *Milky Whey*. Part II explains the constitutional foundations of personal jurisdiction. Part III describes Montana’s long-arm statute and reviews the history and definition of “transacting business” under Montana Supreme Court case law. Next, Part IV provides the factual and procedural background of *Milky Whey*. Part V then summarizes the Court’s reasoning and Chief Justice McGrath’s dissent. Part VI begins by explaining why the majority was correct in its determination that Dairy Partners did not transact business in Montana. The Court followed long-standing precedent, taking the opportunity to aggregate imperative factors and identify a “substantial interactions” test. The substantial interactions test can now be used to determine when a nonresident defendant transacted business in Montana under subsection A of Montana’s long arm statute. Part VI then discusses why, even if the Court had held that Dairy Partners transacted business under Montana’s long-arm statute, Montana’s exercise of personal jurisdiction over Dairy Partners would not comply with due process. The analysis finishes with a discussion of how the substantial interactions test confers personal jurisdiction to the full extent permitted by the Constitution.

* J.D., 2017, Alexander Blewett III School of Law at the University of Montana. I would like to thank the editors and staff of the Montana Law Review for their meticulous editing and good advice, especially Nicholas LeTang and Constance Van Kley. I would also like to thank Professor Anthony Johnstone for his help with this project and for his guidance of the Montana Law Review. Most of all, I wish to thank my family and friends for the endless love and encouragement.

1. *Simmons v. State*, 670 P.2d 1372, 1376 (Mont. 1983).

2. 342 P.3d 13, 20–21 (Mont. 2015).

II. THE CONSTITUTIONAL FOUNDATIONS OF PERSONAL JURISDICTION

The outer bounds of personal jurisdiction are constitutionally defined. The fundamental right of due process is guaranteed by the Fourteenth Amendment of the Constitution: no state shall “deprive any person of life, liberty, or property, without due process of law.”³ A party’s due process rights are violated if (1) the party had a constitutionally protected life, liberty, or property interest; (2) the party was deprived of that interest by an act of the state; and (3) the state did not have a constitutionally sufficient justification to deprive the party of the interest.⁴ A nonresident defendant’s due process rights are violated if she is required to defend a lawsuit in a state to which she has no substantial connection.⁵

An extensive line of Supreme Court case law serves as a guide to states in their exercise of personal jurisdiction over nonresident defendants. The standard is a fluid one that has necessitated change with the modernization of society.

A. *The Traditional Standard*

Traditionally, personal jurisdiction was simply a question of service of process and physical presence. The Court’s 1878 decision *Pennoyer v. Neff*⁶ solidified a rule limiting a state’s judicial powers to persons served within its borders, unless the defendant owned property in the state or consented to jurisdiction. This principle was subsequently expanded in *McDonald v. Mabee*,⁷ where the Court held that service by publication was constitutionally insufficient to provide notice to a defendant who had left the state to reside elsewhere. The Court stated that service must occur in a manner “most likely to reach the defendant” and provide him or her notice of the proceedings.⁸ While purposefully limiting its holding to the facts in *McDonald*,⁹ the Court predicted future expansion of jurisdiction acquisition.¹⁰

3. U.S. CONST. amend. XIV.

4. Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 5 (2014) (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

5. *See id.* at 5–8 for a discussion of how personal jurisdiction implicates due process considerations.

6. 95 U.S. 714, 722, 733–34 (1878) (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”).

7. 243 U.S. 90, 92 (1917).

8. *Id.*

9. *Id.*

10. *Id.* at 91 (“No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance . . .”).

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 341

That growth occurred, as demonstrated in *Milliken v. Meyer*,¹¹ when the Court held that a Wyoming resident personally served outside of the state was served in a constitutionally sufficient manner to allow for the exercise of the Wyoming court's jurisdiction. The Court emphasized that jurisdictional due process depended on whether service provided the defendant with "actual notice of the proceedings and an opportunity to be heard."¹²

These early jurisdictional standards were applied to physical people, however, and the Court had to be creative in extending the same principles to foreign corporations.¹³ Two legal fictions developed that allowed states to obtain jurisdiction over foreign corporations.¹⁴ First, there was an idea that a foreign corporation impliedly consented to jurisdiction in a state where it was doing business.¹⁵ The second legal fiction was that a corporation "doing continuous and systematic business" in a state was physically present in that state and could therefore be bound by service of process.¹⁶ These standards were attenuated, however, and an expanding interstate economy necessitated true, not fictional, jurisdictional foundations.

B. *The Evolution of Personal Jurisdiction*

The famous foundation of our modern personal jurisdiction analysis, focusing not on physical presence but on a defendant's relationship with the forum state, lies within the Court's 1945 decision *International Shoe Co. v. Washington*.¹⁷ The Court held that exercising personal jurisdiction over a nonresident defendant complies with due process if the nonresident defendant has sufficient "minimum contacts" with the forum state so as to ensure that the court's exercise of power over the defendant does not "offend traditional notions of fair play and substantial justice."¹⁸ The Court was not seeking to create a bright-line rule and purposefully did not develop a mechanical test.¹⁹ Instead, the Court instructed that compliance with due process depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws."²⁰ It clarified that a state

11. 311 U.S. 457, 463 (1940).

12. *Id.*

13. Thomas E. Towe, *Personal Jurisdiction over Non-Residents and Montana's New Rule 4B*, 24 MONT. L. REV. 1, 5-6 (1962).

14. *Id.* at 5.

15. *Id.* at 5-6; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

16. Towe, *supra* note 13, at 6.

17. 326 U.S. at 316.

18. *Id.* (internal quotations omitted).

19. *Id.* at 319.

20. *Id.*

R

does not have jurisdiction over “an individual or corporate defendant with which the state has no contacts, ties, or relations.”²¹

The *International Shoe* Court recognized the quid-pro-quo relationship that states and foreign corporations have:

to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.²²

As long as a foreign corporation has sufficient contacts with the state, service upon that corporation provides reasonable assurance that the corporation received actual notice of the litigation.²³

After *International Shoe*, the Court applied this contacts approach to personal jurisdiction and expanded the scope of contact needed to satisfy due process in *McGee v. International Life Insurance Co.*²⁴ In *McGee*, a Texas life insurance company insured a California resident.²⁵ The Texas insurance company sent terms of a reinsurance policy to the insured party in California, the insured party sent his insurance premiums by mail from California to Texas, and later the insured party died in California.²⁶ The Court held that the life insurance contract created a substantial connection between the foreign company and California—due process was satisfied.²⁷ California had a “manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.”²⁸ The Court recognized how both a historical study of personal jurisdiction and a consideration of the transforming national economy supported broadening the scope of personal jurisdiction over nonresident defendants.²⁹

The Court was unwilling, however, to abolish all limitations on personal jurisdiction, and less than one year after *McGee* clarified that its holding did not present a trend towards “the eventual demise of all restrictions on the personal jurisdiction of state courts.”³⁰ In *Hanson v. Denckla*,³¹

21. *Id.* (citing *Pennoyer*, 95 U.S. at 733).

22. *Id.*

23. *Id.* at 320.

24. 355 U.S. 220, 222–24 (1957).

25. *Id.* at 221–22.

26. *Id.* at 223.

27. *Id.*

28. *Id.*

29. *Id.* at 222–23 (“Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).

30. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 343

the Court considered Florida's jurisdiction over a Delaware trust company. The trust's settlor executed the trust in Delaware and later moved to Florida.³² The Delaware company did not have offices in Florida, the trust assets were not held in Florida, and the company did not solicit business in Florida; therefore, the Delaware company did not transact business in Florida.³³ The Court acknowledged that the trust administration carried on in Florida was similar to the payment of insurance premiums from California via the postal service in *McGee*.³⁴ However, the Court ultimately distinguished the facts of *McGee*, where the insurance company sought to reinsure the California resident, from those of *Hanson*, where the Delaware company did not solicit any business from the Florida resident.³⁵

The Court clearly focused on which party solicited the business relationship in distinguishing *Hanson* from *McGee*. The *Hanson* Court explained, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."³⁶ In *McGee*, California had a "manifest interest" in protecting its citizens, but Florida did not have the same interest in *Hanson* because the foreign corporation did not solicit the business from a Florida resident.³⁷ The Court acknowledged the flexibility of its contacts test, but drew a line: "[A]pplication of [the] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be *some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state*, thus invoking the benefits and protections of its laws."³⁸

The Court has continued to require that a defendant purposefully avail "itself of the privilege of conducting activities within the forum state" before personal jurisdiction complies with due process.³⁹ For example, in *World-Wide Volkswagen v. Woodson*,⁴⁰ a New York car dealership did not purposefully avail itself of the privilege of doing business in Oklahoma even though it could have foreseen that a buyer would drive a car to Oklahoma. On the other hand, in *Keeton v. Hustler Magazine*,⁴¹ Hustler

31. *Id.* at 238.

32. *Id.* at 238–39.

33. *Id.* at 251.

34. *Id.* at 252.

35. *Id.*

36. *Hanson*, 357 U.S. at 253.

37. *Id.* at 252.

38. *Id.* at 253 (emphasis added).

39. *Id.* at 253. While not discussed in this note, it should be acknowledged that the purposeful availment consideration gets even more complicated in stream-of-commerce cases. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987); *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011).

40. 444 U.S. 286, 287, 295, 299 (1980).

41. 465 U.S. 770, 772, 777–78, 781 (1984).

Magazine purposefully availed itself of the privilege of doing business in New Hampshire when it distributed its magazine into the state. The *Keeton* Court emphasized that, when considering whether minimum contacts exist, courts should focus on “the relationship among the defendant, the forum, and the litigation.”⁴² The *plaintiff’s* relationships with the defendant, forum, and litigation are notably excluded from the Court’s list. A nonresident defendant avails itself of the privilege of doing business in a state when it deliberately engages “in significant activities within a State” or has “created continuing obligations between himself and the residents of the forum.”⁴³

C. Recent Developments

In its 2014 decision *Walden v. Fiore*,⁴⁴ the Court emphasized two aspects relevant in evaluating whether the defendant’s suit-related conduct created a substantial connection to the forum state. First, the defendant’s relationship to the forum state “must arise out of contacts that the defendant *himself* creates.”⁴⁵ The Court reiterated that the plaintiff’s contacts to the forum state are irrelevant, using *Hanson* and *World-Wide Volkswagen* as examples.⁴⁶ The Court clearly stated its position: “[H]owever significant the plaintiff’s contacts with the forum may be, those contacts cannot be decisive in determining whether the defendant’s due process rights are violated.”⁴⁷

Second, the *Walden* Court emphasized that courts should look “to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”⁴⁸ The Court cited *Keeton* as an example of a situation in which a company deliberately reached out into a forum state by circulating its magazines.⁴⁹ A defendant is subject to a state’s personal jurisdiction when that defendant “purposefully reached out beyond [its] state and into another by . . . entering a contractual relationship that envisioned continuing and wide-reaching contacts in the forum State.”⁵⁰ It is important that the plaintiff is not “the only link between the defendant

42. *Id.* at 775 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). This idea was recently reiterated in *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

43. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (citing *Keeton*, 465 U.S. at 781 and *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 648 (1950)) (internal quotation marks and citations omitted).

44. *Walden*, 134 S. Ct. at 1121–22.

45. *Id.* at 1122 (quoting *Burger King*, 471 U.S. at 475 (internal quotation marks omitted) (emphasis in original)).

46. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)).

47. *Id.* (internal quotations and citations omitted).

48. *Id.*

49. *Id.* (citing *Keeton*, 465 U.S. at 781).

50. *Walden*, 134 S. Ct. at 1122 (internal quotations and citations omitted).

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 345

and the forum.”⁵¹ Therefore, a contract alone is inadequate to establish sufficient minimum contacts.⁵² To comply with due process, a state can only exercise personal jurisdiction over a nonresident defendant “based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.”⁵³

Consideration of the defendant’s contacts with the forum state is a threshold jurisdictional inquiry. After a court establishes that the “defendant purposefully established minimum contacts with the forum state, [those] contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’”⁵⁴ These factors, specifically enumerated in *World-Wide Volkswagen* and *Burger King Corp. v. Rudzewicz*,⁵⁵ include: “the burden on the defendant; the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”⁵⁶ After considering these factors, a court may determine that asserting personal jurisdiction over a nonresident defendant does not comport with fair play and substantial justice and therefore violates due process, even if the defendant has sufficient contacts with the forum state.⁵⁷

The Court’s due process standard for state exercise of personal jurisdiction has evolved as our nation has developed, and, if history is any indication, we can likely expect to see change in the future as well.

III. BACKGROUND OF PERSONAL JURISDICTION IN MONTANA

Each state grants its courts personal jurisdiction power over nonresident defendants via a long-arm statute.⁵⁸ Some states’ long-arm statutes simply confer personal jurisdiction to the full extent allowed by the Constitution.⁵⁹ Other states, like Montana, define the scope of personal jurisdiction

51. *Id.*

52. *Id.* at 1122–23 (quoting *Burger King*, 471 U.S. at 478).

53. *Id.* at 1123 (quoting *Burger King*, 471 U.S. at 475) (internal quotations omitted).

54. *Burger King*, 471 U.S. at 476 (quoting *Int’l Shoe*, 326 U.S. at 320).

55. 471 U.S. 462.

56. *Id.* at 476–77 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (internal quotations omitted).

57. *Id.* at 477–78.

58. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496 (2004).

59. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (2016) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).

tion by expressly stating what type of contact a nonresident defendant must have with the state before its courts may exercise personal jurisdiction.⁶⁰

Montana has developed a two-prong test that must be satisfied for a nonresident defendant to be subject to personal jurisdiction.⁶¹ First, the nonresident defendant's conduct must fall within Montana's long-arm statute.⁶² Second, the court's exercise of personal jurisdiction over the nonresident defendant must satisfy due process by comporting "with traditional notions of fair play and substantial justice."⁶³ Analysis of the second prong is only necessary if the first is satisfied.⁶⁴

A. *Montana's Long-Arm Statute*

1. *History of Montana's Long-Arm Statute*

On January 1, 1962, the modern Montana Rules of Civil Procedure became effective.⁶⁵ The rules were generally fashioned after the Federal Rules of Civil Procedure and were, in part, "designed to aid the exercise of jurisdiction in cases having substantial contacts with Montana."⁶⁶ Montana's long-arm statute was enacted among these new rules as Montana Rule of Civil Procedure 4(b).⁶⁷ This new rule was needed because the old code provisions too narrowly limited personal jurisdiction.⁶⁸

Montana followed the national trend away from personal jurisdiction based on physical service within the state and towards personal jurisdiction based on service that provided the defendant with sufficient notice of the pending litigation.⁶⁹ Montana's Rule 4(b) was modeled after the First Tentative Draft of the Uniform Extra-Territorial Process Act and similar statutes from states like Illinois, Texas, and Wisconsin.⁷⁰ The Commission Note made clear Montana's intent to expand its scope of personal jurisdiction:

This rule expands the exercise of personal jurisdiction over nonresidents in cases having substantial contacts with Montana. It is in accord with a trend that began more than thirty years ago with the nonresident motorist acts. The constitutional basis for such expanded jurisdiction is afforded by such decisions of the Supreme Court of the United States as *International Shoe* and

60. MONT. R. CIV. P. 4(b)(1) (2015).

61. *Simmons*, 670 P.2d at 1376.

