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In Personam Jurisdiction—General Appearance

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In *Socorro v. City of New Orleans*,[1] the plaintiff sued several defendants, including the City of New Orleans and its liability insurer, to recover damages for the injuries plaintiff sustained in a diving accident in Lake Pontchartrain which resulted in permanent quadraplegia. In the petition the plaintiff named DEF Insurance Company as the liability insurer of the City of New Orleans, and even though the plaintiff later learned through discovery that Angelina Casualty Company was the City's insurer, he did not amend the petition to substitute Angelina for DEF Insurance Company or serve Angelina with process. Before trial, an unsuccessful motion for summary judgment was filed on behalf of the City and Angelina, which were represented by the same attorney. After trial the court rendered a judgment against the City but refused to enter judgment against Angelina. On appeal, the court of appeal affirmed,[2] reasoning that the motion for summary judgment filed by Angelina did not constitute a general appearance subjecting it to the jurisdiction of the court because under Louisiana Code of Civil Procedure article 7,[3] one must first be a party before one can make a general

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1. 579 So. 2d 931 (La. 1991).
2. Socorro v. City of New Orleans, 561 So. 2d 739 (La. App. 4th Cir. 1990).
3. La. Code Civ. P. art. 7 provides:

A. Except as otherwise provided in this Article, a party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections thereto when, either personally or through counsel, he seeks therein any relief other than:

(1) Entry or removal of the name of an attorney as counsel of record;

(2) Extension of time within which to plead;

(3) Security for costs;

(4) Dissolution of an attachment issued on the ground of the nonresidence of the defendant; or

(5) Dismissal of the action on the ground that the court has no jurisdiction over the defendant.

B. This Article does not apply to an incompetent defendant who attempts to appear personally, or to an absent or incompetent defendant who appears through the attorney at law appointed by the court to represent him.

C. When a defendant files a declinatory exception which includes a prayer for the dismissal of the action on the ground that the court has no jurisdiction over him, the pleading of other objections therein, the filing of the dilatory and peremptory exceptions therewith, or the filing of an answer therewith when required by law, does not constitute a general appearance.

appearance, and Angelina was not a party because it had not been named in the petition.[4] The supreme court reversed, rejecting the appellate court's reading of Article 7 as too strict. The supreme court argued that named parties who had not been served could subject themselves to jurisdiction by making a general appearance, and the court pointed out that unnamed parties, such as intervenors, could also subject themselves to the jurisdiction of the court without having been named or served with process.[5] Furthermore, once Angelina filed the motion it was clear that it was the DEF Insurance Company named in the petition, and, even more importantly, Angelina was not prejudiced or adversely affected in any way because it was represented by the same attorney who represented the City and had taken the same position on liability as had been taken by the City.

This case is a good example of the application of the principle expressed in Article 5051 that the articles of the Code are to be construed liberally and that rules of procedure are not an end in themselves. The issues of liability and damages were thoroughly litigated between the plaintiff, the City and the City's insurer. The identity of the insurer was known and it fully participated in the litigation through an attorney retained to represent its interests. To hold that Angelina cannot be named in the judgment because it was not named in the petition would elevate the technicalities of pleading over the substance of the trial. Furthermore, it would result in a needless prolongation of the proceedings while the pleadings were amended to name Angelina as defendant because the result would be the same after amendment since Angelina's insured had been found liable.

In *deReyes v. Marine Management and Consulting, Ltd.*,[6] the Louisiana Supreme Court considered whether it would violate the due process clause of the fourteenth amendment for Louisiana to assert *in personam* jurisdiction over a Hong Kong corporation which maintained a regional office in New Orleans in an action for the wrongful death of a Honduran seaman who had died on board a Panamanian ship in international waters off the coast of Oregon. The original due process test for *in personam* jurisdiction, stated by the Supreme Court in *International Shoe Co. v. Washington*,[7] is that the nonresident defendant must have certain minimum contacts such that the assertion of jurisdiction does not offend traditional notions of fair play and substantial justice.[8] This test has evolved into two separate but related components: "minimum

4. The court of appeal cited Black's Law Dictionary (5th ed. 1979) for the definition of "party."

5. La. Code Civ. P. arts. 1091, 1093.

6. 586 So. 2d 103 (La. 1991).

