University of Richmond Law Review

Volume 6 | Issue 2 Article 21

1972

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Recommended Citation

Long Arm Jurisdiction- Transacting Business Means Minimum Contacts in Virginia, 6 U. Rich. L. Rev. 420 (1972).
Available at: http://scholarship.richmond.edu/lawreview/vol6/iss2/21

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Long Arm Jurisdiction—TRANSACTING BUSINESS MEANS MINIMUM CONTACTS IN VIRGINIA—*John G. Kolbe, Inc. v. Chromodern Chair, Inc.*

Virginia's "long arm" statute[1] is designed to increase the jurisdictional power of this state so as to provide adequate redress in Virginia courts against persons[2] who inflict injuries upon or incur obligations to those in whose welfare this state has a legitimate interest.[3] Section 8-81.2(a)(1) of the Virginia Code vests the courts of this state with personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from that person transacting any business in this state.[4] Recently the Virginia Supreme Court has construed this section to provide Virginia's courts with the maximum jurisdictional power now permissible under the due process clause of the fourteenth amendment.[5]

In *John G. Kolbe, Inc. v. Chromodern Chair, Inc.*,[6] the Virginia Supreme Court rejected its "doing business" heritage[7] and employed the modern

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1 VA. CODE ANN. §§ 8-81.1 to -81.5 (Cum. Supp. 1971). With the exception of paragraph 5 of Section 8-81.2, the power source of Virginia's "long arm" statute was taken in toto from the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.039B U.L.A. (1966) which was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association in 1962. For a comprehensive note on the Virginia "long arm" statute see Note, *The Virginia "Long Arm" Statute*, 51 VA. L. REV. 719 (1965). For a list of "long arm" statutes enacted in other states see *Jurisdiction Over Foreign Corporations*, 25 CORP. J. 291 (1968).

2 In the context of "long arm" jurisdiction, VA. CODE ANN. § 8-81.1 (Cum. Supp. 1971) defines "person" as "an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State."

3 Carmichael v. Snyder 209 Va. 451, 456, 164 S.E.2d 703, 707 (1968).

4 VA. CODE ANN. § 8-81.2(a)(1) (Cum. Supp. 1971).

5 The Virginia Supreme Court only twice before has been called upon to decide controversies arising under Virginia's "long arm" statute since its enactment in 1964. Neither case required the court to interpret the phrase "transacting business." *See* Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968) which involved VA. CODE ANN. § 8-81.2(a)(6) (Cum. Supp. 1971), and Walke v. Dallas, 209 Va. 32, 161 S.E.2d 722 (1968) wherein the court held that the "long arm" statute may be applied retroactively.

6 211 Va. 736, 180 S.E.2d 664 (1971).

7 To circumvent the territorial power concept established by Pennoyer v. Neff, 95 U.S. 714 (1877) and to permit the extension of state in personam jurisdiction beyond geographical boundaries, the fictional concepts of "implied consent" and "presence" were developed. Later, activity within the forum state by corporate agents was imputed to the corporation and if quantitatively sufficient was denominated as "doing business" and was held to provide an adequate jurisdictional basis on the theory of either implied consent or presence. H. HENN, LAW OF CORPORATIONS § 97, at 151-52 (2d ed. 1970). For the purpose of judicial jurisdiction, "doing business"

"minimum contacts" rule[8] in order to find a sufficient transaction of busi-

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meant "the doing of a series of similar acts for the purpose of thereby realizing pecuniary profit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47, Comment *a* (Proposed Official Draft, May 23, 1969). The standard provided for a purely quantitative determination without regard to the burden on the defendant or the urgency of the need for adjudication in the forum state. *Developments In The Law, State-Court Jurisdiction*, 73 HARV. L. REV. 909, 922-23 (1960).

Under the "doing business" test there further developed a distinction between "mere solicitation" which provided no basis for "long arm" service and "solicitation plus" which was deemed tantamount to "doing business." Accordingly, most courts held "that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there." International Shoe Co. v. Washington, 326 U.S. 310, 314 (1945).