62. *Id.*

63. *Id.*

64. *Id.*

65. David R. Mason, *The Montana Rules of Civil Procedure*, 23 MONT. L. REV. 1, 3 (1961).

66. *Id.* at 3.

67. *Id.* at 12.

68. *Id.*

69. *Id.* at 13.

70. *Id.* at 12.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 347

McGee. In these decisions the Court departed materially from the rigid rule of *Pennoyer*, although, as was pointed out in *Hanson*, the rule of *Pennoyer* has not wholly disappeared. Under the new and flexible standard of due process a state may exercise personal jurisdiction whenever the relation between it and the particular litigation sued upon makes it reasonable for the state to try the particular case. In such an inquiry importance attaches to what the defendant has caused to be done in the forum state.⁷¹

While clearly stating an intent to expand Montana's exercise of personal jurisdiction over nonresidents who have substantial contacts with Montana, the Commission Notes do not clarify whether Rule 4(b) was meant to extend personal jurisdiction as far as due process allows or whether Supreme Court precedent was simply a guideline in forming a scope of jurisdiction unique to Montana.

2. *General and Specific Personal Jurisdiction under Montana's Long-arm Statute*

Montana's long-arm statute provides:

Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

- (A) the transaction of any business within Montana;
- (B) the commission of any act resulting in accrual within Montana of a tort action;
- (C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;
- (D) contracting to insure any person, property, or risk located within Montana at the time of contracting;
- (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;
- (F) acting as a director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or
- (G) acting as personal representative of any estate within Montana.⁷²

This rule confers on courts the power to exercise both general and specific jurisdiction. General jurisdiction is continuous personal jurisdiction over a nonresident arising from any cause of action, regardless of its origin, because of the nonresident's significant connection to the state.⁷³ A nonresident defendant must be "found within the state of Montana" to be subject to general personal jurisdiction under Montana's long-arm statute.⁷⁴ To be

71. Commission Note to Proposed Rule, MONT. R. CIV. P. 4 (West) (internal citations omitted).

72. MONT. R. CIV. P. 4(b)(1).

73. *Tackett v. Duncan*, 334 P.3d 920, 925 (Mont. 2014).

74. MONT. R. CIV. P. 4(b)(1).

“found within” Montana, foreign corporations’ “affiliations with the State [must be] so continuous and systematic as to render them essentially at home in” Montana.”⁷⁵ A corporate defendant is generally only “at home” where it is incorporated and where its principal place of business is located.⁷⁶

Alternatively, a nonresident defendant may be subject to specific personal jurisdiction if the specific claim arises out of one of the seven enumerated acts.⁷⁷ This note focuses on subsection A: specific jurisdiction based on nonresident defendants’ transaction of business within Montana. This rule has good intentions—it gives Montana courts jurisdiction over nonresident defendants when a Montana plaintiff’s claim arises from the defendant’s business transaction within Montana. However, the definition of “transacting business within Montana” is fact-intensive and therefore the analysis varies from case-to-case.

B. *The History of “Transacting Business” in Montana*

When Montana’s long-arm statute was first enacted, attorney Thomas E. Towe made two predictions. First, he predicted that the definition of “the transaction of any business within” Montana was “certain to cause a great deal of litigation.”⁷⁸ Second, he predicted that giving the provision too wide of a definition would result in rendering other subsections of Montana’s long-arm statute meaningless.⁷⁹

Towe noted that Montana’s “transacting business” subsection was the same as the Uniform Interstate and International Procedure Act’s provision

75. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal citations omitted).

76. *BNSF Ry. Co. v. Tyrrell*, No. 16–405, ___ U.S. ___, 2017 U.S. LEXIS 3395, at *16–17 (May 30, 2017). A corporate defendant can also be “at home” in an “exceptional case” where the “defendant’s operations in another forum may be so substantial and of such a nature as to render the corporation at home in that State.” *Id.* at *17 (internal quotations omitted) (citing *Daimler*, 134 S. Ct. at 761 n.19). An example of an “exceptional case” is that of *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48, where “war had forced the defendant corporation’s owner to temporarily relocate the enterprise from the Philippines to Ohio,” which “then became the center of the corporation’s wartime activities.” *BNSF* at *17.

In *BNSF* the Court held BNSF was not subject to general personal jurisdiction in Montana, as BNSF is incorporated in Delaware and maintains its principal place of business in Texas, and the Court did not find the case to be an exceptional one rendering the railroad company at home in Montana. *Id.* at *7, 18. The Court highlighted the difference between general and specific personal jurisdiction, stating, “the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in Montana.” *Id.* at *18.

77. MONT. R. CIV. P. 4(b)(1)(A)–(G).

78. Towe, *supra* note 13, at 26.

79. *Id.* at 27–28.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 349

and Illinois's long-arm statute.⁸⁰ The Act provided, "A court may exercise jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's transacting any business in this state."⁸¹ The Act's provision was derived from Illinois's statute and was intended to "be given the same expansive interpretation that was intended by the draftsmen of the Illinois Act and that has been given by courts of that state."⁸² Illinois courts interpreted the statute as extending personal jurisdiction to the full constitutional limit permitted by due process.⁸³ Perhaps then, because Montana's long-arm statute was fashioned after Illinois's statute, it too was to be interpreted as expanding personal jurisdiction to the full constitutional limit.

However, Towe pointed out a main difference between Illinois's and Montana's long-arm statutes.⁸⁴ He observed that, despite having identical subsection A's, Montana's long-arm statute contained more provisions than Illinois' long-arm statute.⁸⁵ Illinois's statute had nothing similar to Montana's subsections E or F.⁸⁶ Subsection E of Montana's statute provides specific jurisdiction over a defendant based on "entering into a contract for services to be rendered or for materials to be furnished" in Montana.⁸⁷ Towe observed that "these words would appear to include any and all isolated business transactions," and therefore if Montana defined transacting business as broadly as Illinois, subsection E would be meaningless.⁸⁸ Towe pointed out that adopting California's approach of permitting jurisdiction to the full constitutional limit would have a similar result.⁸⁹

Therefore, Towe suggested Montana courts may choose to define "transacting business" not to the full constitutional limit like Illinois.⁹⁰ Instead, Towe proposed Montana might define transacting business the same way it defined "doing business."⁹¹ At that time, the Montana Supreme Court defined "doing business" as "more than a single sale, more than mere solicitation"—it was "more or less a continuing course of business within the state," with or without a resident business agent.⁹²

80. *Id.* at 26.

81. UNIF. INTERSTATE AND INT'L PROC. ACT § 1.03(a)(1) (1962) (withdrawn 1977).

82. Comment to UNIF. INTERSTATE AND INT'L PROC. ACT § 1.03(a)(1) (citations omitted).

83. Towe, *supra* note 13, at 27–28.

84. *Id.* at 28.

85. *Id.*

86. *Id.*

87. MONT. R. CIV. P. 4(b)(1)(E).

88. Towe, *supra* note 13, at 28.

89. *Id.* at 26–27.

90. *Id.* at 28.

91. *Id.*

92. *Id.* at 27.

