SMU | Dedman School of Law

SMU Law Review

Volume 36 | Issue 5 Article 6

January 1983

Expansion of Long-Arm Jurisdiction in Texas: Hall v. Helicopteros Nacionales de Colombia, S.A.

Thomas P. Arnold

NOTES

THE EXPANSION OF LONG-ARM JURISDICTION IN TEXAS: *HALL V. HELICOPTEROS NACIONALES DE COLOMBIA, S.A.*

IN 1974 Petro Peru, the state-owned Peruvian oil company, contracted with Williams-Sedco-Horn, a joint venture,[1] to build a pipeline from its drilling site in the Amazon jungles of Peru to the Pacific Ocean. Consequently, Williams-Sedco-Horn contracted with Helicopteros Nacionales de Colombia, S.A. (Helicol)[2] to transport workers and supplies by helicopter to the jungle interior. Four workers, hired in Houston by Williams-Sedco-Horn, were killed when a Helicol helicopter crashed in Peru while transporting the workers. Neither the workers nor their survivors were residents of Texas, but each was a United States citizen. The survivors brought separate actions in Harris County, Texas, and service of process was had on Helicol under article 2031b, the Texas long-arm jurisdiction statute.[3] Helicol entered a special appearance in each case to

1. The joint venture consisted of Williams International Sudamericana, Ltd., a Delaware corporation with headquarters in Tulsa, Oklahoma, and two Texas corporations, Sedco Construction Corp. and Horn International, Inc. The joint venture was organized for the sole purpose of performing the contract in Peru.

2. Helicopteros Nacionales de Colombia, S.A., referred to by the Texas Supreme Court as "Helicol," is a Colombia corporation with its principal place of business in Bogota, Colombia. Ninety-four percent of its stock is owned by Avianca, the national airline of Colombia.

3. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982-1983) provides:

> Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.
>
> Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing

contest jurisdiction.[4] The trial court overruled each special appearance.[5] The cases were consolidated for trial, resulting in a jury verdict against Helicol and a joint judgment of $1,141,200 for the plaintiffs.[6] The Houston [1st District] court of appeals reversed and ordered the case dismissed for lack of jurisdiction.[7] The Texas Supreme Court granted writ of error.[8] Finding insufficient contacts between Helicol and Texas to warrant assertion of jurisdiction, the Texas Supreme Court affirmed the judgment of the court of civil appeals.[9] On motion for rehearing, the court in a plurality opinion withdrew its original opinion and reversed the court of appeals. *Held, reversed*: The defendant, through its activities in Texas, had sufficient minimum contacts with the state to justify a finding of jurisdiction without offending due process, even though the cause of action did not arise out of the defendant's activities. *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870 (Tex. 1982).

I. PERSONAL JURISDICTION, DUE PROCESS, AND LONG-ARM STATUTES

The United States Constitution established a federal system of government under which the states retain certain essential attributes of sovereignty, including the power to try causes in their courts.[10] The sovereignty retained by each state necessarily implies a limitation on the sovereignty of

---

> business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Prior to the enactment of art. 2031b, Texas had no general jurisdictional statute. Thode, *In Personam Jurisdiction; Article 2031b, The Texas "Long Arm" Jurisdiction Statute; And the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 304 n.165 (1964). *See generally* Wilson, *In Personam Jurisdiction Over Non-Residents: An Invitation and a Proposal*, 9 BAYLOR L. REV. 363, 372-79 (1957).

4. *See* TEX. R. CIV. P. 120a. Rule 120a provides for appellate review from the granting of a motion to quash service and dismissal for want of jurisdiction. Because no interlocutory appeal is available from the overruling of such a motion, Helicol could not obtain immediate appellate review after denial of its jurisdictional challenge.

5. 616 S.W.2d 247, 249 (Tex. Civ. App.—Houston [1st Dist.] 1981).

