Comment

PREINCORPORATION CONTRACTS ARE TERMS IN THE MINIMUM CONTACTS FORMULA: REES V. MOSAIC TECHNOLOGIES, INC.

I. INTRODUCTION

On April 6, 1983, Mosaic Technologies, Inc. was formed under the laws of Delaware and began operations with New Hampshire as its principal place of business. This date is particularly significant in Rees v. Mosaic Technologies, Inc. because it separates the two distinct sets of activities analyzed by the district court before dismissing the complaint for lack of personal jurisdiction over the out-of-state defendant, and by the court of appeals before reversing the district court and remanding the action for trial.

On its face, this litigation appears to be the straightforward attempt of an individual plaintiff to sue an out-of-state corporate defendant in the plaintiff’s home state for breach of a personal services contract. Judicial action under these facts calls for an evaluation of the out-of-state defendant’s contacts with the forum state to determine whether sufficient contacts exist to exercise in personam jurisdiction.

However, this adjudication was unique because the quantum of activities subjected to the minimum contacts analysis took place prior

1. The name the corporation took on its original incorporation was Work Stations, Inc. The name of Mosaic Technologies, Inc. was substituted by amendment one month later. Rees v. Mosaic Technologies, Inc., 570 F. Supp. 31 (W.D. Pa. 1983), rev’d, 742 F.2d 765 (3d Cir. 1984). Neither the fact nor the timing of the name change had any effect on the outcome of this case.

2. These were the facts when the plaintiff filed the complaint on May 25, 1983. However, by the time of the appeal, the corporate offices had been moved to Massachusetts. Brief for Appellee at 4, Rees v. Mosaic Technologies, Inc., 742 F.2d 765 (3d Cir. 1984).

3. 570 F. Supp. 31 (W.D. Pa. 1983), rev’d, 742 F.2d 765 (3d Cir. 1984). The district court notes that “[t]he date of incorporation creates the legal dilemma here.” Id. at 32.

4. Id. at 33.

5. Rees, 742 F.2d at 770.

6. See infra notes 46-51 and accompanying text.

7. The court of appeals acknowledged that “[t]his is a case of first impression” where the issue presented is whether preincorporation activities, which are ratified by the subsequently formed corporation, may be used in the in personam minimum contacts analysis. Rees, 742 F.2d at 766.
to the incorporation of the defendant corporation and involved the plaintiff and the promoter of the corporation.

Thus the court is required to address two issues. One involves a question at least comfortably familiar to federal practice although far from a settled area of the law.\(^8\) The other requires the court to work entirely without compelling precedent.\(^9\) The former is the reflex response of any court attempting to exercise personal jurisdiction over an out-of-state defendant to determine if sufficient contacts exist with the forum state. The latter issue requires a determination of whether the contacts of the promoter with the forum state may be attributed to the defendant corporation where the activities of the promoter were subsequently accepted by the corporation.

When a novel issue is decided within the framework of an established analysis, the significance of the former may be overshadowed by the familiarity of the latter. On the other hand, the two issues cannot be analyzed without reference to each other because both are integral to the ultimate resolution of the case.\(^10\) This comment, therefore, will first discuss the development of the minimum contacts analysis and then address the court of appeal's approach to the issue of preincorporation activities in light of this background.

II. Background

Courts of this country are limited by the Constitution in their power to exercise personal jurisdiction over a defendant not within

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8. Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U. ILL. L. Rev. 917, 917 n.3 [hereinafter cited as Waits]. Professor Waits lists 26 law review articles, notes, and comments, published since 1977 which deal specifically with the issue of due process limitations on state court jurisdiction. Professor Waits collectively describes these articles as presenting "divergent views on both what the law (as embodied in the [Supreme] Court's opinions) is, and what the law should be." Id. at 918.

9. See supra note 7.

10. In a court's analysis, the first question that must be raised and answered is whether the defendant corporation has had sufficient contact with the forum state since its incorporation to justify exercising in personam jurisdiction over it. If the answer is affirmative, then there is no need to proceed further and jurisdiction will be allowed.

On the other hand, if the answer is negative, the court must then consider, within the context of personal jurisdiction, whether the preincorporation activities of one other than the defendant can be used to meet the due process test of minimum contacts.

In Rees, both the district court and the court of appeals agreed that the answer to the first question posed was "no." Rees, 570 F. Supp. at 33; 742 F.2d at 768.
their forum. The source of this limitation is the fourteenth amendment, which forbids the states from "depriving any person of life, liberty, or property, without due process of law . . . ." Without a more specific interpretation, however, "due process" is a term too amorphous to be applied with any degree of consistency or predictability. This section will review the development of this definition of due process, first by the Supreme Court, and then as applied by the forum state of Pennsylvania. When appropriate, attention will be focused on the particular issue of when the nonresident defendant is a corporation and the contact is by contract, as in Rees.

A. The Supreme Court

Prior to the modern era of minimum contacts, the personal jurisdiction inquiry was controlled by the territoriality of Pennoyer v.

This took both courts to the second question, and their respective answers constitute the subject of this comment.

11. Before a federal court has the power to hear a diversity case, it must have personal jurisdiction as well as subject matter jurisdiction. 28 U.S.C. § 1332 (1982). The court must also have proper venue, and service of process must have been such that it provided valid notice of the suit to the defendant. See generally Barrett, Venue and Service of Process in the Federal Courts—Suggestions for Reform, 7 VAND. L. REV. 608 (1954). These issues were both uncontested in the instant case.

12. U.S. CONST. amend XIV, § 1. The court of appeals in Rees ruled that when a federal court is sitting in diversity, it is to use state substantive law but federal procedural law. Rees, 742 F.2d at 767 (citing Hanna v. Plumer, 380 U.S. 460 (1965)). The court also ruled that in such a case, Rule 4(e) of the Federal Rules of Civil Procedure "directs a federal court to follow state law by allowing a district court to assert personal jurisdiction over a nonresident to the extent permissible under the law of the state in which the district court sits . . . ." Id. Thus, the due process clause of relevance here is the one applicable to the states. See infra note 48 (commerce clause is the correct authority to limit state court jurisdiction).

13. As the amount of interstate commercial activity has increased in this country, corporations have more frequently found themselves involved in multistate litigation. See 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1069 (1969). Yet the courts have had difficulty discerning from Supreme Court precedent what forms of commercial contact with a forum state will be sufficient to satisfy the constitutional standards of due process. See generally Note, Minimum Contacts and Contracts: The Breaching Relationship, 40 WASH. & LEE L. REV. 1639 (1983) [hereinafter cited as Note, Minimum Contacts] (contrasting decisions in the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits). Justice White has observed that "[t]he disarray among federal and state courts . . . may well have a disruptive effect on commercial relations in which certainty of result is a prime objective," and "prior decisions of this Court offer no clear guidance on the question." Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907, 910-11 (1980) (White, Powell, J.J., dissenting), denying cert. to 597 F.2d 596 (7th Cir. 1979).
Neff44 "reflecting a primal deference to the potentialities of physical power, [and thus requiring] the actual or symbolic seizure of . . . defendants (by arrest, service, or domiciliary control) within the territory of the adjudicating state."15 The modern era was ushered in by the Supreme Court's seminal decision in International Shoe Co. v. Washington.16 In International Shoe, the Court established the modern standard for exercising long-arm17 jurisdiction. A nonresident becomes amenable to suit once it has sufficient minimum contacts with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."18 The holding permitted the state of Washington to exercise personal jurisdiction over a nonresident corporation for the purpose of collecting an unemployment tax covering resident salesmen. Through salesmens' solicitation orders within the state, the corporation enjoyed the protection and benefits of the state laws. The Court reasoned that this activity may give rise to obligations to the state and may require the corporation to respond to a suit within the state.19

While this was certainly a start, it is easy to see that merely substituting "minimum contacts" for "due process" would do very little to aid the courts in determining when jurisdiction could be exercised. For example, the exact meaning of "contacts" was not explained. Would merely setting foot within the forum state constitute a contact or would there have to be some activity? Could minimum

14. 95 U.S. 714 (1877).
15. Ratner, Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective—Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act, 75 Nw. U.L. REV. 363, 364 (1980) [hereinafter cited as Ratner]. Professor Ratner describes the consequences of this as requiring some plaintiffs to seek out their defendants in distant forums while other defendants find themselves subject to suits in forums they were merely visiting or, perhaps, simply passing through.
17. "Long-arm" is the descriptive term applied to state statutes delineating the circumstances under which the state courts may exercise personal jurisdiction over a foreign defendant. Frequently these statutes will permit the state courts to exercise personal jurisdiction to its constitutional limits, but they are not required to do so. See Comment, DeJames v. Magnificence Carriers, Inc.: Examining the Limitations on Personal Jurisdiction in Federal Court, 15 J. MAR. L. REV. 707, 722 n.86 (1982) (citing to Perkins v. Benguet Consol. Mining Co., 345 U.S. 437 (1952)).
18. International Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The primary consideration in making this inquiry is an "estimate of the inconveniences" to the defendant. Id. at 317. This defendant bias in the Court's decisions has persisted.
19. Id. at 319. The Court here noted it was the quality and nature, not the mere quantity, of the contacts which created jurisdiction. Id.
contacts be found where the nonresident had used the mails or the telephone and never actually entered the state? What level of activity would be required to fall within the meaning of "minimum contacts" and whose activity will count, the resident plaintiff's or the nonresident defendant's?