R

R

In fulfillment of Towe's first prediction,⁹³ the Montana Supreme Court must continually decide cases defining "transacting business" under subsection A. In those decisions, the Court analyzes the business contacts between the parties, looking for various factors.⁹⁴ In determining whether a company transacted business in Montana, the Court considers the nonresident's contacts with the state.⁹⁵

The Court has held that the simple act of entering into a contract with a Montana resident does not subject a nonresident to personal jurisdiction in Montana.⁹⁶ In *Cimmaron Corp. v. Smith*,⁹⁷ the Court reasoned that the nonresident defendant did not transact business within Montana when its sole contacts with Montana were the agreements with the plaintiff, the agreement was to be performed in another state, and the plaintiff's complaint did not allege any wrongful actions of the defendant that occurred in Montana.⁹⁸

On the other hand, the Court has held that a nonresident defendant transacts business in Montana if the defendant has contracts with multiple Montana businesses. For example, in *Grizzly Security Armored Express, Inc. v. Armored Group, LLC*,⁹⁹ the nonresident defendant entered into several contracts with other Montana businesses and therefore transacted business in Montana.¹⁰⁰ Also, in *Nelson v. San Joaquin Helicopters*,¹⁰¹ the nonresident defendant transacted business in Montana because it had relationships with the plaintiff and another company in Montana.¹⁰²

In determining whether a nonresident defendant transacted business in Montana, the Court has often considered which party initiated the business transaction. A nonresident company transacts business in Montana if it is the party that initiates the business transaction because, in that situation, the nonresident defendant purposefully availed itself of the privilege of doing business in Montana and invoked the protection of Montana's laws.¹⁰³ For example, in *Spectrum Pool Products, Inc. v. MW Golden, Inc.*,¹⁰⁴ the non-

93. *Id.* at 26.

94. *See, e.g., Milky Whey*, 342 P.3d at 20, *Cimmaron Corp. v. Smith*, 67 P.3d 258, 261 (Mont. 2003); *Spectrum Pool Prods., Inc. v. MW Golden, Inc.*, 968 P.2d 728, 731 (Mont. 1998); *Edsall Constr. Co. v. Robinson*, 804 P.2d 1039, 1042 (Mont. 1991); *Prentice Lumber Co. v. Spahn*, 474 P.2d 141, 144 (Mont. 1970).

95. *B.T. Metal Works v. United Die & Mfg. Co.*, 100 P.3d 127, 133 (Mont. 2004).

96. *Edsall*, 804 P.2d at 1042; *Cimmaron*, 67 P.3d at 261.

97. 67 P.3d 258 (Mont. 2003).

98. *Id.* at 261.

99. 255 P.3d 143 (Mont. 2011).

100. *Id.* at 149.

101. 742 P.2d 447 (Mont. 1987).

102. *Id.* at 450.

103. *Prentice Lumber*, 474 P.2d at 144.

104. 968 P.2d 728, 731 (Mont. 1998).

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 351

resident defendant transacted business in Montana because it initiated contact with the Montana company. However, if a Montana company initiates contact with a nonresident business, the nonresident does not transact business in Montana based on the contract alone.¹⁰⁵

As the above examples show, the definition of transacting business is fact-intensive and therefore it can be difficult to determine whether a specific defendant transacted business in Montana. The Montana Supreme Court's decision in *Milky Whey* clarified the definition of transacting business, setting the scope of the definition to the full extent permitted by the due process clause.

IV. FACTUAL AND PROCEDURAL BACKGROUND OF *Milky Whey*

Milky Whey started as a dispute over a simple business transaction gone badly, but the case unexpectedly posed a complicated jurisdictional question. Milky Whey is a dairy broker that purchases dairy commodities from suppliers and subsequently sells the products to food manufactures.¹⁰⁶ It is a registered Montana corporation headquartered in Missoula, Montana.¹⁰⁷ Dairy Partners is a dairy supply company located in Minnesota.¹⁰⁸ In 2013, Dairy Partners was one of Milky Whey's suppliers.¹⁰⁹

Prior to the commencement of the action, Dairy Partners fulfilled nine orders, valued at over \$181,000, for Milky Whey between 2010 and 2013.¹¹⁰ To complete these transactions, the parties communicated via telephone, fax, and email, and—on occasion—Dairy Partners initiated the purchase orders.¹¹¹ Dairy Partners neither purchased nor sold products in Montana and did not have a physical presence inside Montana.¹¹² Other than its communications with Milky Whey, nothing connected Dairy Partners to Montana.¹¹³

The lawsuit was the result of a transaction Milky Whey initiated with Dairy Partners on January 23, 2013.¹¹⁴ Milky Whey agreed to purchase 10,000 pounds of Swiss Trim from Dairy Partners for \$12,500.¹¹⁵ Milky Whey pre-paid the purchase price, wiring money from Missoula to Dairy

105. *Edsall*, 804 P.2d at 1042–43.

106. *Milky Whey*, 342 P.3d at 14.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 14–15.

111. *Id.* at 14–15, 18.

112. *Milky Whey*, 342 P.3d at 17.

113. *Id.*

114. *Id.* at 15.

115. *Id.*

Partners in Minnesota.¹¹⁶ Milky Whey did not express to Dairy Partners whether it intended to bring the Swiss Trim into Montana.¹¹⁷ Dairy Partners shipped the Swiss Trim to its warehouse in Salt Lake City and Milky Whey picked it up about five weeks later, only to find that nearly half of it had molded and was therefore unusable.¹¹⁸ The parties communicated via e-mail and attempted to resolve the issue, but Dairy Partners refused to reimburse Milky Whey for the damaged product.¹¹⁹

Milky Whey filed its complaint against Dairy Partners on September 26, 2013, alleging four causes of action.¹²⁰ Dairy Partners subsequently filed a motion to dismiss for lack of personal jurisdiction.¹²¹ The district court granted Dairy Partners' motion and dismissed the action, holding that Montana's long-arm statute did not confer jurisdiction over the defendant.¹²² Milky Whey appealed the district court's decision to the Montana Supreme Court,¹²³ contending that Dairy Partners transacted business and was therefore subject to personal jurisdiction under subsection A of Montana's long-arm statute.¹²⁴

V. THE COURT'S DECISION AND CHIEF JUSTICE McGRATH'S DISSENT

A. *The Majority's Decision and Reasoning*

The Court employed its two-prong personal jurisdiction test and affirmed the district court's determination that Montana lacked personal jurisdiction over Dairy Partners.¹²⁵ The Court held that Dairy Partners did not transact business within Montana and that therefore Montana's long-arm statute did not reach Dairy Partners.¹²⁶

To begin its analysis, the Court first considered whether Montana's long-arm statute conferred jurisdiction on Dairy Partners.¹²⁷ The Court quickly disposed of the idea that general personal jurisdiction could exist, finding that Dairy Partners had no substantial or systematic contacts with

116. *Id.*

117. *Id.*

118. *Milky Whey*, 342 P.3d at 15; Appellant the Milky Whey, Inc.'s Opening Brief, *The Milky Whey, Inc. v. Dairy Partners, LLC*, 2014 WL 1318228 at *2 (Mont. 2014) (No. DA-14-0013).

119. *Milky Whey*, 342 P.3d at 15.

120. *Id.* Milky Whey alleged "breach of contract, breach of warranty, unjust enrichment, and breach of an obligation to pay." *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 17. The Court also considered and rejected Milky Whey's contention that Dairy Partners was subject to personal jurisdiction under subsection B of Montana's long-arm statute. *Id.*

125. *Milky Whey*, 342 P.3d at 17, 21.

126. *Id.* at 20.

