Personal Jurisdiction: An Effects Test Recognition and a Knowledge Requirement in Missouri’s Constitutional Limit Long-Arm Statute

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PERSONAL JURISDICTION: AN EFFECTS TEST RECOGNITION AND A KNOWLEDGE REQUIREMENT IN MISSOURI'S CONSTITUTIONAL LIMIT LONG-ARM STATUTE

State ex rel. Sperandio v. Clymer1 (Sperandio II)

In 1967, Sperandio, a Missouri resident suffering from pain in his hip, consulted Drs. Michael and Yancey. They diagnosed his condition as a subluxation of the femoral heads resulting from a hip deformity, and recommended surgery.

Dr. Pemberton was an expert orthopedic surgeon, residing in Utah. He specialized in the “Pemberton Procedure,” a surgical operation he had developed to correct conditions similar to the one experienced by Sperandio. Although Dr. Pemberton originally had developed this procedure for children, he had successfully performed it in a modified version upon several adults.

Having heard Dr. Pemberton lecture about this procedure, Dr. Michael wrote to Pemberton soliciting his opinion as to whether Sperandio’s condition required this operation and requesting instruction for the modified adult procedure. X-rays of the hip were enclosed. One week later, Dr. Pemberton replied. He concurred in Dr. Michael’s diagnosis, described the adult technique and its success, indicated post-operative care, and requested further correspondence should the operation be attempted. No such correspondence was forthcoming.

The operation was performed by Drs. Michael and Yancey. Not satisfied with the results, Sperandio filed a medical malpractice suit against the three doctors in 1975.2 Pemberton’s motion to dismiss, based on his contention that the court lacked personal jurisdiction,3 was sustained by Judge Clymer. Sperandio petitioned the Missouri Supreme Court for a writ of mandamus commanding Judge Clymer to exercise personal jurisdiction over Pemberton.4 An alternative writ issued. The writ was made

1. 581 S.W.2d 377 (Mo. En Banc 1979).
2. Sperandio’s original suit, filed in 1969, was dismissed on January 3, 1975. The 1975 suit consisted of two counts. The first, a medical malpractice action, alleged that Pemberton negligently failed to instruct the two performing doctors in the technique of the operation. The second alleged a conspiracy among the doctors to prevent Sperandio from learning his true condition.
3. A previous service of process on Pemberton was quashed because the defendant’s contact with Missouri was insufficient to establish personal jurisdiction. After a writ of mandamus failed, Sperandio again caused process to be served on Pemberton in Utah. This time Pemberton appeared specially to contest jurisdiction contending that the matter was res judicata.
4. The proper method to challenge a lower court order is uncertain in Missouri. Sperandio utilized a writ of mandamus; other cases have involved writs of prohibition. See Peoples Bank v. Stussie, 536 S.W.2d 934 (Mo. App., St. L.
when the court found sufficient contact between Pemberton and Missouri to establish personal jurisdiction.

The United States Supreme Court granted Pemberton's petition for a writ of certiorari. The Court vacated the *Sperandio I* judgment and remanded the case "for further consideration in light of . . . [Kulko v. Superior Court]." Following these vague instructions the Missouri Supreme Court in *Sperandio II* reversed its earlier position, found insufficient defendant-forum contacts, and quashed the alternative writ for lack of personal jurisdiction.

*Sperandio II*, in holding that "Kulko does not announce new law," illustrates that the minimum contacts test, as "any standard that requires a determination of 'reasonableness,' . . . is not susceptible of mechanical application." Thus, two opposite conclusions, both unanimous decisions by the Missouri Supreme Court, were reached on the same set of facts within one year's time.

In order to elucidate the effect of these decisions upon the Missouri law of personal jurisdiction, it is necessary to discuss the minimum contacts test, its development, and its requirements. The minimum contacts test is a major avenue through which a state acquires personal jurisdiction over a defendant not found within its territorial borders. The test evolved from a series of United States Supreme Court decisions which constitute a framework for the doctrine of in personam jurisdiction. Jurisdiction is

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5. *But see* Empiregas, Inc. v. Hoover Ball & Bearing Co., 507 S.W.2d 657, 660 (Mo. 1974). In *Empiregas*, the lower court had quashed service and then dismissed the petition. The court held that an appeal was proper. *But see* Farmland Indus., Inc. v. Elliott, 560 S.W.2d 60 (Mo. App., K.C. 1977), where the defendant argued that since the plaintiff had an adequate remedy by appeal, mandamus was improper. The court refused to rule on the issue, stating that it would be "wasteful of judicial resources to proceed to a determination on the merits." *Id.* at 64.


7. *Id.* at 812. Kulko v. Superior Court, 436 U.S. 84 (1978). Mr. and Mrs. Kulko were married in California during a three-day military layover. They lived in New York until their separation in 1972. A separation agreement provided that the children would live in New York with Mr. Kulko except during summers when they would join their mother in California. The divorce was obtained in Haiti. In 1973, the father consented to his daughter's request to live in California. In 1975, without her ex-husband's consent, Mrs. Kulko arranged to have the other child join her in California. She then brought suit in California to increase the child support allowance and to obtain full custody of the children. The California court upheld the claim to personal jurisdiction. The Supreme Court, applying *International Shoe*, reversed.

