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Substituted Service of Process on Foreign Corporations in Oklahoma: Notice and Due Process

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SUBSTITUTED SERVICE OF PROCESS ON FOREIGN CORPORATIONS IN OKLAHOMA: NOTICE AND DUE PROCESS

I. INTRODUCTION

The United States Supreme Court, in *International Shoe Co. v. Washington*,[1] broadened a state court's jurisdiction over nonresidents so that almost any purposeful activity of a nonresident which affects the forum state subjects him to the in personam jurisdiction of that state's courts. The Court rejected the multiplicity of tests that had been developed to rationalize a state court's exercise of jurisdiction over nonresidents, especially corporations,[2] and set out a "minimum contacts test" which still defines the maximum constitutional reach of a state court's jurisdiction. In stating the new test, the Court noted that "[d]ue process requires only that in order to subject a defendant to judgment in personam, if he be not present in the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."[3]

It is now beyond question that a state may validly enact long-arm legislation designed to fill out the constitutional "elbow room" provided by *International Shoe*.[4] As a result, during the thirty years since *International Shoe*, states have provided forums in which their residents may seek relief for economic or physical injury sustained due to the action of a nonresident in the forum state. Oklahoma has been

1. 326 U.S. 310 (1945).

2. *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919-23 (1960) [hereinafter cited as *State-Court Jurisdiction*].

3. 326 U.S. at 316.

4. *See* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); 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); *State-Court Jurisdiction, supra* note 2, at 919. A section of one of Oklahoma's two general long-arm statutes provides for the exercise of jurisdiction over any person "maintaining any other relation to this state or to persons or property . . . which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States." OKLA. STAT. tit. 12, § 1701.03(a)(7) (1971).

no exception. The state's long-arm statutes[5] have been held to permit the exercise of jurisdiction over nonresidents to the fullest extent permitted by the due process clause of the fourteenth amendment,[6] as "defined" by *International Shoe.*[7]

In addition to the necessity of sufficient minimum contacts with the forum state, due process also requires a mode of service "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

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5. Oklahoma has two general long-arm statutes, both of which provide for the exercise of in personam jurisdiction over nonresidents under enumerated circumstances. The first long-arm provision is found in OKLA. STAT. tit. 12, § 187 (Supp. 1975) and provides in part:

> (a) Any person, firm, or corporation other than a foreign insurer licensed to do business in the State of Oklahoma whether or not such party is a citizen or resident of this State and who does, or who has done, any of the acts hereinafter enumerated, whether in person or through another, submits himself, or shall have submitted himself, and if an individual his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising, or which shall have arisen, from the doings of any of said acts:
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> (1) the transaction of any business within this STATE;
>
> (2) the commission of any act within this State;
>
> (3) the manufacture or distribution of a product which is sold in the regular course of business within this STATE and is used within this STATE;
>
> (4) contracting to insure any person, property, or risk located within this State at the time of contracting.

The second general long-arm provision is found in OKLA. STAT. tit. 12, § 1701.03(a) (1971) which provides:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
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> (1) transacting any business in this state;
>
> (2) contracting to supply services or things in this state;
>
> (3) causing tortious injury in this state by an act or omission in this state;
>
> (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (5) having an interest in, using, or possessing real property in this state; or
>
> (6) contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States.

As to nonresident motorists, see OKLA. STAT. tit. 47, §§ 391-403 (1971). As to nonresident insurance companies, see OKLA. STAT. tit. 36, § 621 (1971).

6. It is settled that a foreign corporation is a "person" within the meaning of the due process clause of the fourteenth amendment. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Louis K. Liggett Co. v. Baldrige, 278 U.S. 105, 111 (1928); Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 592 (1896).

7. *See, e.g.*, George v. Strick Corp., 496 F.2d 10, 13 (10th Cir. 1974); Vemco Plating, Inc. v. Denver Fire Clay Co., 496 P.2d 117, 119 (Okla. 1972); Hines v. Clendenning, 465 P.2d 460, 462 (Okla. 1970).

objections."[8] The method of service must be that which will most likely give actual notice under the circumstances.[9]

However, a due process issue arises where, pursuant to a statute such as Oklahoma's, jurisdiction is obtained over a foreign corporation by service of process on a statutory agent[10] and no further steps to notify the corporation of an action pending against it are required. This note will analyze the constitutionality of substituted service of process on foreign corporations under the Oklahoma law.

