

COMMENTS

AUTOMATED CLEARING HOUSE GROWTH IN AN INTERNATIONAL MARKETPLACE: THE INCREASED FLEXIBILITY OF ELECTRONIC FUNDS TRANSFER AND ITS IMPACT ON THE MINIMUM CONTACTS TEST

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1. INTRODUCTION

One of the most rapidly growing technologies in the cash management industry is the Automated Clearing House ("ACH") system.¹ The ACH system is the electronic equivalent to the paper check processing system.² The primary benefits of the system, for both banks and their customers, result from reducing the processing time and costs associated with paper check systems.³ Although other types of electronic funds transfer devices are more common, the ACH system is experiencing the fastest growth rate.⁴

The growth of cash management technology has become more significant as nations have become more economically

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¹ See NATIONAL AUTOMATED CLEARING HOUSE ASSOCIATION, ACH RISK MANAGEMENT HANDBOOK: A COMPREHENSIVE GUIDE TO ACH RISK ISSUES AND CONTROL PROCEDURES 1 (1991) [hereinafter NACHA]. Commercial ACH volume experienced a 25% increase from 1988 to 1989. *Id.* The growth rate is expected to remain at approximately 20% over the next several years. *Id.*

² *Id.*

³ NED C. HILL ET AL., THE NATIONAL CORPORATE CASH MANAGEMENT ASSOCIATION, ESSENTIALS OF CASH MANAGEMENT: A STUDY GUIDE 3-9 (Jarl G. Kallberg et al. eds., 2d ed. 1986) [hereinafter NCCMA].

⁴ See Matt Barthel, *Cash Management Revenue Growth Seen Ebbing*, AM. BANKER, Nov. 4, 1993, at 25. Bank revenues from ACH transactions experienced the highest growth among cash management products. *Id.* Other cash management products include, among other items, wire transfers, controlled disbursement accounts, lockboxes, and information reporting services. *Id.*

interdependent.⁵ In Europe, the European Commission is examining the possibility of a super-ACH system to facilitate cross-border payments.⁶ With the creation of U.S. treaties such as the Free Trade Agreement with Canada,⁷ a need for the development of a direct ACH link between foreign countries has arisen.⁸ Currently, however, no such transnational system exists, and many foreign banks can only accomplish an ACH transaction indirectly, through the use of correspondent bank arrangements. Section 2 of this Comment analyzes in detail the ACH system as it exists today.

Courts in the United States today face the issue of whether the use of ACH transactions across state borders sufficiently justifies the exercise of personal jurisdiction upon a nonresident defendant, in accordance with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. While judicial decisions in this area are important to domestic banks, they are even more significant for foreign banks.⁹ It is presently unclear whether the U.S. branch of a foreign bank is subjected to the jurisdiction of a court in a distant state when its only contacts with that state are ACH transactions. With global ACH systems on the horizon, the situation for foreign banks may become even more perilous. Foreign banks with an office in the United States may be better able to cope with the intricacies and inconvenience of litigating in the United States than those banks which are subject to U.S. jurisdiction simply because they electronically transfer funds on a daily basis from an account in the United

⁵ See, e.g., Richard Layne, *Chase, Canadian Bank in EDI Pact; Computer System Will Support Cross-Border Trade*, AM. BANKER, Sept. 14, 1990, at 3. One example of how banks are viewing cash management services in a more global context is Chase Manhattan Corp., which has entered into agreements with both Canadian and European banks to provide international cash management services for its customers. *Id.*

⁶ Maria Mandler & Arvind Singh, *Domestic & International Payments: The Interrelationship*, J. CASH MGMT., July/Aug. 1992, at 43, 45.

⁷ *U.S.-Canada Free-Trade Agreement Implementation Act of 1988*, Pub. L. No. 100-449, 102 Stat. 1851-98 (1988) (codified at 19 U.S.C. § 2112) (1988 & Supp. VI 1994).

⁸ See Craig Ballance & Robert Dido, *A Comparative Look at the Payment and Cash Management Systems of Canada and the U.S.*, J. CASH MGMT., May/June 1992, at 24, 24.

⁹ Justice O'Connor recognized this difficulty in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 114 (1987) (noting "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system").

States to one in Europe or the Far East. Section 3 of this Comment discusses the use of the ACH system by multinational corporations and the role of foreign banks in this system.

Section 4 examines a recent federal district court case which first addressed the issue of using ACH transactions to invoke jurisdiction. Section 5 analyzes whether the ACH system can be used to establish general jurisdiction. Section 6 reviews this recent holding, rejecting the exercise of specific jurisdiction based on ACH transactions, and discusses the problems created by the decision. These problems stem from a reliance upon standards established by courts with regard to other means of electronic funds transfer. When courts apply rules barring the exercise of jurisdiction articulated in cases dealing with wire transfers or correspondent bank accounts without deeper analysis, they fail to recognize the differences that exist between the ACH system and other financial technologies. As cross-border ACH transactions become prevalent, and the potential burdens facing nonresident litigants increase, courts may be more careful to acknowledge these differences.¹⁰ Presently, courts are laying the foundation for the analysis that will be employed, as they address the issue of ACH transactions and jurisdiction for the first time.¹¹ As they do so, and issues arise in situations other than purely domestic affairs, courts will necessarily struggle with both the desirability of exposing foreign banks to U.S. jurisdiction as a result of ACH transactions, and the realities of ACH usage which may justify jurisdiction in some circumstances.

Section 7 of this Comment addresses the arguments for allowing ACH transactions to be used to establish jurisdiction in certain circumstances. In the context of a cash concentration system, for example, such transactions may represent purposeful conduct towards the forum state that is both continuous and systematic. Given the profits that banks realize from such services, the exercise of specific jurisdiction may be reasonable.

This Comment concludes that courts should not simply follow the holdings of previous cases involving other funds transfer mechanisms in finding that ACH transfers may never establish jurisdiction. For a proper analysis, courts must not rely solely

¹⁰ Ballance & Dido, *supra* note 8, at 27.

¹¹ The court in *Resolution Trust Corp. v. First of America Bank*, 796 F. Supp. 1339, 1344 (D.D.C. 1992), first addressed this "novel question."

on standards based on other financial technologies when addressing ACH transactions. Such reliance fails to recognize the flexibility of the ACH system, as compared to the other electronic funds transfer systems. At a minimum, courts should analyze the particular transaction in cases where the jurisdictional question arises, instead of following blanket prohibitions whose logic is based on the workings of other transfer devices.

2. THE AUTOMATED CLEARING HOUSE SYSTEM

ACH was originally designed in 1972 as an electronic alternative to the paper check system.¹² Rather than using paper to provide the necessary information for banks to complete a transaction, firms may deliver payment information by computer.¹³ This information includes the account to be debited, the account to be credited, and the amount of money to be paid.¹⁴ The account information consists of the Federal Reserve district of the drawee bank, a bank identification code, and the individual account to be either credited or debited.¹⁵

The National Automated Clearing House Association ("NACHA") establishes the standards and policies for ACH transfers. NACHA is managed by the participating banks in the system, which includes more than seventy-five percent of all commercial banks and over 20,000 depository institutions.¹⁶ The ACH system in the United States actually consists of thirty-one different regional "clearing houses," where transmissions from member banks are electronically collected, sorted, and forwarded from the financial institution originating the transaction on behalf of its customer to the institution receiving the money transfer.¹⁷ If the bank that originated the ACH and the bank receiving it are in different clearing houses, the information must be transferred between clearing houses.¹⁸ This process is similar to the one in which a paper check is forwarded

¹² NCCMA, *supra* note 3, at 3-7.

