# The Texas Long-Arm Statute, Article 2031b: A New Process is Due

Robert Thompson Mowrey

# THE TEXAS LONG-ARM STATUTE, ARTICLE 2031b: A NEW PROCESS IS DUE

*by Robert Thompson Mowrey*

Although the wording of the Texas long-arm statute[1] has remained unchanged since the statute's enactment,[2] state and federal courts continue to reexamine it.[3] The events leading up to and surrounding the passage of article 2031b have been adequately treated by Professors Thode and Wilson.[4] Moreover, many significant cases involving article 2031b have been noted.[5]

---

1. TEX. REV. CIV. STAT. ANN. art. 2031b (1964). The term "long-arm jurisdiction" refers to the personal jurisdiction that a court may exert over a non-resident defendant even though he is not personally served with process within the state.

2. The statute was adopted on May 12, 1959, but did not become effective until 90 days later on Aug. 10, 1959. Ch. 43, § 9, [1959] Tex. Laws 86.

3. Professor Thode notes that article 2031b was not a factor in litigation in Texas state courts before the passage of the special appearance rule in TEX. R. CIV. P. 120a because a defendant either appeared generally, thus waiving jurisdictional objections, or allowed a default judgment to be taken against him while he remained outside the state. Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 306 (1964). Thode predicted that the adoption of the special appearance rule 120a would increase state litigation as to the scope of article 2031b since a defendant would be able to contest jurisdiction without submitting himself to the court. *Id.* Although the Texas courts of civil appeals have been actively interpreting article 2031b since the passage of rule 120a in 1962, the Texas Supreme Court has not ruled on the validity or the scope of article 2031b. *See* notes 80, 92 *infra* and accompanying text.

4. *See* Thode, *supra* note 3, at 303-10; Wilson, *In Personam Jurisdiction Over Non-Residents: An Invitation and a Proposal*, 9 BAYLOR L. REV. 363 (1957). *See also* Gooch, *Jurisdiction over Foreign Corporations under Article 2031b*, 39 TEXAS L. REV. 214 (1960).

One issue relating to the history of article 2031b that has not been treated adequately is whether the statute was meant to be applied prospectively or retroactively: Can jurisdiction be obtained under article 2031b when the cause of action arose *before* the enactment of the statute? Most jurisdictions have held that since long-arm statutes affect substantive rights, they are to operate prospectively only. *See, e.g.*, Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212 (1948); Krueger v. Rheem Mfg. Co., 260 Iowa 678, 149 N.W.2d 142 (1967); State *ex rel.* Clay Equip. Corp. v. Jensen, 363 S.W.2d 666 (Mo. 1963). Most Texas courts and federal courts sitting in Texas have held that article 2031b is both procedural and remedial and can, therefore, be applied retroactively. Muchard v. Berenson, 307 F.2d 368 (5th Cir. 1962), *cert. denied*, 371 U.S. 962 (1963); Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961); McCarty v. Hinman, 342 S.W.2d 29 (Tex. Civ. App.—Dallas 1960, no writ). *Contra*, Rozell v. Kaye, 201 F. Supp. 377 (S.D. Tex. 1962); *see* Annot., 19 A.L.R.3d 138 (1968).

5. 20 TEXAS PRACTICE, R. HAMILTON, BUSINESS ORGANIZATIONS §§ 973, 981, 989 (1973); 2 R. MCDONALD, TEXAS CIVIL PRACTICE §§ 9.29.5-.6 (1970); A. TODD, DOING BUSINESS IN OTHER STATES 259-69 (1968); Counts, *More on Rule 120a—A Differing Position on Special Appearances*, 28 TEX. B.J. 95 (1965); Gooch, *supra* note 4; Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023 (1975); Thode, *supra* note 3, at 303-10; Thode, *"Long Arm" Jurisdiction and Special Appearance—A Reply*, 28 TEX. B.J. 271 (1965); Vestal, *Civil Procedure, Fifth Circuit Survey*, 6 TEX. TECH L. REV. 467, 473-77 (1975); Wilson, *supra* note 4; 4 HOUSTON L. REV. 316 (1966); 5 ST. MARY'S L.J. 373 (1973); 22 SW. L.J. 892 (1968); 18 SW. L.J. 531 (1964); 14 SW. L.J. 265 (1960); 45 TEXAS L. REV. 188 (1966); 2 TEX. TECH L. REV. 328 (1971). *See also* Comment, *How Minimum is "Minimum Contact"? An Examination of "Long Arm" Jurisdiction*, 9 S. TEX. L.J. 184 (1967). *See generally Conflict of Laws, Annual Survey of Texas Law*, 21-30 SW. L.J. (1967-1976); *Texas Civil Procedure, Annual Survey of Texas Law*, 21-30 SW. L.J. (1967-1976).

Nevertheless, a need exists for a comprehensive review and analysis of the statute's interpretation by state and federal courts.

The purpose of this Comment is to demonstrate how the courts have interpreted article 2031b in the light of the due process clause, and to focus upon federal and state decisions which analyze the application of the long-arm statute to tort cases and litigation which involves parent-subsidiary corporate relationships.[6] Since this analysis reveals certain shortcomings in the present statute, a new long-arm statute is proposed.

## I. THE DEVELOPMENT OF IN PERSONAM JURISDICTION

### A. *United States Supreme Court Decisions*

The story of *Pennoyer v. Neff*,[7] *International Shoe Co. v. Washington*,[8] *McGee v. International Life Ins. Co.*,[9] and *Hanson v. Denckla*[10] has been told and retold by students, professors, judges, and practitioners for nearly two decades.[11] *Pennoyer* was both the epitome of common law jurisdictional philosophy[12] and the starting point for understanding the constitutional scope of a state court's power to adjudicate an issue involving a non-resident defendant. The decision represented a departure from a tradition of the physical power concept of jurisdiction[13] because it signaled the application of due process considerations to jurisdictional questions.[14]

6. TEX. REV. CIV. STAT. ANN. art. 2039a (1964), which permits exercise of jurisdiction over non-resident motorists, and TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Supp. 1976-77), which permits exercise of jurisdiction in certain domestic relations, will not be discussed in this Comment. For an excellent discussion of the new Family Code long-arm statutes see Sampson, *supra* note 5.

7. 95 U.S. 714 (1877).

8. 326 U.S. 310 (1945).

9. 355 U.S. 220 (1957).

10. 357 U.S. 235 (1958).

11. A comprehensive listing of materials relating to these cases would be enormous. Some of the more noted works include Ehrenzweig, *Pennoyer is Dead—Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285 (1958); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Johnston, *The Fallacy of Physical Power*, 1 JOHN MARSHALL J. PRACTICE & PROCEDURE 37 (1967); Kurland, *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); Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959); Seidelson, *Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long Arm Statutes*, 6 DUQUESNE L. REV. 221 (1967-68); Shepherd, *How Long is the Long Arm of Due Process?*, 34 INS. COUNSEL J. 297 (1967); Thode, *supra* note 3; Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 37 INS. COUNSEL J. 265 (1970); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State-Court Jurisdiction*, 73 HARV L. REV. 909 (1960); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH L. REV. 300 (1970); Comment, *Minimum Contacts Confused and Reconfused—Variations on a Theme by International Shoe—Or, Is this Trip Necessary?*, 7 SAN DIEGO L. REV. 304 (1970). *See also* 2 J. MOORE, FEDERAL PRACTICE ¶ 4.25 (2d ed. 1975); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1063-69 (1969).

12. *But see* Ehrenzweig, *supra* note 11, at 292.

13. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917), in which Justice Holmes said that "[t]he foundation of jurisdiction is physical power." Physical presence has always been significant in Anglo-Saxon law. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (3d ed. 1923). Unless the defendant's presence is brought about by the plaintiff's fraud or force, physical presence alone, no matter how casual or transient, has been and continues to be a proper basis for judicial jurisdiction. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 97 (1971).

14. *Pennoyer*'s importance as a basis for development of in personam jurisdiction rests in the

Before *International Shoe* corporate presence and implied consent were the traditional bases for jurisdiction over corporations, and the usual bases of jurisdiction over individuals were physical presence, consent, and domicile.[15] Especially in the area of corporations courts developed legal fictions to justify the conclusion that a corporation was present within a jurisdiction or had consented to the exercise of in personam jurisdiction.[16] Transportation and communication advances accompanied unprecedented economic activity and the growth of corporate activity. Courts were increasingly called upon to adjudicate legal issues pertaining to these entities.[17] *International Shoe* represented a break from the traditional notions of consent and presence.[18] To submit the Delaware corporation to Washington jurisdiction the Court could have based its decision on precedent, using fictional consent as presence. Instead, the Court rejected this analysis[19] and adopted an approach emphasizing the "quality and nature of the activity in relation . . . to due process,"[20] "traditional notions of fair play and substantial justice,"[21] and the defendant's "minimum contacts"[22] with the forum state.[23] As has been aptly noted, "the 'minimum contacts' doctrine has the merit of flexibility and the defect of vagueness."[24]

Although *International Shoe* is the bedrock of modern in personam jurisdiction, two later cases demonstrate an attempt by the Supreme Court to clarify and refine that holding. In *McGee*, the Court's most far-reaching

court's dictum establishing the principle that a judgment is entitled to full faith and credit only if it satisfies the requirements of due process. 95 U.S. at 734-35; *see* Kurland, *supra* note 11, at 572-73.

15. *See Developments in the Law, supra* note 11, at 936.

16. Differing theories were developed but the most widely adopted was that one which made consent to be sued a condition to the foreign corporation's legal transaction of business in the state. Another theory based the presence of a corporation in the forum state if the corporation were found to be "doing business." A great body of law developed as to what constituted "doing business." *See* International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). *See generally* Cahill, *Jurisdiction Over Foreign Corporations and Individuals who Carry on Business Within the Territory*, 30 HARV. L. REV. 676 (1917); Fead, *Jurisdiction Over Foreign Corporations*, 24 MICH. L. REV. 633 (1926); Gavin, *Doing Business as Applied to Foreign Corporations*, 11 TEMP. L.Q. 46 (1936); Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Kurland, *supra* note 11, at 577-86; *Developments in the Law, supra* note 11, at 919-23.

17. *See* Kurland, *supra* note 11, at 578; *Developments in the Law, supra* note 11, at 999.

18. Three Supreme Court cases foreshadowed *International Shoe*. Milliken v. Meyer, 311 U.S. 457 (1940) (defendant's domicile within the state confers jurisdiction); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (doing business by the defendant within the state confers jurisdiction); Hess v. Pawloski, 274 U.S. 352 (1927) (jurisdiction created by a tort arising out of the defendant's operation of a motor vehicle on the state's highways).

19. *See* Kurland, *supra* note 11, at 586-93.

20. 320 U.S. at 319.

21. *Id.* at 316.

22. *Id.*

23. Most significant in *International Shoe* is that due process requires certain minimum contacts which do not offend "traditional notions of fair play and substantial justice." *Id.* Interestingly, the Court also addressed a coalescing problem soon to face it by pointing out that procedural due process, which requires proper notice and an opportunity to be heard, must not be violated. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); McDonald v. Mabee, 243 U.S. 90 (1917).

24. Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1164 (1970).

25. Two cases came between *International Shoe* and *McGee*: Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952) (jurisdiction could be asserted against non-resident defendant even though cause of action did not arise out of defendant's activities within the state, provided

application of *International Shoe*,[25] an in personam default judgment rendered by a California court against a defaulting Texas corporation was affirmed. The Court held that the mailing of insurance premium statements into California by the Texas company satisfied the "minimum contacts" standard of *International Shoe*.[26] Shortly after *McGee*, *Hanson* quieted contentions that *McGee* established the proposition that any contact with the state of the forum would be sufficient to support jurisdiction over a non-resident defendant.[27] In *Hanson* the Court held that the "minimum contacts" test of *International Shoe* is not met unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[28]

*McGee* and *Hanson* give substance to the *International Shoe* test of fundamental fairness and minimum contacts.[29] The two cases, however, leave many in personam questions unresolved.[30] The Supreme Court has, unfortunately, not contributed to clarity in this area, for the Court has not reviewed, since *Hanson*, a major case on in personam jurisdiction.

### B. *The Growth of Long-Arm Statutes*

Instead of adding to the list of fictions to bring a non-resident defendant under the jurisdiction of the forum state, *International Shoe* announced a broad test under which a particular factual setting could be examined. The decision did not automatically vest state courts with the power to obtain jurisdiction over non-resident defendants but only provided the potential for an exercise of such power under an appropriate statute.[31] A court must first look to the applicable state law before deciding whether the defendant has sufficient minimum contacts with the forum to meet the due process standard.[32]

---

defendant had "substantial," as opposed to "minimum," contacts); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) (sending letters into and receiving them from a state subjected foreign corporation to the jurisdiction of that state).

26. The Court in *International Shoe* did not address the issue of whether individuals fell within the minimum contacts test. *McGee* settled that query by clearly indicating that non-resident individuals and corporations would be treated alike. 355 U.S. at 222.

27. *See, e.g.*, Note, *Personal Jurisdiction in Minnesota Over Absent Defendants*, 42 MINN. L. REV. 909, 922 (1958).

28. 357 U.S. at 253. *See also* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

29. *See generally* R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 499-578 (2d ed. 1975).

30. The *Hanson* decision has drawn considerable criticism for its analysis. *See* Hazard, *supra* note 11, at 243-44; Kurland, *supra* note 11, at 610-23. *But see* Scott, *supra* note 11.

31. The Supreme Court has indicated that there is no requirement that state courts exercise the full reach of the jurisdiction constitutionally available. *See* Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 440 (1952); Missouri Pac. R.R. v. Clarenden Boat Oar Co., 257 U.S. 533, 535 (1922). *See also* Thode, *supra* note 3, at 304; *Developments in the Law*, *supra* note 11, at 998-1008. But in accordance with *International Shoe*'s concept of fairness, at what point may a state deny a plaintiff's suit against a non-resident defendant? Although the development of long-arm jurisdiction has centered around the expansion of a plaintiff's ability to bring a cause of action against a non-resident defendant, an interesting question is raised as to the state's power to restrict its jurisdictional forum: If a state is not required to permit jurisdiction to the constitutional limits of due process, would it be permissible, consistent with due process, for a state to disallow long-arm jurisdiction completely? *See generally* R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 535-40; R. WEINTRAUB, *supra* note 13, at 109-13; *Developments in the Law*, *supra* note 11, at 1014-17.

32. *See* W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 179 (1960); 2 J.

At the time of *International Shoe* most state statutes authorizing service over non-resident defendants were limited in scope.[33] After this landmark decision two methods of implementing the new in personam test began to emerge. Some state courts reinterpreted old statutes in the light of *International Shoe*.[34] Alternatively, state legislatures passed long-arm statutes which defined the term "doing business," as that concept was understood after *International Shoe*, by listing specific acts which, if done, would support the exercise of in personam jurisdiction.[35] At present, all fifty states have some type of statute permitting jurisdiction to be obtained over a non-resident defendant.[36] The dichotomy between these two approaches to *International Shoe* application should not be oversimplified. A listing of jurisdiction-producing minimum contacts in a statute is an inflexible approach since the interpretation of the due process clause is not static. As a result of continuous judicial interpretation, the second approach may lead to unsatisfactory results because it relies upon a listing of specific acts. Even statutes passed with the clear intent of expanding in personam jurisdiction to constitutional limits may fall behind the expansion or refinement of constitutional interpretation which occurs after their enactment.

## II. ARTICLE 2031b—THE TEXAS APPROACH

A principle universally accepted by the courts construing article 2031b is that contacts of a non-resident defendant must first satisfy the language of the long-arm statute before due process requirements can be examined.[37] Therefore, in examining the interpretation of article 2031b, the initial consideration is the actual wording of the statute. The key language of article 2031b is found in sections three and four of the statute. Section four defines "doing business" as "entering into contract by mail or otherwise with a resident of Texas

---

MOORE, *supra* note 11, ¶ 4.41-1[3]; WHAT CONSTITUTES DOING BUSINESS 133 (CT Corp. Sys. 1973).

In Roumel v. Drill Well Oil Co., 270 F.2d 550 (5th Cir. 1959), the court refused to extend jurisdiction over a non-resident defendant who had an oil lease interest in Texas. Although this arguably met the minimum contacts required by *International Shoe*, Texas had not yet enacted a long-arm statute, thereby foreclosing a jurisdictional forum in Texas. *See* 14 SW. L.J. 265 (1960).

33. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (sustained jurisdiction over non-resident individuals selling corporate securities in state); Hess v. Pawloski, 274 U.S. 352 (1927) (upheld Massachusetts non-resident motorist statute). *See Developments in the Law*, *supra* note 11, at 999-1000.

34. *See* Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 658-59 (1959).

35. The first truly comprehensive long-arm statute was enacted in Illinois and has served as a model for other states. ILL. REV. STAT. ch. 110, § 17 (1968). *See* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

36. *See* A. TODD, DOING BUSINESS IN OTHER STATES (1968) (a collection of long-arm statutes and selected decisions in each of the fifty states). *See also* UNIFORM INTERSTATE & INT'L PROCEDURE ACT § 1.01.

37. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 492 (5th Cir. 1974); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232-33 (5th Cir. 1973); Southwest Indus. Import & Export, Inc. v. Wilmod Co., 382 F. Supp. 972, 974 (S.D. Tex. 1974), *rev'd on other grounds*, 524 F.2d 468 (5th Cir. 1975); Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871, 873 (S.D. Tex. 1971).

Only one state court has specifially alluded to this two-tier analysis, but there is no indication that the Texas state courts would not adhere to this principle. Pizza Inn, Inc. v. Lumar, 513 S.W.2d 251, 253 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

to be performed in whole or in part by either party in this state, or the committing of any tort in whole or in part in this state."[38] This section also contains a phrase[39] which inelegantly attempts to expand the definition of doing business to include acts other than those arising from a tort or contract.[40] Section three states that a non-resident defendant who does not maintain a place of regular business in Texas or a designated agent may be served with process through the secretary of state of Texas for "causes of action arising out of such business done in this state."[41] Therefore, unless obviated by the catchall phrase, the cause of action must arise out of business done in the state.

The major problem with article 2031b is that it does require, if taken literally, that the cause of action arise out of business done in Texas. The "catchall phrase" is not only inelegant, it literally does not accomplish the job. Since due process does not require that the cause of action arise out of "business done in Texas" in all instances, this portion of the statute is in need of modification. As will be discussed later, [42] the Texas Supreme Court in *O'Brien v. Lanpar Co.*[43] held that jurisdiction could not be entertained over a non-resident unless the cause of action should "arise from, *or be connected with*, such act or transaction."[44] Since the statute does not include *O'Brien*'s "or be connected with" phrase, the wording of the statute does not reach the due process limits defined by the Texas Supreme Court.

### A. *Due Process Interpretation*

In order to determine the boundaries of specific statutory wording, a statute must be examined against the requirements of due process. An analysis of a particular statute could determine it to be more restrictive than the outer limits of due process, beyond the permissible scope of due process, or reaching the maximum boundaries of due process without violating it. The first analysis has received little acceptance by the courts, although some commentators have recognized that article 2031b may be more restrictive than the far reach of due process.[45] For example, a situation could arise where a defendant has sufficient minimum contacts with the forum to meet the due process standard, but service of process is set aside on the ground that the long-arm statute does not encompass that particular activity.[46] In *Bland v.*

38. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).

39. The phrase reads: "and without including other acts that may constitute doing business." *Id.*

40. Professor Thode uses the term "catchall phrase" in explaining this portion of the statute. *See* Thode, *supra* note 3, at 308.

41. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964). This language is taken from *International Shoe. See* 326 U.S. at 319.

42. *See* notes 95-102 *infra* and accompanying text.

43. 399 S.W.2d 340 (Tex. 1966).

44. *Id.* at 342 (emphasis added).

45. *See* Baade, *Conflict of Laws, Annual Survey of Texas Law*, 28 SW. L.J. 166, 173 (1974); Counts, *supra* note 5, at 138; Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 SW. L.J. 244, 248-49 (1975); *Conflict of Laws, Annual Survey of Texas Law*, 24 SW. L.J. 166, 172 (1970); VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 21 SW. L.J. 155, 174 (1968). *See also* 20 TEXAS PRACTICE, R. HAMILTON, *supra* note 5, § 973 n.18. *But see* Thode, *supra* note 3, at 307-08.

46. *See* WHAT CONSTITUTES DOING BUSINESS, *supra* note 32, at 133.

*Kentucky Fried Chicken Corp.*[47] a federal district court declined to interpret the Texas long-arm statute as a statute which subjects a non-resident person or corporation who conducts business in a state to the jurisdiction of that state's courts for some claim having nothing to do with its operations in that state.[48] Although this is the clearest statement by a court that article 2031b does not reach the limits of due process, the *Bland* analysis stressed the lack of state court directives as to the scope of the statute, but did not actually hold that the statute itself is more restrictive than the limits of due process.[49] The same federal district court, in the later case of *Hayes v. Caltex Petroleum Corp.*,[50] again failed to make the due process inquiry because the facts of the case did not bring the defendant "within the Texas construction of its Long Arm Statute."[51]

The second analysis attacks article 2031b for unconstitutional overbreadth by attempting to demonstrate that the statute encompasses factual situations that would violate due process if the forum entertained jurisdiction. Most courts have either rejected[52] or, in the more usual case, evaded the challenge.[53] In most instances in which a court finds that jurisdiction should not be extended to a non-resident defendant, the decision is based upon the lack of sufficient minimum contacts, not the notion that the language of article 2031b impermissibly authorizes jurisdiction beyond the constitutional scope of due

47. 338 F. Supp. 871 (S.D. Tex. 1971).

48. *Id.* at 874-75. *See also* Murdock v. Volvo of America Corp., 403 F. Supp. 55 (N.D. Tex. 1975).