II. THE STATUTE

The statute in question[11] supplements Oklahoma's two general long-arm statutes,[12] offering an independent basis of jurisdiction over

8. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). For a further discussion of what constitutes notice sufficient to satisfy due process, see Milliken v. Meyer, 311 U.S. 457 (1940). As to the necessity of affording an opportunity to defend, see Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); Roller v. Holly, 176 U.S. 398 (1900).

9. The factual situation in each case will dictate the method of notice most reasonably certain to inform those affected of the pendency of an action. Notice by publication will only be sufficient when the whereabouts of the party sought cannot be determined. But where a plaintiff, through the use of due diligence, can ascertain the whereabouts of a party, publication will be inadequate and due process will require notice by personal service or by mail. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950); Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 718 (Okla. 1968). Of course, personal service of process on a defendant will satisfy notice requirements in any type of proceeding.

10. All jurisdictions have similar statutes permitting substituted service on a designated state official for actions arising out of the activities of certain nonresidents while in the forum. These statutes are within the constitutional power of a state to enact and enforce as reasonable impositions on foreign corporations doing business in the state. Union Brokerage Co. v. Jensen, 322 U.S. 202, 207 (1944); Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147, 158-59 (1903). As to nonresident motorists, see Wuchter v. Pizzutti, 276 U.S. 13, 18-19 (1928); Hess v. Pawloski, 274 U.S. 352, 356-57 (1927); as to nonresident insurance companies, see Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648-49 (1950); as to foreign corporations, see Simon v. Southern Ry., 236 U.S. 115, 130 (1915); St. Mary's Petro. Co. v. West Virginia, 203 U.S. 183, 191 (1906). However, for these statutes to be a *reasonable* exercise of state power, there must be provision for giving the defendant notice of the initiation of litigation. *See* Wuchter v. Pizzutti, 276 U.S. 13 (1928); Beck v. Spindler, 99 N.W.2d 670 (Minn. 1959); Byhorn v. Nat'l Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

11. OKLA. STAT. tit. 18, § 1.204a (1971).

> In all cases where a cause of action has accrued or shall accrue to any person by reason of a foreign corporation doing business in this state or having done business in this state or while a foreign corporation was doing business within this state and such foreign corporation has no registered agent in this state upon whom service of summons or other process may be had, an action may be filed against such foreign corporation in any county in the state and service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject matter whether sitting in the county where the Secretary of State is served or elsewhere in the state.

12. OKLA. STAT. tit. 12, § 187 (Supp. 1975); OKLA. STAT. tit. 12, § 1701.03(a) (1971).

foreign corporations.[13] It provides that where a foreign corporation doing business[14] in Oklahoma fails to appoint an agent for service of process, service made on the Secretary of State will be sufficient to confer jurisdiction.[15] While similar substituted service provisions in other states have been held valid,[16] section 1.204a differs from other states' laws in that it does not require that further notice, beyond service of process on the Secretary of State, be given to the defendant foreign corporation. As a result, the corporation may never receive *actual* notice of a suit against it in time to defend the action.[17]

For over forty years the Oklahoma statutes required that the Secretary of State forward notice by mail to a defendant corporation when service was made on his office.[18] This additional notice pro-

13. Section 1.204a offers a third procedure under which a foreign corporation can be subjected to the jurisdiction of Oklahoma courts. Unlike Oklahoma's two general long-arm statutes, section 1.204a does not enumerate the specific actions that bring a foreign corporation within the reach of Oklahoma courts; rather, it requires only that the foreign corporation be "doing business" in the state. Used in this context, the term likely encompasses those actions set out in sections 187 and 1701.03(a) of title 12. *See* note 14 *infra.*

14. "Doing business" has been used to determine whether a foreign corporation is transacting enough business within the state to be (1) subject to the jurisdiction of the state courts; (2) subject to the taxing power of the state; or (3) subject to the qualification or domestication statutes of the state. A greater amount of business activity is required to subject a corporation to the state's domestication requirements. *See* S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954); Wills v. Nat'l Mineral Co., 176 Okla. 193, 55 P.2d 449 (1936); *See also,* Isaacs, *An Analysis of Doing Business,* 25 COLUM. L. REV. 1018 (1925); 45 MICH. L. REV. 218 (1946).