7. 326 U.S. 310, 66 S. Ct. 154 (1945).

8. Id. at 320, 66 S. Ct. at 160.

contacts" and "fairness."[9] The first component—minimum contacts—examines the defendant's relationship with the forum, and the second—fairness—balances the interest of the forum, the interest of the plaintiff, the burden on the defendant, and the interest of the interstate judicial system in the efficient resolution of controversies and in the furtherance of substantive policies.[10] In *deReyes* the first issue the Louisiana Supreme Court had to resolve was whether this two-pronged test applied in cases where the cause of action was unrelated to the defendant's activity in the forum (general jurisdiction) or whether the sole inquiry was whether the defendant had systematic and continuous contacts with the forum. The court could not find a clear answer in the two United States Supreme Court cases that dealt with the assertion of jurisdiction over a cause of action unrelated to the defendant's contacts with the forum. The first of those cases, *Perkins v. Benguet Consolidated Mining Co.*,[11] held that the defendant's business activity in Ohio was sufficiently substantial and of such a nature to support jurisdiction over a cause of action unrelated to that activity, but that case was decided before the development of the separate "fairness" component of the test. In the second case, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[12] jurisdiction was denied because the defendant did not have a systematic and continuous relationship with the forum. Furthermore, the Supreme Court in *International Shoe* recognized that there had been cases in which continuous corporate operations within a state were thought so substantial and of such a nature as to support jurisdiction over those corporations on causes of action unrelated to those activities.[13] These cases could be read to support the position that when the cause of action is unrelated to forum activity, the only jurisdictional inquiry is whether the defendant had engaged in continuous and systematic activity in the forum. The Louisiana Supreme Court in *deReyes* held that the same "minimum contacts—fairness" test which applied in cases of specific jurisdiction (causes of action arising out of forum-related activity) should also govern in cases of general jurisdiction (causes of action unrelated to forum activity); and, it is submitted that the court reached the correct result on this issue.

When the Supreme Court decided *International Shoe* it stated that the real question in *in personam* jurisdiction cases was not whether the

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9. Asahi Metal Indus. Co. v. Superior Ct. of California, 480 U.S. 102, 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980).

10. *Asahi*, 480 U.S. 102, 107 S. Ct. 1026; *Burger King*, 471 U.S. 462, 105 S. Ct. 2174; *World-Wide Volkswagen*, 444 U.S. 286, 100 S. Ct. 559.

11. 342 U.S. 437, 72 S. Ct. 413 (1950).

12. 466 U.S. 408, 104 S. Ct. 1868 (1984).

13. International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S. Ct. 154, 159 (1945).

nonresident corporation was "doing business" or was "present," because that was merely to beg the question, as such phrases merely expressed activities that were sufficient to satisfy due process,[14] but did not make it clear why those activities were sufficient. Instead, the court declared that the inquiry should be to measure the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[15] While it is clear that a state may not assert jurisdiction over a defendant with which it has no contacts, the litigation-provoking question is how much contact is enough. Later cases have made this clearer by emphasizing that the due process clause protects a defendant's liberty interest—that the defendant's connection with the forum must be deliberate and purposeful and must give him fair warning that he could expect to be haled into the forum as a result of his activity.[16] This factor applies in all assertions of jurisdiction—specific and general—because the liberty interest of the defendant is the same in each case. But even if there is sufficient contact to satisfy this part of the "minimum contact" test, there is still an examination of the fairness factors. Sometimes these factors will convince a court that the assertion of jurisdiction would be unfair even if the defendant has the requisite minimum contact. For example, in *Asahi Metal Industry Co. v. Superior Court of California*,[17] the United States Supreme Court held that the assertion of jurisdiction by California over a Japanese corporation would violate due process even though there were minimum contacts. In reaching its decision the court found that California had no interest in the claim for indemnification between Japanese and Taiwanese corporations even though the accident occurred in California, that the plaintiff had no interest because his claim had been settled, and that the burden on the defendant was heavy. This case strongly suggests that the same fairness factors are also applicable in a case of general jurisdiction. If the cause of action is not connected with the forum and the plaintiff is not a resident of the forum, then the same lack of plaintiff and forum interest plus the same heavy burden on the defendant could support a similar finding that the assertion of jurisdiction is unfair even if the defendant has deliberate beneficial contacts with the forum as in *Asahi*. Furthermore, if the court has held that in cases of general jurisdiction the only test was whether the defendant was doing continuous and systematic business, then the court would have been doing the same thing that courts using "presence"

