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## EXPANDING PERMISSIBLE BASES OF JURISDICTION IN MISSOURI: THE NEW LONG-ARM STATUTE<sup>1</sup>

### I. INTRODUCTION

The 1967 Regular Session of the 74th General Assembly enacted a new statute which provides five bases<sup>2</sup> for jurisdiction over nonresidents other than by personal service<sup>3</sup> within Missouri. The purposes of this article are to determine: (1) the scope of this statute, (2) its applicability to causes of action arising before the effective date of the statute, and (3) the relationship of the long-arm statute to other Missouri statutes which provide for substituted service on certain nonresidents. The extent to which the new long-arm statute will broaden Missouri's jurisdiction over nonresidents ultimately depends upon the court's treatment of future cases in light of past Missouri decisions<sup>4</sup> and decisions from other jurisdictions construing substantially similar statutes.<sup>5</sup> The construction of the Illinois long-arm statute

1. §§ 506.500-520, RSMo 1967 Supp.

2. § 506.500, RSMo 1967 Supp.:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section. Mo. Laws 1967, p. —, S.B. No. 130, § 1.

3. § 506.510(1), RSMo 1967 Supp.:

1. Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in section 506.500, may be made by personally serving the process upon the defendant outside this state, or upon a corporation by serving the process upon a managing officer or any person or corporation who shall be designated as a registered agent by such corporation in any of the several states, and shall have the same force and effect as though the process had been served within this state.

4. See, e.g., Anderson, *Personal Jurisdiction Over Outsiders*, 28 Mo. L. REV. 336, 368-382 (1963).

5. Ten years after the decision in *International Shoe v. Washington*, 326 U.S. 310 (1945), Illinois enacted a statute allowing jurisdiction over nonresidents by outstate service of process. Following the Illinois lead, many states have adopted long-arm statutes in the Illinois pattern. The author has placed particular emphasis on Illinois cases because the Missouri statute is drafted in nearly identical language. Other statutes have been referred to for the purpose of comparing the language used in various provisions with that used by the Missouri statute.

is particularly pertinent since the Missouri statute was consciously patterned after the Illinois statute.<sup>6</sup>

## II. THE COMMON LAW CONCEPT OF JURISDICTION OVER NONRESIDENTS

According to the doctrine of *Pennoyer v. Neff*,<sup>7</sup> due process required personal service of process within the forum state to acquire jurisdiction over a nonresident. This strict concept of "physical power" first began to give way when the Supreme Court upheld a state statute prohibiting the use of its highways by nonresidents until such nonresident appointed the secretary of state as his agent for process for any actions arising out of such use.<sup>8</sup> A later case<sup>9</sup> held that a nonresident motorist statute based on the "implied consent" of a nonresident individual to be served through the secretary of state was within the bounds of due process. In exercising jurisdiction over foreign corporations by substituted service, the courts justified their decisions in terms of the corporation's "presence" or "doing business" within the forum state.<sup>10</sup> However, an individual, unlike a corporation, could not be excluded altogether from doing business in another state without violating the privileges and immunities clause of the Constitution. Therefore, systematic or continuous activities within the forum would not sustain jurisdiction over a nonresident individual unless he was personally served in the forum state.<sup>11</sup> This theory was later repudiated<sup>12</sup> in a case upholding jurisdiction over a nonresident individual dealing in corporate securities under a statute permitting service of process on the district manager, in spite of the clear absence of authority to receive process.

The "fall of the citadel," as far as the requirements of due process in the exercise of personal jurisdiction beyond the territorial limits of the state, was heralded by the landmark case of *International Shoe Co. v. Washington*.<sup>13</sup> In order to satisfy due process, a foreign corporation need only have "minimum contacts" with the state ". . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>14</sup> *International Shoe* is significant in that the court abandoned the conceptualistic approach to in personam

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6. State Senator William B. Waters stated that: "This law was represented as being virtually identical to a similar law adopted by the State of Illinois which, it is said, has been held to be constitutional." Waters, *State Legislative Developments*, 23 J. Mo. BAR 452, 455 (Oct. 1967). See also note 22 *infra*.

7. 95 U.S. 714 (1878).

8. *Kane v. New Jersey*, 242 U.S. 160 (1916).

9. *Hess v. Pawloski*, 274 U.S. 352 (1927).

10. *E.g.*, *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914).

11. *Flexner v. Farson*, 248 U.S. 289 (1919).

12. *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

13. 326 U.S. 310 (1945).

14. *Id.* at 316. The court allowed the State of Washington to recover unpaid contributions to the state's unemployment compensation fund from a shoe manufacturer, incorporated under the laws of Delaware, who had salesmen continuously soliciting orders in the state even though the corporation neither maintained an office nor made any contracts within the state.

jurisdiction in favor of a practical approach which bases the exercise of jurisdiction on fundamental fairness and reasonableness. Rather than setting out a specific test, the case destroyed the doctrine under which the court had looked for fictional "presence" and "consent."