8. 581 S.W.2d at 382.


essential to a valid personal judgment. In its broadest sense, jurisdiction establishes the power of the state through its judicial forums to create legal interests that will be respected, recognized, and enforced in all states. Judgments rendered with personal jurisdiction are afforded the protection of the full faith and credit clause, while those rendered against nonresident defendants without personal jurisdiction are void in the rendering state and are subject to collateral attack.

Jurisdiction has two basic requirements: an underlying foundation and reasonable notice to the defendant that an action has been brought against him. Numerous methods have been created to establish the requisite underlying foundation. Examples include presence, domicile, residence, citizenship, appearance, express consent, implied consent.

15. Foundation, as the word is used in this Note, refers to a relationship between the forum state and the defendant upon which a claim to jurisdiction can be laid.
17. Kulko v. Superior Court, 436 U.S. 84, 91 (1978); Slivka v. Hackley, 418 S.W.2d 89, 91 (Mo. 1967); Apco Oil Corp. v. Turpin, 490 S.W.2d 400, 404 (Mo. App., St. L. 1973).
19. See Milliken v. Meyer, 311 U.S. 457 (1940) (forum state has jurisdiction over persons domiciled in the state but absent from it); Mo. R. Civ. P. 54.07(a).
20. See Mo. R. Civ. P. 54.07(a); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (1971).
22. Missouri recognizes the distinction between a general and a special appearance. In the former the plaintiff appears in the state to contest on the merits while in the latter he appears to contest jurisdiction. This distinction developed out of the anomalous situation that occurred when the defendant appeared to contest jurisdiction but thereby subjected himself to service of process and jurisdiction predicated upon his presence. The distinction was an issue in Sperandio II. The court held that while Pemberton appeared in Missouri to move for a dismissal, he did not defend on the merits or recognize the court's jurisdiction. His appearance was therefore special and could not be used as a foundation for jurisdiction. 581 S.W.2d at 384. See also Germanese v. Champlin, 540 S.W.2d 109, 113 (Mo. App., St. L. 1976); Ballew v. Hawkins, 361 S.W.2d 852, 855 (Mo. App., Spr. 1962).
24. Implied consent is a fiction through which jurisdiction attaches. The
doing business,\textsuperscript{28} ownership of property within the state,\textsuperscript{26} and the minimum contacts test. A foundation has been considered to be a justifiable means upon which to establish jurisdiction if the foundation is based upon the “presence” doctrine of Pennoyer \textit{v. Neff},\textsuperscript{27} the recognized waiver concept of consent, or the rationale of the minimum contacts test. The former two groups can be classified as single factor foundations.\textsuperscript{28} The mere existence of the foundation, the single factor, was thought to be sufficient to establish jurisdiction.

The single factor foundations developed early. Eventually, criticism of the “presence” foundations, which were based upon territorial concepts, increased as international transportation and communication advanced. Furthermore, an increased need developed to acquire jurisdiction over nonresident defendants through means not allowed by the single factor foundations.\textsuperscript{29} Recognizing these developments, the Court in \textit{International Shoe Co. v. Washington}\textsuperscript{30} created the minimum contacts test. It became the ultimate foundation by which a state may acquire personal jurisdiction over nonresident defendants. The test is flexible; it limits the power of the forum state to impose jurisdiction only to the extent required by the due process clause. Thus, even if the defendant is not present within the territory of the forum, jurisdiction still will exist if the

nonresident motorist statute is one example. The statute proclaims that the nonresident has consented to jurisdiction and has assigned an agent, such as the secretary of state, upon whom process can be served. See, e.g., Committee Reports, 23 J. Mo. Bar 569, 572 (1967), which discusses a study indicating that there are at least 49 special classifications concerning the subject of service of process in Missouri. Many of these are of the implied-consent type.


26. Ownership of property is the basis for the various forms of in rem jurisdiction.

27. 95 U.S. 714 (1877). The “presence” doctrine is based upon the premise that the state’s power to exert jurisdiction over persons within its boundaries is plenary. \textit{Id}. at 722. It follows that other foundations such as appearance, implied consent, domicile, residence, and citizenship, for example, where the defendant is either actually or fictionally found within the state’s boundaries, would form sufficient relationships for jurisdiction. But see Woods, Pennoyer’s Demise: \textit{Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson}, 20 Ariz. L. Rev. 861, 866 (1978), where it was contended that the express and implied consent foundations should be grouped together. That commentator also delineated a category based on allegiance. See Blackmeyer v. United States, 284 U.S. 421, 438 (1931). Domicile, residence, and citizenship would fall within the allegiance category.


29. The contacts test is not the only way to reach defendants not found within the state’s borders. Implied consent, presence, doing business, and domicile are other examples. Many of these methods, however, are rigid to apply and have been subject to intense criticism because of their fictional nature. Out of this criticism, the minimum contacts test evolved.

defendant has certain minimum contacts with the forum so that "the suit does not offend 'traditional notions of fair play and substantial justice.'" While the Court in International Shoe did not disavow use of the single factor foundations, their validity, especially after Shaffer v. Heitner, is in doubt. Attacking one single factor foundation, ownership of property within the forum state, the Court in Shaffer suggested the vulnerability of several other foundations.