The first major jurisdictional decision by the Supreme Court following International Shoe came twelve years later in McGee v. International Life Insurance Co. Again the nonresident defendant was a corporation and jurisdiction was allowed; but, as it turned out, McGee extended the minimum contacts test to its outer boundaries. California was attempting to assert jurisdiction over a Texas corporation whose only contact with California was a single reinsurance contract solicited from the plaintiff and mailed to his California residence. The policyholder mailed his premiums to the defendant in Texas. Noting a "clearly discernible" trend of expanding state court jurisdiction, a unanimous Court upheld this assertion of jurisdiction, but appears to have based its decision on the fact that the defendant was an insurance company and California had a special statute for the regulation of insurance companies. While some courts have used the result in McGee to apply an expansive jurisdictional analysis, others have limited its application to situations where the state has an extraordinary interest in resolving the dispute.


22. Id. at 222.

23. The Court examined a California insurance statute (not a general long-arm statute) which permitted jurisdiction over nonresident insurers to protect the interests of individual claimants and concluded that this represented a sufficiently strong state interest in regulating this type of defendant to warrant exercising jurisdiction over it. Id. at 221, 223-24.

24. Note, Minimum Contacts, supra note 13, at 1646 n.49 (discussing Pedi Bares, Inc. v. P & C Food Mkt., Inc., 567 F.2d 933, 936-37 (10th Cir. 1977), which cites McGee to affirm jurisdiction based on single contact); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 496 (5th Cir. 1974) (cites McGee for position that defendant need not be physically present in forum state to satisfy minimum contact requirement).

The following term, the Supreme Court handed down the decision which would have the most permanent effect on the area of in personam jurisdiction. In Hanson v. Denkla, the Court denied Florida jurisdiction over a Delaware trustee whose only contact with Florida was administration of a trust created before the settlor became a Florida citizen. The Hanson Court found it was "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." The Court built on the language of International Shoe by requiring the contact with the forum state be purposeful before it can be figured into the calculus of minimum contacts and established a pro-defendant bias that has persisted throughout its subsequent decisions.

The potential tension between Hanson and McGee is obvious.

1984) (noting the McGee Court's reliance on California's strong interest in providing a convenient forum for recovery from insurers).
27. The only remaining contacts after the settlor moved from Pennsylvania to Florida consisted of the receipt of trust income in Florida until her death and directions sent to the trustee from Florida concerning matters of the trust. Hanson, 357 U.S. at 238-39.
28. Id. at 253 (citing International Shoe, 326 U.S. at 319).
29. International Shoe first suggested that a corporation enjoys the benefits and protections of a state to the extent it exercises the privilege of conducting business within the state. See supra note 19 and accompanying text.
30. Wait, supra note 8, at 969 ("The Court has not used Hanson to determine the outcome of new cases by comparing their facts to Hanson's. Instead, the Court has merely cited Hanson's defendant-oriented language to justify defendant-oriented results."). See also Kamp, Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory, 15 GA. L. Rev. 19, 20 (1980) (notes that the Court's strong pro-defendant bias contradicts the pro-plaintiff trend in state courts) [hereinafter cited as Kamp], Note, Minimum Contacts, supra note 13, at 1645; Note, Mere Foresetability of Contacts with a State is Not the Test for Personal Jurisdiction, 46 J. AIR L. & COMM. 541 (1981).

The clash between McGee and Hanson is not primarily a clash between "results." Factual distinctions can be drawn between the two cases, and the minimum contacts test is vague enough to permit arguments that the results of the cases are consistent. The true clash . . . arises from their conflicting descriptions of the test to be applied and the conflicting views of the constitutional limitations in state court jurisdiction which those descriptions reflect.

Id.
and courts have disagreed as to the effect of one on the other.\textsuperscript{12} In the late 1970s, the Supreme Court decided two cases which seemed to tip the scales in favor of Hanson’s pro-defendant bias. The \textit{Shaffer v. Heitner}\textsuperscript{33} decision placed emphasis on the Hanson purposeful availment test and added that the defendant must have a reasonable anticipation of being “hauled before [the forum] court.”\textsuperscript{34} The next year, in \textit{Kulko v. Superior Court},\textsuperscript{35} the Court further reinforced the preference for Hanson’s purposefulness test by setting forth criteria for determining whether the defendant’s contacts with the forum state constituted purposeful availing.\textsuperscript{36} This determination of purposefulness was then combined with a balancing test linking foreseeability of litigation to the fairness of calling a nonresident to defend himself in the forum state.\textsuperscript{37}

Recognizing that the results in \textit{Shaffer} and \textit{Kulko} did not check the trend toward an increasingly limitless exertion of long-arm jurisdiction by the states,\textsuperscript{38} the Supreme Court attempted further clar-

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\item 33. 433 U.S. 186 (1977). \textit{Shaffer} involved a shareholder’s derivative action against a Delaware corporation’s nonresident officers and directors, none of whom had any business contacts with Delaware.
\item 34. \textit{Id.} at 215-16. One commentator has concluded that \textit{Shaffer} means that if the defendant could have anticipated his “actions might result in a legally redressable injury in a distant forum,” jurisdiction should be allowed. Woods, \textit{Pennoyer’s Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson}, 20 ARIZ. L. REV. 861, 883 (1978).
\item 35. 436 U.S. 84 (1978). This case involved a divorced New York couple. The wife moved to California and subsequently the two children moved out to join her. The wife sued in California to get more child support and full custody of the children (under the original custody agreement, the children were to live with the mother only during vacations).
\item 36. \textit{Id.} at 93-94.
\item 37. \textit{Id.} at 98-100. \textit{See Comment, To be Subject to Forum State’s Personal Jurisdiction Foreign Corporations Must Reasonably Expect to Defend Suit}, 51 Miss. L.J. 121, 130-31 (1980). Thus, foreseeability is seen to devolve directly from the defendant’s contacts with the forum state and to be dependent on a finding of purposefulness.
\end{itemize}
ification of its position in World-Wide Volkswagen Corp. v. Woodson and Rush v. Sauchuk. World-Wide Volkswagen once again stressed that jurisdiction cannot be asserted over a defendant having insufficient contacts with the forum state and demanded that the contacts be based on the defendant’s conduct and not on in-state effects resulting from that conduct however reasonably foreseeable. Guarding the dual aims of the minimum contacts test in protecting the defendant against the burdens of defending in a distant and inconvenient forum and in controlling the states’ reach within the boundaries of a federal system made up of coequal sovereigns requires the heavy emphasis on the defendant’s conduct.

In Rush, the Supreme Court again applied Hanson’s test of purposefulness. Additionally, the state supreme court had aggregated the forum contacts of the defendants, allowing the undisputed contacts of the insurance company to be attributed to the individual insured. The Court ruled that such arithmetic “is plainly unconsti-

39. 444 U.S. 286 (1980). This was a products liability action brought by a plaintiff who had purchased a car from the defendant in New York and driven it into Oklahoma, where the accident occurred. The defendant did not conduct any business in the forum state.

40. 444 U.S. 320 (1980). In this case the plaintiff attempted to gain jurisdiction over an individual nonresident defendant who had no contacts with the forum state. He did this by garnishing an insurance obligation running to the defendant, on the theory that the insurance company conducted business in the forum state. The jurisdictional decision here was outcome determinative as suit in defendant’s forum would be barred by the statute of limitations.

41. World-Wide Volkswagen 444 U.S. at 291.

42. Id. at 296-97.

43. Id. at 291-92. Justice White gave two reasons why federalism should act as a limit on jurisdiction: (1) the economic interdependence of the states, and (2) a state’s sovereign power to litigate its cases in its own courts. Id. at 293. The question of economic interdependence has lead some to conclude that it is the commerce clause, not the due process clause, which limits jurisdiction. Carringten & Martin, Substantive Interests and the Jurisdiction of State Courts, 66 Mich. L. Rev. 227, 234 (1967).

For criticisms of the use of federalism in jurisdictional analysis, see Redish, supra note 34 (would rely on a convenience analysis); Kamp, supra note 30 (instead of looking to the relationship between the particular defendant and the forum, would look for the best forum to adjudicate the entire law suit); Ratner, supra note 15 (favors effective-litigation values over the territorial imperative).

Although World-Wide Volkswagen is the first explicit expression of the court’s concern for protecting federalism by requiring close scrutiny of the defendant’s conduct, such could have been inferred from Hanson, Shaffer, and Kulko. See Kamp, supra note 30, at 24.

