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## Civil Procedure—Minimum Contacts—Eighth Circuit Survey

George P. Nelson

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## NOTES

CIVIL PROCEDURE—MINIMUM CONTACTS—EIGHTH CIRCUIT SURVEY. *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982).

Mountaire Feeds (Mountaire), an Arkansas corporation, was engaged in the manufacture and marketing of animal feeds. In January 1977, the president of Agro Impex (Agro), an international corporation with its principal place of business in Dallas, Texas, called Mountaire inquiring about prices for certain feeds. In November 1977, Agro placed a telephone order for four shipments of feed and confirmed the purchase by letter. To secure payment for this purchase, Agro provided Mountaire with an irrevocable letter of credit issued by a Texas bank and presented through an Arkansas bank. Communications were exchanged between Agro and Mountaire concerning packaging, labelling and shipping, and Agro sent Mountaire shipping labels for the bags of feed. Subsequent purchases in January and March of 1978 were made using the same process. All contacts between the parties were by mail or telephone. An Agro agent or official was never physically present in Arkansas. When Agro refused to pay for the last nine shipments of feed, Mountaire filed suit in Arkansas state court for the unpaid balance. Service of process was obtained under the Arkansas long-arm statute.<sup>1</sup> Agro responded by removing the action to federal district court<sup>2</sup> and entering a motion to quash service of process for lack of personal jurisdiction.

The district court granted Agro's motion, holding that the quality of Agro's contacts with the forum state was not adequate to allow

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1. ARK. STAT. ANN. § 27-2502(C)(1)(a) and (C)(2) (1979) provide:

(1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim of relief) arising from the person's

(a) transacting any business in this State; . . .

(2) When jurisdiction over a person is based solely upon this section, only a (cause of action) (claim for relief) arising from acts enumerated in this section may be asserted against him.

2. Removal of the action to federal district court was based on diversity of citizenship, pursuant to 28 U.S.C. § 1332 (1976).

Arkansas to assume jurisdiction.<sup>3</sup> Mountaire appealed. The Eighth Circuit affirmed the judgment. *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982).

Much has changed in the area of personal jurisdiction since the Supreme Court, in *Pennoyer v. Neff*,<sup>4</sup> declared that the constitutional basis for state jurisdiction over an individual is dependent upon the physical presence of the individual or his property within the boundaries of the state. This doctrine, based on state sovereignty, defined jurisdiction for sixty-seven years until the decision in *International Shoe Co. v. Washington*.<sup>5</sup> *International Shoe* recognized certain exceptions<sup>6</sup> to the *Pennoyer* decision and announced a standard that not only protected the constitutional due process rights of the nonresident,<sup>7</sup> but also served the jurisdictional needs of the states as well.<sup>8</sup> *International Shoe* stated that, for a court to exer-

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3. "It is the quality rather than the quantity of the contacts with the forum state that must be considered in determining jurisdictional questions." *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, No. LR-C-78-259 (E.D. Ark. filed Oct. 27, 1980).

4. 95 U.S. 714 (1877). This was an attempt by the plaintiff to attach the property of a nonresident defendant after the execution on a default judgment against the defendant. The nonresident had not been served with process in the state, and the attached property, though within the forum state, was not owned by the defendant until after the judgment against him. Thus, neither the requirements of in personam nor in rem jurisdiction were met. The *Pennoyer* court held the assertion of jurisdiction by the forum state in this situation to be invalid.

5. 326 U.S. 310 (1945).

6. See, e.g., *Milliken v. Meyer*, 311 U.S. 457 (1940) (jurisdiction over a person not in the state was based on his domicile in the forum state); *Hess v. Pawloski*, 274 U.S. 352 (1927) (jurisdiction was based on the implied consent of an individual who traveled on a state's roads; since the state had the power to protect its citizens and property, it had the power to coerce consent to jurisdiction to achieve those ends); *Harris v. Balk*, 198 U.S. 215 (1905) (quasi-in rem jurisdiction was based on the attachment of a debt owed to the nonresident by a third person traveling through the forum state); *St. Clair v. Cox*, 106 U.S. 350 (1882) (jurisdiction was based on the implied consent of a corporation doing business in a state; since the state had the power to license or exclude corporations, it had the power to coerce consent to jurisdiction); *But cf. Flexner v. Farson*, 248 U.S. 289 (1919) (Justice Holmes discussed the difficulties with the doctrine of implied consent and the legal fiction on which it rested).

For an analysis of post *Pennoyer*-pre *International Shoe* developments, see, e.g., Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); and Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 775-80 (1982).

7. "[D]ue 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.'" *International Shoe*, 326 U.S. at 316.

