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Civil Procedure: Service of Process on the Foreign Corporation

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CIVIL PROCEDURE: SERVICE OF PROCESS ON THE FOREIGN CORPORATION

Section 47.16 of the Florida Statutes, commonly known as the "Long-Arm" statute,[1] gives Florida courts jurisdiction over foreign corporations[2] engaging in a business or business venture in the state.[3] This section was passed in 1951 to take advantage of *International Shoe Co. v. Washington*,[4] which extended the reach of state jurisdiction to nonresidents, natural and corporate, having certain "minimum contracts" with the forum state. The statute deems such corporations to have appointed the secretary of state of Florida as its agent to receive process, and prescribes that service shall be made by mailing the process to the secretary of state, "provided that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute."[5] The actual serving of process under the statute should be a mere mechanical task, but because the statute fails to define "resident agent" and therefore fails to specify the circumstances under which service shall not be made on the secretary of state, serving process becomes an involved, confusing undertaking.

Since the confusion stems from the failure of section 47.16 to define "resident agent," the plaintiff must look elsewhere in the statutes for a definition of the term. Chapter 47 of the Florida Statutes contains four provisions describing agents of foreign corporations[6] upon whom service may be made. Sections 47.171 and

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1. "Long-Arm" is a term of uncertain origin generally used to describe statutes expanding state jurisdiction over nonresidents. See 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, 304 (1964).

2. FLA. STAT. §47.16 (1963) also applies to nonresident individuals and partnerships, but the service of process problems discussed in this comment are limited to foreign corporations.

3. FLA. STAT. §47.16 (1963) should not be confused with FLA. STAT. §613.01, which requires foreign corporations to qualify with the secretary of state before transacting business in the state. FLA. STAT. ch. 613 deals with the regulation of foreign corporations actively engaged in business in the state and provides penalties and a prohibition against maintaining suit for failure to qualify. FLA. STAT. §47.16 is concerned with permitting suit against less active foreign corporations, including those engaged in a business venture or a "single act." Nevertheless, the language of FLA. STAT. §47.16 seems to include both qualified and nonqualified foreign corporations.

4. 326 U.S. 310 (1945). For subsequent cases relating to state jurisdiction see Hanson v. Denkla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

5. FLA. STAT. §47.16 (1) (1963).

6. These four provisions apply to both domestic and foreign corporations.

47.17 (5) refer to agents transacting business in the state;[7] section 47.17 (4) concerns business agents, resident in the state; and section 47.35 requires corporations qualified under section 613.01 to transact business in the state to file with the secretary of state the name of an agent to receive process.[8] None of these provisions specifically use the term "resident agent," but two other sections,[9] unrelated to service of process, do use the term to refer to the designated agent required by section 47.35. This strongly indicates that "resident agent" in section 47.16 was intended to mean an agent specifically designated by the corporation pursuant to section 47.35. If this interpretation is correct, the plaintiff's dilemma is solved. He may easily determine which course to take by inquiring of the secretary of state whether the defendant corporation has qualified to transact business in the state under section 613.01 and has designated an agent pursuant to section 47.35. If the corporation has qualified and has such an agent registered with the secretary of state, the plaintiff must serve the agent; if not, he must serve the secretary of state.

The United States Fifth Circuit Court of Appeals, however, apparently chose a different interpretation in *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*,[10] a leading case involving section 47.16. In that case the defendant was not qualified to transact business under section 613.01. In allowing service on the defendant's distributor as its "resident agent,"[11] the court seemed to construe "resident agent" to mean "agent transacting business in the state" (section 47.17 (5)) or "business agent, resident in the state" (section 47.17 (4)). Under this interpretation, the plaintiff must ascertain whether the relationship between an agent and the corporation is such as to create in the agent a "legal or moral duty . . . to report and properly handle a summons."[12] Since such a determination may require a knowledge of the defendant's internal organization, the plaintiff must often await a court decision before the sufficiency of such service can be ascertained. The burden is further increased by the mutually ex-

7. The similarity of FLA. STAT. §§47.17 and .171 (5) (1963) may be attributed to legislative history. FLA. STAT. §47.17 was repealed in 1957 and replaced by FLA. STAT. §47.171 (Fla. Laws 1957, ch. 57-97), but when FLA. STAT. §47.17 was reenacted in 1959 (Fla. Laws 1959, ch. 59-46) FLA. STAT. §47.171 remained on the books.

8. Compare MODEL BUS. CORP. ACT. ANN. §§106, 108 (1960). For the distinction between "transacting business" under FLA. STAT. §§613.01 and 47.16 (1963) see note 3 *supra*.

9. FLA. STAT. §47.50 (1963) (resignation of resident agents); FLA. STAT. §608.38 (1963) (office and resident agent).

10. 332 F.2d 135 (5th Cir.), *cert. denied*, 379 U.S. 915 (1964).

11. *Id.* at 142.

12. Mason v. Mason Prod. Co., 67 So. 2d 762, 763 (Fla. 1953).

clusive language of section 47.16, which implies that service can be made on the secretary of state only if the defendant has no resident agent in the state.[13] Therefore, under the court's interpretation of "resident agent," an incorrect choice by the plaintiff between serving the secretary of state or one of the various agents of the defendant corporation may lead to invalid service, causing delay and inconvenience.[14] Thus, under the *Delray Beach* rationale, service of process under the Long-Arm Statute becomes more than the mere mechanical task contemplated by the statute.

