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Conflict of Laws - Jurisdiction over Foreign Corporations

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COMMENTS

CONFLICT OF LAWS — JURISDICTION OVER FOREIGN CORPORATIONS

The great growth of corporate business during recent decades, coupled with increasing ease of transit across state lines has rendered the problem of controlling foreign corporations particularly acute. The power of a state to subject a foreign corporation to personal jurisdiction when the corporation has not been granted a license to do business within the state is an important aspect of this problem. It has been universally held by the courts that it is essential to the rendition of a personal judgment that the corporation be doing business within the state, regardless of the form of state statute authorizing service of process.[1] The difficulty of analysis lies, however, in what constitutes doing business.

The concept of doing business as it evolved has been predicated upon various theories each having an effect on the development of the rule.[2] Originally the courts employed what is known as the consent theory. By assuming that a foreign corporation could transact business within a state only if the latter consented, it was reasoned that certain conditions could be imposed upon its activities.[3] Thus, if a state statute provided for the appointment of a resident agent to receive service of process, and the corporation appointed such an agent, it was deemed to have impliedly consented to jurisdiction.[4] The right to exclude, however, could not be exercised in cases where the corporation was engaged in interstate commerce and the theory became inadequate.[5]

To provide for situations where no consent could be implied and to avoid burdening interstate commerce the courts began

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[1] Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710 (1917); International Harvester Co. of America v. Kentucky, 234 U. S. 579, 586, 34 S. Ct. 944, 946, 58 L. Ed. 1479 (1914); RESTATEMENT, CONFLICT OF LAWS Sec. 89 (1934) A state can not exercise through its courts jurisdiction over a foreign corporation, if the corporation has neither consented to the exercise of jurisdiction by the courts of the state nor done business within the state.

[2] Comment, 17 Minn. L. Rev. 270 (1933).

[3] Layfayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451 (1856); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).

[4] Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1916).

[5] International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678 (1909).

employing the presence theory.[6] This theory was based historically on the idea that an individual had to be present within a state to be amenable to process in that jurisdiction.[7] The doctrine was then carried over to corporations by reasoning that the latter might be present through acts of its agents.[8] In the case of *Philadelphia & R. Ry. v. McKibbin*,[9] the Supreme Court said, "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent only if it is doing business within the state, in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent."

In construing this proposition the Court has further stated, that the determination of what constitutes doing business rests with the discretion of the court and upon the facts of each particular case.[10] This theory has been somewhat clarified by other decisions which have excluded certain activities from the concept of doing business. In the case of *Hutcheson v. Chase and Gilbert*,[11] the rule was advanced that a single isolated transaction would not amount to doing business . . . that there must be some continuous dealing in the state of the forum, enough to demand a trial away from home. The rule that mere solicitation did not amount to doing business was definitely established under the presence theory and seemed to have been the point of departure.[12] In the case of *Green v. Chicago & B. Q. Ry.*,[13] the defendant Railway was held not to be doing business within the state of the forum when its agents merely solicited freight and passenger business to be performed elsewhere. Where the soliciting agents performed additional activities such as closing contracts,[14] receiving notes

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[6] GOODRICH, CONFLICT OF LAWS, Sec. 78 (1st Ed. 1927).

[7] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[8] See note 1, *supra*.

[9] See note 1, *supra*.

[10] Walton N. Moore Dry Goods Co. v. Commercial Industrial Co., 282 F. 21 (C. C. A. 9th 1922).

[11] 45 F. 2d 139 (C. C. A. 2d 1930).

[12] Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 87, 38 S. Ct. 233, 62 L. Ed. 587 (1918); Minnesota Commercial Men's Ass'n v. Benn, 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573 (1922).

[13] 205 U. S. 531, 533, 534, 273 S. Ct. 595, 51 L. Ed. 916 (1906).

[14] Michigan Aluminum Foundry Co. v. Aluminum Castings Co., 190 F. 879 (E. D. Mich. 1911).

or checks,[15] or handling claims and making collections,[16] the foreign corporation was held to be doing business. If an office or warehouse was maintained there was no dispute.[17] Generally speaking the agent had to perform solicitation together with acceptance or some performance of the contract within the jurisdiction.[18] Apparently a cogent rule was not forthcoming under the presence theory. The amount and quantity of business activity was analyzed in each case and as a result no practical test was established. It has been suggested that the presence theory is a fiction, in that it is impossible to impute the idea of locality to a corporation.[19]

The case of *International Shoe Co. v. State of Washington*[20] placed the basis of the rule upon a new theory. Apparently the test applied was whether the extent of business carried on would make it reasonable to bring the corporation before the courts of the particular state. This case involved a suit by the state of Washington to require the defendant corporation to make contributions to the state unemployment compensation fund.