44. Rush, 444 U.S. at 329. The Court further noted that making the plaintiff’s contacts with the forum decisive is “forbidden by International Shoe and its progeny.” Id. at 332.
tutional” and that minimum contacts must be found as to each defendant.45

A synthesis of the current jurisdic{onal test37 yields a three-step analysis to be applied sequentially. A negative response at any step will preclude a constitutional assertion of jurisdiction:

1. The nonresident defendant purposefully conducted activities within the forum state and evoked the benefits and protections of its laws;46

2. The complaint arose out of the defendant’s contacts with the state,49 or if suit results from activities outside the forum, the forum contacts are substantial;50

3. Jurisdiction over the defendant would be reasonable under the due process standard of fair play and substantial justice.54 Compliance with this test ensures adequate consideration and protection of defendant’s rights and guarantees that the state court’s assertion of jurisdiction over a nonresident defendant is constitutional.

45. Id.

46. The most recent Supreme Court decisions relating to personal jurisdiction, include: Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473 (1984) (first amendment affords no special protection in jurisdiction cases and plaintiff’s motivation for selecting forum not relevant); Calder v. Jones, 104 S. Ct. 1482 (1984) (same first amendment question and denial of “fiduciary shield” doctrine in intentional tort action); Helicopteros Nacionales De Columbia, S.A. v. Hall, 104 S. Ct. 1868 (1984) (general jurisdiction, where action does not arise out of forum contacts, founded only upon “continuous and systematic” contacts). See generally McLaughlin & Tallom, New Trends in “In Personam” Jurisdiction, 192 N.Y.L.J. 4 (1984). See also Waits, supra note 8, at 968 (writing prior to the decisions noted above, but after certiorari had been granted, and concluding that the evolution of jurisdictional analysis is at an “end of cycle” and will remain stable for some time).

47. Note, Long-Arm Jurisdiction, supra note 26, at 382-83 (relying on results from International Shoe, McGee, Hanson, Shaffer, Kulko, World-Wide Volkswagen, and Rush).

48. Hanson, 357 U.S. at 253; Shaffer, 433 U.S. at 216; Kulko, 436 U.S. at 94; World-Wide Volkswagen, 444 U.S. at 297; and Rush, 444 U.S. at 329. For an application of this step to a contractual situation, see Note, Long-Arm Jurisdiction, supra note 26, at 389-400 (a framework for analyzing purposeful availment).


51. Both Shaffer, 433 U.S. at 215-16, and Kulko, 436 U.S. at 98-100, equated fairness with foreseeability of litigation. See supra notes 33-37 and accompanying text. World-Wide Volkswagen placed this third step last on the list and subordinate to the first two. See supra notes 41-42 and accompanying text.

The true nature of this step, with respect to the other two steps, is that while
B. Pennsylvania’s Long-Arm Jurisdiction

As noted earlier, the district court in Rees was sitting in diversity and thus could assert personal jurisdiction to the extent permissible by Pennsylvania law. Therefore, it is appropriate to examine the extent to which Pennsylvania allows its courts to go in asserting jurisdiction over nonresident defendants.

Pennsylvania’s Long-Arm Statute allows in personam jurisdiction in two types of situations, which essentially “track the two jurisdictional theories defined by the [Supreme] Court in International Shoe . . . .” Section 5301 provides for general jurisdiction over a non-resident defendant even if the cause of action does not arise out of the forum contacts. This section is not relevant to the instant case, however, because the plaintiff was not seeking to exert general personal jurisdiction over the defendant. In the alternative, section 5322 provides for jurisdiction when the cause of action arises out of the defendant’s contacts with the state.

This section has been consistently interpreted by both state and federal courts sitting in diversity to extend jurisdiction to foreign

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defendants to the fullest extent allowed under the United States Constitution.\textsuperscript{59}

This conclusion, however, is not sufficient for the issue at hand,\textsuperscript{60} and an analysis of how Pennsylvania and the Third Circuit have applied the Supreme Court precedent is necessary. The proper procedure to be used in Pennsylvania when the issue is one of exerting personal jurisdiction over a nonresident defendant was set forth by the Pennsylvania Superior Court in \textit{Proctor \& Schwartz, Inc. v. Cleveland Lumber Co.}\textsuperscript{61} Although this test was formulated prior to some of the more recent Supreme Court decisions,\textsuperscript{62} it remains the test applied by the courts in Pennsylvania.\textsuperscript{63} Its recognized purpose is to "test whether the 'defendant's conduct and connection with the forum state [was] such that he should reasonably anticipate being hauled into court there."\textsuperscript{64} The test itself consists of three steps,\textsuperscript{65} each garnered from Supreme Court cases: (1) whether the defendant purposefully availed itself of the privilege of conducting activities in the forum state;\textsuperscript{66} (2) whether the cause of action arose from the defendant's activities in the state;\textsuperscript{67} and (3) whether the acts were substantial enough to make jurisdiction reasonable.\textsuperscript{68} The courts are

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Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.


60. See supra notes 13, 24-25 (continuing disagreement among the circuits as to how the Supreme Court decisions should be applied).


cautioned that this is not a mechanical rule but must be applied on an ad hoc basis. Finally, each step is to be evaluated in sequence and a negative answer at any point obviates the need to consider the subsequent steps.

The first step in the Proctor test is the most important because it ensures that the defendant's rights are being protected. Without having purposefully availed itself of the forum state by conducting activities there, it would clearly be unreasonable to require it to come to the state to defend itself. The difficult question here is the nature of the contacts which constitute purposeful availment.

The court in Proctor, dealing with a contract for the purchase of goods to be manufactured by a Pennsylvania corporation, reasoned that a defendant has purposefully availed itself of the privilege of acting within the state when the obligations entered into have a foreseeable and realistic economic impact on the commonwealth. The court in Koenig v. International Brotherhood of Boilermakers expanded this by concluding that "it is the defendant's act of entering into a contract that he knows will be substantially performed in the forum state that constitutes the defendant's 'purposefully availing itself of... the forum state.'" The Third Circuit, acting on facts con-

69. See Strick Corp., 532 F. Supp. at 955 (noting that a trial court, attempting to determine the constitutionality of exercising personal jurisdiction, "can derive only limited help from previously decided cases, since the constitutional inquiry is so often shaped by particular facts that the conclusions drawn from one setting are rarely transferable to another.")

70. See, e.g., United Farm Bureau Mutual Ins. Co. v. United States Fidelity & Guar. Co., 501 Pa. 646, 462 A.2d 1300 (1983) (no minimum contacts found, so fact that notions of fair play are not offended is irrelevant); Kingsley & Keith (Canada) Ltd. v. Mercer Int'l Corp., 500 Pa. 371, 456 A.2d 1333 (1983) (equally divided court affirming jurisdiction) (defendant concedes purposeful availing but cause of action did not arise out of these contacts, so no need to consider the third step) (Opinion in Support of Reversal).


73. Id. at 571, 426 A.2d at 641-42 (quoting the court, in a footnote, makes the point that the contract it was considering made it necessary for the plaintiffs to perform in Pennsylvania. Id. at 571 n.2, 426 A.2d at 642 n.2. This was an attempt to distinguish the result in Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980), where jurisdiction was denied because there was merely a belief the plaintiff would perform in the forum state.).

74. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984). Pennsylvania corporation contracted with nonresident defendant where plaintiff was to attract potential customers for defendant's resort. Defendant also had advertised its services in Philadelphia and sent an airplane into Pennsylvania to pick up potential customers.
ceptually similar to Proctor, noted, however, that evidence of unilateral activity on the part of the plaintiff was insufficient to establish defendant contacts with the forum, even if the activity was in compliance with the terms of a contract. In Dollar Savings Bank v. First Security Bank of Utah, a recent pronouncement on the question of in personam jurisdiction, the Third Circuit denied jurisdiction over a Utah bank in an opinion representing a strong expression of the Supreme Court’s defendant bias. The court assigned little weight to the plaintiff’s assertion of an economic impact on the state, noting that in commercial transactions it is “not concerned with the ‘effects doctrine’ as applied to a tort claim.” In summarizing its position, the court concluded that reliance on the Roman maxim requiring the plaintiff to sue in the defendant’s forum would be justified by the certainty such a practice would lend commercial transactions. In any event, it is the defendant’s contacts which are considered rather than the plaintiff’s.

With respect to contracts for the sale of goods, the district court in Stick Corp. v. A.J.F. Warehouse Distributors, Inc. attempted to deal with this first step in the Proctor test by recommending careful

75. Id. at 65 (quoting Hanson, 357 U.S. at 253).
76. 746 F.2d 208 (3d Cir. 1984). Neither the parties, nor the court of appeals, in Rese would have had the benefit of the reasoning in this case because it was not decided until October 17, 1984, approximately two months after Rese.
77. The Utah bank, as trustee for a group of investors, had borrowed money from a Pennsylvania bank. When the Utah bank defaulted on the loan, the Pennsylvania bank sued to foreclose on the collateral. The loan had been negotiated with plaintiff bank’s law firm in New York City, and all payments prior to default had been made by wire transfers to Pittsburgh. Id. at 209-10.

