In Personam Jurisdiction - Minimum Contacts - Ratifications - Promoters Contracts

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IN PERSONAM JURISDICTION—MINIMUM CONTACTS—RATIFICATION—PROMOTERS CONTRACTS—The Third Circuit Court of Appeals has held that the pre-incorporation acts of a promoter, when coupled with post-incorporation ratification, may suffice to justify the exercise of in personam jurisdiction over a foreign corporation in the state of pre-incorporation activities.

Rees v. Mosaic Technologies, Inc. 742 F.2d 765 (3d Cir. 1984).

In November, 1982, Donald Rees entered into an oral agreement in Pennsylvania with Frank Williams, then promoter and later first president of Mosaic Technologies, Inc.¹ Both were residents of Pennsylvania at the time of contracting.² The terms of this exclusive search contract required Rees to recruit personnel to fill upper-level management positions within the corporation.³ During this time, Rees dealt primarily with Williams, although two other promoters of Mosaic, Douglas Calloway and James Marshall were peripherally involved.⁴

On April 6, 1983, Mosaic was incorporated under the laws of Delaware, with its principal place of business in New Hampshire.⁵ That same month, James Marshall, a New Hampshire resident, replaced Williams as the new corporation's chief executive officer.⁶ From then on, Rees dealt primarily with Marshall, via telephone conversations between their respective offices in Pennsylvania and New Hampshire.⁷ It was during this latter period⁸ that Marshall allegedly assured Rees that he would retain the exclusive search

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². Id. at 767.
³. Id. at 767. An additional purpose of the contract was for Rees to supply Williams with competitive information concerning similar businesses, and to develop business contacts for Williams, in an effort to get the corporation started. Id.
⁴. Id. Both Williams and Calloway utilized Rees' office until mid-April, 1983, in an effort to hold down pre-incorporation expenses. Marshall, on the other hand, operated exclusively out of New Hampshire. Id.
⁵. Id. at 766. The corporation was first incorporated under the name Work Stations, Inc., but that name was later changed to the current Mosaic Technologies, Inc., on May 6, 1983. Id. at 767.
⁶. Id.
⁷. Id. On April 19, 1983, Marshall approved payment of an invoice submitted by Rees and dated April 15, 1983, for services performed. This payment was made to Rees on a company check. Id.
⁸. From mid-April, 1983, to May, 1983. Id.
contract for the corporation. On May 16, 1983, however, Marshall terminated the exclusive search contract and instructed Rees to cease all recruiting efforts. Rees responded by bringing an action against Mosaic in the United States District Court for the Western District of Pennsylvania. Rees sought a declaratory judgment affirming the existence and validity of the contract, an order enjoining Mosaic from recruiting for any further positions for which Rees held the exclusive search contract, and for damages. Mosaic, in response, moved to dismiss for lack of in personam jurisdiction.

In the district court, Rees asserted that Mosaic's subsequent ratification of the pre-incorporation agreement had created the necessary minimum contacts sufficient to justify the exercise of in personam jurisdiction. In a three-part analysis, the district court disagreed.

The district court first held that the pre-incorporation activities of the promoters could not be attributed to the company inasmuch as the corporation did not then exist. As a result, the court reasoned, subsequent incorporation could not give rise to the necessary minimum contacts for the valid exercise of in personam jurisdiction over the foreign corporation.

Rees next argued that Mosaic's ratification of the pre-incorporation agreement, entered into in Pennsylvania, had subjected Mosaic to in personam jurisdiction. The court disagreed, concluding that to adopt Rees' argument would serve to subject a foreign corporation to liability for contacts established after the fact.

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9. 742 F.2d at 767.
10. Id. Rees claimed that he had already contracted with recruits for several positions within the company. Id.
12. Id. at 32. Mosaic also sought dismissal on two other grounds: (1) failure to state a claim; and (2) as an exercise of the court's discretion. The court, however, did not address these issues because it found that Rees could not establish in personam jurisdiction. Id.
13. Id. at 32-33.
14. Id.
15. Id. (citing Bonner v. Travelers Hotel Inc., 276 Pa. 492, 120 A. 467 (1923); 18 Am. Jur. 2d Corporations § 119 (1965)).
16. 570 F. Supp. at 33. The basis for this reasoning is that since the corporation does not exist at the time of contracting, it cannot later avail itself of the forum state's protection in the event of a dispute (citing Procter & Schwartz, Inc., v. Cleveland Lumber Co., 228 Pa. Super. 12, 323 A.2d 11 (1974); Hicks v. Kawasaki Heavy Indus., 452 F. Supp. 130 (M.D. Pa. 1978)).
17. 570 F. Supp. at 33.
18. Id. The court could find no authority in support of Rees' contention, nor did it cite precedent in support of its reasoning. See id.
Finally, the court held that Mosaic’s post-incorporation contacts with Pennsylvania were insufficient to justify a finding of in personam jurisdiction. The suit was then dismissed.

On appeal, the Court of Appeals for the Third Circuit reversed. The court began its analysis with a discussion of in personam jurisdiction and its due process implications. Relying on the mandates of Rule 4(e) of the Federal Rules of Civil Procedure, the court followed Pennsylvania law governing in personam jurisdiction. Judge Adams, writing for the court, specifically noted that Pennsylvania’s long-arm statute provided jurisdiction over the person with the most minimum of contacts within Pennsylvania, and to the fullest extent allowed under the due process clause of the United States Constitution.

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19. *Id.* The only activities occurring in Pennsylvania after Mosaic’s incorporation related to securing additional venture capital, and had nothing to do with Rees’ recruitment contract. The court held that the telephone conversations between Rees and Marshall, and the payment by company check to Rees for services rendered, were insufficient to support in personam jurisdiction over Mosaic. *Id.* at 33 (citing International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (casual presence of the offending corporation, or isolated activities in the forum state, will not give rise to a cause of action there)).

20. *Fed. R. Civ. P.* 4(e) provides:

(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule; except that service by mail must be made pursuant to the procedures set forth in paragraph (8) of subdivision (d) of this rule. *Id.* See also Hanna v. Plumer, 380 U.S. 460 (1965) (federal courts sitting in diversity must apply state substantive law and federal procedural law).

21. Judge Adams was joined by Seitz, J., and Stewart, J. (Late Associate Justice of the United States Supreme Court, sitting by designation).

22. 42 PA. STAT. ANN. § 5322(b)(Purdon 1981). This section provides:

(b) Exercise of full constitutional power over nonresidents.— In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this 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.