49. It is questionable whether courts realize this distinction. For example, in Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973), a federal district court indicated in dictum that, although it was refusing to extend its jurisdiction to a parent corporation whose subsidiary had adequate contacts with the forum because the Supreme Court had not interpreted due process to reach that far, a different conclusion might not violate due process. *Id.* at 248-49. The court did not analyze the problem in terms of whether the statute authorized jurisdiction based on this parent-subsidiary relationship.

*See also* Tabulating Sys. & Serv., Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973, no writ), where the court was unclear as to whether jurisdiction was denied on grounds of statutory construction or insufficient contacts to constitute due process. Although one commentator concludes that the court interpreted the statute as "relational" because the plaintiff did not allege a cause of action which "relates to any of the foregoing contacts in Texas," *id.* at 694, the court cited as authority for its position O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. 1966), a Texas Supreme Court decision which delineated basic *due process* considerations rather than construing article 2031b. *See* notes 95-102 *infra* and accompanying text; Baade, *supra* note 45, at 170-71; *cf.* Crothers v. Midland Prods. Co., 410 S.W.2d 499 (Tex. Civ. App.—Houston 1967, no writ).

50. 332 F. Supp. 1205 (S.D. Tex. 1971).

51. *Id.* at 1206.

52. *See, e.g.*, Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90, 98 (S.D. Tex. 1963); Able Fin. Co. v. Whitaker, 388 S.W.2d 437 (Tex. Civ. App.—Tyler 1965, writ dism'd by agr.); *accord*, Hull v. Gamblin, 241 A.2d 739, 742-43 (D.C. Ct. App. 1968) (construing Texas statute).

53. *See, e.g.*, Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954, 956 (5th Cir. 1965); Pliler v. Asiatic Petroleum Co. (Texas), 197 F. Supp. 212, 215, 217 (S.D. Tex. 1961); Sun-X Int'l Co. v. Witt, 413 S.W.2d 761 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *cf.* Bodzin v. Regal Accessories, Inc., 437 S.W.2d 655 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

A determination of the constitutionality of a statute will be avoided if there are other grounds for deciding a case. *See, e.g.*, Hardin County v. Trunkline Gas Co., 330 F.2d 789 (5th Cir. 1964), *cert. denied*, 379 U.S. 848 (1965); McKinney v. Blankenship, 154 Tex. 632, 282 S.W.2d 691 (1955); Amaino v. Carter, 212 S.W.2d 950 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

process.[54] In *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*,[55] a case arising shortly after passage of the statute, a federal district court held that when the only jurisdictional allegation concerned one contract to be performed partially in Texas, proof of this allegation would be sufficient to come within the language of article 2031b. But the court further held that "[a]s applied to defendant . . . Section 4 of Article 2031b deprives defendant of that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States."[56] The Fifth Circuit Court of Appeals reversed the district court,[57] holding that the plaintiff should be allowed to allege other contacts with the forum.[58] The court noted that if these additional allegations were proven, they would more than suffice to satisfy the due process requirements.[59] Thus, the appellate court circumvented the issue of article 2031b's possible constitutional overbreadth.[60] Since the federal district court decision in 1960 indicating that the Texas long-arm statute is unconstitutionally overbroad, no federal or state court has interpreted the statute to be broader than due process.[61]

A view most frequently expressed by the courts is that the Texas long-arm statute reaches the limits of constitutional due process.[62] The origin of this interpretation is found in the Fifth Circuit's opinion in *Lone Star*, which indicated that "the Texas purpose [in enacting the long-arm statute] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints."[63] The courts dealing with this issue after *Lone Star* have been in agreement with that holding.[64] Moreover, Professor Thode, in his much cited commentary on article 2031b, approves of this interpretation.[65] Regrettably, there is no recorded legislative history as to the intended range of article 2031b.

This approach places article 2031b on the same plane with due process. By viewing the statute and the due process test as synonymous, the courts implicitly determine that statutory construction is unnecessary and shift the focus from the language of the statute to a determination of due process

54. *See* Arthur, Ross & Peters v. Housing Inc., 508 F.2d 562 (5th Cir. 1975); Amco Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215 (S.D. Tex. 1966); Omniplan, Inc. v. New America Dev. Corp., 523 S.W.2d 301 (Tex. Civ. App.—Waco 1975, no writ); Tabulating Sys. & Serv., Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973, no writ).

55. 185 F. Supp. 48 (S.D. Tex. 1960).

56. *Id.* at 56-57.

57. 288 F.2d 69 (5th Cir. 1961).

58. *Id.* at 77.

59. *Id.* at 74.

60. *Id.* at 73.

61. *See, e.g.*, Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963) (lengthy discussion of the constitutionality of article 2031b); *accord*, Able Fin. Co. v. Whitaker, 388 S.W.2d 437, 442 (Tex. Civ. App.—Tyler 1965, writ dism'd by agr.).

62. *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491 (5th Cir. 1974); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973); Reich v. Signal Oil & Gas Co., 409 F. Supp. 846, 849 (S.D. Tex. 1974), *aff'd without opinion*, 530 F.2d 974 (5th Cir. 1976); Reul v. Sahara Hotel, 372 F. Supp. 995, 997 (S.D. Tex. 1974); Estes Packing Co. v. Kadish & Milman Beef Co., 530 S.W.2d 622, 627 (Tex. Civ. App.—Fort Worth 1975, no writ); N.K. Parrish, Inc. v. Schrimscher, 516 S.W.2d 956, 958 (Tex. Civ. App.—Amarillo 1974, no writ).

63. 288 F.2d 69, 73 (5th Cir. 1961).

64. *See* cases cited at note 62 *supra*.

65. *See* Thode, *supra* note 3, at 307.

requirements. Professor Thode recognizes this in writing: "Such an interpretation directs the court's attention immediately to constitutional limitations rather than to problems of statutory construction that could lead to interpretations falling short of permissible constitutional limits."[66]

When the courts state that the Texas long-arm statute reaches "just as far as Fourteenth Amendment Due Process will permit,"[67] they usually are expressing the idea that has been developed above: article 2031b is equal to due process, and statutory construction is unnecessary. In *Clark Advertising Agency, Inc. v. Tice*,[68] however, the court stated that the long-arm statute "is to be given the broadest possible construction, subject only to basic constitutional requirements."[69] This approach emphasizes that the wording of the statute should be construed as broadly as possible, but suggests that due process may include more than the broadest possible construction of the statute.[70] The court failed, however, to analyze the distinction between interpreting the statute as synonymous with due process and determining the broadest possible construction of the statutory wording.[71] In *Clark*, as in most cases, this distinction is not essential either to the result of the case or to the court's analysis. In those cases which do not fit precisely within the language of the statute the differentiation becomes highlighted. In this situation the courts, when they remark that the "scope of Article 2031b is as broad as the constitutional standard"[72] of due process, are stating that the long-arm statute is equal to due process. Although undeveloped, the approach in *Clark* is more precise since it recognizes that the broadest possible construction of article 2031b does not reach the limits of due process.

The view that article 2031b encompasses everything within the grasp of due

66. *Id.* The court in Southern Nat'l Bank v. TRI Fin. Corp., 317 F. Supp. 1173 (S.D. Tex. 1970), noted that the adequacy of service should be tested against the Texas long-arm statute. The court then made this significant remark: "This test, however, reduces to due process, for the long arm of Texas has as great a reach as due process permits." *Id.* at 1191. A state court also followed this reasoning when it indicated: "[S]tatutory construction is not the proper inquiry . . . . [T]he proper focus of inquiry is that of the constitutional limitation . . . ." Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). *See also* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491-92 (5th Cir. 1974) (indicating that since article 2031b represents an effort to reach as far as due process will permit, most challenges to in personam jurisdiction will "turn on constitutional considerations").

67. Mitsubishi Shoji Kaisha Ltd. v. MS Galini, 323 F. Supp. 79, 81 (S.D. Tex. 1971).

68. 331 F. Supp. 1058 (N.D. Tex. 1971), *aff'd*, 490 F.2d 834 (5th Cir. 1974).

69. *Id.* at 1059.

70. If this third analysis is viewed not from the standpoint that article 2031b is equal to due process, but rather that the statute reaches as far as the permissible limits of due process within the context of the statutory language, it essentially becomes the first analysis with emphasis on due process considerations. *See* notes 45-51 *supra* and accompanying text. Moreover, this viewpoint is a refutation to the second analysis espoused by *Lone Star*; if the statutory language is limited to the outer limits of due process, it cannot be carried any further.

71. Since *Clark* concerned a fact setting which clearly fell within the wording of 2031b, the court easily avoided determining the possible scope of the statute. The court cited Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970), in support of its statement quoted in the text. However, the *Coulter* court remarked that "article 2031b should be given *as broad a reach as due process will permit any 'Long Arm' statute* to be given." *Id.* at 1316, quoting Eyerly Aircraft v. Killian, 414 F.2d 591, 598-99 (5th Cir. 1969) (emphasis added). This statement tends to negate any emphasis on statutory construction. It is doubtful that the *Clark* court meant anything different from the court in *Coulter*.

72. Amco Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215, 217 (S.D. Tex. 1966).

process has not been carefully considered nor developed by the courts for a number of reasons. First, although the legislative purpose may have been for article 2031b to embrace every conceivable situation allowed by due process, this purpose is not made clear by the language of the statute itself.[73] Some courts have not recognized the distinction between the intended purpose and the actual effect of the statute, and have simply held that the *purpose* of article 2031b was to reach the maximum limits of due process without going further to hold that the statute does in fact reach the limits of due process.[74] The majority of courts now believe that "it is a well-settled fact that the statute will 'reach [as far] as due process will permit.' "[75]

The second reason for the belief that article 2031b is indistinguishable from due process involves the differences in interpretation of the long-arm statute by federal and state courts. When the *Lone Star* court first determined that the purpose of the Texas Legislature was to "exploit to the maximum the fullest permissible reach under federal constitutional restraints,"[76] the Fifth Circuit recognized that its determination was bound by the interpretation of the statute given by the Texas Supreme Court.[77] The court noted, however, that in the absence of a special appearance procedure there was a paucity of Texas court decisions pertaining to article 2031b.[78] When rule 120a was enacted in 1962 Professor Thode predicted that this special appearance rule would end the dearth of Texas court decisions.[79] However, the Supreme Court of Texas has remained silent concerning the breadth of article 2031b,[80]

73. Long-arm jurisdiction has recently been extended to the domestic relations area by another statute. TEX. FAM. CODE ANN. §§ 3.26 (marital), 11.051 (parent-child) (Supp. 1976-77). If the legislative intent in enacting article 2031b was to extend long-arm jurisdiction to the limits of due process, does not due process encompass long-arm jurisdiction in the field of domestic relations? This rhetorical question is submitted not to demonstrate that §§ 3.26 and 11.051 of the Texas Family Code are superfluous, but rather to point out the error in attempting to interpret article 2031b as encompassing the entire spectrum of due process. *See* Sampson, *supra* note 5, at 1026, 1032.

