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VIRGINIA COMMENT

JURISDICTION UNDER "LONG-ARM" STATUTE OVER
BREACH OF WARRANTY ACTIONS

The 1964 General Assembly of Virginia enacted a "long-arm" statute.¹ The term "long-arm" refers to the enlargement of a state's jurisdictional powers over nonresident defendants. This adoption adds Virginia to a growing list of states which have enacted similar legislation within the past decade.² Several, in addition to Virginia, have adopted the Uniform Interstate and International Procedure Act,³ providing six different bases upon which jurisdiction over nonresidents

¹Va. Code Ann. § 8-81.2 (Supp. 1964). It reads as follows:

"When Personal Jurisdiction Over Person May Be Exercised

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

"(1) Transacting any business in this State;

"(2) Contracting to supply services or things in this State;

"(3) Causing tortious injury by an act or omission in this State;

"(4) Causing tortious injury in this State by an act or omission outside this 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;

"(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also 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;

"(6) Having an interest in, using, or possessing real property in this State;

or

"(7) Contracting to insure any person, property, or risk located within this State at the time of contracting.

"(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; provided, however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this State over foreign corporations which are subject to service of process pursuant to the provisions of any other Statute."

²Idaho Code Ann. § 5-514 (Supp. 1963); Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1956); Kansas Senate Bill No. 140, Sess. of 1963, § 60-308 (Effective Jan. 1, 1964); Mo. Rev. Stat. § 506.150 (3) (1959); Mont. Rev. Codes Ann. § 93-2702-2b (Supp. 1963); N.M. Stat. Ann. § 21-3-16 (Supp. 1964); N.Y.CPLR § 302 (1963); N.C. Gen. Stat. § 55-145 (1960); Okla. Stat. tit. 12, § 187 (1963); Wash. Rev. Code § 4.28.185 (1962); Wis. Stat. Ann. § 262.05 (1963).
72, 75 (Pocket Part 1963).

³Uniform Interstate and International Procedure Act § 1.03, 9B U.L.A.

may be predicated.⁴ Virginia adds a seventh jurisdictional basis, which is specifically designed to broaden and extend the scope of the state's personal jurisdiction over nonresidents in breach of warranty actions.⁵ It is paragraph five and provides:

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

"

"(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also 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;"

Background

The scope of in personam jurisdiction over nonresident defendants has been considerably expanded since the landmark case of *International Shoe Co. v. Washington*,⁶ which was decided in 1945, and developed further in the 1957 decision in *McGee v. International Life Insurance Co.*⁷

⁴Only a few states have provided a separate jurisdictional basis for product liability actions. See statutes of Kansas, North Carolina, Oklahoma, and Wisconsin, *supra* note 2.

⁵*Supra* note 1. 2 University of Richmond Law Notes No. 2 (1964); Mr. J. Westwood Smithers, author of the note, helped draft Virginia's "long-arm" statute.

Liability for an injury caused by negligent acts or omissions outside the forum state has long been recognized. *Young v. Masci*, 289 U.S. 253, 258-59 (1933); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶326 U.S. 310 (1945).

⁷355 U.S. 220 (1957). After the decisions in the *International Shoe* and *McGee* cases, courts of several states significantly expanded the interpretation of existing state jurisdictional statutes. *Shealy v. Challenger Mfg. Co.*, 304 F.2d 102 (4th Cir. 1962); *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117 (S.D. Ind. 1962); *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (D. Md. 1950); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W.2d 607 (1961); *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

Although the Supreme Court has not passed directly on the constitutionality of the "single-act" long-arm statutes, it is significant that the Supreme Court, in deciding the *McGee* case, *supra*, cites *Smyth v. Twin State Improvement Co.*, *supra*, and *S. Howes Co. v. W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954), for the proposition that the due process clause does not preclude the exercise of personal jurisdiction provided there are "substantial connections with the state." Both these

Until 1964 Virginia had elected not to follow the trend towards expanding in personam jurisdiction. A statute requires that a foreign corporation be "transacting business" in Virginia before extraterritorial jurisdiction can be asserted under the statute.⁸ The primary purpose of that statute is to describe how to serve process on a foreign corporation that is "transacting business" in this state. It qualifies as a jurisdictional statute only to the extent that it requires foreign corporations to be "transacting business" in Virginia before liability will attach.⁹ However, no reference is made as to when the corporation will be deemed "transacting business." Most of the Virginia cases involving the exercise of personal jurisdiction over foreign corporations have arisen under Virginia statutes which refer only to how, and not when, service of process shall be made.¹⁰

Transacting business, or doing business,¹¹ as interpreted by Virginia and federal courts applying Virginia law, means solicitation plus some additional business activity,¹² or doing sufficient business "as to warrant the inference that the corporation has subjected itself to the

cases involved an isolated or single act transaction; nevertheless, the nonresident defendants were held to have had sufficient contacts with the forum state.

