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INDIANA'S NEED FOR LEGISLATIVE SURGERY: A JURISDICTIONAL TRANSPLANT

BACKGROUND FOR JURISDICTIONAL EXPANSION

In the last decade there has been a pervasive trend toward expanding the in personam jurisdiction of state courts over the nonresident corporation or individual. Stimulating this expansion has been a series of Supreme Court decisions which has articulated new criteria for determining due process limitations on state court jurisdiction.[1] The new due process standard is one of fairness to the defendant, determined by balancing all interests involved and requiring that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit in that state does not offend "traditional notions of fair play and substantial justice."[2]

State court jurisdiction may be viewed as limited by two factors: the statutory authorization of jurisdiction along with judicial interpretation of this authorization, and the constitutional guarantee of due process.[3] It is clear that state statutes cannot extend jurisdiction beyond due process limits; consequently, statutes in the area are cast in terms of due process limitations as understood at the time the statutes were enacted.[4] Thus the relatively "sudden" expansion of the constitutionally permissible area of state court in personam jurisdiction has resulted in a jurisdictional gap—a void between the area where jurisdiction is actually conferred by existing state statutes and the boundary which could constitutionally be drawn under the limits of due process. In response to this void many states have enacted "long arm" or "single act" statutes which

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1. Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958) [hereinafter cited as Kurland].

2. International Shoe Co. v. Washington, 326 U.S. 310 (1945); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960) [hereinafter cited as *Developments*]. Because the new standard is based on a balancing of the interests involved, which will vary with each case, it can be very flexible. That a new standard was intended is reinforced by the Supreme Court's disregard of the narrower concepts of consent, presence, and doing business upon which jurisdiction over corporations had previously been based and which could have been used in the *International Shoe* situation. These earlier bases were criticized for being quantitative and mechanical, whereas the Court wished to promulgate a test that was qualitative.

3. *See* Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948); F. JAMES, CIVIL PROCEDURE § 12.12 (1965); *Developments, supra* note 2, at 912.

4. Examples of this are IND. ANN. STAT. § 2-808 (Burns 1967 Repl.) and IND. ANN. STAT. § 2-1062 (Burns 1967 Repl.) which, when construed together, require personal service within the state to obtain in personam jurisdiction.

to varying degrees provide for jurisdiction over nonresidents.[5] In addition, the approval of the Uniform Interstate and International Procedure Act[6] by the American Bar Association[7] and the National Conference of Commissioners on Uniform State Laws[8] portends wide acceptance of such statutes.[9]

5. *E.g.*, ALA. CODE tit. 7, § 199(1) (Supp. 1965); ARIZ. R. CIV. P. 4(e)(2) (Supp. 1967); ARK. STAT. ANN. § 27-2502 (Supp. 1967); CONN. GEN. STAT. REV. § 33-422(c) (1962); FLA. STAT. ANN. § 47.16 (Supp. 1965); GA. CODE ANN. § 24-113-116 (Supp. 1967); IDAHO CODE ANN. § 5-514 (Supp. 1967); ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); IOWA CODE ANN. § 617.3 (Supp. 1966); KAN. GEN. STAT. ANN. § 60-308(6) (1964); LA. REV. STAT. ANN. § 13.3201 (Supp. 1966); ME. REV. STAT. ANN. tit. 14, § 704 (1964); MD. ANN. CODE art. 75, § 96 (1965); MICH. STAT. ANN. §§ 27A.701-27A.735 (1962); MINN. STAT. ANN. § 303.13 (Supp. 1966); MO. ANN. STAT. §§ 351.63, 355.375 (1966); MONT. R. CIV. P. 4B (1967 Supp.); NEV. REV. STAT. § 14.080 (1961); N.M. STAT. ANN. § 21-2-16 (Supp. 1967); N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967); N.C. GEN. STAT. § 55-145 (1965); OKLA. STAT. ANN. tit. 12, § 187 (Supp. 1967); ORE. REV. STAT. § 14.035 (Supp. 1965); R.I. GEN. LAWS ANN. § 9-5-33 (Supp. 1966); S.C. CODE ANN. § 10-424 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 2031b (1964); VA. CODE ANN. § 8-81.2 (Supp. 1966); VT. STAT. ANN. tit. 12, § 855 (1965); WASH. REV. CODE ANN. § 4.28.185 (1962); W. VA. CODE ANN. § 31-1-71 (1966); WIS. STAT. ANN. § 262.05 (Supp. 1967).

6. § 1.03, 9B UNIFORM LAWS ANNOTATED 310 (1966).

7. *Proceedings of the* 1963 *Midyear Meeting of the House of Delegates,* 49 A.B.A.J. 385, 393 (1963).

8. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS HANDBOOK 106, 131 (1962).

9. A unique decision with a different answer to the problem was written by Judge Dalton in St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966). The case involved a libel action in which the defendant had mailed libelous statements into Virginia and the plaintiff was attempting to assert jurisdiction over him under the Virginia long arm statute. After concluding the Virginia statute would not cover the situation, Judge Dalton upheld jurisdiction by arguing that jurisdiction was a question of power, limited by due process, that a long arm statute was "merely legislative approval for the exercise by the courts of that state of their inherent jurisdictional power *at least* to the limits set out in the statute," (*Id.* at 152) (his emphasis) and that where the state legislature had not expressly limited state court jurisdiction, the courts were not restrained from extending their jurisdiction to the limits of due process "even if such an assumption of latent power is not expressly authorized by the statute." (*Id.*) Judge Dalton concluded that due process limits would not be violated, although jurisdiction in this instance exceeded the statutory authorization.

Judge Dalton based his argument on two premises; (1) "jurisdiction is a question of power, ultimately defined by due process and not state legislation," (*Id.*) and (2) this power is inherent in a court and, in the absence of express legislative limitation, may be exercised by a court. Neither premise is supported by authority, and the conclusion that a court can go beyond the statutory authorization seems questionable. Jurisdiction in the positive sense of legislative authorization is not defined by due process, but only delimited by the concept. While it can be argued that by specifying the areas of non-jurisdiction, the area of jurisdiction is defined, the argument that this power is inherent in a court (whatever is meant by the phrase) must still be accepted. If this reasoning were followed, it would make a mockery of state statutes, and it is doubtful that many states will accept it (note that the decision was in a federal district court). In addition, it would appear there is a negative implication in the Virginia statute itself to the effect that where the legislature did not authorize jurisdiction they did not want it exercised, particularly since they presumably were aware other statutes went farther.

On the basis of the caveat Judge Dalton expressed—that the court did not express an opinion where there were express legislative limits on jurisdiction, it seems certain

The universal purpose of long arm statutes is to expand in personam jurisdiction of state courts, but the wording and the interpretation of these enactments have varied greatly. While not all the statutes go as far as due process would allow,[10] the decision not to occupy the total area is possibly attributable more to uncertainty over what the due process limitations are than to a desire to leave an area uncovered.[11] Although the Supreme Court has not expressly ruled on the constitutionality of long arm statutes, general approval of them seems certain on the basis of *Rosenblatt v. American Cyanimid Co.*,[12] the views of commentators,[13] and the large number of cases in which jurisdiction has been upheld under the authority of such statutes.[14]

While long arm statutes are proliferating, Indiana has refrained from enacting such a statute. This omission raises the question of whether Indiana needs a long arm statute or whether existing statutes provide sufficient coverage for the protection of state interests.

JURISDICTIONAL COVERAGE OF LONG ARM STATUTES

Long arm statutes are usually subdivided in the same manner: first, a general provision indicating who is subject to service and, second, a listing of the conduct which will subject a nonresident to jurisdiction. Such conduct typically falls into four areas: transaction of business within the state, commission of a tortious act within the state, owning real estate within the state, and insuring property within the state.

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that Indiana courts would not uphold jurisdiction on his reasoning. IND. CONST. art. 7, § 4 states, in effect, that Indiana courts have only such original jurisdiction as the legislature may confer. Danker v. State, 236 Ind. 696, 138 N.E.2d 900 (1956); Spence v. State, 221 Ind. 474, 48 N.E.2d 459 (1943).

10. Examples of statutes which do not go as far as due process apparently allows are N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967); VA. CODE ANN. § 8-81.2 (Supp. 1964). Under these statutes the provisions with respect to jurisdiction for tortious acts out of state causing injury within the state are not as broad as that of Illinois as construed in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) or that of Minnesota as applied in Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963).