14. Id. at 316, 66 S. Ct. at 158.

15. Id. at 319, 66 S. Ct. at 160.

16. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980).

17. 480 U.S. 102, 107 S. Ct. 1026 (1987).

and "doing business" had been doing, that is, asking the wrong question. The question is not whether the defendant is doing continuous and systematic business, but whether it would offend traditional notions of fair play and substantial justice to assert jurisdiction over the nonresident defendant.[18]

In applying the two part "minimum contacts" and "fairness" test the Louisiana Supreme Court, in a five to two decision, reversed the court of appeal on the grounds that first, the court of appeal had misapplied the fairness factors and had failed to consider all of the pertinent evidence and inferences that favored the plaintiff, and, second, the appellate court had erred in overlooking that the burden of proof had shifted to the defendant and that the defendant had failed to discharge that burden. It is the second point that should be explored because it may indicate a significant change in the law.

According to the majority opinion, once the plaintiff has demonstrated that the defendant has minimum contacts with the forum, there is a presumption that the assertion of jurisdiction is reasonable, and the burden of production and persuasion shifts to the defendant to overcome this presumption by showing that the assertion of jurisdiction is unreasonable. Thus the court seems to be changing the generally understood rule that the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant[19] and also seems to be suggesting that this is required by the nature of the two part test for jurisdiction. But in *Burger King*,[20] the United States Supreme Court in describing the application of the due process test stated, "Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[21] This does not in any way suggest the establishment of a presumption in favor of jurisdiction once minimum contacts have been established, nor does it suggest a shifting of the burden of proof. Certainly it is reasonable to shift to the defendant the burden of producing evidence on the issue of how burdensome litigation in the forum would be for the defendant because this evidence would be most readily available to that party, but that is very different from establishing a presumption of jurisdiction which the defendant must overcome by convincing evidence and from

18. See Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 2584 (1977): "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."

19. Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc., 785 F.2d 1330, 1332 (5th Cir. 1986).

20. 471 U.S. 462, 105 S. Ct. 2174 (1985).

21. Id. at 476, 105 S. Ct. at 2184.

ruling in favor of jurisdiction because the defendant failed to carry that burden of proof as the court did in *deReyes*.

Venue

In *Fox v. Board of Supervisors*,[22] a student at St. Olaf's College in Minnesota sued his college, Louisiana State University (L.S.U.), and its insurers in Louisiana state court to recover for injuries he had sustained during a rugby match played at L.S.U. The trial court granted summary judgment in favor of L.S.U. and its insurer and dismissed St. Olaf and its insurers on an exception of lack of personal jurisdiction. The court of appeal affirmed as to L.S.U. and St. Olaf, but as to St. Olaf's insurers, the court ruled that they were subject to personal jurisdiction because they were doing business in Louisiana. However, the court dismissed the action against them on *forum non conveniens* grounds.[23] This decision created a split in the circuits on the existence of *forum non conveniens* between the first circuit in *Fox* and the fifth circuit in *Kassapas v. Akron Shipping Agency, Inc.*[24] The Louisiana Supreme Court granted plaintiff's application for writs.[25]