In citing the *Smyth* and *Howes* cases the Supreme Court may have been placing its stamp of approval on this type of extended jurisdiction over nonresidents. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). Also the continued recognition of nonresident motorist statutes is persuasive authority that a single tortious act committed within the state is sufficient to satisfy due process. *Hess v. Pawloski*, 274 U.S. 352 (1927); but see *Nevins v. Revlon, Inc.*, 23 Conn. Supp. 314, 182 A.2d 634 (Super. Ct. 1962).

If "one-act" statutes are to be held constitutional by the Supreme Court there is no doubt that Virginia's paragraph five will be held constitutional because of its more restrictive jurisdictional basis.

⁸Va. Code Ann. § 13.1-119 (Repl. Vol. 1964). Heretofore, Virginia's jurisdictional statutes provided only for in personam jurisdiction over foreign corporations. Virginia's new "long-arm" statute provides for personal jurisdiction over individuals as well as foreign corporations. This change is in conformity with the earlier Supreme Court decision of *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

⁹Supra note 8, in pertinent part provides: "If a foreign corporation transacts business in this State . . . , its directors, officers and agents doing such business shall be jointly and severally liable for any contracts made or to be performed in this State and any torts committed in this State. . . ."

Activities which do not constitute "transacting business" are enumerated in the Va. Code Ann. § 13.1-102.1 (Repl. Vol. 1956).

¹⁰Va. Code Ann. § 8-60 (Repl. Vol. 1957); Va. Code Ann. § 13.1-111 (Repl. Vol. 1964); see also Va. Code Ann. § 8-81.3 (Cum. Supp. 1964).

¹¹The term "transacting business" has been construed to mean "doing business" within the forum state. *Rock-ola Mfg. Corp. v. Wertz*, 249 F.2d 813 (4th Cir. 1957).

¹²*Iliff v. American Fire Apparatus Co.*, 277 F.2d 360 (4th Cir. 1960); *Trignor v. L. G. Balfour & Co.*, 167 Va. 58, 187 S.E. 468 (1936).

laws of the state."¹³ Courts in other states have chosen to follow the less restrictive "substantial minimum contact" test.¹⁴

¹³*Atlantic Greyhound Lines, Inc. v. Metz*, 70 F.2d 166 (4th Cir. 1934); *Carnegie v. Art Metal Const. Co.*, 191 Va. 136, 60 S.E.2d 17 (1950); see 20 C.J.S. Corporation 1920 (1940).

¹⁴Numerous factors are considered in determining what constitutes minimum contacts within the state, *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 298 (6th Cir. 1964); *Moore-McCormack Lines, Inc. v. Bunge Corp.*, 307 F.2d 910, 914, 915 (4th Cir. 1962); some of these factors are: volume of business activity, *Chovan v. E. I. DuPont de Nemours & Co.*, 217 F. Supp. 808, 812, 813 (E.D. Mich. 1963); where an independent manufacturer's agent is told to solicit orders and ship goods into the forum state, *Wisconsin Metal & Chemical Corp. v. DeZurik Corp.*, 222 F. Supp. 119, 123 (E.D. Wis. 1963); direct delivery in plaintiff's state, *Shealy v. Challenger Mfg. Co.*, supra note 7; control exercised over local distributor, *Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915, 920 (1st Cir. 1962); representative's activity in forum state, *Florio v. Powder Power Tool Corp.*, 248 F.2d 367 (3rd Cir. 1957); direct shipment of goods to forum state without agents in forum state, *Atkins v. Jones & Laughlin Steel Corp.*, 258 Minn. 571, 104 N.W.2d 888 (1960); an exclusive independent distributor in the state through whom products are sold, *Eclipse Fuel Eng'r Co. v. Superior Court*, 148 Cal. App. 2d 736, 307 P.2d 739 (1957); inherently dangerous article shipped into the forum state, *Jeter v. Austin Trailer Equip. Co.*, 122 Cal. App. 2d 376, 265 P.2d 130 (Dist. Ct. App. 1954). See also, *Hass v. Fancher Furniture Co.*, 156 F. Supp. 564, 567 (N.D. Ill. 1957); *Nixon v. Cohn*, 62 Wash. 2d 987, 385 P.2d 305 (1963).

More than a counting of the number of contacts is necessary in exercising jurisdiction. Factors such as interest of the forum state, forum non conveniens, and the availability of the evidence are also considered. *Waco-Porter Corp. v. Superior Court*, 211 Cal. App. 2d, 27 Cal Rptr. 371 (Dist. Ct. App. 1963).

Three rules for testing future litigation concerning the exercise of personal jurisdiction over nonresidents have been advocated. They provide as follows:

"(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.

"(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'

"(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens." Note, 47 Geo. L.J. 342, 351-52 (1958).

These three rules are taken from a combined reading of the *International Shoe* case, supra note 6; the *McGee* case, supra note 7; and *Hanson v. Denckla*, 357 U.S. 235 (1958). These rules are discussed in the case of *L. D. Reeder Contractors v. Higgins Industries, Inc.*, 265 F.2d 768 (9th Cir. 1959).