However, the court adds that “if incidental economic detriment as such furnishes a contact . . . , then every monetary claim would per se furnish the predicate for personal jurisdiction over a nonresident debtor,” Dollar Sav. Bank, 746 F.2d at 213 (emphasis added), but does not explain what should happen if the economic detriment is more than incidental, or, in fact, what “incidental” means.
79. The maxim referred to reads actor sequitor forum rei and translates “plaintiff must pursue defendant in his forum.” Dollar Sav. Bank, 746 F.2d at 214.

It is important to note that the court prefaced this remark with the observation that the status of the two parties, both substantial banks transacting interstate business, “tends to blur the rationale for the underlying rule of law.” Id. By so saying, the court may have been leaving the door open, in cases where such parity between the parties does not exist, to a more favorable result for a less substantial plaintiff.
80. Id. at 214.
consideration of four factors: (1) the precontract negotiations charter; (2) the location of precontract negotiations; (3) the terms of the sales agreement; and (4) the type of goods involved. With this approach, the court could assign the proper weight to the defendant's acts and determine the extent to which it reasonably could have foreseen being subject to suit in the forum. Properly applied, these factors are consistent with the rule that the unilateral acts of the plaintiff should have no effect on the susceptibility of the nonresident defendant to in personam jurisdiction.

Although the Strick factors were originally conceived to evaluate a contract involving the sale of goods, they have also been applied to contracts for personal services. In Bucks County Playhouse v. Bradshaw, the court applied the first two factors of Strick which focus on the negotiating phase of the contracting process. The relevant aspects of the first factor (character of the pre-contract negotiations) are whether the defendant initiated the contract, whether the defendant attempted to alter the terms of the contract, and whether the negotiations were significant. If the defendant has come into the forum or made contact with the forum through a substantial number of telephone

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82. Id. at 958. The court noted the purposefully availing language of Hanson was compelling, but feared if it was given "talismanic significance," the courts would lose sight of the underlying concern in Hanson—the desire to protect the wholly passive defendant. Id.

83. The court envisioned placing the defendant on a scale having at one end virtually no contacts and at the other a major contact. Id.

84. See, e.g., Freedom Forge Corp. v. Jersey Forging Works, Inc., 549 F. Supp. 99 (M.D. Pa. 1982) (Pennsylvania court was without jurisdiction over New Jersey defendant which submitted six purchase orders by mail over a nine month period to Pennsylvania seller, as the seller had initiated the business relationship and negotiated the purchases in New Jersey, and the New Jersey buyer never visited the seller's offices in Pennsylvania); Baron & Co. v. Bank of N.J., 497 F. Supp. 534 (E.D. Pa.1980) (same result when the defendant's sole contact with the forum consisted of correspondence and insignificant number of telephone calls, contract negotiated and executed in New Jersey).

85. 577 F. Supp. 1203 (E.D. Pa. 1983). Plaintiff Playhouse alleged breach of an oral personal service contract by Terry Bradshaw, a citizen of Louisiana, to perform at the Playhouse. Defendant Bradshaw's only contacts with Pennsylvania (excluding his years as quarterback of the Pittsburgh Steelers football team) were a series of telephone calls, mailing a picture and biographical material, and sending one telegram. Id. at 1207.

86. Id. at 1209. It is difficult to tell how, if at all, the latter two considerations are related. Is the court to look first to the defendant's attempts to alter the contract, and then measure to see whether these acts protracted the negotiations? Or will the defendant be in jeopardy if the negotiations become substantial because the plaintiff is driving a hard bargain and the defendant is merely acting to protect itself?
calls or letters, it would indicate the defendant has in fact conducted activities in the forum. Thus, the second factor (location of the negotiations) is relevant.

The court in *Bucks County* did not consider the remaining two factors in the *Strick* analysis because it felt they were too oriented toward sales contracts. This reasoning, as to the third factor, is not easily supported. The wording refers specifically to the terms of the sales contract. However, the *Strick* court found the significance of the third factor was in determining whether the defendant could reasonably expect to be sued in the distant forum. Most contracts will have a number of terms dictating the conduct of the parties which can be analyzed by the court. From this analysis the court can determine whether exertion of personal jurisdiction over a particular party is reasonable.

The second prong of the *Proctor* test, requiring that the cause of action arise from the defendant’s activities within the forum state, is explained by the Pennsylvania Supreme Court as necessary to ensure “the nexus between the defendant’s activities, the cause of action and the forum state have [sic] ... been established.” In

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87. Id. The *Bucks County* court emphasized the word “substantial” but offered no explanation of what constituted “substantial.” The only elaboration consists of recognizing that fleeting or fortuitous contacts with the state are not sufficient. *Id.*

88. *Id.* at 1203.

89. The two *Strick* factors unused by the Bucks County court involve reference to the terms of the sales agreement and the type of goods sold. *Id.* at 1208 n.3.

90. *Strick*, 532 F. Supp. at 959. For example, such a conclusion would be reasonable “where the contract indicates that it is to be substantially performed in the forum, that the law of the forum will control any disputes rising from the agreement, or that payment is directed to the forum . . . .” *Id.*

One element that might be added to this list is an agreement as to which forum will have jurisdiction over any dispute. See, e.g., *Lucent v. Martin & Mark, Inc.*, 24 Pa. D. & C. 12, 15 (1982) (“Pennsylvania case law provides that parties to a contract may agree in advance to submit to jurisdiction of a given Court, and that the designated court then has in personam jurisdiction . . . .”). But see *Webb Research Corp. v. Rockland Indus., Inc.*, 580 F. Supp. 990 (E.D. Pa. 1983) (Contract called for jurisdiction in defendant's home state, but in light of the defendant's heavy contacts with Pennsylvania, and the fact that the jurisdiction clause in the contract did not call for exclusive jurisdiction in Maryland, the court allowed jurisdiction in Pennsylvania.

The fourth factor (the type of goods involved) draws a distinction between mail-order consumer goods and sophisticated, high priced industrial equipment and would not be informative with respect to service contracts. *Strick*, 532 F. Supp. at 959.

91. *Kingsley & Keith (Canada) Ltd. v. Mercer Int'l Corp.*, 500 Pa. 371, 380-82, 456 A.2d 1333, 1338 (1983) (opinion in support of reversal). The three justices in this opinion rejected the lower court's interpretation of this prong (requir-
Koenig, the court applied this prong by reasoning that if the contact is a contract, and if there is a breach of the contract, then the action arising as a result of the breach arises out of the contact, thus satisfying the second prong.

The third and final prong of the Proctor test, deciding whether the acts of the nonresident defendant are so substantially related to Pennsylvania that exercising jurisdiction is reasonable, is applicable only where the first two prongs have been answered affirmatively. The assumption, then, is that the defendant has sufficient contacts with the forum state to support jurisdiction and the cause of action arises out of these contacts. The question becomes whether the now established jurisdiction should be asserted, or whether the equities militate against doing so. Koenig suggests that the several factors enumerated in World-Wide Volkswagen are to be weighed against the defendant’s burden. Thus, the interests of the plaintiff, the forum state and the interstate system are invoked. The Koenig court went on to note that mere inconvenience to the defendant will not deny the plaintiff the right to sue in his home forum. In Strick, the court concluded that suit need not be brought either where the defendant has the most contacts or even in the most logical forum and reasoned that Pennsylvania’s interest lies in providing a forum for its residents when they are injured in their contractual relations.

Thus, in light of recent applications of the first prong of the Proctor test, it appears that the trend in Pennsylvania is toward a more restrictive view of when nonresident contacts with the state rise to a level sufficient to make an exercise of in personam jurisdiction constitutional.

93. Id. at 573, 426 A.2d at 642.
94. World-Wide Volkswagen, 444 U.S. at 291.
95. Koenig, 284 Pa. Super. at 573, 426 A.2d at 643. The factors included the forum state’s interest in resolving the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in the most efficient resolution of the controversy, and the interest of the several states in furthering substantial social policies. World-Wide Volkswagen, 444 U.S. at 306.
III. Analysis

A. Factual Background

In November of 1982 Donald Rees, a citizen of Pennsylvania, entered into an oral personal services contract with Frank Williams, a promoter of the yet unformed corporation. At this time Williams was living in Pennsylvania. Under the contract Rees was to have the exclusive authority to recruit personnel to fill the high-level management positions in the corporation and was to be paid a commission for each recruitment. As further consideration for the "exclusive search" contract, Rees was to provide "competitive information," such as facts concerning other businesses and general business contacts.

During the period from November 1982 until April of 1983, Williams conducted much of his business out of Rees' office in an effort to minimize expenses. This activity consisted primarily in searching for venture capital for the unborn corporation.