6. *Id.*

7. In determining whether Helicol was subject to the jurisdiction of Texas courts, the appellate court applied the three-pronged *O'Brien* test, *infra* notes 45-46 and accompanying text, which had been approved by the Texas Supreme Court in U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex.), *cert. denied*, 434 U.S. 1063 (1977). 616 S.W.2d at 251. The appellate court concluded that the plaintiffs had failed to show sufficient contacts between Helicol and Texas to justify assertion of jurisdiction under the Texas long-arm statute. *Id.* at 252.

8. 24 Tex. Sup. Ct. J. 390 (May 13, 1981).

9. 25 Tex. Sup. Ct. J. 190 (Feb. 24, 1982).

10. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). In this case plaintiffs brought a products liability action in an Oklahoma state court against a New York retailer and wholesaler for injuries suffered in an accident that occurred while the plaintiffs were driving through Oklahoma. The state courts denied defendants' jurisdictional challenge, but the United States Supreme Court reversed, finding a total absence of affiliating circumstances between defendants and the forum. *Id.* at 295.

the other states.[11] A state court's power to render a binding personal judgment against a nonresident defendant is limited by the due process clause of the fourteenth amendment.[12] In general, "[d]ue process requires that the defendant be given adequate notice of suit[13] . . . and be subject to the personal jurisdiction of the court."[14]

The United States Supreme Court established the foundation for modern jurisdictional requirements in *International Shoe Co. v. Washington*.[15] In *International Shoe* the Court held that a state court can only exercise jurisdiction over a nonresident defendant who has sufficient "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[16] According to the Court, once a nonresident engages in activities within a state, he incurs an obligation to defend suits which "arise out of or are connected with" those activities.[17] The Court also noted, however, that instances exist in which "continuous" and "substantial" operations within a state are sufficient to justify suit against the nonresident defendant in causes of action "entirely distinct from those activities."[18] The Supreme Court made clear in *Hanson v. Denckla*,[19] however, that in each case the defendant must do some act by which it "purposefully avails itself" of the benefits and protections of the forum state's laws.[20] Similarly, in *Kulko v. Superior Court*,[21] the Supreme Court stated that the defendant must do

11. *Id.* at 293.

12. *Id.* at 291; *see* U.S. CONST. amend. XIV, § 1, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

13. 444 U.S. at 291 (citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950)).

14. 444 U.S. at 291 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

15. 326 U.S. 310 (1945). State courts held the defendant corporation subject to state unemployment compensation fund fees and amenable to suit in state court to recover for same. The Supreme Court affirmed because of the systematic and continuous activities carried on by the defendant in the state. *Id.* at 320-22.

16. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The concept of minimum contacts serves the dual purpose of protecting a defendant from the burdens of litigating in a distant forum and also ensures that the states do not overreach the territorial limits implicit in the federal system. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291-92 (1980).

17. 326 U.S. at 319.

18. *Id.* at 318; *see* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). In *Perkins* the Supreme Court concluded that Ohio could exercise jurisdiction over a Philippine corporation that had temporarily relocated its business offices to Ohio during World War II. Because of defendant's continuous and systematic activities in the state, due process did not require that the suit arise from the specific activities. *Id.* at 446.

19. 357 U.S. 235 (1958). The Supreme Court held that the Florida courts did not have in rem jurisdiction over the corpus of a trust located in Delaware, or personal jurisdiction over a Delaware trust company, and could not, therefore, pass on the validity of the trust. *Id.* at 250-52.

20. *Id.* at 253.

21. 436 U.S. 84 (1978). Defendant, a New York resident, unsuccessfully challenged the jurisdiction of California courts over him in an action for increased child support. The United States Supreme Court reversed, finding insufficient contacts to warrant assertion of jurisdiction. *Id.* at 94. The Court found that defendant's acquiescence to his daughter's wish to live in California did not constitute "availment" of the benefits of California law. *Id.*

some act for which he "could reasonably have anticipated being 'haled before a [California] court.' "[22] These due process limitations provide a degree of predictability to the legal system and therefore allow potential defendants to structure their conduct in a way that will avoid inconvenient litigation in distant forums.[23]