*Id.*

23. 742 F.2d at 767-68. See also Koenig v. International Bd. of Boilermakers, 284 Pa. Super. 558, 567, 426 A.2d 635, 639 (1980) (Pennsylvania’s long-arm statute is coextensive
Using the above as a starting point, Judge Adams next analyzed the applicable case law defining the lower limits of minimum contacts sufficient to exercise in personam jurisdiction in a Pennsylvania court over a foreign entity. The court concluded that the proper standard was to be found in Procter & Schwartz, Inc. v. Cleveland Lumber Company, which set forth a three-prong test.

with the scope of personal jurisdiction as permitted by the due process clause of the fourteenth amendment). Pennsylvania’s long-arm statute is known as a “generic” statute in conflicts terms.

24. 742 F.2d at 768. Citing International Shoe Co. v. Washington, 326 U.S. 310 (1945), the court stated that, “Consonant with due process, personal jurisdiction may be asserted over a nonresident corporation so long as there exist ‘minimum contacts’ between the corporation and the forum state.” 742 F.2d at 768.


26. 742 F.2d at 768. At this juncture, the court relied upon World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) for the proposition that predictability of the legal system is only possible when a defendant is able to structure its activities within a forum to the extent that by those activities it “should reasonably anticipate being haled into court there.” Id. at 297.

For an excellent discussion of World-Wide Volkswagen Corp. v. Woodson, see World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead, 56 Notre Dame Law. 65 (1980).

In World-Wide, the plaintiffs purchased an automobile from defendant Seeway Volkswagen. Thereafter, plaintiffs relocated to Arizona. While driving through Oklahoma, they were involved in an accident, the result of which caused the plaintiffs to be severely burned. The plaintiffs sued defendants Seeway and World-Wide in Oklahoma. World-Wide claimed that Oklahoma had no jurisdiction over it, as its place of business was in New York, that it distributed vehicles, parts and accessories under contract, to automobile dealers in New York, New Jersey and Connecticut, and that it did no business in Oklahoma. 444 U.S. at 288-89. The United States Supreme Court agreed, concluding that these contacts did not make it foreseeable that World-Wide would subsequently be called to defend itself in Oklahoma. Id. at 298.

In what is the most significant case to date on in personam jurisdiction, the World-Wide Court expressly reaffirmed its position that before a court can exercise personal jurisdiction over a non-resident, there must exist certain “minimum contacts” between the defendant and the forum in order to satisfy due process requirements. Id. at 291. The Court reasoned that these “minimum contacts” protected the non-resident against the inconvenience of defending in a distant forum. Id. at 291-92. Moreover, the Court also revived the underlying principle of Pennoyer, and stated that requiring minimum contacts acts to ensure that states “do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” Id. at 292. In support of this dual policy underlying the minimum contacts standard, the Court strongly emphasized “reasonableness” as a basis for jurisdiction over the non-resident. Id. The Court noted that one consideration with regard to “reasonableness” was the state’s interest in protecting the rights of its citizens. Id. Upon reflection, it is clear that the third prong of the Procter test centers around these considerations. See infra notes 122-29 and accompanying text.

Also implicit in the Court’s rationale in World-Wide was that the cause of action must be directly related to the defendant’s activities within the forum state. This is, essentially, the second prong of the Procter test. In World-Wide, the fact that the defendant had never conducted its business within the forum state was one of the key considerations to the
The defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws . . . . The cause of action must arise from defendant's activities within the forum state . . . . Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable.27

Applying this test to the instant case, the court stated that the post-incorporation activities of Mosaic, standing alone, would not have created sufficient contacts to establish jurisdiction over Mosaic.28 Nevertheless, Judge Adams disagreed with the district court's determination that pre-incorporation activities could not be figured into the jurisdictional equation.29 According to Judge Adams, while no case law concerning the jurisdictional aspects of pre-incorporation activities could be found, the basic notion of post-incorporation ratification of pre-incorporation activities was well founded.30 He further noted that the acts of the promoter, an agent of the corporation, once ratified, related back to the time of the original activities. Therefore, the corporation would be liable for the acts of the promoter.31 Thus, Judge

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27. 228 Pa. Super. at 19, 323 A.2d at 15.
28. Proctor, 742 F.2d at 768. See also supra note 19. Judge Adams compared Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984), as an analogous situation where the circuit court applied the Proctor test to find minimum contacts lacking. 742 F.2d at 768.
29. 742 F.2d at 768.
30. Id. at 768-69 (citing 18 Am. Jur. 2d Corporations § 119 (1965) for the proposition that "a corporation does not exist as a legal entity until incorporated, and therefore cannot have agents before its organization." 742 F.2d at 768). See also Harnett v. Ryan Homes, Inc., 360 F. Supp. 878, 893 (W.D. Pa. 1973) (post-incorporation ratification can form the basis for liability from pre-incorporation agreements), aff'd 496 F.2d 832 (3d Cir. 1974).
31. 742 F.2d at 769. See 3 Am. Jur. 2d Agency § 160 (1962); "The acts of ratification
Adams concluded that under these circumstances, the first two prongs of the Procter test had been met; i.e., by entering into the contract in Pennsylvania, Mosaic had availed itself of the protections and benefits of Pennsylvania law, and, also, that the cause of action arose from its acts within Pennsylvania.\(^{32}\)

Finally, Judge Adams resolved the third prong of the Procter test by stating simply that jurisdiction was both fair and reasonable in light of Pennsylvania's desire to ensure the performance of contracts made within its borders.\(^{33}\) The judgment of the district court was then vacated, and the case was remanded for further proceedings consistent with the court's opinion.\(^{34}\)

The Rees decision raises two distinct yet related issues. Namely, whether the correct interpretation of Pennsylvania law on ratification was applied,\(^{35}\) and whether the Procter test, still valid in light of the latest cases handed down by the Supreme Court,\(^{36}\) was properly administered to render in personam jurisdiction permissible. To accurately determine the significance of Rees, the historical scope of ratification and in personam jurisdiction must be ex-

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." Id. at § 160. See also Comprehensive Group Serv. Bd. v. Temple University, 363 F. Supp. 1069, 1098 n.52 (E.D. Pa. 1973) (failure to repudiate constitutes acquiescence under Pennsylvania law, thus binding the corporation); McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 216-17, 134 A.2d 873, 876 (1957) (adoption, acceptance or ratification of pre-incorporation contract causes liability both at law and in equity on the contract).

