

Louisiana Law Review

Volume 34 | Number 3

Employment Discrimination: A Title VII Symposium

Symposium: Louisiana's New Consumer Protection

Legislation

Spring 1974

In Personam Jurisdiction Over Nonresident Buyers: Louisiana Lengthens Its Long-Arm

David B. Means III

Repository Citation

David B. Means III, *In Personam Jurisdiction Over Nonresident Buyers: Louisiana Lengthens Its Long-Arm*, 34 La. L. Rev. (1974)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss3/20>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Since many of the penal institutions throughout the country are notoriously inadequate, both in terms of staff and facilities, it is often the case that a prisoner's injuries are not the result of fault on the part of prison officials but are due instead to the inadequacies of the institution.⁴¹ The prisoner whose injury is not caused by the individual shortcomings of those who have immediate control over him, but instead by the failure of the state to provide its penal institutions with sufficient resources, usually has no claim against the state.⁴² This position, not without merit, reflects the judicial hesitancy to second-guess political decisions. The determination as to how the limited funds of the state are to be allocated is considered a legislative function, outside both the authority and the competence of the judiciary. On the other hand, arguments have been advanced by some that the state, which has placed its prisoners in their perilous situation and deprived them of their means of self-protection, should to some degree be responsible for their safety.⁴³ Although this is presently a minority position, it indicates a growing concern for the rights of prisoners and the increased possibility of judicial enforcement of these rights.

Jim Walsh

IN PERSONAM JURISDICTION OVER NONRESIDENT BUYERS:
LOUISIANA LENGTHENS ITS LONG-ARM

Plaintiff, a Louisiana corporation, which contracted with defendant to furnish engineering services, sought to assert personal juris-

41. "Tragically, plaintiff's injury was the product of an environment in which violent, disturbed, and sexually abnormal men are crowded into a single prison unit under conditions that are far less than ideal. As the record shows no degree of caution can altogether prevent such occurrences." *State v. Parker*, 282 So. 2d 483, 487 (La. 1973). "We agree, as argued by plaintiff before us, that Hawaii State Prison is very antiquated and inadequate. . . ." *Upchurch v. State*, 51 Hawaii 150, 152, 454 P.2d 112, 114 (1969).

42. *Upchurch v. State*, 51 Hawaii 150, 454 P.2d 112 (1969); *City of Lexington v. Greenhow*, 451 S.W.2d 424 (Ky. Ct. App. 1970); *Parker v. State*, 282 So.2d 483 (La. 1973).

43. "The state's failure to appropriate adequate monies for the state's institutions to perform their custodial function should not, in this last part of the Twentieth Century, immunize the state from liability to an inmate who is injured through the state's lack of reasonable care in furnishing reasonable safeguards for his physical security while he is in the state's custody and unable to fend for himself." *Nedd v. State*, 281 So. 2d 131, 136 (La. 1973) (dissenting opinion). A similar opinion is expressed in the dissenting opinion in *Parker v. State*, 282 So. 2d 483, 488 (La. 1973).

diction over the nonresident buyer in a suit concerning the contract. The defendant was not authorized to do business in Louisiana and had no place of business or representatives in the state. Defendant sent its vice-president to Louisiana to negotiate the contract, and mailed periodic payments to plaintiff's office. The contract was performed in Indonesia, although plaintiff performed various incidental services in its Louisiana office. Furthermore, an average of two telephone calls per week were made between the two corporations over the six-month duration of the contract. The district court sustained defendant's exception to the court's in personam jurisdiction, and was affirmed by the Third Circuit. The Louisiana supreme court reversed, *holding* that defendant had sufficient contacts with the state to justify the assertion of in personam jurisdiction. *Drilling Engineering, Inc. v. Independent Indonesian American Petroleum Company*, 283 So. 2d 687 (La. 1973).

For purposes of establishing in personam jurisdiction, most courts have always drawn a distinction between buyers and sellers.¹ Originally this distinction was rooted in statutory construction, as shown by the reluctance of the courts in the past to hold that buying within the state satisfied the old "doing business" and "presence" tests.² However, with the expansion of personal jurisdiction over non-residents since the landmark decision of *International Shoe v. Washington*,³ most states have completely abandoned the notion that the factual differences are so great as to preclude the assertion of jurisdiction over *all* nonresident buyers.⁴ Despite the fact the nonresident may be a buyer, the assertion of personal jurisdiction over him is still subject to the same due process—minimum contacts test that is applied to the nonresident seller. However, due to inherent factual differences between buyers and sellers, most courts have recognized that the quantum of contacts required to satisfy this test must be

1. *See, e.g.*, *Fourth N.W. Nat. Bank v. Hilson Ind., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959).

