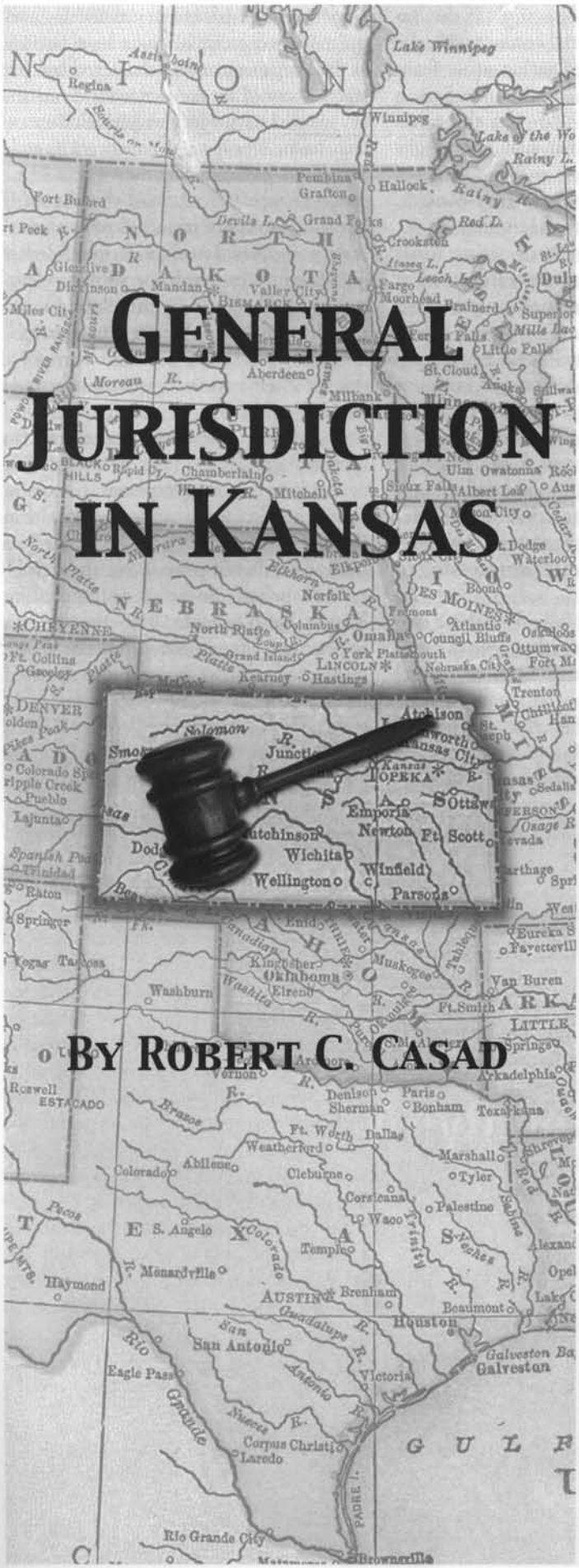

General Jurisdiction in Kansas

By Robert C. Casad

I. General Subject Matter Jurisdiction

The term "general jurisdiction" has at least two different meanings. In the context of subject matter jurisdiction, general jurisdiction means that the court has subject matter jurisdiction over any kind of case except those cases that are expressly excluded, or cases over which some other court has exclusive jurisdiction.[1] "General subject matter jurisdiction" is the opposite of "limited jurisdiction." The latter term means that the court can hear only those cases that it has been expressly empowered to hear. The Kansas district courts, thus, are courts of general subject matter jurisdiction. The federal district courts, on the other hand, are courts of limited jurisdiction. A Kansas district court would have subject matter jurisdiction over a suit between a citizen of Japan against a citizen of Saudi Arabia concerning a tort committed in Brazil. A federal court would not have subject matter jurisdiction over such a case, however, because federal courts are not empowered to entertain a suit between two aliens that does not arise out of federal law (except for some admiralty claims).

A Kansas district court could not actually entertain such a case, however, unless it also had "personal jurisdiction" over the defendant. That would probably be impossible in the hypothetical case, unless the Saudi Arabian defendant consented to jurisdiction in Kansas, or had very extensive "presence" in Kansas. In other words, the defendant would have to be subject to what we now call "general personal jurisdiction" in Kansas.