¹³ *Id.* at 3-6.

¹⁴ *Id.*

¹⁵ *Id.* at 3-2 to 3-3.

¹⁶ *Id.* at 3-8.

¹⁷ See NACHA, *supra* note 1, at 6-10.

¹⁸ See Ballance & Dido, *supra* note 8, at 25-26.

from the Federal Reserve Bank of the district in which it was deposited to the Federal Reserve Bank of the district in which the payor bank is located.¹⁹ An obvious advantage of the ACH system is that the information that appears on the check is sent electronically, thereby eliminating the need to physically move the paper, which is necessary when a bank clears a check.

One of the primary reasons for the increased use of ACH transfers in recent years has been the financial savings it presents for its users. Bank customers save both bank costs and internal costs when transactions are not tied to the paper check system.²⁰ It is easier for the banks, and therefore cheaper for the corporation utilizing the ACH system, to process payments that have been transmitted to them electronically. Internally, the costs of reconciling payments made through the ACH system are less than those associated with the reconciliation required for checks.²¹

An example of an ACH transaction is the direct deposit of payroll.²² Traditionally, an employer must process a vast number of paper checks which the employees will cash at their leisure. In an ACH transaction, the employer collects the bank account information of its employees and forwards it, along with the amount to be paid, to the bank for transfer.²³ Employees enjoy the benefit of not having to travel to the bank to cash their checks. They simply receive notice of its deposit, and the employer knows exactly when the money has been received by the bank.

¹⁹ NCCMA, *supra* note 3, at 3-1, 3-2.

²⁰ NACHA, *supra* note 1, at 11-12.

²¹ The ACH system makes reconciliation easier because payments will be debited from the payor's account shortly after they are made. *Id.* Checks, however, can go undeposited for long periods of time, creating large gaps between the date the check was written and the date the money is debited from the account.

²² NACHA, *supra* note 1, at 9.

²³ One drawback that any corporation must consider when deciding whether to use the ACH system is the loss of "float." Float is the time between when a check is written and when it is debited from an account. The time required for a mailed check to reach its destination, be deposited, and cleared (debited from the payor's account) constitutes the float. A payor benefits from this float by earning interest on its account balances until the check is cleared and the amount is debited. *See generally* NCCMA, *supra* note 3, at 4-2 (discussing collection float). For example, by using the direct deposit of payroll (which automatically deposits the employee's payment), a company loses the float it would otherwise enjoy when an employee does not deposit a paycheck

Another important advantage of the ACH system is that it allows the party receiving the payment to initiate the transaction. Instead of waiting for the payor to mail a check, preauthorization agreements through the ACH system allow the payee to debit the payor's account and transfer the funds.²⁴ Such arrangements eliminate much of the delay associated with the processing and payment of invoices that would ordinarily exist within both the payor and payee firms. Such preauthorized agreements are most common with regularly recurring payments, including utility budget billing, mortgage payments, installment loans, and insurance premiums.²⁵

While banks complete both ACH transfers and wire transfers electronically, the transactions are significantly distinct. Unlike a wire transfer, where the customer transfers funds from one account to another immediately, an ACH transfer has a clearing period before the funds are available, similar to that of a deposited check.²⁶ Because wire transfers involve an immediate transfer of funds, the risk associated with such transfers is high, as there is less opportunity to recognize and prevent erroneous transfers. Therefore, the bank fee for such a transaction is considerably higher than that of an ACH transfer.²⁷ This price difference is important, because it has allowed banks to provide services to their customers that in the past were economically infeasible.

These savings have allowed companies to employ ACH transactions extensively, especially with cash concentration systems, which will be discussed in Section 3 of this Comment.²⁸ It is in these instances, where litigation involves cash concentration systems, that courts will have the most difficulty determining whether jurisdiction is appropriate.

²⁴ See NCCMA, *supra* note 3, at 3-9.

²⁵ NCCMA, *supra* note 3, at 3-8 to 3-9.

²⁶ See NACHA, *supra* note 1, at 1. See also Ballance & Dido, *supra* note 8, at 25 ("A cross-country payment can take several days, even [though] the transfer is electronic."); NCCMA, *supra* note 3, at 3-8 ("Transactions typically have settlement in either one or two business days.").

²⁷ See NCCMA, *supra* note 3, at 3-9.

²⁸ See Jeanne Ilda, *Visa, Clearing Houses to Test Fund Transfer Link*, AM. BANKER, Sept. 24, 1993, at 16 ("The automated clearing house is typically used for electronic transactions such as corporate cash concentration . . .").

3. CASH CONCENTRATION SYSTEMS FOR MULTINATIONAL CORPORATIONS

The concentration of cash is often a goal of a multinational corporation, as the corporation attempts to make the most efficient use of any excess funds that its various entities may be holding. It is useful to look at an actual example to understand the dynamics of such a cash concentration system. Recently, a large U.K.-based multinational corporation implemented a new centralized cash management system in the United States.²⁹ The corporation, Ladbroke Group PLC ("Ladbroke"), has real estate holdings in the United States and the United Kingdom, race tracks and betting parlors in the two countries, hotels operating worldwide, and a home products retailing business in Europe. The benefits of Ladbroke's particular concentration system include "a major reduction in annual net interest expense, due to improved cash utilization" and the receipt of "more timely and better information about [its] U.S. operations."³⁰ In theory, a parent corporation may use a variety of means to concentrate its cash, thus enjoying better financial information and control over its funds.³¹

3.1. Use Of U.S. Bank Services

Currently, the most common means by which a multinational corporation implements a cash management system in the United States is through the use of services provided by a U.S. bank. This system works as it would for any U.S. corporation with solely domestic entities. Companies with more than one entity or office use cash concentration systems in an effort to maximize interest income by pooling their cash in a single account, or to reduce interest expenses, as the various entities of the corporation can borrow against the pooled funds of the corporation more cheaply than from a bank.³² While this concept seems simple, banking

²⁹ Harry Cooper & Susan Skerritt, *Establishing a U.S. Cash Management System for a Foreign Multinational Corporation*, J. CASH MGMT., July/Aug. 1992, at 39.

³⁰ *Id.* at 41. Although Ladbroke had entities around the world, its primary operations were in the United States and United Kingdom.

³¹ *Id.*

regulations like those mandated by the McFadden Act of 1927³³ present problems for companies that have entities in different states. The McFadden Act prohibits banks from accepting deposits across state lines, and requires banks to adhere to geographic restrictions imposed by the states.³⁴ These restrictions prevent banks from simply depositing the money at one bank in a single account.

Instead, companies maintain a relationship with a local bank for the purpose of depositing funds, and then arrange to have that money transferred to and concentrated at a single bank.³⁵ ACH transfers are the most efficient way to accomplish this concentration, as a company's home office can authorize the debiting of the local depository account without the need to wait for its local staff to initiate the transaction.³⁶ ACH transactions are also the most economical means of transferring these funds. The cost of daily wire transfers from a number of entities could quickly offset any potential increase in interest income.

An obvious drawback of this system for the multinational corporation is that it only operates within the United States. There are, however, more efficient means on the horizon. The development of cross-border ACH technology will enable the multinational entity to avoid having to maintain separate concentration systems in different countries.

3.2. Use Of Cross-Border ACH Transactions

In theory, a parent corporation might be able to concentrate its cash in a single account by asking the bank with which it has established accounts to initiate daily ACH debits in order to collect funds from its foreign subsidiaries. Such a system would allow a corporation to use a bank with which it is familiar and satisfied. While any corporation faces a difficult decision in entrusting important services to a new bank, in the international

³³ 12 U.S.C. § 36 (1988).