2. *See, e.g.*, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (Where the defendant's only business transacted in the state was the purchase of goods, the court held that defendant was not doing business in such a manner and to such extent as to warrant the inference that he was present there.)

3. 326 U.S. 310 (1945).

4. *See, e.g.*, *M & W Cont., Inc. v. Arch Min. Corp.*, 466 F.2d 1339 (6th Cir. 1972); *Flying Saucers, Inc. v. Moody*, 421 F.2d 884 (5th Cir. 1970); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836 (E.D.N.Y. 1971); *Hill v. Smith*, 337 F. Supp. 981 (W.D. Mich. 1972); *McIntosh v. Navaro Seed Co.*, 81 N.M. 302, 466 P.2d 868 (1970). In all these cases the only contacts the defendants had with the forum were those incidental to their purchasing activities. This writer could find no states which refused as a matter of statutory construction to assert jurisdiction over nonresident buyers.

greater when nonresident buyers are involved.⁵

A major difference between the two is that a seller's product remains in the state with the possibility of future causes of action arising due to its presence, whereas a buyer may "transact business" without entering the forum, leaving nothing behind except his obligation to pay. Another distinction is that a seller's activity within the state is always for the purpose of gaining an economic benefit, which is not necessarily the situation where buyers are concerned.

In seeking to balance the interest of the resident seller in receiving payment through a suit in the forum, and the interest of the buyer in not being forced to defend a suit in a distant forum, some courts have recognized the need to classify the particular type of buyer involved in each factual situation.⁶ Through classification a rational basis is established for asserting jurisdiction over buyers who enter the forum hoping to profit from their transactions and for declining jurisdiction over the passive mail order consumer, who should not be presumed to assume any of the risks involved in making interstate business transactions.

The first Louisiana case decided under R.S. 13:3201⁷ involving a

5. See, e.g., *Belmont Ind., Inc. v. Superior Ct.*, 107 Cal. Rptr. 237, 31 C.A.3d 281 (1973); *Tiffany Records, Inc. v. M.B. Krupp Dist., Inc.*, 81 Cal. Rptr. 320, 276 C.A.2d 610 (1969); *Geneva Ind., Inc. v. Copeland Const. Corp.*, 312 F. Supp. 186 (N.D. Ill. 1970); "Automatic" Sprink. Corp. v. Seneca Foods Corp., 280 N.E.2d 423 (Mass. 1972); *Branstrom & Assoc., Inc. v. Community Mem. Hosp.*, 209 N.W.2d 389 (Minn. 1973). Jurisdiction over the nonresident buyer was denied in each of these cases on the basis of insufficient contacts. Because of the differing nature of buyers and sellers, additional contacts would have been present in each case had the buyer been a seller. Compare *Geneva Industries with Aucoin v. Hanson*, 207 So. 2d 834 (La. App. 3d Cir. 1968); *Belmont Industries and Branstrom with Coreil v. Pearson*, 242 F. Supp. 802 (W.D. La. 1965); *Tiffany Record with Coulter v. Sears, Roebuck and Co.*, 426 F.2d 1315 (5th Cir. 1970); and "Automatic" Sprinkler with *Kokomo Opalescent Glass Inc. v. Arthur W. Schmid International, Inc.*, 371 F.2d 208 (7th Cir. 1966). In these cases jurisdiction was asserted over nonresident sellers.

6. Compare *In-Flight Devices Corp v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *American Cont. Imp. Agency v. Superior Ct.*, 30 Cal. Rptr. 654, 216 C.A.2d 317 (1963) (stressing the profit motive of the nonresident buyers involved) with *Darby v. Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423 (1970); *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959) (stressing rights of the mail order consumer).