II. General Personal Jurisdiction

The term "general personal jurisdiction" is of fairly recent origin. Its usage began with a highly influential article by professors Arthur T. von Mehren and Donald T. Trautman in 1966.[2] "General jurisdiction," in this sense, means personal jurisdiction to entertain a suit against a defendant that does not arise from the defendant's connection with the forum state. It is contrasted to "specific jurisdiction," which would support a suit against the defendant only if the cause of action arose from the defendant's contact with the forum state.

Before the landmark decision in *International Shoe v. State of Washington*,[3] the distinction between what we now call specific and general personal jurisdiction was not part of our general theory of jurisdiction. Under the territorial power theory of jurisdiction reflected in *Pennoyer* v. *Neff*,[4] personal jurisdiction meant general jurisdiction. Only three bases for personal jurisdiction were possible: consent, domicile, or physical presence. The state of the defendant's domicile or residence could exercise jurisdiction over him or her for any cause of action. Likewise if the defendant consented to jurisdiction, or if the defendant could be found by a process server

(continued on next page)

FOOTNOTES

1. *See* Robert C. Casad, Jurisdiction and Forum Selection, 2d ed., 3:01 (1999).
2. Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966).
3. 326 U.S. 310 (1945).
4. 95 U.S. 714 (1878).

while physically present in the state, he or she could be sued there regardless of where the cause of action arose.

Some special statutes, the nonresident motorist statutes, could provide personal jurisdiction over a nonconsenting nonresident even without personal service in the state for causes of action arising from the operation of a motor vehicle in the state.[5] Widespread recognition of the distinction between what we now call general and specific personal jurisdiction really began with *International Shoe*. There, in attempting to determine the limits on state court jurisdiction imposed by the 14th Amendment's due process clause, the U.S. Supreme Court adopted the current "minimum contacts" test as a limit on a state court's ability to subject a defendant to its authority. In the course of the majority opinion, the Court re-examined a great many prior decisions dealing with due process and personal jurisdiction over nonresidents. The opinion organized those older cases into four categories. The distinction between the categories turned on two factors: the extent of the defendant's contact with the state and the geographical source of the cause of action. If the defendant had substantial contact with the state and the cause of action arose from that contact, the Court said, jurisdiction has always been upheld. On the other hand, if the defendant had only slight contact with the state and the cause of action did not arise from that contact, jurisdiction has always been denied.

But where the cause of action arose from the defendant's in-state contact, even if the defendant had only limited contact with the state, jurisdiction had sometimes been upheld and sometimes not. And where the defendant's contacts with the state were substantial, continuous and systematic, jurisdiction was sometimes upheld even if the cause of action did not arise from the defendant's contact with the state. This fourth category is what von Mehren and Trautman used the term "general jurisdiction" to describe.

In analyzing cases falling in these two indefinite categories, the courts were directed to weigh and balance several factors to determine whether the defendant's contacts satisfied the "minimum" necessary for "specific jurisdiction" or whether they were sufficiently "substantial, systematic, and continuous" to satisfy the constitutional standard for "general jurisdiction."[6]

III. Doing Business Statutes

In most of the cases the Supreme Court looked at in framing its decision in *International Shoe*, the ostensible question the courts were looking at was whether the defendant's activity in the state constituted "doing business" under statutes designed to permit the exercise of jurisdiction over foreign corporations doing business in the state. These "doing business" statutes were enacted at a time when *Pennoyer* power theory of jurisdiction prevailed.

Fitting jurisdiction over corporations into that theory, which recognized only consent, domicile, or physical presence as permissible bases for jurisdiction, required the exercise of some legal fiction. If the corporation was chartered by that state, it could be considered a domiciliary, and thus subject to jurisdiction on that basis. If a foreign corporation consented to jurisdiction, then it could be subject to jurisdiction on that basis. If the foreign corporation did not consent, however, the only other permissible basis was physical presence. But a corporation, unlike an individual human, has no physical body. Where can a corporation be physically present? To resolve this problem, state legislatures enacted statutes requiring all foreign corporations "doing business" in the state to formally qualify. As part of the qualification process, the corporation was required to designate some agent within the state who would be authorized to receive service of process on the corporation's behalf. Some states, including Kansas,[7] also required the corporations to consent to jurisdiction based on service of process on some designated public official, usually the secretary of state. The fact that the "consent" thus obtained was not really a product of the corporation's own decision did not seem to trouble anyone.

A foreign corporation could not avoid jurisdiction by simply refusing or failing to qualify. Other statutes treated the corporation's activity in "doing business" in the state as manifesting the corporation's "presence" there. Such statutes permitted the exercise of jurisdiction over such nonqualifying foreign corporations by service in the state on some designated official or agent. Usually these "doing business" statutes did not limit jurisdiction to cases arising from the corporation's in-state activity.