The actual analytical framework of the minimum contacts test is difficult to ascertain. There must be a defendant-forum contact and a nexus between that contact and the cause of action. If both of these connections can be shown, their sufficiency is measured by a fairness test. If either connection is so weak as to make it unfair to subject the defendant to a suit in that state, the forum state will not be permitted to assert jurisdiction. In addition to the above constitutional factors which comprise the minimum contacts test, compliance with the state law authorizing jurisdiction must be attained.

The plaintiff first must establish a connection between the defendant and the forum state. The various kinds of contacts can be divided into three categories: doing business in the state, performing an act in the state, and performing an act outside the state which causes an effect.

31. Id. at 316.
33. The major distinction between the single factor foundations and the minimum contacts test is that in the former no fairness test is required. Once the factor is established and notice is conveyed to the defendant, jurisdiction is automatic. When the minimum contacts test is employed, however, the focus of jurisdictional inquiry is shifted from the individual's relationship to the forum state to the reasonableness of that forum's assertion of jurisdiction over the individual. The minimum contacts test may not be the only foundation that requires a fairness test. Restatement (Second) of Conflict of Laws §§ 30-31 (1971) would require a fairness test if the residence or citizenship foundations were used. The Court in Shaffer held that quasi in rem jurisdiction was no longer automatic but was subject to the minimum-contacts, fairness test approach. 433 U.S. at 207. The Court added, "We . . . conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Id. at 212. Several commentators agree that if Shaffer is read broadly, other "presence" jurisdictional foundations would fall under a similar analysis. See Kalo, supra note 10, at 1189-91; Vernon, supra note 28, at 293; Woods, supra note 27, at 864-68; The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 159 (1977). But see Zammit, Reflections on Shaffer v. Heitner, 5 Hast. Const. L.Q. 15, 24 (1978), where the author suggests that the International Shoe doctrine was limited to persons not present within the state. It therefore is possible to argue that the mere presence of the defendant within the forum alone is not sufficient to establish jurisdiction. In this situation a fairness test may be required. The classification of the various foundations into the groups discussed in note 27 and accompanying text supra, could then become critical. The Shaffer doctrine may not apply to the consent group. See Shaffer v. Heitner, 433 U.S. 186, 216 (1977). Woods, supra note 27, at 865, further suggests that it would not apply to the domicile category. For an in-depth discussion of Pennoyer, its logic, and its eligibility for oblivion, see Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241.
34. Restatement (Second) of Conflict of Laws § 35 (1971).
35. Id. § 36.
in the state.36 Logically, as one proceeds from the former to the latter, the contact with the state becomes increasingly attenuated. Consequently, the effects test constitutes what is presently the outside limits for a defendant-forum contact. The test at least arguably meets due process standards, gaining constitutional support from Hanson v. Denckla.37

Hanson noted that the defendant must perform an act through which he "purposefully avails [him]self of the privilege of conducting activities within the forum State."38 Application of the "purposeful" qualification to the defendant's activity has caused numerous problems, especially in product liability cases where a requirement of specific intent may be dispositive. Several approaches to applying the "purposeful" language have developed: treat it as passing language; interpret it narrowly; interpret it to require mens rea, either knowledge or foreseeability; or add it as a factor in the fairness test.39

Regardless of the criticism of the Hanson purposeful contact requirement, the purposeful language was recognized in Kulko and Shaffer. World-Wide Volkswagen Corp. v. Woodson40 and Rush v. Savchuk,41 cases decided subsequent to Sperandio II, have refined the Hanson contact requirement. The Court in Woodson, noting that the defendant had no contacts, ties, or relations with the forum state, and implying that the driving of a car into Oklahoma where a fortuitous accident occurred was a contact based upon unilateral activity,42 held that there was not a sufficient

36. Id. § 37, which states that a "state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere."
38. Id. at 253. See also World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 565 (1980).
39. See Woods, supra note 27, at 871.
40. 100 S. Ct. 559 (1980). World-Wide was a New York corporation engaged in a regional distributorship of vehicles and accessories. Its business activity was confined solely to New York, New Jersey, and Connecticut. The plaintiffs purchased an Audi automobile from Seaway, a retail dealer connected only contractually with World-Wide. While passing through Oklahoma, the plaintiffs were injured in an accident, allegedly caused by a defective design. The Oklahoma Supreme Court held jurisdiction to be proper. The United States Supreme Court, with three judges dissenting, reversed.
41. 100 S. Ct. 571 (1980). The plaintiffs in Rush based their claim to jurisdiction over the defendant upon the attachment of a contractual debt owed to the defendant's insurance company. The Court, following Shaffer, held that quasi in rem jurisdiction was subject to a minimum-contacts test analysis. Applying that test, the Court held the claim to jurisdiction invalid because there existed no contacts, ties, or relations with the forum state. Id. at 580. The only alleged connection was that the defendant's insurance company did business in the forum state. The Court noted that while the presence of property within a state may be the contact needed for jurisdiction, the fictitious notions concerning the situs of intangible property can have no jurisdictional significance as a contact. Id. at 581.
42. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 567 (1980). The language used by the Court in Woodson revived the "ties and relation" language of International Shoe. This language depicts a potentially broader concept than "contact," which usually suggests a physical tie. See Woods, supra note
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forum-defendant contact. The failure to find a purposeful activity by the defendant was dispositive. In making this separate analytical determination, foreseeability was held to be relevant only in the sense that the defendant's contact with the state should be such that he reasonably should anticipate being haled into the courts of that state. 43