*International Shoe* laid the foundation for further expansion of jurisdiction over nonresidents<sup>15</sup> in subsequent cases.<sup>16</sup> *McGee v. International Life Insurance Co.*<sup>17</sup> extended the limits of due process to a single transaction in which the defendant's only contacts were mailing a reinsurance contract to its lone insured in California and receiving annual premiums from him. While it might thus seem that the significance of state boundaries has been completely abolished, substituted service of process on nonresidents has been limited: (1) by requiring that form of service which is most likely to lead to actual notice;<sup>18</sup> (2) by refusing to allow substituted service in certain actions such as alimony decrees;<sup>19</sup> and (3) by insisting that the nonresident defendant's contact with the forum state arise out of a "purposeful act."<sup>20</sup>

15. There is authority for the propositions that the "minimum contacts" rationale of *International Shoe* also applies to individuals. In *Owens v. Superior Court*, 52 Cal. 2d 822, 831, 345 P.2d 921, 924-25 (1959) Justice Traynor stated:

The rationale of the *International Shoe* case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as foreign corporations. It is now settled that jurisdiction over nonresident motorists does not rest on consent but on their activity in the state.

16. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n. v. Virginia ex rel. State Corp. Comm'n.*, 339 U.S. 643 (1950).

17. 355 U.S. 220 (1957).

18. *Schroeder v. City of New York*, 371 U.S. 208 (1962) (extending *Mullane* requirements to a condemnation proceeding); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (service by publication not binding on beneficiaries of common trust fund whose names and addresses were known); *Milliken v. Meyer*, 311 U.S. 457 (1940) (personal service binding on domiciliary while temporarily outside state); *McDonald v. Mabee*, 243 U.S. 90 (1917) (service by publication not binding on domiciliary who left state without intent to return).

19. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). The Court held that although Nevada could render a valid decree of divorce *ex parte*, the court could not extinguish the non-resident wife's right to alimony without personal service of process on her in Nevada.

20. *Hanson v. Denckla*, 357 U.S. 235 (1958). This case involved a Delaware trustee of an inter vivos trust executed in Delaware. The settlor moved to Florida eight years before her death where she corresponded with the trustee and received trust income by mail. These were the trustee's only contacts with Florida. The validity of two powers of appointment executed by the settlor was the subject of the action. The Court held that in the absence of personal service in Florida, the Delaware trustee was not bound by the proceedings. In support of its holding, the Court stated:

The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus involving the benefits and protections of its laws. *Hanson v. Denckla*, *supra* at 253.

### III. THE SCOPE OF THE LONG-ARM STATUTE

The "minimum contacts" rationale of *International Shoe* provided the impetus for statutes extending jurisdiction over nonresidents.<sup>21</sup> Undoubtedly, the purpose of the long-arm statute is to make it easier for Missouri residents to litigate their claims against outsiders in Missouri courts.<sup>22</sup> The idea is that if a nonresident performs a *purposeful act* which has a *substantial connection* with a Missouri resident, it is fair and reasonable that he answer for his conduct in the courts of this state. Exactly how far the statute authorizes Missouri courts to extend jurisdiction and yet remain consistent with the requirements of due process is an open question. Therefore, it is incumbent upon the Missouri courts to look to the interpretation of similar statutes by our sister states. Unfortunately, the effort to liberalize jurisdiction over nonresidents may be frustrated by the overly conservative interpretation given to *International Shoe* by the Missouri courts in the past.<sup>23</sup>

Before considering the scope of the five jurisdictional bases, there are some features of the statute which should be carefully considered even though they may seem obvious. As the introductory paragraph clearly states, section 506.500 applies to individuals (including their personal representatives) as well as to corporations.<sup>24</sup> Also, a person or corporation performing any one of the acts provided for alone or *through an agent* is amenable to Missouri jurisdiction by substituted service. An important requirement is that the cause of action must arise out of one of the enumerated acts.<sup>25</sup> Furthermore, the statute contemplates both residents and nonresidents. And finally, the required form of notice is *personal service outside the state*.<sup>26</sup>

#### A. The Transaction of Any Business

Although *International Shoe* destroyed fictional concepts of jurisdiction and said that "minimum contacts" would satisfy due process, the pre-long-arm Missouri cases have expressed a reluctance to accept the full breadth of the opinion.

21. *Supra* note 5.

22. Discussing the similar Illinois long-arm statute in *Haas v. Fancher Furniture Co.*, 156 F.Supp. 564, 567 (N.D. Ill. 1957), the Court said *inter alia*:  
There cannot be any doubt that it was the intention of the drafters of this section to assert the jurisdiction of the State of Illinois over nonresident defendants to the fullest extent permissible under . . . Due Process . . . and the Illinois Constitution. . . .

23. See Anderson, *supra* note 4.

24. There was some doubt as to whether the "minimum contacts" rationale applied to individuals. *Supra* note 14. § 506.500 leaves no doubt that *its* coverage extends to individuals as well as corporations.