On April 6, 1983 the corporation was formed. Incorporated in Delaware under the name Work Stations, Inc., the corporation established its principal place of business in New Hampshire. One month later the name was changed to Mosaic Technologies, Inc. (Mosaic). Approximately one week after incorporation, John Marshall replaced Williams as the chief executive officer. Rees asserts that from this time until May 16, 1983, Marshall assured him by telephone that he (Rees) would retain the exclusive recruitment contract. During this period Rees also continued to provide Mosaic with competitive information in response to Marshall's telephone requests. However, there is no indication of this in either the court's recitation of the facts or in Rees' affidavit regarding the frequency of such requests. On April 15, 1983, Rees prepared and submitted an invoice for

98. Rees, 742 F.2d at 767.
99. Id. at 766. For convenience, and because the name change is not a significant fact, the corporation will be referred to as Mosaic, even during the times before it officially changed its name.
100. For example, on April 19, 1983, Rees asserts that Marshall called him at his office in Pittsburgh and asked for the latest information Rees could get on a certain computer hardware and software system. The information was needed in anticipation of "high-level" negotiations between Mosaic and two major investment firms. Affidavit filed by Appellant at 2 (July 18, 1983), Rees v. Mosaic Technologies, Inc., 742 F.2d 765 (3d Cir. 1984).
101. The invoice was addressed to Work Stations, Inc. in New Hampshire and marked for the attention of Mitchell. It requested payment of $3,000 to cover
his services to date. This was approved by Marshall on April 19, 1983, and paid with a corporate check.

On May 16, 1983, Marshall informed Rees that he would no longer have the exclusive recruitment contract and could not recruit further for Mosaic.

B. District Court

On May 25, 1983, Rees filed a complaint with the Federal District Court for the Western District of Pennsylvania for a declaratory judgment, injunctive relief, an accounting, and damages.102

Acting on Rees’ amended complaint,103 the district court granted Mosaic’s motion to dismiss for lack of in personam jurisdiction.104 The court first addressed the question of whether the preincorporation activities of the promoter could be considered to be the activities of the corporation. Deciding in the negative, the court relied on the well established fact that “[a] corporation does not exist as an entity until incorporated.”105 Applying this to the issue of personal contacts, Judge Weber held that these preincorporation activities could not be used to provide the basis for the minimum contacts necessary to exert personal jurisdiction over Mosaic.106

Next, addressing Rees’ contention that Mosaic’s ratification of the preincorporation activities subjected Mosaic to personal jurisdiction, the court acknowledged that ratification would subject Mosaic to certain liabilities. However, the court limited this result to the

102. The declaration sought was that Rees had an exclusive service contract for the executive positions yet to be filled by Mosaic. The injunction sought to prevent Mosaic from filling these positions on its own. The accounting was to determine the commissions due Rees for the positions already filled by Mosaic. Brief for Appellant at 4, Rees v. Mosaic Technologies, Inc., 742 F.2d 765 (3d Cir. 1984).

103. After Rees filed his complaint, and before Mosaic filed any responsive pleading, the district court, sua sponte, raised the issue of in personam jurisdiction. Rees then filed an amended complaint. Id. at 3-4.

104. Rees, 570 F. Supp. at 32.

105. Id. Having decided this, the court logically reasoned that because the corporation did not yet exist, it cannot have acted. Id. (citing 18 AM. JUR. 2d, Corporations § 119 (1963)).

106. Id. at 33. The court basically used the following syllogism: Personal jurisdiction requires that the subject act within the forum. Preincorporation activities in the forum are not activities of the corporation, and the corporation does not exist to avail itself of the forum. Therefore, the preincorporation activities cannot be used to exert personal jurisdiction over the foreign corporation. Id.
substance of the activities and denied any jurisdictional consequences.107 Having ruled out any help for Rees in the preincorporation activities, the court turned its attention to the postincorporation activities.

After rejecting any significance in Williams’ presence in Pennsylvania after incorporation,163 the court looked to Mosaic’s activities in Pennsylvania. Finding them short lived and unrelated to Rees’ exclusive service contract, Judge Weber found them an insufficient basis for personal jurisdiction.109

C. Court of Appeals

Rees appealed this decision to the Third Circuit Court of Appeals.110 After reviewing the facts in somewhat greater detail than did the district court111 and summarizing the constitutional standard to be followed,112 Judge Adams laid out the Proctor test as the analysis used by the courts of Pennsylvania.113 The court then analyzed the postincorporation activities of Mosaic and, agreeing with the district court, concluded that “[w]here the issue before us based solely on the postincorporation activities ... there [would be] insufficient contacts with Pennsylvania to provide a basis for personal jurisdiction.”114

107. Id. (The court stated: “It is simply a matter of contract law.”).
108. Id. (relying on International Shoe, 326 U.S. at 317, the court stated that “the presence of an officer or agent in a forum for isolated activities in the corporation’s behalf is insufficient to subject [Mosaic] to in personam jurisdiction.”).
109. Id. Although the court did acknowledge “isolated” telephone calls with Marshall in New Hampshire, it did not mention the nature of the calls or the invoice and subsequent payment. Id. Cf. supra notes 100, 101.
110. Rees v. Mosaic Technologies, Inc., 742 F.2d 765 (3d Cir. 1984). The Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States (Retired), was sitting by designation with Circuit Judges Adams and Seitz. Judge Adams wrote the opinion for the court.
111. Id. at 766-67. Specifically, Judge Adams discussed the business nature of the calls between Rees and Marshall (allegedly affirming the contract and requesting competitive information on other companies) and the payment of the invoice by Marshall. Id. at 767.
112. Id. at 767-68 (cases relied upon include International Shoe for the requirement that minimum contacts must be found to exist between Mosaic and Pennsylvania, and World-Wide Volkswagen, for the requirement that these contacts must be such that Mosaic could expect potential liability in a Pennsylvania court).
113. Rees, 742 F.2d at 768. For a review of the elements of this test, see supra notes 65-70 and accompanying text.
114. Rees, 742 F.2d at 768. The acts relied upon by the court were: (1) the telephone calls between Rees and Marshall; (2) the request for competitive information by Marshall; and (3) the payment of the invoice. The court juxtaposed
Having reached this conclusion, the issue in the case became clearly defined. With the postincorporation activities removed from consideration, the only possible justification for exerting jurisdiction over this nonresident defendant would be a finding of purposeful contacts in the form of preincorporation activities and a connection between these activities and the defendant.\textsuperscript{115} The court first considered the question whether such preincorporation activities could be used to find minimum contacts.

As a foundation for an analysis of an appellate court decision, a brief description of certain aspects of the judicial process in a common-law system is appropriate at this juncture.\textsuperscript{116} Establishing how the system should work will provide a basis for determining whether it has worked in this case.

1. The Judicial Process

An appellate court, having been presented with a case demanding resolution, should first look to relevant precedent for guidance in making its decision, thus protecting the system's need for efficiency and fairness.\textsuperscript{117} Clear precedent, however, is frequently an unavailable luxury for courts of appeal,\textsuperscript{118} as the instant case plainly demonstrates. This result may be due to changes in society making the existing precedent less easily supported.\textsuperscript{119} The case may present a fact

\textsuperscript{115} By performing the analysis in this order, instead of attributing the acts to the defendant first and then looking to see whether the acts were sufficient for jurisdiction, the court would obviate the possibility of the new precedent being mere dicta. However, the court was not “reading the novel” to see what would happen in the last chapter but rather was writing it with full knowledge of the ending.

\textsuperscript{116} The reader is enthusiastically directed to Waits, supra note 8, for a thoughtful article on the appellate judicial process and its use as a tool for analysis of Supreme Court decisions in the area of state court jurisdiction.

\textsuperscript{117} Waits, supra note 8, at 920. Such a method of dispute resolution takes advantage of the system’s “inherited wisdom” and provides members of society with a means of knowing how to structure their behavior so as to avoid negative legal consequences. Id. at 920 n.21.

\textsuperscript{118} If the appeal was discretionary, and the lower court had properly applied the clear precedent, there would be no reason for the appellate court to grant a review.

\textsuperscript{119} Id. at 921. Compare Plessy v. Ferguson, 163 U.S. 547 (1896) (in the area of race discrimination, separate but equal railroad coaches for blacks and whites
pattern not yet encountered by the courts (which is apparently the situation in the instant case), or "seemingly applicable precedents [may] point in opposite directions."120 When faced with such a situation, then, the court must either change the existing precedent to include the fact situation before it, or create new precedent.121 In this way, a particular area of the law will evolve from general guidelines to more specific directives, although there is no assurance that fact patterns will present themselves in such a convenient order that the evolution will be without hitches or aberrations.122

Therefore, the judge, who finds himself without clear precedent upon which to rely, must approach his decision in another way. Certainly, the court will want to consider similar areas of the law to see whether a solution may be found there. In so doing, it will try to find "comfort in the conviction that the decision and the rule announced fit with the feel of the body of our law—that they go with the grain rather than across it or against it . . . ."123 This search, even when faithful, will not, or perhaps cannot, eliminate a second level of decision making—"trained intuition" or judicial "hunch."124 The more difficult the decision, i.e., the less certainty offered by the existing principles, the more the judge will have to


120. Waits, supra note 8, at 920. Professor Waits acknowledges that in this situation, the problem often is really the difficulty in determining correctly what is the preceding cases actually say, rather than in applying their results. Id. at 920 n.26.