127. *Id.* at 17.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 353

Montana, and moved on to its analysis of whether specific personal jurisdiction existed because Dairy Partners transacted business within Montana under Rule 4(b)(1)(A).¹²⁸ The Court considered various factors, including: the company's local negotiations, "the solicitation of business within the state, prior litigations in the forum, the presence of agents in the state, and the existence of ongoing contractual relationships with residents of the forum state."¹²⁹ The Court applied these factors and determined that Dairy Partners did not transact business within Montana.¹³⁰

The Court focused on four specific facts to support its conclusion that Dairy Partners did not transact business in Montana. First, it was Milky Whey who initiated the transaction with Dairy Partners.¹³¹ Second, Dairy Partners did not send representatives to or negotiate contracts in Montana.¹³² Third, Dairy Partners did not have contracts or business relationships with any other Montana businesses.¹³³ Fourth, no part of the contract occurred in Montana; the product was delivered to Utah pursuant to the parties' agreement.¹³⁴

The Court reasoned that a company transacts business in Montana "where substantial interactions occur within Montana."¹³⁵ The Court stated that substantial interactions include "entering into contracts with multiple Montana businesses or negotiating contracts between businesses."¹³⁶ However, the simple act of a nonresident entering into a contract with a Montana resident is not a substantial interaction. The Court emphasized this by comparing Dairy Partners' interactions with Montana businesses to the interactions of the nonresident defendant in *Cimmaron*, where Montana did not have personal jurisdiction over the defendant because the contract at issue was for services to be performed exclusively in another state.¹³⁷ The Court made its position very clear that agreeing to contracts with multiple businesses can confer personal jurisdiction, but "even extensive interstate communications . . . do not give rise to jurisdiction where the contract is to be performed in another state."¹³⁸

The Court distinguished Milky Whey and Dairy Partners' relationship from the business relationships of parties in earlier cases where the Court

128. *Id.* at 17–18.

129. *Id.* at 18.

130. *Id.* at 17–18.

131. *Milky Whey*, 342 P.3d at 20.

132. *Id.* at 19.

133. *Id.* at 20.

134. *Id.*

135. *Id.* at 19.

136. *Id.* (citing *Grizzly*, 255 P.3d at 148; *Nelson*, 742 P.2d at 448).

137. *Milky Whey*, 342 P.3d at 19; *Cimmaron*, 67 P.3d at 260–61.

138. *Id.* (citing *Cimmaron*, 67 P.3d at 260–61; *Bird v. Hiller*, 892 P.2d 931, 934 (Mont. 1995); *Edsall*, 804 P.2d at 1042).

held that the nonresident defendant was subject to personal jurisdiction.¹³⁹ The Court explained that in *Grizzly*, the nonresident defendant entered into multiple contracts, interacted with other businesses in Montana, and advertised in Montana.¹⁴⁰ In *Nelson v. San Joaquin Helicopters*,¹⁴¹ the nonresident company purposefully interjected itself into Montana by contracting with another business in Montana and negotiating a specific contract with the plaintiff.¹⁴² In *Spectrum Pool Products*, the nonresident defendant initiated the business relationship, negotiated with the Montana company regarding multiple aspects of the contract, and requested that services be performed on the product in Montana.¹⁴³ In *B.T. Metal Works v. United Die and Manufacturing Co.*,¹⁴⁴ the nonresident defendant made a product for a Montana business and sent the product into Montana more than 20 times.¹⁴⁵ The defendants in those cases had more interaction with Montana than Dairy Partners.¹⁴⁶ The Court made it clear that Dairy Partners was not “transacting with a Montana business” based simply on the fact that it knew Milky Whey was a Montana business.¹⁴⁷

The Court concluded that subsection A of Montana’s long-arm statute did not reach Dairy Partners.¹⁴⁸ Because it determined part one of the test was not satisfied, the Court did not reach part two, whether the exercise of personal jurisdiction was within the limits of due process.¹⁴⁹

B. Chief Justice McGrath’s Dissenting Opinion

Chief Justice McGrath, joined by Justice Wheat, disagreed with the majority’s conclusion that Dairy Partners was not subject to personal jurisdiction under subsection A of Montana’s long-arm statute.¹⁵⁰ The dissent emphasized Milky Whey and Dairy Partners’ past transactions and characterized the current agreement as more than a “mere act of entering into a contract with a forum resident.”¹⁵¹ Instead, Chief Justice McGrath characterized Dairy Partners’ actions as “purposeful acts through which [it] did repeated business with a Montana company.”¹⁵² He emphasized that the

139. *Id.* at 20.

140. *Id.* (citing *Grizzly*, 255 P.3d at 148).

141. 742 P.2d 447.

142. *Milky Whey*, 342 P.3d at 20 (citing *Nelson*, 742 P.2d at 450).

143. *Id.* (citing *Spectrum Pool Prods.*, 968 P.2d at 730–31).

144. 100 P.3d 127 (Mont. 2004).

145. *Milky Whey*, 342 P.3d at 20 (citing *B.T. Metal Works*, 100 P.3d at 132–33).

146. *Id.*

147. *Id.*

148. *Id.* at 21.

149. *Id.*

150. *Milky Whey*, 342 P.3d at 21 (McGrath, C.J., with Wheat, J., dissenting).

151. *Id.* (quoting *Simmons*, 670 P.2d at 1386).

152. *Id.*

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 355

payment to Dairy Partners originated in Montana and that the refund Dairy Partners allegedly initially promised Milky Whey would have accrued in Montana.¹⁵³

Chief Justice McGrath highlighted Montana's interest in adjudicating the issue.¹⁵⁴ Additionally, Chief Justice McGrath enumerated the ways in which Milky Whey contributes to Montana's economy by generating income, paying taxes, employing Montana residents, and utilizing Montana infrastructure.¹⁵⁵ Chief Justice McGrath would have held that Milky Whey and Dairy Partners' continuous transactions established that Dairy Partners was transacting business in Montana pursuant to the standard from *Grizzly*.¹⁵⁶ Because Chief Justice McGrath would have found that Montana's long-arm statute conferred personal jurisdiction over Dairy Partners under step one of the analysis, he briefly addressed step two and concluded that due process was satisfied.¹⁵⁷

VI. ANALYSIS

In *Milky Whey*, the majority correctly followed precedent in holding that nonresident defendant Dairy Partners did not transact business in Montana and therefore was not subject to personal jurisdiction. The *Milky Whey* Court aggregated factors from precedent and named a "substantial interactions" test to determine if a nonresident defendant transacted business in Montana. Even if the Court had found that Dairy Partners transacted business under Montana's long-arm statute, Montana's exercise of personal jurisdiction would have still failed because it would not comply with due process. The substantial interactions test confers jurisdiction under subsection A of Montana's long-arm statute to the full extent permitted by the Due Process Clause.

A. *The Majority's Correct Application of Precedent*

The majority correctly applied precedent in holding that Dairy Partners did not transact business within Montana solely based on its contract with Milky Whey. Case law establishes that a nonresident defendant must do more than enter into a contract with a Montana resident to transact business

153. *Id.*

154. *Id.* Specifically, Chief Justice McGrath pointed out that Montana "provided the setting which allowed Dairy [Partners] to engage in the various transactions with Milky Whey over a span of years." *Id.*

155. *Id.*

156. *Milky Whey*, 342 P.3d at 21 (McGrath C.J., with Wheat, J., dissenting) (citing *Grizzly*, 255 P.3d at 148).

157. *Id.* at 21–22.

within Montana.¹⁵⁸ Personal jurisdiction is particularly inappropriate when it is based on an agreement, no part of which will be performed in Montana.¹⁵⁹ The Court appropriately relied on and distinguished its previous decisions in concluding that Dairy Partners was not subject to personal jurisdiction based solely on the fact that it entered into a contract with Milky Whey, especially when that contract was to be performed outside of Montana.