25. § 506.500(2), RSMo 1967 Supp. Prior Missouri cases have insisted that ". . . the circumstance that the injury arose out of corporate activity within the state is an important factor in determining jurisdiction." *Simpkins v. Council Mfg. Corp.*, 332 F.2d 733, 737 (8th Cir. 1964). *Accord*, *Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963); *Pucci v. Blatz Brewing Co.*, 127 F. Supp. 747 (W.D. Mo. 1955); *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749 (Mo. 1955).

26. § 506.510(1), RSMo 1967 Supp., *supra* note 3. This type of service of process should be adequate to satisfy the requirements of due process. See cases cited, *supra* note 18; *cf.* Mo. R. Civ. P. 54.07(a), 54.08(a).

In order to be amenable to Missouri jurisdiction, the Missouri courts have insisted that a foreign corporation must be "doing business"<sup>27</sup> in the state, which requires ". . . something more than the minimum compliance with federal due process. . . ."<sup>28</sup> Jurisdiction was refused where the defendant's contacts with the state were characterized as "mere solicitation"<sup>29</sup> or only amounted to a single isolated act.<sup>30</sup> For a nonresident to be subject to Missouri jurisdiction, his activities here had to rise to the level of a continuous course of business<sup>31</sup> under the label of "solicitation plus."<sup>32</sup>

The courts themselves have not agreed as to how far they would assert jurisdiction over nonresidents in light of *International Shoe*. The United States District Court for the Western District of Missouri said that "Missouri does not assert the full constitutional breadth of process power."<sup>33</sup> Three years later, the same court stated that "Missouri has expressed a willingness to extend its jurisdiction over foreign corporations to the limits allowed within the bounds of due process."<sup>34</sup> To confuse their position even further, a subsequent opinion by the Court of Appeals for the Eighth Circuit found *no intention* by the Missouri Court to extend jurisdiction to the maximum extent allowed by due process.<sup>35</sup>

Hopefully, the phrase "transaction of any business" will be interpreted in a manner consistent with the liberal purpose of section 506.500. Illinois wasted little time in recognizing that their long-arm statute and process act reflected ". . . a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause."<sup>36</sup> Therefore, the "transaction of any business" could not be given the same restrictive interpretation as the old "doing business" cases.<sup>37</sup> Their court has upheld jurisdiction over a foreign corporation

27. See *Simpkins v. Council Mfg. Co.*, 332 F.2d 733, 737 (8th Cir. 1964). After reviewing past cases, the court concluded that Missouri still applies the "doing business" test instead of the minimal contacts standards. A later case indicated a possible change in attitude by recognizing *McGee* as ". . . an illustration of the ever-shrinking conception of the standards required for outside service of process." *State ex rel. M. Pressner & Co. v. Scott*, 387 S.W.2d 539, 543 (Mo. En Banc 1965). See also *Slivka v. Hackley*, 418 S.W.2d 89 (Mo. 1967).

28. *Jennings v. McCall Corp.*, 320 F.2d 64, 72 (8th Cir. 1963).

29. See, e.g., *Long v. Victor Products Corp.*, 297 F.2d 577 (8th Cir. 1961); *Shannon v. Brown & Williamson Tobacco Corp.*, 167 F. Supp. 493 (W.D. Mo. 1958); *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749 (Mo. 1955).

30. *Collar v. Peninsular Gas Co.*, 295 S.W.2d 88 (Mo. 1956). Plaintiff, a Kansas resident doing business in Missouri, brought this action against a Michigan corporation for malicious prosecution arising out of a prior suit initiated by the defendant in Missouri. Presumably, today, jurisdiction would be sustained under either § 506.500, RSMo 1967 Supp. or § 351.633, RSMo 1965 Supp. See text *infra* Part III C.

31. See *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. En Banc 1963).

32. *Wooster v. Trimont Mfg. Co.*, 356 Mo. 682, 203 S.W.2d 411 (1947).

33. *Pucci v. Blatz Brewing Co.*, 127 F. Supp. 747, 750 (W.D. Mo. 1955).

34. *Shannon v. Brown & Williamson Tobacco Corp.*, *supra* note 29 at 494.

35. *Simpkins v. Council Mfg. Co.*, 332 F.2d 733, 736 (8th Cir. 1964), *citing* *Morrow v. Caloric Appliance Co.*, 372 S.W.2d 41 (Mo. En Banc 1963).

36. *Nelson v. Miller*, 11 Ill.2d 378, 389, 143 N.E.2d 673, 679 (1957); see also *Berlemann v. Superior Distributing Co.*, 17 Ill. App.2d 522, 151 N.E.2d 116 (1958).