121. Id. at 921. Justice Cardozo's eloquent vehemence advised that "[t]hose [legal principles] that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void." Id. at 922 n.35 (quoting B. Cardozo, The Nature of the Judicial Process (1921), reprinted in Selected Writings of Benjamin Nathan Cardozo 114 (M. Hall ed. 1947)).

122. An example of this evolutionary process is the area of personal jurisdiction. International Shoe (1945) gave the general requirement of minimum contacts; Hanson (1958) refined this to require a search for purposefulness in the contacts; and Worldwide Volkswagen (1980) established that the defendant should reasonably expect to be haled into the foreign court. See generally Waits, supra note 8, at 622-23. Also, consider how much smoother the development of the constitutional standard for state court jurisdiction would have been had McGee (1957) either not occurred at all, or had occurred after the court had more fully developed the standard.

123. K. Llewellyn, The Common Law Tradition: Deciding Appeals 191 (1960) [hereinafter cited as Llewellyn], cited in Waits, supra note 8, at 925 n.57. Consistency in the law, including abouting fields, is always a goal, albeit one which sometimes must be sacrificed. Waits, supra note 8, at 924-25.

rely on the value judgments inherent in his "hunch." In the absence of specific guidelines, these value judgments must be tested against more general principles of the law, each side giving a little until a sense of what is right is achieved.

Frequently, however, the courts' opinions will not reflect this reliance on value judgments. Often the court seeks to protect the tradition that judges merely "find" the law, they do not make it. This results in decisions which appear to be the mandate of existing law, when in fact the precedents are not nearly so clear. Another explanation for this type of opinion is that the judge may be willing to admit to only one kind of rationality, namely logic and the scientific method. Neither can be readily used to justify values. If the appellate court provides the true rationale for its decision, however, it will enhance the guidance function of the opinion when applied to a unique set of facts by a subsequent court.

With these guidelines in mind, attention to the court of appeals' analysis of the issue of first impression presented in Rees is appropriate.

Decisions, 14 Cornell L.Q. 274, 283 (1929) ("hunch" with respect to legal principles).
125. Gross, The Theory of Judicial Reasoning—Toward a Reconstruction, 66 Ky L.J. 801, 804 (1978). Thus, it would seem that those who have occasion and are willing to indulge in the oft-quoted adage that "hard cases made bad law" are actually expressing a lack of confidence in the judicial "hunch."
126. See Waits, supra note 8, at 929-31 (Professor Waits discusses the role of neutral principles—principles of general applicability—as a stabilizing influence on the judicial process).
127. Id. at 927. "The masking of value issues may derive from a fear of public acceptance if the general citizenry realizes the breadth of judicial choice." Id. at 932 n.109. This fact leads to the result that lawyers, conditioned by this tradition, often will either fail to spot the values or fail to bring them before the court for fear of reprisal. Id. at 927.
128. Id. at 932. This method of opinion writing has been called the Formal Style and has been described as one: "in which the appellate judges [seek] to do their deciding without reference to much except the rules, [seek] to eliminate the impact of sense, as an intrusion, and [seek] to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court." Llewellyn, supra note 123, at 5-6, cited in Waits, supra note 8, at 932.
129. Waits, supra note 8, at 933. But, if they are the product of a careful analysis, value judgments can be rational. Id.
130. Id. at 934.
2. Evaluation

a. Preincorporation Activities in Jurisdictional Calculus

The court of appeals disagreed with the district court and held that the preincorporation activities of the promoter can be used against the subsequently formed corporation in determining whether personal jurisdiction should be allowed.\textsuperscript{131} As noted earlier, the court recognized that because this question was one of first impression, it would have to make its determination without established precedent. To do so, it turned to "parallel considerations" for guidance.\textsuperscript{112}

After correctly concluding that a corporation cannot have an agent prior to incorporation because it does not legally exist beforehand,\textsuperscript{133} the court looked to the circumstances under which a corporation will be liable for a promoter's contract.\textsuperscript{134} To fully support its eventual conclusion that the acts of the promoter can be attributed to the corporation, the court held that the corporation must show that it has done more than merely adopt the preincorporation act;

\textsuperscript{131} Rees, 742 F.2d at 769.

\textsuperscript{132} Id. at 768. See also supra note 7.

\textsuperscript{133} Rees, 742 F.2d at 768. This proposition has been recognized and established for many years. See Wall v. Niagara Mining & Smelting Co., 20 Utah 474, 478, 59 P. 399, 400 (1899) ("[I]t may be assumed as true that promoters and incorporators \[sic\] have no standing in any relation of agency, since that which has no existence [the corporation to be formed] can have no agent . . . ."); 1 A. Fletcher, Encyclopedia Corporations § 205, at 418 (1983) ("As well say as child in ventra sa mere may enter into a contract, or that its parents may bind it by contract.") [hereinafter cited as Fletcher]. See generally 18 Am. Jur. 2d Corporations § 119 (1965).

\textsuperscript{134} Rees, 742 F.2d at 769. To support the conclusion that such liability can exist, Judge Adams cited two cases: (1) Harnett v. Ryan Homes, Inc., 360 F. Supp. 878 (E.D. Pa. 1973), aff'd, 496 F.2d 832 (3d Cir. 1974); and (2) McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 216-17, 134 A.2d 873, 876 (1957). Although both cases stand for the proposition for which they are cited, they are poorly chosen in light of the next conclusion the court attempts to draw. See infra note 135 and accompanying text (the requirement that the contract be ratified so its effect will relater back).

The Hartnett court observed that it is obvious that a corporation would be liable for the obligations of its promoters which it ratifies or adopts. Hartnett, 360 F. Supp. at 893. However, under the facts of that case, the court concluded that the corporation, once formed, repudiated the promoter's activities. Id. Therefore, the court stated the applicable law but did not have an opportunity to apply it.

McCloskey also states this rule, but under its facts, the court is required only to find that the preincorporation contract was accepted by the corporation once it was formed. McCloskey, 134 A.2d at 876-77. Ratification was not needed because no relation back in time was required.

Thus, neither of these cases can stand for anything but the general proposition
that is, the corporation must have ratified the act.\textsuperscript{135} This is an important distinction because it is only upon ratification that the corporation’s relationship to the acts of the promoter will relate back to the time of the acts themselves. Such a result cannot be reached if the corporation has merely adopted the contract.\textsuperscript{136}

While both adoption and ratification presuppose that the acts were performed by one claiming to act on account of another, ratification assumes there was a principal in existence at the time the other acted.\textsuperscript{137} This is the difficulty which the court of appeals appears to have ignored. The court found that “[t]he acts of ratification relate back to the time of the original activities and establish an agency relationship permitting the acts of the promoter to constitute, in effect, acts done by the corporation.”\textsuperscript{138} The error in the court’s reasoning is the conclusion that ratification establishes the agency relationship while in fact the ratification depends upon the prior existence of the agency relationship.\textsuperscript{139}

that a corporation can adopt a contract made by a promoter and thereby become presently liable under it.


\textsuperscript{136} The consequence to the corporation of both ratification and adoption is full liability on the contract. See Fletcher, supra note 133, § 212. Thus, courts frequently use the two theories interchangeably when the question of present liability arises. See also supra note 134.

\textsuperscript{137} However, the timing of the two theories is different. With an adoption, the corporation becomes a party to the contract as of the time of adoption. Henn & Alexander, supra note 135, § 111. The theory behind this is that the contract between the promoter and the third party is an implied continuing offer to the corporation. Id.

With ratification, “to talk technical even though fictitious language, [it] ‘relates back’ in time to the date of the act by the agent.” In re Eastern Supply Co., 267 F.2d 776, 778 (3d Cir. 1959), See also Henn & Alexander, supra note 135, § 111. Ratification, though, carries with it the connotation of relating back. Therefore, the preferred term is adoption. McGrillis v. A. & W. Enterprises, Inc., 270 N.C. 637, 643, 155 S.E.2d 281, 286 (1967).


\textsuperscript{139} See supra note 137. The court cited as its authority 3 Am. Jur. 2d Agency § 160 (1962), which states that “if the person in whose name the act was performed subsequently ratifies . . . what has been done, the ratification relates back and
The lack of an agency relationship at the time the alleged agent acted has been dispositive in past cases. For example, in Plaza Realty Investors v. Bailey,Keynote the plaintiff attempted to assert individual jurisdiction in New York over a nonresident general partner based on contacts with New York of an agent of the general partnership occurring before the defendant joined the partnership. The court was unwilling to attribute the agent's contacts to the defendant when they occurred prior to the creation of the agency relationship.Keynote Further, the appellate court in Rees failed to address the question which the district court found dispositive—that even if there might have been a ratification, such "does not appear to have any jurisdictional consequences [and was] simply a matter of contract law."Keynote Although there is no case law to establish a connection between ratification and jurisdictional liabilities, there are cases which limit ratification to the terms of the contract. An early Texas case, Weatherford M.W. & N.W. Railroad v. Granger, held:

[W]hen it is said that when a corporation accepts the benefit

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supplies original authority to do the act.'"Rees, 742 F.2d at 769. This statement in turn cites to 2 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 278 (3d ed. 1959), which states that "[f]or effective ratification it is essential, too, that the principal should himself have been an ascertained person competent to enter into the transaction at the time when the so-called [sic] agent acted . . . ." Rees, 742 F.2d at 269.