Significantly, the Court in *Kulko* stressed that the relevant factors to be weighed in determining the reasonableness of asserting jurisdiction include not only the burden that will be imposed on the nonresident in requiring him to defend in the forum, but also the forum state's interest in adjudicating the dispute.[24] In an earlier decision, *McGee v. International Life Insurance Co.*,[25] the Supreme Court had found such a state interest manifested by a special long-arm jurisdictional statute that dealt specifically with insurance contracts between residents and foreign corporations.[26] Long-arm statutes are state enactments that provide for personal jurisdiction over nonresidents through substituted service of process.[27] A state may not exercise jurisdiction over a nonresident pursuant to a long-arm statute beyond the limits established by the due process clause of the fourteenth amendment.[28]

II. APPLICATION OF ARTICLE 2031b IN THE COURTS

Article 2031b, the Texas long-arm statute, became effective in 1959, but the Texas Supreme Court did not construe the statute until 1977.[29] In a number of decisions, however, the Fifth Circuit interpreted the statute without guidance from the Texas Supreme Court. In *Atwood Hatcheries v. Heisdorf & Nelson Farms*,[30] decided in 1966, the Fifth Circuit addressed the question of whether a foreign corporation that contracted with several

22. *Id.* at 97-98 (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977)).

23. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

24. *Id.* at 292 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

25. 355 U.S. 220 (1957). The Court held a Texas insurance company amenable to suit in a California court to recover the proceeds of an insurance policy. *Id.* at 224. The Court found that due process was not offended because the suit was based on a contract accepted in California. *Id.* at 223.

26. *Id.* at 223-24. In this context the Court cited Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (state interest in corporate securities demonstrated by regulation thereof), and Hess v. Pawloski, 274 U.S. 352 (1927) (state interest in adjudicating automobile accidents between its citizens and nonresidents manifested by special long-arm statute providing for exercise of personal jurisdiction over such nonresident motorists).

27. BLACK'S LAW DICTIONARY 849 (rev. 5th ed. 1979).

28. *See supra* note 12 and accompanying text.

29. The Texas Supreme Court first construed art. 2031b in U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). *See infra* notes 56-61 and accompanying text. The delay was due in part to the effect of York v. State, 73 Tex. 651, 11 S.W. 869 (1889), *aff'd*, 137 U.S. 15 (1890). Under the *York* rule the defendant either appeared generally, thereby waiving the right to challenge jurisdiction, or stayed out of the state and allowed a default judgment to be taken. Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 599 n.10 (5th Cir. 1969) (quoting Thode, *supra* note 3, at 306). Adoption in 1962 of TEX. R. CIV. P. 120a, which allows a defendant to appear specially to contest jurisdiction without becoming subject to the jurisdiction of the court, partially obviated the *York* problem. *See supra* note 4.

30. 357 F.2d 847 (5th Cir. 1966).

Texas hatcheries to lease or sell breeding chickens could be subject to the jurisdiction of Texas. The appellate court asserted that two inquiries are appropriate: whether state law provides for the exercise of jurisdiction under the circumstances presented, and if so, whether the exercise of jurisdiction pursuant to state law violates the federal Constitution.[31] In concluding that jurisdiction was proper, the court declared that " 'the Texas purpose [in enacting article 2031b] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints.' "[32]

The Fifth Circuit addressed the reach of article 2031b in a products liability action in *Eyerly Aircraft Co. v. Killian*.[33] A young girl had been seriously injured in a fall from an amusement ride manufactured by an Oregon corporation. The court acknowledged that while the injury-producing tort did not arise out of the defendant's contacts with the state, jurisdiction over the defendant was proper based on the defendant's "continuous and substantial business relations directly with Texas concerns."[34] The court found an additional justification in the fact that Eyerly Aircraft had introduced the injury-producing product into interstate commerce and had reason to know that it would eventually end up in Texas.[35]