37. *Haas v. Fancher Furniture Co.*, 156 F. Supp. 564, 567 (N.D. Ill. 1957).

whose only contacts were through an agent who secured purchase orders for vending machines in Illinois.<sup>38</sup> A breach of warranty arose out of and was directly connected with defendant's activity in Illinois; and the securing of the orders by its employees plus the promise to send an employee to train plaintiff constituted sufficient "minimum contacts."<sup>39</sup> The execution of an employment contract<sup>40</sup> also satisfied the "transaction of any business" but the court, in this case, refused to exercise jurisdiction beyond the limits of due process where the nonresident's contacts were fortuitous rather than purposeful<sup>41</sup> and where the defendant's alleged contacts with the state really amounted to the unilateral activity of the plaintiffs.<sup>42</sup>

Other courts have been equally liberal in their definitions of what constitutes transacting business within the state. Even the solicitation of orders by mail has been enough to make a nonresident corporation amenable to jurisdiction by service of process outside the state.<sup>43</sup> Nonresident manufacturers who personally serviced their product<sup>44</sup> or sent salesmen to investigate a defect<sup>45</sup> were also held to answer for breach of warranty in the consumer's state in spite of the fact that sales were made through independent brokers or dealers.

Thus, even a single act has been considered the equivalent of transacting business. Such a broad definition would be a radical departure from the old "doing business" requirements in Missouri. It is doubtful whether the Missouri courts need go this far though since we have four other subsections, each of which can independently support jurisdiction and would be rendered somewhat meaningless by making "transacting of any business" an all-encompassing provision.

### B. *The Making of Any Contract*

The language of this provision seems to be the most straight-forward of all the subsections and leaves little room for speculation as to what acts would be covered thereunder. Although the execution of a single contract in Missouri may have previously been vulnerable to attack under a plea of "mere solicitation," this is no longer the case. The Illinois courts, on the other hand, have had to stretch "transacting business" since their act does not have a "making of any contract" provision.

Other long-arm process acts have a provision covering nonresidents who enter into a contract to supply services or furnish materials within the state<sup>46</sup>

38. Berlemann v. Superior Distributing Co., 17 Ill. App.2d 522, 151 N.E.2d 116 (1958).

39. *Id.* at 526, 151 N.E.2d at 118.

40. Haas v. Fancher Furniture Co., 156 F. Supp. 564 (N.D. Ill. 1957). Illinois does not provide a jurisdictional base for "the making of any contract" as does the Missouri statute.

41. Kaye-Martin v. Brooks, 267 F.2d 394 (7th Cir. 1959).

42. Orton v. Woods Oil & Gas Co., 249 F.2d 198 (7th Cir. 1957).

43. Green v. U.S. Chewing Gum Mfg. Co., 224 F.2d 369 (5th Cir. 1955).

44. Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959).

45. S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954).

46. See, e.g., MONT. R. CIV. P. 4B(1)(e) (Supp. 1965); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(2) (1962); VA. CODE ANN. § 8-81.2(a)(2) (Supp. 1964); WIS. STAT. § 262.05(5) (Supp. 1963).

or contracts to be performed in whole or in part within the state.<sup>47</sup> The emphasis there is on the location of ultimate performance of the contract rather than the place where the contract is made. A literal interpretation of that type of provision would allow enforcement of a wholly executory contract where no act has been performed in the state asserting jurisdiction. Section 506.500 contemplates that the parties perform a definite physical act in the forum by requiring that the execution of the contract takes place in Missouri.

### C. *The Commission of A Tortious Act*

The interpretation of this provision is likely to cause the most difficulty. Its vague language does not suggest the answers to several varied situations which have arisen in other jurisdictions. Yet while there are questions about the scope of the statute, the courts in other jurisdictions have not felt that there are serious due process questions arising from the assertion of jurisdiction on the basis of a single tort.

In *Nelson v. Miller*,<sup>48</sup> an Illinois plaintiff brought an action in Illinois against a Wisconsin resident whose employee allegedly injured the plaintiff while delivering a stove in Illinois. Jurisdiction over the Wisconsin resident was found not to be a denial of due process. A similar conclusion was reached in *Smyth v. Twin State Improvement Corp.*,<sup>49</sup> where plaintiff brought an action for damages allegedly caused by the defendant foreign corporation in re-roofing his house. Both cases note the availability of *forum non-conveniens*<sup>50</sup> in cases of extreme hardship but both concluded that normally the most convenient forum will be where the tortious act occurs.

In both cases discussed above, the negligent act of the nonresident defendant and the resulting injury to the plaintiff took place in the forum state. Difficult questions of construction arise when one of these takes place outside the forum state. When the negligent act or omission occurs in Missouri and the injury occurs in another state, the applicability of the statute depends upon whether the words "tortious act" mean the last act necessary to render the actor liable or the negligent act or omission which gave rise to the injury. In determining the applicable substantive law, Missouri courts define the place of tort as the place where the injury occurred.<sup>51</sup> However, the statute does not say "tort"; it say "tortious act." Furthermore, one of the leading conflicts scholars has warned that it is dangerous to assume that the definition of a word which appears in two entirely different rules has the same meaning and scope in both contexts.<sup>52</sup> The comment to the Uniform Act, which uses language similar to the Missouri statute, suggests that

47. See, e.g., MINN. STAT. § 303.13(3) (Supp. 1957); VT. STAT. tit. 12, ch. 855 (1947); see Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959).