The case cited by the court of appeals for support, Comprehensive Group Servs. Bd. v. Temple Univ., 363 F. Supp. 1069 (E.D. Pa. 1973), dealt with a situation where the president of the board authorized the institution of a suit before getting the board's approval. The board's subsequent ratification constituted authorization and related back to the time of the suit. Id. at 1098 n.52. Thus, the principal was clearly in existence at the time of the agent's act.

These authorities do not support the Rees court's conclusion. The difficulty is that the court sees general statements of the law in prior cases and seizes upon them without considering the dissimilarities in fact patterns. See Waits, supra note 8, at 922.

141. Id. at 347. While Plaza Realty is not a preincorporation activity case, it demonstrates one court's recognition of the agency relationship in jurisdictional questions. See also McArthur v. Times Printing Co., 48 Minn. 319, 51 N.W. 216 (1892) (Employee suing for breach of an oral employment contract made initially with promoter to run for one year. The corporation subsequently formed and adopted the contract but claimed the contract was void under the statute of frauds because it could not be performed within one year. The court noted that a corporation cannot ratify a contract, so there can be no relation back to the making of the contract with the promoter. Therefore, the defendant's contract dated from the time of adoption, and the contract was not within the statute of frauds.).
143. 86 Tex. 35, 24 S.W. 795 (1894).
of a contract made by its promoters it takes it *cum onere* [with the burden], it is important to understand distinctly what is meant . . . . The benefits of a contract are the advantages which result to either party from a performance by the other and in like manner its burdens are such as its terms impose.\[144\]

The court of appeals simply accepted without discussion that the liability Mosaic assumed under the contract with Rees included the possibility of being called into Pennsylvania to defend itself.\[145\]

Thus, the court of appeals reached the conclusion that preincorporation activities of a promoter may be figured into the jurisdictional calculus.\[146\] However, this is unsupported by the court’s legal argument. The question then becomes, on what basis did the court make its decision? It is submitted that the answer lies in the value judgments of the court. This conclusion is reinforced by the very real possibility of abuse had the court decided the other way. For example, if a promoter’s activity could not lead to in *personam* jurisdiction, the promoter of a prospective east coast corporation

144. *Id.* at 35, 24 S.W. at 797.
145. *Rees*, 742 F.2d at 769. The argument that the contract adopted by Mosaic contained an implied term, as part of the bargained-for exchange, requiring Mosaic to submit itself to Pennsylvania jurisdiction may appear to overcome the objection that the liabilities involved are merely a question of contract law, but it cannot withstand closer scrutiny.

First, even when the contract contains an express calling for jurisdiction within a certain state, such a result will not necessarily follow. In Webb Research Corp. v. Rockland Indus., 580 F. Supp. 990 (E.D. Pa. 1983), the court considered possible jurisdiction of Pennsylvania courts over a Maryland defendant. The contract at issue contained a clause stating that the parties agreed to submit to Maryland jurisdiction. The court reasoned that “‘[s]uch a provision is a factor to be considered in determining whether jurisdiction is proper . . . but it is not determinative.’ *Id.* at 993. The court reasoned that the defendant’s strong contacts with Pennsylvania made jurisdiction there reasonable. This case points out that in the final analysis, it is the contacts with the forum state that will determine personal jurisdiction.

Second, under contract law, if a material term is missing from a contract, the court will provide it on the basis of a reasonableness standard. See, e.g., J. Calamari \& J. Perillo, THE LAW OF CONTRACTS § 2-13 (2d ed. 1977) (if price term is missing, reasonable price is implied; time for delivery is missing, reasonable time is implied). Thus, even if a jurisdiction clause was material, it could only be implied based on reasonableness, which is the constitutional standard anyway. If the missing term is not material, the courts will ordinarily refuse to supply it. *Id.*

Finally, there is no compelling reason why such a term should be implied favoring the plaintiff. Under exactly the same logic, a term could be implied requiring the plaintiff to come to the defendant’s forum.

146. *Rees*, 742 F.2d at 768-69.
could travel to California, contract for services the corporation would need, and return to the east coast to form the corporation. The corporation could then accept the benefits of this contract and refuse to pay.\textsuperscript{147} Because of the impracticality of filing an action for the breach in a distant forum,\textsuperscript{148} the creditor might be forced to simply accept the loss. If the fear of fraud perpetrated by the promoter and the later-formed corporation was the value judgment implicitly utilized by the court of appeals,\textsuperscript{149} its failure to so state has lead to a result that is overinclusive.

When a court includes a consideration of values into its decision making, it should do so only after weighing these values against established legal principles. In this way the court can strike the desired balance between the sometimes competing interests of individual justice and certainty of application of the law.\textsuperscript{150} With the value judgment described above, the general principles to be considered are those that have been laid down by the Supreme Court in the area of \textit{in personam} jurisdiction and incorporated into Pennsylvania’s analysis of the question. Certainly the court’s concern for protecting the resident contracting party from fraud perpetrated by out-of-state promoters and corporations does not run afoul of the Supreme Court’s philosophy. But the broad sweep of the court’s decision, encompassing the situation where the parties have dealt squarely with each other and the plaintiff has had ample opportunity to protect itself, ignores the Supreme Court’s established bias towards

\textsuperscript{147} A similar argument was given by Rees to the court of appeals, where the hypothetical service engaged by the promoter was the printing of brochures or prospecti. Brief for the Appellant at 6-7, Rees v. Mosaic Technologies, Inc., 742 F.2d 765 (3d Cir. 1984).

\textsuperscript{148} The corporation’s liability under the contract is not relevant to the jurisdictional question so it need not be discussed here.

\textsuperscript{149} The appeals court in \textit{Rees} never expressly identified or explained any value judgments, although some of its language is suggestive of a solution reached by means other than compelling logic. Having concluded that Mosaic’s liability relates back to the preincorporation acts, the court stated that it “\textit{see[s] no reason why} a corporate defendant could not reasonably anticipate” suit in Pennsylvania, and later added that “\textit{it would seem permissible} to consider in the jurisdictional decision” the preincorporation acts. \textit{Rees}, 742 F.2d at 769 (emphasis added).

\textsuperscript{150} This tension can arise in two situations. First, where the sympathies of the court are heavily slanted toward one party while the general principles favor the other; and second, when the court is faced with determining the content of a legal principle, whether to make it a certain (bright line) test or one where equities are to be balanced. See Waits, \textit{supra} note 8, at 926-27 (giving the area of due process as an example of a legal principle tending toward the uncertainty of balancing).
the defendant. The corporation is to be protected from being called into distant forums unless its own conduct would reasonably have led the corporation to believe that such an event might be forthcoming.\textsuperscript{151}

In the fact pattern presenting the fraud, there can be little doubt that the corporation would have knowledge of the activities of its promoter and, therefore, would be aware of the nature of the promoter's contacts with the forum state. Thus, by adopting the promoter's contract, the corporation can reasonably expect to be called there should a dispute arise.\textsuperscript{152} However, in the case where the dealings are fair, there is no reason to conclude that the corporation knows the nature of the promoter's conduct in the forum state or reasonably expects that a dispute will have to be litigated in the other party's forum.\textsuperscript{153}

Finally, the contact between the nonresident corporation and the forum may be merely fortuitous if there is no complicity involved.\textsuperscript{154} Under the facts where fraud is the issue, the forum state was chosen specifically because it was distant from the state of eventual incorporation. Where such a consideration is not involved, however, the promoter's reason for entering into the contract in the forum state may have been strictly his own convenience and not based on the needs of the corporation. Thus, when the corporation comes into existence and adopts the contract, it may do so simply because it is

\textsuperscript{151} This was the refinement supplied by \textit{World-Wide Volkswagen} for the \textit{Hanson "purposefully availing"} test. \textit{Cf. supra} note 122.

\textsuperscript{152} Another situation where the defendant foreign corporation might be held to have met the Supreme Court standard is where the corporation, once formed, is deemed to be nothing more than the \textit{alter ego} of its promoter. Under these facts, however, the plaintiff would be able to sue the promoter directly, as he presumably would have minimum contacts. \textit{See, e.g.}, Pepper v. Litton, 308 U.S. 295 (1939) (Court willing to "pierce the corporate veil" (disregard the corporate entity) when the defendant had treated the corporate enterprise as his own).

\textsuperscript{153} Even if the promoter, upon formation of the corporation, becomes one of its officers, his knowledge cannot be automatically imputed to the corporation. \textit{See} Steele v. Litton Indus., Inc., 260 Cal. App. 2d 157, 68 Cal. Rptr. 680 (1968) (corporation not bound by promoter's promise to transfer stock, even though promoter became president). \textit{But cf.} Chartrand v. Barney's Club, Inc., 380 F.2d 97 (9th Cir. 1967) (knowledge of preincorporation agreement between plaintiff and promoter who later became president, director, major stockholder, and guiding spirit of the corporation was imputed to the corporation).