Although the plaintiff's burden of showing minimum contacts is very light,

Long-Arm Statute Problems

The insertion of paragraph five in Virginia's "long-arm" statute raises the following problems:

- (1) how Virginia's past approach to the exercise of extraterritorial jurisdiction will be affected;
- (2) to what extent Virginia plaintiffs will be provided with a more adequate remedy against acts or omissions occurring outside Virginia with resulting consequences inside Virginia; and
- (3) whether the "long-arm" statute will operate retrospectively.

The extent to which the Virginia statute expands in personam jurisdiction in breach of warranty actions depends on the interpretation of the key words "regularly," "persistent," and "substantial" found in paragraph five. Paragraph four of Virginia's "long-arm" statute requires the same business activity found under paragraph five. Therefore, it may be reasonably inferred that the Commissioner's notes relating to paragraph four apply equally to paragraph five. These notes pertaining to paragraph four state: "It is not necessary that this activity amount to the doing of business."¹⁵

There is little doubt as to the constitutionality of paragraph five. The intentional use of the magical due process words, "regularly," "persistent," and "substantial," place paragraph five well within the permissible scope of due process limits.¹⁶ The jurisdiction of Virginia courts is no longer limited by the doctrine that solicitation alone is insufficient to constitute doing business in Virginia.¹⁷ As long as the

the plaintiff must be prepared to prove jurisdiction if the nonresident defendant challenges it. *Williams v. Connolly*, 227 F. Supp. 539 (D. Minn. 1964); see also, *Yack Mfg. Corp. v. Superior Court*, 202 Cal. App. 645, 21 Cal. Rptr. 51 (Dist. Ct. of App. 1962); *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963).

¹⁵Supra note 3, at 77. The Commissioner's notes also indicate that the activity required to satisfy the minimum contact test need have no relationship to the act giving rise to the present cause of action. But where a "double substantial" relationship exists, then jurisdiction may be based on a single act. *L. D. Reeder Contractors v. Higgins Industries, Inc.*, supra note 14.

Although the Commissioner's notes would not be binding upon a Virginia court in its interpretation of paragraph five, they would provide the court with persuasive secondary authority.

Past decisions concerning what constitutes "doing business" do not govern the interpretation of the Illinois "long-arm" statute. Supra note 2. *Haas v. Fancher Furniture Co.*, supra note 14.

¹⁶The language of *International Shoe*, supra note 6, was probably adopted by the drafters of Virginia's paragraph five in order to increase the possibility of legislative approval, and to permit Virginia courts to interpret paragraph five as broadly as necessary.

¹⁷Paragraph five requires only "that he regularly does or solicits business..." The notion that solicitation alone is sufficient to constitute doing business by a

nonresident defendant regularly solicits business and might reasonably have expected "such person to use, consume, or be affected by the goods in this State," jurisdiction most likely will be sustained.¹⁸

While Virginia's new statute appears to expand significantly personal jurisdiction over nonresident defendants, an examination of paragraph five actually reveals a restrictive approach toward the extension of in personam jurisdiction when compared with "long-arm" statutes of other states.¹⁹ Virginia's "long-arm" statute is the only one which expressly creates a jurisdictional basis exclusively for breach of warranty actions. In other states jurisdiction for breach of warranty actions is usually asserted under a "single-act" provision designed for tortious injury actions.²⁰

In 1956 Illinois enacted the first "single-act" statute, which several states have adopted.²¹ "Single-act" statutes have a broader application than do Virginia's paragraphs four and five. Under a "single-act" statute the nonresident defendant is not required to have systematic or continuous contacts with the forum state, and the plaintiff does

foreign manufacturer was first presented in *Traveler's Health Ass'n v. Virginia*, 339 U.S. 643 (1959); and in *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959) the Fourth Circuit said, "The distinction between solicitation and other, frequently far less important, activity . . . is far from controlling." 264 F.2d at 857.

¹⁸It is intended that personal jurisdiction over nonresident defendants should be predicated on a general course of business activity with reasonableness, fairness, and substantial justice as touchstones. This approach is supported by *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 325 P.2d 21, 27 (Dist. Ct. App. 1958) (concurring opinion); *Conn. v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871, 875 (1959); Restatement (Second), Conflict of Laws § 92 (Tent. Draft No. 3 1956).

It does not violate traditional notions of fair play to provide that nonresidents shall be tried in the courts of the state whose interest is direct and immediate. *Gillioz v. Kincannon*, 213 Ark. 1010, 214 S.W.2d 212 (1948) and *Smyth v. Twin State Improvement Corp.*, supra note 7.

¹⁹Supra note 2.