The Fifth Circuit's struggle with article 2031b was typified in *Jetco Electronic Industries Inc. v. Gardiner*.[36] The plaintiff brought a tort action asserting the defendant's negligence in conducting tests on treasure hunting equipment and its libelous conduct in making the results available for subsequent dissemination in Texas. The court first found that a defendant who "does business" in Texas is amenable to jurisdiction in suits arising from such business, including the commission of a tort in whole or in part within the state.[37] The court then noted that article 2031b was intended to reach the outer limits of in personam jurisdiction and held that jurisdiction could be asserted if the defendant's unrelated contacts satisfied the minimum contacts requirement.[38] In conclusion, the court ruled that even though the defendant's contacts were neither as "substantial" nor "continuous" as the defendant's contacts were in *Eyerly Aircraft*, the assertion of jurisdiction did not offend due process.[39]

---

31. *Id.* at 852.

32. *Id.* (quoting Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69, 72-73 (5th Cir. 1961)); *see* Thode, *supra* note 9, at 307. The Fifth Circuit had previously addressed art. 2031b in Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965), and in *Lone Star*. In both cases the court tentatively suggested that the Texas long-arm statute reached to the permissible limits of due process, but did not expressly so hold. The court's reluctance stemmed from the fact that the Texas Supreme Court had not yet construed the statute. *Turner*, 353 F.2d at 956.

33. 414 F.2d 591 (5th Cir. 1969).

34. *Id.* at 597.

35. *Id.*; *see* Coulter v. Sears, Roebuck & Co., 426 F.2d 1315, 1317-18 (5th Cir. 1970).

36. 473 F.2d 1228 (5th Cir. 1973).

37. *Id.* at 1232.

38. *Id.* at 1234 (citing Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966)); *accord* Gurley v. Lindsley, 450 F.2d 268, 278 (5th Cir. 1972): Mitsubishi Shoji Kaisha Ltd. v. MS Galini, 323 F. Supp. 79, 81 (S.D. Tex. 1971); Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90, 98-99 (S.D. Tex. 1963).

39. 473 F.2d at 1234-35. Compare the seemingly conflicting statements in *Jetco* with

While this somewhat confusing line of precedent was developing in the federal courts, the Texas Supreme Court had occasion to consider indirectly the question of long-arm jurisdiction. In *O'Brien v. Lanpar Co.*,[40] a 1966 decision, the Texas Supreme Court had to determine whether an Illinois judgment against a defaulting Texas corporation was entitled to full faith and credit in Texas. As posited by the court, the judgment's validity turned on the court's construction of the Illinois long-arm statute,[41] subject to the limitations of due process.[42] The plaintiff was an Illinois attorney seeking full payment for services he performed in Illinois for a Texas corporation. Since Illinois courts had repeatedly held that the Illinois statute extended as far as permitted by the due process clause,[43] the Texas court turned to an examination of due process standards. After reviewing the development of those standards in decisions by the United States Supreme Court, the Texas court adopted a due process standard formulated by the Washington Supreme Court,[44] which set forth three factors for determining if jurisdiction over a nonresident corporation can be entertained.[45] First, the nonresident defendant must purposefully do some act in the forum state; second, the cause of action must arise from, or be connected with, such act; third, the assertion of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice.[46] Although the Texas Supreme Court was careful to emphasize that it was the Illinois law and not the Texas law that was under consideration, these standards were quickly adopted as the test for amenability to jurisdiction in Texas.[47]

The first of two important decisions by Texas courts directly analyzing

---

the two similarly conflicting tests for assessing jurisdiction recognized by the Texas Supreme Court in U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), *discussed infra* notes 56-61 and accompanying text. Just one year after *Jetco*, in Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974), the Fifth Circuit returned to its more common assessment that article 2031b reaches as far as constitutional requirements of due process will permit, without reference to any nexus requirement. *Id.* at 491.

40. 399 S.W.2d 340 (Tex. 1966).

41. ILL. ANN. STAT. ch. 110, §§ 16 & 17 (Smith-Hurd 1968 & Supp. 1982-1983).

42. 399 S.W.2d at 341.

43. *Id.*

44. *See* Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963).