On the other hand, only a minimal amount of activity is necessary to be doing business in Oklahoma for the purposes of jurisdiction. In other words, "the question of 'doing business' is synonymous with power to subject a foreign corporation to local jurisdiction." B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759, 762 (Okla. 1967). That power has been extended to the outer limits of the due process clause. Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965). This article employs the phrase "doing business," as it relates to jurisdiction and to domestication statutes, in such a manner that the context and meaning of the phrase will be clear.

15. All foreign corporations doing business in Oklahoma are required to appoint a service agent. OKLA. CONST. art. 9, § 43 (1971); OKLA. STAT. tit. 18, § 1.17 (Supp. 1975); OKLA. STAT. tit. 18, § 475.1 (1971).

16. *See* note 10 *supra.*

17. In fact, notice by mail is given to all foreign corporations. Interview with Linda Norfleet, Clerk for the Oklahoma Secretary of State (Nov. 8, 1976). Even so, the Supreme Court cases make it clear that the requirements of due process are not fulfilled by such an arrangement; the statute must *require* that notice be given. *See* notes 39-41 and 54 *infra* and accompanying text.

18. Until 1929 the Oklahoma substituted service statute made no provision for the Secretary of State to forward notice to a defendant corporation. Law of February 25, 1911, ch. 26, § 2, 1911 Okla. Sess. Laws 47. But in 1929 the statute was amended to provide that the Secretary of State forward notice by mail to a defendant corporation when service was made on his office. Law of July 17, 1929, ch. 226, § 1, 1929 Okla. Sess. Laws 249. Except for a brief two-year period from 1947 to 1949, during which the notice provision was deleted, the law remained unchanged until 1961. The Okla-

vision, for no apparent reason, was repealed by the Oklahoma legislature in 1972.[19] As a result, Oklahoma is left with a substituted service statute that, while otherwise valid, fails to meet the due process requirement of providing for a method of service of process "reasonably calculated to give . . . actual notice . . . ."[20] The statute therefore appears to be unconstitutional on its face.

III. SUBSTITUTED SERVICE AND FOREIGN CORPORATIONS

Several jurisdictions have entertained the question of whether sufficient notice is afforded to a foreign corporation by service made upon

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homa legislature then enacted a law containing three provisions which specifically dealt with substituted service on foreign corporations. Law of March 3, 1961, tit. 18, ch. Ad, §§ 1-3, 1961 Okla. Sess. Laws 197. These three sections were placed in different parts of title 18. Section 1 became section 1.204a of title 18, section 2 became section 661 of title 18, and section 3 became section 662 of title 18. These combined sections provided a method for notifying a foreign corporation that it was being sued in Oklahoma when service was made upon the Secretary of State pursuant to section 1.204a.

19. Law of March 31, 1972, tit. 12, ch. 208, §§ 1-12, 1972 Okla. Sess. Laws 292. This enactment repealed a number of provisions, including the notice provision provided by section 661 of title 18. The only provision relevant to providing notice to a foreign corporation which could be considered a possible substitute for section 661 of title 18 is section 2 of the enactment, codified at OKLA. STAT. tit. 12, § 170.1(3) (Supp. 1975). It provides in part:

> Service may be made outside of the state either by personal service or by mail, at the election of the plaintiff, in any action, including:
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> . . .
>
> 3. Actions against foreign corporations where Title 18 of the Oklahoma Statutes authorizes service upon the Secretary of State.

However, if this language was intended to substitute for the repealed notice provision, legislative draftsmanship has made this intention less than clear. The new provision appears to relieve the Secretary of State of the burden to locate and notify the foreign corporation, substituting instead a provision that allows a plaintiff to furnish notice to the corporation. By the use of the word *may* rather than *shall*, a plaintiff's duty to give notice is made optional. The plaintiff *may* give notice by personal service or service by mail, but is not *required* to do so. Under this provision, a plaintiff is only required to serve the Secretary of State. The repealed provision, however, *required* the Secretary of State to forward notice to the defendant foreign corporation.