48. 11 Ill.2d 378, 143 N.E.2d 673 (1957).

49. 116 Vt. 569, 80 A.2d 664 (1951).

50. *Nelson v. Miller*, 11 Ill.2d 378, 391, 143 N.E.2d 673, 680 (1957); *Smyth v. Twin State Improvement Corp.*, *supra* note 49 at 574, 80 A.2d at 667.

51. *Hughes Provision Co. v. LaMear Poultry & Egg Co.*, 242 S.W.2d 285 (St. L. Mo. App. 1951).

52. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 159 (1942).



jurisdiction should be sustained in this situation.<sup>53</sup> It seems probable, therefore, that the statute will be construed to confer jurisdiction where the negligent act or omission takes place in Missouri even through the resulting injury occurs elsewhere.

The converse of the above situation, *i.e.*, when the negligent act or omission takes place outside Missouri and the injury occurs within the state, has given rise to conflicting decisions. Apparently, Illinois favors a broad interpretation. In *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>54</sup> a foreign corporation which manufactured safety valves in Ohio was held subject to jurisdiction in Illinois in an action brought for injuries sustained from the explosion of a hot water heater. The safety valves were incorporated into the product which was manufactured in Pennsylvania and subsequently sold to the Illinois consumer. The court reasoned that to be tortious an act must cause injury. Therefore, the place of wrong is where the last event which is necessary to render the actor liable takes place. Notwithstanding the fact that defendant had no agent or employee in Illinois, the exercise of jurisdiction was reasonable as long as the act itself had a substantial connection with the forum state.<sup>55</sup>

*Gray* is in conflict with *Helbrigel v. Sears Roebuck & Co.*<sup>56</sup> where the federal district court held that Illinois could not assume jurisdiction over a nonresident manufacturer whose allegedly defective lawn mower was purchased by the plaintiff from Sears. The court concluded that since the acts constituting the alleged tort occurred outside Illinois and the manufacturer had abandoned all control of the article after it left the plant, a proper interpretation of the words "tortious act" required that both the act and the consequence thereof occur in Illinois.<sup>57</sup>

The conflict appears to have been resolved in *McMahon v. Boeing Airplane Co.*<sup>58</sup> Jurisdiction was sustained in an action by a stewardess who suffered injuries as a result of defendant's alleged negligence in design and construction of an aircraft. The defendant had no office in Illinois, and the aircraft was manufactured, tested, sold and delivered outside the state. The federal district court felt bound to follow Illinois law in this diversity action and thus adopted the approach taken by the Illinois Supreme Court in *Gray*.

Litigation in the area of products liability often involves a local plaintiff with a cause of action against a nonresident manufacturer. If the resident plaintiff were forced to bring his claim in the state where the defective product was manufactured, the costs and other complications could be prohibitive in many cases.<sup>59</sup>

53. Comment, UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(3) (1962); see also Wis. STAT. § 262.05(3) (Supp. 1963).

54. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

55. *Id.* at 438, 176 N.E.2d at 764.

56. 157 F. Supp. 718 (N.D. Ill. 1957).

57. *Id.* at 721.

58. 199 F. Supp. 908 (N.D. Ill. 1961).

59. "Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted." *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 443, 176 N.E.2d 761, 766 (1961).

The courts are aware of these problems and have sustained jurisdiction in a number of situations<sup>60</sup> where products were sold by nonresident manufacturers through independent dealers rather than directly or through an agent. But in finding no violation of due process, these courts have emphasized that the foreign corporations have also maintained sufficient contacts with the forum state either by continuous solicitation or sales of their product, or the reasonable expectation that their products would be used in the forum.<sup>61</sup>

In most of these cases the activity of the nonresident manufacturer was sufficient to rise to the level of "doing business." Some long-arm statutes have a separate provision for tortious acts outside the state with the further requirement that there be some reasonable connection between the state and the nonresident defendant.<sup>62</sup> There is some suggestion<sup>63</sup> that it is not necessary that this activity amount to "doing business" but is sufficient if (a) defendant regularly advertises his products or services in the state or (b) carries on some other continuous course of activity or (c) derives substantial revenue from goods supplied or services performed in the state. Nevertheless, any pre-requisite of continuous activity is necessarily more restrictive than the Illinois approach in *Gray* which only requires that the *single isolated act itself* has a substantial connection with the forum state. That event, the injury to the plaintiff, provides sufficient contact to allow service of process on the defendant outside of the forum.<sup>64</sup> The *Gray* rationale may be vulnerable to constitutional attack, however, unless the plaintiff pleads sufficient facts to demonstrate that the defendant has yielded to the jurisdiction of the forum state by purposefully performing an act there. Since it is sometimes difficult to describe defendant's conduct as a purposeful act in products liability cases, the courts may be willing to assert jurisdiction where plaintiff can at least show that the defendant could have anticipated a market for his products in the forum and is thereby causally responsible for the presence of the injuring agency.<sup>65</sup>