8. The language and description of contacts deemed sufficient by the Court in *International Shoe* are largely taken from earlier cases which had hammered out tests of their own in trying to avoid the restrictions of *Pennoyer*. See, e.g., *Milliken v. Meyer*, 311 U.S. 457

cise jurisdiction over an individual not present in the state, purposeful or beneficial contacts must be found between the nonresident and the forum state and there must be a connection between the cause of action and those contacts.<sup>9</sup> The *International Shoe* decision also suggested that if the nonresident had persistent contacts with the forum state, even though there was no connection between the claim and the contacts, the forum state would have jurisdiction due to the benefits and protections the nonresident had received from that state.<sup>10</sup>

The cases following *International Shoe* further reduced the jurisdictional restraints on the states. From *Travelers Health Association v. Virginia*,<sup>11</sup> which followed the main emphasis of *International Shoe*, to *Perkins v. Benguet Consolidated Mining Co.*<sup>12</sup> and *McGee v. International Life Insurance Co.*,<sup>13</sup> which allowed jurisdiction in the most marginal of situations, a trend toward liberalized personal jurisdiction emerged.<sup>14</sup>

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(1940) (used the standard of traditional notions of fair play and substantial justice to allow jurisdiction); *Hess v. Pawloski*, 274 U.S. 352 (1927) (a single act by its nature and quality may be enough to allow jurisdiction); *Kane v. New Jersey*, 242 U.S. 160 (1916) (the state extracted jurisdictional consent by statute based on public interest of the forum state); *St. Clair v. Cox*, 106 U.S. 350 (1882) (if activities of a corporation are not only continuous and systematic, but also give rise to the liabilities sued on, then contacts are adequate to uphold jurisdiction).

9. 326 U.S. at 319-20.

10. *Id.* at 318.

11. 339 U.S. 643 (1950). The Court upheld jurisdiction over a nonresident insurance company which had solicited the business of Virginia residents through the mail. There were many policy holders in Virginia, and many claims against the nonresident company had been investigated there. Additionally, the Court referred to the traditional state control and regulation of the insurance business as a point of contact between the nonresident and the state.

12. 342 U.S. 437 (1952). Benguet was located in the Philippine Islands. During World War II the president of the corporation returned to Ohio, but continued to run the business, thereby generating many contacts in Ohio. A suit was brought against the Philippine company in Ohio, even though the damages, the plaintiff and the defendant were located elsewhere. Through the many contacts with the forum state, the defendant had taken advantage of the benefits and protections of the forum state's laws, and thus the state's assertion of jurisdiction would not be unreasonable or a violation of due process rights.

13. 355 U.S. 220 (1957). In *McGee*, the Court upheld jurisdiction over a nonresident insurance company which had issued a reinsurance policy to a California resident who was the only policy holder in the state. The Court decided the contract with the California resident was enough of a connection to the forum state, by itself, to support jurisdiction. The Court cited the interest of the forum state, by way of insurance regulations, and felt that a balancing of the hardships between plaintiff and defendant was persuasive in allowing California to have jurisdiction. This was supported by the affirmative nature of the nonresident's contact and the forum state's concern with providing protection for its citizens.

14. *Id.* at 222. "Looking back over this long history of litigation a trend is clearly dis-

The Court slowed this trend in *Hanson v. Denckla*,<sup>15</sup> which asserted the primacy of contact by the nonresident with the forum state over the due process analysis which had dominated earlier. In *Hanson* the Court recognized the trend toward expansion of jurisdiction, but noted that such a trend did not herald "the eventual demise of all restrictions on the personal jurisdiction of state courts."<sup>16</sup>

Having addressed the proper approach to personal jurisdiction issues, the Court did not consider this topic again for nineteen years. During this period the state and federal courts struggled with the conflicting signals from the available Supreme Court decisions. Some courts stayed very close to the language of *International Shoe*,<sup>17</sup> while others forged ahead with standards and tests of their own, avoiding strict application of the Supreme Court language.<sup>18</sup>

In 1977 and 1978 the Supreme Court handed down the first personal jurisdiction decisions in nineteen years: *Shaffer v. Heit-*

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cernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."

15. 357 U.S. 235 (1958). A Delaware bank was named as trustee by an individual who later died in Florida. The legatees of her will brought suit in Florida to have the trust pass to them, rather than to the named beneficiaries of the trust. The Delaware trustee challenged Florida's jurisdiction. The Court found insufficient contacts by the Delaware trustees and no connection between the cause of action and the forum state.

The Court noted that the defendant in *McGee* was an insurance company which solicited a California resident. Thus, the strong traditional interest in and regulation of insurance by the states was focused on the nonresident when the insurance policy was sent to California. However, the Delaware trustee in *Hanson* had not "performed any acts in Florida that [bore] the same relationship to the agreement as the solicitation in *McGee*." *Id.* at 252. The trustee had not "purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

16. *Id.* at 251.

17. See, e.g., *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) (five part test used to allow jurisdiction over a nonresident who sent products directly into the forum state); *L.D. Reeder Contractors v. Higgins Indus. Inc.*, 265 F.2d 768 (9th Cir. 1959) (jurisdiction denied when the only contact was negotiation and acceptance of a single contract to be delivered to another state). See also Comment, *Constitutional Law—In Personam Jurisdiction: Federalism and Fairness as Functions of Minimum Contacts—A Conceptual Failure: World-Wide Volkswagen Corp. v. Woodson*, 32 U. FLA. L. REV. 796, 801 n.37 (1980) for a list of cases which "remained within the spirit of *International Shoe* and its progeny." *Id.* at 801.