³⁴ *Id.* See also NCCMA, *supra* note 3, at 2-3.

³⁵ NCCMA, *supra* note 3, at 4-1.

³⁶ See NACHA, *supra* note 1, at 11-12. In a cash concentration system using ACH debits, the local employees need only make the deposit; the home office has the ability to initiate the transfer. Thus, by initiating the transfer, the home office can ensure that the transfer is properly made, and done so on a daily basis.

context the task is made more onerous³⁷ because of differences in national banking systems.³⁸

This method, however, is not presently viable because it is not technologically feasible³⁹ to use an ACH transaction to concentrate funds beyond U.S. borders.⁴⁰ But international applications for the ACH network, especially the integration of the U.S. ACH system and a similar electronic funds transfer system in Canada, are foreseeable in the near future. The likely benefits of more effective cash management and the reduction in operating costs on both sides of the border provide the impetus for such a system.⁴¹

³⁷ This onerous task is not necessarily mitigated by the fact that the multinational corporation already has U.S. entities. The employees of the individual entities may not be sufficiently sophisticated to understand, much less translate, the comparative differences between the two countries' banking systems. This was evinced in Ladbroke's situation, where "some of the financial personnel were using good cash management procedures on a local basis, [but] most of them had limited exposure to the concepts of cash management." Cooper & Skerritt, *supra* note 29, at 42. Ladbroke found that one of the benefits of the new cash management system was that "all of the U.S. entities have an increased knowledge and awareness of cash management techniques." *Id.*

³⁸ In the U.S.-U.K. situation, the difference in banking systems is especially notable in the area of cash management. In the United Kingdom, cash management systems are not necessary because of a process known as netting. *Id.* at 40. Under such a system, balances maintained in various accounts are aggregated or offset against one another without transferring any funds. *Id.* The company need not even maintain the accounts at the same bank branch for them to be netted. *Id.* See generally NCCMA, *supra* note 3, at 11-9 to 11-12. Cash management systems are required in the United States because of laws such as the McFadden Act. See *supra* note 33 and accompanying text.

³⁹ It is somewhat misleading to use the word "technologically" when discussing feasibility. In reality, there is currently no such mechanism for the cross-border ACH transactions, at least between the United States and Canada, because issues such as float periods, standards, settlement, and risk management have yet to be resolved. Ballance & Dido, *supra* note 8, at 27.

⁴⁰ Besides "technological" feasibility, other elements such as tax implications must be considered before any individual entity decides to employ a cash management system using cross-border ACH transactions. See Susan H. Griffiths, *International "Pooling"—Getting the Story Straight*, J. CASH MGMT., Nov./Dec. 1992, at 26.

⁴¹ See Ballance & Dido, *supra* note 8, at 25. While there is much to be gained by integrated cash management systems, there are significant hurdles that must first be overcome. For example, the U.S. and Canadian banking systems are not identical. One difference is that Canada has a national banking system in which banks have branches across the country. Further, it is presently unclear which private or governmental entities can make this integrated system a reality.

Another reason that U.S. and Canadian banks are working towards integration is the development of a related cash management service, known as electronic data interchange ("EDI").⁴² Encouraged by anticipated growth in U.S.-Canadian trade as a result of various trade agreements,⁴³ banks in each country believe that EDI, a service by which corporations can send payments and invoices electronically to trading partners via banks, has a profitable future.⁴⁴

3.3. Use Of U.S. Office Of A Foreign Bank

If the foreign parent company wished to rely on the banking relationship it has already developed to concentrate its cash, it could call upon the foreign bank's office in the United States to centralize the funds of its U.S. entities. Many foreign banks make use of the U.S. ACH system through correspondent bank arrangements.⁴⁵ Under such an arrangement, the foreign bank's office has a U.S. bank with ACH capabilities carry out such transfers on its behalf.⁴⁶

To complete such a transaction, the foreign bank notifies its U.S. correspondent bank that it needs money transferred via the ACH system, and relays the instructions received from its customer. The U.S. bank then simply transfers the desired amount from an account maintained by the foreign bank at that U.S. bank. Simultaneously, the foreign bank makes an appropriate adjustment to the account of the customer who requested the transfer. In essence, the foreign bank authorizes the correspondent bank to send or receive funds from its account, while the foreign bank maintains the balance in this account

⁴² Richard Layne, *Wanted: Cross-Border Partners*, AM. BANKER, Mar. 19, 1991, at 3 [hereinafter *Cross-Border Partners*].

⁴³ Ballance & Dido, *supra* note 8, at 24. Instead of having two separate systems, the EDI system combines electronic invoice and payment applications into a single system.

⁴⁴ Layne, *Cross-Border Partners*, *supra* note 42, at 3.

⁴⁵ Foreign banks that do not participate in the U.S. Federal Reserve System cannot use the ACH system independently because the clearing houses are generally run by the Federal Reserve, which makes use of accounts maintained with it to settle transactions. NCCMA, *supra* note 3, at 3-8.

⁴⁶ See NACHA, *supra* note 1, at 5 (stating that correspondent arrangements for use by the ACH system are "essentially the same as under the paper check system").

through credits to, or debits from, its customer's accounts.⁴⁷

For example, if a customer wished to transfer \$200 from an account at a U.S. office of a foreign bank via an ACH transfer, the foreign bank would pass the instructions to its U.S. correspondent. The U.S. bank would then send \$200 via the ACH system, debiting the account maintained by the foreign bank. Meanwhile, the foreign bank would debit the account of the requesting customer, and use these funds to restore the balance in its account at the correspondent bank.

Whether using such a system is economically efficient for the multinational corporation depends in large part upon the number of ACH transactions being completed. ACH services offered by a bank through a correspondent relationship are usually more expensive than utilizing a U.S. bank; however, if the bank is more interested in earning income from other aspects of the business relationship, it is possible that such a bank would not charge more than a U.S. bank.⁴⁸ Further, any surcharge from ACH transaction fees resulting from the use of a bank that is dependent on a correspondent arrangement may be offset by the costs of attempting to establish a new banking relationship. The foreign parent, operating in an unfamiliar banking system, may not have the expertise to identify the services it will need, much less be able to properly analyze more detailed issues such as pricing.⁴⁹ For these reasons, it is reasonable for a foreign

⁴⁷ NCCMA, *supra* note 3, at 2-1 (discussing how correspondent accounts—banks keeping accounts at other banks—are used to facilitate the settlement of transactions).

⁴⁸ This point is demonstrated by the fact that historically most banks offering cash management services viewed this area as a cost center. Barthel, *supra* note 4, at 25. For such banks, cash management is viewed as a means of providing customer service, and thus enhancing the ability of the bank to realize profits in other areas. Foreign banks are usually oriented in this manner, as they typically do not enter the U.S. market with a focus on non-credit services, but rather with the hope of using such services as a "relationship builder." With Ladbroke's system, Mellon Bank provided a line of credit and a number of other bank services, from which it expected to realize substantial income. Cooper & Skerritt, *supra* note 29, at 41. It is also likely, however, that Mellon Bank, as an active participant in the cash management industry, viewed the cash management area as a profit center.

⁴⁹ Ladbroke hired outside consultants to determine exactly what services were necessary, how its cash management system should be designed, and which bank was offering the best proposal. Cooper & Skerritt, *supra* note 29, at 40. See also *supra* note 37 (explaining that the multinational corporation having U.S. entities is not necessarily helpful in providing insight to the parent).

parent to rely on an established relationship, even if the use of the ACH system through a correspondent relationship is more expensive.