²⁰Several states possess "long-arm" statutes which provide for personal jurisdiction in case of "the commission of a tortious act within this state." This provision was taken from Ill. Ann. Stat., ch. 110, § 17 (Smith-Hurd 1956); Me. Rev. Stat. Ann., ch. 112, § 21(I)(B) (Cum. Supp. 1963); N.Y. CPLR § 302(a)(2) (1963); N.C. Gen. Stat. § 55-145(4) (1960); or upon the commission of a tort "in whole or in part" in the state. Minn. Stat. Ann. § 303.13(3) (Pocket part 1963); Vt. Stat. Ann. tit. 12, § 855 (1958).

Without stating that a breach of warranty action sounds in tort, some hold that jurisdiction is obtainable for a breach of warranty action under "single-act" tortious injury jurisdictional basis. *Mueller v. Steelcase, Inc.*, 172 F. Supp. 416 (D. Minn. 1959); *Johns v. Bray State Abrasive Products Co.*, supra note 7; *Connecticut Tool & Mfg. Co. v. Bowsteel Distribs., Inc.*, 24 Conn. Supp. 290, 190 A.2d 236 (1963); *Gray v. American Radiator & Standard Sanitary Corp.*, supra note 7; *Smyth v. Twin State Improvement Corp.*, supra note 7.

²¹Supra note 2.

not have to show that the defendant might reasonably have expected the person to use, consume, or be affected by the defective product.

In *Gray v. American Radiator & Standard Sanitary Corp.*²² the Illinois Supreme Court sustained the exercise of personal jurisdiction over an Ohio valve manufacturer. The failure of a defective valve and the resulting injury, the last events necessary to make the manufacturer liable for committing a tortious act, occurred in Illinois, the forum state. The court rejected the argument that the term "tortious act" was intended to limit jurisdiction to those situations in which the act or omission of the defendant occurred within Illinois, as distinguished from consequences in Illinois caused by an act having its origin in another state.²³

Several states have a general product liability basis of jurisdiction.²⁴ Such a basis authorizes recovery under any theory of law: tort, contract, or breach of warranty.

North Carolina's "long-arm" statute has the broadest general product liability basis for asserting jurisdiction over nonresident defendants.²⁵ It provides in pertinent part:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

"...
 "(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and

²²Supra note 7. An Illinois plaintiff brought an action for breach of warranty against an Ohio valve manufacturer for a defective valve. The Ohio manufacturer had shipped the valve to a Pennsylvania corporation, who installed it in a water heater. The heater was shipped to Illinois where the plaintiff purchased it. Thereafter, the heater exploded in plaintiff's home causing him serious injury.

²³The *Gray* case, supra note 7, is in conflict with an earlier Federal decision on this point. In *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957), the court held that the section did not apply merely because the defective product caused damage in Illinois. Since all the defendant's acts, with respect to the defective product, occurred outside Illinois the defendant had not committed a tortious act in Illinois.

²⁴Kansas, North Carolina, and Oklahoma, supra note 2.

²⁵Supra note 2. Although the defendant must reasonably expect that the goods will be used or consumed in North Carolina, there is no requirement that the defendant must reasonably expect "such person" to be affected by the product. In this respect the North Carolina general product liability provision is broader than paragraph five of Virginia's "long-arm" statute.

are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers."

In applying this statute the North Carolina Supreme Court has carefully weighed the quantity and quality of the contacts within the state.²⁶ Oklahoma's recently enacted "long-arm" statute contains a general product clause which provides that "the manufacture, or distribution of a product which is sold in the regular course of business within this state," shall be subject to the jurisdiction of the courts of Oklahoma.²⁷ No cases have been decided under Section 187 (B)(5) of the Oklahoma statutes. Kansas has the narrowest general product liability section in its "long-arm" statute.²⁸ It reads as follows:

"Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided in addition, that at the time of the injury either (1) the defendant was engaged in solicitation or services activities within this state or (2) products, materials or things procured, serviced or manufactured by the defendant anywhere where used or consumed within this state in the ordinary course of trade or use."

²⁶The general product liability provision of North Carolina's statute was held inapplicable when applied to a single sale of defective yarn consummated in New York with the reasonable expectation that the yarn would be used in North Carolina. The sale of yarn F.O.B. from the New York plant, and the performance of the contract in New York, were the extent of business activity. The court held the minimum contacts were insufficient to sustain jurisdiction. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); see also *Putnam v. Triangle Publications, Inc.*, 245 N.C. 423, 96 S.E.2d 445 (1957).

The same court has held that where an Illinois corporation sold an allegedly defective tractor-mower to an independent Virginia distributor, who resold it to a North Carolina city and injury thereafter resulted, there were insufficient contacts to sustain jurisdiction over either the Illinois manufacturer or the Virginia distributor. *Moss v. City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961).

But where the distributor was not disclosed the court held the foreign corporation was subject to suit on the theory that demonstration and promotion activities were sufficient contacts. *Babson v. Clairol, Inc.*, 256 N.C. 227, 123 S.E.2d 508 (1962).