18. See, e.g., *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966). *Phillips* was a tort case which upheld jurisdiction while rejecting the literal application of the "purposefully avails" standard of *Hanson*. The basis of jurisdiction was fairness to the plaintiff and no showing of unfairness to the defendant. In *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976) the court upheld jurisdiction over the nonresident truck driver who was on his way to the forum state. Jurisdiction was based on his past routes and his intent to enter the forum.

ner<sup>19</sup> and *Kulko v. Superior Court*.<sup>20</sup> In each case, jurisdiction over the nonresident was denied, as the Court relied more on *Hanson's* stricter standard of purposeful contacts.<sup>21</sup> The Court also evidenced disfavor with using the forum state interest to supply the missing ingredient for jurisdiction.<sup>22</sup>

Within two years the Supreme Court was called upon to clarify the minimum contacts test again in *World-Wide Volkswagen Corp. v. Woodson*.<sup>23</sup> The Court addressed the use of foreseeability as a method for asserting jurisdiction, restricted the degree to which the nonresident's foreseeability of a contact could control jurisdiction,<sup>24</sup> and declared an additional limitation on jurisdiction in their reference to interstate federalism.<sup>25</sup> It is from these cases that the Eighth

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19. 433 U.S. 186 (1977). This was a stockholder derivative action, in which the plaintiff tried to gain quasi-in rem jurisdiction over the corporation's stockholders by attaching shares and options of the corporation. The defendants were found to have had insufficient contacts with the forum state to meet the *International Shoe* minimum contacts test. Since they had no purposeful contact with the forum state they had no reason to anticipate such quasi-in rem jurisdiction.

20. 436 U.S. 84 (1978). This was an action for child support in which the Court held that a father, who had allowed his daughter to leave New York and live with her mother in California, had not purposefully availed himself of the benefits and protections of the laws of the forum state; did not gain economic benefit from the move by his daughter; could not have reasonably expected to be subject to California's jurisdiction; and had not initiated the contact with California, but rather, had acquiesced to the request of his daughter.

21. *Shaffer*, 433 U.S. at 216; *Kulko*, 436 U.S. at 93-94.

22. *Shaffer*, 433 U.S. at 214-16; *Kulko*, 436 U.S. at 98-101. See also Note, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA. L. REV. 175 (1979).

23. 444 U.S. 286 (1980). This was a tort action in which the plaintiffs tried to get jurisdiction over a nonresident automobile distributor and retailer who, the plaintiff maintained, should have foreseen, by the nature of the product, that an automobile sold in the New England area could cause an injury in Oklahoma. Jurisdiction was denied.

24. There are two kinds of foreseeability which might influence a personal jurisdiction question; first, whether the nonresident reasonably can foresee causing an effect or consequence in the forum state, and second, whether he reasonably can foresee being haled into court there. The first is too broad. It is based on the question of likelihood and is rejected in *World-Wide Volkswagen*. 444 U.S. at 297. The second is more troublesome for the Court. Jurisdiction based on foreseeability of being haled into court is the standard, but is limited by reference to interstate federalism and the need for states to respect the sovereignty of one another. *Id.* at 293.

25. "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293. A much more recent comment on the issues of forum state interest and interstate federalism appears in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982). This was a case in which sanctions under F.R. Civ. P. 37(b)(2) were applied to a nonresident who would not comply with an order compelling discovery necessary to establish jurisdiction. The Court explained that the ability of a state to assert jurisdiction is limited by the concept of fairness, which is the basis of the individual's due process rights. "The personal jurisdiction requirement recog-

Circuit developed the standards for personal jurisdiction applied in *Mountaire*.

The leading Eighth Circuit case on the topic, *Aftanase v. Economy Baler Co.*,<sup>26</sup> was a tort case. *Aftanase* involved a Minnesota resident who was injured by a metal baler manufactured in Michigan and sold in the forum state of Minnesota. The Eighth Circuit reviewed the Supreme Court cases from *International Shoe* to *Hanson*, and formulated its own five factor test for determining which minimum contacts would support jurisdiction and yet not violate constitutional due process.<sup>27</sup> The *Aftanase* court divided the five factors into three primary and two secondary considerations.

The primary factors are (1) the quantity of contacts with the forum state; (2) the nature and quality of contacts with the forum state; and (3) the source and connection of the cause of action with those contacts. The secondary factors are: (4) the interest of the forum state and (5) the convenience of the parties.<sup>28</sup>

In *Aftanase* the court found "some quantity of contacts,"<sup>29</sup> and "an element of quality in the contacts,"<sup>30</sup> and a connection between the contacts and the cause of action. Looking at the secondary factors the court found an interest by the state in providing a forum, and no issue of convenience that would be determinative.<sup>31</sup> The court indicated that not all five factors need be present in substantial degree for jurisdiction to be constitutionally effected. Based on their analysis, the Eighth Circuit found "more than the minimum con-

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nizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 2104. In a note the Court added,

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns.

*Id.* at 2105 n.10.

26. 343 F.2d 187 (8th Cir. 1965).

27. Those cases were said to "establish only general and not precise guidelines." *Id.* at 197. The court emphasized the fact-intensive nature of personal jurisdiction cases, citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

28. 343 F.2d at 197.

