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Constitutional Law: State Regulatory Jurisdiction Over Foreign Corporation Doing Business by Mail

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the judgment debtor, by bringing within twenty years an action of debt upon the judgment, thereby creating a new limitation period for another twenty years.[12]

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CONSTITUTIONAL LAW: STATE REGULATORY JURISDICTION OVER FOREIGN CORPORATION DOING BUSINESS BY MAIL

Travelers Health Association v. Virginia, 339 U.S. 643 (1950)

A Nebraska non-profit membership corporation, without offices or paid agents in Virginia, was conducting a mail-order health insurance business. Its approximately 800 members voluntarily and without compensation recommended prospective new members, whereupon the home office in Omaha mailed application blanks. Upon return of these, with the requisite fee, the applicants were considered for membership and elected thereto in Nebraska. Certificates were then mailed to them, subject to return within ten days "if not satisfactory." The corporation had no offices or designated agents in Virginia, but it did cause many sick-benefit claims to be investigated within the state.[1] The corporation refused to comply with the Virginia Blue Sky Law,[2] notably the provision requiring designation of the secretary of state to accept service of process for suits filed in Virginia. The State Corporation Commission served notice upon the corporation at its home office by registered mail. It appeared specially to contest jurisdiction. The Commission then issued an order directing it to cease and desist, until compliance with Virginia law, from further solicitation of or sales of certificates to Virginia residents by any advertisement from within or without the state by mail or otherwise. The Supreme Court of Appeals of Virginia affirmed the order and the corporation appealed. HELD, on these facts Virginia has jurisdic-

[12]Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806 (1911); Crane v. Muta, 157 Fla. 85, 26 So.2d 670 (1946); CRANDALL, FLORIDA COMMON LAW PRACTICE §177 (1928).

[1]Page 646 of the opinion.

[2]VA. CODE ANN. §§3848(47),(5),(51),(53),(55) (1942).

tion over defendant corporation for the purpose of entering an injunctive order conditioned on appointment of the secretary of state as agent for service of process.

The members of the court expressed divergent views on subsidiary procedural questions. Some regarded the appeal as premature until some action should be taken to enforce the order, and there was opposition to the assumption of jurisdiction in personam by mere service by mail in another state.[3] Seven justices met in accord on the problem of jurisdictional requisites. The following inquiry will be directed primarily toward determining what factors entered into their decision and whether traditional concepts have been significantly altered.

Justice Black, in the majority opinion, points to three possible grounds on which jurisdiction may be rested. First, the corporation was in a sense doing business in Virginia, since its transactions there were not "isolated or short-lived" but rather created "continuing obligations" between it and resident members.[4] Justice Douglas in his concurring opinion expressed the view that even isolated acts of solicitation are sufficient to confer jurisdiction, and said in addition that the activity of resident certificate holders in recommending prospects without pay rendered them corporate agents.[5]

A second circumstance noted is the availability of the Virginia courts to the corporation.[6] Any foreign plaintiff, however, can sue a defendant in Virginia, regardless of whether plaintiff is doing any business there at all. In further justification of the decision, a convenience-of-suit argument is made to the effect that if Virginia is without power to require appointment of an agent to receive service, then the only forum available to injured resident certificate holders would be Nebraska.[7] Whenever litigants are domiciled far apart, the home of one is necessarily an inconvenient forum for the other.

Other than the factors referred to above, the finding of jurisdiction is supported only by such phrases as "fair play," "substantial justice," and "minimum contacts" constituting "presence" for purposes of suit.[8]

[3]At pp. 657, 658 (dissenting opinion).

[4]At p. 648.

[5]At p. 654. *Contra:* Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573 (1910); Cooper Mfg. Co. v. Ferguson, 113 U.S. 727 (1885); St. Clair v. Cox, 106 U.S. 350 (1882); Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., 124 Fed. 259 (3d Cir. 1903).

[6]At p. 648.

[7]At pp. 648-649.

[8]At p. 648.