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60. See, e.g., *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117 (S.D. Ind. 1962) (explosion of gas hot water heater); *Becker v. General Motors*, 167 F. Supp. 164 (D. Md. 1958) (malfunction of auto bumper); *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W.2d 607 (1961) (defective door); *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959) (explosion of gas hot water heater); *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App.2d 211, 325 P.2d 21 (1958) (fire in an incubator). *But see O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963) (glass in a can of beans).

61. *Ibid.*

62. See UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(4) (1962); WIS. STAT. § 262.05(4) (Supp. 1963).

63. E.g., Comment, UNIFORM ACT § 1.03(a)(4) (1962); see also VA. CODE ANN. § 8-81.2(a)(4) (Supp. 1964).

64. *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W.2d 607 (1961); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

65. *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963) suggests that the court will not *infer* that defendant has yielded to the court's jurisdiction by a purposeful act or active participation in the market. Although defendant's motion to dismiss was granted, the court allowed plaintiff leave to amend his complaint in order to make the necessary allegations of jurisdiction.

Whether Missouri accepts *Gray* in cases involving tortious acts committed outside the state or decides to impose some additional requirement of activity within the state depends to some extent on the effect of sections 351.633, RSMo 1965 Supp., in cases involving foreign corporations. Under that statute, a foreign corporation which commits a tort, except libel and slander, *in whole or in part* in Missouri is deemed to be "doing business" for the purpose of substituted service of process. The use of the words "in whole or in part" suggests that tortious acts committed outside the state would be within the scope of the statute. The bare language of section 506.500 does not convey the same intent. But the long-arm statute does not purport to repeal or supercede any existing statutes. Presumably, therefore, in products liability cases, the clearest means of obtaining jurisdiction over the nonresident corporate manufacturer would seem to be by service under section 351.633. With respect to nonresident *individuals*, their amenability to jurisdiction under the long-arm statute depends solely upon the courts determination of the scope of "the commission of a tortious act within this state." It can be argued that since the legislature specifically used the language "in whole or in part" in a previous corporation statute, the fact that such language was omitted in the new long-arm statute evidences an intent not to assert jurisdiction over nonresident *individuals* unless the tortious act itself occurs in Missouri.

Assuming that section 351.633 does impliedly restrict the scope of section 506.500, an interesting problem may be raised concerning actions of libel and slander as the former statute specifically excludes such actions. In *WSAZ, Inc. v. Lyons*,<sup>66</sup> a West Virginia television station, broadcasting regular programs into Kentucky, was held subject to jurisdiction in Kentucky via substituted service in a libel action arising out of a news broadcast. The court believed there were substantial contacts with Kentucky based on WSAZ's solicitation and execution of contracts for the sale of advertising within Kentucky.<sup>67</sup> Another case<sup>68</sup> allowed jurisdiction over a foreign publishing corporation which had published plaintiff's pictures in magazines distributed in the forum where such pictures allegedly constituted an invasion of privacy.

A restrictive construction of section 506.500 for tortious acts covered by section 351.633 and then a liberal interpretation in cases of libel and slander or other acts not covered thereby would be anomalous. This provision of the long-arm statute should be given an independent interpretation consistent with the needs of justice in a highly mobile and technological society without distinguishing between corporations and individuals.

66. 254 F.2d 242 (6th Cir. 1958).

67. *Id.* at 247.

68. *Jenkins v. Dell Publishing Co.*, 130 F. Supp. 104 (W.D. Pa. 1955). Other courts have not been persuaded that the distribution of newspapers is enough of a purposeful act to bring the nonresident corporation within the jurisdiction of the state; see *Schmidt v. Crowell-Collier Publishing Co.*, 384 U.S. 819 (1954); *Insull v. New York World Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959); *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957).

#### D. *The Ownership, Use, or Possession of any Real Estate*

Missouri, Illinois, and the Uniform Act have limited this section to real property.<sup>69</sup> On the other hand, the Montana statute<sup>70</sup> says "any" property and Wisconsin<sup>71</sup> includes both real and personal property. Problems associated with stolen property, conditional sales, and chattel mortgages present a reason for excluding personal property as a basis of jurisdiction.<sup>72</sup>

What would be the result if a Missouri resident executes a contract for the sale of Missouri land to a California purchaser and the buyer later defaults? Is the Missouri resident entitled to a decree for specific performance in Missouri if the buyer is personally served in California? The buyer would have an equitable interest in the land, but the statute requires ownership. On the basis of in rem jurisdiction over the property, the Missouri resident could only bring an action to remove any "cloud" on his title.<sup>73</sup> The Montana statute<sup>74</sup> is broader in scope as it covers the ownership, possession, use or any interest therein of property within the state. Under that provision, an equitable interest would seem to be enough to subject a nonresident individual to the jurisdiction of the forum. Although equitable ownership may not be sufficient to acquire jurisdiction over a nonresident buyer under the Missouri counterpart, it is arguable that jurisdiction could be based on the "making of any contract" provision if the contract had been executed in Missouri.