As to the extension of state jurisdiction over foreign corporations prior to the enactment of its "long arm" statute, Virginia traditionally adhered to the conservative "doing business" concept. *See* Iliff v. American Fire Apparatus Co., 277 F.2d 360 (4th Cir. 1960); Rock-Ola Mfg. Corp. v. Wertz, 249 F.2d 813 (4th Cir. 1957); Sikes v. Rexall Drug Co., 176 F. Supp. 33 (W.D. Va. 1959); Carnegie v. Art Metal Constr. Co., 191 Va. 136, 60 S.E.2d 17 (1950); Trignor v. L. G. Balfour & Co., 167 Va. 58, 187 S.E. 468 (1936). *But cf.* Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962); Westcott-Alexander, Inc. v. Dailey, 264 F.2d 853 (4th Cir. 1959); Travelers Health Ass'n v. Virginia, 188 Va. 877, 51 S.E.2d 263 (1949), *aff'd*, 339 U.S. 643 (1950).

[8] In International Shoe Co. v. Washington, 326 U.S. 310 (1945) the United States Supreme Court answered the demands of a commercially progressive and mobile nation and abandoned the rigid "doing business" concept in favor of a more realistic minimum contacts test. The defendant in *International Shoe* maintained no office or stock in the forum state, made no contracts there, and made no delivery of goods in interstate commerce; yet, the company was deemed to be transacting business in that state and was held subject to its jurisdiction due to the systematic and continuous solicitation of business by its in-state salesman. The Court rejected the concepts of "presence" and "implied consent" and held that due process requires only that the defendant "have certain minimum contacts with [the state] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316. Although the decision articulated no precise standards, the Court did indicate that the test was not merely mechanical or qualitative, but

> must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. . . .
>
> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. *Id.* at 319.

For an in-depth analysis of the *International Shoe* doctrine and its subsequent applications see Annot., 27 A.L.R.3d 397 (1969); H. HENN, LAW OF CORPORATIONS

ness in Virginia, thereby subjecting a California corporation to suit in this state. The case involved an action for breach of contract against Chromodern Chair, Inc., a California manufacturer, brought by John G. Kolbe, Inc., a Virginia corporation and an established non-stocking dealer for Chromodern's products in Virginia. The cause of action arose from a single sale of merchandise to Kolbe by the defendant, Chromodern, through a Virginia based manufacturer's representative who secured a purchase order from Kolbe in Virginia, calling for delivery to a remote purchaser in North Carolina. Although Chromodern maintained no telephone, office facility, or inventory in Virginia, it had actively solicited and secured the business of other Virginia dealers in an attempt to develop a Chromodern market in this state.[9] Accordingly, the court found that the defendant's activities constituted a sufficient transaction of business in this state and further found that the defendant had purposely availed itself of the privilege of conducting activities within Virginia, thus invoking the benefit and protection of its laws.[10] Therefore, the Virginia Supreme Court determined that the existing minimum contacts were sufficient to satisfy the due process requirements of the fourteenth amendment and held that the assertion of jurisdiction by Virginia would not offend "traditional notions of fair play and substantial justice." [11]

By defining the transacting business clause of Virginia's "long arm" statute[12] in terms of minimum contacts, the *Kolbe* court has endorsed Virginia's legislative acceptance of the invitation issued by *International*

§§ 96-97 (2d ed. 1970); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533 (1963); Kurkland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law, State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Note, *The Virginia "Long Arm" Statute*, 51 VA. L. REV. 719 (1965).

[9] "On June 18, 1968, William Conklin, a manufacturer's representative, was appointed by Chromodern as its representative in Virginia, North Carolina, South Carolina, and all of Maryland except Baltimore and was authorized to name dealers in his territory. From October 15, 1968, through April, 1969, Conklin sold Chromodern merchandise to dealers in Norfolk and Roanoke amounting to $3,446.60." 211 Va. at 737, 180 S.E.2d at 665.