These expressions, at best, merely pose the problem and are so vague as to be virtually worthless as jurisdictional tests, a fact that Justice Black himself formerly recognized.[9] Perhaps the most potent factual item was the investigation in Virginia of claims for losses,[10] but the opinion, oddly enough, places very little emphasis on this.[11]

The *International Shoe*,[12] *Osborn*[13] and *Hoopeston*[14] cases are the three authorities cited as expressing controlling principles. The first is clearly inapplicable; paid employees of the corporation not only resided and did their business principally in Washington but also made a practice of renting, at the expense of the corporation, space for carrying on solicitation of orders. The *Osborn* case is equally beside the mark; the regulatory statute attacked was expressly limited to certain types of insurance companies legally authorized to do business in Virginia, and the appellant was such a company. The *Hoopeston* case, containing another of Mr. Justice Black's opinions, is more nearly in point, although appellant reciprocal insurance association had for years taken a license under the older regulatory law, was engaged to a large extent in insuring immovables located in New York against fire losses, and serviced the policies both by sending its engineers to encourage reduction of hazards and by repairing or replacing damaged property.

This being the status of the authorities cited as favorable, the trend of other decisions merits brief examination. To subject itself to jurisdiction, a foreign corporation originally had to act directly or through duly authorized officers or agents.[15] Mere solicitation of business by such agents, even when regular and continuous, was ordinarily insufficient of itself to bring the foreign employer within the terms of statutes relating to substituted service of process on foreign corpora-

[9]See his vigorous concurring opinion in International Shoe Co. v. Washington, 326 U.S. 310, 322, 324 (1945).

[10]At pp. 646, 648.

[11]Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407 (1905); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); Union Mut. Life Co. of Iowa v. Bailey, 99 Colo. 570, 64 P.2d 1267 (1937).

[12]International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[13]Osborn v. Ozlin, 310 U.S. 53 (1940).

[14]Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

[15]People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Herndon-Carter Co. v. James N. Norris, Son & Co., 224 U.S. 496 (1912); Mechanical Appliance Co. v. Castleman, 215 U.S. 437 (1910); Peterson v. Chicago, R.I. & P. Ry., 205 U.S. 364 (1907); Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); St. Clair v. Cox, 106 U.S. 350 (1882).

tions.[16] Solicitation within a state of a contract of sale subject to approval elsewhere, followed by shipment of outside goods into the state, did not in the opinion of most courts constitute doing business within the state.[17] And an insurance company receiving applications of foreign citizens and issuing policies and collecting premiums by mail was not regarded as doing business in the state of residence of the insured.[18]

The older strict view of solicitation was strongly criticized and considerably weakened prior to the instant case.[19] Today solicitation within a state plus some other activity is generally sufficient to confer jurisdiction over a foreign corporation.[20] Even solicitation by mail does not immunize the foreign corporation when this practice is coupled with an additional factor such as receiving payment via an agent in the state,[21] or sending into it an adjuster upon whom service is made.[22] Similarly, withdrawal after securing a license and doing business in the state does not destroy the jurisdiction of the courts of that state as regards suits relating to contracts made there during

[16]*E.g.*, People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); *see* Frene v. Louisville Cement Co., 134 F.2d 511, 514-517 (D.C. Cir. 1943), in which the authorities are ably marshaled.

[17]People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Boardman v. S. S. McClure Co., 123 Fed. 614 (D. Minn. 1903); Hastings v. Piper Aircraft Corp., 274 App. Div. 435, 84 N.Y.S.2d 580 (1st Dep't 1948); *see* International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945), and cases cited therein.

[18]Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196 (1937); Sasnett v. Iowa State Traveling Men's Ass'n, 90 F.2d 514 (8th Cir. 1937), *cert. denied*, 302 U.S. 711 (1937); Cronin v. Unionaid Life Ins. Co., 184 Ark. 493, 42 S.W.2d 758 (1931); Cindrich v. Indiana Travelers Assur. Co., 356 Mo. 1064, 204 S.W.2d 765 (1947); Sanders v. Columbian Prot. Ass'n, 208 S.C. 152, 37 S.E.2d 533 (1946). *Contra:* Iowa State Traveling Men's Ass'n v. Ruge, 242 Fed. 762 (8th Cir. 1917).

[19]International Shoe Co. v. Washington, 326 U.S. 310 (1945); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943).

[20]*E.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943).

[21]*E.g.*, International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Beneo v. Yesler, 12 Ore. 40, 7 Pac. 329 (1885).