29. The "quantity of contacts" analysis focused on the number of shipments over a period of time into the forum state. *Id.*

30. The "quality" analysis focuses on two general contacts. The baler in the forum state was itself a contact. The quality of that contact was enhanced by the baler's size and its potential for harm. The shipments into the forum state were also contacts. Their quality was enhanced since each was an affirmative act of the nonresident. *Id.*

31. *Id.*

tacts which the Supreme Court has prescribed as the standard

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The next Eighth Circuit decision concerning personal jurisdiction was *Electro-Craft Corp. v. Maxwell Electronics Corp.*<sup>33</sup> This was a contract action in which the nonresident defendant took an order from a Minnesota plaintiff, and with knowledge of the buyer's residence, shipped the equipment directly to the plaintiff in Minnesota.<sup>34</sup> Even though all of the activity within the forum state was carried out by the plaintiff and could easily be considered unilateral activity,<sup>35</sup> the court thought the knowing, direct shipment of a product into the forum state was a contact whose quality was such that jurisdiction was consistent with constitutional requirements.

The *Electro-Craft* court also made a distinction between a nonresident buyer and a nonresident seller. The seller, by shipping goods into the forum state, in exchange for the right to compete for sales in the forum state market, "subjects itself to the obligation of amenability to suit"<sup>36</sup> in the forum state. The nonresident buyer has no such gain and is therefore subject to no such obligation.<sup>37</sup> Thus, in *Electro-Craft*, once the nonresident seller had taken the first affirmative step, he was subject to jurisdiction, even though the remainder of the activity in the forum was the plaintiff's unilateral activity.

The Eighth Circuit's next opportunity to consider the limits of jurisdiction came in *Thompson v. Ecological Science Corp.*<sup>38</sup> Jurisdiction was allowed over a nonresident company whose officers were present in the forum state two days for contract negotiations. The court, because of the voluntary and purposeful presence of the

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32. *Id.*

33. 417 F.2d 365 (8th Cir. 1969).

34. *Id.* at 368. Although the equipment was shipped F.O.B. Texas, the defendant made the arrangements and knew the equipment was being shipped directly to Minnesota. *Id.* at 369.

35. In *Scullin Steel v. National Ry. Utilization Corp.*, 676 F.2d 309, 313 (8th Cir. 1982), the Eighth Circuit characterized the performance of the resident plaintiff in *Electro-Craft* as "unilateral."

36. 417 F.2d at 368.

37. Other jurisdictions have also recognized this factor as a valid distinction. See, e.g., *Nordberg Div. of Rex Chainbelt Inc. v. Hudson Eng'g. Corp.*, 361 F. Supp. 903 (E.D. Wis. 1973); *Marshall Egg Transp. Co. v. Bender-Goodman Co.*, 275 Minn. 534, 148 N.W.2d 161 (1967); *Fourth Northwestern Nat'l. Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Dahlberg Co. v. Western Hearing Aid Center, Ltd.*, 259 Minn. 330, 107 N.W.2d 381 (1961); *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959); cf., *Tube Turns Div. of Chemetron v. Patterson Co.*, 562 S.W.2d 99 (Ky. Ct. App. 1978); *Vacu-Maid, Inc. v. Covington*, 530 P.2d 137 (Okla. Ct. App. 1975) (both basing the distinction on acts).

38. 421 F.2d 467 (8th Cir. 1970).



company's agents in the forum state, found this contact "significant"<sup>39</sup> enough to satisfy one of the prerequisites of jurisdiction.<sup>40</sup> The contact was also held to have "give[n] rise to the claim involved in the lawsuit"<sup>41</sup> and to raise the forum state interest "in protecting the rights of its citizens under a contract negotiated and effectuated in [the forum state]."<sup>42</sup>

In *Gardner Engineering Corp. v. Page Engineering Co.*,<sup>43</sup> the Eighth Circuit allowed jurisdiction over a nonresident in an anticipatory breach of contract action. The fact that the nonresident had promised to "supply specially designed machinery and equipment to be installed in Arkansas under its supervision,"<sup>44</sup> was enough to establish the necessary connection with the forum state.<sup>45</sup> The *Gardner* court, in applying the *Afianase* test, looked to the quality of the contacts as the determining factor in its decision. The contacts were held to be an expression of the intention to use the forum state as a base of operations for work to be done under the proposed contract.<sup>46</sup> This affirmative act by the defendant satisfied the court that there was no violation of due process in granting jurisdiction over the defendant.<sup>47</sup>

With *Block Industries v. D.H.J. Industries, Inc.*<sup>48</sup> the trend toward expansion of jurisdiction in the Eighth Circuit began to slow.

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39. *Id.* at 469.

40. *Id.* at 470 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)).

41. *Id.*

42. *Id.* In *Afianase*, a tort action, the forum state interest was to provide the injured citizen with a convenient forum. 343 F.2d 187, 197 (8th Cir. 1965).

In *Electro-Craft*, a contract action, the forum state interest in the product which was sent into the forum was declared to be "obvious" and was not further explained. 417 F.2d at 367.