7. La. R.S. 13:3201 (Supp. 1964): "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

- (a) transacting any business in this state;
- (b) contracting to supply services or things in this state;
- (c) causing injury to damage by an offense or quasi offense committed through an act or omission in this state;
- (d) causing injury or damage in this state by an offense or quasi offense committed

nonresident buyer was *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*⁸ There the nonresident buyer, who had made two prior purchases of lumber and had advertised in publications distributed in the state, was held not amenable to personal jurisdiction by the Fourth Circuit in a suit for recovery of the purchase price. The court drew a sharp distinction between nonresident buyers and sellers, asserting that a buyer does not "conduct business activities" within the meaning of R.S. 13:3201(a). In finding the statute inapplicable the court stressed that there is no statutory provision applying to buyers comparable to subsection (b), which provides for the assertion of jurisdiction over those who contract to supply services or things in Louisiana. Since there is no provision specifically applying to consumers who contract to buy in the state, and since subsection (a) was found to exclude all buyers by definition, the court denied jurisdiction on the basis of a statutory lack of power. No classification of the nonresident buyer was made, for the court reasoned, "[a] seller may be 'doing business' when he sells in this state, but this is not necessarily true for a buyer."⁹ The court further added, "the buyer does not contemplate any use of the laws or judicial machinery of his nonresident seller's domiciliary state."¹⁰ Through such generalizations the court placed Craftsman and all nonresident buyers into one homogeneous class typified by the ordinary mail order consumer.

Although recognizing that R.S. 13:3201(a) made no distinction between buying and selling, the supreme court affirmed the appellate decision in *Riverland*. Despite this recognition and the fact that the defendant-buyer's presence in Louisiana was profit motivated, the court went on to embrace the reasoning of the Fourth Circuit: "Buying is not traditionally the same as doing business."¹¹ The court found this difference between buying and selling constitutionally compelled by the due process clause. Stressing that buyers do not normally contemplate the use of the laws or courts of the seller's state, the court concluded that, "it would 'offend traditional notions of fair play and substantial justice' to allow a foreign state to subject an out of

through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; or (e) having an interest in, using, or possessing a real right or immovable property in this state."

8. 239 So. 2d 465 (La. App. 4th Cir. 1970), *aff'd*, 259 La. 635, 251 So. 2d 45 (1971).

9. 239 So. 2d at 468 (La. App. 4th Cir. 1970).

10. *Id.* at 467.

11. *Riverland Hardwood Co. v. Craftsman Hardwood Lbr. Co.*, 259 La. 635, 642, 251 So. 2d 45, 47 (1971).

state purchaser to its jurisdiction.”¹² The court did add, however, that the above statement applied to relatively small purchases by buyers who are ultimate consumers.

Drilling Engineering is the second and most recent Louisiana case involving nonresident buyers decided under R.S. 13:3201.¹³ The Court of Appeal for the Third Circuit denied jurisdiction citing *Riverland* and *Fisher v. Albany Machine and Supply Company*.¹⁴ *Fisher*, however, did not involve a nonresident buyer. In that case, the defendant was a nonresident seller who pleaded the restricted view of minimum contacts as expressed in *Riverland*. In holding the *Riverland* decision inapplicable the court in *Fisher* stated,

[o]ur holding there meant that it would require more ‘contacts’ for our courts to obtain jurisdiction over a nonresident who buys in Louisiana than a nonresident who sells in Louisiana. We there held that due process requirements are different for nonresident buyers and nonresident sellers.¹⁵

The court in *Fisher* proceeded to assert jurisdiction under R.S. 13:3201(d) and the “deriving substantial benefit” clause based on the defendant’s isolated sale of a \$12,958 machine in the state.

The Third Circuit in *Drilling Engineering* distinguished the instant case from *Babineaux v. Southeastern Drilling Corporation*.¹⁶ That case also involved a nonresident buyer and is factually similar to the instant case, but it was decided under R.S. 13:3471(1).¹⁷ In *Babineaux*, the resident plaintiff sought workmen’s compensation for injuries received while working for the defendant on a drilling rig in the Persian Gulf. The defendant had advertised in a Louisiana newspaper soliciting workers for its drilling operations and had come to

12. *Id.*

13. *Babineaux v. Southeastern Drilling Corp.*, 170 So. 2d 518 (La. App. 3d Cir. 1965), to be discussed later in this paper, was also a nonresident buyer case but was decided under R.S. 13:3471(1).

14. 261 La. 747, 260 So. 2d 691 (1972).

15. *Id.* at 758, 260 So. 2d at 695.

16. 170 So. 2d 518 (La. App. 3d Cir. 1965).