#### E. *The Contracting to Insure any Person, Property, or Risk*

Similar provisions<sup>75</sup> appear in most long-arm statutes including Illinois, Virginia, and the Uniform Act. Under the aegis of *McGee v. International Life Ins. Co.*, such provisions should be sustained when attacked on due process grounds. Missouri emphasizes the location of the person, property, or risk at the time of contracting. Wisconsin<sup>76</sup> takes a different approach in the comparable provision of their long-arm statute. Rather than basing jurisdiction on the location of the person or thing insured at the time of contracting, Wisconsin looks to the domicile of the insured at the time when the cause of action arises.

The Wisconsin provision is more likely to effectuate the general purpose of the long-arm statutes which is to accord the residents of a particular state wider access to their own state courts in suits against nonresidents. By basing jurisdiction on the location of the person or thing insured at the time of contracting, the

69. ILL. REV. STAT. ch. 110 § 17(1)(c) (Supp. 1965); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(5) (1962).

70. MONT. R. CIV. P. 4B(1)(c) (Supp. 1965).

71. WIS. STAT. § 262.05(6) (Supp. 1963).

72. See Comment, UNIFORM ACT § 1.03(a)(5) (1962).

73. Cf. MO. R. CIV. P. 54.08(a); see generally Note, 44 IOWA L. REV. 374 (1959).

74. MONT. R. CIV. P. 4B(1)(c) (Supp. 1965).

75. ILL. REV. STAT. ch. 110 § 17(1)(d) (Supp. 1965); UNIFORM INTERNATIONAL AND INTERSTATE PROCEDURE ACT § 1.03(a)(6) (1962); VA. CODE ANN. § 8-81.2(7) (Supp. 1964).

76. WIS. STAT. § 262.05(10) (Supp. 1963).

Missouri provision, if carried to its logical extreme, could have the effect of opening the Missouri courts to nonresidents (whose person or property was in Missouri when originally insured) in their claims against foreign insurance companies.<sup>77</sup> No doubt this result was not anticipated by the drafters of the statute.

In *Washington v. Western Empire Life Ins. Co.*,<sup>78</sup> a Missouri resident sought to collect the proceeds of a life insurance policy from a Colorado insurance company on a policy sold and executed in Missouri. The agent had sold the policy without the company's authorization. The court denied jurisdiction based on substituted service on the ground that the legislature did not intend to assert jurisdiction over a defendant who was unaware that a policy had been issued. One wonders whether the same result would be reached under the long-arm statute. Even if the company is not ultimately liable, a policy was issued on the life of a Missouri resident; and, thus, the defendant would have fulfilled the literal requirements of the statute. The plaintiff should be entitled to litigate the issue of implied authority in a Missouri court. The facts necessary to allege jurisdiction should not be dependent upon the facts which must be proved to establish liability.<sup>79</sup>

#### IV. SOME SPECIAL PROBLEMS

##### A. Tolling Statutes

The long-arm statute makes no reference to the applicability of the tolling statute.<sup>80</sup> It is logical to suspend the running of the statute of limitations while the defendant is absent from the state in those actions where the defendant must be personally served in the state. But in causes of action where jurisdiction is based on the long-arm statute, the defendant, whether a resident or nonresident, will always be amenable to local jurisdiction by service of process outside the state.<sup>81</sup> Hence, there is no need to toll the statute of limitations. Since one cannot be sure of the court's approach at this point, the cautious lawyer will not rely on the existence of the tolling statute as a license to postpone timely filing of his client's claim where the defendant would be amenable to jurisdiction under the long-arm statute.

##### B. Retrospective Effect?

In characterizing their long-arm statute as merely establishing a new mode of obtaining personal jurisdiction over the defendant, the court in *Nelson v.*

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77. For example, suppose a Missouri resident purchases a policy with a Florida insurance company covering certain valuable paintings. The insured later moves to Arkansas where the paintings are damaged. Assume Arkansas does not have a long-arm statute or any insurance code which would allow jurisdiction over the Florida insurer. The insured would not have to bring his claim in Florida, the property insured was located in Missouri at the time of contracting. Therefore, the Florida insurer would be amenable to Missouri jurisdiction in an action by the Arkansas plaintiff.

78. 298 F.2d 374 (8th Cir. 1962).

79. See *Nelson v. Miller*, 11 Ill.2d 378, 391-395, 143 N.E.2d 673; 680-682 (1957).

80. § 516.200, RSMo 1959.