Service of process was served on the defendant's agents within the state. The defendant was a Delaware corporation and maintained no contacts with the state of Washington other than solicitation carried on by its agents. These agents made no contracts within the state for the sale or purchase of merchandise and no stock of merchandise was maintained or deliveries made. The authority of the agents was limited to exhibiting their samples and soliciting orders at prices and terms fixed by the defendant corporation. All orders were transmitted to the defendant's home office for acceptance or rejection and the merchandise was shipped from outside the state to purchasers within the state. The salesmen had no authority to contract or make collections and they were compensated by commissions based on the amount of their sales. They did, however, occasionally rent hotel rooms for the purpose of exhibiting their samples.

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[15] International Harvester Co. v. Kentucky, 234 U. S. 579, 586, 34 S. Ct. 944, 946, 58 L. Ed. 1479 (1914).

[16] St. Louis Southwestern Ry. v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 57 L. Ed. 486 (1912).

[17] Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

[18] Wills v. National Mineral Co., 176 Okla. 193, 55 P. 2d 449 (1936).

[19] See note 11, *supra*.

[20] 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945).

The Supreme Court held that the Washington statute providing for service of process under such circumstances did not contravene due process of law. It was further held that a foreign corporation may be subjected to personal jurisdiction if such contacts were established within the territorial forum that the maintenance of the suit would not offend traditional notions of fair play and substantial justice. The court pointed out that the defendant's activities within the state were continuous and gave rise to the liability sued upon. In answering the defendant's plea that its activities within the state did not manifest presence, the court said: "To say that a corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities . . . which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, . . . to require the corporation to defend the particular suit which is brought there."

The opinion in the *International Shoe Case, supra,* obviously rejected the presence theory and presumably embodied an attempt to establish the test of reasonableness as a guide for lower courts to follow. In view of the uncertainty of prior decisions it would seem that the decision in that case was an attempt to clarify such uncertainty.

A class of cases recently decided indicate that the *Shoe Case, supra,* has effected a change in the concept of doing business and that mere solicitation or a very little more than solicitation would be sufficient to render a foreign corporation amenable to personal jurisdiction. In the case of *Winkler Kock Engineering Co. v. Universal Products Co.,*[21] the defendant corporation was held to be doing business in New York when its agents rendered certain services to customers in addition to soliciting business. The court stated that the doctrine of reasonableness as set forth in the *Shoe Case, supra,* had amplified the concept that mere solicitation did not amount to doing business. It was pointed out in the opinion that if the mere solicitation rule still obtains it readily yields to slight addi-

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[21] 70 F. Supp. 77 (S. D. N. Y. 1946).

tions.[22] It would seem that the rule that a very little more than solicitation amounts to doing business would have little advantage over the old rule. The necessity of comparing the quantity of business activity with prior precedent would still exist. The case of *Lasky v. Norfolk & W. Ry.*,[23] would seem to present a more reasonable and practical application of the *Shoe Case* doctrine. In that case the defendant corporation was held to be doing business when the only activity carried on within the state of the forum was the solicitation of freight and passenger business. Following the opinion in the *Shoe Case, Supra,* the court stated that the case of *Green v. Chicago B. Q. Ry., supra,* had in effect been overruled. From this case it is possible to advance the thesis that mere solicitation would amount to doing business if the solicitation was continuous and gave rise to the liability sued upon. If the *Shoe Case, supra,* would be accepted broadly as standing for this proposition it would seem that some measure of uncertainty would be resolved.

It was pointed out in the opinion of the case of *State v. The Ford Motor Co.*[24] that the doctrine of reasonableness allows a distinction between causes of action that arise within the state and those that arise outside the state.[25] The fact that the cause of action arises out of local activity then becomes an additional factor in determining amenability to process. It would seem that such an interpretation would correct an inherent weakness manifested by the presence theory. Under the presence theory a corporation once found within a particular jurisdiction became amenable to process there regardless of where the cause of action arose.