17. LA. R.S. 13:3471(1) (1950), as amended by La. Acts 1950, No. 21 § 1; 1954, No. 142 § 1; 1960, No. 32 § 1. “If the foreign corporation is not one required by law to appoint an agent for the service of process, but has engaged in a business activity in this state, service of process in an action or proceeding on a cause of action resulting from such business activity in this state, or for any taxes due or other obligations arising therefrom, may be made on any employee or agent of the corporation of suitable age and discretion found in the state. If such employees or agents are no longer in the state . . . the officer charged with the duty of making the service shall make his return to the court . . . Thereupon the court shall order that service shall be made on the secretary of state . . .”

Louisiana to interview the prospective workers. The defendant sent the plaintiff to New Orleans for a physical examination and inoculations, and furnished the plaintiff's plane ticket and travel expenses for the trip from New Orleans to the Persian Gulf. Plaintiff's injuries were sustained on a rig purchased and assembled in Louisiana. Stressing the extensive contacts present in *Babineaux* and the strong factors of fairness and justice in plaintiff's favor,¹⁸ the Third Circuit in *Drilling Engineering* indicated that without a comparable quantum of contacts, jurisdiction would not be asserted over nonresident buyers.

The Louisiana supreme court reversed, stating that on the facts of the instant case the defendant-buyer was "transacting business" within the meaning of R.S. 13:3201(a), and that there were sufficient contacts with the state such that due process requirements were satisfied. There was no discussion of factual differences between buyers and sellers nor did the majority differentiate between mail order consumers and buyers-for-profit. Rather, the court stressed three factors: (1) the defendant contacted the plaintiff and came to Louisiana for negotiations; (2) the contract was in furtherance of defendant's business; and (3) the contract stretched over a six-month period. Only in Justice Barham's concurring opinion was there language touching on the fundamental problem in this area, the need for classification of buyers in order to differentiate between the mail order consumer and the buyer-for-profit.¹⁹

In cases where the buyer is seeking to profit from the transaction, the courts in other states have consistently based their decisions on the traditional due process—minimum contacts test without stressing the fact that the nonresident defendant was a buyer.²⁰ One of the few cases clearly articulating the considerations required in cases involving nonresident buyers was *In-Flight Devices Corp. v. Van*

18. Plaintiff was disabled in Louisiana at the time and needed medical attention in the state.

19. 283 So. 2d 687, 690 (La. 1973).

20. See, e.g., *Flying Saucers, Inc. v. Moody*, 421 F.2d 884 (5th Cir. 1970) (where defendant's agent carried on substantial activities in Florida resulting in the purchase of a ship); *Hill v. Smith*, 337 F. Supp. 981 (W.D. Mich. 1972) (where Illinois residents came to Michigan to view, negotiate for, and purchase a ski resort); *Nix v. Dunavant*, 249 Ark. 641, 460 S.W.2d 762 (1970) (where defendant's agent negotiated for the purchase of an Arkansas cotton crop); *Kropp Forge Co. v. Jawitz*, 37 Ill. App. 2d 484, 186 N.E.2d 76 (1962) (where defendant inspected plaintiff's premises in Illinois and measured the equipment he subsequently purchased for \$2600); *McIntosh v. Navaro Seed Co.*, 81 N.M. 302, 466 P.2d 868 (1970) (where Texas grain buyer's contact with New Mexico included sending of trucks and an agent into the state). In all these cases jurisdiction was asserted over the nonresident buyer.

Dusen Air, Incorporated.²¹ In holding the nonresident buyer amenable to jurisdiction in Ohio, the court stated:

To the extent the buyer vigorously negotiates, perhaps dictates, contract terms, inspects production facilities and otherwise departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears. Where the passivity characterizing some buyers is absent, . . . the distinction is of little significance.²²

Despite the rarity of clear articulation of the above reasoning, a majority of the courts seem to apply it without discussion in the form of a stricter due process—minimum contacts standard.²³ Such a test recognizes that inherent differences between buyers and sellers do exist, and that these differences normally give rise to fewer contacts with the forum when buyers are involved. The test is completely consistent with today's liberal interpretation of the due process—minimum contacts test, but recognizes that buyers must be classified in order to protect the passive mail order consumer.

Although the buyer status is certainly one factor that the courts must consider, in cases where jurisdiction over nonresident buyers is denied, most decisions are based on a lack of minimum contacts, not on defendant's status as a buyer.²⁴ Buyers-for-profit have been able to insulate themselves to a limited degree by making their purchases by telephone or through the mail. Most states refuse to assert jurisdiction in cases of isolated purchases of this type where the defendant has no other contacts with the forum.²⁵ A nonresident buyer who

21. 466 F.2d 220 (6th Cir. 1972).