The supreme court affirmed the summary judgment in favor of L.S.U. and its insurer and affirmed the dismissal of St. Olaf on lack of personal jurisdiction but reversed the dismissal of St. Olaf's insurers on *forum non conveniens* grounds. In tracing the history of the doctrine of *forum non conveniens* the court noted that the doctrine had been consistently applied in Louisiana.[26] The change in application began when Louisiana courts held that they had no authority to transfer a case from one Louisiana court of proper venue to another Louisiana court of proper venue.[27] To cure this problem the legislature enacted Louisiana Code of Civil Procedure article 123.[28] Although the legislation

22. 576 So. 2d 978 (La. 1991).

23. *Fox*, 559 So. 2d 850 (La. App. 1st Cir. 1990).

24. 485 So. 2d 565 (La. App. 5th Cir. 1986).

25. *Fox*, 565 So. 2d 930 (La. 1990).

26. Stewart v. Litchenberg, 148 La. 195, 86 So. 734 (1920); Smith v. Globe Indemnity Co., 243 So. 2d 882 (La. App. 1st Cir. 1971); Union City Transfer v. Fields, 199 So. 206 (La. App. 1st Cir. 1940).

27. Chaney v. Williher, 205 So. 2d 770 (La. App. 1st Cir. 1967); Trahan v. Phoenix Ins. Co., 200 So. 2d 118 (La. App. 1st Cir. 1967).

28. La. Code Civ. P. art. 123.

> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.

dealt only with intrastate change of venue, it was used by the court in *Kassapas*[29] to conclude that the authority of Louisiana courts to dismiss cases must also be based on legislation and that courts did not have inherent authority to dismiss a case on *forum non conveniens* grounds. In 1988, the legislature amended Article 123 to authorize dismissal of certain federal causes of action.[30] The supreme court examined the application of the doctrine of *forum non conveniens* in other jurisdictions and found that only a small minority of states refused to apply it. Nevertheless, the court concluded that Louisiana courts do not have the inherent authority to dismiss a case on *forum non conveniens* grounds. The only authority to do so is found in Article 123, and since that article did not authorize dismissal under the facts in *Fox*, the judgment dismissing the action against St. Olaf's insurers was reversed.

This decision raises some important questions. The first is whether Article 123 is constitutional. Under this article the only cases that would be dismissed are cases arising under federal law. Thus in cases presenting identical facts except that one case is based on federal law and the other on state law, a Louisiana court could dismiss the federal claim but not the state claim. This raises the argument that Louisiana is discriminating against the federal claim; this the United States Supreme Court has held a state may not do.[31]

A further question is whether the legislature should authorize courts to dismiss a case on *forum non conveniens* grounds. One argument against such a doctrine is that a defendant is adequately protected by the due process limitations on *in personam* jurisdiction. The problem with this argument is that due process and *forum non conveniens* focus

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29. 485 So. 2d at 566.

30. La. Code Civ. P. art. 123:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
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> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 or federal maritime law.

31. McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 54 S. Ct. 690 (1934).

on different considerations. Due process is concerned with the fairness of requiring a defendant to litigate in a particular forum, whereas the doctrine *forum non conveniens* assumes that there is more than one forum with jurisdiction over the defendant (and therefore a "fair" forum) and seeks to determine if another forum would be a more convenient place of trial. Such a doctrine is especially needed in cases of general jurisdiction where the cause of action arises elsewhere and the defendant is subject to jurisdiction because it is licensed to do business in the state, or, as in *Burnham v. Superior Court of California*,[32] the defendant is an individual who was served with process while in the state. In these cases, factors such as the location of witnesses and other evidence and familiarity with the law to be applied may make the place where the cause of action arose a more convenient place for trial. In such instances, Louisiana courts should have the authority to apply the principles of *forum non conveniens*.

32. 495 U.S. 604, 110 S. Ct. 2105 (1990).