In a conversation with John W. McCune, former member of the Oklahoma House of Representatives and floor manager of the bill in the House, McCune expressed surprise that the notice provisions had been repealed, and indicated that the intent of the legislature in enacting the bill was to provide an *additional, optional method of notification* to a nonresident defendant. It was his opinion that the repeal of section 661 of title 18 was inadvertent. The intent of the legislature to provide an optional method of notice for the plaintiff is suggested by the legislature's choice of the word *may* rather than the word *shall*. As a result of this inadvertent repeal, when service is made upon the Secretary of State pursuant to section 1.204a, there is currently no requirement that either the plaintiff or the Secretary of State forward notice to the defendant foreign corporation. Interview with John W. McCune (Oct. 20, 1976).

20. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

a public official as the statutory process agent.[21] There appears to be little question that, with one major exception, some further notice to the corporation is necessary.

Domesticated Corporations

The exception to the general rule that service made on a public official alone is insufficient notice to the corporation arises where a foreign corporation enters a state and complies with its statutory requirements for certification as a domesticated corporation.[22] By qualifying to do business as a domesticated corporation, it will be required to appoint an agent for service of process[23] or to accept a designated state official to act as process agent.[24] In the event the corporation then withdraws from the state, along with its appointed process agent,[25] service of process on the statutory public official has been held valid by the United States Supreme Court, without any further requirement that notice be forwarded to the defendant corporation.[26] The rationale

21. Most jurisdictions have held substituted service statutes that lack notice provisions invalid. *E.g.*, Knapp v. Bullock Tractor Co., 242 F. 543 (S.D. Calif. 1917); King Tonopah Mining Co. v. Lynch, 232 F. 485 (D. Nev. 1916); Southern Ry. v. Simon, 184 F. 959 (E.D. La. 1910); Gouner v. Missouri Valley Bridge & Iron Co., 123 La. 964, 49 So. 657 (1909); State v. Scott, 387 S.W.2d 539 (Mo. 1965).

While some older cases have upheld substituted service statutes similar to section 1.204a as it presently reads, it should be noted that these decisions are pre-*Mullane*. *See, e.g.*, Olender v. Crystalline Mining Co., 149 Cal. 482, 86 P. 1082 (1906); Richardson Machinery Co. v. Scott, 122 Okla. 125, 251 P. 482 (1926); Kaw Boiler Works v. Frymyer, 100 Okla. 81, 227 P. 453 (1924); Title Guaranty & Surety Co. v. Slinker, 42 Okla. 811, 143 P. 41 (1914).

The trend of the Supreme Court in more recent cases has been toward requiring the best practical notice available under the circumstances. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Milliken v. Meyer, 311 U.S. 457 (1940). As a result, it seems apparent that decisions allowing service on a statutory service agent, without further provision for some form of notice, are no longer effective precedent. Indeed, in all jurisdictions except Oklahoma, the question would not even arise since the legislatures in those jurisdictions have enacted notice provisions. *See, e.g.*, CAL. CORP. CODE § 6502 (West 1955); LA. CODE CIV. PRO. ANN. art. 1262 (West 1960); MO. ANN. STAT. § 351.630 (Vernon 1966).

22. Domestication and qualification are synonymous terms which mean that a foreign corporation has complied with certain statutory requisites for doing business in a state (such as filing its articles of incorporation with the Secretary of State and appointing a process agent) and will thereafter be treated as if it were a domestic corporation. *See* OKLA. STAT. tit. 18, §§ 1.199 and 1.228 (1971). For purposes of this article, a foreign corporation will be considered a corporation incorporated in a state other than the forum which has not become domesticated according to the law of the forum.

23. OKLA. STAT. tit. 18, § 1.17(a) (Supp. 1975).

24. *Id.*

25. Where a domesticated corporation has never appointed a process agent, service upon the Secretary of State is sufficient. OKLA. STAT. tit. 18, § 1.17(a) (Supp. 1975).

26. Washington, *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court of the

supporting this limited notification is that a domesticated corporation that withdraws after transacting business in a state can reasonably be expected to be familiar with that state's law applicable to service of process on a corporation. As a result, the domesticated corporation alone bears the responsibility for the consequences of its failure to comply with that statute.[27]

In Oklahoma, a foreign corporation intending to transact business in the state must apply to the Secretary of State for a certificate of domestication.[28] As a condition for issuance of this certificate, the foreign corporation must appoint a registered agent to receive service of process in Oklahoma.[29] Once domesticated, the corporation falls within the situation discussed above; that is, if the corporation withdraws from Oklahoma along with its registered agent (or prior to appointing an agent), service made only on the Secretary of State in compliance with section 1.204a satisfies the notice requirements of due process.