It is in this context of foreign bank-initiated ACH transactions that interesting questions of jurisdiction arise. One question that courts have only recently attempted to answer is whether such transactions are sufficiently substantial that a court may use them to justify jurisdiction over a bank. Currently, this jurisdictional problem affects the international banking community only when the U.S. office of a foreign bank in one state completes an ACH transaction in another state. In the near future, as the U.S. ACH network moves closer to transnational capabilities, the answer to this question will have widespread ramifications.

Thus far, courts have had limited opportunities to rule on whether ACH transactions can be used to justify an exercise of jurisdiction. As both the volume of transactions and the number of nations affected by these transactions increase, it is critical that courts in the United States be prepared to address these jurisdictional issues. Courts must not apply the logic of past decisions regarding other electronic funds transfer devices without analyzing the particular aspects of the ACH system itself. For foreign banks, a finding that jurisdiction may be exercised would be preferable to the uncertainty they would face if a decision was based on an inappropriate analysis.⁵⁰

⁵⁰ In *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, Justice White stated that uneven applications of the "minimum contacts" test "may well have a disruptive effect on commercial relations in which certainty of result is a prime objective." 445 U.S. 907, 911 (1980) (White, J., dissenting from denial of certiorari). Such uncertainty removes the degree of predictability that allows potential defendants to adjust their conduct and limit the risks "of burdensome litigation by procuring insurance, passing the expected costs on to customers, or . . . severing its connections" with the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Foreign banks could be strongly affected by this uncertainty. Besides risking exposure to inconvenient litigation in the United States, foreign litigants face unfamiliar discovery procedures, trial by jury, the adversarial system, contingent fees, different rules concerning attorney's fees, and higher damage awards. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 24-25 & n.102 (1987), reprinted in GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS*

4. ACH TRANSACTIONS AND PERSONAL JURISDICTION

4.1. *Personal Jurisdiction And Due Process Standards*

A court's authority to adjudicate a claim against a nonresident defendant depends upon a finding that such an exercise of personal jurisdiction by the court does not offend the Due Process Clause of the U.S. Constitution.⁵¹ In *International Shoe Co. v. Washington*,⁵² the U.S. Supreme Court held that personal jurisdiction may be constitutionally exercised if the nonresident defendant has "minimum contacts" with the forum state.⁵³ The Supreme Court stated that such contacts must be determined by the relationship of the defendant with the forum state, and in light of "traditional notions of fair play and substantial justice."⁵⁴ Generally, U.S. courts have applied the same due process standards regardless of whether the litigation involves a purely domestic matter or international parties.⁵⁵

Two different standards exist for determining general jurisdiction and specific jurisdiction.⁵⁶ General jurisdiction allows a court to exercise jurisdiction over a nonresident defendant even with regard to causes of action unrelated to the forum, while specific jurisdiction permits the exercise of personal jurisdiction over a nonresident defendant only when the cause of action relates to the defendant's contacts within the state. In cases where general jurisdiction is sought, the Supreme Court has decided that due process requires substantial, continuous, and systematic

⁵¹ Born, *supra* note 50, at 31.

⁵² 326 U.S. 310 (1945).

⁵³ *Id.* at 319. See also Born, *supra* note 50, at 33. The author notes that *International Shoe's* "minimum contacts" test replaced, or at least modified, the due process test of *Pennoyer v. Neff*, 95 U.S. 714 (1878), because the latter could not withstand the rigors of increased industrialization and interstate commerce. *Pennoyer* had a "strict territorial view of judicial jurisdiction" that did not allow for personal jurisdiction unless the person (or entity in the case of a corporation) was within the territorial boundaries of the state. The result was that the state had little judicial power to regulate corporations that conducted business within state boundaries, but were not incorporated there.

⁵⁴ 326 U.S. at 316.

⁵⁵ Born, *supra* note 50, at 78.

⁵⁶ See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,

contacts.⁵⁷ Specific jurisdiction has a lower threshold requirement.⁵⁸ For specific jurisdiction to be appropriate, the Court in *Burger King Corp. v. Rudzewicz*⁵⁹ held that the nonresident defendant must have purposely directed its activities toward the forum state and that those activities form the basis of the cause of action.⁶⁰ Additionally, such an exercise of jurisdiction must be reasonable.⁶¹

4.2. *Resolution Trust Corp. v. First Of America Bank*

In *Resolution Trust Corp. v. First of America Bank*,⁶² the District Court for the Central District of California addressed "the novel question whether personal jurisdiction exists over a non-forum bank which participated in transactions with a forum bank through a national electronic fund clearing house system."⁶³ In this case, the Resolution Trust Corporation, in an attempt to bring Michigan's First of America Bank before a California tribunal, argued that because the cause of action arose from First of America's "minimum contacts" with the state of California, jurisdiction could legally be exercised over the bank.⁶⁴ The claim involved an ACH overpayment from a California savings and loan institution, and First of America's subsequent refusal to honor an ACH transaction seeking return of the excess monies.⁶⁵

The *First of America* court held this limited interaction to be "an insufficient minimum contact."⁶⁶ When confined to the specific factual situation of this case, the holding is reasonable. The language of the decision may be interpreted too broadly, however, thus foreclosing proper analysis in different circumstances.⁶⁷ The court relies upon decisions holding that

⁵⁷ See *Resolution Trust Corp. v. First of America Bank*, 796 F. Supp. 1333, 1335 (1992) (citing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952)).

⁵⁸ 466 U.S. at 414 & n. 8.

⁵⁹ 471 U.S. 462 (1985).

⁶⁰ See *id.* at 477-78.

⁶¹ See *id.*

⁶² 796 F. Supp. 1333 (C.D. Cal. 1992).

⁶³ *Id.* at 1334.

⁶⁴ See *id.* at 1337.

⁶⁵ See *id.* at 1334.

⁶⁶ *Id.*

⁶⁷ See *id.* at 1336.

“jurisdiction has been declined in instances of correspondent accounts or a correspondent relationship, the passage of a check through the clearing process, or dealings between banks through wire transfers or similar contacts.”⁶⁸ The use of these decisions disallowing jurisdiction based upon specific financial technologies demonstrates the possibility that courts may blindly apply *First of America* to decide jurisdiction in future cases involving ACH transactions.

4.3. *The Issue In First Of America*

The *First of America* court properly applied standard aspects of the “minimum contacts” analysis. It noted that the Michigan bank had no offices, branches, employees, or property in California; was not registered to do business there; and did not solicit customers in California.⁶⁹ Under these facts, the court identified “[t]he issue at bar . . . [to be] whether a non-forum bank has established minimum contacts in California by belonging to a national clearing house service association and accepting a wire transfer (or several wire transfers) from a California bank.”⁷⁰

One problem with defining the issue in this way is that the court recognized that situations may arise with multiple electronic funds transfers, but it did not discuss whether the actual number of transfers impacts the minimum contacts test. Without addressing this dilemma, but still holding that the exercise of personal jurisdiction would be improper, the *First of America* court leaves the impression that, regardless of the amount of activity, electronic funds transfers may never be used to establish jurisdiction.

Further, the analysis undertaken to decide whether “minimum contacts” have been established indicates the court’s failure to recognize the distinction between a wire transfer and an ACH transaction.⁷¹ While both are electronic funds transfers, their differences are significant enough to justify individual analysis.

⁶⁸ *Id.* at 1336-37 & nn.2-4.

⁶⁹ *See id.* at 1334.

⁷⁰ *Id.* at 1335.

⁷¹ *See id.* at 1335-36. The court at no point recognizes that electronic wire transfers and ACH transfers are not the same transactions. Instead, it refers to both transactions under the auspices of NACHA simply as electronic wire transfers.