43. 484 F.2d 27 (8th Cir. 1973).

44. *Id.* at 32.

45. *Id.* at 31 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). No analysis of *McGee* is offered other than an assertion that the promise of performance within the forum state provided a substantial connection with the state.

46. The contacts included: (1) a letter sent from Arkansas, the forum state, to the nonresident defendant asking for bids, (2) a letter from the defendant to Arkansas, not in response to the letter of the plaintiff, but on the nonresident's own initiative, announcing its interest in bidding for the project, and (3) the establishment, by mutual arrangement, of a base of operations in Arkansas from which the work could be performed. *Id.* at 32.

47. *Cf.*, *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976). California jurisdiction was allowed over a nonresident truck driver who, as the result of an accident, injured a California resident in Nevada, near the California state line. The court reasoned that the intention of the driver to enter the state, shown by his many previous trips by that route and the continuity of those trips over several years, was enough to uphold jurisdiction.

48. 495 F.2d 256 (8th Cir. 1974).

In *Block* the court denied jurisdiction in a tort action in which the defendant, Block, wanted to join two nonresident suppliers as third party defendants. The complaint alleged that Block manufactured a shirt which was sold to the plaintiff, who was injured when the shirt caught fire. Since the material supplied to Block by the nonresidents at most only met the description of the material which caught fire, the court held the supplier's contacts to be insufficient to support jurisdiction.<sup>49</sup> *Caesar's World, Inc. v. Spencer Foods, Inc.*,<sup>50</sup> decided shortly after *Block*, permitted jurisdiction over a nonresident in a contract action. The court noted that the contract was partially performed in the forum state. *Caesar's World* has been subsequently cited to support the denial of jurisdiction in which there is not at least partial performance of the contract in the forum state.<sup>51</sup>

The Eighth Circuit handed down three personal jurisdiction cases in 1977,<sup>52</sup> which was also the year the Supreme Court broke its long silence on that topic.<sup>53</sup> The three Eighth Circuit decisions all concerned the same plaintiff, Aaron Ferer, and were based on the same cause of action. Aaron Ferer & Sons Co., a Nebraska scrap metal broker, was preparing to declare bankruptcy. During this time, Ferer had contracts with several nonresident companies for the delivery of goods. The completion of the contracts would have been to Ferer's benefit. The nonresident companies, however, stopped delivery of the goods that were still under their control when they learned of the impending bankruptcy. Ferer brought suit against these companies to compel them to complete the contracts, alleging their noncompletion constituted voidable preferential transfers in violation of the bankruptcy code.<sup>54</sup> In each case, Ferer had difficulty obtaining jurisdiction because, as a broker, very little of the contractual activity had occurred in Nebraska.

In *Aaron Ferer & Sons Co. v. Atlas Scrap Iron*,<sup>55</sup> the court found that each of four nonresident defendants had a contract with the plaintiff which was to be performed totally outside the forum

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49. *Id.* at 260.

50. 498 F.2d 1176 (8th Cir. 1974).

51. *See, e.g.,* Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450, 454-55 (8th Cir. 1977).

52. Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F.2d 1206 (8th Cir. 1977); Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211 (8th Cir. 1977); Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 (8th Cir. 1977).

53. Shaffer v. Heitner, 433 U.S. 186 (1977).

54. For an explanation of the bankruptcy problem and Aaron Ferer's complaint see Aaron Ferer & Sons Co. v. Atlas Scrap Iron, 558 F.2d 450, 452 n.3 (8th Cir. 1977).

55. 558 F.2d 450 (8th Cir. 1977).

state. The defendants' only contacts with the forum state were made by letters and telephone calls to and from the plaintiff. The court held that these "did not supply the necessary minimal contact" needed to establish jurisdiction.<sup>56</sup> Again, the Eighth Circuit used the *Aftanase* five factor test, but, unlike in *Gardner*,<sup>57</sup> a case allowing jurisdiction in an anticipatory breach of contract action, the Eighth Circuit gave no indication which factors they considered significant.

The second and third Aaron Ferer cases were decided later in 1977.<sup>58</sup> In the third case, *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*,<sup>59</sup> the court again denied jurisdiction over the nonresident defendants. In this instance, Ferer had asserted jurisdiction based on the volume of business each defendant conducted with Ferer. The court found that business volume<sup>60</sup> could not make up for the lack of contact with the forum. The court did find one instance of contact with the forum state based on a contract with one of the six defendants. However, that lone contact was deemed insufficient since the defendant had not designated, as a requirement of the contract,<sup>61</sup> that the activity on the part of Aaron Ferer must take place

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56. Seven cases were cited in support of this proposition, all from the Second, Third and Fifth Circuits. *Id.* at 455. The language from *Gardner*, appearing at 484 F.2d at 32, that "where the negotiations leading to a contract are initiated by a letter from the forum state or by a letter directed to the forum state, the nature of the contacts cannot be deemed to be insignificant," was ignored by the Eighth Circuit in *Atlas Scrap Iron*.

57. 484 F.2d 27 (8th Cir. 1973).