Even if a purposeful connection is shown, the plaintiff must show that a nexus exists between the cause of action and the contact. In applying the minimum contacts test, absent a situation similar to that in Perkins v. Benguet Consolidated Mining Co. 44 in which the business connection with the state was continuous and substantial, 45 most states hold that due process requires that personal jurisdiction be limited specifically to those claims that arise out of the contact with the forum state. 46

The fairness test qualifies the two factors considered above. This test is one in which few answers will be written in black and white. "The greys are dominant and even among them the shades are innumerable." 47 Weighing the facts on a case-by-case basis, the courts have established numerous factors which they use to determine the reasonableness of requiring a defendant to defend in the forum state. 48

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27, at 868-69. In Woodson, the Court rejected the argument that the defendant would not earn revenue from sales in New York but for the fact that the automobiles sold there could be used in states like Oklahoma.

43. 100 S. Ct. at 567. In finding no contact, the Court placed heavy reliance upon the purposeful language qualification to the defendant's activity. The Court distinguished product liability cases involving a chain of distributors where the products are delivered into the stream of commerce with the expectation that they will be purchased by the consumer.

44. 342 U.S. 457 (1952).

45. The Court in Perkins held that if the business connection with the state is continuous and substantial, jurisdiction will rest over causes of action not related to the business done in the state. The Perkins analysis should be compared with the approach discussed in Comment, The Cornelison Doctrine: A New Jurisdictional Approach, 14 SAN DIEGO L. REV. 458 (1977), discussing Cornelison v. Chaney, 16 Cal. 5d 143, 144 P.2d 264, 127 Cal. Rptr. 352 (1976). The Court held that the cause of action did not arise out of the forum-defendant contact so as to conform with the traditional requirement of specific jurisdiction. The Court applied a broader "rational nexus" test, attaching jurisdiction to those claims with a logical relationship to the forum. The commentator posed the following hypothetical to illustrate the implications of this test. A Nebraska school teacher vacations and goes to school each summer in California. While en route to California, she injures a California resident in Arizona. Applying the test, jurisdiction could attach in California.

46. Bork v. Mills, 458 Pa. 228, 329 A.2d 247 (1974). The defendant, a Maryland resident engaged in a trucking business in an area that included Pennsylvania, hit plaintiff in Virginia. Held: the cause of action did not arise out of the contact with Pennsylvania, the forum state. See also Duflour v. Smith, 380 F. Supp. 405 (D. Me. 1971). RSMo § 506.500(2) (1978) follows this approach by requiring that the plaintiff's claim arise out of the defendant's connection with the state. By endorsing a constitutional limit statute, the Sperandio decisions might render this language meaningless. See notes 71-75 and accompanying text infra. If so, the Cornelison approach, if accepted as within due process limits, may be adopted in Missouri. See note 45 supra.

47. Estin v. Estin, 394 U.S. 541, 545 (1948).

48. Factors used include the nature and quality of the contact, the quantity
The plaintiff also must show that state law authorizes the assertion of jurisdiction. While the minimum contacts test provides the avenue through which jurisdiction may be obtained, the state's long-arm statutes provide the vehicle. These statutes cannot reach beyond the limits of due process as defined by International Shoe, but they can impose stricter requirements for establishing jurisdiction. Thus, attempts at obtaining jurisdiction may satisfy the due process requirements but fail for lack of compliance with state law. This problem is mitigated by those states that establish equivalent statutory and due process limits.

In applying the minimum contacts test, the label attached to the connection with the state is very important. This labeling procedure of the contacts, the relationship of the claim to the forum state, the interests of the forum state, foreseeability, the relative economic burden upon the parties, the availability of alternative forums, the choice of law, the relative conveniences of the parties, basic fairness considerations, the relative aggressiveness of the parties, and external constitutional doctrines. See Woods, supra note 27, at 891-98; Comment, Unified Jurisdictional Test Applied to In Personam Jurisdiction, 1978 Wash. U.L.Q. 797, 802-04.


50. The contact with the state can be insufficient either for lack of compliance with state law or for due process reasons. Following a traditional canon of construction, the interpretation of the state law will be resolved first so as to avoid the constitutional question if possible.