11. Much of this doubt is due to the restrictive holding of Hanson v. Denckla, 357 U.S. 235 (1958), following the prior expansive decision in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), as indicated in the 1965 Practice Commentary by McLaughlin to the N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967).

12. 86 S. Ct. 1 (1965) (discussed in text accompanying footnote 84). The case involved the provision of the New York long arm statute conferring jurisdiction for the commission of a tortious act within the state.

13. *E.g.*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 569 [hereinafter cited as Currie]; *Developments, supra* note 2.

14. *E.g.*, Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967); Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965); Anderson v. Penncraft Tool Co., 200 F. Supp. 145 (N.D. Ill. 1961); and see Note, *The Virginia "Long Arm" Statute*, 51 VA. L. REV. 719 (1965) for an excellent presentation of Virginia's long arm statute, what it attempts to cover, and some problems it raises.

Jurisdiction under these classifications is always limited by the highly flexible test of fairness, as represented by minimum contacts. In addition, there is often a special provision for service of process in an action arising under the statute.

For purposes of discussion, the Illinois act will be used as a representative long arm statute, and references will be mainly to the Illinois and New York provisions.[15] The Illinois act was the first such comprehensive statute and has been copied by a number of states. It has, however, been interpreted liberally[16] while the New York act, which is similar in wording, has been construed more conservatively.[17] The Illinois act provides:

> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, 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 said acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;
>
> (c) The ownership, use, or possession of any real estate situated in this State;
>
> (d) Contracting to insure any person, property or risk located within this State at the time of contracting.

The transaction of any business within the state

The transaction of business within the state as a basis of jurisdiction is duplicated almost verbatim in the New York act, and similar phrasing is present in most long arm statutes.[18] The question is how

15. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967).

16. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

17. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965).

18. Among variations in the phrasing are those represented by the Michigan and Wisconsin statutes. Michigan's statute, in addition to providing for jurisdiction in a cause of action arising from the transaction of any business, provides for jurisdiction in a cause of action arising from "[e]ntering into a contract for services to be performed or for materials to be furnished in the state by the defendant." MICH. STAT. ANN. §§ 27A.701-27A.735 (1962). Wisconsin provides for jurisdiction in a cause of action which "arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from the state goods, documents of title, or other things of value; . . ." WIS. STAT. ANN. § 262.05 (Supp. 1967). The detail added by these provisions has been a response to a feeling that "transaction of business" requires a direct act in the state, while a contract involving a state resident creates sufficient state interest for jurisdiction. There is also

far, under this phrasing, jurisdiction can consititutionally be exercised.[19] Most of the actions under this provision concern the performance of contracts involving a nonresident, and the question is whether the nonresident has had sufficient connection with the state to warrant jurisdiction over him.[20] While some state statutes provide for jurisdiction where a contract is to be performed in whole or in part in the state.[21] New York courts, by saying that the mere shipment of goods into the state is insufficient,[22] have not extended jurisdiction as far as constitutionally permissible.[23] Illinois only recently discarded a requirement that the defendant be physically present at some point in the transaction;[24] however, where the nonresident was present at some stage, both New York and Illinois generally uphold jurisdiction.[25] Other factors in determining whether the defendant has had sufficient contact with the

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probably a fear the courts will give an unduly restrictive interpretation to "transacting any business" and that by such a provision it is made clear that a single act is sufficient to justify jurisdiction. While the specification may result in less litigation over coverage, it is apparent these provisions could be covered by a broad interpretation of "transacting any business." However, a good argument for including a provision covering contracts to supply services or things in the state is given in Note, *The Virginia "Long Arm" Statute,* 51 VA. L. REV. 719, 733-44 (1965).

19. Because the interpretation of what comes within the statute and what constitutes minimum contact or "fairness" is essentially a subjective one, with the result depending on the facts of each case, it is difficult to generalize as to when jurisdiction will be upheld. Another problem of evaluation, due to the interaction of long arm statutes and the due process limit, is the analytical difficulty of determining whether the court is indulging in statutory interpretation or is interpreting due process requirements.

20. McGee v. International Life Ins. Co., 355 U.S. 220 (1957) indicated an isolated contract may be sufficient, but that case involved an area in which the state had a special interest (life insurance). However, the Court in that instance balanced the interests of the plaintiff, the state, and the defendant; presumably, the state's interest was only one factor considered.

21. MINN. STAT. ANN. § 303.13 (Supp. 1966).

22. Kramer v. Vogl, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 259 (1966). The defendant was a nonresident who had sold and sent goods into New York pursuant to orders from within the state. The defendant had conducted no advertising or promotional activities within the state and while the defendant's sales into New York totaled 125,000 dollars annually, they were only one to two percent of the defendant's total volume. The court held the contact insufficient to be considered transacting business.

23. Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963).

24. Ziegler v. Houghton-Mifflin Co., 80 Ill. App. 2d 210, 224 N.E.2d 12 (1967); Koplin v. Thomas, Haab & Botts, 73 Ill. App. 2d 242, 219 N.E.2d 646 (1966). The absolute requirement of such an element illustrates a danger that the minimum contact test will be made into a quantitative, mechanical test, instead of the flexible, qualitative determination of fairness suggested by *International Shoe.* There is also a danger that a court will apply old "doing business" criteria, while "transacting any business" is a new test requiring less contact. This appears to be what happened in Grobark v. Addo Machine Co. 16 Ill. 2d 426, 158 N.E.2d 73 (1959).

25. National Gas Appliance Corp. v. AB Electrolux, 270 F.2d (7th Cir. 1959); Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965).

state to warrant jurisdiction include the place where the agreement was negotiated[26] or signed,[27] the presence of advertising,[28] and the volume of business in the state.[29]

The commission of a tortious act within the state

Conflicting interpretations as to coverage have been given to this provision. It is certain that the provision includes torts commited by the nonresident defendant or his agent while physically present in the state,[30] but it is not clear whether it includes negligent acts outside the state causing injury within—the typical products liability situation. Illinois has interpreted the phrasing to include the out of state act,[31] while the New York courts (prior to a statutory amendment) held it did not.[32] Some states have avoided the issue by saying "a tort in whole or in part," which clearly covers both interpretations.[33] It is clear that in tort actions courts have required less than in contract actions in terms of the defendant's relation to the forum state to sustain jurisdiction, but it is uncertain how much less.[34] Partially due to this uncertainty, the current

26. Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967).

27. United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966); Haas v. Fancher Furniture Co., 156 F. Supp 564 (N.D. Ill. 1957).

28. Pallas v. Driv-Rite, Inc., 252 F. Supp. 582 (N.D.N.Y. 1966).

29. McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965). It is evident that no fixed series of factors can be listed as sufficient contact in contract actions. The degree of contact required varies with the equities of the situation. Thus, where the defendant and plaintiff are both in the state when the contract is executed, this may be sufficient contact, but if the defendant is out of state, the questions of who initiated the transaction and where acceptance took place become important. For example, a high degree of contact may be required when the plaintiff goes out of state to initiate or execute the contract. *See* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Morgan v. Heckle, 171 F. Supp. 482 (E.D. Ill. 1959); Currie, *supra* note 13, at 577.

30. Smyth v. Twin State Improvement Co., 116 Vt. 569, 80 A.2d 664 (1951), cited favorably in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), in which the nonresident defendant was physically present in the state when the negligent act was committed.

31. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In product liability cases involving injury to the consumer, the fairness test, as applied in some states, has become a question of whether it was reasonably foreseeable by the manufacturer that his product would enter the forum state. See Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966); Metal-Matic, Inc. v. Eighth Judicial Circuit Court, 415 P.2d 617 (Nev. 1966).

32. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965).

33. MINN. STAT. ANN. § 303.13 (Supp. 1966).

34. While the decision in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), could be interpreted as indicating the mere occurrence of the injury is sufficient contact, the court in that case presumed from the nature of the defendant's business that the defendant derived substantial commercial benefit from Illinois purchasers. Minnesota courts are perhaps the most liberal on this score. Jurisdiction was upheld in Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963), where the defendant manufacturer of the defective product had sold the product to an Ohio company which had in turn sold it to an Illinois distributor who sold it to a Minnesota retailer. The manufacturer had no

New York statute and the Uniform Act take the cautious approach of enacting statutory requirements of the degree of contact a nonresident defendant must have with the state before it can exercise jurisdiction over him for a negligent act outside the state causing injury within.[35] These statutory requirements are equivalent to a state definition of due process limits, but one which is well within the Supreme Court standard.