Jurisdiction was sustained where a foreign corporation shipped defective gas heaters into North Carolina with the reasonable expectation that the heaters would be installed and used by North Carolina residents. The court distinguished earlier cases on their facts and held the statute was applicable in this particular fact situation. *Shepherd v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959).

²⁷Supra note 2. The Oklahoma statute does not have the requirement that the manufacturer, or seller must have reasonably expected the person to use, consume, or be affected by the product shipped into the state.

Perhaps the phrase "in the regular course of business" can be equated to Virginia's requirement that there must be either regular business or solicitation, persistent conduct, or substantial revenue.

²⁸Supra note 2.

It should be noted that only one of these conditions must be satisfied, since the disjunctive "or" is used rather than the conjunctive "and." Although no cases have been brought under this subparagraph, there is no reason to assume, in view of the statute's "single-act" basis, that either of these conditions are dependent upon the "doing business" test.

Under paragraph five of the Virginia statute the plaintiff must show that the defendant might reasonably have expected the plaintiff to use, consume, or be affected by the defective product, whereas, the general product liability provisions do not contain such a requirement. While Virginia's paragraph five requires continuous or regular contacts with the forum state, other "long-arm" statutes possessing general product liability subsections do not define what constitutes sufficient minimum contacts. Because of the elimination of this requirement, general product liability statutes as a basis for jurisdiction are broader than the Virginia breach of warranty clause.

Although the Kansas general product liability paragraph is somewhat broader than Virginia's corresponding paragraph, the courts could reach the same result under the entire Virginia statute.²⁹

Relationship Between Different Jurisdictional Bases

The drafter of section 1.03 of the Uniform Interstate and International Procedure Act recognized the possible need for using different jurisdictional bases to obtain extraterritorial jurisdiction. The need for a broader jurisdictional basis would arise where there has been an isolated sale within a state of a defective product manufactured in another state. The Commissioner's note states, "In some instances a jurisdictional basis may be found under more than one subdivision."³⁰ Although paragraph five of Virginia's "long-arm" statute is not included within section 1.03 of the Uniform Act, it would seem that the Commissioner's notes regarding the finding of jurisdiction

²⁹For example, suppose a Virginia resident enters into a contract for the construction and shipment of bleacher seats for a public auditorium. The bleachers are subsequently shipped to the Virginia purchaser, and installed by the purchaser. This particular manufacturer has never transacted any other business in Virginia, nor has he solicited or advertised in the state. As a direct result of a defective part, the bleachers collapse, causing serious injury to numerous Virginia spectators. Possibly jurisdiction could be asserted under Virginia's paragraph five, provided the contract price constituted "substantial revenue." If the court found that the contract price did not constitute "substantial revenue," it could still find a valid jurisdictional base under either paragraphs one or two.

³⁰Supra note 3, at 75.

under more than one paragraph would apply equally to Virginia's paragraph five. Therefore, assuming the plaintiff in a breach of warranty action can show that the defendant's activities fall within the proviso portion of paragraph five, and that the non-resident defendant might "reasonably have expected such person to use, consume, or be affected by the goods in this State . . .," there is no reason why the plaintiff cannot allege jurisdiction under either paragraphs one, two, four, or five.

For example, in the case of a single sale, jurisdiction under paragraphs four and five would not be sustained because of insufficient contacts. If the single sale were directly consummated between the foreign seller and Virginia plaintiff, jurisdiction might be sustainable under either paragraphs one or two.³¹ Because the transaction was direct, the foreign seller could not argue that he was being subjected to the state's jurisdiction for unforeseen liability.³² Several cases have arisen where a defective product manufactured by a foreign corporation was purchased and taken into another state where the injury to the purchaser occurred.³³ If the defective product purchased in Virginia is taken to an adjoining state where injury results to the purchaser, jurisdiction under paragraph five is not possible, since the injury must occur "in this State,"³⁴ but either paragraphs one or two would provide possible jurisdictional bases, if minimum contacts with Virginia could be shown.

The fact that jurisdiction in some instances may be sustained under more than one jurisdictional basis raises the problem of whether or not the plaintiff can obtain jurisdiction over a nonresident defendant on one theory and base his claim for recovery on a different theory.

One possible answer is found in the Commissioner's notes re-

³¹As paragraph two is worded it apparently authorizes jurisdiction on a wholly executory foreign contract and also in cases of defective products delivered in Virginia which clearly might not involve a "transaction" within the state.

³²O'Brien v. Comstock Foods, Inc., *supra* note 14, at 570.