51. Establishing equivalent state law and due process limits is commonly accomplished by either of two methods. In the first, the court by statutory interpretation finds that the intent of the legislature was to extend the long-arm statute to such limits. See Hass v. Fancher Furniture Co., 156 F. Supp. 564, 567 (N.D. Ill. 1957); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976). The Court in World-Wide Volkswagen Corp. v. Woodson, 116 S. Ct. 2264 (1957); it is an implied consent statute. This labeling process finds that the intent of the legislature was to extend the long-arm statute to such limits. See Scheidegger v. Greene, 451 S.W.2d 135, 138 (Mo. 1970) (long-arm statute held not appropriate but jurisdiction extended to the limit of due process even if such assumption of latent power was not authorized by statute).

52. The labeling process is exemplified in RSMo § 551.633 (1978), which states that a foreign corporation which commits a tort in whole or in part in Missouri impliedly consents to personal jurisdiction. This statute provides probably the easiest way for the plaintiff to establish jurisdiction over a foreign corporation as no fairness test is required. See Comment, Expanding Permissible Bases of Jurisdiction in Missouri: The New Long-Arm Statute, 33 Mo. L. Rev. 248, 257 (1968). This statute by its terms does not apply to libel and slander actions; it is an implied consent statute. See Scheidegger v. Greene, 451 S.W.2d 135, 138 (Mo. 1970) (RSMo § 551.633 (1978) is a fiction; RSMo § 506.500 (1978), the commonly used Missouri long-arm statute, is not). See also Adams Dairy Co. v. National Dairy Prods. Corp., 395 F. Supp. 1135 (W.D. Mo. 1968). Shaffer, by requiring a fairness test, may affect the application of § 351.633 but such an effect would be negligible because the requirements of the statute probably constitute a reasonable defendant-forum contact. See Deere & Co. v. Pinnell, 454 S.W.2d 899, 903 (Mo. En Banc 1970), where the court held that the contact listed in § 351.633 also meets the requirements of the minimum contacts test. This might affect the statute's classification as one of implied consent.
might accurately be described as the “straining process.” Upon deciding that jurisdiction is reasonably established in certain fact situations, categories of reasonable forum-defendant connections are created. Examples include “transacting business” or “engaging in tortious activity.” A court will then strain a new fact situation in order to attach such labels, borrowing from their prejudged and already incorporated reasonableness. Advertising, for instance, becomes “transacting business.”

This process expands with the incorporation of these categories into a long-arm statute. At this point, the “straining process” becomes necessary to establish statutory compliance. The problem reaches a peak as the due process limits for obtaining jurisdiction extend beyond the state’s statutory limits. Additional judicial straining is required to place fact situations that establish sufficient connections under liberal due process limits within the requirements listed by the previously adequate but now outdated statutes. Such straining, however, establishes statutory compliance and by judicial interpretation extends the reach of the statute to the limits allowed by International Shoe. What surfaces in the case law is a disposal of minimum contacts questions by a labeling process based upon stare decisis, rather than by a case-by-case analysis using a fairness test. The courts return to a use of fictions, a process the contacts test sought to avoid.

With this general framework in mind, the effect of the Sperandio I

53. See Danforth v. Reader's Digest Ass'n, Inc., 527 S.W.2d 355 (Mo. En Banc 1975) (promotional activity held to be a reasonable contact). The effect of the labeling process upon the fairness test is illustrated by Restatement (Second) of Conflict of Laws § 35 (1971). The fairness test is omitted if the defendant is doing business in the state. Id. The fairness test also is omitted if the cause of action is a tort arising out of an act committed in the state, but a fairness test is retained if a non-tort action arises out of a similar act. Id. § 36.

54. The Missouri long-arm statute, RSMo § 506.500 (1978), incorporates five such requirements. See notes 60-62 and accompanying text infra. When the Missouri legislature adopted § 506.500 in 1967, it arguably was trying to extend its jurisdictional reach. It adopted an almost verbatim copy of what was then a liberal Illinois statute. State Senator Waters stated, “This law is represented as being virtually identical to a similar law adopted by the State of Illinois which, it is said, has been held to be constitutional.” Waters, State Legislative Developments, 23 J. Mo. Bar 452, 455 (1967). Subsequent liberal interpretations of the due process requirements, however, have left the statute burdensome and restrictive.

55. Two patterns of analysis appear in states that do not have constitutional limit statutes. The first is to find that the statutory requirements are constitutional. In subsequent cases, then, the courts will fit the fact situation within the statute’s limits. The second method is illustrated in First Nat'l Bank v. Ward, 380 F. Supp. 782 (W.D. Mo. 1974). After the statute’s requirements are analyzed, the fairness test is used regardless of whether the statute previously has been held to be constitutional.

56. To use advertising as an example, some jurisdictions would use the straining process to attach the label of transacting business. In a state with a constitutional limit statute, however, the advertising would establish a defendant-forum contact. Its business nature would then be a factor weighted in favor of establishing jurisdiction when the fairness test was applied.
and II decisions upon the Missouri personal jurisdiction doctrine now will be analyzed. The alleged connection between Pemberton, the defendant, and Missouri, upon which jurisdiction was to attach, was the letter from Pemberton to Dr. Michael. The court in both decisions utilized the effects test while discussing this contact: Sperandio I noted that Pemberton's acts caused an effect in Missouri; Sperandio II stated that an effect took place in Missouri. Recognition of the effects test approach is important. The Missouri Supreme Court refused to apply the straining process to find that Pemberton had committed an act within Missouri. The implications of this approach can be shown in a discussion of Missouri's statutory requirements.