In passing the Long-Arm Statute to expand and facilitate amenability of service over nonresidents, the legislature certainly did not intend to afford the defendant a procedural loophole and to make the actual service of process more difficult for the plaintiff. In addition, since Florida's statute is frequently construed in other jurisdictions, where adequacy of service is questioned in actions to enforce Florida judgments,[15] clear language is essential to insure an interpretation that comports with the purposes of the statute. Under the present statute, with its unclear language and resulting confusion, these goals are not attained. Therefore, certain legislative changes are needed to clarify the method of service of process and give greater effect to the Long-Arm Statute.

Any statute involving service of process against foreign corporations must satisfy the constitutional due process requirement of notice.[16] As a guideline, the United States Supreme Court has decreed that the statutory method of service must be "reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard."[17] The statute must also be able to withstand the strict construction traditionally given such substituted service statutes.[18] Even when the defendant receives actual notice, the service will be quashed if the statute does not reasonably guarantee actual notice[19] or if the statute is not strictly followed.[20] It is essential, therefore, that the statute prescribe clearly and fully the manner of giving such notice, removing all ambiguities that may subject the service to adverse court interpretation.

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13. Lake Erie Chem. Co. v. Stinson, 162 So. 2d 545 (2d D.C.A. Fla. 1964) (dictum); Note, 10 U. FLA. L. REV. 345, 353 (1957).

14. See Note, 10 U. FLA. L. REV. 345, 353 (1957).

15. *E.g.*, Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., 332 F.2d 135 (5th Cir.), *cert. denied*, 379 U.S. 915 (1964); Berkman v. Ann Lewis Shops, Inc., 246 F.2d 44 (2d Cir. 1957).

16. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

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

18. See Wuchter v. Pizzutti, 276 U.S. 13 (1928).

19. *Ibid.*

20. Bond v. Golden, 273 F.2d 265 (10th Cir. 1959).

Florida employs the most far-reaching and easily administered method of substituted service[21] that has been upheld by the courts.[22] The Florida method involves service of process upon the secretary of state followed by notice to the defendant by registered mail. This statutory scheme should be retained, for it provides a means of proof that actual notice was received by requiring a return receipt signed by the defendant.[23] Furthermore, it is designed to reach practically all defendants, since under the Florida statutes, if the defendant cannot be reached by mail he can be given notice through personal delivery by a state officer of either Florida or the state in which the defendant is located.[24] The present basic method seems to permit as broad a method of service as is practicable under the constitutional standards. The problem lies in the alternative methods provided by the present statute.

Although substituted service on the secretary of state could be the exclusive method, it would be an unnecessary inconvenience in cases where the defendant foreign corporation has qualified to transact business in the state under section 613.01 and has named an agent to receive process. Under the present statute, foreign corporations with resident agents are excluded from substituted service. But since "resident agent" has been interpreted to include a variety of agents, great confusion has arisen regarding when a corporation has a resident agent on whom service should be made or when substituted service is the correct method. To correct this, the term "resident agent" should be clearly defined as an agent officially designated by the corporation to receive process under section 47.35, thereby eliminating confusion regarding when service should be made on someone other than the secretary of state. Since the corporation specifically consents to service upon such a designated agent, this method clearly meets the requirements of due process.[25] Once "resident agent" is clearly defined, the statute would provide the plaintiff a means of service free of ambiguity.

It is not suggested that service of process under the Long-Arm Statute be strictly limited to service upon the secretary of state or a resident agent, for it may sometimes be more convenient for the plaintiff to serve an officer, director, or agent of a foreign corporation as provided by section 47.17. The provisions of section 47.17 are made cumulative to all existing laws by subsection 47.17 (7). Thus service upon officers, directors, or agents of a foreign corporation can be made

21. FLA. STAT. §47.30 (1963).
22. *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
23. FLA. STAT. §47.30 (1963).
24. *Ibid.*
25. See Washington v. Superior Court, 289 U.S. 361 (1933).

in addition to the methods provided in section 47.16. Since this is not made clear in the Long-Arm statute itself, such a cumulative provision should be incorporated into section 47.16 to assure that the Long-Arm Statute's methods of service will not be interpreted as precluding service by any other authorized method.[26] This provision would be solely for the convenience of the plaintiff, who would bear the risk of the sufficiency of service under these other methods, and it is presumed that plaintiffs would use this additional method only when it would clearly result in sufficient service.

Thus, the proposed revision would provide for service on the secretary of state except in cases in which the defendant has designated a resident agent, supplemented by a provision allowing service by any other method authorized in the statutes. The result of this amendment would be to (1) free the courts from having to make unnecessary determinations of who is a resident agent; (2) relieve plaintiffs of the burden of choosing a method that may later be held defective; and (3) guarantee that defendants are accorded the full and fair notice required by due process. Until such a plan is adopted, the full reach of Florida's long arm will not be realized.

It is therefore recommended that the last two sentences of section 47.16 (1) be amended to read as follows by adding the italicized words:

> Service of process shall be in accordance with and in the same manner as now provided for service of process upon nonresidents under the provision of section 47.30. Provided that if a foreign corporation has in the state a resident agent *designated pursuant to section 47.35*, service of process shall be had upon such resident agent as now provided by statute. *Provided further that nothing contained herein shall preclude service by any method now authorized by statute.*[27]

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26. See Mason v. Mason Prod. Co., 67 So. 2d 762 (Fla. 1953).

27. The proposed amendment would render FLA. STAT. §47.171 (1963) superfluous since a foreign corporation without a resident agent could be served through the secretary of state or by the methods provided in FLA. STAT. §47.17, and a domestic corporation without a resident agent could be served under FLA. STAT. §47.17.