58. In the second of these cases, *Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206 (8th Cir. 1977), Ferer alleged that in certain dealings with the defendants, products handled by Ferer originated in the forum state of Nebraska. The court found, however, "out of fifteen years of trading with [American Compressed Steel], Aaron Ferer has directed our attention to only two contracts under which metal moved . . . through the State of Nebraska." *Id.* at 1210. It was noted that "those contracts are totally unrelated to the complaints in the cases here on appeal," and thus not sufficient to justify the assertion of jurisdiction over the defendant. *Id.* at 1211. In a footnote, the court mentioned that the state interest and convenience factors of the *Aftanase* test could not control the minimum contacts question without sufficient contacts first being established utilizing the three primary factors. *Id.* at 1210 n.5.

59. 564 F.2d 1211 (8th Cir. 1977).

60. The plaintiff conducted \$10,000,000 worth of business with Mueller Brass Co., one of the six defendants. *Id.* at 1214.

61. *Id.* at 1215. See also *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). In *Lakeside* the court reversed a grant of jurisdiction by the lower court, stating that although the defendant has "in a sense caused the activity . . . by placing the order," the resident plaintiff was "in absolute control . . . [of] that activity" and made a unilateral decision to conduct the activity in the forum state. *Id.* at 603. In a footnote, the court stated that it would express no opinion on whether the result would be different if the contract required the resident to perform in the forum state. *Id.* at 603 n.13. *Lakeside* also provides a survey of the circuits on this issue. *Id.* at 601.

within the forum state. Thus, an incidental, or even foreseeable, contact was not an adequate basis for jurisdiction. The basis necessary for jurisdiction was "the intention of invoking the benefits and protections of the laws of the forum state."<sup>62</sup>

Another aspect of *Diversified Metals*, and one which will affect future Eighth Circuit decisions, is the treatment of the distinction between buyers and sellers which was drawn in *Electro-Craft*. *Electro-Craft* and six lower court cases were cited for the proposition that the seller and buyer are held to different standards.<sup>63</sup> The court in *Diversified Metals* did not wholly endorse the *Electro-Craft* position, holding that "the ultimate test is whether the [nonresident] defendant, *either as seller or buyer*, has performed 'some act by which [it has] purposefully [availed] itself of the privilege of conducting activities within the forum state thus invoking the benefits and protections of its laws.'"<sup>64</sup>

Thus, by making the test for buyer and seller the same, the Eighth Circuit implies that a nonresident buyer or seller who, through affirmative acts such as solicitation, makes contact with a state, has met the "purposefully avails" standard, and will be subject to jurisdiction as a result. However, Eighth Circuit cases shed little light on the impact of solicitation as a factor in minimum contacts analysis, since no Eighth Circuit case turns on solicitation to establish jurisdiction. Other courts are equally vague on the subject: California has held solicitation alone is not enough for jurisdiction;<sup>65</sup> a New York case seems to establish jurisdiction based on contacts made entirely through solicitation efforts;<sup>66</sup> and the Fourth Circuit has held both ways on the issue.<sup>67</sup> When solicitation is not

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62. 564 F.2d at 1215. See also *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978) (en banc), *cert. denied*, 439 U.S. 983 (1978). The court in *Hutson* rejected the "stream of commerce" theory found in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), on the grounds of due process. The court thought that inconvenience to the foreign defendant was the controlling factor, especially when there were other, closer defendants.

63. 564 F.2d at 1214-15.

64. *Id.* at 1215 (emphasis added) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

65. *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959). The defendant had solicited business in the forum state, but the cause of action arose elsewhere.

66. *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439 (1965). Although the defendant airline did not fly to New York, jurisdiction was allowed. Jurisdiction was based on the defendant's New York ticket office, which leased office space, employed several people, and had a bank account in New York in addition to doing public relations and publicity work for the defendant.

67. *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971) (denying jurisdiction over nonresident defendants who only solicited in the fo-

an element of the defendant's activity, courts often suggest that element would have been determinative.<sup>68</sup> However, when solicitation is present, it may not be enough for jurisdiction without some other significant contact with the forum state.<sup>69</sup>

Despite this question regarding solicitation, the Eighth Circuit has consistently placed strong emphasis on the "purposefully avails" standard since the *Aaron Ferer* cases.<sup>70</sup> In *Mountaire Feeds, Inc. v. Agro Impex, S.A.*,<sup>71</sup> the court first noted that the nonresident Agro did not contest the question whether their activity was enough to satisfy the "transacting business" clause of the Arkansas long-arm statute.<sup>72</sup> The issue in *Mountaire* was, however, whether the exercise of personal jurisdiction by the Arkansas courts was consistent with federal due process.<sup>73</sup>

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rum, since the plaintiff's injury did not arise out of the nonresident's activity in the forum state); *Lee v. Walworth Value Co.*, 482 F.2d 297 (4th Cir. 1973). This court distinguished *Ratliff* on the basis of forum state interest. Here, the defendant's contact with the forum was solicitation only, but since the cause of action arose on the high seas and no better jurisdiction existed, jurisdiction was allowed.