[10] *Id.* at 741, 180 S.E.2d at 668.

[11] *Id.*

[12] In defining the transacting business clause, the *Kolbe* court concluded that, "Section 8-81.2(a)(1) discarded the concept of 'doing business' as the exclusive test of jurisdiction and provided instead, insofar as pertinent here, that personal jurisdiction may be asserted over a nonresident if, in person or through an agent, he transacts any business in this State." 211 Va. at 740, 180 S.E.2d at 667. The modern majority view is that the phrase referring to transaction of any business does not mean "doing business" and requires considerably less contacts than those required under the traditional doing business test. *See* Annot., 27 A.L.R.3d 397, 428 (1969).

Shoe Co. v. Washington[13] to expand the jurisdictional basis of its courts. The basic test of "traditional notions of fair play and substantial justice" adopted by the *Kolbe* court is truly a realistic approach to the issue of state jurisdiction over non-residents, but it is necessarily void of any precise or definitive standards and indeed at first glance offers "no more basis for judging than the highly amorphous and ultimately subjective standard of reasonableness." [14] However, the decision is not entirely wanting of direction. The court defines the transacting business clause as a single-act statute, requiring only one transaction in Virginia to confer jurisdiction on its courts[15] and further asserts that its application is bounded only by the limitations imposed by the due process clause.[16] Fortunately, when viewed in terms of constitutional limitations, *Kolbe's* seemingly recondite statutory interpretation sheds some of its abstract quality and gains a certain degree of functional significance.

At present the high-water mark in the United States Supreme Court's expansion of the permissible scope of in personam jurisdiction over non-residents is *McGee v. International Life Insurance Co.*[17] There, an assertion of jurisdiction by the state of California was upheld although the only contact that a Texas insurer had with California was the mailing of an offer of reinsurance to a California resident who accepted and thereafter mailed the premiums on a single policy to Texas. In allowing jurisdiction based on such an isolated transaction, the *McGee* court reasoned that, "It is sufficient for purposes of due process that the suit was based on a contract which has substantial connection with that state." [18] Subsequent to the *McGee* case, the minimum contacts doctrine received its only significant limitation in *Hanson v. Denckla*,[19] wherein the Supreme Court, after noting the trend

[13] 326 U.S. 310 (1945).

[14] Southern Mach. Co. v. Mahasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968).

[15] 211 Va. at 740, 180 S.E.2d at 667.

[16] As it had in Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968), the *Kolbe* court stated that, "It is manifest that the purpose of Virginia's long arm statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in this State to the extent permissible under the due process clause." 211 Va. at 740, 180 S.E.2d at 667.

[17] 355 U.S. 220 (1957).

[18] *Id.* at 223. In dilineating this "substantial connection" the *McGee* court stated, "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* The general applicability of *McGee* will be considered in note 21 *infra*.

[19] 357 U.S. 235 (1958). The *Hanson* case, in which jurisdiction was denied the Florida court, involved an action against a Delaware corporation on a trust executed in Delaware, brought by the settlor of the trust who had transferred her domicile

toward expanding jurisdiction,[20] cautioned that to satisfy the requirements of due process ". . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." [21] The *Hanson* court thus established the *sine qua non* of valid "long arm" service under the transacting business clause to be the purposeful engagement in activity within the forum state. Therefore, as developed by the United States Supreme Court, the present permissible scope of due process permits the assertion of state jurisdiction on the basis of a single transaction,[22] irrespective of the defendant's physical presence within the forum state, so long as the cause of action arises out of or results from the defendant's purposeful activity within the forum state[23] and the

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from Pennsylvania to Florida and had there exercised her power of appointment under the trust agreement. The defendant's only direct contact with the forum state was its remittance of trust funds to the settlor in Florida.