32. 742 F.2d at 769 (citing In re Eastern Supply Co., 267 F.2d 776, 778 (3d Cir. 1958) (ratification of an act, purportedly done for principal by agent, is as effective at the time the act was done), cert. denied, 361 U.S. 900 (1959)). The court also distinguished Bonner v. Travelers Hotel, Inc., 276 Pa. 492, 120 A. 467 (1923), on which the district court had relied to find no ratification. The Third Circuit indicated that Bonner properly stood for the proposition that a corporation will not be bound by a single promoter's contract if the corporation immediately and expressly repudiates it upon incorporation. 742 F.2d at 769.

33. 742 F.2d at 769. The court further stated that under the circumstances of the case, Mosaic could reasonably have anticipated litigation in Pennsylvania. Id. See Koenig v. International Bhd. of Boilermakers, 284 Pa. Super. 558, 571, 426 A.2d 635, 641-42 (1980). See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (corporation's contacts with forum state should be of such a degree that corporation could reasonably anticipate being sued there). The court also placed great emphasis upon the fact that Mosaic's promoters, who dealt with Rees and subsequently ratified the contract, were at all times acting with authority and later held top-level positions within the corporation. 742 F.2d at 769.

34. 742 F.2d at 770.

35. Under the mandates of Hanna v. Plumer, 380 U.S. 460 (1965), federal courts sitting in diversity must apply the substantive law of the state in which they sit. Therefore, in the discussion pertaining to post-incorporation ratification, this note will deal primarily with Pennsylvania law as interpreted by the supreme court.

In Pennsylvania, although case law is relatively scarce, the law is firmly established that a contract entered into between a promoter and third party, without more, is not binding upon a subsequently formed corporation. This general rule, which dates back to the English Common law, is based on well-grounded policy considerations. On the other hand, the law is equally clear that liability will normally be imposed upon a corporation that accepts the benefits of contracts entered into between its promoters and third parties prior to incorporation. This principle, first adopted in Pennsylvania in *Bell's Gap Railroad Co. v. Christy*, has come to be

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37. See Tift v. Quaker City National Bank, 141 Pa. 550, 553, 21 A. 660, 661 (1891) (promise by single promoter, with no evidence of subsequent ratification, will not bind the corporation); Bonner v. Travelers Hotel Co., Inc., 276 Pa. 492, 497, 120 A. 467, 468 (1923) (contract by single promoter, immediately repudiated after incorporation, is but a contract between individual promoter and contracting third party); Solomon v. Cedar Acres East, Inc., 455 Pa. 496, 499-500, 317 A.2d 283, 285 (1974) (knowledge possessed by a single promoter, having only a minority interest, cannot bind the corporate defendant). See also 1A *FLETCHER CYCLOPEDIA CORPORATIONS*, ch. 9 §205 (1983); 18 *AM. JUR. 2D* Corporations §119 (1965).


39. These policy considerations stem from a fundamental principle of contract law which states that at least two competent parties are needed in order to enter into a binding agreement. If one of those parties is "incompetent," as that term is generally understood by the law, then the contract is void and of no effect. Because a corporation is not a competent party prior to its existence, it cannot have agents acting for it and thus imposing liability upon it. If the contrary were true, a newly formed corporation could be burdened with unknown liabilities affecting the interests of shareholders and others who deal with the corporation. *See RESTATEMENT (SECOND) OF CONTRACTS* § 9 (1979), and *RESTATEMENT (SECOND) OF AGENCY* § 20 (1957) and comment c. See also 1A *FLETCHER CYCLOPEDIA CORPORATIONS*, ch. 9 § 205 (1983).

40. Fletcher's treatise on corporate law states: American courts generally hold that a contract made by the promoters of a corporation on its behalf may be adopted, accepted or ratified by the corporation when organized, and that the corporation is then liable, both at law and in equity, on the contract itself, and not merely for the benefits which it has received.

1A *FLETCHER CYCLOPEDIA CORPORATIONS* §207 (1983)(see survey of American cases adhering to this rule in footnote 2). See also McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 216-17, 134 A.2d 873, 876 (1957), where the court held:

Where an agreement is entered into between incorporators and a promoter whereby pre-incorporation services are to be performed on behalf of a corporation in return for a specified compensation, the contract may be adopted, accepted or ratified by the corporation when organized. The corporation then becomes liable both at law and in equity on the contract.

*Id.* (footnote omitted). See also Bell v. Scranton 'Trust Co., 282 Pa. 562, 128 A. 494 (1925) (ratification may be express or implied).

41. 79 Pa. 54, 21 Am. Rep. 39 (1875), *aff'd sub nom.* Bell's Gap R.R. Co. v. Pennsylvania-
known as ratification, or adoption.42

In Bell's Gap, the Pennsylvania Supreme Court held that an informal group, associated for the purpose of a common objective and with the intent to later form a corporation, may authorize certain acts to be done on its behalf, by one or more of its promoters, with the understanding that these acts will be compensated for upon subsequent incorporation.43 In reaching this conclusion, the court placed great emphasis upon the fact that a majority of promoters could authorize such pre-incorporation acts in order to bind the later formed corporation.44

The corollary of this principle was first stated in Tift v. Quaker City National Bank.45 There, the court held that a single promoter could not bind a subsequently formed corporation, when there was no evidence of ratification by the board of directors.46 The thrust of this decision was that evidence of subsequent ratification was required before a pre-incorporation agreement could be held binding upon the corporation. Absent such evidence, knowledge of the

42. The term "ratification" as used by the Pennsylvania courts is not, technically speaking, entirely correct. Ratification is the act of an existing principal ratifying a contract made between his agent and another, where the agent is purportedly acting for the principal. If, as in the case of promoters' contracts, however, the principal does not exist at the time of contracting, ratification is not possible. Instead, the correct term is "adoption" or "novation". Richards, The Liability of Corporations on Contracts Made by Promoters, 19 Harv. L. Rev. 97, 98-99 (1906); Ehrich & Bunzl, Promoter's Contracts, 38 Yale L.J. 1011, 1031 (1929). Nevertheless, Pennsylvania courts use these terms interchangeably, and, in the interest of clarity they will be used interchangeably in this note. See, e.g., McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 216-17, 134 A.2d 873, 876 (1957); 8A P.L.E. Corporations § 18 (1971). Cf. Restatement (Second) of Agency §84 (1957), and comment d.