22. *Id.* at 233.

23. See note 5 and accompanying text *supra*.

24. See, e.g., *Hamilton Bros., Inc. v. Peterson*, 445 F.2d 1334 (5th Cir. 1971) (where the deposit of \$15,000 in a Florida bank and a telegram sent to plaintiff in Florida offering to purchase a stricken vessel were held to be insufficient contacts); *The Purdy Co. v. Argentina*, 333 F.2d 95 (7th Cir. 1964) (where defendant was held not to have "transacted business" in Illinois where its only contact with the state was the establishing of a letter of credit on an Illinois bank pursuant to a contract for sale made in Argentina); *Culkin v. Smith*, 293 N.Y.S.2d 913, 57 Misc. 901 (1968) (where the purchase of stock in resident corporations was held to be insufficient contacts). *But see Branstrom and Assoc., Inc. v. Community Mem. Hosp.*, 209 N.W.2d 389 (Minn. 1973) (where the court distinguished the application of the Minnesota Long Arm Statute to the activities of nonresident sellers and tortfeasors on the one hand and nonresident buyers on the other).

25. See, e.g., *Garret v. R.H. Macy & Co.*, 360 F. Supp. 872 (E.D. Tenn. 1972); *Gildenhorn v. Lum's, Inc.*, 335 F. Supp. 329 (S.D.N.Y. 1971); *Sol Tool Co. v. American Tool & Die Co.*, 293 A.2d 583 (Del. 1972); *"Automatic" Sprink. Corp. v. Seneca Foods Corp.*, 280 N.E.2d 423 (Mass. 1972).

makes an isolated mail or telephone purchase has fewer contacts with the forum than does a nonresident seller who makes an isolated sale in the forum. Additional contacts must be found when buyers are involved since no activity has been carried on within the state and no product remains after the transaction. However, regular or systematic purchases of a significant value have been found to satisfy the minimum contacts requirement despite the fact the nonresident buyer or his agent never entered the forum.²⁶

When regular purchases or other additional contacts with the forum by buyers-for-profit are found, most states do not require for the assertion of jurisdiction that the defendant had to be present in the forum while transacting the business in question.²⁷ The Louisiana requirement here is unclear. Although nothing in the Louisiana Long Arm Statute indicates such a result, the court of appeal in *Aucoin v. Hanson*²⁸ indicated that the defendant's presence was "probably necessary."²⁹ Subsection (d) of R.S. 13:3201 does not require defendant's presence for a personal injury action so it is therefore arguable that there should be no substantial reason for differentiating personal injury actions from business transactions insofar as the physical presence of the defendant is concerned. However, it should be noted that a *substantial connection* with the forum is required under subsection (d), whereas under subsection (a) the requisite contacts are subject only to the traditional due process—minimum contacts test.

26. See, e.g., *State ex rel. White Lbr. Sales, Inc. v. Sulmonetti*, 252 Ore. 121, 448 P.2d 571 (1968). *Contra*, *M. Katz & Son Bill. Prod., Inc. v. G. Correale & Sons, Inc.*, 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 (1967) (where jurisdiction was denied over a telephone purchaser who had been making such purchases with plaintiff for thirty years).

27. See, e.g., *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972)(Ohio); *O'Hare Int. Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971) (Illinois); *Southern Mach. Co., Inc. v. Mohasco Ind., Inc.*, 401 F.2d 374 (6th Cir. 1968) (Tennessee); *McGraw v. Mattaci*, 340 F. Supp. 162 (E.D. Mich. 1972); *Ellwein v. Sun-Rise, Inc.*, 203 N.W.2d 403 (Minn. 1972); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970); *White Lbr. Sales, Inc. v. Sulmonetti*, 252 Ore. 121, 448 P.2d 571 (1968); *Zerbel v. H.F. Fenderman & Co.*, 170 N.W.2d 872 (Wisc. 1970).

28. 207 So. 2d 834 (La. App. 3d Cir. 1968). *Aucoin* was an action in redhibition by a Louisiana buyer to recover the purchase price of a horse from the Mississippi seller. Jurisdiction was asserted over the defendant seller based on the court's finding that defendant had conducted prior business activities in the state which were related to and of the same general nature as the one out of which plaintiff's claim arose. Although defendant had no horses or other property in Louisiana, he had purchased horses in Louisiana and he consistently raced his horses in New Orleans and Lafayette.