Our current Kansas statutes authorizing jurisdiction over qualifying corporations[8] do not expressly limit jurisdiction to causes of action arising within the state, and the Kansas Supreme Court has now held that they are not so

5. The nonresident motorist statutes were early instances of specific jurisdiction.

6. In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 note 10, (1980), the Supreme Court listed five interests to consider: (1) the burden on the defendant, (2) forum's interest in adjudicating the case, (3) plaintiff's interest in obtaining convenient and effective relief, (4) interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of all states in advancing fundamental substantive policies.

7. K.S.A 17-7301; K.S.A 40-218 (insurance companies).

8. *Id.*

limited.[9] Our statute authorizing jurisdiction over nonqualifying corporations expressly states that it is not limited to causes of action that arise within the state. It applies to any cause of action that arose while the corporation was doing business here, i.e. a cause of action that arose while the corporation was "present" in the state.[10] So corporations, domestic or foreign, qualifying or nonqualifying were subject to general personal jurisdiction in Kansas if they were "doing business" here.

There have been many judicial decisions concerning the meaning of "doing business" in these statutes. Precise definition of the term was not possible, but one thing was clear: "doing business" required some systematic, ongoing, business activity by the corporation's agents in the state. A single transaction was not "doing business," even if the cause of action arose from that transaction. Moreover, mere solicitation of business for interstate commerce, even if continuous and ongoing, could not be "doing business."[11] Cases had held that extending a state's jurisdiction over a foreign corporation in such mere solicitation cases would be a denial of due process of law.

The issue actually argued in the *International Shoe* case was whether the corporation's activity in the state of Washington constituted "doing business" under the Washington statute and if so, whether it would be a denial of due process to extend that state's jurisdiction over a corporation whose activity in the state was solicitation for interstate commerce. The Court's solution to the problem was to strip away the legal fictions of "consent" and "presence" and to frame a new theory of jurisdiction. The foundation of jurisdiction is not the state's coercive power, as had previously been believed, but "fundamental fairness."

To determine whether it is fair for a state to exercise jurisdiction in a given case, a court must look at the interests that are at stake in the issue: the interests of the plaintiff and the defendant, the interest of overall litigational convenience, the interests of the states involved, etc. It would be unfair to subject a defendant to jurisdiction in a state where the defendant had no contact. There had to be at least a "minimum" of contact or it would be a denial of due process. Defining that minimum required the interest balancing referred to above. If the cause of action arose from the contact, a single transaction might be enough, even if that contact was solicitation for interstate commerce. If the cause of action did not arise from the defendant's in-state contact, however, much more connection between the defendant and the state was required. The Court noted that if the defendant's contact was substantial, systematic, and continuous, it would not necessarily be a denial of due process to subject that defendant to the state's jurisdiction even if the cause of action did not arise in the state. The Supreme Court, thus, declared that what

9. *Merriman v. Crompton Corp.*, 282 Kan. ___, 146 P.3d 162 (2006), decided Nov. 9, 2006. *See* discussion below at note 23.

10. K.S.A 17-7307(c).

11. *See* 1 CASAD AND RICHMAN, JURISDICTION IN CIVIL ACTIONS, 3d ed., 432-433, n. 455 (1998).

we now call general personal jurisdiction over nonconsenting nonresidents could be constitutional.[12]

IV. The Long-Arm Statutes

The somewhat delayed reaction of the states to the *International Shoe* decision was to enact some new statutes authorizing the exercise of jurisdiction over nonconsenting nonresidents even if they were not found in the state by a process server. Theses statutes, authorized service of a state court's process to be made outside the state in certain circumstances. These statutes started appearing in the middle 1950s, nearly 10 years after *International Shoe*. Our Kansas "long-arm statute" was first adopted in 1963, 18 years after *International Shoe*. The statute authorized the exercise of specific personal jurisdiction over defendants that might have only a single contact with Kansas in six specifically described types of cases.[13] Process could be served on the defendant outside the state in such cases.

The Kansas statute was still phrased in terms that would be consistent with the older coercive power theory of jurisdiction. It declared that persons who did any of the enumerated acts thereby "submitted" the person; and if the person was an individual, the individual's personal representative, to jurisdiction for any cause of action arising from the doing of the acts. The basis for jurisdiction was thus described in terms of consent (submission): a fictitious implied consent.