The ownership, use, or possession of any real estate situated in the state

This provision is common in long arm statutes,[36] and is a natural outgrowth of *International Shoe Co. v. Washington.*[37] The support for such jurisdiction comes from two sources: the strong state interest in land within the state, and the balancing of interests process put forth in *International Shoe*. The reasoning is that the continuing status of owning, possessing, or using land in a state represents a more significant contact than a single act, and that nonresidents falling into these categories are continuously receiving benefits from the protective laws and facilities of the state, while the situs of the land evidences voluntary contact with the state.[38]

There has been relatively little litigation under this provision,[39] and many causes of action which could be encompassed by it are also

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contacts with Minnesota. In sustaining jurisdiction, the court said the product was mass produced for nationwide use and it was a reasonable inference it would be used in Minnesota.

The problem the courts have in the area stems from Judge Sobeloff's example in Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) of a Pennsylvania resident who purchased a defective tire from a California retailer which caused an injury in Pennsylvania. Where the seller's scope of business is so local in nature, it is manifestly unjust to require him to go to a distant forum. But note that Currie does not think jurisdiction even in this extreme case would necessarily be unfair. Currie, *supra* note 13, at 557.

35. The Uniform Act provides for jurisdiction over the nonresident defendant for "causing tortious injury in this state by an act or omission outside the state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; . . ." UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03, 9B UNIFORM LAW ANNOTATED 310 (1966). The New York act excepts defamation from the tortious acts, and adds to the preceding Uniform Act provision: "expects or reasonably should expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967). In effect, these statutes are enacting express definitions of what constitutes the implicit limitation of "minimum contacts," but which are more conservative than some current applications.

36. *E.g.*, the provision is reproduced in the New York statute and the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT with very little variation.

37. 326 U.S. 310 (1945).

38. See Note, *Ownership, Possession, or Use of Property as a Basis of In Personam Jurisdiction*, 44 IOWA L. REV. 374 (1959) for a discussion of the provision.

39. In Illinois and New York there have been only three reported cases dealing with the provision. Levin v. Ruby Trading Corp., 248 F. Supp. 537 (S.D.N.Y. 1965). People v. Streeper, 12 Ill. 2d 204, 145 N.E.2d 625 (1957); Porter v. Nahas, 35 Ill. App. 2d 360, 182 N.E.2d 915 (1962).

included within the phrase "transaction of business."[40] While the provision is not without problems,[41] the word "use" is indefinite enough to give a court flexibility in handling many situations. The value of the provision is demonstrated in cases such as *Porter v. Nahas*[42] in which it was used to acquire jurisdiction over former tenants, who had left the state, in an action to recover damages from use of the property in violation of a lease. The court pointed out that while the tenants had lived in Illinois they had received the benefit and protection of Illinois' laws.[43]

INDIANA'S PRESENT JURISDICTION

Comparison of the approach embodied in a long arm statute with the Indiana system is difficult since Indiana determines its jurisdiction by its provisions for service of process. Indiana process statutes, and consequently Indiana's jurisdiction are based on the type and location of the defendant instead of the nature of the action. This is a logical emphasis for statutes dealing with process, but it has resulted in narrowly defined coverage and an unwieldy diffusion of jurisdictional statutes. A better approach would be to recognize that jurisdiction and service of process are different concepts with different due process requirements. Jurisdiction deals with the appropriate geographic area for the action and some connection of the defendant with that area, while service of process deals with the giving of adequate and timely notice for the defense of the action.[44]

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40. *E.g.*, the corporation or individual who owns or uses property within a state often does so as an incident of doing business within that state.

41. The Commissioners' notes to the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03, 9B UNIFORM LAWS ANNOTATED 310, 313 point out that while:

> . . . the Michigan and Wisconsin statutes (MICH. STAT. ANN. §§ 27A.705, 27A.715, 27A.725, 27A.735 (1962); WIS. STAT. ANN. tit. 25, § 262.05 (6)) include the ownership, use or possession of personal property as a basis of jurisdiction, this basis has been excluded because of the difficulties that might be posed in situations such as those involving stolen property, conditional sales and chattel mortgages.

Note, however, that this is related to *personal* property.

42. 35 Ill. App. 2d 360, 182 N.E.2d 915 (1962).

43. Discussion of provision (d) will be deferred until the comparable Indiana statute is evaluated.

44. The logical distinction was recognized and used as an analytical base by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *Developments, supra* note 2, at 987-88 states:

> [f]urther, notice and jurisdiction seemed to be two aspects of the same thing in early American law, since the act of service of process provided evidence of the defendant's presence in the state as well as notified him of the proceedings. However, statements in the early cases that service was limited to the territorial confines of the state may now be seen to have referred to the limited basis of jurisdiction rather than to a restriction arising from limits on methods and extent of notice.

Indiana, however, still identifies the two concepts.

Indiana's Jurisdiction Over Foreign Corporations

Much of the litigation involving foreign defendants stems from commercial situations and involves corporations. This is a logical result of expanding interstate business and the tendency of sole proprietorships and partnerships to conduct a localized business, or, if doing business on a larger scale, to incorporate to gain the benefits of this form of organization. Thus it could be argued that Indiana's "doing business" or "qualification" statutes, under which it attempts to exercise in personam jurisdiction over foreign corporate defendants, are sufficient protection for Indiana residents since there are relatively few cases involving individual defendants.

Indiana has two key qualification statutes.[45] Section 25-301[46] provides that before any foreign corporation organized for profit may transact business in the state it must obtain a certificate of admission from the secretary of state. The requirements for the granting of a certificate include appointing a resident agent for service of process in actions against the foreign corporation.[47] There is no requirement for jurisdiction under section 25-301 that the cause of action arise out of the transaction of business, and once the agent is appointed jurisdiction is assured for any action. The penalty for noncompliance with section 25-301 is a denial of the right to maintain any suit in the courts of the state and a monetary fine.[48]

45. The main statutes are IND. ANN. STAT. § 25-301 (Burns 1960 Repl.) and IND. ANN. STAT. § 25-316 (Burns 1960 Repl.) which apply to foreign corporations generally, but Indiana also has a series of qualification statutes applying to more specialized corporate defendants: IND. ANN. STAT. § 18-2327 (Burns 1964 Repl.) (nonresident banks); IND. ANN. STAT. § 25-870 (Burns Supp. 1967) (nonresident seller of securities); IND. ANN. STAT. § 39-5503 (Burns 1965 Repl.) (unauthorized foreign insurer); IND. ANN. STAT. § 47-1237 (Burns 1965 Repl.) (nonresident common carrier and contract carrier); IND. ANN. STAT. § 42-1803 (Burns 1965 Repl.) (nonresident operating collection agency); IND. ANN. STAT. § 55-4102 (Burns 1951 Repl.) (foreign express companies). Another statute under which in personam jurisdiction over a foreign corporation could be attained is IND. ANN. STAT. § 2-703 (Burns 1967 Repl.), (foreign express companies). Another statute under which in personam jurisdiction over a foreign corporation could be attained is IND. ANN. STAT. § 2-703 (Burns 1967 Repl.) but any situation falling under it would also come under section 25-316. In addition, in a narrow range of situations an Indiana buyer (wholesaler, retailer) could put a "string" on a nonresident seller under the "vouching in" provision of IND. ANN. STAT. § 19-2-607 (Burns 1964 Repl.). Thus if an Indiana buyer was sued by a consumer who purchased from him for breach of warranty, the Indiana buyer could, by giving his seller the proper notice, bind the defendant seller on the determination. A subsequent action by the buyer on the Indiana judgment in the defendant's forum would be pro forma. Also, see Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358 (1958).

46. IND. ANN. STAT. § 25-301 (Burns 1960 Repl.) [hereinafter all textual section references will be to Burns IND. ANN. STAT.].