43. 79 Pa. at 59.

44. Id. Specifically, the Court stated:

[T]he projectors or promoters of the enterprise . . . must be a majority at least of such persons, and not one, two, or three, or a small minority thereof. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized.

Id. This is a minority position, adopted only by Pennsylvania and Nebraska. See 18 Am. Jur. 2d Corporations § 119 (1965). The majority position asserts that promoters, as opposed to directors, cannot bind a corporation not yet in existence, no matter how unanimous they may be. See supra notes 37-39 and accompanying text. However, in Pennsylvania, the "majority of promoters" rule stems from cases in which the majority of promoters became directors of the subsequently formed corporation, and then impliedly or expressly ratified the contract in question, i.e., the Pennsylvania minority rule is premised upon the notion that these promoters later became directors of the corporation. See e.g., Girard v. Case Bros. Cutlery Co., 225 Pa. 327, 74 A. 201 (1909); Beltz v. Garrison, 254 Pa. 145, 98 A. 956 (1916); McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 219 n.4, 134 A.2d 873, 877 n.4 (1959).

45. 141 Pa. 550, 21 A. 660 (1891).

46. Id. at 553, 21 A. at 661.
contract in question would not be imputed to the board.\textsuperscript{47}

Nearly two decades passed before the Pennsylvania Supreme Court, in \textit{Girard v. Case Brothers Cutlery Co.},\textsuperscript{48} shifted to a less rigorous standard. The \textit{Girard} court ruled that once the corporation’s promoters accepted the benefits of a contract entered into between one of them and a third party, the contract became binding upon the subsequently formed corporation unless it was renounced and disapproved by the corporation’s board of directors.\textsuperscript{49} In so holding, the court, in effect, shifted the burden of proving renunciation of the contract from the plaintiff to the defendant corporation. This holding was further expanded in \textit{Beltz v. Garrison},\textsuperscript{50} where the court held that ratification could be inferred from acts, done by the corporation, which established that the corporation had accepted the benefits of a contract between a promoter and third party.\textsuperscript{51}

In both \textit{Girard} and \textit{Beltz}, knowledge of the promoter’s contract was imputed to the board of directors—a result seemingly in contravention to the \textit{Tift} holding. The difference in facts, however, provides the basis for this distinction.\textsuperscript{52} In \textit{Tift}, only one promoter contracted with a third party, whereas in \textit{Girard} and \textit{Beltz}, a majority of promoters, who later became either officers or directors of the newly formed corporation, accepted the benefits of a third party contract and, once in positions of authority, these promoters

\textsuperscript{47} Id.
\textsuperscript{48} 225 Pa. 327, 74 A. 201 (1909). In \textit{Girard}, prior to incorporation, the promoters of the defendant corporation contracted to retain the services of Girard. Girard was to be an officer of the new corporation, and to receive stock in the new corporation. Several months after incorporation, Girard was discharged. Girard then sued to receive the monetary worth of his stock in the corporation. \textit{Id.} at 328, 74 A. at 202.
\textsuperscript{49} \textit{Id.} at 333, 74 A. at 203. While, essentially, the \textit{Girard} court shifted the burden of proof onto the defendant corporation, it is important to note that the basic tenets of ratification, laid down in \textit{Bell’s Gap R.R. Co.}, were reaffirmed. That is, if the corporation does not renounce the pre-incorporation contract, the contract will be deemed to have been ratified. Moreover, as in \textit{Bell’s Gap R.R. Co.}, the majority of the promoters were also the majority stockholders in the corporation. \textit{Id.}, 74 A. at 203.
\textsuperscript{50} 254 Pa. 145, 98 A. 956 (1916) (per curiam).
\textsuperscript{51} \textit{Id.} at 152, 98 A. at 958. This was so even though the board of directors did not pass a formal resolution accepting the contract. \textit{Id.}
\textsuperscript{52} In \textit{Tift}, the plaintiff testified that the promoter who had entered into the pre-incorporation contract with him had discussed the contract with other members of the board of the newly formed corporation, and that the board did not object to the contract. The court held, however, that this evidence was insufficient and “would not have amounted to ratification by the corporation.” 141 Pa. at 553, 21 A. at 661. Thus, the court was unwilling to impute knowledge of the promoter’s contract to the board of directors. This result stems from the fact that “the promise was made by a single promoter,” who was not in the “majority” of the newly formed enterprise. \textit{Id.}
continued to accept the benefits of the contract. Thus, the company in this latter situation was held liable.53

Subsequent decisions have left this distinction intact. In *Bonner v. Travelers Hotel Company, Inc.*,54 the court reiterated the proposition established in *Tift* that when a single promoter enters into a contract with a third party, and a majority of the promoters, as well as the corporation, immediately renounce the contract, the corporation cannot be bound thereby.55 Additionally, in *Solomon v. Cedar Acres East, Inc.*,56 the most recent decision addressing this issue, the court held that knowledge retained by a single promoter having only a minority interest could not bind a subsequently formed corporation.57

Based on the foregoing authority, the current status of Pennsylvania law on ratification provides three criteria for holding a subsequently formed corporation liable on a promoter's contract. First, a majority of the promoters must know of the existence of the contract;58 second, those same promoters must later become officers or directors of the newly formed corporation; and third, the officers or directors, acting on behalf of the corporation,59 must continue to accept the benefits of the contract after the company has been formed.60

53. In *Girard*, the majority of promoters who had entered into the contract with the plaintiff became majority shareholders and officers of the newly formed corporation. 225 Pa. at 333, 74 A. at 203. Likewise, in *Beltz*, the promoters became directors and sole shareholders of all of the stock in the subsequently formed company. 254 Pa. at 146-50, 98 A. at 956-58. Additionally, the *Beltz* court adopted the lower court’s holding that “[a] corporation acts by its directors and, practically for the purpose of binding it, they are the corporation.” 254 Pa. at 153, 98 A. at 958. Therefore, if the promoters enter into a contract with an individual, and those promoters continue to accept the benefits of the contract after becoming directors of the newly formed corporation, then the corporation will be liable to the one with whom the promoters originally contracted. Additionally, the *Beltz* court held that:

The adoption of a contract may be inferred from acts done, although no resolution is passed . . . . The company received the benefits and cannot be relieved of the burden. The principle upon which a corporation is held liable for the acts of its promoters is that it cannot receive benefits without assuming the burdens.