In describing the effect of service outside the state, the statute declared that if such service was made "upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of service of process within this state; otherwise it shall have the force and effect of service by publication."[14] The statute thus kept alive the language of the older theory: presence, consent, and domicile were the permissible bases, but the consent was implied from the doing of the acts.

The reference to the distinction between effect of service of process within the state and service of publication meant merely that the service would authorize *in personam* jurisdiction over domiciliaries or persons who had submitted to jurisdiction, but in any other situation it would allow only *in rem* jurisdiction over any property the defendant might have within the state. At that time lawyers and judges did not analyze the basis element of jurisdiction and the process of invoking it separately as we do today. The two concepts were commingled. Scarcely anyone believed in 1963 that *in personam* jurisdiction could be obtained by publication service, but we now know that *in personam* jurisdiction can constitutionally be obtained that way if no address for the defendant to which mail can be sent is discoverable with reasonable diligence.[15]

One of the acts that could lead to specific jurisdiction under the original 1963 statute (and still today) was "transaction of any business." This did not mean the same thing as "doing business" under the older statutes. Ongoing activity was required for "doing business," but "transaction of business" could be a single act.

The long-arm statute specifically declared, "Nothing declared in this section limits or affects the right to serve any process by any other manner provided by law."[16] Thus, it left unimpaired the right to serve process on foreign corporations under the older "doing business" statutes. The long-arm statute applied to corporations as well as to individuals, so two different methods of serving process on foreign corporations were available in some cases. They could be served out-of-state under the long-arm statute if the case arose from one of the now 11 enumerated acts, or they could be served in the state in accordance with the "doing business" statutes.

Although the long-arm statute was expressly limited to cases of specific jurisdiction, where the cause of action arose from the enumerated act, the "doing business" statutes, as we have seen, were not limited to specific jurisdiction cases. In a proper case, they would permit the exercise of general jurisdiction over the corporation for a cause of action that did not arise within the state. A plaintiff might obtain general jurisdiction over a corporation by service inside the state under the doing business statutes, but such jurisdiction could not be obtained by service of process outside the state under the long-arm statute. This presented an anomaly. If the corporation was subject to general jurisdiction in the state, why should it make any difference how the process was served? The problem was made more difficult than necessary by a line of cases, mostly by Kansas federal courts, which took the position that the Kansas long-arm statute extended jurisdiction to the outer limits of due process, and, accordingly, that the only question in long-arm cases was the constitutional one.[17]

12. *See Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).
13. The first statute, L. 1963, ch. 303, 60-308, authorized specific jurisdiction for cases arising out of the conduct described in what is now subsections 1,2,3,4,7 and 8 of K.S.A 60-308(b).
14. K.S.A 60-308(a).
15. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).
16. K.S.A. 60-308(d).
17. *See, e.g., Luc v. Krause Werk GMBH*, 289 F. Supp. 2d 1282 (D. Kan. 2003); *Cole v. American Family Mut. Ins. Co.* 333 F. Supp. 2d 1038 (D. Kan 2004); *Multi-Media Int'l LLC v. Promag Retail Services LLC*, 343 F. Supp. 2d 1024 (D. Kan. 2004).

This "one-step" approach derives from some language in an early Kansas Supreme Court decision.[18] This approach ignores the specific terms of the long-arm statute. The Kansas Supreme Court, in *Kluin v. American Suzuki Motor Corp.*[19] denounced the "one-step" approach. In the course of the opinion, the court noted that the statute does not extend jurisdiction to the limits of due process. Due process would allow the exercise of general jurisdiction, whereas our long-arm statute is expressly limited to specific jurisdiction cases. What the court in the earlier case meant was simply that the terms of the long-arm statute are to be broadly interpreted, not that those terms were to be ignored.

The Court in the *Kluin* case noted that general jurisdiction might be available under one of the "doing business" statutes, but not under the long-arm statute. Nevertheless, some courts, focusing on the statement in *Kluin* that the long-arm statute does not authorize general jurisdiction, took the position that Kansas does not recognize general jurisdiction at all.[20] That position conflicted with the cases that had upheld general jurisdiction under the "doing business" statutes.[21]

To resolve these conflicts and to eliminate the anomaly posed by making the availability of general jurisdiction depend on whether process was served in the state or outside the state, the Kansas Judicial Council recommended a change in the long-arm statute that would expressly authorize general jurisdiction in cases where that would be consistent with the 14th Amendment due process clause. The resulting statute became effective July 1, 2006. As enacted it is somewhat different from the Judicial Council's version.[22]