45. 399 S.W.2d at 342. The Fifth Circuit later questioned the Texas Supreme Court's use of the *Tyee* test in *O'Brien* as a due process standard. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266 n.8 (5th Cir. 1981).

46. 399 S.W.2d at 342.

47. *Id.* at 343. The context in which the *O'Brien* test appears indicates that it is a due process test rather than one of statutory interpretation. The subsequent treatment of the test by the Texas Supreme Court in U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), supports that position. In *U-Anchor* the court expressly adopted the test as a due process standard. *Id.* The second prong, however, which requires the cause of action to arise from, or be connected with, the defendant's contacts in the forum, is in conflict with the recognized federal standard for due process. *See supra* note 39 and accompanying text. *See generally* Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process is Due*, 30 SW. L.J. 747, 758-70 (1976).

article 2031b was *Hoppenfeld v. Crook*.[48] The plaintiff brought a tort action against a New York resident alleging fraudulent misrepresentation in inducing him to enter into a franchise agreement with the defendant. As a preliminary determination, the Austin court of civil appeals noted that the burden of persuasion and proof is on the nonresident defendant contesting jurisdiction pursuant to Texas Rule of Civil Procedure 120a.[49] The defendant argued that it was not amenable to process under article 2031b because its activities did not constitute "doing business" within the meaning of the statute.[50] The court rejected the defendant's argument because "statutory construction" is not the proper inquiry; rather, the proper focus is on due process standards, since the reach of article 2031b "is limited only by the United States Constitution."[51] The court then applied the *O'Brien* test to determine whether the requirements of due process had been met.[52] The following year in *Pizza Inn, Inc. v. Lumar*[53] a Texas corporation brought suit against a Virginia resident alleging breach of a franchise agreement. The Eastland court of civil appeals concluded that the defendant was "doing business" in Texas and was, therefore, subject to the state's long-arm statute.[54] The court then applied the *O'Brien* test to determine whether assertion of jurisdiction over the defendant was permissible under due process. The court held the defendant amenable to jurisdiction.[55]

---

48. 498 S.W.2d 52 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

49. *Id.* at 55. The converse is true in federal court; the party invoking jurisdiction has the burden of establishing that jurisdiction exists. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 490 (5th Cir. 1974).

50. 498 S.W.2d at 55-56.

51. *Id.* at 56. The court believed this interpretation to be "well entrenched" in the federal courts, citing Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966); Jetco Elec. Indus., Inc. v. Gardiner, 325 F. Supp. 80 (S.D. Tex. 1971), *rev'd*, 473 F.2d 1228 (5th Cir. 1973); AMCO Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215 (S.D. Tex. 1971). 498 S.W.2d at 56. The *Hoppenfeld* court, however, was apparently unaware of the Fifth Circuit's rather confusing treatment of art. 2031b in *Jetco*, because it only cited the district court's disposition of the case. The Fifth Circuit had handed down its decision on appeal just a few months before. *See supra* notes 36-39 and accompanying text.

52. 498 S.W.2d at 56-58.

53. 513 S.W.2d 251 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

54. *Id.* at 254.

55. *Id.* at 254-55. The Fifth Circuit addressed these developments in Wilkerson v. Fortuna Corp., 554 F.2d 745 (5th Cir. 1977). In *Wilkerson* a Texas horse trainer brought suit against a corporation operating a horse track in New Mexico, just across the border from El Paso, and alleged that he had been arbitrarily denied the use of horse stalls at the track. The district court relied on *O'Brien, Hoppenfeld*, and *Pizza Inn* in dismissing the action, because it found that the cause did not arise from any of the defendant's activities in Texas. *Id.* at 747 & n.2. The Fifth Circuit reversed, concluding that the defendant's "general endeavors" in Texas constituted "doing business" within the meaning of art. 2031b. *Id.* at 749. The court did not think it "appropriate" to require the plaintiff to demonstrate some specific local act that created the cause of action. *Id.* The court also concluded that due process did not require a showing of a specific nexus between the defendant's activities in the forum and the cause of action. *Id.* at 749-50 (citing National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977)). The Fifth Circuit had also had the *O'Brien* test before it in Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969). *See supra* notes 33-35 and accompanying text. The defendant in *Eyerly* had argued that *O'Brien* undermined previous Fifth Circuit interpretations of art. 2031b; the court disagreed, however, stating that in