74. *See, e.g.*, Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969), in which the court spoke in terms of the fullest permissible reach analysis, note 63 *supra* and accompanying text, but then cited cases which explicitly held that the long-arm statute reaches the limits of due process. *See, e.g.*, Barnes v. Irving Trust Co., 290 F. Supp. 116, 117 (S.D. Tex. 1968). *But see* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491-92 (5th Cir. 1974), in which the court stated that "many, if not most, challenges . . . will turn on constitutional considerations." This statement implies that at least *some* challenges will turn on statutory rather than due process treatment. However, the *Cousteau* court cited as authority for its position the case of Gurley v. Lindsley, 459 F.2d 268, 278 (5th Cir. 1972), which held that article 2031b reaches as far as due process permits.

75. Reul v. Sahara Hotel, 372 F. Supp. 995, 997 (S.D. Tex. 1974), quoting Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966). *See also* Gurley v. Lindsley, 459 F.2d 268, 278 (5th Cir. 1972); Coulter v. Sears, Roebuck & Co., 426 F.2d 1315, 1316 (5th Cir. 1970); Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp., 358 F. Supp. 1345, 1347 (S.D. Tex. 1973); Clark Advertising Agency, Inc. v. Tice, 331 F. Supp. 1058, 1059 (N.D. Tex. 1971), *aff'd*, 490 F.2d 834 (5th Cir. 1974); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

76. 288 F.2d at 73.

77. *Id.* at 73 n.3. *See* FED. R. CIV. P. 4(e) (providing for service on non-residents in manner prescribed in statute or rule of court of state in which court is held). *See also* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Walker v. Savell, 335 F.2d 536, 540 (5th Cir. 1964); 1 W. BARRON & A. HOLTZOFF, *supra* note 32, § 179, at 696.

78. 288 F.2d at 73 n.3; *cf.* Acme Eng'rs v. Foster Eng'r Co., 254 F.2d 259 (5th Cir. 1958).

79. *See* Thode, *supra* note 3, at 306.

80. The most significant Texas Supreme Court decision concerning article 2031b is Mc-

and relatively few decisions by the state civil appeals courts,[81] in comparison to decisions by federal district courts and the Fifth Circuit,[82] have dealt with the relationship between article 2031b and due process.

In *Turner v. Jack Tar Grand Bahama, Ltd.*[83] the Fifth Circuit stated that it had "no desire actually to construe Article 2031b before the Texas courts have had a chance to do so."[84] *Lone Star* was decided before the enactment of rule 120a, but *Jack Tar* was decided in 1965, three years after special appearance was made available. Since the *Jack Tar* decision made no reference to the "Texas purpose," it was possible that the Fifth Circuit was momentarily retracting from its *Lone Star* position, hoping that the allowance of special appearance would provide the Texas courts an opportunity to speak on the breadth of article 2031b.[85] By 1970, however, there had been no word from the Texas Supreme Court,[86] and in *Coulter v. Sears, Roebuck & Co.*[87] the Fifth Circuit announced that " 'article 2031b should be given as broad a reach as due process will permit any "Long Arm" statute to be given.' "[88] Two years later, in *Gurley v. Lindsley*,[89] the court used the catchall phrase in section four of the statute[90] to justify the expansion of the "jurisdictional scope of the statute to constitutional limits."[91] Nevertheless, the Supreme Court of Texas has remained silent,[92] and only one Texas court of civil appeals has gone so far as to say that "[t]he rule is now entrenched in the federal courts, and we are in

---

Kanna v. Edgar, 388 S.W.2d 927 (Tex. 1965), which makes no mention of the due process issue. Rather, the case discusses the procedural aspects of the statute. *Cf.* Whitney v. L & L Realty Corp., 500 S.W.2d 94 (Tex. 1973); Collins v. Mize, 447 S.W.2d 674 (Tex. 1969).

81. *See, e.g.*, Estes Packing Co. v. Kadish & Milman Beef Co., 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ); N.K. Parrish, Inc. v. Schrimscher, 516 S.W.2d 956, 958 (Tex. Civ. App.—Amarillo 1974, no writ); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); National Truckers Serv., Inc. v. Aero Sys., Inc., 480 S.W.2d 455, 459 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

82. *See* note 62 *supra*.

83. 353 F.2d 954 (5th Cir. 1965).

84. *Id.* at 956. *See also* Pliler v. Asiatic Petroleum Co. (Texas), 197 F. Supp. 212, 215 (S.D. Tex. 1961), in which the court refused to speculate about the constitutional due process limits of article 2031b.

85. There were no other Fifth Circuit decisions pertaining to article 2031b between the enactment of rule 120a and the *Jack Tar* case.

86. In a footnote the Fifth Circuit in Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 849 n.3 (5th Cir. 1966), made this significant remark: "The Supreme Court of Texas has now promulgated a rule of procedure . . . to permit a special appearance thus making it unnecessary, *and in many ways now inappropriate*, for us to be 'making' Texas law on jurisdiction over nonresidents, a responsibility foisted on us." (Emphasis added.)

87. 426 F.2d 1315 (5th Cir. 1970).

88. *Id.* at 1316, quoting Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 598-99 (5th Cir. 1969).

89. 459 F.2d 268 (5th Cir. 1972).

90. *See* notes 39-40 *supra* and accompanying text.

91. 459 F.2d at 278. *See also* Amco Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215, 217 (S.D. Tex. 1966). Professor Thode also uses this catchall phrase to justify his conclusion that article 2031b expands to the limits of due process. Thode, *supra* note 3, at 307-08.

92. In one sense, however, the supreme court may be said to have spoken. TEX. R. CIV. P. 108, which provides for service on a non-resident defendant, was amended by the Texas Supreme Court in 1975 becoming effective on Jan. 1, 1976. The last sentence of the rule reads: "A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within the state *to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.*" (Words in italics were added by the 1975 amendment.) The court remarked that the purpose of the amendment "is to permit acquisition of

agreement, that the reach of art. 2031b is limited only by the United States Constitution."[93]

### B. *Three Tests for Due Process*

The federal courts must follow state laws in interpreting the Texas long-arm statute.[94] Due to the lack of an indication from the Texas Supreme Court as to the construction of the statute, and the increasing acceptance of the idea that article 2031b is equal to due process, the courts have focused primarily on the due process question. Since this is a constitutional inquiry rather than an examination of state law, various criteria have been developed by the federal as well as state courts to determine if fact situations meet the requirements of due process.

A decision by the Texas Supreme Court, *O'Brien v. Lanpar Co.*,[95] has been repeatedly employed by federal[96] and state civil appeals courts[97] to analyze due process. The issues in *O'Brien* were whether Texas should give full faith and credit to a judgment from Illinois and whether the Illinois court had jurisdiction over the defaulting Texas corporation against whom it had rendered a default judgment. The Texas court initially acknowledged that "the validity of the Illinois judgment is controlled by the law of Illinois . . . ."[98] After reviewing *International Shoe* and *McGee*, the court quoted

in personam jurisdiction to the constitutional limits." *See Civil Procedure Rules Amended—Official Court Order*, 38 TEX. B.J. 823, 824 (1975). In a letter to the editor of the *Texas Bar Journal* Professor Hans Baade of the University of Texas School of Law argues that rule 108 "is an impermissible extension of the Texas long-arm statute." 38 TEX. B.J. 988 (1975). He points out that long-arm jurisdiction has been determined by the legislature in its enactment of article 2031b and that for the court to attempt to *amend* rather than to *implement* article 2031b is constitutionally impermissible. *Id. See* TEX. CONST. art. V, § 25. If the Texas Supreme Court had previously judicially interpreted article 2031b as reaching the limits of due process, the amendment to rule 108 could scarcely be viewed as an improper procedural device.

Professor William V. Dorsaneo III of Southern Methodist University in his forthcoming book, TEXAS LITIGATION GUIDE ch. 32, to be published by Matthew-Bender, argues that amended rule 108 can be reconciled with article 2031b for at least two reasons. First, amended rule 108 merely provides for the possibility of an alternative method of service of process from article 2031b, § 1, which provides for service of process upon the secretary of state for a nonresident. The amendment speaks to the method of process and does not address the interpretation of "doing business." Second, the amendment of rule 108 provides for a means of effecting service of process under TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Supp. 1976-77), since these new long-arm statutes under the Family Code do not provide for a method of service of process. Although Dorsaneo doubts the first rationale for the amendment, he contends that the second reason is more probable.

Before the 1976 amendment rule 108 had been held not to confer long-arm jurisdiction. *See* Aamco Automatic Transmissions, Inc. v. Evans Advertising Agency, Inc., 450 S.W.2d 769, 770-71 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); American Institute of Real Estate Appraisers v. Hawk, 436 S.W.2d 359, 365-66 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

93. Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

94. *See* note 77 *supra* and accompanying text.

95. 399 S.W.2d 340 (Tex. 1966).

96. *See, e.g.*, Arthur, Ross & Peters v. Housing, Inc., 508 F.2d 562, 564 (5th Cir. 1975); Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871, 874 (S.D. Tex. 1971).

97. *See, e.g.*, Estes Packing Co. v. Kadish & Milman Beef Co., 530 S.W.2d 622, 626 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); Law, Snakard, Brown & Gambill v. Brunette, 509 S.W.2d 671, 674 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

98. 399 S.W.2d at 341.

the Washington Supreme Court's[99] establishment of three basic factors which should coincide if jurisdiction over a non-resident corporation is to be entertained:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
> (2) the cause of action must arise from, or be connected with, such act or transaction; and
> (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[100]

Deciding that the Illinois judgment should be given full faith and credit, the court emphasized that the Illinois law and not the Texas law was on point.[101] Nevertheless, courts rarely mention that *O'Brien* was a full faith and credit decision concerning Illinois law; rather, courts use the decision to analyze factual settings under article 2031b.[102] Such an approach to interpretation of article 2031b is faulty because *O'Brien* merely determined due process limits and did not even consider a construction of the Texas statute.

In some instances federal courts have adopted other due process tests which are consistent with the *O'Brien* test but which emphasize other considerations. A federal district court in *Hearne v. Dow-Badische Chemical Co.*[103] indicated that the factors to be considered in determining whether due process is satisfied are: (1) the nature and character of the business; (2) the number and type of activities within the forum; (3) whether such activities give rise to the cause of action; (4) whether the forum has some special interest in granting relief; and (5) the relative convenience of the parties.[104] The *Hearne* test has been used by many federal district[105] and state civil appeals courts[106] in deciding whether a defendant has sufficient minimum contacts with the forum to exercise jurisdiction.

Recently, a third test for determining whether due process is met was

---

99. Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963).

100. 399 S.W.2d at 342. *See generally* Note, *Jurisdiction over Nonresident Corporation Based on a Single Act: A New Sole for International Shoe*, 47 GEO. L.J. 342 (1958).

101. 399 S.W.2d at 343.