254 Pa. 145, 152, 98 A. 956, 958 (emphasis added) (citations omitted).

54. 276 Pa. 492, 497, 120 A. 467, 468 (1923). The *Bonner* court reaffirmed the *Girard* holding, although it distinguished *Girard* on its facts. Id. at 497, 120 A. at 468.

55. *Id.*


57. The court relied on both *Tift* and *Girard* in reaching its decision, but distinguished *Beltz* on its facts. *Id.* at 500, 317 A.2d at 285.


60. See generally *Beltz* and *Girard* v. Case Bros. Cutlery Co., 225 Pa. 327, 74 A. 201 (1909). See also supra notes 49-57 and accompanying text.
Implicit in the Third Circuit’s determination that Mosaic had ratified the contract in question was its tacit reliance upon the above stated criteria.\textsuperscript{61} Indeed, based upon the facts as delineated in the opinion, this finding was both reasonable and well within the confines of the current Pennsylvania law on ratification. As the record established, two of the three promoters of Mosaic had knowledge of the contract between Rees and Williams; two of these promoters, Williams and Marshall, became officers and directors of Mosaic; and Mosaic, subsequent to incorporation, continued to accept the benefits of the contract.\textsuperscript{62} In light of these circumstances, the Third Circuit’s conclusion was sound.\textsuperscript{63}

More importantly, however, the Rees court also determined that the ratification “related back”\textsuperscript{64} to the time of the pre-incorporation activities.\textsuperscript{65} In Pennsylvania, this doctrine permits a subse-

\begin{enumerate}
\item 742 F.2d at 767. Also implicit in the Third Circuit’s holding was the concept of “implied ratification”. It has long been the law of Pennsylvania that ratification can be either express or implied. See Bell v. Scranton Trust Co., 282 Pa. 562, 569, 128 A. 494, 496 (1925).
\item 742 F.2d at 767. The court specifically found that “[i]n the case of Mosaic the promoters who dealt with Rees and later ratified the contract were acting with authority; at all relevant times each held positions of president or chief executive officer of the corporation.” Id. at 769. See also supra notes 37-44 and accompanying text.
\item See supra notes 58-60 and accompanying text.
\item 742 F.2d at 769. The concept of relation back, a legal fiction, is in actuality, the heart of ratification itself. In F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 195 (4th ed. 1952), Mechem states that every ratification relates back and is equivalent to prior authority. Id. In W. SEAVEY, LAW OF AGENCY § 39B (1964), the author notes:
\begin{quote}
The most characteristic feature of ratification is that described as “relation back” to the time and place of the first transaction. This is merely a fictitious method of stating that the rights and liabilities are the same as if the purported principal became a party at that time and place.
\end{quote}

Id. Moreover, this concept runs counter to other areas of the law. For instance, under contract law, one cannot bind himself retroactively on a contract without receiving consideration therefore, and without communication to the other contracting party. See generally 1 A. CORBIN, CONTRACTS §§ 67, 109 (1963).

Likewise, traditional tort law does not recognize a principal’s liability for compensatory or punitive damages after the completion of a tort when the tortfeasor was not the principal’s agent at the commission of the tort. Thus, while under vicarious liability a master will be responsible for the torts of his servant due to his ability to select and control his servant, W. PROSSER & P. KEETON, LAW OF TORTS § 69 (5th ed. 1984), such reasoning will not justify the ratification of a tort because the master necessarily enters the scene after the tort has been committed. See also SEAVEY § 32 A.

65. 742 F.2d at 769. The leading Pennsylvania decision on the “relation back” principle is Evans v. Ruth, 129 Pa. Super. 192, 195 A. 163 (1937). In Evans, the court stated that “[i]t is a well recognized rule of law that, if A assumes to act for B . . ., and B subsequently affirms A’s act, it is a ratification which related back and supplies original authority for the act.” Id. at 195, 195 A. at 165. See also In re Eastern Supply Co., 267 F.2d 776, 778 (3d Cir. 1959) (“relation back” principle applies to bankruptcy proceeding).

Similarly, support for this proposition may be found in Restatement (Second) of Agency
quently ratified pre-incorporation agreement to relate back in time to when the contract was first entered into between the promoter and third party. Moreover, by incorporating the concept of relation back into ratification, liability attaches in situations that would otherwise leave a plaintiff without a remedy. By determining that the defendant’s subsequent ratification related back to the time of the original agreement between Rees and Williams, the court was able to determine the more crucial issue of in personam jurisdiction.

In questions involving jurisdiction, federal courts are required to follow the law of the forum state in which they sit when determining whether a foreign corporation can be sued in that state. One commentator has pointed out that courts typically follow a “two step” test when analyzing this issue. The first part of the test requires statutory authority before a non-resident can be subjected

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§§ 82, 100A (1957). Section 82 states:

**Ratification**

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.  

**Id.**

Section 100A states:

**Relation Back in Time and Place**

The liabilities of the parties to a ratified act or contract are determined in accordance with the law governing the act or contract at the time and place it was done or made. Whether the conduct of the purported principal is an affirmance depends upon the law at the time and place when and where the principal consents or acts.  

**Id.**

66. With respect to post-incorporation ratification and relation back, Pennsylvania varies from most other jurisdictions. Generally, the ratification of a pre-incorporation contract does not relate back in time to the original execution of the promoter/third party contract. This is due to the simple fact that a corporation does not legally exist at the time of contracting; hence, original authority for the acts of the promoter agent is lacking. Instead, it is deemed that new consideration was tendered at the time of ratification, with “relation back” going only the date of incorporation. **Restatement (Second) of Agency** § 84 comment d (1957) is particularly illustrative on this point: “The obligation of the corporation cannot have an effective date before the organization becomes a legal entity.”  