The Texas Supreme Court interpreted article 2031b for the first time in 1977 in *U-Anchor Advertising, Inc. v. Burt*.[56] The plaintiff's cause of action arose from the breach of a rental contract executed by the parties in Oklahoma that provided for the erection of six advertising signs in Oklahoma. The contract required the defendant to mail payments to the plaintiff's Amarillo office. The defendant argued that it was not "doing business" in Texas, but the court, concluding that the mailing of payments constituted "doing business," disagreed:

> [I]n this respect, as well as with respect to "other acts that may constitute doing business," Article 2031b reaches as far as the federal constitutional requirements of due process will permit. We let stand the statement in [*Hoppenfeld*] "that the reach of Art. 2031b is limited only by the United States Constitution." . . . The federal courts have similarly construed Article 2031b. . . . Furthermore, such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define "doing business."[57]

Since the specific requirements of article 2031b were deemed satisfied, the court turned to the due process question. The court acknowledged two different tests for resolving that question: the dual test announced by the Fifth Circuit in *Product Promotions, Inc. v. Cousteau*[58] and the tripartite test articulated by the Texas Supreme Court in *O'Brien*. The distinction between the two due process standards lies in the "arising from" requirement of the *O'Brien* test.[59] The court neither stated a preference for either test, nor acknowledged the potential conflict between the two. The court did conclude, however, that the assertion of jurisdiction over the defendant would violate due process.[60] The defendant was a customer of a Texas corporation who "neither sought, initiated, nor profited from his single and fortuitous contact with Texas."[61]

The *U-Anchor* opinion further confused the scope of article 2031b. The court broadly equated the reach of the statute with due process, without discussion of the "arising from" language in the statute. Further, the court's use of two separate tests in its due process discussion provides little guidance as to the number of contacts it deems necessary for assertion of jurisdiction.

This uncertainty manifested itself in subsequent lower court decisions.

O'Brien the Texas Supreme Court had been concerned with the Illinois long-arm statute rather than its own. 414 F.2d at 599 n.12. Moreover, the *Eyerly* court said, *O'Brien* was discussing due process limitations and not statutory limitations. *Id.*

56. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

57. 553 S.W.2d at 762 (citations omitted).

58. 495 F.2d 483 (5th Cir. 1974). The *Cousteau* test requires "[f]irst, 'there must be some minimum contact with the state which results from an affirmative act of the defendant.' Secondly, 'it must be fair and reasonable to require the defendant to come into the state and defend the action.' " *Id.* at 494 (quoting 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.25[5], at 4-262 (2d ed. 1982)).

59. *See supra* notes 46-47 and accompanying text.

60. 553 S.W.2d at 763.

61. *Id.*

In *Michigan General Corp. v. Mod-U-Kraf Homes, Inc.*,[62] a case arising out of an alleged breach of contract, the Dallas court of appeals applied both due process tests set forth in *U-Anchor*. Since the court found the nexus requirement of *O'Brien* satisfied, it was able to avoid the conflict between the two tests.[63] Another court was even less clear in its reading of *U-Anchor*. In *Computer Synergy Corp. v. Business Systems Products*[64] a Houston court of appeals cited the *O'Brien* test as the proper standard for assessing the reach of article 2031b. At the same time, the court recognized that the *O'Brien* test was a synthesis of United States Supreme Court decisions assessing the scope of due process.[65] Another Houston court of appeals noted the potential conflict between the two due process tests in *Siskind v. Villa Foundation for Education, Inc.*[66] That court noted: "[T]hough the Supreme Court of Texas has indicated the Texas Long-Arm Statute is to reach as far as the Federal Constitutional requirements of due process will permit [citing *U-Anchor*], the factors used in the federal courts are less strict than those purportedly used in Texas."[67] None of the courts recognizing both tests were forced to reconcile the tests, however, since in each case, the courts concluded that the cause of action had arisen from the defendants' contacts in Texas.