³³For example, a defective geologist hammer was made in one state, shipped into New York where it was purchased by the plaintiff who was subsequently injured by the hammer in Connecticut. The court placed great emphasis on the dangerous nature of the hammer in sustaining jurisdiction. The court distinguished the Erlanger Mills case, *supra* note 26, on the basis that only a commercial contract was breached, while in this case a tort was committed. *Singer v. Walker*, 21 App. Div. 2d 285, 250 N.Y.2d. 216 (Sup. Ct. 1964); see also *Florio v. Powder Power Tool Corp.*, *supra* note 14; but see *Lolli v. Mack Truck, Inc.*, 170 F. Supp. 671 (E.D. Pa. 1958), where a defective truck spring was manufactured in Illinois, sold to a Pennsylvania plaintiff who was injured in New Jersey as a result of the defect. The court held service of process was invalid as the injury did not occur in Pennsylvania. See also, *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

³⁴*Supra* note 1.

garding section 1.03 of the Uniform Act which states, "Each of the subdivisions will support a cause of action under any theory of law."³⁵ For example, a cause of action arising from a "tortious injury" may sound in contract, tort, or breach of warranty.

On the other hand, the legislature may have intended the jurisdictional fact in product liability actions against foreign manufacturers to be the act or omission committed outside the state and not the resulting injury inside the state. While restricting the paragraphs pertaining to breach of warranty and tortious acts occurring outside the state with the regular and persistent conduct requirement, the legislature did not similarly restrict the paragraph involving tortious acts committed inside the state. Therefore, to obtain a recovery based on either a tort or breach of warranty theory,³⁶ the plaintiff must exercise jurisdiction only under those paragraphs designed for acts occurring outside the forum state.

Relation To UCC

Creating an expanded jurisdictional basis specifically for breach of warranty actions was thought desirable to complement and effectuate

³⁵Supra note 3. Subsection (b) of Virginia's "long-arm" statute states in part that, "when jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted . . . against him . . ." This might be interpreted to mean, for example, that, if jurisdiction is obtained under paragraph two, a tort or breach of warranty cause of action could be asserted against the defendant, because these are "acts enumerated in this section." This might be a practical argument if the contract damages would be less than damages under a tort or breach of warranty recovery theory.

³⁶The Virginia Uniform Commercial Code provides two causes of action for product liability cases: negligence and breach of warranty. Whether or not an action brought for breach of warranty is an ex-delicto or ex-contractu action is a matter of much confusion and disagreement.

Some courts use a tort criteria to decide whether or not the plaintiff can sue in contract, and then use a contract criteria on which to base the measure of recovery. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See 18 Wash. & Lee L. Rev. 124 (1961). See also Prosser, *Torts* § 88, p. 546 (2d ed. 1955) for comments on whether breach of warranty sounds in tort or contract.

New York characterizes an alleged breach of warranty action as sounding in tort for the purpose of obtaining jurisdiction over nonresident defendants. *Singer v. Walker*, supra note 33; *Goldberg v. Kollsman Inst. Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592 (1963); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 363 (1962).

Providing two causes of action simplifies the problem of characterizing breach of warranty actions. The drafters of Virginia's Uniform Commercial Code may have desired to avoid the confusion regarding whether or not breach of warranty sounds in tort or contract by allowing a recovery based on either negligence or on breach of warranty. Since Virginia's new statute provides a separate jurisdictional basis for breach of warranty, tortious injury, and contract, the legislature most likely intended to avoid completely such characterization problems.

ate the breach of warranty section of Virginia's recently enacted Uniform Commercial Code,³⁷ thereby affording additional protection to Virginia residents against defective goods or services originating outside the state.

Under common law a recovery for an injury resulting from a breach of warranty was obtainable only by showing privity between the manufacturer and plaintiff.³⁸ Because of this necessity Virginia plaintiffs were often denied any effective remedy against the manufacturer. The initial inroads in Virginia against privity as a defense to breach of warranty actions was made by case law,³⁹ and then by statute.⁴⁰ Virginia's Uniform Commercial Code incorporates the language found in the statute, stating that "lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence. . ."⁴¹

Although abolishing privity as a defense improves the plaintiff's chances for a recovery, he still lacks any recourse against a foreign manufacturer without some means of asserting in personam jurisdiction over him. Under Virginia's "transacting business" statutes a foreign manufacturer selling goods to a foreign retailer, who in turn ships the goods into Virginia, would not be doing business in Virginia.⁴² By applying Virginia's "long-arm" statute to the same sit-

³⁷Va. Uniform Commercial Code § 2-318 (effective date Jan. 1 1966), Chapter 219, Acts of General Assembly, Regular Session 1964.

³⁸Actions brought for defects in food products: *Blythe v. Camp Mfg. Co.*, 183 Va. 432, 32 S.E.2d 659 (1945); *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936). Breach of warranty actions brought for defects in nonfood cases: *Harris v. Hampton Roads Tractor & Equip. Co.*, 202 Va. 958, 121 S.E.2d 471 (1951); *H. M. Gleason & Co. v. International Harvester Co.*, 197 Va. 255, 88 S.E.2d 904 (1955); for a collection of cases see 77 C.J.S. Sales § 305 (1952).

³⁹Privity was first abolished in sealed food cases. *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959).

⁴⁰Privity was eliminated entirely as a defense in both food and nonfood cases. Va. Code Ann. § 8-654.3 (Cum. Supp. 1964).

⁴¹Supra note 37.