[22]*E.g.*, Commercial Mut. Accident Co. v. Davis, 213 U.S. 245 (1909); Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407 (1905); Union Mut. Life Co. of Iowa v. Bailey, 99 Colo. 570, 64 P.2d 1267 (1937). *But cf.* Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923).

active operations.[23] A few cases hold that insuring risks in a state constitutes doing business there;[24] and at least one state recently upheld service on its secretary of state as sufficient in a suit against a foreign insurance company that issued by mail a policy on the life of a resident thereof. The question of doing business was brushed aside, and the court's only reason for this view on the constitutional issue was the convenience-of-suit factor.[25]

Jurisdiction over foreign corporations for the purpose of forcing foreign mail-order corporations to collect and remit use taxes has been sustained when they have stores in the taxing state;[26] and the presence of soliciting agents produces the same result.[27]

The United States Supreme Court previously held in *Minnesota Commercial Men's Association v. Benn*[28] that a foreign mail-order insurance corporation operating under circumstances almost identical to those in the instant case was not doing business for jurisdictional purposes, and that service in a suit by a policyholder could not be validly made on the secretary of the state of his residence. The instant majority opinion does not expressly overrule the *Benn* case; it merely states the facts and then casts the decision aside as no test of jurisdiction for regulatory purposes.[29] The state, as distinct from an individual litigant, is said to have a legitimate interest in the protection of its residents against risks; and the practical consequences of insurance contracts in the state where those insured reside, regardless of where the contract is technically entered into or to be performed, are in themselves sufficient to justify regulation by the state.[30]

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[23]Mutual Reserve Fund Life Ass'n v. Phelps, 190 U S. 147 (1903); *see* Hunter v. Mutual Res. Life Ins. Co., 218 U.S. 573, 589-591 (1910).

[24]Iowa State Traveling Men's Ass'n v. Ruge, 242 Fed. 762 (8th Cir. 1917); New Orleans v. Kansas City Life Ins. Co., 207 La. 745, 22 So.2d 51 (1945).

[25]White v. Indiana Travelers Assur. Co., 22 So.2d 137 (La. App. 1945) *semble,* federal review not sought.

[26]Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941).

[27]Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939).

[28]261 U.S. 140 (1923); *cf.* Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907).

[29]At p. 647.

[30]This theory emerges in the opinions, although it is not essential to the decisions, in Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943), Osborn v. Ozlin, 310 U.S. 53 (1940).

In the face of contrary precedent, the Supreme Court thus justifies its decision by stating that different purposes require different degrees of presence. But in addition a convenience-of-suit argument was stressed. As already noted, the Court was concerned with the fact that resident certificate holders might be forced to travel great distances to bring suit for any injury. This argument indicates that the next step in the *Osborn-Hoopeston-Travelers* chain may be to permit a citizen to make valid service on a foreign corporation by serving his secretary of state, or even by mailing the process. If the instant decision is regarded as extending state jurisdiction over a foreign corporation for regulatory purposes only, the citizen will still be enabled to accomplish indirectly via state regulation what he has been forbidden to achieve directly.[31] An injunction against all corporate activity through the mails, if enforceable, would effectively force the appointment of an agent for service in spite of the fact that a statute allowing service on a state officer without such appointment would be invalid against a corporation confining its operations to the mails.

The majority opinion, especially when its rationale is analyzed in relation to facts in this case that support the decision on other grounds, marks a serious inroad upon the traditional concept of state regulatory jurisdiction over foreign corporations doing business by mail. While such an extension may well be desirable from the standpoint of the public interest, the reasoning of the Court is at least questionable. The majority opinion sets the stage for judicial legislation destroying the established law of jurisdiction in fields other than insurance, and perhaps in suits by individual citizens.

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[31]See dissenting opinion of Justice Minton at p. 658: "An *in personam* judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia . . . . If that may not be done directly, it may not be done indirectly. Certainly such service cannot be justified where its purpose is to make substituted service legal in the future. These non-residents cannot be brought in through service by registered mail and compelled to designate the Secretary of the Commonwealth as their agent for service of process so that thereafter service may be effected upon such non-residents by serving the Secretary. So to hold would allow the State to pull itself up by its own bootstraps."