Another class of cases decided since the *Shoe Case, supra,* indicate that cases are still being decided upon precedents established under the presence theory. In the case of *McWhorter v. Anchor Serum Co.*[26] the defendant corporation was held not to be doing business when the only activity carried on

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[22] Such an interpretation undoubtedly stems from the fact that in the *Shoe Case* the Defendent's agent occasionally rented hotel rooms for the purpose of exhibiting their samples, in addition to soliciting business.

[23] 157 F. 2d 674 (C. C. A. 6th 1946).

[24] 208 S. C. 379, 38 S. E. 2d 242 (1946).

[25] RESTATEMENT, CONFLICT OF LAWS, Sec. 92 (1934). A state can exercise through its courts jurisdiction over a foreign corporation doing business within the state at the time of service of process as to causes of action arising out of business done within the state.

[26] 72 F. Supp. 437 (W. D. Ark. 1947).

within the state of the forum was the solicitation of business. *Following the case of International Harvester Co. v. Kentucky,*[27] the court stated that the maintenance of a mere soliciting agent did not amount to doing business. The cause of action in this case arose out of local activity. In the case of *Murray v. Great N. Ry.*[28] the defendant corporation was held not to be doing business when the only activities carried on within the state attempting to impose jurisdiction was the solicitation of freight and passenger business. This decision was apparently based on the case of *Green v. Chicago & B. Q. Ry., supra,* which like the *International Harvester Case, supra,* was a leading case under the presence theory. The liability in suit did not arise out of local activity but this fact was not pointed out in the opinion as an important consideration. The court attempted to distinguish the *Shoe Case, supra,* on the ground that the solicitation of transportation did not amount to a principle part of the defendant's business. It would seem that the solicitation of transportation is as much a part of the transportation business as the solicitation of shoe customers is a principle part of the shoe business. *In the case of Bomze v. Nardis Sportswear Inc.,*[29] the defendant corporation was held to be doing business within the state of the forum when it hired a New York firm to solicit business. The soliciting firm leased permanent premises for display purposes and the defendant's name appeared on the office door as wel las in various public directories. The court stated that the *Shoe Case, supra,* was not controlling because a question of taxation was involved in that case.[30] On appeal the decision was reversed. The court held that the business carried on by the defendant corporation was sufficient to bring the case within the New York cases decided under the presence theory. It was pointed out in the opinion that the state law need not extend to suitors' access to its courts as ample as it has power to do under the constitution. That is the constitution as interpreted by the United States Supreme Court determines the lower limits of due process but the state law may prescribe a higher standard in determining amenability to process. In this case the action

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[27] See note 15, *supra.*

[28] 67 F. Supp. 944 (E. D. Pa. 1946).

[29] 68 F. Supp. 156 (S. D. N. Y. 1946) Reversed 165 F. 2d 33 (C. C. A. 2d 1948).

[30] This distinction would seem specious in view of the opinion in the *Shoe Case* which specifically stated that the same rule should apply in suits brought by individuals.

had been removed from a state court so the defendant had not lost his right to challenge the validity of process in that court. The court stated that it was therefore constrained to follow the New York law, although dictum in the case indicated that the doctrine as set forth in the *Shoe Case, supra,* would be preferrable, and that if liability in suit arises out of the local activity it should not be necessary to go further except to show that the business was continuous.

The problems discussed here has been stated generally as involving a balancing of opposing interests. That is, balancing the convenience of the individual wishing to bring suit against the inconvenience of the corporation which is required to defend.[31] Closely associated with the latter consideration is that fact that subjecting a corporation to jurisdiction in a particular state might amount to a burden on interstate commerce. In relation to this problem the rule has been advanced that because a corporation might be engaged in interstate commerce does not of itself render it immune from jurisdiction.[32] It has been further pointed out that if the liability in suit arises out of local activity there is much less danger of burdening interstate commerce.[33] Proceeding upon these considerations it would seem that when a foreign corporation comes into a state and pursues a regular course of business, whether it be solicitation or otherwise, it would be reasonable to require it to defend suits arising out of such activity. An important consideration should be the protection of the individuals dealing with such a corporation. As suggested by the *Shoe Case, supra,* if the corporation accepts the benefits offered by a state, it should also bear corresponding responsibilities. As the case indicated, no apparent uniformity of decision has been forthcoming since the *Shoe Case, supra.* Cases are being decided upon different theories and employ different rules. There is obvious need for a cogent rule defining the limits in either direction.

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[31] See note 11, *supra.*
[32] See note 15, *supra.*
[33] Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8, 21, 27 S.Ct. 236, 51 L. Ed. 345, 350 (1907).