81. Cf. Mo. R. Civ. P. 54.07(a).

*Miller*<sup>82</sup> promptly decided that the Illinois statute would be given retrospective effect. The court concluded that the statute is procedural and just secures existing rights rather than creating a new cause of action. This same reasoning prevailed in *Owens v. Superior Court*<sup>83</sup> where it was decided that the defendant possessed no vested right to have the jurisdiction of the California court remain unchanged. In that case, the defendant was a California resident when his dog bit the plaintiff, also a California resident. When the suit was filed, defendant had become a resident of Arizona, but California then had a statute permitting personal service outside the state and the statute was applied retroactively.

By no means has there been universal agreement that these statutes are to be given retrospective effect. One argument for prospective application is the lack of unequivocal language in the statute embracing past transactions.<sup>84</sup> Another is that the statute is substantive in character since the decision to exercise jurisdiction may result in the application of forum law depending on the court's approach to choice of law.<sup>85</sup> The Missouri court in *State ex rel. Clay Equipment Corp. v. Jensen*<sup>86</sup> employed both of these arguments in holding that a statute allowing jurisdiction over a foreign corporation committing a tort within the state applied prospectively only. Because the statute used the word "commits" instead of "has committed" and the use of "shall," the court believed that ". . . the statute evidences an intention to look to the future."<sup>87</sup> The court went on to find that the statute was substantive in character:

We have heretofore held that . . . the Legislature intended the Act to be prospective in its application; and that to hold otherwise would make the section unconstitutional and void, because it would change the legal effect of past actions and would impose new duties and attach new disabilities in respect to transactions or considerations already past.<sup>88</sup>

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82. 11 Ill.2d 378, 382, 143 N.E.2d 673, 676 (1957); accord, *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957); *Haas v. Fancher Furniture Co.*, 156 F. Supp. 564 (N.D. Ill. 1957); see also *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670 (1959).

83. 52 Cal.2d 822, 345 P.2d 921 (1959).

84. See, e.g., *Nevins v. Revlon, Inc.*, 23 Conn. Supp. 314, 317, 182 A.2d 634, 636 (1962).

85. The author has not attempted to cover the companion area of choice of law. However, it is important to realize that the exercise of jurisdiction may lead to the application of local law to the particular controversy. This would be particularly true if Missouri were to embrace the local law theory of Professor Currie. See, e.g., CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1965). The Restatement approach in applying the law of the state with the most significant relationship to the parties and the occurrence would theoretically produce a uniform result regardless of the forum. See, e.g., *RESTATEMENT (SECOND), CONFLICT OF LAWS*, § 379 (Tent. Draft No. 8, 1963). For a discussion of the current Missouri position on choice of law, see *McPheeters, Choice of Laws—New Missouri Approach?*, 32 Mo. L. Rev. 392 (1967); *Northrip, Choice of Law Rules in Tort Cases—A Coming Conflict in Missouri*, 33 Mo. L. Rev. 81 (1968).

86. 363 S.W.2d 666 (Mo. En Banc 1963).

87. *Id.* at 669. See also *State ex rel. Mercantile National Bank at Dallas v. Rooney*, 402 S.W.2d 354, 360 (Mo. En Banc 1966).

88. *State ex rel. Clay Equipment Corp. v. Jensen*, 363 S.W.2d 666, 672 (Mo. En Banc 1963).

However, the provision dealing with the manner of notification in what is essentially the same statute was recently found to be procedural and was given retrospective effect.<sup>89</sup> The status of causes of action which arose before the effective date of the long-arm statute will depend on judicial pronouncement as to whether this statute is merely procedural or actually changes the legal effect of past actions. It is not likely though that a nonresident defendant would have relied on a particular court exercising jurisdiction and applying the law of that state before deciding to perform a certain act except perhaps in transactions involving contracts.<sup>90</sup>

#### V. CONCLUSION

The new long-arm statute reflects a substantial departure from the restrictive concept of personal jurisdiction set forth in *Pennoyer v. Neff*. The legislature has recognized the need to open the Missouri courts to its own residents whose rights and liabilities are affected by the activities of a complex commercial world that ignores state boundaries. The framework for extending jurisdiction over non-residents has been provided. Although the reach of the statute has not been precisely defined, the spirit of the act is self-evident. The refinements await judicial determination.

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89. *Jackman v. Century Brick Corp. of America*, 412 S.W.2d 111 (Mo. 1967). The cause of action here arose after the enactment of § 351.630, RSMo 1961 Supp. (foreign corporation committing tort in state) but before the enactment of § 351.633, RSMo 1965 Supp. which left the former unchanged except for requirements of notice in the service of process.

90. For transactions covered by the UNIFORM COMMERCIAL CODE, § 400.1-105, RSMo 1965 Supp. allows the parties to choose the applicable law in their contract as long as that state bears some reasonable relation to the transactions. If the parties so agree, the exercise of jurisdiction in a particular forum would have no bearing whatsoever on the legal rights and liabilities arising out of the transaction.