\textsuperscript{154} In \textit{World-Wide Volkswagen}, 444 U.S. at 295, the Court reasoned that the defendant did not have sufficient contacts with the forum state because the fact the automobile had been driven there was merely a fortuitous event, not by the design of the defendant.
there and not because of any intent to take advantage of the forum state.

After the court of appeals' decision to consider preincorporation activities in the total contacts assessment, corporations might be well advised to repudiate all promoter contracts entered into in states where conducting a defense would be inconvenient or expensive.\textsuperscript{155} Even if the corporation decides such a move is too drastic, it might at least want to investigate the nature of the promoter's contacts with the forum state. This, however, would be expensive for the corporation and the conclusion reached by corporate counsel might not be the same as a subsequent court of law. In fact, these activities might be factored into the minimum contacts analysis.

The court of appeals would have avoided this overinclusive holding by being more open about the value considerations used to reach its decision. Fearing the possibility of collusion between the promoter and the corporation, the plaintiff could be allowed to show the existence of such fraud and thereby be permitted to use preincorporation activities to meet its burden of proof.\textsuperscript{156}

Otherwise, it would be limited to postincorporation activities. By this means the court can attack the abuse envisioned while at the same time avoid infringing on the rights of the foreign defendant as recognized by the Supreme Court and the forum state of Pennsylvania. Because Rees would not have been on notice of this new requirement, the court of appeals should have remanded the action with instructions that the plaintiff be given an opportunity to show fraud on the part of the defendant and its promoter.\textsuperscript{157} If Rees were unable to make such a showing, the action would be dismissed.

\textsuperscript{155} \textit{See infra} note 172 and accompanying text (discussion of effect of this on interstate commerce).

\textsuperscript{156} \textit{See} Strick, 532 F. Supp. at 953 ("Once the court's \textit{in personam} jurisdiction is challenged by the defendant, the plaintiff has the ultimate burden of proving that the non-resident defendant's activities in the forum state are sufficient to bring it within the reach of the court's jurisdiction.").

\textsuperscript{157} Some "badges" of fraud which a plaintiff might use to make such a showing include: the state of contract is a great distance from the state of incorporation; the services contracted for were readily available in or near the state of incorporation; the promoter let the plaintiff believe incorporation would be close by and is unable to explain why it actually occurred in a distant state; the corporation can offer no other explanation for its breach or default (although a \textit{bona fide} defense need not be offered to constitute a satisfactory explanation). If the state of incorporation is other than the state where the corporation does business, the inquiry should focus on the closer of the two. This list is not intended to be exhaustive, nor should any single element be considered dispositive.
b. Postincorporation Activities

Having concluded that the preincorporation activities were to be considered, the court of appeals turned to these activities to determine whether they were sufficient to constitute minimum contacts. Applying the Proctor three-prong test, the court found the contacts sufficient to meet the constitutional standard.

In its analysis of the first prong (purposefully availing), the purposefulness of the contacts was declared to have been established. Mosaic knew the contract would be performed substantially in Pennsylvania, even though it was to be the plaintiff who would be acting in the forum state, not the defendant. The court relied on Koenig v. International Brotherhood of Boilermakers to support this finding, but failed to account for a significant factual difference between the two cases. In order to distinguish its result from that in Lakeside Bridge & Steel Co. v. Mountain State Construction Co., the Koenig court made a special point to state that the performance by the plaintiffs in Pennsylvania was a necessary part of the contract. There is no evidence in Rees that the contract between Rees and Williams required or expected Rees to perform in Pennsylvania.

Also, the court specifically mentioned that Williams was a resident of Pennsylvania at the time he contracted with Rees. By this, it surely cannot mean to suggest that, in addition to its willingness to attribute Williams’ activities to Mosaic, it also would attribute Williams’ residence to the corporation. There is no doubt about Mosaic’s residence.

The court could not use the noncontract activities of Williams.

158. Rees, 742 F.2d at 769.
159. Id.
160. Id.
162. 597 F.2d 596 (7th Cir. 1979), cert denied, 445 U.S. 907 (1980). In Lakeside, the court held that the plaintiff’s performance of contract in forum state did confer jurisdiction over nonresident defendant where contract did not require the plaintiff to perform in forum state and the defendant had no control over place of plaintiff’s performance. Id., cited in Koenig, 284 Pa. Super. at 570, 426 A.2d at 641.
163. See supra note 73 and accompanying text. See also Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984) (discussed supra note 74 and accompanying text) (unilateral acts of plaintiff not sufficient for minimum contacts, even if acts in response to terms of a contract).
164. Rees, 742 F.2d at 769.
165. Mosaic was incorporated under the laws of Delaware and had New Hampshire as its principal place of business at the time of the suit. Id. at 766.
in Pennsylvania166 because to do so would contradict its conclusion that the cause of action arose out of the contacts with Pennsylvania—
the second prong of the Proctor test. The third prong is met, according to the court, because it would be fair and reasonable to exercise jurisdiction over Mosaic in light of Pennsylvania's legitimate interests.168 These interests were identified as the need to protect contracts made within the state and to provide a forum to its citizens when the contracts were breached. The former interest is more closely related to choice-of-law considerations,169 while the latter, standing alone, cannot be considered compelling.170 Recalling that these other interests are to be weighed against the defendant's interest in defending in its home forum, "other considerations being equal, the antiharassment value requires that the plaintiff go to the defendant . . . ."171

However, other things are not equal here. In addition to the forum state's interest, the interests of the interstate judicial system are to be weighed. By allowing jurisdiction based on preincorporation contracts, upon incorporation the contracts that threaten inconvenient forums will be repudiated and both parties will be injured. This would have an adverse effect on interstate commerce.172

Thus, even considering the preincorporation activities between

166. Williams used Rees' office primarily for the purposes of soliciting funds for the corporation-to-be. Id. at 767.
167. Id. at 769.
168. Id.
169. A state protects its contracts via its contract law, not by its forum. The question of choice-of-law is beyond the scope of this comment, but it should be noted that the Supreme Court, in Hanson v. Denkla, 357 U.S. 235, 253 (1958), found that choice-of-law considerations were inappropriate for purposes of determining jurisdiction.
170. As much as Pennsylvania would like to provide Rees with a forum, so would New Hampshire like to accommodate Mosaic. "Plaintiffs cannot always sue at home." Ratner, supra note 17, at 378.
171. Id.
172. Permitting jurisdiction under these facts may have the effect of discouraging promoters from using Pennsylvania services, thereby having a negative impact on interstate commerce. See Note, Asserting Jurisdiction Over Nonresident Corporations on the Basis of Contractual Dealings: A Four-Step Approach, 12 Pac. L.J. 1039, 1065 (1981). The consideration then becomes one of "imposition on the defendant's business insofar as it serves to impair the public interest in an open economy in our federal system." Note, Developments in the Law—State Court Jurisdiction, 73 Harv. L. Rev. 909, 985 (1960). In World-Wide Volkswagen, 444 U.S. at 293, Justice White cited the economic interdependence of the states as one of the two reasons for allowing federalism to limit jurisdiction.
Williams and Rees, minimum contacts should not have been found to exist. And even though they were found to exist, Mosaic's interest in defending in its home state and the negative effect on interstate commerce outweigh the forum state's interest in providing its citizens a forum.

IV. Conclusion

The court of appeals in Rees failed to meet the constitutional standard for minimum contacts by allowing Pennsylvania to exert personal jurisdiction over a nonresident defendant based on the preincorporation activities of the defendant's promoter. The Supreme Court has determined that a state may not require a foreign defendant to appear before its courts unless the defendant has purposefully availed itself of the privilege of doing business within the state such that it can reasonably anticipate being called there to defend itself. The state of Pennsylvania has expressly incorporated this standard in its long-arm statute as interpreted by the state courts.

In its analysis of this issue of first impression, the court of appeals relied on the agency principle of ratification, requiring a relationship back of the principal's liability to the making of the original contract. But the court failed to apply the rest of the rule which requires the principal to be in existence at the time of the contract before ratification is even possible. By protecting the resident plaintiff while ignoring the defendant bias clearly set forth by the Supreme Court, the court arguably was attempting to avoid the situation where a promoter enters into contracts and then forms the corporation in a distant state to make it difficult for the third party to sue in the event of a default. A distinctly narrower holding and a more open recognition of its concerns would have provided the desired protection without violating the defendant's rights.

When a court is faced with a fact pattern and an issue which cannot be resolved by application of existing precedent, it is incumbent upon that court to provide a full discussion of its reasoning to explain its decision. Whether the answer was found in an analogous area of the law, or in the judicial hunch or intuition of the judge, old precedent is being reshaped or new precedent is being created and it must be explained. Only in this way will the court's opinion provide the guidance necessary for subsequent lower courts to understand the new rule and apply it correctly. The court of appeals in Rees failed to do this.

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