47. IND. ANN. STAT. §§ 25-304 to 25-306 (Burns Supp. 1967).

48. IND. ANN. STAT. § 25-314 (Burns 1960 Repl.).

The second statute, section 25-316,[49] provides for substituted service on the Secretary of State for any cause of action arising from "any act or thing" done by a foreign corporation which has engaged "in any transaction or the doing of any business in this state" when not licensed or admitted to do business in the state. Thus even though a corporation had not complied with section 25-301, it could still be amenable to service of process under section 25-316. However, although section 25-316 has not been construed by state courts, it appears that less activity in Indiana by the foreign corporation is required for the corporation to be subject to Indiana process than is required before the corporation must qualify as "transacting business."[50] Thus section 25-316 would provide a broader initial jurisdiction than would section 25-301, and section 25-301 is of little moment for purposes of expanded jurisdiction.[51]

In terms of coverage, a question remains as to what is included under "transacting business" or under "any transaction or the doing of any business."[52] In analyzing the opinions which have construed the phrase "transacting business" a distinction has been made between actions arising under the qualification statute, section 25-301 (which deals with the commerce clause as a limit), and those determining whether the corporation is subject to service of process, in which case the due process clause is the limiting factor.[53] In addition, many of the cases arising under section 25-301 involve the resident defendant who attempts to avoid liability by arguing the nonresident plaintiff was transacting business in Indiana, had not complied with section 25-301,

49. IND. ANN. STAT. § 25-316 (Burns 1960 Repl.).

50. This conclusion is supported by 1929-30 OP. ATT'Y GEN. IND. 136 which suggests that despite the similar wording of sections 25-301 and 25-316, the requirements of section 25-316 for service of process are not the same as section 25-301 for qualification. See also Kokomo Opalescent Glass Co. v. A. W. Schmid Int'l, Inc., 371 F.2d 208 (7th Cir. 1966); Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117 (S.D. Ind. 1962).

51. Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358, 370 (1958) observes that doing business for qualification purposes often requires a higher quantum of activity than when the same phrase is used to acquire jurisdiction over non-complying corporations. The Note also observes that the state acquires a greater extent of jurisdiction over a corporation which complies with the qualification statute than over one which does not. *Id.* 369.

52. It must be noted that while the statutes use the quoted phrases, they are generally referred to as " doing business" statutes, and that the courts discuss the statutes' application in terms of doing business, making no distinction between the different phrases.

53. This distinction was noted in Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117, 132 (S.D. Ind. 1962), the leading case in the area. The court observed that subjecting a foreign corporation to qualification under section 25-301 may constitute a burden on interstate commerce, whereas the interstate commerce may create sufficient "minimum contacts" to permit service of process, which is not a burden on interstate commerce. On pages 130-31 of the opinion there is an excellent footnote presenting Indiana cases relating to foreign corporations "transacting business."

was subject to the penalty provision, and was, therefore, unable to bring suit.[54] Thus a requirement of extensive contact before the corporation is considered to be transacting business has resulted from the combination of the case posture which results in the court's traditionally narrow construction of penalty provisions influencing the interpretation of "transacting business," and the additional factor of encouraging or discouraging business.[55]

Section 25-316 is thus left as the major statute relevant to service of process, but it has never been construed by Indiana courts.[56] The leading decision construing the statute is *Green v. Robertshaw-Fulton Controls Co.*,[57] in which the plaintiff was suing for personal injuries resulting from a defective product manufactured by a nonresident defendant. Although all orders were approved out of state and all shipments

54. Gross Income Tax Div. v. Surface Combustion Corp., 232 Ind. 100, 111 N.E.2d 50 (1953); Mutual Mfg. Co. v. Alpaugh, 174 Ind. 381, 91 N.E. 504 (1910); Wilson v. Ohio Farmers Ins. Co., 164 Ind. 462, 73 N.E. 892 (1905); Dodgem Corp. v. D. D. Murphy Shows, Inc., 96 Ind. App. 325, 185 N.E. 169 (1933); North Dakota Realty & Inv. Co. v. Abel, 85 Ind. App. 563, 155 N.E. 46 (1927); Hollowell v. Smith Argicultural Chem. Co., 41 Ind. App. 361, 83 N.E. 772 (1908). More than a single contact is required to come under section 25-301. It was stated in *Alpaugh* and later in Lowenmyer v. National Lumber Co., 71 Ind. App. 458, 125 N.E. 67 (1919) that a single contact or isolated business act was not transacting business because section 25-301 was only intended to apply to corporations which established permanent agencies in the state. In cases where the foreign corporation was held to fall under the statute there was substantial contact, usually over a considerable period of time. Gross Income Tax Div. v. Fort Pitt Bridge Works, 227 Ind. 538, 86 N.E.2d 685 (1949); Burroughs v. Southern Colonization Co., 96 Ind. App. 93, 173 N.E.716 (1930); United States Const. Co. v. Hamilton Nat. Bank, 73 Ind. App. 149, 126 N.E. 866 (1920); Lowenmyer v. National Lumber Co., 71 Ind. App. 458, 125 N.E. 67 (1919). The distinction of transacting business for purposes of qualification from that for service of process was also noted in 1929-30 OP. ATT'Y GEN. IND. 136.

55. Peter & Burghard Stone Co. v. Carper, 96 Ind. App. 554, 172 N.E. 319 (1930). The liberality toward the foreign corporation in this situation is further exemplified by holdings that failure to qualify only renders a contract sued upon voidable, and that the foreign corporation could sue upon the contract after subsequent compliance. Farmers Mut. Hail Ins. Co. v. Gorsuch, 123 Ind. App. 264, 110 N.E.2d 344 (1953); Warren Co. v. Exodus, 114 Ind. App. 651, 54 N.E.2d 775 (1944).

56. Section 25-316 has been construed by the attorney general in determining amenability of foreign real estate corporations, not licensed as real estate brokers in Indiana and not admitted to do business in Indiana, but which occasionally sent agents into Indiana to obtain listings of Indiana property, to service of process for the purpose of enjoining such activity. 1957 OP. ATT'Y GEN. IND. 96. The attorney general concluded this was doing business in Indiana, under the terms of section 25-316. This is not general authority for a single act falling under Indiana's definition of doing business, however, as the attorney general based his conclusion on section 9 of the Real Estate License Law which provided that a single act would require a real estate license. Only on the basis of that statute was the single act equivalent to doing business. In addition, in the case with which the attorney general dealt, the agent was physically present in Indiana. It is interesting to note that the attorney general made no mention of the *International Shoe* test and referred to section 25-316 as a "doing business statute." The opinion should therefore be regarded as an "exception" to Indiana's usual approach to qualification statutes.

57. 204 F. Supp. 117 (S. D. Ind. 1962).

were f.o.b. Chicago, the defendant did a large volume of business in Indiana and had several sales representatives in the state. The defendant argued that merely having sales representatives in Indiana soliciting orders did not make it subject to process under section 25-316.

The central problem was interpreting the phrase "any transaction or the doing of any business," on which both tort and contract actions must be based. The defendant relied on criteria established in *Mutual Mfg. Co. v. Alpaugh*,[58] which the *Green* court rejected as relating to the penalty provision and not turning on the question of the extent to which Indiana would subject a foreign corporation to service of process. The plaintiff phrased his arguments in terms of the standard set forth in *International Shoe*, but the court relied heavily on an 1898 case, *Rush v. Foos Mfg. Co.*,[59] which it interpreted as indicating that solicitation of business in Indiana was sufficient transaction of business to allow service of process for in personam jurisdiction. Reliance was also placed on an unreported case discussed in *Rush* which held that service of process in Indiana upon a traveling salesman of a foreign corporation was sufficient to acquire personal jurisdiction in an action for personal injuries.[60]

From these and other sources[61] the court concluded that Indiana had not adopted a narrow interpretation of "doing business" in determining the amenability of a foreign corporation to service of process.[62] The court stated that, although the statute did not go as far as the "single tort" theory of jurisdiction of other states, the statutory language "engaging in any transaction or the doing of any business in the Indiana statute is as broad as constitutional authority will permit."[63] In addition to the physical presence of the agents, the court emphasized the systematic and continuous activities of the defendant in Indiana, and the large volume of business in the course of which the defendant received the benefit and protection of Indiana law.

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58. 174 Ind. 381, 91 N.E. 504 (1910). The case had said, with respect to the applicability of the qualification statute, that a foreign corporation was "transacting business" when it had established permanent agencies in the state, and that transacting business did not include the situation in which traveling agents were in the state or delivery of goods took place outside the state.

59. 20 Ind. App. 515, 51 N.E. 143 (1898). The action was for breach of warranty.

60. Scofield v. Peter Scheonhoffer Brewing Co., mentioned in *Rush* at 20 Ind. App. 515, 532, 51 N.E. 143, 149 (1898). In *Scofield* the action was for personal injuries, and from the facts given it appears to be very similar to *Green* in that the foreign corporation apparently sold products in Indiana, the salesmen in Indiana only solicited orders, and goods were shipped f.o.b. Chicago.