Section 2-318 reads as follows:

"Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty two."

⁴²*Iliff v. American Fire Apparatus Co.*, supra note 12. 23 Am. Jur. Foreign Corporations § 371 (1939).

uation, it is fairly certain that the foreign manufacturer would be subject to the state's jurisdiction. Thus, without the expanded jurisdictional power provided by the "long-arm" statute, Virginia's Uniform Commercial Code would be less effective in protecting Virginia plaintiffs against harm caused by defective goods.

While the "long-arm" statute puts teeth into section 2-318 of Virginia's Uniform Commercial Code, the Commercial Code operates indirectly to provide a supplemental means for recovering when jurisdiction is not obtainable under paragraph five. Although Virginia does not permit third-party practice, Virginia's Commercial Code establishes a close substitute commonly known as "vouching-in."⁴³ Section 2-607 provides:

"Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

"(5) Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over

"(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound."⁴⁴

The need for "vouching-in" only arises when the foreign manufacturer is beyond the jurisdictional reach of the plaintiff.⁴⁵ Where a foreign manufacturer only engages in sporadic business activity through an independent retailer, the plaintiff's direct remedy is against the retailer for breach of warranty. If the retailer chooses to invoke the "vouching-in" section of Virginia's Uniform Commercial Code, he can force the foreign manufacturer to submit to jurisdiction and defend or

⁴³A good example of how third party practice may work to plaintiff's advantage is shown in the case of *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951).

⁴⁴Supra note 37, at § 2-607. This section may have the effect of changing Virginia law prohibiting third party practice.

⁴⁵The theory underlying "vouching-in" is that the manufacturer not only warrants the quality of the goods sold, but also warrants he will defend or be bound by the judgment against the buyer-retailer. Because vouching letters cross state lines, conflict of law questions will arise; but since the promise to defend is implicit in the warranty given by the manufacturer, full faith and credit controversies are likely to be resolved in the buyer-retailer's favor. 51 Calif. L. Rev. 471 (1963). See *Lowrance Buick Co. v. Mullina*, 91 Ga. App. 865, 87 S.E.2d 412 (Ct. App. 1955), where Georgia gives effect to a Tennessee judgment.

be bound by an adverse judgment against the retailer.⁴⁶ There are strong pressures against the foreign manufacturer to submit to jurisdiction because he will ultimately be liable to the retailer on the theory of indemnification and will desire to control the litigation, if liability is likely to be imposed upon him.

Retroactivity

The first problem the Virginia courts will likely be called upon to decide is whether paragraph five operates retroactively in cases where the cause of action had arisen before Virginia's "long-arm" statute became effective. There is nothing within Virginia's constitution which expressly prohibits a statute from operating retrospectively.⁴⁷ In the *McGee* case⁴⁸ the applicable California jurisdiction statute became effective one year after the defendant insurance company had assumed the insurance contract, and the Supreme Court applied the California statute retrospectively without difficulty.

In *Nelson v. Miller*,⁴⁹ the court decided that the Illinois "long-arm" statute operated retroactively. The statute established a means of securing existing rights, and did not destroy any vested rights. A recent Federal case from Michigan is to the same effect.⁵⁰

Contrary to the Michigan case, a lower Connecticut court in *Nevins v. Revlon, Inc.*,⁵¹ held that, since Connecticut's "long-arm" statute affected "fundamental" substantive rights, the statute operated only prospectively.

The essence of the problem of retroactivity is whether or not the operation of Virginia's "long-arm" statute affects vested rights,⁵² as Virginia courts have held that a statute not involving vested rights may operate retrospectively.⁵³ Although there are no Virginia cases deciding

⁴⁶Comment, B.C.U.C.C. Co-Ord. §§ 2-312 (1963); See *Frank v. McCafferty Ford Co.*, 192 Pa. Super. 435, 161 A.2d 896 (1960).

⁴⁷Va. Const. Art. 4, § 58 (1902); *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906).

⁴⁸Supra note 7.

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

⁵⁰*Chovan v. E. I. DuPont de Nemours & Co.*, 217 F. Supp. 808 (E.D. Mich. 1963); see generally 50 Am. Jur. Statutes, § 478 (1944); 2 Sutherland, Statutory Construction, § 2212 (3rd ed. 1943).

⁵¹23 Conn. Supp. 314, 182 A.2d 634 (Super. 1962); *Gillioz v. Kincannon*, supra note 18.

⁵²Virginia defines a vested right "as a right, so fixed, that it is not dependent on any future act, contingency, or decision to make it more secure." *Bain v. Boykin*, 180 Va. 259, 23 S.E.2d 127 (1942).