One important difference between the two is the bank charge for each transaction.⁷² Because ACH transactions are less expensive, they are more widely used in cash concentration systems.⁷³ As such systems are used to concentrate funds on a daily basis, it is possible that there may be transactions between the forum state and a nonresident bank every day of the year.⁷⁴ Wire transfers used in this manner are possible, but they are rarely done because of the large costs associated with such transactions. Although attention to legal precedent concerning wire transfers and jurisdiction is appropriate because of the similarities of the two transactions, the failure of the court to distinguish the two is problematic. Without further analysis and recognition of these situations, in which ACH transactions provide continuous and systematic contacts, the court's apparent blanket prohibition with regard to ACH transactions and the exercise of jurisdiction is unwarranted.

5. ACH TRANSACTIONS AND GENERAL JURISDICTION ANALYSIS

Because ACH transactions in a cash concentration system provide continuous and systematic contacts, a party could argue that such transactions justify some exercise of jurisdiction. To establish general jurisdiction, a party still would need to demonstrate that the ACH transfers represented "substantial contacts."

Such an argument, however, is probably ill-fated. First, in a leading Supreme Court case, *Keeton v. Hustler Magazine, Inc.*,⁷⁵ the Court seemed to assert that the distribution of as many as 15,000 magazines within a state was not substantial enough contact to establish general jurisdiction.⁷⁶ The Court based its finding on *Perkins v. Benguet Consolidated Mining*,⁷⁷ which first set forth the continuous and systematic test, and found that general jurisdiction existed in that case because the party was

⁷² See NACHA, *supra* note 1, at 1.

⁷³ See *supra* text accompanying note 27.

⁷⁴ See NCCMA, *supra* note 3, at 3-10 (noting that some banks and ACHs will accept tapes over the weekend).

⁷⁵ 465 U.S. 770 (1984).

⁷⁶ *Id.* at 779-80.

⁷⁷ 342 U.S. 437 (1952).

temporarily maintaining its principal place of business within the forum state.⁷⁸ If the Court was suggesting that contacts are not substantial unless they are equivalent to maintaining a principal place of business within the forum, a simple transfer of funds clearly would not be substantial under *Perkins*. Even under the less rigorous “doing business” standard,⁷⁹ simply transferring funds does not appear to constitute the required general business activities that were present in *Perkins*.⁸⁰

Second, even with a lesser standard for substantial contacts, the argument that the large sums being transferred amount to substantial contacts has been defeated in other contexts. Courts have rejected similar claims that correspondent bank accounts represent substantial contacts if they have large balances.⁸¹ This line of argument also might be blocked by the actual use of ACH transfers. If the amount of the transfer is large, it is more likely that an individual will use a wire transfer because there is no float associated with such transactions, thus allowing the money to be deposited and to earn interest immediately.⁸²

Commentators recognize the “continuous and systematic” test for general jurisdiction as “substantially more rigorous than the . . . ‘minimum contacts’ test applicable in the specific

⁷⁸ 465 U.S. at 779-80.

⁷⁹ Born, *supra* note 50, at 41. See also *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984); *Broadcasting Rights Int'l Corp. v. Societe du Tour de France, S.A.R.L.*, 675 F. Supp. 1439 (S.D.N.Y. 1987).

⁸⁰ Cf. *United Rope Distributors, Inc. v. Kimberly Line*, 785 F. Supp. 446 (S.D.N.Y. 1992) (holding that the maintenance of a bank account within the jurisdiction satisfied the “doing business” standard). The *Kimberly Line* court reasoned that this case was distinguishable from other cases because the account was not merely incidental to the company’s activities, but was used for substantially all of the activities. See *id.* at 450.

⁸¹ See *Oriental Imports and Exports, Inc. v. Madura & Curiel’s Bank N.V.*, 701 F.2d 889 (11th Cir. 1983).

⁸² Because they offer instant availability, wire transfers allow the receiving party to begin earning interest immediately, a potentially substantial amount when dealing with large dollar transactions. The receiving party does not want to wait for a check to be mailed, processed, and cleared, because in doing so, it forgoes interest income that would accrue each day until its account is credited. Conversely, when funds are transferred by wire, the sending party loses interest income it would otherwise enjoy as a result of float. See *supra* note 23. Wire transfers may be used for other reasons as well. For example, the immediate completion of such a transfer adds a finality to transactions that ACH transfers do not, as initiation and clearing do not occur

jurisdiction context.”⁸³ It would therefore be surprising if ACH transactions, meeting the continuous and systematic elements of the general jurisdiction test, failed to satisfy the lesser requirements of specific jurisdiction. Even if a court deciding the jurisdictional issue views the tests for general and specific jurisdiction as entirely independent, a litigant may wish to highlight the continuous and systematic nature of the contacts in an effort to demonstrate that the exercise of specific jurisdiction in such instances is indeed reasonable.

6. FIRST OF AMERICA'S SPECIFIC JURISDICTION ANALYSIS OF ACH TRANSACTIONS

In *Resolution Trust Corp. v. First of America Bank*, which did not involve a cash concentration system, but rather two ACH transfers received by the party, the court correctly found that specific jurisdiction could not be exercised.⁸⁴ While recognizing that jurisdiction depends on the facts of each case, the court erred when it relied upon decisions denying jurisdiction regarding other financial technologies.⁸⁵ Such reliance causes a great deal of uncertainty as to whether the exercise of jurisdiction is inappropriate because of the facts before the court, or because ACH transactions, as a limited financial technology, should not as a general rule be used to establish jurisdiction. This confusion is unfortunate because the court's comparison of ACH transactions to other “limited technological or financial interaction”⁸⁶ is not necessarily proper. In particular, the court refers to decisions based on wire transfers, check clearing processes, correspondent accounts, and finally, claims that the ACH transactions are a “technological necessity . . . [like] telephone service,” and therefore, are insufficient to support jurisdiction.⁸⁷

6.1. Comparing ACH Transactions To Wire Transfers

In deciding *First of America*, the court relied upon legal precedent regarding the use of wire transfers. In *Dollar Savings*

⁸³ Born, *supra* note 50, at 46.

⁸⁴ See 796 F. Supp. at 1334.

⁸⁵ See *id.* at 1336-37.

⁸⁶ *Id.* at 1336.

⁸⁷ *Id.* at 1335.

Bank v. First Security Bank,⁸⁸ the Third Circuit held that wire transfers, absent other activities within a state, could not be used to exercise personal jurisdiction over a nonresident party.⁸⁹ The plaintiff in *Dollar Savings Bank* argued that a federal district court in Pennsylvania should assert jurisdiction over the defendant, a Utah bank, based upon the bank's repayment of a loan to a Pennsylvania financial institution through the use of wire transfers.⁹⁰ Dismissing the case for lack of jurisdiction and referring to wire transfers as the sole contacts, the court stated: "These circumstances created no expectation of submission to the jurisdiction of Pennsylvania courts. Moreover, they do not constitute purposeful availing of the privilege of conducting activity within the forum state."⁹¹ The "purposeful availment" test had been established by the Supreme Court in *Hanson v. Denckla*,⁹² requiring that there be some conduct by the defendant which demonstrates that it "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," and therefore enjoyed both the "benefits and protections" of the forum state's laws, before personal jurisdiction may be properly asserted.⁹³ The *First of America* court enlisted this argument, refusing to find jurisdiction because the defendant had taken no affirmative actions to avail itself of the benefits and protections of the laws of California.⁹⁴

While this rationale is correct on the facts in both *First of America* and *Dollar Savings Bank*, it will not be valid in all

⁸⁸ 746 F.2d 208 (3d Cir. 1984).