K.S.A. 60-308(a)(1) was amended to read: "Service of process may be made on any party outside the state. If upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, *such service shall provide personal jurisdiction over that party; otherwise it shall provide in rem jurisdiction over specifically identified property that person may have in the state.*" The italicized portion replaces the following language in the previous section: "it shall have the force and effect of service of process within this state; otherwise it shall have the force and effect of service by publication." The change was needed to bring the statutory language up to contemporary jurisdictional usage. The older language was that of the "power theory" of *Pennoyer*, which required personal service in the state for personal jurisdiction over nonconsenting nonresidents. What the statute really meant was that out-of-state service could provide personal jurisdiction over residents and also nonresidents in certain circumstances. The "circumstances" were defined in subsection (b), but the statute retained the older explanation, casting the circumstances in the language of constructive consent. The new statute retains the constructive consent language but eliminates the unnecessary reference to "service within the state."

Similarly, the older reference to the effect of service on one who had not "submitted" was expressed in terms of "service by publication." In 1963, hardly anyone would have believed that service by publication could have produced anything but *in rem* jurisdiction over Kansas-based property in the case of nonresidents. The present language simply eliminates the unnecessary reference to service by publication.

K.S.A. 60-308(b)(b) is now divided into subsections. Subsection (1) retains all of the references to specific acts that can subject a nonresident to specific jurisdiction. Subsection (2) is new and provides as follows: "A person may be considered to have submitted to the jurisdiction of the courts of this state for a cause of action, which did not arise in this state if substantial, continuous and systematic contact with the state is established that would support jurisdiction consistent with the Constitution of the U.S. and of this state."

Thus, K.S.A 60-308(b)(1) authorizes specific jurisdiction for purposes of causes of action arising from the enumerated contacts with the state. K.S.A. 60-308(b)(2) authorizes general jurisdiction for causes of action not arising within the state if the defendant has substantial, continuous, and systematic contact with the state.

K.S.A. 60-308(c) preserves the right to serve process in any other manner provided by law, specifically referring to K.S.A. 17-7301 (service on qualifying foreign corporations generally), 17-7307 (service on nonqualifying foreign corporations) and 40-218 (service on foreign insurance companies).

The statute as enacted contains an unintended anomaly. It allows for specific jurisdiction over parties whose in-state contact gives rise to one of the causes of action enumerated in 60-308(b)(1). It allows general jurisdiction for causes of action that did not arise in the state if the defendant has substantial, con-

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18. *Woodring v. Hall.* 200 Kan. 597, 605, 438 P.2d 135 (1968).

19. 274 Kan. 888, 568 P.2d 829 (2002).

20. *See, e.g.,* the Court of Appeals opinion in *Merriman v. Crompton Corp.*, 133 P.3d 834 (unpublished in Kan. App. 2d) (2005); *rev'd* 282 Kan. ____, 146 P.3d 162 (2006).

21. *See e.g. Novak v. Mut. of Omaha Ins. Co.*, 29 Kan. App. 2d 526, 28 P.3d 1033, *rev. denied*, 272 Kan. 1419 (2001).

22. L. 2006, ch. 49.

tinuous, and systematic contact with the state. But what if the defendant has substantial, continuous, and systematic contact and the cause of action arose within the state, but not from one of the enumerated causes? The statute seems to exclude jurisdiction in such a case, but that result would be make no sense. This anomaly was not a part of the statute as proposed by the Judicial Council.

Most courts would probably construe the statute to avoid the anomaly if a case like the one last suggested should arise. That is the way courts have treated a similar anomaly in Rules 13(a) and (b) of the Federal Rules of Civil Procedure, which also appears in K.S.A. 60-213(a) and (b). Under Rule 13(a) (compulsory counterclaims), a pleader must plead as a counterclaim any claim that it has against an opposing party that arose out of the same transaction as the opposing party's claim. There are, however, a few exceptions, where counterclaims arising out of the same transaction are not compulsory. Rule 13(b) (permissive counterclaims) declares that "[a] pleading may state as a counterclaim any claim against an opposing party *not* arising out of the same transaction," etc. But what of a claim that *does arise* out of the same transaction but is not a compulsory counterclaim? A strict reading of the text would indicate that such a claim would neither be compulsory since it falls within one of the exceptions to Rule 13(a), nor would it be permissive, since it does arise out of the same transaction. That result, however, would make no sense, so most courts have ruled that such counterclaims are permissive, despite the language of Rule 13(b).