Pennsylvania, however, deems a subsequently ratified pre-incorporation agreement as relating back to the time of the inception of the contract between the promoter and the third party. See 8 A Pennsylvania Law Encyclopedia, Corporation § 18 (1971). See also McCloskey v. Charleroi Mountain Club, 390 Pa. 212, 134 A.2d 873 (1957); Central Trust Co. of Pittsburgh v. Lappe, 216 Pa. 549, 65 A. 1111 (1907).


to suit in a given state. The second part necessarily follows from the first, i.e., if statutory authority exists, the court's exercise of in personam jurisdiction must not offend the non-resident's due process rights.\textsuperscript{69}

The first half of this test is met in the instant case because Pennsylvania, like all other states,\textsuperscript{70} provides statutory authority for the exercise of in personam jurisdiction over a non-resident. This authority is found in Pennsylvania's long-arm statute which cloaks its courts with jurisdiction over non-residents "to the fullest extent allowed under the Constitution of the United States . . . ."\textsuperscript{71} Since this statute has been held to be coterminous with the scope of the due process clause,\textsuperscript{72} the inquiry thus properly shifts to part two of the above test, namely, the court's exercise of in personam jurisdiction over the non-resident.\textsuperscript{73}

Due process requires that before a non-resident can be amenable to suit in a state court, a basis for personal jurisdiction must first exist.\textsuperscript{74} Without an appropriate jurisdictional basis, a non-resident defendant would be subject to an unreasonable burden which does not "comport with due process."\textsuperscript{75} It is therefore necessary that the non-resident have some "minimum contact" or other "reasonable" relationship to the forum state before due process requirements can be satisfied.\textsuperscript{76} What constitutes an adequate basis for this relationship has been the center of much litigation and controversy since the Supreme Court's historic decision in \textit{Pennoyer v. Neff}.\textsuperscript{77}

\textsuperscript{69} \textit{Id.} at 51-52.

\textsuperscript{70} The constitutionality of such statutes was initially upheld in \textit{Gray v. American Radiator & Standard Sanitary Corp.}, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The Illinois statute allowed for jurisdiction to the fullest extent possible under the United States Constitution. The defendant Pennsylvania corporation manufactured a water heater. The heater subsequently exploded, injuring the plaintiff in Illinois. The court concluded that "[a]s a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products." \textit{Id.} at \textit{---}, 176 N.E.2d at 766.

\textsuperscript{71} 42 PA. STAT. ANN. § 5322(b) (Purdon 1981), reproduced in full in note 22, \textit{supra}.


\textsuperscript{73} For an excellent and in-depth discussion and history of Pennsylvania's long-arm statute, see Comment, \textit{Pennsylvania's New Long-Arm Statute: Extended Jurisdiction Over Foreign Corporations}, 79 DICK. L. REV. 51 (1974).

\textsuperscript{74} \textit{See International Shoe Co. v. Washington}, 326 U.S. 310, 316-17 (1945).

\textsuperscript{75} \textit{Id.} at 317.

\textsuperscript{76} \textit{E.g.}, \textit{id.} at 316; \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 292 (1980).

\textsuperscript{77} 95 U.S. 714 (1877).
In *Pennoyer*, the state of Oregon, in an attempt to secure jurisdiction, attached certain property owned by the defendant. On appeal, the United States Supreme Court adopted a strict territorial approach to jurisdiction. The Court concluded that in personam jurisdiction in the forum state could not be obtained over a non-resident unless he were personally served with process within the borders of the state, or unless he voluntarily appeared there to defend his suit.\(^7\) Thus, the court in the forum state was confined, in a jurisdictional sense, to its territorial boundaries. With the onslaught of the industrial revolution and the growing number of large corporations with operations spanning several states, however, this rule quickly fell into disfavor.\(^8\) Criticism was based upon the fact that a corporation could not have legal existence outside of the state in which it was created.\(^8\) As a result, when many corporations began conducting business in foreign states, the *Pennoyer* territorial concept gave them virtual immunity to suit outside of their home state since there was no way to effectuate service of process.\(^8\)

In order to avoid the injustices which followed from this fundamental weakness of the territorial concept, the courts began to develop legal fictions.\(^8\) One such fiction was the "implied consent" theory, which presupposed that a foreign corporation would only transact business in those states in which it had registered one of its agents with the state's officials.\(^8\) This facilitated service of pro-

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78. *Id.* at 733.


80. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (a corporation can have no legal existence outside of the state boundaries in which it was created).


83. *See* e.g., St. Clair v. Cox, 106 U.S. 350 (1882). In *St. Clair*, the defendant corporation had been incorporated under the laws of Illinois. The plaintiff, a Michigan resident, brought suit in Michigan. Michigan law provided, *inter alia*, that jurisdiction over a foreign corporation would attach if any officer or agent of the corporation were personally served in Michigan. *Id.* at 351-53. In that portion of the opinion that affirmed the validity of the Michigan statute, the Court, speaking through Justice Field, indicated that the "doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and of manifest injustice." *Id.* at 355. Therefore, the Court concluded that in order to conduct business in another state, a foreign corporation either expressly or impliedly consents to the conditions imposed by the state.

If a State permits a foreign corporation to do business within her limits, and at the
cess, and thus jurisdiction could be obtained over the foreign corporation if sued in that state.

The other legal fiction to emerge was the "presence" theory. Under this approach, the corporation's amenability to suit was dependent upon its "presence" or the amount of business activity conducted within the state. If a certain threshold were met, the company was subject to suit within that state's borders.

These various theories ultimately presented difficult problems for the courts. Among these difficulties was the determination of whether under either theory, the corporation was doing business in the state. As one judge stated, these did "no more than put the question[s] to be answered." In 1945, however, the landmark decision of International Shoe Company v. Washington laid these legal fictions to rest.

same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process.

Id. at 356. The court was quick to note, however, that such statutes must not encroach upon the principles of "natural justice," and that notice must be reasonable; process may only be served upon those "agents as may be properly deemed representatives of the foreign corporation." Id.

Likewise, in Hess v. Pawloski, 274 U.S. 352 (1927), although the defendant was an individual and not a corporation, the Court concluded that a non-resident motorist's use of the highways of Massachusetts was, pursuant to a Massachusetts statute, "the equivalent of the appointment of the registrar [of motor vehicles] as agent on whom process may be served." Id. at 357.

84. See, e.g., Philadelphia and Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917), wherein the Court concluded that the defendant's presence within the forum was insufficient to allow for jurisdiction. The Court stated that defendant's only presence within New York was the sale of coupon tickets. Were the sale of these tickets a "doing of business" then, the Court forewarned, "nearly every railroad company in the country would be 'doing business' in every State." Id. at 268.

85. 243 U.S. at 265. As an example of this threshold, Justice Brandeis stated: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." Id.

86. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1066-67 (1969). See also Comment, Developments in the Law-State Court Jurisdiction, 73 HARV. L. REV. 909, 922 (1960). The authors of Developments note that much case law centered upon the determination of whether a corporation was "doing business" in the forum. For instance, the mere presence of an officer within the forum, as well as a subsidiary's presence, would not allow for jurisdiction. The author also notes that the degree of solicitation necessary to constitute the carrying on of business was likewise a subject of much debate and dispute. Id. at 922.

87. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (Judge L. Hand).

88. 326 U.S. 310 (1945).
In *International Shoe*, the Supreme Court rejected the "implied consent" and "presence" theories and established what is now the modern doctrine of in personam jurisdiction.\(^8\) The Court, in relaxing the strict territorial principle of *Pennoyer*, concluded that the foreign corporation's activities in the forum state (e.g., presence of salesmen, solicitation of goods, etc.), provided certain minimum contacts through which in personam jurisdiction would attach.\(^9\) In a much quoted passage, the Court stated:

> [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."\(^9\)\(^0\)

In reaching this decision, the Court rejected a mechanical or quantitative approach when determining what acts by a corporation would subject it to a court's jurisdiction.\(^9\)\(^1\) Instead, it furnished a flexible guide whereby each case could be decided upon its unique facts. Thus, the courts began the evolutionary process of expanding jurisdiction over individual and corporate non-residents.\(^9\)\(^2\)

The next major decision by the Supreme Court on in personam jurisdiction expanded *International Shoe's* "fair play" and "substantial justice" standard. In *McGee v. International Life Insurance Company*,\(^9\)\(^4\) the Court upheld jurisdiction over a non-resident

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8. *Id.* at 316-19.

9. *Id.* at 320. The International Shoe Company was sued by the State of Washington in order to enforce International Shoe's contribution to the State's unemployment compensation fund. The Court concluded that International Shoe's activities (presence of salesmen, solicitation for orders, renting space for displaying goods, and the shipment of goods into Washington) were regular and systematic and constituted a doing of business in the state. *Id.* at 314. "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." *Id.* at 320.

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

11. 326 U.S. at 319. The Court stated: "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *Id.*


13. 355 U.S. 220 (1957). In *McGee*, the plaintiff sued the defendant, a Texas corporation, in California. The defendant was sued via registered mail in Texas pursuant to a California statute which subjected foreign corporations to suit in California on insurance contracts, even though such corporations could not be served with process within California. *Id.* at 221. The Court noted that the contract had been delivered in California, the premiums had been mailed from California, and that the insured at the time of his death was a Cali-
corporation whose only contact with the forum state was the issuance through the mails of a sole insurance contract to a resident of the forum state.\textsuperscript{95} The McGee Court based its determination on the premise that the contract had a "substantial connection" with the state.\textsuperscript{96} The Court conceded that inconvenience to the non-resident company was probable, but not to a degree "which amount[ed] to a denial of due process."\textsuperscript{97}

McGee represented the pinnacle of the Court's permissive jurisdiction, as well as a further departure from Pennoyer's strict territorial concept. The McGee Court implicitly incorporated a test of "reasonableness" into the "substantial justice" and "fair play" standards of International Shoe, and suggested that courts should look to the interests of the plaintiff and the forum state when deciding the appropriateness of in personam jurisdiction over a non-resident.\textsuperscript{98}

In Hanson v. Denckla,\textsuperscript{99} decided only one year after McGee, the Court retreated from this liberal approach to jurisdiction and somewhat revived the territorial principle of Pennoyer. In holding that Florida could not exercise in personam jurisdiction over a Delaware trustee when it seemed certain that minimum contacts sufficient to satisfy due process existed, the Court stated that the jurisdictional restrictions on state courts "are a consequence of territorial limitations on the power of the respective States."\textsuperscript{100} The court relied upon the quid pro quo that jurisdiction can only be exercised over those non-resident defendants who "purposefully [avail themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."\textsuperscript{101}

\textsuperscript{95}Id. at 222-23. The Court also concluded that California, too, "ha[d] a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." \textit{Id.} at 223.

\textsuperscript{96}Id. at 223.

\textsuperscript{97}Id. at 224.

\textsuperscript{98}Id. at 223-24. In stating that the interests of the plaintiff should be considered, the Court specifically noted that the increasing nationalization of commerce had resulted in many interstate transactions, and that "[a]t the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." \textit{Id.} at 223. See also Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 VA. L. REV. 85, 89-91 (1983).


\textsuperscript{100}Id. at 251.

\textsuperscript{101}Id. at 253.
The cumulative effect of these decisions led one group of commentators to formulate a three-pronged test for determining when in personam jurisdiction could be exercised over a non-resident based only on a single act in the forum state, without violating that non-resident's due process rights.\footnote{102}{Note, Jurisdiction Over Nonresident Corporations Based On A Single Act: A New Sole For International Shoe, 47 Geo. L.J. 342 (1958) (hereinafter cited as Georgetown Note). As the authors discuss, the three prongs are:

1. The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.

2. The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."

3. Having established by Rules One and Two a minimum contact between defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens. 

\textit{Id.} at 351-52 (footnotes omitted). This test presupposes that statutory authority exists for the court's exercise of jurisdiction over the non-resident's single act. \textit{Id.} See \textit{also} discussion in notes 70-72 and accompanying text, relating to the necessity of statutory authority.} 

\footnote{103}{401 F.2d 374 (6th Cir. 1968).} 

\footnote{104}{\textit{Id.} at 381. The modifications to the original three-pronged test are in wording only, and the overall flavor of the court's test is the same as the proposed test in the \textit{Georgetown Note}. See \textit{supra} note 102.} 

\footnote{105}{401 F.2d at 381.} 

\footnote{106}{For an exhaustive sampling of those courts adopting the three-pronged test, see Comment, Pennsylvania's New Long-Arm Statute: Extended Jurisdiction Over Foreign Corporations, 79 Dick. L. Rev. 51, 77 n.136 (1974); and Kingsley & Keith (Can.) Ltd. v. Mercer Int'l., 500 Pa. 371, 378 n.6, 456 A.2d 1333, 1337 n.6 (1983).} 

\footnote{107}{\textit{See supra} notes 26-34 and accompanying text.} 

prong of the Procter test is that “the defendant must have purposefully availed itself of the privilege of acting within the forum state, thus invoking the benefits and protections of its laws.”¹⁰⁹ This prong is taken from the combined holdings of Hanson¹¹⁰ and McGee.¹¹¹ The amount of activity by the non-resident is, however, relatively unimportant under the application of this prong, and is considered sufficient by this standard when a single direct action has taken place within the forum state.¹¹²