⁸⁹ See *id.* at 214-15.

⁹⁰ See *id.* at 210-11. The court also points out:

Until recently the question of personal jurisdiction over a national bank was not difficult because the venue statute permitted suit only in the district in which the bank was established. See 12 U.S.C. § 94 (1976). This statute received wide criticism and Congress amended its provisions in 1982

. . . The Senate Report commenting on the 1982 legislation explained that . . . "[t]he likelihood of disruption to a bank is now no greater than to any other corporation, while the burden imposed on plaintiffs by the special venue law may be substantial." S. REP. NO. 536, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3082.

746 F.2d at 210-11.

⁹¹ *Id.* at 214.

⁹² 357 U.S. 235 (1958).

⁹³ *Id.* at 253.

situations involving ACH transfers, especially in the cash concentration context. Although a foreign bank may have no offices, personnel, or property within the forum state, and may never have approached the entity in the forum state about providing banking services, the business could nonetheless have been solicited through a parent company or related entity. With the ability of the ACH system to debit distant accounts, this is not an unlikely scenario. The ability to debit a distant account is the ability to perform a necessary service, the transferring of funds into a cash concentration account, for the subsidiary, without ever having solicited its business. Even if it is the foreign parent company that asks the foreign bank to perform this necessary service, it is difficult to say that the bank has not taken an affirmative action with regard to the entity within the forum.

In *World-Wide Volkswagen Corp. v. Woodson*,⁹⁵ the Supreme Court stated that it was not unreasonable to find specific jurisdiction if the claim arose from a manufacturer's efforts to serve, directly or indirectly, the market in another state.⁹⁶ Applying this reasoning, the exercise of specific jurisdiction would be reasonable, even if the bank did not approach the individual entities. The bank, by approaching the non-forum parent, has indirectly secured the business of the forum subsidiaries, and thus successfully competed in the bank services market within that forum.

The ability of a non-forum bank to compete in the forum market with the most indirect of contacts is especially prevalent in the electronic funds transfer market, where a company seeking to make such a transfer has three options: a wire transfer, an ACH which sends the funds and credits the receiving account (an ACH credit), or an ACH transaction that withdraws the funds and debits the receiving account (an ACH debit). In the first two types of transactions, the bank must have some sort of contact with the entity, and therefore the forum, to transfer its funds because each of these transactions requires initiation by the forum entity. The ACH debit requires no such contact with the forum, as initiation can be based on contact with another forum, presumably the forum of the parent. Yet, the bank clearly is serving the market, whether or not it has additional contacts.

⁹⁵ 444 U.S. 286 (1980).

⁹⁶ See *id.* at 297.
<https://scholarship.law.upenn.edu/jil/vol15/iss1/3>

If the court denies that ACH transactions, in themselves, are sufficient contacts, it cannot exercise jurisdiction over the non-forum bank that is, in fact, competing with forum banks in the funds transfer market. If the court is to exercise jurisdiction over the non-forum bank competing in the forum market, it must concede that ACH transactions are, without other contacts, a sufficient basis for jurisdiction.

To deny that ACH transactions are by themselves enough to justify jurisdiction, is also to reject that the non-forum bank has, in seeking revenues and profits, purposely availed itself of the market in the forum state. Banks are increasingly viewing cash management services like ACH as devices designed to increase profits.⁹⁷ This trend is not surprising as banks have made large investments in the financial technology of a number of services.⁹⁸ Unlike the *Dollar Savings Bank* situation, where the wire transfers were simply a means of repaying a loan, the ACH transfers are not a means, but an end—the provision of a service to a forum entity, for which the bank will be compensated.

The notion that the exercise of jurisdiction is improper absent some deliberate action with regard to the forum state was reinforced in *Asahi Metal Industry Co. v. Superior Court*.⁹⁹ The Supreme Court held that there must be some act “purposefully directed towards the forum State” (emphasis in original) for jurisdiction to be properly asserted, arguing that there must be more than the placement of a product in the “stream of commerce.”¹⁰⁰ The Court sought further indicia of intent or purpose to serve the forum state, which could include “designing the product for the market in the forum state” or “establishing

⁹⁷ See Barthel, *supra* note 4, at 25. “[I]n recent years, more and more banks are trying to squeeze profits from their cash management services.” *Id.* See also *supra* note 48 (discussing Ladbroke and its arrangement with Mellon Bank).

⁹⁸ See, e.g., Richard Layne, *U.S., Canada Banks to Test Cash Management Service*, AM. BANKER, Mar. 20, 1991, at 3 [hereinafter *Banks to Test Cash Management Service*]. Banks developing an international EDI service are engaged in a test of a pilot system. Even though “no customer has declared an interest” in using the system, the banks view this test as a valuable investment “in building a technology infrastructure for EDI,” because they “expect demand to increase for domestic and international payments.” *Id.*

⁹⁹ 480 U.S. 102 (1987).

channels for providing regular advice to customers."¹⁰¹ When a bank develops a cash concentration system, it works very closely with both the parent corporation and the subsidiaries to ensure that the needs of both entities are met. While simply designing a cash concentration system is not the equivalent of designing a product that is to be openly marketed within the forum state, it is nonetheless a specific act directed towards a resident corporation. In addition, once a cash concentration system is implemented, the bank has service personnel available to offer assistance to the corporate entities. Again, though not directed to the general public of the forum state, the availability of personnel constitutes a purposeful action directed to the forum state. Therefore, an ACH transaction, as part of a cash concentration system, may be viewed as an indication of an intent to serve the forum state.

6.2. Comparing ACH Transactions To Check Clearing

Besides looking at wire transfers, the court in *First of America* invoked the logic of cases involving personal jurisdiction and the use of paper checks.¹⁰² On first impression, the analogy appears reasonable, as ACH transfers have been described as the electronic alternative to checks. In reality, this approach ignores some important differences between the two types of transactions. The use of the ACH system allows banks to perform services not possible with the ordinary check.

In cash concentration systems, the customer simply notifies the bank of the amount, and the bank actively initiates the transaction, a transaction which it will execute at the end of each day. Such an active role could justify a finding that the non-forum bank had purposely availed itself of the forum. In contrast, checks do not involve the bank in any active role. Instead, the bank merely acts as a conduit to the check clearing system in a transaction initiated by the individual who writes the check.

While a decision like *Froning & Deppe, Inc. v. Continental Illinois National Bank & Trust Co.*¹⁰³ is correct in holding that justice is not served when jurisdiction over a nonresident bank

¹⁰¹ *Id.*

¹⁰² 796 F. Supp. at 1336-37 & n.3.

¹⁰³ 695 F.2d 289 (7th Cir. 1982).

is based only on the bank's acceptance of a check from the forum state, its language should not be mechanically applied to ACH transactions. The court in *First of America* did not err in citing *Froning & Deppe* because both cases had similar facts involving the receipt of a fund transfer mechanism. The danger arises, however, when a rule prohibiting the use of ACH transactions to establish jurisdiction is found to exist based on improper comparisons to the check clearing situation.

6.3. Comparing ACH Transactions To Correspondent Bank Accounts

In *First of America*, the court also compared the situation before it to other decisions which held that it is inappropriate to exercise personal jurisdiction when the only contacts with the forum state are correspondent bank accounts.¹⁰⁴ Banks will often maintain accounts at other banks to facilitate the settlement of various transactions between the banks. Such accounts are referred to as correspondent accounts.¹⁰⁵ The *First of America* court's comparison in this case is dangerous because while it did not have any bearing on the case before the court, the decision could have a significant impact on whether courts will be amenable to asserting jurisdiction over foreign banks that are working with U.S. banks to provide ACH services for their customers.