The Missouri long-arm statute used in both Sperandio I and II was Mo. Rev. Stat. section 506.500. Section 506.500 is a single-act statute which can be used to acquire jurisdiction over individuals, corporations, and their agents. Its use is available to resident and nonresident plaintiffs. The statute limits the scope of Missouri's jurisdiction by establishing specific jurisdiction and enumerating five acts through which jurisdiction can attach: the transaction of any business within the state, the making of any contract within the state, the commission of a tortious act within the state, the ownership of real estate within the state, and contracting to insure within the state.

Fears of a conservative interpretation of the statute were laid to

57. 568 S.W.2d at 936.
58. 581 S.W.2d at 383.
59. RSMo § 506.510 (1978) provides for service of process upon the defendant outside Missouri. RSMo § 506.520 (1978) provides the power for a court to render judgment against defendants subject to jurisdiction established by RSMo § 506.500 (1978).

60. In applying the statute, the nature of the alleged forum-defendant contact and not the plaintiff's claim is determinative. The five categories dictate what connections are available. The only restriction upon the plaintiff's claim is that it arise out of a permitted contact. Thus, numerous claims arising out of a defendant's business transaction have been allowed. Fulton v. Chicago, R.I. & Pac. R.R., 481 F.2d 926 (8th Cir. 1973) (Carmack Amendment claim, a statutory action for property damaged during interstate transportation by a common carrier); Sith v. Manor Baking Co., 418 F. Supp. 150 (W.D. Mo. 1976) (employment discrimination claim); Hitt v. Nisson Motor Co., 399 F. Supp. 888 (S.D. Fla. 1975) (antitrust action). See also Apco Oil Corp. v. Turpin, 490 S.W.2d 400 (Mo. App., St. L. 1973) (allowing indemnity claim arising out of a tortious act committed within the state). Furthermore, the connection need not be between the parties to the lawsuit. See id. at 407 (the tortious activity need not be committed upon the person bringing the cause of action).

61. No contract connection appears in the Illinois statute. The Illinois courts have interpreted such connections to be encompassed by the "transaction of any business" clause.


63. Such fears were described in Comment, supra note 52, at 251. The author noted past decisions in which the Missouri courts appeared to apply a restrictive approach to the contacts test. For an analysis of pre-adoption cases, see Anderson, Personal Jurisdiction Over Outsiders, 28 Mo. L. Rev. 336 (1963). But see Adams
rest as courts attempted to equate its reach with that allowed by due process.\textsuperscript{64} In doing so, however, the straining process appeared. A tortious act within the state has been defined to include acts committed by the defendant outside Missouri with tortious consequences in Missouri even if the defendant's activity was totally extraterritorial.\textsuperscript{65} Transacting business has included signing a promissory note,\textsuperscript{66} attending a business conference in Missouri,\textsuperscript{67} and participating in promotional activity within the state.\textsuperscript{68}

The "within the state" language also has caused problems. The desire to meet this statutory requirement has led to analyses such as showing that a contract is formed upon acceptance, that acceptance occurred by letter or phone conversation, and that such letters or calls were conveyed from Missouri.\textsuperscript{69} Even when the contract had not been executed within Missouri or negotiated by the defendant or her agent, jurisdiction still would attach. One decision noted that the out-of-state signing of the agreement adopted and ratified the in-state negotiations which had led to the contract.\textsuperscript{70}

Dairy Co. v. National Dairy Prods. Corp., 293 F. Supp. 1135, 1155 n.26 (W.D. Mo. 1968), where Judge Oliver contended that this past conservative stance was in fact due to a lack of an adequate long-arm statute upon which the courts could act. This judicial restraint probably led to the adoption in 1967 of RSMo § 506.500 (1978).

64. The following cases illustrate the liberal jurisdictional attitude adopted by the Missouri courts: Deere & Co. v. Pinnell, 454 S.W.2d 889, 893 (Mo. En Banc 1970) (RSMo § 506.500 held to be constitutional); Slivka v. Hackley, 418 S.W.2d 89 (Mo. 1967) (in an action to enforce an Illinois judgment, the court held that the Illinois statute was constitutional); Nichols v. Fuller, 449 S.W.2d 11, 14 (Mo. App., St. L. 1969) (the near verbatim adoption of the Illinois statute comes with a presumption of that state's construction).

65. Fulton v. Southern Pac. Co., 320 F. Supp. 45 (W.D. Mo. 1975) (Texas resident suing a Minnesota corporation in Missouri for negligently loading a train in Minnesota leading to damage while passing through Missouri); Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. En Banc 1970) (defective product sold in Missouri); Apco Oil Corp. v. Turpin, 490 S.W.2d 100 (Mo. App., St. L. 1973) (defective product sold in Missouri). Bank of Gering v. Schoenlaub, 540 S.W.2d 31 (Mo. En Banc 1976), may impose a limit to this approach. The court in Bank of Gering found jurisdiction lacking. In discussing a possible "actionable consequences" approach, the court implied that at least the injury must occur in Missouri.