[20] As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. *Id.* at 250-51.

[21] 357 U.S. at 253.

[22] The United States Supreme Court has not yet ruled whether a single contract other than an insurance contract, or a single tort, is, as a matter of due process, a sufficient basis to subject a nonresident to the in personam jurisdiction of a state court. It has been argued that in view of *Hanson, McGee* should be regarded as a special interest exception, applicable only to insurance contracts. However, a review of the more recent decisions of the federal circuit courts indicates a unanimous acceptance of *McGee* as a precedent of general applicability. *See, e.g.,* O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971); Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); Jennings v. McCall Corp., 320 F.2d 64, 67 (8th Cir. 1963); Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910, 913-14 (4th Cir. 1962).

The view that a single act may provide a sufficient basis for "long arm" service was strengthened considerably by the opinion of Mr. Justice Goldberg, in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (1965) (in chambers on an application for a stay pending appeal). Justice Goldberg pointed out that the logic of *International Shoe* and *McGee* supports the due process validity of "single-tort" statutes and further noted the general uniformity with which jurisdiction has been upheld on the basis of a single tort. Further, it has been stated that although the United States Supreme Court has not directly ruled on provisions of single act statutes which relate to breach of warranty or tortious injury, it has left little doubt that such will be held constitutional. Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1 (W.D. Va. 1965). See Note, The Virginia "Long Arm" Statute, 51 VA. L. REV. 719, 727 (1965).

[23] The actual physical presence of a nonresident within the forum state during

assumption of jurisdiction is consonant with the due process tenants of fair play and substantial justice.[24]

Although the factual situation of *Kolbe* was pregnant with significant contacts,[25] so as not to require a liberal application of the minimum contacts rule, it is submitted that as applied to the transacting business clause, the

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the commission of the act which gives rise to the cause of action sued on is indeed an important factor, but in view of the combined effect of *McGee* and *Hanson*, it is no longer controlling where the nonresident by his activity may be deemed to have invoked the benefits and protections of the law of the forum. *See* Consolidated Laboratories, Inc. v. Shandon Scientific Co., 384 F.2d 797, 801 (7th Cir. 1967). *See also* Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); Curtis Publishing Co. v. Golina, 383 F.2d 586 (5th Cir. 1967) (magazines sent into state for sale by independent contractors); WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958) (transmission of radio broadcasts into forum state). But the mere presence of a corporate agent in the forum state is not in itself a sufficient basis for jurisdiction; the presence must be for the purpose of conducting business in the state. *See* Blount v. Peerless Chemicals, Inc., 316 F.2d 695 (2d Cir. 1963); Kaye-Martin v. Brooks, 267 F.2d 394 (7th Cir. 1959).

[24] In L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 773 n. 12 (9th Cir. 1959) the Court of Appeals for the Ninth Circuit stated three basic rules to be drawn from a combined reading of the *International Shoe, McGee*, and *Hanson* decisions:

> 1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
> 2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."
> 3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenents of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

See also Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968); State *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 448 P.2d 571, 574 (Ore. 1968).

[25] The facts of the *Kolbe* case reveal that the cause of action arose from a written obligation secured in Virginia from the plaintiff by the defendants agent while physically present within the state. Prior to securing such obligation, the defendant through his agent had actively solicited the business of the plaintiff and established the plaintiff as a non-stocking Virginia dealer. Further, the facts reveal transactions with other Virginia dealers which, when considered with the sale to the plaintiff, delineate a pattern of activities intended to develop the defendant's market in Virginia and to reap economic benefit therefrom. 211 Va. at 741, 180 S.E.2d at 668.