⁵³*Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774, (1937).

whether jurisdictional statutes affect vested rights,⁵⁴ it seems evident that Virginia's "long-arm" statute is intended to be procedural in character and to be concerned primarily with granting the power to Virginia's courts to "adjudicate ripened disputes."⁵⁵ As a general rule, a party has no vested rights in matters of procedure.⁵⁶

The nonresident defendant might argue that if the jurisdiction over him is based on his regular solicitation, this would constitute a new right or remedy for the plaintiff that had not existed prior to the enactment of paragraph five. The more logical argument would be that the statute does not create a new right or cause of action, but merely carries into force the cause of action created by substantive law.⁵⁷ The statute provides the legal machinery by which a substantive right for redress is made effective.

Conclusion

As cases come before the Virginia courts under paragraph five, there will be two basic problems to face.⁵⁸ The first is whether or not

⁵⁴The question of whether or not Virginia's nonresident motorist statute applies retrospectively has never arisen. Va. Code Ann. § 8-67.1 (Repl. Vol. 1957). Other states have held their nonresident motorist statutes not to operate retrospectively. *Monacelli v. Grimes*, 48 Del. 122, 99 A.2d 255 (1953); *Ogden v. Gianakos*, 415 Ill. 591, 114 N.E.2d 686 (1953); *Davis v. Jones*, 247 Iowa 1031, 78 N.W.2d 6 (1954); *State ex rel. Clay Equip. Corp. v. Jensen*, 363 S.W.2d 666 (Mo. 1963); *Cassan v. Fern*, 33 N.J. Super. 96, 109 A.2d 482 (1954); *Teller v. Edwards*, 56 Wash. 2d 652, 354 P.2d 925 (1960).

Nonresident motorist statutes have been distinguished from personal jurisdiction statutes on the basis that nonresident motorist statutes are based on a "fictional agency relationship" while in jurisdictional statutes the relationship is between a tortfeasor and the victim. This relationship exists prior to, and independent of, the jurisdictional statute. *Chovan v. E. I. Dupont de Nemours & Co.*, supra note 50.

⁵⁵*Flaherty v. United Eng'rs & Constructors, Inc.*, 191 F. Supp. 661, 663 (E.D. Pa. 1961); *Connell v. Kanwa Oil, Inc.*, 161 Kan. 649, 657, 170 P.2d 631, 636 (1946).

⁵⁶*Link v. Receivers of Seaboard Air Line Ry.* 73 F.2d 149, 151 (4th Cir. 1934). 82 C.J.S. Statutes, § 416 (1953).

⁵⁷If the cause of action arose before privity was completely abolished as a defense by statute, the plaintiff would have no existing rights because the statute is not intended to affect suits pending at its effective date; Va. Code Ann. § 8-654.3 (Cum. Supp. 1964).

⁵⁸The problem of whether or not jurisdiction over a nonresident can be sustained is a combined state and Federal matter. *Bomze v. Nardis Sportswear, Inc.*, 165 F.2d 33 (2d Cir. 1948); *Hilton v. W. T. Grant Co.*, 212 F. Supp. 126 (W.D. Pa. 1962); *Mirabella v. Banco Industrial de la Republica Argentina*, 38 Misc. 2d 128, 237 N.Y.S.2d 499 (Sup. Ct. 1963).

A third problem to be considered is which state's substantive law may indirectly bear upon whether or not to sustain the assertion of personal jurisdiction over a nonresident defendant. The fact that a state's substantive law is applicable

paragraph five is applicable to a particular nonresident defendant in a given fact situation. It is impossible to draft any statute that encompasses every conceivable fact situation. For example: a plaintiff is injured by a defective product manufactured by an independent subsidiary corporation doing business in Virginia. Prior to bringing suit, the subsidiary is declared bankrupt. Can the plaintiff now obtain jurisdiction over the foreign parent corporation which has absolutely no contacts with Virginia? Secondly, if the statute is applicable will the exercise of in personam jurisdiction over a nonresident deprive the defendant of his property without due process of law, hinder or burden interstate commerce, or violate the equal protection of the laws?

The answers to these questions must come on a case-by-case basis as there is no magic formula for predicting under what fact situation Virginia courts will sustain or deny the exercise of extraterritorial jurisdiction under paragraph five.

Although paragraph five of Virginia's "long-arm" statute is conservatively phrased, a reasonable interpretation of this paragraph will allow the Virginia courts to change significantly Virginia law relating to in personam jurisdiction over nonresident defendants. Virginia plaintiffs have been provided with a more effective remedy against foreign sellers or manufacturers of defective goods shipped into Virginia.

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may constitute the jurisdictional fact upon which to base the exercise of personal jurisdiction. *Gray v. American Radiator & Standard Sanitary Corp.*, supra note 7; 19 Wash. & Lee Rev. 271, 276 (1962). The substantive law of the place of sale controls in breach of warranty action, while the substantive law of the place of injury controls in negligence cases. 76 A.L.R.2d 150 (1961).

The applicability of a state's substantive law is one of the integral factors to be considered by states which follow the "center of gravity" approach in determining whether or not to exercise personal jurisdiction over nonresidents in a breach of warranty action. *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960), which is the first case to apply the "center of gravity" theory in a breach of warranty action.