102. *See, e.g.*, N.K. Parrish, Inc. v. Schrimscher, 516 S.W.2d 956, 959 (Tex. Civ. App.—Amarillo 1974, no writ). *See also* Tabulating Sys. & Serv., Inc. v. I.O.A. Data Corp., 498 S.W.2d 690 (Tex. Civ. App.—Corpus Christi 1973, no writ); National Truckers Serv., Inc. v. Aero Sys., Inc., 480 S.W.2d 455, 459 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.); Sun-X Int'l Co. v. Witt, 413 S.W.2d 761 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.).

103. 224 F. Supp. 90 (S.D. Tex. 1963).

104. *Id.* at 99. These factors were first enumerated in Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48, 56 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961).

105. *See* Odom v. C.R. Thomas, 338 F. Supp. 877, 878-82 (S.D. Tex. 1971); Jetco Electronic Indus., Inc. v. Gardiner, 325 F. Supp. 80, 83 (S.D. Tex. 1971), *rev'd on other grounds*, 473 F.2d 1228 (5th Cir. 1973); Williams v. Brasea, Inc., 320 F. Supp. 658, 659-60 (S.D. Tex. 1970), *aff'd*, 497 F.2d 67, 77 (5th Cir. 1974).

106. *See* Hoppenfeld v. Crook, 498 S.W.2d 52, 57 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); Country Clubs, Inc. v. Ward, 461 S.W.2d 651, 657 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.).

developed by the Fifth Circuit in *Product Promotions, Inc. v. Cousteau.*[107] This test includes only two factors and represents a change from *O'Brien* and *Hearne* in at least one significant area. The court's dual test is: "First, 'there must be some minimum contact with the state which results from an affirmative act of the defendant.' Secondly, 'it must be fair and reasonable to require the defendant to come into the state and defend the action.' "[108] Although this test does not expressly include factors such as "the quality, nature, and extent of the activity in the forum state" and "whether the forum has some special interest in granting relief," these are tacitly included in *Cousteau*'s "minimum contact" and "fair and reasonable" standards.[109] However, the criterion of whether the cause of action arises from the contacts with the forum is notably missing.

The *O'Brien*, *Hearne*, and *Cousteau* tests were all derived either in whole or in part from the leading United States Supreme Court decisions concerning in personam jurisdiction.[110] The *O'Brien* test, however, is more restrictive than the tests developed in federal courts. To the extent that *O'Brien* has given assistance in construing article 2031b, an unnecessary limitation has been placed on in personam jurisdiction since the test requires that "the cause of action must arise from, or be connected with"[111] the act or transaction. Further, *O'Brien* has been incorrectly used by Texas courts as the Texas Supreme Court's construction of article 2031b. The tests developed in *Hearne* and particularly in *Cousteau* are more desirable than the *O'Brien* test because they permit a flexible approach which involves a consideration of all the relevant factors in determining due process. Justice Goldberg, author of the opinion in *Cousteau*, aptly noted: "[N]o one formulation of the constitutional test could possibly encompass all the potentially important factors, nor could a formula perform the crucial task of weighing and balancing the relevant considerations."[112]

## III. INADEQUACIES OF ARTICLE 2031b AND A PROPOSAL FOR CHANGE

In many factual situations the possible incongruity between the language of

107. 495 F.2d 483 (5th Cir. 1974).

108. *Id.* at 494; *see* 2 J. MOORE, *supra* note 11, ¶ 4.25[5].

109. The *Cousteau* court recognizes the *O'Brien* and *Hearne* tests but does not accept them. 495 F.2d at 494 n.17.

110. *See* notes 15-28 *supra* and accompanying text. The first *O'Brien* consideration was clearly taken from *Hanson*. The first *Cousteau* criterion is a combination of *International Shoe* and *Hanson* while the second is a combination of *International Shoe* and *McGee*. The third *O'Brien* factor and most of the *Hearne* test were derived from the idea in *International Shoe* of "fair play and substantial justice." The test of whether the cause of action arises out of the contacts with the forum is supposedly derived from *Hanson*. Although the *Hanson* court recognized that the cause of action was unrelated to the defendant's contacts with the state, this was dictum, having dubious impact on the result. 357 U.S. at 251-52. *See generally* Kurland, *supra* note 11, at 610-23. It is far from clear that this is a correct interpretation of this case. In discussing whether due process permits a forum to entertain jurisdiction over a non-resident defendant whose contacts with the state are unrelated to the cause of action, the Supreme Court in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952), remarked that due process neither "prohibits" nor "compels" the courts to exercise jurisdiction. Although the Court's decision is less than clear, it generally rested its decision on fairness, thereby adding little to *International Shoe*. *Id.* at 443-47. *See generally* Kurland, *supra* note 11, at 598-606.

111. *See* note 100 *supra* and accompanying text.

112. 495 F.2d at 499.

the statute and due process is inconsequential. In a case that obviously concerns a tort or contract, a court can state the principle that article 2031b is as broad as due process and then proceed to determine if there are sufficient "minimum contacts" as required by due process. Analytical problems arise when the courts are faced with a situation that does not appear to come within the terms of the statute. But, because the thought has become so "well entrenched"[113] that the long-arm statute is equal to the test of due process, courts simply state that proposition and move quickly to the due process analysis, thus avoiding statutory construction. This section demonstrates how that passage, although at times producing equitable results, has created strained and faulty analysis in certain situations.

### A. *Torts*

*Negligence and Products Liability.* There are two significant themes that have been developed by the courts in negligence and products liability cases. The first is the "stream of commerce" theory which was initially developed in *Gray v. American Radiator & Standard Sanitary Corp.*[114] The second intertwines with the first, and concerns the issue of whether the cause of action must arise out of the defendant's contacts with the forum.

The stream of commerce analysis normally involves the situation in which a manufacturer introduces a product into the stream of commerce and an injury results from the product in a state other than the manufacturer's residence. A federal district court first dealt with this issue in *Hearne* when a Texas resident was injured as the result of a faulty valve manufactured by the non-resident defendant. In analyzing whether the facts came within article 2031b, the court recognized the distinction between "tortious act" and "a tort committed in whole or in part," the former being more restrictive than a "tort."[115] Concluding that the Texas statute is broader than those which only specify "tortious act,"[116] the court held that "for the purpose of determining the applicable state substantive law the place of the tort is the place of the injury and not the place of wrongful act or omission."[117] The court went on to explain that the "in part" phrase of artible 2031b was intended to "include a situation where the operative wrongful act occurs in another state but the injury occurs in Texas."[118] The *Hearne* decision greatly extended the jurisdic-

113. Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

114. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

115. 224 F. Supp. at 95.

116. *See* McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961). The *Hearne* court reasoned that since the Illinois "tortious act" statute was more restrictive than article 2031b and the Illinois Supreme Court in *American Radiator* had sustained jurisdiction in a similar fact situation, article 2031b's "tort in whole or in part" would certainly encompass the case at bar. *But see* Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965) (New York court considering a fact setting similar to *American Radiator* held jurisdiction not obtainable under a "tortious act" statute). Following this decision, New York amended its statute. N.Y. CIV. PRAC. LAW § 302 (McKinney 1972 & Supp. 1976-77).

117. 224 F. Supp. at 96. *But cf.* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968) (Texas wrongful death statute could not be given extraterritorial effect because it had been construed for eighty years in accordance with the usual canon that a statute is presumed to have no extraterritorial application unless it contains an express provision to that effect).

118. 224 F. Supp. at 96; *accord,* Hull v. Gamblin, 241 A.2d 739 (D.C. Ct. App. 1968)

tion of the Texas courts to allow service on manufacturers who neither sold products within Texas nor had any direct contact with Texas.[119] However, the court properly considered the language of article 2031b before giving an expansive definition to the tort concept.[120]

The stream of commerce theory was adopted by the Fifth Circuit in *Eyerly Aircraft Co. v. Killian*[121] where the Oregon defendant had manufactured an amusement ride twenty years before the cause of action arose. The machine was taken to many states before finally entering Texas where it caused injury. Basing its reasoning more on a due process analysis than on statutory construction, the court concluded that the defendant had "reason to know or expect that its product would be brought into the state where the injury occurred."[122] The court also founded its decision on certain contacts of the defendant with Texas which were unrelated to the cause of action.[123] If the defendant's unrelated contacts were alone sufficient to sustain jurisdiction,[124] this appears to be contradictory to the actual wording of article 2031b which states that the cause of action must arise out of the non-resident's activities within the forum.[125] The court, however, did not discuss this issue. The defendant in *Eyerly* contended that the second element of the *O'Brien* due process test[126] forbade the exercise of jurisdiction since the cause of action was not related to the defendant's activities.[127] The court gave three reasons for the inapplicability of *O'Brien*: the *O'Brien* case involved the Illinois long-arm statute, not article 2031b; the Texas Supreme Court was discussing due process limits on long-arm service of process, not statutory limits; and the Washington case on which *O'Brien* was based was distinguishable on its facts.[128] Not only was the *Eyerly* court questioning the validity of *O'Brien* as a source of Texas authority, but it was also questioning *O'Brien*'s test for due process in examining any long-arm statute.[129]

---

(construing article 2031b); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 37, 50 (1971). *See also* 2 J. MOORE, *supra* note 11, ¶ 4.15[5].

119. *See* 18 SW. L.J. 531, 532 (1964).

120. See notes 103-06 *supra* for *Hearne*'s discussion of due process.

121. *See* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 25 SW. L.J. 146, 146-48 (1971).

122. 414 F.2d at 596. *See* Garza v. Frank Hrubetz & Co., 496 S.W.2d 143 (Tex. Civ. App.—San Antonio 1973, no writ), which presented a similar factual situation to *Eyerly* but because there was no proof that the defendant either "manufactured, assembled, or sold the subject amusement ride," jurisdiction was not sustained. *Id.* at 146. *See also* Taylor v. American Emery Wheel Works, 480 S.W.2d 26 (Tex. Civ. App.—Corpus Christi 1972, no writ).

123. The court indicated that these unrelated contacts, such as sales and deliveries of amusement devices and parts directly into the state, were "neither occasional nor sporadic—they were both continuous and substantial." 414 F.2d at 594-95.

124. The court held that the defendant's "contacts with Texas were substantial enough to constitutionally support Texas' assertion of 'Long Arm' in personam jurisdiction over it." *Id.* at 597. In the next sentence, the court indicated it was basing its holding on the dual grounds of stream of commerce *and* the defendant's unrelated contacts with Texas. *Id.*

125. Recognizing that there was authority for the theory that the commission of a single tort without further contacts would not contravene due process, the court refused to mark the limits of such theory. *Id.* at 597-98; *cf.* Mehaffey v. Barrett Mobile Home Transp., Inc., 473 S.W.2d 643 (Tex. Civ. App.—Fort Worth 1971, no writ) ("isolated, one-shot transaction" of defendant's employee did not make the defendant "present").

126. *See* text accompanying note 100 *supra*.

127. 414 F.2d at 599 n.12.

128. *Id.* at 599-600 n.12.