Following that approach, courts should rule that jurisdiction should be proper over any party that has the constitutionally requisite substantial connection to Kansas, regardless of where the cause of action arose. However, to be safe, the Legislature might consider amending K.S.A. 60-308(b)(2) to read as follows:

> A person may be considered to have submitted to the jurisdiction of the courts of this state if substantial, continuous and systematic contact with this state is established that would support jurisdiction consistent with the Constitution of the United States and of this state, whether or not the cause of action arose in this state.

V. *Merriman v. Crompton Corp.*

On Nov. 9, 2006, the Kansas Supreme Court announced its decision in *Merriman v. Crompton Corp.*[23] The case was a class action brought against several defendants alleging a conspiracy to fix prices on some chemicals used in the production of automobile tires. The petition sought damages, attorneys' fees and other relief under the Kansas Restraint of Trade Act.[24] All the defendants were foreign corporations. The alleged price fixing conspiracy was formed out-

23. 282 Kan. ____,146 P.3d 162 (2006).

24. K.S.A. 50-101 *et seq.*

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side of Kansas. The class representative plaintiff bought two tires in Kansas at a price that was alleged to be inflated due to the price-fixing conspiracy.

Some of the defendant corporations were qualified to do business in Kansas and were served in accordance with K.S.A. 17-7301. Some were not qualified but were nevertheless doing business here, and they were served in accordance with K.S.A. 17-7307(c). Others were served outside the state under K.S.A. 60-308.

The defendants objected to personal jurisdiction on the ground that they lacked sufficient contact with Kansas to be subject to jurisdiction here. The trial court and the Court of Appeals agreed and dismissed the case for lack of jurisdiction. The Court of Appeals opinion ruled that since the cause of action did not arise from any contact with the state, the Kansas long-arm statute did not authorize jurisdiction. Plaintiff argued that K.S.A.17-7301 and 17-7307(c) authorized general jurisdiction, but the Court of Appeals rejected that contention, declaring that Kansas law did not authorize general jurisdiction.

The Kansas Supreme Court granted a petition for review and reversed the Court of Appeals' decision. In a very thorough opinion by Justice Marla J. Luckert, the Supreme Court unanimously ruled that both K.S.A. 17-7301 and 17-7307 (c) do authorize general jurisdiction. The Court then decided that the exercise of general jurisdiction in the case did not offend due process of law. The qualifying defendants had expressly consented to jurisdiction, and so no further examination of the scope of their in-state activity was necessary to satisfy due process. In the case of the non-qualifying defendants, the Court had to look further to determine whether their contacts with the state were sufficiently substantial to satisfy the constitutional standard for general jurisdiction. Quoting Wright and Miller's "Federal Practice and Procedure," the Court stated the test as follows:

> In order for general jurisdiction to lie, a foreign corporation must have a substantial amount of contacts with the forum state. In assessing contacts with a forum, courts consider (1) whether the corporation solicits business in the state through a local office or agents; (2) whether the corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which the corporation holds itself out as doing business in the forum state, through advertisements, listings, or bank accounts; and (4) the volume of business conducted in the state by the corporation.[25]

The Court found that only one of the nonqualifying corporations had sufficient contact to satisfy that standard.

The Court nevertheless upheld specific jurisdiction over the other defendants who were served under the long-arm statute. The Court ruled that price-fixing was a "tortious act" within the meaning of K.S.A. 60-308(b)(2). Although the conspiracy may have been formed outside the state, the tort occurs where the injury is incurred. The injury occurred in Kansas when the plaintiff had to pay an inflated price for the two tires. The tires were not manufactured in Kansas, but they entered Kansas through the stream of commerce, and the Court found that the defendant that manufactured them had sufficiently directed that commerce to Kansas to satisfy even the more restrictive view of the "stream of commerce" theory of purposeful availment.[26]

Although only that one defendant had contact with Kansas that would satisfy the long-arm statute, the Court ruled that the contact of that defendant in pursuance of the conspiracy could be imputed to the other co-conspirators. The Court found that such exercise of specific jurisdiction was constitutional.

So now, the combination of subsection (b)(2) of the new long-arm statute and the *Merriman* case, which clarifies the availability of general jurisdiction under the "doing business" statutes make it very clear that Kansas does authorize general personal jurisdiction. ■

25. 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 2d ed., 1069, at 348-55 (1987).

26. *Merriman v. Crompton Corp.*, 282 Kan. ____,146 P.3d 162 at 187 (2006).

About the Author

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