A nonresident defendant transacts business within Montana when it has business contracts with more than one Montana business. In both *Grizzly* and *Nelson*, the nonresident defendant had contracts with businesses in Montana other than the plaintiff.¹⁶⁰ These multiple business relationships led to the Court's conclusions that the defendants transacted business within Montana and were subject to personal jurisdiction.¹⁶¹ Dairy Partners did not have contracts with other Montana businesses, and therefore the Court correctly determined that Dairy Partners did not transact business in Montana in the way the nonresident defendants in *Grizzly* and *Nelson* did.

A nonresident defendant who ships its product into Montana transacts business in the state and is consequently subject to personal jurisdiction. In *B.T. Metal Works*, the nonresident defendant sent its product into Montana more than 20 times and therefore transacted business in Montana.¹⁶² The Court properly distinguished Dairy Partners' relationship with Montana from that of the defendant in *B.T. Metal Works* because, unlike the nonresident defendant in *B.T. Metal Works*, Dairy Partners did not ship its product into Montana.¹⁶³ Therefore, the Court properly determined that Dairy Partners did not transact business within Montana in the same way that the defendant in *B.T. Metal Works* did.

The majority and the dissent both rely on *Spectrum Pool Products* to support their positions.¹⁶⁴ However, *Spectrum Pool Products* is not especially helpful to either side because it relied heavily on subsection E of Montana's long-arm statute, "entering into a contract for services to be rendered or for materials to be furnished in Montana," to confer personal jurisdiction on the nonresident defendant.¹⁶⁵ *Spectrum Pool Products* only briefly addressed subsection A.¹⁶⁶ In its analysis of subsection A, *Spectrum Pool Products* clarified that an important fact in determining whether the

158. *Cimmaron*, 67 P.3d at 260–61; *Edsall*, 804 P.2d at 1042; *Simmons*, 670 P.2d at 1380.

159. *Cimmaron*, 67 P.3d at 260–61.

160. *Grizzly*, 255 P.3d at 148; *Nelson*, 742 P.2d at 450.

161. *Grizzly*, 255 P.3d at 149; *Nelson*, 742 P.2d at 450.

162. 100 P.3d at 132–33.

163. *Milky Whey*, 342 P.3d at 20 (majority opinion).

164. *Id.*; *id.* at 21 (McGrath, C.J., with Wheat, J., dissenting).

165. MONT. R. CIV. P. 4(b)(1)(E) (2015); 968 P.2d at 730–31.

166. 968 P.2d at 730–31.

nonresident defendant transacted business in Montana was whether the nonresident defendant initiated contact with the Montana plaintiff.¹⁶⁷ The majority properly differentiated the facts of *Spectrum Pool Products*, where the nonresident defendant was the party to initiate the transaction, with those in *Milky Whey*, where the Montana plaintiff was the party to initiate contact with the nonresident defendant, Dairy Partners.¹⁶⁸ On the other hand, the dissent simply stated, “As in *Spectrum Pool [Products]*, Dairy [Partners] purposely interjected itself into Montana through its several dealings with Milky Whey.”¹⁶⁹ However, a close reading of *Spectrum Pool Products* verifies that the Court relied more on subsection E of Montana’s long-arm statute than it did on subsection A in determining that the nonresident defendant interjected itself into Montana.¹⁷⁰ The majority correctly distinguished *Spectrum Pool Products*, while the dissent’s reliance on *Spectrum Pool Products* to support personal jurisdiction under subsection A was misplaced.

B. The Substantial Interactions Test

In *Milky Whey*, the majority reasoned that the exercise of personal jurisdiction under subsection A is proper where “substantial interactions occur within Montana.”¹⁷¹ The phrase “substantial interactions” is not used in any of the cases the Court cites in its analysis of the definition of transacting business within Montana. The majority in *Milky Whey* coined this novel phrase and aggregated important factors from precedent to clarify when a nonresident defendant transacts business in Montana under subsection A of Montana’s long-arm statute. Substantial interactions within Montana include: entering into contracts with more than one Montana business, negotiating contracts between multiple Montana businesses, agreeing to ship and/or shipping product into Montana, and initiating contact with a Montana resident.¹⁷² Montana courts should also consider factors such as prior litigations in Montana and whether the defendant has agents in Montana.¹⁷³

C. State and Federal Due Process Tests

Montana would not have personal jurisdiction over Dairy Partners even if the Court determined that Dairy Partners transacted business in Montana pursuant to subsection A of Montana’s long-arm statute because

167. *Id.* at 731.

168. *Milky Whey*, 342 P.3d at 20.

169. *Id.* at 21 (McGrath, C.J., with Wheat, J., dissenting) (internal quotations omitted).

170. *Spectrum Pool Prods.*, 968 P.2d at 730–31.

171. *Milky Whey*, 342 P.3d at 19 (majority opinion).

172. *Id.* at 19–20.

173. *Id.* at 17–18.

the exercise of personal jurisdiction over Dairy Partners would violate due process. The majority in *Milky Whey* did not reach the question of whether the exercise of personal jurisdiction over Dairy Partners satisfied due process by comports with traditional notions of fair play and substantial justice because it found that the first prong of the personal jurisdiction test was not satisfied.¹⁷⁴ However, the dissent did address the question and took the position that “subjecting Dairy [Partners] to jurisdiction in Montana courts on this claim would comport with notions of fair play and substantial justice, consistent with due process.”¹⁷⁵ That said, the dissent’s conclusion is inconsistent with both Montana’s due process analysis and the Supreme Court’s due process framework set forth in *Walden v. Fiore*.¹⁷⁶

1. Montana’s Due Process Analysis

Montana has adopted a three-part test developed by the Ninth Circuit to determine whether state exercise of specific personal jurisdiction over a nonresident defendant comports with due process:

- (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its laws;
- (2) the claim must be one which arises out of or results from the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must be reasonable.¹⁷⁷

A plaintiff does not have to prove that all three elements of the test are satisfied.¹⁷⁸ Once the plaintiff shows element one, purposeful availment, personal jurisdiction over the defendant is presumed reasonable.¹⁷⁹ After a plaintiff establishes the presumed reasonableness, a defendant can only overcome the presumption “by presenting a compelling case that jurisdiction would be unreasonable.”¹⁸⁰

First, a nonresident defendant must purposefully avail itself of the privilege of doing business in Montana, thereby invoking the laws of Montana. As to this first factor, “[i]t is well-settled that a nonresident defendant’s mere act of entering into a contract with a forum resident does not provide the necessary jurisdictional contact between the defendant and the forum state.”¹⁸¹ In *Simmons v. State*,¹⁸² the Montana Supreme Court ac-

174. *Id.* at 21.

175. *Id.* (McGrath, C.J., with Wheat, J., dissenting).

176. 134 S. Ct. at 1121–23.

177. *Spectrum Pool Prods.*, 968 P.2d at 731 (citing *Simmons*, 670 P.2d at 1378).

178. *B.T. Metal Works*, 100 P.3d at 134.

179. *Id.*

180. *Id.*

181. *Simmons*, 670 P.2d at 1380.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 359

knowledgeable nonresident defendants will often contract with residents of the forum state for goods and services that are to be provided outside of the forum state. Those nonresident defendants do “not maintain businesses, property or agents in the forum state, and they [do] not actively transact commercial or industrial activity therein.”¹⁸³ Because of the way these nonresident defendants do business, personal jurisdiction over such defendants is inappropriate.¹⁸⁴ When “critical performance” of the business contract occurs outside of the forum state, personal jurisdiction is inappropriate, even if the nonresident defendant was aware that its product could eventually end up in the forum state.¹⁸⁵ Similarly, because “interstate communication is an almost inevitable accompaniment to doing business in the modern world,” telephone and mail communications between parties “cannot by [themselves] be considered a contact for justifying the exercise of personal jurisdiction.”¹⁸⁶

The considerations under part one of Montana’s due process test closely resemble Montana’s substantial interactions test, and, as already discussed, Dairy Partners did not transact business in Montana solely based on its contract with Montana plaintiff Milky Whey.¹⁸⁷ Thus, necessarily, under *Simmons*, Dairy Partners did nothing to purposely avail itself of the privilege of conducting activities within Montana.