The Fifth Circuit interpreted article 2031b in *Prejean v. Sonatrach, Inc.*[68] In that case two engineering firm employees under contract with the Algerian national oil company were killed in a plane crash in Algeria. Their widows brought a wrongful death action against the oil company, an Algerian airline, and an aircraft manufacturer. The district court dismissed the action against each defendant for lack of personal jurisdiction, and the plaintiffs appealed.[69] The Fifth Circuit first examined the meaning and application of the Texas long-arm statute, and correspondingly,

---

62. 582 S.W.2d 594 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

63. *Id.* at 596. Other cases in which both the *Cousteau* and *O'Brien* tests were applied include Siskind v. Villa Found. for Educ., Inc., 624 S.W.2d 803, 807 (Tex. Civ. App.—Houston [14th Dist.] 1981), *rev'd in part, aff'd in part*, 26 Tex. Sup. Ct. J. 78 (Nov. 3, 1982); Sherman Gin Co. v. Planters Gin Co., 599 S.W.2d 348, 350-51 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (finding the *O'Brien* test not met and citing *Cousteau* in support thereof); Motiograph, Inc. v. Check-Out Sys., 573 S.W.2d 606, 607-08 (Tex. Civ. App.—Eastland 1978, writ ref'd).

64. 582 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). For a factual comparison of *Computer Synergy*, *Mod-U-Kraf*, and *Motiograph*, see Newton, *Conflict of Laws, Annual Survey of Texas Law*, 34 Sw. L.J. 385, 390-92 (1980).

65. 582 S.W.2d at 575-76. Other cases relying primarily on the *O'Brien* test for assessing amenability to jurisdiction include Read v. Cary, 615 S.W.2d 296, 299 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Wright Waterproofing Co. v. Applied Polymers, 602 S.W.2d 67, 71 (Tex. Civ. App.—Dallas), *writ ref'd per curiam*, 608 S.W.2d 164 (Tex. 1980); Rosemont Enters., Inc. v. Lummis, 596 S.W.2d 916, 921 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); Quiroz v. McNamara, 585 S.W.2d 859, 861-62 (Tex. Civ. App.—Tyler 1979, no writ); Diversified Resources Corp. v. Geodynamics Oil & Gas, Inc., 558 S.W.2d 97, 98 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

66. 624 S.W.2d 803 (Tex. Civ. App.—Houston [14th Dist.] 1981), *rev'd in part, aff'd in part*, 25 Tex. Sup. Ct. J. 78 (Nov. 3, 1982); *see infra* note 123.

67. 624 S.W.2d at 807.

68. 652 F.2d 1260 (5th Cir. 1981).

69. *Id.* at 1264.

whether or not article 2031b authorizes the broadest reach that fourteenth amendment due process permits.[70] The court found that the Texas statute "expressly limits its personal jurisdiction to causes of action arising out of activities or business done within the state."[71] The Fifth Circuit distinguished the language in *U-Anchor* that indicated that article 2031b reaches the constitutional limits of due process: "[The] language directly addressed only the meaning of 'doing business' in the context of whether it is coextensive with the constitutional confines of due process."[72] The court also noted that even a legislative intent that the statute in its entirety reach constitutional bounds could not alter the unambiguous language of the statute.[73] The Fifth Circuit concluded that it was confident that the Texas Supreme Court would also require a nexus between the cause of action and the defendant's contacts with Texas solely on the basis of the statute.[74]