Foreign Corporations

While service of process in compliance with section 1.204a does not appear to offend any due process rights of domesticated corporations, the statute's application to non-domesticated foreign corporations raises serious constitutional questions as to its validity. Under the expanded concept of long-arm jurisdiction, a foreign corporation engaging in almost any activity in Oklahoma is "doing business" within the mean-

State of Washington, 289 U.S. 361 (1933). In that case, a foreign corporation doing business in Washington qualified and appointed a service agent in accordance with Washington statutes. The corporation subsequently ceased doing business in the state and, along with its process agent, withdrew from the state. In a later civil action, service of process was effectuated by serving the Secretary of State, the statutory agent under the applicable statute. Despite the fact that the statute did not provide for notice to be sent to the corporation, both the Washingon Supreme Court and the United States Supreme Court held the statute valid and not violative of the corporation's right to due process. It should be noted that the case was decided prior to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), which arguably set a more stringent notice requirement than was followed in *Bond*. *See* note 8 *supra* and accompanying text.

27. Because the corporation's qualification in the state was held to be "an assent on its part to all reasonable conditions imposed," the Court held that the corporation should not be heard to complain of the consequences of failing to meet those conditions. *Id.* at 364-65.

28. OKLA. STAT. tit. 18, §§ 1.199 and 1.228 (1971).

29. By statute that agent is either the Secretary of State or an individual designated by the corporation as its registered agent. OKLA. STAT. tit. 18, § 1.17 (Supp. 1975). Failure for 30 days to appoint and maintain a registered agent in the state is a ground for ouster of a domesticated corporation. OKLA. STAT. tit. 18, § 1.204(b)(4) (1971).

ing of that phrase as used in section 1.204a and is therefore subject to the jurisdiction of the Oklahoma courts.[30] A foreign corporation may subject itself to Oklahoma jurisdiction by doing as little as placing an article into the stream of commerce that subsequently causes economic or physical injury in Oklahoma,[31] or by committing a single act within the state, such as the execution of a contract[32] or the commission of a tort.[33]

Under these circumstances, it is improbable that every foreign corporation subject to Oklahoma's long-arm jurisdiction is aware of the state's requirements for conducting corporate affairs within the state and the consequences of the failure to comply. Unlike a domesticated corporation, a non-domesticated foreign corporation doing business in the state in the limited sense that it has some minimal contact there cannot reasonably be charged with knowledge of the Oklahoma statutes concerning process agents. Indeed, it is quite conceivable that the first indication a foreign corporation may have that it is transacting business in Oklahoma occurs when it learns that a default judgment has been taken against it under the authority of section 1.204a.

This is not to suggest, of course, that a state cannot subject a foreign corporation to its substituted service statutes. Service of process can validly be made on domesticated corporations and non-domesticated foreign corporations alike by serving the designated public offi-

30. See notes 3 through 7 *supra* and accompanying text. *See* OKLA. STAT. tit. 12, § 187(a)(2) (Supp. 1975); OKLA. STAT. tit. 12, § 1701.03(a)(7) (1971); Vinita Broadcasting Co. v. Colby, 320 F. Supp. 902 (N.D. Okla. 1971); Vernco Plating, Inc. v. Denver Fire Clay Co., 496 P.2d 117 (Okla. 1972); B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759 (Okla. 1967); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

31. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). There a safety valve was manufactured by an Ohio corporation and sold to defendant, a Pennsylvania corporation, which incorporated the valve into a hot water heater that was sold to the plaintiff in Illinois. The court held that it was "not unreasonable where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this state to justify a requirement that he defend here." *Id.* at 766. *See also* OKLA. STAT. tit. 12, § 187(a)(3) (Supp. 1975).

32. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957), where the execution of an insurance contract by the insured in California was held to be sufficient contact with the state to subject the insurer, an Arizona corporation, to the jurisdiction of California. *See also* Vemco Plating, Inc. v. Denver Fire Clay Co., 496 P.2d 117, 119 (Okla. 1972); B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759, 762 (Okla. 1967); OKLA. STAT. tit. 12, § 1701.02(a)(2) (1971).