Second, the claim must arise out of or result from the defendant’s forum-related activities.¹⁸⁸ This factor is important to the exercise of *specific* personal jurisdiction, as the focus is on the one claim, not the defendant’s general relationship with the forum state. The Court rarely considers this factor separately.¹⁸⁹ This is likely due to the presumption of reasonableness that arises upon the showing of purposeful availment.¹⁹⁰ However, it remains one of the factors and deserves its due consideration. In *Milky Whey*, the only forum-related activity relevant to this factor is the Swiss Trim business transaction, as Milky Whey’s claim arose out of only that transaction.¹⁹¹ The other business dealings between the parties are irrelevant, as Milky Whey’s claim did not arise out of those other dealings. Dairy Partners did not engage in forum-related activities when it engaged in the Swiss

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (internal quotes omitted).

187. *See supra* Part VI, Section A.

188. *Spectrum Pool Prods.*, 968 P.2d at 731 (citing *Simmons*, 670 P.2d at 1378).

189. *See, e.g., id.*; *Simmons*, 670 P.2d at 1379–80; *B.T. Metal Works*, 100 P.3d at 134.

190. *B.T. Metal Works*, 100 P.3d at 134.

191. *Milky Whey*, 342 P.3d at 15.

Trim business transaction, as it did not initiate the business transaction and had no other interactions with Montana related to that sale.¹⁹²

In analyzing the third part of the test, whether the exercise of jurisdiction is reasonable, Montana courts consider similar factors to those reasonableness factors enumerated by the Supreme Court in *World-Wide Volkswagen*¹⁹³ and *Burger King*.¹⁹⁴ Montana's reasonableness factors are:

- (1) the extent of the defendant's purposeful interjection into Montana;
- (2) the burden on the defendant of defending in Montana;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) Montana's interest in adjudicating the dispute;
- (5) the most efficient resolution of the controversy;
- (6) the importance of Montana to the plaintiff's interest in convenient and effective relief; and
- (7) the existence of an alternative forum.¹⁹⁵

In the time since the compilation of the reasonableness inquiry, the importance of each separate factor has changed. For example, the burden of defending a lawsuit in a foreign state has decreased throughout the years.¹⁹⁶ A nonresident defendant can quite easily and adequately prepare for and defend a suit in a foreign state.¹⁹⁷ Montana courts still have an interest in allowing Montana plaintiffs to bring claims for tortious acts, regardless of where the act occurred.¹⁹⁸ However, Montana's interests should not be weighted too heavily, because a state almost always has a legitimate interest in safeguarding legal rights.¹⁹⁹ In the same light, it can also usually be said that Montana is a convenient forum that will likely provide effective relief for a plaintiff who is located in Montana.²⁰⁰ However, the plaintiff's interest in Montana as a forum state is diminished if the plaintiff can bring its suit in an alternative forum.²⁰¹ The forum that will provide the most efficient resolution of the controversy will vary case-by-case, but the most efficient forum is often where the actual acts or events occurred because most of the witnesses will be in that location.²⁰²

192. *Id.*

193. 444 U.S. at 292.

194. 471 U.S. at 476–77.

195. *Spectrum Pool Prods.*, 968 P.2d at 731 (citing *Nelson*, 742 P.2d at 450). Most of these factors were originally articulated by the Montana Supreme Court in *Simmons*, 670 P.2d at 1383–85. *Simmons* marked the first time the Montana Supreme Court considered the effect of *World-Wide Volkswagen* on the state's due process constitutional analysis. *Simmons*, 670 P.2d at 1378.

196. *Simmons*, 670 P.2d at 1383.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Simmons*, 670 P.2d at 1383.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 361

In *Milky Whey*, the factors do not necessarily weigh for or against the reasonableness of Montana's exercise of personal jurisdiction over Dairy Partners. If Dairy Partners was required to defend a lawsuit in Montana, it would be burdened because it has absolutely no connection to Montana other than its contractual relationship with Milky Whey. On the other hand, Chief Justice McGrath makes a good argument that Montana has a high interest in adjudicating the dispute because of what Milky Whey, a local business, adds to Montana's economy in revenue and jobs.²⁰³ Also, Milky Whey, as the plaintiff, does have an interest in obtaining convenient and effective relief, and having to bring this lawsuit elsewhere would be less efficient for the company. In a case such as this one, where the plaintiff lives in one state, the defendant lives in another, and the claim accrued in yet another, there is unfortunately no forum that will be efficient for every party. Additionally, Utah, where the moldy product was discovered,²⁰⁴ may be an efficient forum because witnesses to the transaction may reside there.

Even if the Court had held that Dairy Partners had enough contact with Montana to transact business in the state, exercise of personal jurisdiction over Dairy Partners based on the Swiss Trim transaction would not have comported with the due process standard of fair play and substantial justice.

2. *The Supreme Court's Contacts Requirement*

The Supreme Court's recent due process framework in *Walden* also does not support personal jurisdiction over Dairy Partners. The *Walden* Court instructed state courts to consider two aspects in determining whether the defendant's suit-related conduct created a substantial connection to the forum state. First, "[t]he relationship must arise out of contacts that the *defendant himself* creates with the forum State."²⁰⁵ This first requirement fails because Milky Whey was the party who initiated the botched Swiss Trim transaction with Dairy Partners;²⁰⁶ therefore, the defendant did not create his own contacts with Montana for purposes of this claim.

Second, courts should look "to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," because "the plaintiff cannot be the only link between the defendant and the forum."²⁰⁷ This aspect also fails because the *only* affiliation that Dairy Partners had with Montana was its contractual relationship with Milky Whey. Dairy Partners did not have contractual relationships with other Montana

203. *Milky Whey*, 342 P.3d at 21–22 (McGrath, C.J., with Wheat, J., dissenting).

204. *Id.* at 15 (majority opinion).

205. *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 475) (internal quotation marks omitted) (emphasis in original).

206. *Milky Whey*, 342 P.3d at 18–19.

207. *Walden*, 134 S. Ct. at 1122.

residents and did not ship its product to Montana.²⁰⁸ Under *Walden*, Montana could not have subjected Dairy Partners to the power of its courts based exclusively on Dairy Partners' connection to the resident plaintiff. Because *Walden's* standards could not be satisfied, Montana's exercise of specific personal jurisdiction over Dairy Partners based on the Swiss Trim business transaction would violate due process.

Even if Dairy Partners did have sufficient contacts with Montana, exercise of personal jurisdiction over Dairy Partners based on the Swiss Trim business transaction with Milky Whey may not have comported with the federal standard of "fair play and substantial justice" articulated in *World-Wide Volkswagen*.²⁰⁹ As discussed in the immediately preceding section, Montana adopted many of the Supreme Court's factors in part three of its due process analysis, and the same inconclusive result reached there can be found under the federal standard.²¹⁰

D. The Substantial Interactions Test and the Full Constitutional Limit of Personal Jurisdiction

The Supreme Court's "substantial connection[s]" threshold needed for due process presents the same standard as Montana's "substantial interactions" needed for the transaction of business under Montana's long-arm statute.²¹¹ In *Walden* the Supreme Court stated that "the defendant's suit-related conduct must create a substantial connection with the forum State."²¹² Similarly, in *Milky Whey* the Montana Supreme Court stated that a party transacts business under subsection A of Montana's long-arm statute when "substantial interactions occur within Montana."²¹³ The terms "substantial connection" and "substantial interaction" used by the respective high courts are unquestionably similar, and as applied in practice the standards for due process and transacting business are the same.