For example, in McGee, the Supreme Court found a basis for jurisdiction when the only contact with the forum consisted of a sole insurance contract and premium payments thereon.¹¹³ Thus, when the Third Circuit in the instant case held that the pre-incorporation agreement between Rees and Marshall satisfied this first requirement, it was well within the confines of the rule. In Rees, not only was there a contract entered into in Pennsylvania, but office space was shared with two of the three promoters of Mosaic in Pennsylvania, and payments were made to Rees in Pennsylvania by Mosaic from New Hampshire. This fact situation is clearly analogous to that in McGee.¹¹⁴ Additionally, there was a conclusive indication that Mosaic had “purposefully availed” itself of the privilege of acting within Pennsylvania because the contract was to be substantially performed there. Moreover, based upon the Hanson rationale, Mosaic could have expected to be haled into a Pennsylvania court. Therefore, the Third Circuit reached the correct result by holding that the first prong of the Procter test was met.¹¹⁵

The second prong of the Procter test, that “the cause of action must arise directly from the defendant’s activities within the forum state,”¹¹⁶ also has its foundations in Hanson.¹¹⁷ Derived from a reasonableness standard, which requires that a non-resident’s

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¹⁰⁹. Id. at 19, 323 A.2d at 15.
¹¹⁰. 357 U.S. at 253.
¹¹¹. 355 U.S. at 222-23.
¹¹². See Georgetown Note, supra note 102, at 353.
¹¹³. 355 U.S. at 222.
¹¹⁴. See supra note 94 and accompanying text.
¹¹⁵. This conclusion rests on the reasoning that Mosaic’s pre-incorporation activities could be figured into the jurisdictional equation. 742 F.2d at 768-69. Without the benefit of these pre-incorporation activities, due process would not have been served if the court had found a basis for jurisdiction. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984) (defendants held to have had insufficient contacts with the forum under Procter test).
¹¹⁶. 228 Pa. Super. at 19, 323 A.2d at 15.
¹¹⁷. 357 U.S. at 251-52.
acts within the forum must be directly related to the cause of action,\textsuperscript{118} this aspect of \textit{Procter} is significant because without a direct relationship between the non-resident's activities and the forum, the non-resident's connection to the forum state, and thus the cause of action, could not be established. Therefore, any tangential or unrelated acts by the defendant would be deemed insignificant.\textsuperscript{119}

The application of this second prong to the facts in the principal case is relatively straightforward. In \textit{Rees}, it was undisputed that the contract, Mosaic's act within the forum state, was directly related to the cause of action.\textsuperscript{120} Indeed, the contract dispute gave rise to the cause of action. Because this prong was meant to apply to this precise factual setting, the court reached the only result possible under the mandates of the test.\textsuperscript{121}

The third element of the test, stemming from \textit{Hanson}\textsuperscript{122} and \textit{International Shoe},\textsuperscript{123} and deemed "most important" by the \textit{Procter} court, provides that "the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable."\textsuperscript{124} Implicit in the analysis of whether this prong has been met is the concept of "fairness." In order to determine whether there has been a substantial connection with the forum state, all of the dispositive factors which come into play must be weighed with regard to "traditional notions of fair play."\textsuperscript{125} These factors involve the inconvenience to the non-resident corporation in defending its suit in a distant forum;\textsuperscript{126} the benefits derived by the non-resident corporation from conducting its business within the forum;\textsuperscript{127} and, the factors previously discussed in the first two prongs of the \textit{Procter} test. Although the \textit{Rees} court's analysis of these factors was limited, its reasoning that the concept of "fairness" implicit in the third prong of the test centered on the forum state's interest in resolving a suit brought

\textsuperscript{118} 228 Pa. Super. at 19, 323 A.2d at 15. \textit{See also Georgetown Note, supra} note 102, at 353-54.
\textsuperscript{119} 228 Pa. Super. at 19-20, 323 A.2d at 15-16.
\textsuperscript{120} 742 F.2d at 766-67.
\textsuperscript{121} \textit{See also Georgetown Note, supra} note 102, at 355-59.
\textsuperscript{122} Hanson v. Denckla, 357 U.S. 235 (1958). \textit{See supra} note 99 and accompanying text.
\textsuperscript{124} 326 U.S. at 316.
\textsuperscript{125} \textit{Id.} at 317.
\textsuperscript{126} \textit{Id.} at 319.
\textsuperscript{127} \textit{Procter}, 228 Pa. Super. at 20, 323 A.2d at 16.
by one of its citizens\textsuperscript{128} nevertheless comported with the goals that a weighing of the above factors seeks to accomplish. Therefore, when the Third Circuit held that jurisdiction over Mosaic was fair in light of legitimate state interests,\textsuperscript{129} the court stayed well within the confines of \textit{Procter} and properly applied the third prong of the test.

Given the requirements of \textit{Procter}, the Third Circuit’s conclusion that personal jurisdiction could be exercised over Mosaic was a sound result. If there is to be any criticism on this aspect of the court’s decision, it is that Judge Adams laid little groundwork for his final holding. Once he initially found a basis upon which to find jurisdiction, i.e., Mosaic’s ratification of the contract, little discussion was spent in applying the three-pronged \textit{Procter} test. Of course, the court’s brief treatment of the case could also be considered a strength. Allowing that questions concerning in personam jurisdiction are frequently encountered, and that much has been written on the subject, the Third Circuit could properly have concluded that little was needed to be said. The \textit{Rees} decision, therefore, represents a logical step forward in the evolutionary process of the law of personal jurisdiction over a foreign corporation. In a logical and well-reasoned opinion, the Third Circuit was able to bridge the gap between post-incorporation ratification of pre-incorporation acts and in personam jurisdiction, to reach a result which is timely in today’s highly technical, multinational corporate world. Notwithstanding Judge Adam’s terse style, the end result in \textit{Rees}, a case of first impression, will have strong precedential value for the future decisions which will undoubtedly follow from the court’s holding. Indeed, the \textit{Rees} decision will go far in ensuring that businessmen can deal with out-of-state promoters and corporations and be treated justly for their efforts.

\textit{Edward G. Rice}

\textsuperscript{128} \textit{Rees}, 742 F.2d at 769. According to the court, Pennsylvania’s legitimate interest was to ensure that contracts made and to be performed in Pennsylvania were not breached, and that its citizens had a forum when a breach thereof occurred. \textit{Id.}

\textsuperscript{129} \textit{Id.}