61. These included the court's analysis of Indiana case law, statutes, attorney general opinions, and Schmidt v. Esquire, Inc., 210 F.2d 908 (7th Cir. 1954).

62. Since we are concerned with finding how broadly Indiana has interpreted its statute, this conclusion is of little value. In effect, it means only that Indiana does not require as much contact for service of process as for compliance with the qualification statute. The question remains of how little contact is required.

63. F. Supp. 117, 137 (S.D. Ind. 1962).

The phrasing of section 25-316—"any transaction" and "any act or thing"—with wording in the singular, coupled with the district court's interpretation of Indiana decisions, could be the basis for arguing that section 25-316 goes as far as any long arm statute, but the *Green* opinion poses several difficulties. First, it is unfortunate that the court primarily concerned itself with what Indiana considers "doing business," which was the question in *Rush* and other authorities analyzed. Given the facts presented and the old authority relied upon, the *International Shoe* test was unnecessary for the decision as rendered; however, the *Green* court could have applied the new standard of fairness determined by a balancing of interests by basing their decision on the "any transaction" phrase instead of "doing business."[64]

Secondly, while the court emphasized *Rush*, which upheld service of process on an officer of a foreign corporation present in the state for the transaction of business, the reasoning in *Rush* was that a corporation could only act through its agents and could be said to be present where its agents were. Thus both *Rush* and the unreported decision it discussed would require the physical presence of an agent of the corporation to sustain jurisdiction in either a tort or contract action.[65] This conclusion is further supported by *Chassis-Trak, Inc. v. Federated Purchaser, Inc.*,[66] in which a federal district court in New Jersey construed section 25-316 as not applying to an action by an Indiana firm against a New York Corporation for breach of contract. The foreign corporation had initiated the contract by a phoned order, and all negotiation was by mail and telephone. The court found a failure to comply with the mechanics of section 25-316 fatal to the action, but stated that even if there had been compliance there were insufficient contacts.[67] However, in subsequent

64. If the court had wanted to base its decision on the *International Shoe* standard, it could have construed the phrase "any transaction" as the minimal requirement, equating this to the "transaction of any business" in the Illinois and New York statutes. Then it would have been able to balance the interests involved in determining if jurisdiction was fair under the circumstances, ignoring Indiana's interpretation of "doing business." But using the Indiana interpretation, the *Green* court has left the question unanswered as to whether future cases will be decided on a qualitative, fairness basis, or on the previous mechanical quantitative "doing business" concepts.

65. Since the equities of a tort action differ considerably from the contract action, the requirement seems questionable from that standpoint. In addition, such a rigid position runs contra to the flexible test propounded by *International Shoe* under which physical presence should only be one factor among others. In today's realm of interstate business and transportation, where orders are often by mail or phone, the requirement of physical presence seems ludicrous and dated by the stage of development of business at the time the decision was rendered.

66. 179 F. Supp. 780 (D.N.J. 1960). The plaintiff Indiana corporation was suing on a judgment recovered in an Indiana state court. The defendant moved for a summary judgment upon the ground that the Indiana court lacked jurisdiction over the defendant.

67. The court based its decision on Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) in which a single shipment from the foreign corporation to the resident plaintiff was insufficient contact to support an action for breach of

cases jurisdiction has been upheld where the foreign corporation's representatives have been present in Indiana.[68] In contrast, neither Illinois nor New York requires physical presence in tort actions,[69] and it is clear that Illinois (and probably New York) does not require it in contract actions although they consider it an important factor.[70]

A third problem, of course, is that the Indiana district court's interpretation of Indiana policy and section 25-316 is not authoritative. The factual situation in *Green* made it relatively easy to uphold jurisdiction, while in a single contact situation the question would be much much difficult; thus it remains uncertain how broadly Indiana courts will construe the statute. Further, assuming jurisdiction were expanded under section 25-316, this jurisdiction would be under the guise of new definitions for old terms which have already acquired meanings that may act restrictively on any expansive interpretation. Thus, while section 25-316 may potentially accommodate an expanded jurisdiction over foreign corporations to the extent possible under a long arm statute, there is little reason to expect that broad an application.[71]

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contract. The case could have been distinguished, however, as in *Erlanger* the resident had initiated the transaction by sending its agent to the foreign corporation. In *Chassis-Trak,* the foreign corporation initiated the contract and arguably this situation could require less contact to justify jurisdiction. See Currie, *supra* note 13, at 55-56.

68. Kokomo Opalescent Glass Co. v. A. W. Schmid Int'l. Inc., 371 F.2d 208 (7th Cir. 1966); Electronic Mfg. Corp. v. Trion, Inc., 205 F. Supp. 842 (S.D. Ind. 1962). While factors other than physical presence are considered, physical presence seems to be the element on which the cases are turning. The court in *Kokomo* emphasized the physical presence of the defendant for installation of a machine pursuant to a contract of sale. In *Trion,* the defendant foreign corporation had taken part in negotiations in Indiana, claimed a proprietary interest in property in Indiana, and had been buying goods from the plaintiff Indiana corporation for over four and one-half years. In contrast to the *Green* decision, both the instant cases emphasize the *International Shoe* minimum contacts test, and focus on "any transaction" as a test apart from doing business, but until a close factual situation is presented it is uncertain how far the Indiana federal courts will expand jurisdiction under section 25-316. In addition, to the extent Indiana plaintiffs can get into the federal courts on an expanded diversity jurisdiction under section 25-316, Indiana state courts may not be given the opportunity to authoritatively construe section 25-316.

69. Ziegler v. Houghton-Mifflin Co., 80 Ill. App. 2d 210, 224 N.E.2d 12 (1967); N.Y. CIV. PRAC. LAW. § 302 (McKinney Supp. 1967) lists the New York requirements.

70. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). New York law on this point is unclear, although it is clear that the mere shipment of goods into the state, without more, is insufficient. Kramer v. Vogl, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966). Singer v. Walker, included within Longines-Wittnauer W. Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965) would seem to indicate physical presence is not required, but that little more in addition to shipment is required. See Supplementary Practice Commentary by McLaughlin for 1966 under N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967).

71. Minnesota's long arm statute (MINN. STAT. ANN. § 303.13 (Supp. 1966)) exemplifies how far jurisdiction can be extended. It is comparable to section 25-316 in that it applies only to foreign corporations, but jurisdiction has been upheld over a manufacturer for tortious injury from a defective product which reached Minnesota via several intermediaries. Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56,

Indiana's Jurisdiction Over Individuals and Others

Indiana's most glaring jurisdictional void is the absence of any provision for in personam jurisdiction over nonresident individuals, partnerships, or unincorporated associations.[72] Indiana's rationale for refusing to extend jurisdiction over nonresident individuals is based on an old Supreme Court decision[73] and a narrow interpretation of *International Shoe*. In *Travis v. Fuqua*,[74] the court stated that service of process under section 2-703 which provides for jurisdiction over the nonresident individual or company having an office or agency in any county for the transaction of business for a cause of action arising out of that business would not be good against a nonresident individual. The basis for this conclusion was *Flexnor v. Farson*[75] in which the United States Supreme Court construed a Kentucky statute similar to section 2-703 and concluded that service could not be made on the agent of a non-resident partnership. The Court said the state could not exclude the individual partners as it could a corporation and, therefore, could not imply consent to service from the partnership's doing business in Kentucky. The Indiana court ignored a later Supreme Court opinion, *Henry L. Doherty & Co. v. Goodman*,[76] which construed a similar statute and upheld jurisdiction over a nonresident individual who sold securities in Iowa. The *Doherty* opinion distinguished *Flexnor* on the ground that the one served in *Flexnor* was not then the agent of the defendants—a basis not mentioned in *Flexnor* and so tenuous as to overrule that case.[77]

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124 N.E.2d 824 (1963). The court reasoned the product was made for national consumption and thus it was reasonably foreseeable it would reach Minnesota. Such an approach is a far broader basis on which to exercise jurisdiction than considerations and arguments in *Green* indicate Indiana would follow.