129. Discussing the second element of the text in Tyee Constr. Co. v. Dulien Steel Prods.,

Another products liability decision by the Fifth Circuit was *Coulter*,[130] where the plaintiff was injured by a TV set purchased at Sears, Roebuck and Co. but manufactured and supplied to Sears by the non-resident defendant. Relying on *Eyerly*, the court held that the stream of commerce analysis was sufficient to exercise jurisdiction over the defendant. The *Coulter* court emphasized that the volume of business done by the defendant in Texas, the pattern of product distribution, and the foreseeability of the product's entering the forum were notable factors in determining whether to entertain jurisdiction.[131] The court also remarked that because the defendant had knowledge that its products reached Sears in Texas, its contacts with the forum were stronger than were those of the defendants in *Eyerly*.[132]

The answer to the question of whether the cause of action must arise from the defendant's contacts with the forum is still in a state of flux. In an early decision, *Pliler v. Asiatic Petroleum Co. (Texas)*,[133] the court held in this action for wrongful death that the defendant's contacts with Texas were insufficient to exercise jurisdiction when the cause of action was unrelated to those contacts. The contacts of the *Pliler* defendant with the forum appeared to be sparse. But in *Odom v. Thomas*,[134] where a Texas plaintiff brought suit against an Alabama resident for an automobile-truck collision in Arkansas, the court stated: "It is clear that the defendant's contacts with Texas are not insubstantial, and certainly must be deemed sufficient to justify his amenability to process in Texas but for the unbridgeable gap separating defendant's activities in Texas from the incident involved in this litigation."[135] A few weeks later in *Bland*, a decision concerning breach of contract, the same court indicated that the reason the court could not subject a non-resident defendant to its jurisdiction when the cause of action was not related to the defendant's contacts with the forum was not because due process would be violated if it did so, but because the federal courts are required to follow state law and Texas had declined to speak on this issue.[136]

To further add to the confusion, the Fifth Circuit in *Jetco Electronic Industries, Inc. v. Gardiner*[137] held that because the cause of action was

Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963), from which *O'Brien* was derived, a commentator made this remark: "[T]he requirement seems to have a statutory base in the provision for jurisdiction as to 'any cause of action arising from the doing of any of said acts.' " Trautman, *Long-Arm and Quasi in Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1, 6 (1975). *See* WASH. REV. CODE ANN. § 4.28.185(1) (1962). *See generally* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970).

130. *See* 2 TEX. TECH L. REV. 328 (1971).

131. 426 F.2d at 1318.

132. *Id.* at 1318, 1320; *cf.* Williams v. Brasea, Inc., 320 F. Supp. 658, 659 (S.D. Tex. 1970), *aff'd*, 497 F.2d 67 (5th Cir. 1974) ("[K]nowledge, rather than the place where the injury actually occurred, . . . should be determinative on the question of Bender's [defendant's] amenability to process."). *See also* Jetco Electronics Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973), where there was no question of the defendant's negligence, yet the defendant contended that there had been too many intervening factors for the foreseeability test to be met. The court rejected this argument, holding that the negligence of the defendant was the proximate cause of the injury to the plaintiff. *Id.* at 1232-33.

133. 197 F. Supp. 212 (S.D. Tex. 1961).

134. 338 F. Supp. 877 (S.D. Tex. 1971).

135. *Id.* at 878.

136. 338 F. Supp. at 875; *see* notes 47-49 *supra* and accompanying text.

137. 473 F.2d 1228 (5th Cir. 1973).

unrelated to the defendant's contacts with the forum, a prima facie showing that the defendant committed a tort in whole or in part in Texas would be required in order to exercise jurisdiction. As in *Eyerly*, the court fell back into a dual analysis, leaving uncertainty as to whether the unrelated contacts were sufficient or necessary to entertain jurisdiction.[138] The court in *Jetco* noted that the defendant's contacts with Texas were neither as "substantial" nor "continuous" as those of the defendants in *Eyerly* or *Coulter*, in that the defendant had held only two jobs in Texas within a five-year period.[139] Nevertheless, the court held that the "fairness" test of due process was met.[140] Again, the court did not discuss article 2031b in relation to whether the cause of action must be related to the defendant's contacts with the forum, but analyzed the fact situation only in terms of due process.

The Fifth Circuit has recently affirmed, without opinion, *Reich v. Signal Oil & Gas Co.*,[141] a case involving the crash of a helicopter off the coast of Ghana. One defendant challenging jurisdiction was an Italian manufacturer who had no contact with Texas except that it had built the helicopter according to the design of a Texas company. The other defendant, an English corporation challenging Texas as a forum, had leased the helicopter from the Italian corporation. The helicopter was never in Texas prior to the accident, but some testing of the helicopter was performed in Texas subsequent to the crash. Although the English defendant had "numerous and substantial contacts with Texas,"[142] the court held that it could not entertain jurisdiction because the contacts were unrelated to the cause of action.[143] The court distinguished *Coulter* and *Eyerly* by finding that operation of the helicopter in Texas was not foreseeable.[144]

In reaching this conclusion, the *Reich* court may have answered the question that both *Eyerly* and *Jetco* left unresolved. According to *Reich* the defendant's unrelated contacts, although "substantial," are not alone sufficient to exercise jurisdiction. The *Reich* court employed a trilogy of questions. The court first asked whether the defendants' activities fell "within the strictures of the state statute."[145] Although it concluded that they did not, the court circuitously reasoned that the defendants were not "doing business" as statutorily defined because the requirements of due process were not satisfied.[146] The next two inquiries were the tests developed in *Cousteau*: whether there are "minimum contacts," and whether it would be "fair and reasonable to require the defendant to litigate in this forum."[147] The court found that the Italian corporation met neither test. The English corporation, however, had satisfied the first prong of *Cousteau*, but the court thought the fact that the

138. *Id.* at 1232, 1234.
139. *Id.*
140. *Id.* at 1234-35.
141. 409 F. Supp. 846 (S.D. Tex. 1974), *aff'd*, 530 F.2d 974 (5th Cir. 1976).
142. 409 F. Supp. at 849.
143. *Id.* at 850.
144. *Id.* The court refused to sustain jurisdiction over the Italian corporation on the same ground. *Id.* at 851-52.
145. *Id.* at 849.
146. *Id.* at 850.
147. *Id.* at 849.

English corporation was not a stranger to Texas did not make Texas a more convenient forum.[148] This analysis emphasizes concepts similar to *forum non conveniens* principles expressed in *Hearne.*

Although the *Hearne* court correctly looked to the wording of the statute before giving an expansive definition to the tort concept, most courts analyze both the theories of stream of commerce and the relationship of the cause of action with the contacts of the defendant from the standpoint of due process. In *Reich*, for example, lip service was given to the literal language of the statute, but in actuality the court reasoned in terms of due process. If the courts begin to adopt the theory that jurisdiction can be exercised over a defendant even if the cause of action is unrelated to the defendant's contacts, this principle, while it might not "fly in the face of due process,"[149] will confuse the literal meaning of article 2031b. On the other hand, if the "fair and reasonable" test of *Cousteau* is applied as was done at least partially by the court in *Reich*, the emphasis shifts to this inquiry rather than the inquiry of whether the cause of action is related to the defendant's contacts. This distinction is important because if there are enough current, purposeful, although unrelated, contacts with the forum, the defendant is "present," and it is, therefore, fair to expect the defendant to litigate in Texas regardless of where the liability producing act, injury, or damage took place.[150]

*Fraud.* Clearly, if the defendant while personally present in Texas makes representations which become the basis for an action in fraud by the plaintiff, the exercise of jurisdiction over the non-resident defendant is proper.[151] A more complex issue is raised when the misrepresentation is made in another state. In *Hoppenfeld v. Crook*[152] the court noted that a fraud is not actionable until relied upon to the detriment of the person to whom the representations were made. The exercise of jurisdiction over the defendant was sustained; although the misrepresentation had been made in New York, the reliance by the plaintiff occurred in Texas.[153] This analysis is consistent with the idea that

148. *Id.* at 851.

149. Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871, 875 (S.D. Tex. 1971).

150. Other Texas cases involving causes of action in negligence and article 2031b include Ranger Ins. Co. v. United Housing of New Mexico, Inc., 488 F.2d 682 (5th Cir. 1974) (Texas insurer could obtain jurisdiction over non-resident insureds when plane crash occurred in Texas); Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965) (personal injuries); Reul v. Sahara Hotel, 372 F. Supp. 995 (S.D. Tex. 1974) (tank explosion); Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973) (no jurisdiction over parent corporation in action based on patent infringement in that the parent and subsidiary corporations were separate entities); Frye v. Ross Aviation, Inc., 523 S.W.2d 500 (Tex. Civ. App.—Amarillo 1975, no writ) (where defendant's only contacts with Texas were plane stops on an unscheduled basis under orders of the Atomic Energy Commission, defendant's activities did not rise to, nor bear relation to, cause of action outside of Texas); Goldman v. Pre-Fab Transit Co., 520 S.W.2d 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (irrelevant that tort action does not arise out of defendant's contacts with forum if the defendant has consented to jurisdiction under Texas statute).

151. *See generally* Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1 (1951); Gorfinkel & Lavine, *supra* note 24, at 1203-04.

152. 498 S.W.2d 52 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

153. *Id.* at 56. *See also* Geodynamics Oil & Gas, Inc. v. U.S. Silver & Mining Corp., 358 F. Supp. 1345 (S.D. Tex. 1973) (reliance on defendant's fraudulent misrepresentation was "operative fact"); Southern Nat'l Bank v. TRI Financial Corp., 317 F. Supp. 1173 (S.D. Tex. 1970),

the tort is committed not where the wrongful act takes place but where the injury occurs.[154]

*Defamation.*[155] In Texas defamation is defined by statute[156] and may not be altered by a judicial decision.[157] In *Jetco* the non-resident defendant had advertised a treasure hunting device in a catalogue magazine. Plaintiffs brought suit against the defendant, alleging that the catalogue made libelous statements. Relying on the proposition that the cause of action was unrelated to the contacts of the defendant with the forum, the court held that plaintiffs must present a prima facie case of libel in order for the court to exercise jurisdiction.[158] The Texas defamation statute was satisfied since the allegedly false test reports concerning the plaintiffs' treasure hunting device could injure the plaintiffs' reputation and expose them to financial injury.[159]

In *Curry v. Dell Publishing Co.*[160] the defendant corporation published an allegedly libelous article. The corporation had purchased the article from a freelance writer, included the article in its magazine, and then sold the magazine to a wholly owned subsidiary. Although the court found that the plaintiff had failed to plead the case correctly, thereby causing service on the defendant to be unjustified,[161] it questioned the effect of a parent-subsidiary relationship on a finding of jurisdiction over the parent corporation.[162]

### B. *Parent-Subsidiary Corporations*

In recent years there has arisen an increasing number of cases which question whether a parent corporation can be subjected to the jurisdiction of the forum solely because of its relationship to a subsidiary which is "doing

*modified sub nom.* Southern Nat'l Bank v. Cratco, Inc., 458 F.2d 688 (5th Cir. 1972) ("reliance wholly in Texas"); *accord,* Hull v. Gamblin, 241 A.2d 739 (D.C. Ct. App. 1968) (in construing article 2031b, Texas court had jurisdiction over non-resident defendant in action for fraud based on advertisement in Texas telephone directory).