68. Danforth v. Reader's Digest Ass'n, Inc., 527 S.W.2d 869 (Mo. En Banc 1975).
70. Farmland Indus., Inc. v. Elliott, 560 S.W.2d 60 (Mo. App., K.C. 1977). Accord, Peoples Bank v. Stussie, 536 S.W.2d 934 (Mo. App., St. L. 1976) (court held that the defendant had become subject to jurisdiction under the statute by accepting the benefits which resulted directly from contacts made with Missouri by a second defendant's agent). Such attempts by the court to establish jurisdiction by aggregating the defendants together to determine jurisdictional questions may be unconstitutional. Rush v. Savchuk, 100 S. Ct. 571 (1980), struck down such an
The effects test arguably developed from such strained decisions—notably in product liability cases. In most cases a strained application of the Missouri statute and the effects test will reach the same conclusions. The latter, however, requires only an out-of-state act causing an in-state effect. The Missouri statute requires an in-state act, which is further qualified by the five enumerated categories.

In both Sperandio I and II, the Missouri Supreme Court refused to use the strained approach to find either establishment of a contact or statutory compliance. It chose instead to establish minimum contacts by the effects test and found statutory compliance by interpreting the long-arm statute to have a reach equal to that allowed by due process. In holding that the “ultimate objective of § 506.500 ‘was to extend the jurisdiction of this state over nonresident defendants to that extent permissible under the Due Process Clause,’” the court endorsed a “constitutional limit” statute like those in California and Rhode Island.

The Sperandio II decision potentially expands the scope of personal jurisdiction in Missouri. Establishing one of the five categories of sec-

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tion 506.500 probably no longer is crucial in pleading or dispositive in litigation. The court instead will proceed directly to a due process inquiry. Adoption of this approach will be of special importance in those cases brought in the federal courts in Missouri. These courts are required to follow the Missouri interpretation of section 506.500 to determine the extent of their personal jurisdictional reach. The definition of the due process limits of jurisdiction, however, is not controlled by the Missouri courts. Thus, the approach to questions such as the use of special factors in the fairness test, absent a United States Supreme Court decision, largely will depend upon how the federal courts apply the minimum contacts test.

The "purposeful" language of Hanson was recognized in both Sperandio I and II, but application of this requirement led to differing results. Sperandio I found Pemberton's acts to be purposeful; Sperandio II did not. Sperandio I noted that Pemberton had knowledge that his letter would be used in Sperandio's operation; Sperandio II stated that nothing in the record indicated Pemberton knew his suggested technique would be followed. It also appears that in both decisions the court incorporated the knowledge and purposeful requirements as part of the fairness test. In doing so, the court did not use the approach adopted later by Woodson.

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Id. at 362. See also Adams Dairy Co. v. National Dairy Prods. Corp., 293 F. Supp. 1135 (W.D. Mo. 1968). "[F]or reasons that have not been articulated, the Supreme Court of Missouri, contrary to the practice in the federal courts and those of some other states, has elected to await legislative action in regard to extraterritorial service of process rather than exercise the rule making power delegated it under the Missouri Constitution." Id. at 1157 n.27.

75. That which must be pleaded is uncertain. Fulton v. Southern Pac. Co., 320 F. Supp. 45 (W.D. Mo. 1970) (complaint must allege one or more of the enumerated grounds); Empiregas, Inc. v. Hoover Ball & Bearing Co., 507 S.W.2d 567 (Mo. 1974) (petition must be examined to determine if service of process is proper); Peoples Bank v. Stussie, 536 S.W.2d 934 (Mo. App., St. L. 1976) (hearing to quash is limited to an evaluation of the defendant's contacts and a prima facie showing that the acts contemplated by the statute took place); Birdboro Corp. v. Kimberlin, 461 S.W.2d 292 (Mo. App., K.C. 1970) (allegation of general negligence is sufficient).

76. While the states may formulate rules governing jurisdiction over out-of-state persons, the determination of federal due process requirements is a question of federal law. Jennings v. McCall Corp., 320 F.2d 64, 67 (8th Cir. 1963). The question of whether federal court personal jurisdiction is determined by state or federal law is widely debated: See Annot., 6 A.L.R.2d 1103 (1966). The Court of Appeals for the Eighth Circuit has held that state law is controlling. Jennings v. McCall Corp., 320 F.2d 64, 67 (8th Cir. 1963) (if due process limits are met the state law controls as to questions such as what constitutes doing business). See also Simpkins v. Council Mfg. Corp., 332 F.2d 733 (8th Cir. 1964).

77. For a list of several fairness factors, see note 48 supra.

78. 568 S.W.2d at 937 ("Pemberton's acts were performed for the purpose of causing an effect."). Sperandio II noted that Kulko recognized the purposeful language. 581 S.W.2d at 382. It added that Pemberton did not purposefully avail himself of conducting activities within the forum state. Id. at 383.