Kolbe decision provides authority for expanding the jurisdiction of Virginia's courts to utilize fully the increased jurisdictional power created by the trilogy of *International Shoe, McGee* and *Hanson.*[26] Accordingly, where the requisite purposeful activity in Virginia is present, and the assertion of personal jurisdiction is not violative of the constitutional standard of general fairness to the defendant, the statute, being remedial in nature,[27] should be applied liberally[28] in the context of "modern day commercial and personal accelerated relationships."[29] The non-resident defendant "should not be in the position, even though indirectly, to enjoy the fruit but disavow the situs of the tree from which the fruit was derived."[30]

By interpreting the transacting business clause of Virginia's "long arm" statute in terms of a realistic and flexible rule based on the now accepted standards of due process,[31] the *Kolbe* court not only has clarified an important area of Virginia law but has further empowered the courts of this

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26 In effect, the *Kolbe* decision emasculated the "doing business" concept in Virginia and established "transacting business" as the determinant standard governing the extension of "long arm" jurisdiction under VA. CODE ANN. § 8-81.2(a)(1) (Cum. Supp. 1971). It secondly defined "transacting business" in terms of the modern minimum contacts test of *International Shoe* and its subsequent extensions and modifications in *McGee* and *Hanson.* Lastly, the *Kolbe* decision reiterated that the purpose of Virginia's "long arm" statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in this state to the extent permissible under the due process clause. 211 Va. at 740-41, 180 S.E.2d at 667-68.

27 "The Virginia long arm statutes are remedial only and do not disturb vested rights or create new obligations; they merely supply a remedy to enforce an existing right." Walke v. Dallas, Inc., 209 Va. 32, 35, 161 S.E.2d 722, 724 (1968).

28 "Protection of life and property within its boundaries is a primary concern of state government, and each state has a vital interest in providing a forum for actions that arise both from torts committed, and out of contracts entered into, within its borders." Carmichael v. Snyder, 209 Va. 451, 455, 164 S.E.2d 703, 707 (1968). Virginia enacted its "long arm" legislation for the expressed purpose of exercising its manifest interest in providing effective redress for its citizens. Therefore, within the permissible scope of due process, such legislation should be interpreted and applied liberally as a remedy to enforce the existing rights of Virginia's citizens.

29 O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1177 (7th Cir. 1971).

> The test of whether business was transacted within the state must be applied in the context, not of communication and transportation criteria of yesteryears, but of modern day commercial and personal accelerated relationships. The long arm statutes are comrades of the computer. *Id.*

30 *Id.*

31 Prior to the *Kolbe* decision, the federal district courts applying Virginia's "long arm" statute to extend their own jurisdiction over nonresident defendants, anticipated the Virginia Supreme Court's adoption of the "minimum contacts" standard and interpreted the statute accordingly. *See* Dotson v. Kwiki Systems, Inc., 281 F. Supp. 874 (W.D. Va. 1968); Olin Mathieson Chem. Corp. v. Molins Organizations, Ltd., 261 F. Supp. 436 (E.D. Va. 1966); Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1 (W.D. Va. 1965); Jackson v. National Linen Serv., 248 F. Supp. 962 (W.D. Va. 1965).

increasingly mobile and commercially progressive state to provide Virginia's citizens with the full protection of the law. The minimum contacts theory excludes a mechanical approach whereby a single factor may be permitted controlling significance and requires in each case that jurisdiction be granted or denied on the basis of a careful balancing of all the factors, equities and conveniences. Therefore, in order to realize the full protection of the transacting business section and indeed the entire "long arm" statute, it is essential that courts and practitioners be aware of and sensitive to all of the facts surrounding the transaction giving rise to the cause sued upon.[32] Such diligent application of the *Kolbe* decision will indeed provide realistic protection for the citizens of this state as well as a reliable degree of predictability in the development of Virginia's "long arm" jurisprudence.

J. F., III

[32] As noted by the *Kolbe* court, "the divergence of judicial opinions demonstrates that the holding in each case must rest upon an analysis of its own particular facts and circumstances." 211 Va. at 740, 180 S.E.2d at 667. For a survey of current state and federal decisions see Annot., 27 A.L.R.3d 397 (1969).