33. *See* Hess v. Pawloski, 274 U.S. 352 (1927), holding that a single act of negligence was sufficient to subject the nonresident defendant to the forum's jurisdiction. *Id.* at 356. *See also* B. K. Sweeney Co. v. Colorado Interstate Gas Co., 429 P.2d 759, 762 (Okla. 1967); OKLA. STAT. tit. 12, § 1701.03(a)(3) (1971).

cial as statutory process agent. The distinction is that while in certain situations[34] service made only on the public official, when no actual notice to the corporation is required by statute, satisfies due process requirements as to *domesticated corporations*, this method of service is not compatible with due process requirements as to *non-domesticated foreign corporations*. While a foreign corporation may lawfully be required to accept service through a public official, the statute nevertheless must provide that notice of service on the statutory agent be forwarded to the nonresident defendant.

Case law seems to support this position. In *Consolidated Flour Mills Co. v. Muegge*[35] an early version of Oklahoma's substituted service statute[36] was held valid by the Oklahoma Supreme Court on the ground that a foreign corporation consented to its application by doing business in the state.[37] The United States Supreme Court reversed, without opinion,[38] on authority of *Wuchter v. Pizzutti*;[39] a decision involving a New Jersey nonresident motorist long-arm statute providing for substituted service on the Secretary of State without requiring that notice be forwarded to the nonresident defendant. In *Wuchter*, the Court held the statute unconstitutional as violative of a nonresident defendant's right to due process because it did not "make provision for communication to the proposed defendant"[40] even though the Secretary of State had voluntarily given the defendant notice.

> [T]he enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, without more, it will be entirely

34. See notes 22-27 *supra* and accompanying text.

35. 278 U.S. 559 (1928). In this case the defendant foreign corporation owned two grain elevators in Oklahoma where it stored wheat purchased from surrounding farmers. Plaintiff farmers sued for payment for wheat purchased by the defendant, who had subsequently sold the elevators and left the state. Service was made upon the Secretary of State pursuant to the substituted service statute then in force.

36. Law of Feb. 25, 1911, ch. 26 § 2, 1911 Okla. Sess. Laws 47. This statute provided for substituted service on the Secretary of State where a foreign corporation failed to appoint a service agent, but did not provide for notice to be forwarded to the defendant corporation.

37. 127 Okla. 295, 260 P. 745 (1927).

38. 278 U.S. 559 (1928).

39. 276 U.S. 13 (1928).

40. *Id.* at 25.

> possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state . . . . A provision of law for service that leaves open such a clear opportunity for the commission of fraud . . . or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law.[41]

The *Muegge* decision, in effect, applies the requirement of notice in nonresident motorist long-arm statutes to statutes providing for substituted service on foreign corporations. Even without opinion, it seems clear that the Supreme Court requires some form of notice to defendant corporations when served pursuant to a substituted service statute like section 1.204a.

IV. Implied Waiver of Due Process

The constitutional validity of service of process on a state's Secretary of State for domesticated corporations is supported in part by the corporation's consent to such substituted service. Substituted service is considered reasonable because a domesticated corporation has made a conscious decision to enter the state and has clearly indicated that it understands the terms of its entry.[42] Similarly, substituted service on a foreign corporation might be justified under the theory that such a corporation impliedly waives its right to statutory assurance of notification of a pending suit as a condition to doing business within the state. This argument is untenable under the holding of *Quaker Cab Co. v. Commonwealth*.[43] According to the Supreme Court in *Quaker Cab*: "The rights [of a state] to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal constitution."[44]

Because a state cannot impose conditions on a foreign corporation that require the surrender of its constitutional rights,[45] it cannot

41. *Id.* at 19. As to corporations, the Court stated: "Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served." *Id.* at 21.

42. See notes 23-27 *supra* and accompanying text.

43. 277 U.S. 389 (1928).

44. *Id.* at 401.

45. A foreign corporation may not do business in a state without that state's consent, since a state may arbitrarily exclude it altogether, or impose conditions upon

be said that a corporation circulating its products within a state implicitly waives its right to due process of law. In both civil and criminal actions, there is a presumption against waiver of fundamental rights[46] and any waiver must be both voluntarily and intelligently made.[47] No plausible argument can be made that a foreign corporation, by virtue of the fact that it has minimal contact with a state, voluntarily and intelligently waives its right to be notified and given an opportunity to defend a lawsuit arising out of its transactions there. To sustain the validity of this argument is to admit that a state may impair rights guaranteed by the constitution; something which it clearly cannot do.[48]