154. *See* note 117 *supra* and accompanying text. *See also* Smith v. Reynolds, 533 S.W.2d 861 (Tex. Civ. App.—San Antonio 1976, no writ).

155. Principal defamation cases of the Fifth Circuit, involving jurisdictional questions but not specifically relating to Texas, include: Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967); New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966); Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966). *See generally* Comment, *Constitutional Limitations to Long-Arm Jurisdiction in Newspaper Libel Cases,* 34 U. CHI. L. REV. 436 (1967); Comment, *Lono-Arm Jurisdiction Over Publishers: To Chill a Mocking Word,* 67 COLUM. L. REV. 342 (1967).

156. TEX. REV. CIV. STAT. ANN. art. 5430 (1958).

157. Deen v. Snyder, 57 S.W.2d 338 (Tex. Civ. App.—Fort Worth 1932, no writ).

158. 473 F.2d at 1233.

159. *Id.*

160. 438 S.W.2d 887 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

161. The plaintiff did not affirmatively allege that the defendant "does not maintain a place of regular business in this State, or a designated agent upon whom service of citation may be made." 438 S.W.2d at 890. The court based its decision on McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965), which is still controlling in the Texas state courts. *See, e.g.,* Prine v. American Hydrocarbons, Inc., 519 S.W.2d 520 (Tex. Civ. App.—Austin 1975, no writ). The federal courts, however, have viewed the *McKanna* decision as relating to procedural matters and have chosen to apply the federal rules. *See* Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 603-04 (5th Cir. 1969).

162. 438 S.W.2d at 891. For additional cases concerning article 2031b and defamation see Harris v. Columbia Broadcasting Sys., Inc., 405 S.W.2d 613 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (broadcasting system is doing business in those states where its programs are carried); Mulcahy v. Cohen, 377 S.W.2d 100 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (court upholds trial court's conclusion that tort of libel was not committed in whole or in part in Texas).

business" within the state. The imputed contact theory between parent and subsidiary corporations is a response to an argument that a non-resident corporate entity which is part of a cohesive economic unit and derives benefits from the activities of its affiliate should be subjected to in personam jurisdiction in Texas. Since the focus of article 2031b is "doing business," the courts have interpreted the parent-subsidiary relationship in that manner, relying primarily on theories of agency, control, and alter ego rather than upon article 2031b's definition of doing business which speaks in terms of contracts, torts, and "other acts."

The general rule has been that the relationship of the parent and subsidiary corporations is not itself a sufficient basis for subjecting the non-resident parent corporation to the jurisdiction of the forum state.[163] If the court finds that the parent and subsidiary corporations are not separate entities or that the subsidiary is acting as an agent for the parent corporation, jurisdiction has been exercised over the parent.[164] The few Texas civil appeals cases that have dealt with this issue have held that as much as 100 percent stock ownership of a corporation does not suffice to subject the stockholder to the jurisdiction of the court.[165] The court in *Curb Cone, Inc. v. Wood*[166] recognized this principle but went on to uphold jurisdiction over the non-resident defendant on the stream of commerce theory rather than a parent-subsidiary relationship.[167] In dictum the court noted that when a foreign corporation has a Texas subsidiary, jurisdiction over the parent depends upon the acts of the parent, not of the subsidiary.[168] The court further remarked, although somewhat ambiguously, that *International Shoe*'s minimum contacts test could be utilized to determine if there was an agency relationship involved.[169] Another Texas court, in *Country Clubs, Inc. v. Ward*,[170] a full faith and credit case, found the fact that the non-resident Texas corporation owned seventy percent of the Kentucky corporation's stock was insufficient for jurisdictional purposes. The court, therefore, refused to give full faith and credit to Kentucky's default judgment against the Texas corporation. Notably, the court did not look at the overall control exercised by the Texas corporation over the Kentucky corporation but rather at the contacts between the two corpora-

163. The most significant federal case in this area is Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), in which the Supreme Court held that even though the parent corporation owned the subsidiary's entire capital stock and exerted its "control both commercially and financially" over the subsidiary, each corporation maintained a "distinct corporate entity." *Id.* at 335. *See generally* 2 J. MOORE, *supra* note 11, ¶ 4.25[6]; 4 C. WRIGHT & A. MILLER, *supra* note 11, § 1069.

164. *See generally* 2 J. MOORE, *supra* note 11, ¶ 4.25[6]; *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 (1971) (jurisdiction over the subsidiary will establish jurisdiction over the foreign parent if the foreign parent controls and dominates the subsidiary so that it disregards the subsidiary's independent status).

165. *See, e.g., Curb-Cone, Inc. v. Wood*, a state district court case reported in 27 TEX. B.J. 235 (1964).

166. *Id.*

167. *Id.* at 275.

168. *Id.* at 236.

169. *Id.*

170. 461 S.W.2d 651 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.); *see* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 26 SW. L.J. 191, 197-98 (1972).

tions in relation to the contract that formed the basis of the cause of action.[171]

Four significant cases decided in the federal district courts demonstrate the inability of article 2031b to encompass the parent-subsidiary relationship. The first case is *Bland v. Kentucky Fried Chicken Corp.*[172] in which a cause of action was brought for breach of contract against a franchise food corporation, Colonel Sanders' Inn, Inc. (CSI), and its parent corporation, Kentucky Fried Chicken Corp. (KFC). The plaintiff had contracted with CSI to sell a motel to CSI in exchange for stock in KFC which CSI would cause to be issued.[173] The court did not analyze the factual circumstances in terms of the statute but proceeded directly to the three due process criteria set forth in *O'Brien v. Lanpar Co.*[174] and concluded that the second criterion of *O'Brien*,[175] which is also a literal requirement of article 2031b,[176] had not been met in that the cause of action which was grounded in the plaintiff's contract with CSI was unrelated to the franchise relationship between KFC and CSI.[177] Although recognizing that subjecting KFC to the jurisdiction of the forum solely on the basis of the franchise relationship would not violate due process, the court refused to do so because Texas had not chosen to act in this area.[178] Having decided that the cause of the action was unrelated to KFC's contacts with Texas, the court went on to exercise jurisdiction over the parent corporation on the theory that KFC was a party to the contract between the plaintiff and CSI.[179] Noting that KFC owned ninety-five percent of CSI's stock and controlled its board of directors, the court boldly stated that "[s]uch power is enough to *suggest* that KFC was controlling CSI in the making of these motel acquisition contracts and was actually doing business through CSI."[180] The court even went so far as to say that "KFC played a substantial role in the formulation of the contract"[181] to justify its holding, yet earlier in the opinion the court had admitted that KFC's contacts with Texas were unrelated to the contract between the plaintiff and CSI. Indeed, the court was creating a fiction of KFC's "doing business" by "entering into a contract" in order to justify exercising jurisdiction over the parent corporation.

*Reul v. Sahara Hotel*,[182] rendered by the same federal district court that

171. 461 S.W.2d at 657-58. *But cf.* Curry v. Dell Publishing Co., 438 S.W.2d 887 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.), in which the defendant parent corporation published and sold a magazine with allegedly libelous materials to its wholly owned subsidiary corporation. Although service over the defendant was not perfected due to procedural problems, the court questioned the parent corporation's ability to shield itself from liability in light of its knowledge "that the magazine would have national circulation and, if libelous, the article could cause untold harm." *Id.* at 891.

172. 338 F. Supp. 871 (S.D. Tex. 1971); *see* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 27 SW. L.J. 182, 183 (1973).

173. 338 F. Supp. at 872-73.

174. 399 S.W.2d 340 (Tex. 1966); *see* notes 95-102 *supra* and accompanying text.

175. *See* text accompanying note 100 *supra*.

176. *See* TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964).

177. 338 F. Supp. at 874-75.

178. *Id.*; *see* notes 47-49 *supra* and accompanying text.

179. 338 F. Supp. at 875. *But cf.* Pliler v. Asiatic Petroleum Co. (Texas), 197 F. Supp. 212 (S.D. Tex. 1961) (no jurisdiction over parent corporation when the cause of action did not arise out of the insubstantial contacts of the parent corporation with the forum).

180. 338 F. Supp. at 876 (court's emphasis).

181. *Id.*

182. 372 F. Supp. 995 (S.D. Tex. 1974); *see* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 29 SW. L.J. 265, 266 (1975).

decided *Kentucky Fried Chicken*, represents the most expansive application of the parent-subsidiary relationship. The Texas plaintiff was injured in Nevada by a tank manufactured by a corporation with a permit to do business in Texas. Unlike *Kentucky Fried Chicken* in which jurisdiction was exercised over the parent corporation due to its control over the Texas subsidiary, the plaintiff in *Reul* sought to have service brought on a non-resident subsidiary of the Texas parent corporation. The court indicated, without elaborating, that the legal test of liability is more stringent than the legal test relating to in personam jurisdiction,[183] and found that the subsidiary corporation had "clearly not committed a tort in Texas nor entered into a contract to be performed in Texas."[184] Resolving that the catchall phrase in article 2031b was an "inelegant attempt to keep the statute from being limited to torts and contracts," the court exercised jurisdiction over the subsidiary corporation, holding that the subsidiary's "very relationship with its parent corporation gives rise to a situation in which its 'acts . . . constitute doing business.' "[185] In citing the proposition in *O'Brien* that the " 'cause of action must arise from, or be connected with, such act or transaction,' "[186] the court apparently used the "or connected with" language to mean that the defendant's liability producing acts are similar to acts done in Texas.

The court recognized a further statutory problem in that the cause of action did not arise out of the subsidiary's contacts with the state,[187] but reconciled its decision by stating that the cause of action was "connected with the parent's activities in Texas."[188] The court's analysis was further strained in that, unlike the case in *Kentucky Fried Chicken*, the *Reul* court could not base its holding on a control theory since the *subsidiary* was being subjected to the jurisdiction of Texas by way of the parent corporation. The court's analysis focused on an alter ego theory rather than a control test.[189]

The third federal district court decision, *Frito-Lay, Inc. v. Procter & Gamble Co.*,[190] involved an alleged patent infringement. Although the non-resident parent corporation entirely owned a subsidiary authorized to do business in Texas, guaranteed the debt of the subsidiary, and controlled four out of five members of the subsidiary's board of directors, the court held that the plaintiff failed to make a prima facie showing of actual control of the internal affairs of the subsidiary by the parent corporation. Finding that the subsidiary enjoyed independent responsibility for its management and day-to-day operations, the court rejected the plaintiff's contention that the subsidiary and parent corporations were alter egos.[191] By primarily grounding its

183. 372 F. Supp. at 997.
184. *Id.* at 998.
185. *Id.*; *cf.* Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., 332 F.2d 135 (5th Cir. 1964) ("close economic business ties" were sufficient to subject parent corporation to jurisdiction through subsidiary's contacts with state under Florida long-arm statutes); *see* FLA. STAT. ANN. § 48.181(3) (1969) (providing that any corporation which through its distributors sells to any corporation in the state, shall be conclusively presumed to be conducting business).
186. 399 S.W.2d at 342.
187. 372 F. Supp. at 1002.
188. *Id.*
189. *Id.* at 998-1002.
190. 364 F. Supp. 243 (N.D. Tex. 1973); *see* Baade, *supra* note 45, at 174.
191. 364 F. Supp. at 250.

decision on the Supreme Court case *Cannon Manufacturing Co. v. Cudahy Packing Co.*,[192] the *Frito-Lay* court suggested that it might not violate due process to entertain jurisdiction in this type of case, but that the Supreme Court had not yet modified its position in *Cannon*.[193]

The most significant Fifth Circuit decision in this area is *Cousteau*,[194] in which the plaintiff contended that an agency relationship existed between a subsidiary corporation undisputedly within the reach of article 2031b and its parent corporation. Although the court found no evidence of an agency or parent-subsidiary relationship,[195] it remarked that, assuming that there was such a relationship, the type of control necessary to impute to the parent corporation the activities of the subsidiary was lacking.[196] The *Cousteau* court placed much weight on the failure of the plaintiff to establish prima facie evidence that the subsidiary acted with either actual or apparent authority of the parent corporation.[197] The court did not clearly delineate a distinction between an agency relationship and a parent-subsidiary relationship.