72. There are several statutes in special areas which provide for personal jurisdiction by substituted service on a state official, *e.g.*, the nonresident motorist (IND. ANN. STAT. § 47-1043 (1965)); the nonresident airplane operator (IND. ANN. STAT. § 14-907 (Burns 1964 Repl.)); and the nonresident seller of securities (IND. ANN. STAT. § 25-870 (Burns Supp. 1967)). In addition, IND. ANN. STAT. § 2-703 (Burns 1967 Repl.) is phrased to include jurisdiction over the nonresident individual or company having an office or agency in any county for the transaction of business for a cause of action arising out of that business. Even though section 2-703 is very limited in scope, doubt has been expressed as to the constitutionality of its application to individuals. Travis v. Fuqua, 121 Ind. App. 440, 97 N.E.2d 867 (1951); Gavit, *The New Federal Rules and Indiana Procedure*, 13 IND. L.J. 203 (1938) which states that Flexnor v. Farson, 248 U.S. 289 (1919) also casts doubt upon the validity of IND. ANN. STAT. § 2-805 (Burns 1967 Repl.) (service of process on agent of nonresident receiver) and IND. ANN. STAT. §§ -1307 (Burns 1968 Repl.) (service of process on the agent of a nonresident in an action for ejectment).

73. Flexnor v. Farson, 248 U.S. 289 (1919).

74. 121 Ind. App. 440, 97 N.E.2d 867 (1951).

75. 248 U.S. 289 (1919).

76. 294 U.S. 623 (1935).

77. Nelson v. Miller, 11 Ill. 2d 378, 388-89, 143 N.E.2d 673, 678-79 (1957). See Kurland, *supra* note 1, at 577; *Developments, supra* note 2, at 918; Smithers, *Virginia's*

The *Doherty* opinion stressed the state interest in regulating the sale of securities, and noted that *Hess v. Pawloski*[78] had established the power of a state to regulate the activities of nonresidents within its borders if the state had a special interest in those activities.

The Supreme Court's reasoning in *Flexnor* was purely conceptual[79] and was based on an implied consent theory which it has now discarded as a basis of jurisdiction.[80] Thus, as in *Doherty,* section 2-703 could be supported by an argument emphasizing the state's special interest in regulating business activities and protecting residents from abuse by nonresident individuals.[81] When the plaintiff in *Travis* pointed to the new jurisdictional test of *International Shoe,* however, the Indiana court distinguished that case as applying only to foreign corporations. This distinction is unwarranted as that test of due process was set forth without specifically limiting it to corporations, and contained later specific references to natural persons.[82] In addition, the great majority of writers and the weight of case authority have upheld the test's application to individuals.[83]

"Long Arm" Statute: An Argument for Constitutionality of Jurisdiction Over Nonresident Individuals, 51 VA. L. REV. 712 (1965).

78. 274 U.S. 352 (1937).

79. See Note, *Personal Jurisdiction in Minnesota over Absent Defendants,* 42 MINN. L. REV. 909, 925 (1958).

80. As noted in Currie, *supra* note 13, at 561 and *Developments, supra* note 2, at 935, the states' jurisdiction over foreign corporations is not based on a power to exclude as they have jurisdiction over foreign corporations engaged in interstate business in the state, although they have no power to exclude them. Even before *International Shoe,* it was recognized that the real basis for subjecting a foreign corporation to jurisdiction was reasonableness or fairness. Hutchinson v. Chase & Gilbert, Inc. 45 F.2d 139 (2d Cir. 1930).

81. The argument justifying jurisdiction on the basis of the state's special interest in the activity could result in a very broad jurisdiction, for, as the need arose, the state's special interest could be shown in many areas. Thus the problem would become where to draw the line between "special" interests and "ordinary" interests which would presumably not justify an assumption of jurisdiction.

82. International Shoe Co. v. Washington, 326 U.S. 310, 316, 319 (1945); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). The justifications given in support of this decision would also apply to an individual as well as to a corporation.

83. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). Judge Traynor in Owens v. Superior Court of Los Angeles County, 52 Cal. 2d 822, 831, 345 P.2d 921, 924—25 (1959) said

> [t]he 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.

Currie, *supra* note 13, at 561 states that *International Shoe* made it

> . . . clear that the test of personal jurisdiction is fundamental fairness to the defendant in the light of state interests and trial convenience as indicated by contacts with the state. There is no earthly reason for limiting this test to corporations. If it is fair to subject corporations with certain business contacts with the State to suit there, it is no less so to do the same with individuals similarly situated.

While no decision of the Supreme Court has yet explicitly upheld state court jurisdiction over a nonresident individual doing business within the state, absent a special regulatory interest, there is little doubt they would do so if necessary. This conclusion is supported by the trend of the decisions as exemplified by Justice Goldberg's opinion denying an application for a stay of judgment in *Rosenblatt v. American Cyanimid Co.*[84] On the strength of this decision and authority previously mentioned,[85] it is clear that Indiana's interpretation of both *Flexnor* and *International Shoe* is outmoded, and that a significant jurisdictional void exists.[86]

Indiana's Jurisdiction Based on Insurance

While Indiana provides for in rem and quasi in rem jurisdiction,[87] it has nothing comparable to the coverage of the Illinois provision which creates in personam jurisdiction for a cause of action arising from the ownership, use, or possession of land situated in the state.[88] Thus this provision covers still another area left untouched by Indiana.

Indiana's Jurisdiction Based on Insurance

Subsection (d) of the Illinois statute provides for jurisdiction in a cause of action stemming from: "[c]ontracting to insure any person, property, or risk located within this State at the time of contracting."

See also *Developments, supra* note 2, at 935 (1960); Note, *Personal Jurisdiction in Minnesota Over Absent Defendants,* 42 MINN. L. REV. 909, 925 (1958).

84. 86 S. Ct. 1 (1965). Goldberg relied heavily on the article by Currie in 1963 U. ILL. L.F. 533. In *Rosenblatt* the individual defendant had stolen trade secrets in New York and was served with process under the New York long arm statute. The defendant applied for a stay of judgment pending an appeal to the U.S. Supreme Court on the basis that personal jurisdiction over him would be unconstitutional. In denying the application, Mr. Justice Goldberg concluded the constitutional argument was insubstantial and plenary review by the court was unlikely. Also, see Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1 (W.D. Va. 1965).

85. *Supra* note 83.

86. Assuming jurisdiction over the nonresident individual is constitutional a fortiori it would be over partnerships and unincorporated associations. However, to say that jurisdiction is constitutional does not mean, under the fairness test of *International Shoe,* jurisdiction will be sustained over a nonresident individual in the same cases where it would if the defendant were a foreign corporation. The nature of the parties is a significant factor in balancing the interests involved, and when the defendant is an individual more may be required in terms of minimum contacts before jurisdiction is fair.

87. IND. ANN. STAT. §§ 2-708 (Burns 1967 Repl.) and 2-807 (Burns 1967 Repl.) provide a statutory base for quasi in rem actions. IND. ANN. STAT. § 2-703 (Burns 1967 Repl.) is somewhat similar to the Illinois provision, but requires that the cause of action arise out of the transaction of business of an office or agency situated in the county.

88. The original statute upon which this is based was passed before *International Shoe.* PA. STAT. ANN. tit. 12, § 331 (1953). The Illinois statute was the first similar provision and is somewhat broader than the original. It is interesting to note that the provision is directly opposite to Pennoyer v. Neff, 95 U.S. 714 (1877) as generally understood.

Many states have similar provisions as part of their scheme of insurance regulation.[89] There is little question of the state's power over insurance companies[90] and, though it is certain some contact with the state is required to sustain jurisdiction,[91] *McGee v. International Life Ins. Co.*[92] indicates how little that contact need be. The relevant Indiana statute[93] has not yet been construed, and it is difficult to tell how broadly it would be applied as it contains an omnibus clause. The first section bases jurisdiction on the issuance or delivery of an insurance contract to a resident of Indiana or to a corporation authorized to do business in Indiana.[94] This coverage is not as broad as that of the Illinois provision which grants jurisdiction over companies which insure property or a risk located within the state at the time of contracting. Thus it appears that Illinois would allow a nonresident individual who has property or any other insured risk within the state to maintain suit under the statute while Indiana would not since it predicates service of process on the issuance or delivery of insurance contracts to residents of the state. On the other hand, the Illinois act apparently would not extend jurisdiction to a company which insures property out of state owned by a resident, while the Indiana act would since it does not require that the object insured be in the state.