79. See note 78 supra.
80. 568 S.W.2d at 936.
81. 581 S.W.2d at 382.
where the United States Supreme Court incorporated the Hanson requirement as a separate analytical step.\textsuperscript{82}

The fairness test was implemented in both cases. Sperandio \textit{II} noted that the ultimate question in determining the existence of personal jurisdiction is one of reasonableness.\textsuperscript{83} Previous Missouri cases have noted five factors to be weighed in this test: the nature and quality of the contacts with the forum state, the quantity of the contacts with the forum state, the interest of Missouri in providing a forum for its residents, the relationship of the cause of action to the contact, and the convenience of the parties.\textsuperscript{84} These categories have been further subdivided. The nature of the contact includes the directness of the contact, who invoked it, and whether the defendant reasonably could anticipate consequences in the forum state.\textsuperscript{85} The quality of the connection encompasses the relative importance of the contact to the whole transaction between the parties.\textsuperscript{86} In one case, the court included several factors in its discussion of the nature, quantity, and quality of the contact: whether the defendant purposely availed himself of the privilege of conducting activities within the forum state by entering into a transaction having an impact on the commerce of that state; whether the plaintiff initiated the negotiations; whether, if the plaintiff had initiated the contact, the defendant actively had participated in it; the defendant's knowledge of the transaction; how much activity actually had occurred in the forum state; and the value and number of the contacts.\textsuperscript{87}

\textit{Sperandio I}, in finding the contact sufficient to establish jurisdiction, noted that Missouri had an interest in securing redress for its citizens who had been injured in Missouri and who had had no contact with Utah. The court concluded that the defendant Pemberton knew that his suggestions would be used in the plaintiff's operation, and he, therefore, performed an act with the purpose of causing an effect in Missouri.

\textit{Sperandio II}, in holding that the contact was insufficient, applied a

\textsuperscript{82}. \textit{See} notes 41-43 and accompanying text \textit{supra}. Cases prior to \textit{Sperandio I} and \textit{II} applied varying requirements with regard to the purposeful language. Stith \textit{v. Manor Baking Co.}, 418 F. Supp. 150 (W.D. Mo. 1976) (sufficient that a product would be used in Missouri); Bank of Gering \textit{v. Schoenlaub}, 540 S.W.2d 31 (Mo. En Banc 1976) (majority and dissent reached opposite conclusions with regard to applying the purposeful language); Apco Oil Co. \textit{v. Turpin}, 490 S.W.2d 400 (Mo. App., St. L. 1973) (knowledge that an effect would occur in Missouri); Birdsboro Corp. \textit{v. Kimberlin}, 461 S.W.2d 292 (Mo. App., K.C. 1970) (reasonable anticipation that its acts would subject it to the jurisdiction of the state and federal courts).

\textsuperscript{83}. \textit{See} \textit{e.g.}, Peoples Bank \textit{v. Stussie}, 536 S.W.2d 934 (Mo. App., St. L. 1976).

\textsuperscript{84}. \textit{See} \textit{e.g.}, \textit{Peoples Bank \textit{v. Stussie}}, 536 S.W.2d 934 (Mo. App., St. L. 1976).

\textsuperscript{85}. \textit{Gardner Eng'r Corp. \textit{v. Page Eng'r Co.}}, 484 F.2d 27 (8th Cir. 1973).


\textsuperscript{87}. 581 S.W.2d at 381 (discussion of the facts considered in \textit{Kulko}).
broader fairness test. The court, noting the several factors used in *Kulko* to determine reasonableness and with the *Sperandio I* factors in mind, stated that the letter had been unsolicited, no financial benefit had been sought, no fee had been paid or solicited, no doctor-patient relationship had existed, and the defendant had not known that his technique would be followed. The court concluded that the defendant had not purposefully availed himself of the privilege of conducting activities within Missouri.

The court, noting that *Sperandio II* resembled other doctor cases in which the effects test requirements had been met, but in which reasonable connections had not been established, distinguished this case from product liability cases. The court observed that Pemberton had not been the operating physician and that Sperandio had not been his patient. The correspondence between the doctors had been an exchange of opinion and not the treatment of patients by mail. The state's interest in deterring the conduct exhibited by Pemberton was not as great as if the doctor-patient relationship had existed.

The case also recognized a factor that is becoming increasingly important in other states. The language stating that the letter had been unsolicited and a fee had not been sought recognized that if the plaintiff is the one who had initiated the contact, jurisdiction might not exist unless the defendant's participation in the contact had been active.

The *Sperandio* cases will have an important impact upon Missouri's future personal jurisdiction requirements. Ease of attaining jurisdiction may be expanded if the court's language, endorsing a constitutional limit statute and recognizing the effects test, is applied. This expansion will, however, be checked because the court recognized the use of a pervasive fairness test with several balancing factors.

**PHILLIP C. ROUSE**

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88. Id. at 383. The court cites *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972) (court emphasized that the state's interest in deterring such interstate conduct is an important factor of the fairness test).