29. *Id.* at 838. This requirement was cited with apparent approval in Judge Redmann's concurring opinion in the *Riverland* court of appeal decision and also in *Rush v. Matson Navigation Co.*, 221 So. 2d 265 (La. App. 2d Cir. 1969).

Although the *Riverland* case involved a mail-order purchase, the Louisiana supreme court chose to base its decision on a finding of insufficient contacts with the forum, rather than solely on the lack of defendant's presence in the forum. Since the *Riverland* court did not address itself to the presence question, and the *Aucoin* case is the only one in Louisiana that has treated the issue, the question in Louisiana remains unclear.

Assertion of jurisdiction over a nonresident buyer becomes more difficult in the area of the non-business purchase. The issue is settled beyond question that the typical mail-order consumer may not be sued at the home of the seller.³⁰ Concern over the rights of this group of nonresident buyers has been one of the primary sources of confusion in the nonresident buyer area. As shown by the *Riverland* decision, a failure to differentiate between these buyers and the buyer-for-profit can result in inequities for the resident plaintiff. However, an individual may lose the protection afforded him as a mail order buyer if he enters a foreign state and makes substantial non-business purchases. Although generally the courts will not assert jurisdiction over nonresident holders of non-business retail sales accounts,³¹ New York seems to be the exception to this general rule.³² In New York, profit motivation is not the test for satisfying its "transacting any business" provision; rather it is whether significant acts are done within the state.³³ This approach has merit in that it allows application of the traditional due process—minimum contacts test without injecting the sometimes confusing question of whether the particular transaction was one induced by the profit motive. As the New York rule recognizes, the utility of classifying buyers as buyers-for-profit or non-business buyers loses its importance in cases where substantial purchases are made. The fact that the buyer is not a buyer-for-profit becomes a much smaller consideration in such cases, while defendant's presence, the number of prior purchases, and the

30. See, e.g., *Conn v. Whitmore*, 9 Utah 250, 342 P.2d 871 (1959).

31. See, e.g., *Darby v. Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423 (1970), citing *Harry Winston v. Waldfogel*, 292 F. Supp. 473 (S.D.N.Y. 1968), as the only case it could find asserting jurisdiction on a retail sales account. However, the court in *Darby* recognized that the in-state activities of the purchaser in *Winston* constituted the basis for the decision.

32. See, e.g., *Harry Winston, Inc. v. Waldfogel*, 292 F. Supp. 473 (S.D.N.Y. 1968) (where jurisdiction was asserted over a nonresident buyer of a \$53,000 diamond ring); *Cohen v. Haberkorn*, 30 App. Div. 2d 530, 291 N.Y.S.2d 119 (1968) (where jurisdiction was asserted over a nonresident who entered the state to receive medical treatment).

33. *Gilper v. Kiamesha Concord, Inc.*, 302 A.2d 740 (D.C. 1973). See also *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970).

value of his purchases become the major factors.³⁴ Assume that a New Orleans buyer, having no other contacts with the state of Texas, places a mail order with Neiman Marcus in Houston for a \$15,000 mink coat. In a suit for payment of the purchase price, may Neiman Marcus obtain jurisdiction over the Louisiana buyer in a Texas court? Despite the importance of the defendant's presence, it is not essential in most states, as previously noted.³⁵ Considerations of fairness would seem to be satisfied since the buyer thought enough of the forum to enter into a transaction with one of its residents involving such a substantial sum.

The factor of solicitation also becomes important, for a finding that the seller advertises in the buyer's state militates against the assertion of jurisdiction over a buyer drawn into the state by the seller's solicitous acts. However, solicitation by the seller, being only one of many factors to consider, should not be used to deny jurisdiction in cases involving substantial purchases. A finding that the buyer initiated the non-business transaction would strongly point toward the assertion of jurisdiction in the seller's state, since the buyer would have "purposefully availed himself of conducting activities within the forum state."³⁶ Such a finding, when coupled with the substantial purchase, should satisfy due process requirements. Therefore, in cases involving nonbusiness purchases, the controlling

34. These factors apply with equal force in the more numerous buyer-for-profit cases. For their application in the scattered non-business and personal consumption cases, see *Oswalt Industries, Inc. v. Gilmore*, 297 F. Supp. 307 (D. Kan. 1969) (where the court stressed the lack of defendant's presence and transactions pursuant to a purchase of farm equipment); *Wichman v. Hughes*, 248 Ark. 121, 450 S.W.2d 294 (1970) (where the court stressed defendant's entry into the state pursuant to the purchase of horses); *Darby v. Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423 (1970) (where a buyer of mahogany lumber for personal use was held not to have done any act by which he purposefully availed himself of the privilege of conducting activities within Tennessee); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970) (where the purchase of two paintings for \$96,000 was held to be sufficient contacts despite the lack of defendant's physical presence).