Neither Indiana nor Illinois, in accordance with *McGee*, attaches significance to where the contract was made or whether agents were sent into the state. A problem of state interest would be presented in the event that the insured individual moved out of state unless the object insured was property or a risk within the state. The Illinois statute appears to assure state interest by requiring that the object of the insurance be within the state at the time of contracting, while Indiana does so by requiring the person receiving the insurance contract to reside in the state. While the actual coverage of both statutes remains in doubt, the Illinois statute seems better designed to assure contact by

89. See notes to the UNIFORM UNAUTHORIZED INSURER'S ACT, 9C UNIFORM LAWS ANNOTATED 305 (1957) for a partial listing.

90. 59 Stat. 33, ch. 20. (1945).

91. "That clause [due process] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." International Shoe Co. v. Washington 326 U.S. 310, 319 (1945).

92. 355 U.S. 220 (1957).

93. IND. ANN. STAT. § 39-5503 (Burns 1965 Repl.).

94. Arguably limiting the use of the statute to resident plaintiffs violates the privileges and immunities clause by creating a privilege not available to nonresidents within the jurisdiction. However, the distinction of privileges according to residence may be based on rational considerations, *e.g.*, preference to residents in access to overcrowded courts both for convenience sake and the fact that they pay for supporting the court, and to the extent the distinction is reasonable it is not a violation. Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

the insuring company with the state and, therefore, to assure the consequent justification of state jurisdiction.[95] The presence of the omnibus clause in the Indiana statute, however, could allow the extension of jurisdiction as far as the Illinois statute and Indiana residents may be well protected.

Service of Process Under a Long Arm Statute

Since the person to be served with process under a long arm statute is a nonresident, many such statutes have special provisions for service upon the defendant. The Illinois long arm statute[96] provides:

> (2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

As mentioned, Indiana does not separate service of process and the jurisdictional act, but, rather, determines jurisdiction by whether there is a provision for service of process. Moreover, Indiana has two statutes which would have a negative effect on any attempted expansion of in personam jurisdiction. Section 2-808[97] provides that "[w]hen the defendant is a nonresident, personal service out of the state is equivalent to publication," and section 2-1062[98] states that "[n]o personal judgment shall be rendered against a constructively summoned defendant who has not appeared in the action." The import of these statutes reflects *Pennoyer v. Neff*,[99] as generally understood, and indicates that personal jurisdiction may be obtained over the nonresident in two ways: actual service within the jurisdiction upon him or his authorized agent, or the less likely means of waiver, general appearance, or consent.[100] While the requirement of personal service within the state for in personam jurisdiction may be consistent with Indiana's interpretation of *Flexnor v. Farson*, there is little to support it as a logical or legal requirement of today's notion of due process.[101] To have a viable long arm statute,

95. See Currie, *supra* note 13, at 581-83 for a short discussion of the Illinois provision and some potential problems.
96. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).
97. IND. ANN. STAT. § 2-808 (Burns 1967 Repl.).
98. IND. ANN. STAT. § 2-1062 (Burns 1967 Repl.).
99. 95 U.S. 714 (1877).
100. Shafe v. Shafe, 101 Ind. App. 200, 198 N.E. 826 (1935).
101. 248 U.S. 289 (1919). The concern over service of process is that it provide adequate, timely, reasonable notice, which does not depend on the defendant's being located in the state. The holdings in Hess v. Pawloski, 274 U.S. 352 (1927) and Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) made it evident that service within

Indiana would need to repeal these statutes or to provide a specialized means for service of process under a long arm statute.[102]

AN ARGUMENT FOR A LONG ARM STATUTE

The chief argument for a long arm statute centers on the state's duty to protect its residents. With the fundamental transformation of the national economy has come a nationalization of commerce resulting in a great increase in the amount of interstate business and, therefore, an increase in contacts of residents with nonresidents. In the face of this growth, the state has an increasing interest in protecting its citizens by furnishing a convenient forum to protect their rights. If the resident is forced to sue out of state, he may be faced with a prohibitive expense which, in effect, would render the nonresident defendant immune from suit. In addition, many conveniences point to allowing suit in the plaintiff's state—the witnesses and evidence are usually there, the law of the plaintiff's forum often applies, it is frequently not inconvenient for the defendant to defend there, and the plaintiff may avoid hostile foreign courts while retaining the advantage of using his own. At the same time, modern transportation and communication have made foreign defense much less burdensome.[103] It should also be noted that residents of many other states are gaining or have the potential for gaining in personam jurisdiction over Indiana residents by virtue of their long arm statutes. Indiana resident plaintiffs are equally entitled to this form of protection.[104]

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the state was not an absolute requirement. See *Developments, supra* note 2, at 987-91; Note, *Due Process of Law and Notice by Publication,* 32 IND. L.J. 469 (1956); Note, *Personal Jurisdiction in Minnesota Over Absent Defendants,* 42 MINN. L. REV. 909, 923 (1958). Problems created by these statutes were noted in Gavit, *The New Federal Rules and Indiana Procedure,* 13 IND. L.J. 203, 209 (1938).

102. Special provisions for service of process in actions arising under long arm statutes are common. The main requirement is that the notice provisions conform to the standards set forth in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Examples of such provisions include ILL. STAT. ANN. ch. 110, § 17 (Smith-Hurd 1956), MINN. STAT. ANN. § 303.13 (Supp. 1966), N.Y. CIV. PRAC. LAW § 308 (McKinney Supp. 1967). The latter is particularly commendable for the flexibility it provides through a hierarchy of methods in service of process.

103. Many of these points were brought out in McGee v. International Life Ins. Co., 355 U.S. 220 (1957). See also *Developments, supra* note 2 at 1015; Note, *A Reconsideration of "Long Arm" Jurisdiction,* 37 IND. L.J. 333, 335 (1962).

104. This could be regarded as the classic argument for long arm jurisdiction. Assuming equal justice is rendered by every court, however, it is not certain jurisdiction is needed in a state to "protect" its residents. However, the decision of a foreign court is not what the resident is being protected from, but the greater expense of litigating in the foreign forum. In this respect, it may be desirable to require a plaintiff to post a bond to cover the defendant's travel expenses and costs, thus eliminating the objection that residents may file spurious claims in small amounts in the hope the defendant will pay rather than incur the cost of defending the suit. See Note, *Personal Jurisdiction in Minnesota Over Absent Defendants,* 42 MINN. L. REV. 909, 928 (1958). Wisconsin in effect does this by providing that if an action is dismissed due to the defendant's

Objections can be raised to long arm statutes on a number of grounds, none of which is very persuasive.[105] It is possible that there may be reluctance of foreign businesses to transact business in a state, but with the large and increasing number of such statutes the suggestion that business would discriminate between locales on this basis is without merit. Such statutes will naturally add another forum in which the plaintiff may bring an action and the objection of forum shopping may arise. However, only one jurisdiction would be added to the large number already possible, and the convenience of that jurisdiction for the plaintiff would make it unlikely that he would bring an action elsewhere. An increase in court business would also logically follow, but other states have not found this unduly burdensome, and certainly not a basis for denying their residents protection. In addition, while the plaintiff may be faced with a two-step litigation process to reduce the judgment to money, the second step would be largely pro forma.

While a long arm statute is desirable, experience has shown that drafting a good statute is a highly complex problem. The major difficulty confronting the draftsmen is determining how specific the statute should be in setting forth the conduct or events giving rise to jurisdiction. Depending upon how specific the statute is made, the burden of determining its application will be shifted between the legislature and the judiciary.

The states have taken two approaches in drafting long arm statutes, with the vast majority typified by broad statements of the nature of the cause of action as a basis for jurisdiction, such as the Illinois provision. The nature of the cause of action, however, has little necessary relationship to the central question—whether there are sufficient contacts with the state to justify jurisdiction in terms of fairness. The second approach has been to specify in great detail the conduct giving rise to jurisdiction, irrespective of tort or contract;[106] thus the legislature assumes the initial burden of determining coverage and the courts are left with the question of whether due process is violated by the statute in each situation. One of the initial problems under this approach is determining what conduct should or can be specified as giving rise to jurisdiction.

If the purpose of a long arm statute is to protect state residents, it would seem that a statute with a broad, general authorization would allow a greater extension of jurisdiction, and thus more protection, than

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objection of lack of jurisdiction over his person, the court may order the plaintiff to pay reasonable expenses of the action up to 500 dollars. WIS. STAT. ANN. § 262.20 (Supp. 1967).