### C. *A Proposal*

The issues of whether the cause of action must be connected with the defendant's contacts with the forum, and the difficult question of jurisdiction based on parent-subsidiary relationships, demonstrate the inherent weaknesses of article 2031b. Although the draftsmen of the long-arm statute probably intended the statute to extend to the limits of due process as set forth in *International Shoe*, the "doing business" language is clearly a vestige of the fictions that developed after *Pennoyer*. It does indeed appear strange to label a tort as "doing business." The catchall phrase in section four of the statute simply does not contemplate the necessary considerations in parent-subsidiary relationships.

The basic flaw of article 2031b is that it attempts to expand long-arm jurisdiction by menas of specific criteria rather than by providing a comprehensive concept of jurisdiction in the context of due process. The Supreme Court recognized this hazard in *International Shoe* when it remarked that the "criteria . . . cannot be simply mechanical or quantitative."[198] Due process is a term used to describe the limitation placed on the power of government to act, yet the courts' perception of this limitation is in a constant state of flux. The emphasis of article 2031b should be directed at the theory rather than the application of due process since the concept of due process in

192. 267 U.S. 333 (1925); *see* note 163 *supra* and accompanying text.

193. 364 F. Supp. at 248-49.

194. *See* Figari, *supra* note 182, at 265-66; Thomas, *supra* note 45, at 246-47; *cf.* Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954, 956 (5th Cir. 1965) ("common stock ownership and/or identity of officers do not in themselves establish the agency relationship"). *See also* Gray Co. v. Ward, 145 S.W.2d 650 (Tex. Civ. App.—Waco 1940, writ dism'd jdgmt. cor.) (agent of corporation subjects corporation to jurisdiction).

195. 495 F.2d at 493.

196. *Id. Cousteau* also changed the plaintiff's burden of proof from a showing of a prima facie cause of action to prima facie evidence.

197. *Id.* at 493; *see* Murdock v. Volvo of America Corp., 403 F. Supp. 55 (N.D. Tex. 1975) (plaintiff failed to meet *Cousteau*'s prima facie showing of control and agency relationship). The *Murdock* court remarked that the *Cousteau* case restated the Supreme Court's decision in *Cannon*. 403 F. Supp. at 57. *See generally* Kurland, *supra* note 11, at 569-86.

198. 326 U.S. at 319.

its purest sense is idealistic, while its implementation is expressed in countless different ways according to the facts of a particular situation. The variances that account for these differences in the application of due process are deeply embedded in such factors as economics, politics, and technology.

Long-arm statutes are far from uniform, and commentators have yet to find a truly acceptable one. If the statute delineates specific criteria, it may provide guidelines for litigants but is likely to include less than the full extent of due process. State and federal courts interpreting article 2031b have been forced to avoid statutory construction of article 2031b in certain areas in order to "expand" the statute to the limits of due process. If, on the other hand, the statute is of the California type,[199] which simply states that the court has power to "exercise jurisdiction on any basis not inconsistent with the Constitution," it avoids the dangers of statutory construction falling short of due process limitations but is even more vague than *International Shoe*'s "minimum contacts."[200]

The upshot of this dilemma focuses on the fundamental tensions in the theory of in personam jurisdiction. The specific criteria of any long-arm statute have roots grounded in the traditional "presence" theory of *Pennoyer* while at least part of the due process concept of *International Shoe* is premised on an examination of all the relevant factors in exercising jurisdiction. Although an examination of all the relevant factors is at the very heart of "fair play and substantial justice," it is far from evident that *International Shoe*'s "minimum contacts" test was a break from the concept of presence so firmly entrenched in jurisdictional theory.[201] No statutory panacea is offered here. A statute is presented, however, that aspires to the same degree of flexibility of California's statute, yet contains factors to be considered in determining whether due process will permit the exercise of jurisdiction in a particular situation.

Proposed Long-Arm Statute

*Section 1.* Any person who does any act, or causes any consequences[202] in this state[203] or who does any act, or causes any consequences outside of this State that may have foreseeable consequences in this State,[204] shall be subject to the jurisdiction of the courts of this State for any claim for relief or cause of action[205] to the extent that it is not inconsistent with due process of law.[206]

199. CAL. CIV. PRO. CODE § 410.10 (West 1973).

200. *See* Gorfinkel & Lavine, *supra* note 24, at 1165-69; Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 265-67 (1959); Note, *In Personam Jurisdiction over Foreign Corporations: An Interest-Balancing Test*, 20 U. FLA. L. REV. 33, 48-53 (1967).

201. *See generally* Ehrenzweig, *supra* note 11.

202. More than physical acts are contemplated by the statute. *See generally* Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdictions*, 44 IOWA L. REV. 249 (1959).

203. The "presence" concept of article 2031b is retained.

204. The primary expansion of the statute to meet the limits of due process is in this phrase.

205. Both terms are used so as not to limit relief and thus fragment claims being brought. *See* UMW v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 19 (2d ed. 1970).

206. This phrase is taken from the California long-arm statute. CAL. CIV. PRO. CODE § 410.10 (West 1973).

*Section 2.* In determining whether the exercise of in personam jurisdiction is consistent with due process the courts of this State shall consider any relevant factors.[207] Factors that may be considered by the courts include, but are not limited to:[208]

2.1) the existence of a contract related to a person, subject matter, or occurrence within this State;[209]

2.2) the commission of a tort or the possible existence of tort liability related to a person, subject matter, or occurrence within this State;[210]

2.3) any transaction entered into or carried out purposefully which invokes the protection of the laws of this State;[211]

2.4) the quality, nature and extent of the activity in this State;[212]

2.5) the existence or non-existence of a relation between the claim for relief or cause of action and the person's contacts with the State;[213]

2.6) the fairness and reasonableness of requiring a person to defend the action;[214]

2.7) any special interests this State has in exercising jurisdiction.[215]

*Section 3.* For purposes of this Article, "person" includes 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.[216]

*Section 4.* The provisions of this section shall be cumulative of other jurisdictional statutes including, but not limited to, the following:[217]

TEX. BUS. CORP. ACT ANN. arts. 2.11, 8.10 (1956);
TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Supp. 1976-77);
TEX. INS. CODE ANN. arts. 3.65, 3.66 (1963);
TEX. NON-PROFIT CORP. ACT ANN. art. 1396-8.09 (1962);
TEX. REV. CIV. STAT. ANN. arts. 2032, 2033a, 2033b, 2039a (1964).

---

207. The court is *required* to consider *any* and *all* factors that due process demands it to consider in exercising jurisdiction.

208. The court is not required to consider each of these factors in every case. This is not a checklist; instead, this list provides assistance to a court in its decision as to whether the exercise of jurisdiction is in accordance with due process. In some fact situations all of these factors may be relevant; in others, few if any may be relevant. Depending on the circumstances of a particular case, the court may emphasize one factor more than another.

209. No longer is the emphasis necessarily on the performance of a contract. Solicitation, preliminary negotiations, and the execution of a contract may be relevant to the court's consideration of whether to exercise jurisdiction. *See, e.g.*, Arthur, Ross & Peters v. Housing, Inc., 508 F.2d 562, 565 (5th Cir. 1975) ("performance, rather than execution, should govern the determination of jurisdiction").

210. This expands the tort concept to the limits of due process. Unless the present statute is construed to be something that it is not, it is doubtful that jurisdiction could be obtained under any circumstances when both the tortious act and the injury occurred out of state to a Texas resident. This statute permits the courts to consider exercise of jurisdiction whenever tort liability is involved as long as due process is satisfied.

211. This is adopted from Hanson v. Denckla, 357 U.S. 235 (1958).

212. This is adopted from the *O'Brien* test. *See* note 100 *supra* and accompanying text.

213. In some instances it may be important to ascertain whether the cause of action is connected to the contacts with the state. In other situations, however, this consideration may be irrelevant.

214. These criteria were adopted from Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974).

215. Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90, 99 (S.D. Tex. 1963), is the source for this factor.

216. This third section is the definition of "person" in UNIFORM INTERSTATE & INT'L PROCEDURE ACT § 1.01.

217. This list is not necessarily meant to be inclusive.

*Section 5.* The manner of service of process shall be effected pursuant to TEX. R. CIV. P. 108 or any other rules promulgated by the Texas Supreme Court in accordance with the notice requirements of due process. Whenever service of process of a non-resident defendant pursuant to TEX. R. CIV. P. 108 is impractical,[218] the court may, on motion, prescribe a different method of service, if the court finds, and so recites in its order, that the method so prescribed would be likely to give the defendant actual notice.[219]

## IV. CONCLUSION

If article 2031b is retained in its present form, courts will continue to have difficulty applying it to certain situations. The universal tendency of the courts, especially on the federal level, has been to interpret the Texas long-arm statute as reaching to the limits of due process. The Texas Supreme Court has been reluctant to speak on article 2031b, but the "to the limits" interpretation by many state and federal courts has often produced desirable results. Although the supreme court could decide judicially that the statute reaches the limits of due process, the decision would create an even stronger precedent for further strained analyses in various factual circumstances. The best course is legislative action to provide a means to implement the principles set forth in *International Shoe.*

The legal issues surrounding in personam jurisdiction are at best enigmatic and at worst unintelligible. The study of long-arm statutes exposes and accentuates the problematic nature of jurisdiction theory. Article 2031b was enacted shortly after the last of the major decisions by the Supreme Court pertaining to in personam jurisdiction. Since that time article 2031b and other state long-arm statutes have been subject to a vast amount of interpretation and discussion from commentators and courts alike. As our world increasingly becomes smaller and our society more complex, the significance of the issues relevant to the power of a state to exercise jurisdiction is greatly heightened. It is hoped that legislative bodies as well as the judiciary will begin to perceive jurisdiction not simply in terms of specific criteria but in light of "fair play and substantial justice."

218. *See* TEX. R. CIV. P. 106.
219. *Id.* 109a.