68. See, e.g., *Iowa Electric Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980); *Hutson v. Fehr Bros.*, 584 F.2d 833 (8th Cir. 1978), cert. denied, 439 U.S. 983 (1978); *McBreen v. Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976).

69. For cases denying jurisdiction when there was solicitation but no other significant contact, see *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980) (activity after the solicitation was unilateral activity of the resident); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), cert. denied, 404 U.S. 948 (1971) (cause of action did not arise from solicitation); *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959) (cause of action did not arise from solicitation). For cases allowing jurisdiction when there was some other significant conduct beyond solicitation, see *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968); accord, *Shealy v. Challenger Mfg. Co.*, 304 F.2d 102 (4th Cir. 1962).

70. See, e.g., *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982) in which the resident buyer was not subject to Missouri jurisdiction. The court held that the contacts with the forum state by mail and phone, a provision in the contract for "F.O.B. forum state," and payment in Missouri did not amount to the minimal contacts necessary for due process. The activity in the forum state was held to be the resident's unilateral activity. In *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980) jurisdiction was denied over a nonresident seller in a contract action in which the products did not reach the forum state. It was held insufficient even though the product was "destined" for the forum. In *Hutson v. Fehr Bros.*, 584 F.2d 833 (8th Cir.), (en banc), cert. denied, 439 U.S. 983 (1978), jurisdiction was denied over a nonresident company which put a metal chain into the stream of commerce. The chain found its way into Arkansas and caused an injury. The court held the connection, via an exclusive distributorship, to be too attenuated, *id.* at 837, since the defendant did not solicit business in the forum state.

71. 677 F.2d 651 (8th Cir. 1982).

72. *Id.* at 653, see *supra*, note 1.

73. *Id.* at 653.

Before addressing the due process issue, the court referred to the *Electro-Craft* decision. The court noted that the plaintiff's reliance upon *Electro-Craft* could not help his case even though in *Electro-Craft*, jurisdiction had been allowed over a nonresident when the plaintiff's activity in the forum was unilateral. *Electro-Craft*, the court pointed out, was modified by the Eighth Circuit in *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, and in *Mountaire*, with the result that "the test as applied to either nonresident sellers or buyers is now the same."<sup>74</sup> However, the court distinguished the *Electro-Craft* decision by pointing out that the nonresident defendant in *Electro-Craft* was a seller, not a buyer, as here.<sup>75</sup> Then, referring to *Hanson v. Denckla*, the court stressed that the "ultimate test" is the "purposefully avails" standard, which must be applied to both buyer and seller.<sup>76</sup>

The court also referred to the five factor test of *Aftanase*, and cautioned that the two last named factors are not determinative.<sup>77</sup> The *Aftanase* test is not referred to again.<sup>78</sup> Once more citing *Hanson*, the court stressed the "purposefully avails" standard and the fact that unless the defendant has a direct relationship with the forum state, there is only unilateral activity by the plaintiff.<sup>79</sup> The Supreme Court decision in *World-Wide Volkswagen* was cited for the proposition that foreseeability alone was not sufficient to establish jurisdiction under the due process clause.<sup>80</sup>

With this as a backdrop, the court reviewed the contacts of Agro, and concluded that "Mountaire's unilateral performance in the forum state is insufficient to support the exercise of personal jurisdiction over Agro Impex."<sup>81</sup> The court then gave a summary of

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74. *Id.* at 654.

75. *Id.* The court in *Mountaire* agreed with the decision in *Diversified Metals*, which disapproved of the idea that different treatment should be accorded buyer and seller in an analysis of jurisdictional issues. The *Mountaire* court found no difficulty, however, in distinguishing the plaintiff's position in *Mountaire* from the plaintiff's position in *Electro-Craft* on exactly that basis.

76. *Id.*

77. *Id.*

78. *Aftanase* and the three cases immediately following, *Electro-Craft*, *Thompson*, and *Gardner*, were the only cases to apply the five factor test to the fact situation point by point. Since *Gardner*, the test has been cited often, but has never again been subject to a detailed application to the fact situation of any case in the Eighth Circuit.

79. 677 F.2d at 654.

80. *Id.* at 656.

81. *Id.* at 655 (citing *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 603 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980)); *Premier Corp. v. Newsom*, 620 F.2d 219, 222-23 (10th Cir. 1980); and *Barnstone v. Congregation Am Echad*, 574 F.2d 286, 288 (5th Cir. 1978).

Agro's contacts. The list mentioned only the sales contracts between the parties, their communications by mail, phone, and letters of credit to a bank in the forum, and payment by Agro sent to the forum state.<sup>82</sup>

The sales contracts between Mountaire and Agro did not constitute a basis for jurisdiction, since the contracts tied Agro to the plaintiff, but not to the forum state.<sup>83</sup> Neither was the use of mail, telephone and banks in the forum state sufficient "standing alone" to satisfy the minimum contacts test.<sup>84</sup> The court did not include in the list any initiation of contact by Agro. Finally, the court cited *McQuay, Inc. v. Samuel Schlosberg, Inc.*,<sup>85</sup> and said that the amount of the payment due a company in the forum state does nothing to strengthen long-arm jurisdiction.<sup>86</sup> The court also reviewed a list of contacts which were not made by Agro: (1) no sales representatives in Arkansas, (2) no supervision of the contract by Agro's agents or officers in Arkansas, and (3) no performance of the contract in Arkansas.<sup>87</sup>

*Mountaire* brings into focus two unsettled issues of personal jurisdiction law. The first issue is the effect that solicitation by the nonresident will have on the court's analysis. The second is whether the nonresident buyer should have a special status regarding personal jurisdiction issues.<sup>88</sup> The *Mountaire* court asserts that a buyer should have no special status. Then, however, by ignoring the buyer's solicitation of the contact, the court ignores almost the only activity of a buyer which could form the basis for a minimal contact.