105. See Note, *A Reconsideration of Long Arm Jurisdiction*, 37 IND. L.J. 333 (1962).

106. WIS. STAT. ANN. § 262.05 (Supp. 1967).

one in which specific conduct is delineated. Rhode Island has enacted the broadest possible statute by providing for jurisdiction whenever there are the requisite minimum contacts.[107] However, such broad statutory language may be objectionable for at least two reasons: first, the court would in effect be required to interpret due process in each case and, second, a lengthy period of judicial interpretation would be necessary before the statute acquired definitive meaning. For these reasons, the better approach would be for the legislature to be more specific as to what will justify jurisdiction, although a wide range of possibilities is left.[108] In addition, courts will be less likely to misinterpret or limit a statute which is specific, although the detail may hamper the adaptability of the statute.

It must be remembered that despite the single act wording of these statutes, they are still bound by the flexible test of "fairness" which is determined by the process of balancing interests.[109] Thus, while the single contact may exist, jurisdiction may still violate fairness. Further, the equities of a case can shift radically between corporation v. individual, corporation v. corporation, and individual v. individual.[110] A good example would be the reverse of the *McGee* situation, with the insurance company trying to sue the insured individual in the company's home state and the only contact being the insurance contract. By working with the "fairness" test, a court can require different degrees of contact in determining if jurisdiction is fair, and the favored position of one such as a

107. "Every foreign corporation, every individual not a resident of this state. . ., and every partnership or association, . . ., that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, ..." R.I. GEN. LAWS ANN. § 9-5-33 (Supp. 1966).

108. While the very act of specification would seem to involve a more limited coverage than due process would allow, due to the need to fit the action into one of the specific provisions, specification may be done in such a broad manner it would merely give the court guidelines for interpretation. The Illinois act is an example of a broad yet more specific authorization. Perhaps the most specific or detailed long arm statute is WIS. STAT. ANN. § 262.05 (Supp. 1967).

109. Note that fairness is the constitutional limitation of due process as expressed through minimum contacts. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

110. Most of the cases arising under the tort provisions of long arm statutes have been product liability cases in which the defendant is a foreign corporation. The expanding jurisdiction in this area coincides with the growing interest in consumer protection, in addition to having the favorable posture for the plaintiff of individual plaintiff v. corporate defendant. In many of the contract actions both parties are corporations, and while more contact seems to be required under contract actions, a corporation's ability to defend in a foreign forum more easily than an individual is an important factor. In actions involving individual defendants, the courts require a high degree of contact on the part of the nonresident. Most individual businessmen operate in a very localized area and it could be a severe burden to require them to defend in a foreign state. See Judge Sobeloff's hypothetical in Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), and Currie's discussion in 1963 U. ILL. L.F. 533, 538-79. The localized business was an important factor in the decision in Oliver v. American Motors Corp., 425 P.2d 647 (Wash. 1967).

physically injured plaintiff is obvious. It is apparent that many factors may enter into the determination of "fairness," and relatively minor aspects can be of importance in a close case.[111]

A serious question is whether the statute should apply only to commercial situations, as many statutes presently do. Obviously "transaction of business" fits only the commercial context, but many states have limited the tort provision by requiring substantial economic contact with the state before jurisdiction may be exercised.[112] It would seem, however, that as long as the requisite minimum contacts exist, whether the tort occurred in a commercial setting should not be conclusive.

A possible third approach which some cases have mentioned should also be considered in drafting a statute.[113] The concept of minimum contacts as connoting fairness centers on the relation of the parties and of the defendant to the prospective forum state. There is little problem in justifying jurisdiction where there are actual substantial contacts with the state, but there is a problem in situations such as product liability where there may be no privity between parties. In this instance the problem could be handled by drafting, either in terms of or as a limitation upon a broader provision, a requirement of reasonable foreseeability of the product's reaching other states. Thus, the single product coming into a state and causing injury, despite lack of other business contacts, may justify jurisdiction over a manufacturer if he availed himself of a national distribution system. By the same reasoning, jurisdiction in a noncommercial situation may be exercised if the contact with the state was by direct action of the defendant, which certainly makes consequences within the state reasonably foreseeable. An example is the defamatory letter mailed from out of state.[114]

Somewhat related to how specific a long arm statute should be is the

111. The factors could include who initiated the transaction, place of performance, place of making of a contract, the state's relation to the parties and the subject matter of litigation, the nature of the parties—individual or corporation, relative economic positions, locations of witnesses and evidence, nature of remedy sought, and many other factors which may be of significance in a given factual situation. Thus the determination of fairness resembles the application of the doctrine of forum non conveniens in certain respects. In addition, to prevent unfairness to the defendant, the Illinois courts have emphasized the use of forum non conveniens and the possibility of removal to a federal court and then making a motion for removal to a more convenient forum. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

112. N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967).

113. *See* Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963).

114. St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966) presents such a fact situation. The limitation of the tort provision of the Virginia long arm statute to the commercial situation was the occasion for Judge Dalton's efforts to sustain jurisdiction. (See note 9 *supra*). However, some states, such as New York, except defamation from the coverage of their long arm statute. N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1967).

necessity of assuring adequate protection to the defendant. Long arm statutes are intended to aid the resident plaintiff, but the due process limitation is in terms of fairness to the defendant and a tension can result from these opposing considerations. The further jurisdiction is extended and the more tenuous the defendant's contact with the forum becomes, the more important it becomes that the defendant be adequately protected. The defendant may try to remove the case to a federal court and then make a motion for removal to a more convenient forum.[115] Another possible protection for the defendant is the doctrine of forum non conveniens on the state level, and it may be desirable to enact this doctrine into statutory form to insure its consideration.[116] Finally, by specifying in some detail the conduct which will subject a defendant to jurisdiction, the legislature can assure a greater degree of fairness to the defendant.[117]

This writer favors adopting a statute based upon the Wisconsin provision, which provides for jurisdiction in three situations[118] and is relatively specific in format. Enactment of a similar statute would have several desirable effects in Indiana. Because the conduct giving rise to jurisdiction is spelled out in detail, the early period in which judicial boundaries are being set would be minimized. Secondly, by not using the usual classification of conduct into tort and contract, the statute avoids any initial question of the character of the act. Thirdly, the statute presents all the bases for jurisdiction of the state courts in one place, and separates the jurisdictional act and the giving of notice. This clarifying move alone commends the statute to Indiana. In addition, this writer feels the doctrine of forum non conveniens should be enacted into statute, thus insuring the forum state has sufficient interest in the controversy, vis-à-vis other states, to exercise jurisdiction fairly under the circumstances.

CONCLUSION

In *International Shoe* the United States Supreme Court opened up a new area into which state jurisdiction over nonresidents can be extended, thus giving further protection to residents. Indiana, unlike

115. This was suggested in Nelson v. Miller, 11 Ill. 2d. 378, 143 N.E.2d 673 (1957).

116. This has been done in Wisconsin. WIS. STAT. ANN. § 262.19 (Supp. 1967).

117. This is the effect, if not the purpose, of the statutory requirements set forth in the New York statute and the Model Act when the action is based on a negligent act out of state causing injury within the state. The method is not limited to this situation, however.

118. WIS. STAT. ANN. § 262.05 (Supp. 1967). The three general situations are: 1) an act by the defendant in the state which affects the plaintiff, 2) an action involving some degree of consensual privity between the plaintiff and the defendant which contemplates a substantial contact with the state, and 3) actions out of state causing injury or damage to property within the state.

many other states, has not responded with a long arm statute, and its current laws do not provide comprehensive protection to Indiana residents. Enactment of a long arm statute would involve some effect on existing statutes;[119] however, there is no reason that presently existing jurisdictional bases could not be retained. While there are many factors to be considered in drafting a long arm statute,[120] the large number of states possessing them indicates their desirability and workability, and Indiana's inadequate protection of its residents demonstrates a need for such a statute.

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119. To the extent the method of service of process provided in a new statute is less cumbersome than the method now provided in certain statutes, the new statute may supersede the latter in use. Statutes which may be thus superseded include the nonresident motorist and the nonresident airplane operators statutes (IND. ANN. STAT. § 47-1043 (Burns 1965 Repl.); IND. ANN. STAT. § 14-907 (Burns 1964 Repl.)). In addition, if a long arm statute is enacted, there should be a provision to the effect that IND. ANN. STAT. § 2-606 (Burns 1967 Repl.) (which suspends the Indiana statute of limitations during the time the defendant is a nonresident of the state) does not apply to actions which could be brought under the long arm statute. If an action can be brought in Indiana, there is no reason for the suspension.

120. A list of a number of relevant factors is given in *Developments, supra* note 2, at 1015. See also, Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105 (1963).