6.3.1. General Analysis Of Financial Technology

The *First of America* court's use of precedents in the area of correspondent bank accounts is even more puzzling than its use of cases involving wire transfers and the check clearing process because the latter cases at least involve a funds transfer mechanism. In *First of America*, correspondent bank relations were not present.¹⁰⁶ Yet the court includes such relations in its analysis by way of analogy, comparing the situation before it to instances where correspondent bank accounts have been

¹⁰⁴ See 796 F. Supp. at 1336-37 & n.2.

¹⁰⁵ NCCMA, *supra* note 3, at 2-1. See *supra* notes 45-47 and accompanying text.

¹⁰⁶ The court explains that the nonresident defendant, First of America Bank, "does not maintain any correspondent banking relationship with any California financial institution." 796 F. Supp. at 1334.

found to be insufficient contacts.¹⁰⁷ The court cites these cases because they demonstrate that limited financial interaction with the forum state is insufficient to justify an exercise of jurisdiction.¹⁰⁸ The court's analogy is indicative of the general theoretical framework on which it relies. The analogy, however, is faulty, since correspondent bank accounts were not at issue here.

A general analysis that views ACH transactions as simply another limited financial transaction fails to recognize the distinctive nature of the system and the possibility that the "minimum contacts" standard may be satisfied in certain circumstances. The court in *First of America*, however, may have been more concerned with establishing a general rule to address ACH transactions. In rejecting the use of wire transfers to establish jurisdiction, the court in *Dollar Savings Bank* noted that ad hoc determinations of jurisdiction cause "confusion where there should be certainty and . . . extensive and expensive skirmishing before even reaching the merits."¹⁰⁹ This rationale would justify any general rule regarding the exercise of jurisdiction, and would support the rule possibly suggested in *First of America* for ACH transactions.

6.3.2. Possible Impact On Jurisdiction Over Foreign Banks

With U.S. branches of foreign banks offering ACH services to their customers, the correspondent account issue is important because foreign banks necessarily rely on correspondent accounts to offer these services. Foreign banks are able to offer ACH services by entering into relationships with U.S. banks.¹¹⁰ At each U.S. bank with which it has such a relationship, the foreign bank maintains a bank account in its own name. The accounts

¹⁰⁷ *Id.* at 1336-37 & n.2.

¹⁰⁸ The court states: "A number of analogous cases have declined to find jurisdiction based on limited technological or financial interaction with a non-forum bank. Jurisdiction has been declined in instances of correspondent accounts or a correspondent relationship . . ." *Id.* at 1336.

¹⁰⁹ 746 F.2d at 214 (explaining why the same "minimum contacts" test is used for individuals and corporations).

¹¹⁰ Foreign banks can rely on a single correspondent bank to carry out their ACH transactions. One commentator has noted, however, that banks will often enter into relationships with multiple U.S. banks across the country, with each covering a different region. See Layne, *Cross-Border Partners*, *supra* note 42, at 3.

are adjusted with each transaction that is made on behalf of the foreign bank and its customers.¹¹¹

Even if ACH payments are themselves sufficient to justify jurisdiction, the party which is actually performing the transaction would still be at issue in the cases involving foreign banks. While the foreign bank offers the service, a domestic bank actually carries out the transaction through this correspondent relationship. Because many courts, like that in *First of America*, believe that limited financial transactions are insufficient to meet the "minimum contacts" test,¹¹² they are unlikely to use ACH transactions to expand jurisdiction to reach U.S. offices of foreign banks that do not directly carry out such transactions.

An interesting impact of any decision holding that only direct ACH transactions are sufficient to establish jurisdiction (in stead of those completed through a correspondent) is that foreign banks might not be subject to the same jurisdiction as domestic banks. Such a ruling would raise the type of problem that Congress tried to address with the International Banking Act of 1978,¹¹³ in response to the claims of U.S. banks that foreign banks in the United States enjoyed too many competitive advantages over domestic institutions.¹¹⁴ While the ability to avoid jurisdiction may not rise to the level of a significant competitive advantage, it does present an interesting issue that courts need to address as they decide whether ACH transactions can be used to establish minimum contacts.

6.4. Comparing ACH Transactions To Telephone Service

The *First of America* court characterizes the ACH system as "a technological necessity of modern banking, similar in some respects to having telephone service,"¹¹⁵ and therefore an insufficient basis for jurisdiction. Similarly, in *T.J. Raney & Sons, Inc. v. Security Savings & Loan Ass'n*,¹¹⁶ the Eighth Circuit affirmed that the use of banking facilities, as well as the use

¹¹¹ See *supra* notes 45-47 and accompanying text.

¹¹² 796 F. Supp. at 1336.

¹¹³ 12 U.S.C. §§ 3105-08 (1988).

¹¹⁴ Daniel M. Laifer, Note, *Putting the Super Back in the Supervision of International Banking, Post-BCCI*, 60 *FORDHAM L. REV.* S467, S476 & n.57 (1992).

¹¹⁵ 796 F. Supp. at 1335.

of mail or telephone facilities, absent other contacts, did not meet the "minimum contacts" standard and could not be used to exercise personal jurisdiction.¹¹⁷ The *First of America* court summed up the rationale behind such a ruling, stating that "such technology which makes banking services more accessible to customers does not commit the bank to national jurisdiction without some affirmative action to avail itself of a particular forum."¹¹⁸ The court was concerned that basing jurisdiction on involvement in the clearinghouse system "would mean that every bank in the nation is probably subject to jurisdiction in all states."¹¹⁹

Given the facts, *First of America* was rightly decided; however, the court went too far and adopted a legal rule that is overly broad. In *First of America*, the nonresident bank simply received the ACH payment and did not solicit or offer the service to the customer who actually used it. In this situation, just as in the case of receiving a telephone call from the forum state, there is insufficient contact to meet due process standards. Such a finding is consistent with the notion that a unilateral act by one party to cause contact with the forum state is not enough to merit the exercise of personal jurisdiction.¹²⁰

Still, it is significant that the converse situation is not as clear cut. Not only does the foreign bank which initiates the transaction make the technological equivalent of a phone call, it also provides a banking service—transferring the funds of a forum entity—for which it expects to be compensated. Unlike a telephone conversation, where the individual avails itself of the service immediately upon initiation of the call, the bank initiates the transaction and then performs the transfer. In a cash concentration system, the bank will operate on standing instructions with regard to its accounts, awaiting only direction from the firm as to the amount to be transferred. It then has the equivalent of a "conversation" when it transfers the funds. In fact, in a recent decision, *United Rope Distributors, Inc. v.*

¹¹⁷ *Id.* at 525 ("The district court properly concluded that the use of interstate mail, telephone or banking facilities, standing alone, was insufficient to satisfy [the jurisdictional requirements].").

¹¹⁸ 796 F. Supp. at 1336.

¹¹⁹ *Id.* at 1335.

¹²⁰ See *Hanson v. Denckla*, 357 U.S. at 235, 253 (1958).

Kimberly Line,¹²¹ the court found that the bank's activities in transferring funds were so important that the bank served as an agent for the firm maintaining the account.¹²² In such circumstances, it can be argued that the use of the technology is an act by which the non-forum bank, not the customer, purposefully avails itself of an entity in the forum state. If courts interpret these holdings to state that electronic funds transfers alone can never be enough to establish jurisdiction, they are ignoring this important fact.