V. SECTION 1.204a AND THE OKLAHOMA COURTS

Although never challenged before the Oklahoma Supreme Court, there is a strong likelihood that the court would strike down section 1.204a, if given the opportunity, on the basis that it fails to meet the requirements of due process for lack of an adequate notice provision. In addressing the issue of notice in *Bomford v. Socony Mobil Oil Co.*,[49] the court recently noted:

> A state cannot invest itself with, and exercise through its courts, judicial jurisdiction over a person in a proceeding which may directly and adversely affect his legally protected interests, unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard.[50]

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its engaging in any business within its jurisdiction. Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 507 (1926); *see* Lincoln Nat'l Life Ins. Co. v. Read, 194 Okla. 542, 156 P.2d 368 (1944). But a state "may not exact as a condition of the corporation engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed." Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 507 (1926).

46. As to fundamental rights, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937).

47. *See* D. H. Overmyer v. Frick Co., 405 U.S. 174, 185 (1971).

48. King Tonopah Mining Co. v. Lynch, 232 F. 485 (D. Nev. 1916). "Clearly, however, the corporation cannot, as punishment, be deprived of, or compelled to waive, a right guaranteed by the federal Constitution. To hold otherwise is to hold that the Constitution of the United States may be nullified or abridged by state action." *Id.* at 489-90.

49. 440 P.2d 713 (Okla. 1968). This case involved a quiet title action where notice was given to the defendant by publication. The court held that where the plaintiff, after due diligence, could not secure personal service upon the defendants, notice by publication was proper and not a denial of due process.

50. *Id.* at 718.

Clearly, section 1.204a does not meet the notification requirements as set out by the Oklahoma Supreme Court, since it fails to provide the foreign defendant corporation with a method of notice reasonably calculated to give knowledge of a suit against it. *Bomford* indicates that the Oklahoma court will not look favorably on a statute that dispenses entirely with all notice provisions to a foreign corporation once service of process has been made on the Secretary of State.

VI. CONCLUSION

A foreign corporation doing business in Oklahoma, but not certified as a domesticated corporation, cannot be deemed to have consented to a statute that subjects it to the jurisdiction of the Oklahoma courts, but does not provide for notice of the invocation of this jurisdiction. This implied waiver of a corporation's right to due process cannot be sustained under existing case law.[51] Nor can a foreign corporation be charged with knowledge of the statute and subjected to the consequences of its failure to comply when the only contact it has with the forum state ocurs through the fortuitous circumstance that its multistate activities lead to minimal contact with the state.

The Oklahoma legislature erred in repealing the notice provisions governing service of process on foreign corporations[52] applicable when substituted service is obtained pursuant to section 1.204a. Simple reenactment of similar notice provisions[53] offers the best solution to the problem. The legislature cannot rely on the voluntary issuance of notice to a defendant corporation by the Secretary of State, since voluntary notification will not render valid a statute invalid on its face.[54] At the very least, the legislature should provide for the same notice to foreign corporations as that accorded other nonresidents who are subject to the jurisdiction of the Oklahoma courts.[55] As the statute now stands,

51. See notes 43-48 *supra* and accompanying text.

52. See note 19 *supra*.

53. The easiest solution to the problem would be to amend section 1.204a with the repealed notice provision section 661 of title 18. The result would be a substituted service statute that would meet the requirements of due process. Alternatively, a reenactment of section 661 in the same manner as it was previously in the statutes would achieve the same result, but in a less organized manner. See notes 18 and 19 *supra*.

54. *See* Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928).

55. Where service upon a foreign insurance company is made by serving the Insurance Commissioner, the Commissioner is required to forward notice to the insurer. OKLA. STAT. tit. 36, § 622 (1971); where service upon a nonresident motorist is made by serving the Secretary of State, the plaintiff is required to forward notice to the nonresident motorist. OKLA. STAT. tit. 47, § 394 (1971). The fact that these notice

"it is difficult to conceive of a method of constructive service better calculated *not* to accomplish the object for which service of summons is designed."[56]

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provisions were not repealed along with section 661 is further evidence that the legislature inadvertently repealed section 661 in 1972. See note 19 *supra*.

56. King Tonopah Mining Co. v. Lynch, 232 F. 485, 494 (D. Nev. 1916) (referring to a statute which did not require that actual notice be given to foreign corporations) (emphasis added).