35. See note 27 *supra*.

36. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *Hanson* involved no nonresident buyer, but its broad principles should apply to any nonresident who is found to be "conducting activities within the forum state."

Likewise, the broad language of *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), applied equally to nonresident buyers, despite the fact the suit in *McGee* was against a nonresident seller. "With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.* at 223.

factor would seem to be the value of the purchase, but no definitive rule can be laid down here, for what is considered "substantial" can only be determined on a case by case basis.

If the buyer had entered the state, though solely for the purpose of picking up the coat, an even stronger case would be presented.³⁷ The same would result if there had been a history of prior purchases.³⁸ However, like the defendant's presence, this factor should not be considered indispensable, especially where the court has determined that the value of the purchase was "substantial." However, as the value of the purchase decreases, greater weight should be given to the factors of prior purchases, buyer's presence, and solicitation, until the value of the purchase decreases to a point where the scales of fairness may be tipped in buyer's favor.

The significance of the defendant's status as a buyer is readily apparent if we change the facts in the above hypothetical and create a defendant *seller*. Shortly after receiving a \$24.95 dress through the mail, the buyer's wife is badly burned while wearing the dress. The buyer sues in Louisiana alleging a negligent failure to warn of the dress's highly combustible nature. Since Neiman Marcus advertises in Louisiana, it can be presumed to accept the risks of dealing in interstate commerce.³⁹ Jurisdiction would undoubtedly be asserted here and the value of the purchase would be given little weight. Also, the additional factors of prior transactions and the defendant's presence, which are given great weight in nonresident buyer cases, are unimportant here because of the fundamental difference in the nature of the transaction. That a buyer has allegedly been harmed by a product shipped directly to him by the nonresident seller should control, despite the fact that in a suit against the nonresident buyer in Texas for payment of the \$24.95 purchase price, due process requirements of fairness may call for the denial of jurisdiction.

It would seem that the result in *Drilling Engineering* was correct.

37. Physical entry into the state is not required to satisfy the test of *Hanson v. Denckla*, 357 U.S. 235 (1958). However, the factor is very important in satisfying the requirements of *Hanson* and the need for "economic activity" under *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

Compare *Wickman v. Hughes*, 248 Ark. 121, 450 S.W.2d 294 (1970) with *Darby v. Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423 (1970).

38. See, e.g., *Oswalt Ind., Inc. v. Gilmore*, 297 F. Supp. 307 (D. Kan. 1969) (where the court stressed the lack of prior transactions); *State ex rel. White Lbr. Sales, Inc. v. Sulmonetti*, 252 Ore. 121, 448 P.2d 571 (1968) (a buyer-for-profit case, where jurisdiction was upheld on the strength of prior transactions, despite the fact that the transaction sued upon was made by telephone).

39. The principles of *McGee*, a contract case, should apply with equal force in a tort case. See note 36 *supra*.

The decision also extended the reach of Louisiana's Long Arm Statute over nonresident buyers to the extent allowed by the majority of the states. However, many of the problems left by the *Riverland* decision remain unresolved. With respect to the defendant's presence, the better view is that defendant's presence is only one of the many factors to consider,⁴⁰ for if it were a strict requisite, a nonresident buyer who has a substantial connection with the forum would be able to insulate himself from suit in the seller's state simply by doing his "shopping" by mail or telephone. Although the due process—minimum contacts test is used for both buyers and sellers, a stricter application must be made when nonresident buyers are involved, for a single transaction by a seller will normally involve a much greater quantum of contacts than a single transaction by a buyer. Justice Barham's concurring opinion in *Drilling Engineering* will hopefully guide the courts in the future to classify nonresident buyers according to the nature of their business activity. However, it should be recognized that such a classification loses its utility in cases where "substantial" non-business purchases are made.

David B. Means, III

40. See note 27 *supra*.