The *Electro-Craft* decision gave the nonresident buyer protection from foreign jurisdiction based on his status as a buyer versus that of a seller.<sup>89</sup> *Diversified Metals*, the third *Aaron Ferer* case, took away that status protection and substituted the "purposefully avails" standard of *Hanson v. Denckla*. Thus, in the Eighth Circuit, the

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82. 677 F.2d at 655.

83. *Id.* (citing *Iowa Electric Power & Light Co. v. Atlas Corp.*, 603 F.2d 1301, 1303 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) and *Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206 (8th Cir. 1977)).

84. 677 F.2d at 656.

85. 321 F. Supp. 902 (D. Minn. 1971).

86. 677 F.2d at 656.

87. *Id.* at 655. Conspicuous by its absence from this list of missing contacts is any mention of "no solicitation or initiation of contact by the nonresident."

88. See *supra* note 37 and accompanying text.

89. "[S]olicitation by a nonresident purchaser for delivery outside the state is more minimal contact than that of a [nonresident] seller soliciting the right to ship goods into the forum state." *Electro-Craft*, 417 F.2d at 368.

nonresident buyer would be exposed to jurisdiction only if he intentionally conducted certain activities in the forum which are recognized as significant by the Eighth Circuit.<sup>90</sup>

The ruling in *Diversified Metals*, endorsed by the court in *Mountaire*, is not in accord with several other courts.<sup>91</sup> However, the *Mountaire* court has reached the result of protecting the buyer by ignoring the buyer's solicitation of the contact. It is not clear whether there would be jurisdiction in the following situations: a nonresident mail order buyer ordering from a seller in the forum state,<sup>92</sup> a nonresident buyer placing an ad in a publication which reaches the forum state,<sup>93</sup> or a nonresident buyer soliciting over the phone or through the mail.<sup>94</sup>

In *Mountaire* it appears that a buyer is protected even though

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90. A compilation of the Eighth Circuit contacts sufficient to meet the minimum contacts test would be:

- (1) the intentional, knowing and direct delivery of a product into the forum (*Aftanase, Diversified Metals* and *Hutson*);
- (2) at least partial performance of the contract in the forum (*Caesar's World*); or
- (3) the resident's activity in the forum, in preparation for performance which must be part of the contractual obligation (*Diversified Metals*);
- (4) for physical presence in the forum to control, it must be in connection with the making or supervision of the contract (*Thompson*);
- (5) for the forum state interest to control, it must be a clear or statutory interest, declared with specificity (*Iowa Electric*):
  - (a) that would not violate standards of interstate federalism (*World-Wide Volkswagen*);
  - (b) which is limited by the nonresident's due process rights (*Ins. Corp. of Ireland*).

91. See *supra* note 37 and accompanying text. See also *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902 (D. Minn. 1971) (characterizing the nonresident seller as an aggressor). *Contra* *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977) and *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). These cases rejected the automatic characterization of the seller as active and the buyer as passive.

92. See *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959) (the mail order buyer should be protected).

93. The Fifth Circuit found no basis for jurisdiction in this situation when the ads were placed by a seller. See *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 187 (5th Cir. 1978); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723, 730-31 (5th Cir. 1973), *cert. denied*, 414 U.S. 830 (1973).

94. See, e.g., *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982) (jurisdiction denied with phone and mail contacts, but solicitation not discussed); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir. 1974) ("contact by mail alone can be sufficient"); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972) ("A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents"); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1050 (D.N.J. 1981) (in acknowledging the modern trend to conduct business over the phone and by mail, the court "therefore count[ed] defendant's calls and mail communications to plaintiff as significant contacts with the State of New Jersey").



the solicitation occurs in conjunction with other contacts such as phone calls, mail, letters of credit and sales contracts between the parties.<sup>95</sup> In the Eighth Circuit there apparently must be a sufficient contact, independent of any solicitation by the nonresident, for the nonresident to be subject to the jurisdiction of the forum state.

There is still substantial disagreement from court to court and from circuit to circuit on the treatment of such contacts.<sup>96</sup> The Eighth Circuit's holding in *Mountaire*, not for what it says but rather for what it leaves unsaid, will add to the confusion in this area of law.

*George P. Nelson*

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95. *Cf. Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184 (5th Cir. 1978); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723 (5th Cir. 1973), *cert. denied*, 414 U.S. 830 (1973).

96. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., Inc.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980). Justice White dissented from the denial of certiorari since "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts.") *Id.* at 909 (citing *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 601 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980)).