Additionally, if the bank in some manner solicited the corporation in an effort to sell this service, the fact that it is similar to phone service is of little consequence. In such circumstances, it would be perplexing if a court stated that a nonresident phone company selling long distance service would not be subject to the "minimum contacts" test, simply because it is selling phone service.

7. THE IMPACT OF *FIRST OF AMERICA* ON FUTURE DECISIONS

Future attempts to establish jurisdiction on the basis of ACH transactions must overcome the significant hurdle erected by *First of America*. The imperfect analogies upon which that court relied, however, may be successfully challenged in certain factual settings, such as those that exist when ACH transactions are used as part of a cash concentration system. In such situations, the ACH transactions to the forum are performed systematically on a daily basis,¹²³ as opposed to the limited transactions upon which the plaintiff in *First of America* attempted to base jurisdiction.¹²⁴

The ability to successfully establish jurisdiction also depends on the nature of the jurisdiction sought. Because the requirements for specific jurisdiction are less stringent, it will be easier to overcome the *First of America* holding in that context.¹²⁵ For this reason, this decision will be less likely to

¹²¹ 785 F. Supp. 446 (S.D.N.Y. 1992).

¹²² See *id.* at 450.

¹²³ See *supra* notes 29-36 and accompanying text.

¹²⁴ 796 F. Supp. at 1335.

¹²⁵ While a court could possibly find ACH transactions sufficient to constitute "doing business" within the forum state, it is not clear that it would be willing to find the existence

hinder cases involving specific jurisdiction than those seeking general jurisdiction based on ACH transactions.

Given a corporate cash management system, there are three major arguments that may be employed to defeat the general prohibition on the use of technological interactions to establish jurisdiction, thus nullifying the specific rule regarding ACH transactions set out in *First of America*.¹²⁶

First, any cash concentration system that relies on ACH debits may arguably represent a "purposeful availment" of the forum in which jurisdiction is sought. Certainly, banks within the forum state that have lost a potential customer for their electronic funds transfer services will regard this availment as sufficient.¹²⁷

Second, it will be important to demonstrate that using the ACH transactions to establish jurisdiction is not unreasonable based upon the continuous and systematic nature of the contacts that exist between the foreign bank and the forum state.¹²⁸ This claim rests on the notion that if two-thirds of the elements necessary to establish general jurisdiction are present, the more easily satisfied test for specific jurisdiction should be met. Even if courts view these two tests as wholly independent, thereby diminishing the value of this specific argument, the exercise of jurisdiction hardly seems unreasonable, especially in light of the profits received by non-forum banks from services being provided to forum entities.

Finally, it may be useful to demonstrate that technological interaction is not simply a means by which plaintiffs attempt to establish jurisdiction where none exists. While courts have tended to rely on certain criteria (which traditionally have not included technological interactions) to determine whether a party was sufficiently "present" within a forum to warrant the exercise of jurisdiction, they have been slow to recognize that such technology may in fact allow entities to operate in a forum without the risk of having to defend themselves there. Therefore, in an effort to make courts aware of such situations, it will be beneficial to cite the more progressive cases in this area, such as *United*

of general jurisdiction, it is more likely that it would uphold specific jurisdiction, finding a "purposeful availment." See *supra* notes 57-67 and 74-82 and accompanying text.

¹²⁶ 796 F. Supp. at 1336.

¹²⁷ See *supra* notes 94-101 and accompanying text.

¹²⁸ See *supra* notes 72-73 and accompanying text.

Rope Distributors, Inc. v. Kimberly Line,¹²⁹ where the court noted that technological advances, such as the telephone, telex, and fax have made it possible to conduct business within a state, without having an agent physically located there.¹³⁰

8. CONCLUSION

Electronic payments are a rapidly growing type of financial transaction, even though "[t]he volume of those electronic payments is still minuscule compared to the total number of . . . payments made by check."¹³¹ However, demand for such domestic and international payments is expected to increase.¹³² The ACH system, through both the use of cash concentration systems and EDI, may well lead the way in this expansion.

In order for U.S. courts to be prepared to deal with the jurisdictional questions that may result from these international transactions, they must first address both the jurisdictional issues surrounding purely domestic transactions and the use of this technology by foreign banks within the United States. For courts to properly carry out this analysis, it is imperative that they recognize the flexibility of the ACH system. In answering this jurisdictional question, it is inappropriate to look to other types of financial transactions that do not share this flexibility.

Comparisons to wire transfers fail to recognize the way in which ACH transactions are used to concentrate funds across state lines on a daily basis, which, with current technology, can even include weekend transactions.¹³³ In addition, such comparisons fail to acknowledge that banks can use ACH services to compete in a forum's electronic funds transfer markets, without additional contacts.

Although the ACH system has been called the electronic equivalent to paper checks, it is inappropriate to use the paper checking system as a model to establish jurisdictional rules. The ability of a bank to initiate an ACH transfer distinguishes the transaction from that of clearing a check, which is written by the customer and passively processed by the bank. The active

¹²⁹ 785 F. Supp. 446 (S.D.N.Y. 1992).

¹³⁰ See *id.* at 450.

¹³¹ Layne, *Cross-Border Partners*, *supra* note 42, at 3.

¹³² Layne, *Banks to Test Cash Management Service*, *supra* note 98, at 3.

¹³³ Layne, *ACH System*, *supra* note 3, at 10.

role taken by a bank in the ACH process lends considerably more support to a "purposeful availment" argument.

Reliance upon case law prohibiting the use of correspondent accounts to establish contacts can be justified only if the correspondent account is equated to ACH transactions as a financial device for providing customer service. This analogy, however, fails to grasp that ACH transactions are services in themselves which can be offered and sold to customers in states outside of the bank's domicile, and are not simply a means for providing customer service.

The mention of correspondent accounts in an ACH analysis is ironic because they come into play only when a foreign or a small bank tries to provide this service. While foreign banks with U.S. offices can offer ACH services, they must complete the transaction through correspondent accounts. This arrangement can lead to an interesting paradox, as domestic banks may be found amenable to jurisdiction, while foreign banks, offering the same service, may be able to avoid jurisdiction by pointing to cases severely limiting the impact of correspondent accounts on the "minimum contacts" test.

Finally, a comparison to telephone service is accurate only if a bank is receiving the ACH transfer. When a bank receives an ACH transaction on behalf of a customer, it is only making banking more accessible to this customer. If the bank sends the ACH transfer, however, it plays a very active role in completing a service from which it expects a profit.

The failure to recognize the unique qualities of the ACH system means that such transactions, which in specific instances can at least meet the continuous and systematic aspects of the "minimum contacts" test needed to establish general jurisdiction under the due process clause, are not being properly analyzed. This breakdown is troubling because it would appear that if specific jurisdiction were sought, as it was in *First of America*, it would be refused, even though a cash concentration system using ACH transactions would satisfy two-thirds of the general jurisdiction test.

Further, as banks are currently using this technology to gain access to non-forum electronic funds transfer markets, it appears that they are, at a minimum, "purposefully availing" themselves of an important aspect of the forum state. And, as these banks increasingly use these transactions to generate profits, the exercise of jurisdiction certainly appears to be reasonable in some

circumstances.

First of America is the only case to have addressed this issue. That court appropriately held that the limitations of due process prevent the exercise of personal jurisdiction over a bank that had simply received two ACH transactions initiated by another bank. However, the court should have been more cautious, limiting the holding to the specific facts of the case. It is unclear whether its decision establishes a precedent that will have to be overcome before the ACH system, with its continuous and systematic contacts, can be used to justify jurisdiction. Courts should recognize that in specific circumstances, the bright line rules established over the years for financial transactions may not be appropriate, as financial systems become increasingly flexible products that banks sell as services to their customers.