Both the federal due process analysis and Montana's substantial interactions test require more than a single contract between a nonresident defendant and a resident of the forum state. The Supreme Court has held that a contract alone is insufficient to establish minimum contacts sufficient for due process;²¹⁴ the plaintiff cannot be the only connection between the defendant and the forum state.²¹⁵ A nonresident defendant also cannot be said

208. *Milky Whey*, 342 P.3d at 19–20.

209. 444 U.S. at 292; *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320).

210. See *supra* Part VI, Section C(1).

211. Compare *Walden*, 134 S. Ct. at 1121–22, with *Milky Whey*, 342 P.3d at 19.

212. *Walden*, 134 S. Ct. at 1121–22.

213. *Milky Whey*, 342 P.3d at 19.

214. *Burger King*, 471 U.S. at 478.

215. *Walden*, 134 S. Ct. at 1122–23.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 363

to have transacted business under Montana's long-arm statute based on a contract alone; pursuant to *Cimmaron*, *Edsall*, and *Simmons*, a nonresident defendant must do more than enter into a contract with a Montana resident to transact business within Montana.²¹⁶

Which party solicited the business relationship is an imperative factor in both the Supreme Court's due process analysis and the Montana Supreme Court's substantial interactions test. In *McGee*, the Supreme Court held that California had personal jurisdiction over a nonresident company because the company solicited business from a California resident,²¹⁷ whereas the Court held that Florida did not have personal jurisdiction over the nonresident company in *Hanson* when the company did not solicit business from the Florida resident.²¹⁸ When enacting Montana's long-arm statute, the drafters noted that a proper consideration of whether the defendant's activities fall under the statute "attaches to what the defendant has caused to be done in the forum state."²¹⁹ In *Spectrum Pool Products*, the Montana Supreme Court clarified that a nonresident defendant may have transacted business in Montana by initiating the business relationship with the Montana resident.²²⁰

Which party solicited the business transaction is important because if the nonresident defendant initiated the transaction, the defendant purposefully availed "itself of the privilege of conducting activities within the forum State."²²¹ This is another factor that is relevant to both the federal due process and Montana substantial interactions inquiries. The Supreme Court's decision in *Walden* clearly states that a state's exercise of personal jurisdiction over a nonresident defendant comports with due process when that defendant "purposefully reached out beyond their state and into another by . . . entering a contractual relationship that envisioned continuing and wide-reaching contacts in the forum State."²²² Similarly, a nonresident defendant transacts business within Montana under the substantial interactions test when it has business contracts with more than one Montana business. In both *Grizzly* and *Nelson*, the nonresident defendant had contracts with businesses in Montana other than the plaintiff.²²³ These multiple business rela-

216. *Cimmaron*, 67 P.3d at 260–61; *Edsall*, 804 P.2d at 1042; *Simmons*, 670 P.2d at 1380.

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

218. *Hanson*, 357 U.S. at 252.

219. MONT. R. CIV. P. 4, advisory comm. nn. (West 2016).

220. *Spectrum Pool Prods.*, 968 P.2d at 730–31.

221. *Hanson*, 357 U.S. at 253.

222. *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 479–80) (internal quotations omitted).

223. *Grizzly*, 255 P.3d at 148; *Nelson*, 742 P.2d at 450.

tionships demonstrated wide-reaching contacts in Montana, thus the nonresident businesses transacted business under Montana's long-arm statute.²²⁴

The Montana Supreme Court's substantial interactions test not only extends jurisdiction to the full scope allowed by the Constitution, at some points it may even tiptoe near the line of potentially violating due process. In cases like *Milky Whey* and *Spectrum Pool Products*, the inquiry seems to hang on one, very precise factor: which party initiated *that* business transaction.²²⁵ The defendant's solicitation of business into the forum state is important because one way a defendant can purposefully avail itself of the privilege of doing business in a forum state is by initiating contact with a resident of that state.²²⁶ However, the Supreme Court has continually held that a mere contract is not sufficient to satisfy the Due Process Clause.²²⁷ Therefore, it follows that if a nonresident defendant initiated a business transaction with a Montana resident, the contents of which were to be performed outside of Montana, the contract alone will not satisfy due process, even though it may be enough to satisfy the definition of transacting business.²²⁸ Montana can extend its long-arm statute as far as it would like, but it must remember the due process backdrop and give prong two of the personal jurisdiction test true consideration each time it finds a nonresident transacted business in Montana based on substantial interactions within the state.

E. Implications of The Substantial Interactions Test

In some respects, Towe's second 1962 prediction, that giving too wide a definition to transacting business would result in rendering other subsections of Montana's long-arm statute meaningless,²²⁹ has now come to fruition. The disparate application of *Spectrum Pool Products* in *Milky Whey* serves as an example of this phenomenon. *Spectrum Pool Products* relied on both subsection A, "the transaction of any business," and subsection E, "entering into a contract for services," to hold that the nonresident's actions fell within Montana's long-arm statute.²³⁰ In *Milky Whey*, the Court was only concerned with the application of subsection A and the definition of transacting business. However, the *Milky Whey* Court was not able to pull a clear rule from *Spectrum Pool Products* because the Court's consideration

224. *Grizzly*, 255 P.3d at 149; *Nelson*, 742 P.2d at 450.

225. *Milky Whey*, 342 P.3d at 20; *Spectrum Pool Prods.*, 968 P.2d at 731.

226. *Hanson*, 357 U.S. at 253.

227. *Walden*, 134 S. Ct. at 1122–23 (quoting *Burger King*, 471 U.S. at 478).

228. *Compare Prentice Lumber*, 474 P.2d at 144, with *Walden*, 134 S. Ct. at 1122–23.

229. Towe, *supra* note 13, at 27–28.

230. *Spectrum Pool Prods.*, 968 P.2d at 730–31.

2017 MILKY WHEY, INC. V. DAIRY PARTNERS, LLC 365

of the two subsections in *Spectrum Pool Products* was too intertwined.²³¹ Lack of clarity in applying these different sections makes it difficult for the Court to follow its own precedent and makes it even harder for lower courts to apply the judicially created definition of transacting business.

On the other hand, subsection A of Montana's long-arm statute may have always been intended to reach the full extent of what due process permits. The Commission Comments do not provide a clear answer,²³² but if the intent was to expand Montana's definition of transacting business to the full constitutional limit, the Court has succeeded with its substantial interactions test. If the original intent was to extend jurisdiction under subsection A to the full constitutional limit, then it does not matter that some parts of the long-arm statute render others meaningless. In that case, each section simply provides notice to nonresident defendants of types of contact that may subject them to personal jurisdiction in Montana.

VI. CONCLUSION

The Montana Supreme Court properly applied precedent in holding that nonresident defendant Dairy Partners did not transact business pursuant to Montana's long-arm statute and therefore was not subject to personal jurisdiction in Montana. The *Milky Whey* decision aggregated imperative factors from precedent and named a substantial interactions test for determination of when a nonresident defendant transacted business in Montana. Even if the Court had found that Dairy Partners transacted business under Montana's long-arm statute, Montana's exercise of personal jurisdiction would still fail because it would not comply with due process. The substantial interactions test confers personal jurisdiction over nonresident defendants who transact business under subsection A of Montana's long-arm statute to the full extent permitted by the Constitution's Due Process Clause.

231. See *supra* Part VI, Section A.

232. MONT. R. CIV. P. 4, advisory comm. nn. (West 2016).