Several months later, in *Placid Investments, Ltd. v. Girard Trust Bank*,[75] the Fifth Circuit found the plaintiff's argument that its cause of action need not arise out of specific Texas contacts "foreclosed by *Prejean*."[76] The plaintiff also argued that jurisdiction could be obtained under Texas Rule of Civil Procedure 108.[77] The court responded that a rule of procedure adopted by the Texas Supreme Court could not be used as an "end-run" around the substantive jurisdictional requirements of article 2031b, as enacted by the Texas Legislature.[78] Similarly, in *Jim Fox Enterprises, Inc. v. Air France*[79] the Fifth Circuit reasserted that the Texas long-arm statute requires a nexus between the cause of action and the defendants' contacts with Texas.[80] "This requirement means that Texas does not reach

70. *Id.* The Fifth Circuit has consistently stated that the threshold question in assessing whether jurisdiction is to be maintained is whether the state statutory requirements have been met. Only after that question is affirmatively answered will the court turn to federal due process considerations. Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852 (5th Cir. 1966); *see supra* note 31 and accompanying text. *But cf.* Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) (due process considerations addressed before state statutory requirements).

71. 652 F.2d at 1265 (quoting thereafter from article 2031b, §§ 2, 3); *see supra* note 9.

72. 652 F.2d at 1265-66. The court also distinguished *Cousteau, Jetco, Eyerly Aircraft*, and *Atwood Hatcheries* on the ground that those cases proclaimed maximum statutory reach only in the context of what were sufficient contacts, but not with respect to whether article 2031b required a nexus. *Id.* at 1266 n.7.

73. *Id.* at 1266 n.7. The court noted that there was no legislative history on the intended scope of the statute. *Id.*

74. *Id.* at 1266 n.8.

75. 662 F.2d 1176 (5th Cir. 1981), *withdrawn and vacated on rehearing*, No. 81-1273, slip op. (5th Cir. Oct. 28, 1982) (remanded for further proceedings consistent with *Helicol*); *see infra* note 123.

76. 662 F.2d at 1178.

77. *Id.* at 1179. TEX. R. CIV. P. 108 (Vernon 1979) provides that a "defendant served with such notice shall be required to appear and answer . . . to the full extent that he may be required to appear and answer under the Constitution of the United States in an action in rem or in personam." The part of the quoted excerpt following the ellipsis was added by amendment by the Texas Supreme Court in 1975. In *U-Anchor* the Texas Supreme Court stated "that the purpose of the amendment is to permit acquisition of in personam jurisdiction to the constitutional limits." 553 S.W.2d at 762 n.1.

78. 662 F.2d at 1179.

79. 664 F.2d 63 (5th Cir. 1981).

80. *Id.* at 63-64.

nearly as far as Due Process would permit."[81] The court therefore held that it could not maintain jurisdiction over the defendant even though the defendant had " 'minimum contacts' galore."[82]

III. *HALL V. HELICOPTEROS NACIONALES DE COLOMBIA, S.A.*

In the original *Hall v. Helicol*[83] opinion, the Texas Supreme Court, after noting the confusion surrounding article 2031b, reaffirmed its view that the statute reaches as far as the constitutional limits of due process will permit.[84] The court refuted the narrow definition of "doing business" applied by the court of appeals, which required a showing that the defendant either committed a tort or entered into a contract to be performed in Texas.[85] Instead, the court noted that the catchall language in the definition of "doing business" in article 2031b had been invoked to extend jurisdiction to due process limits.[86]

The court further found in its original opinion that *U-Anchor* had adopted the *O'Brien* test as the proper standard for determining due process.[87] In discussing the second prong of the *O'Brien* test, the "arising out of" requirement, the court held that satisfaction of this prong was not a prerequisite for the assertion of jurisdiction.[88] In the absence of such a nexus, the court suggested that due process "compels proof of more pervasive contacts with the forum."[89] Applying this standard to Helicol's contacts with Texas, the court concluded the relationship was insufficient to justify an assertion of jurisdiction.[90]

Justice Wallace dissented from the majority's conclusion in the original decision and cited eight specific acts committed by Helicol in Texas, including the negotiation of the contract in Houston and the purchase of four million dollars worth of equipment from Bell Helicopter, a Texas corporation.[91] The dissent opined that these contacts satisfied all three prongs

---

81. *Id.* at 64.

82. *Id.*

83. 25 Tex. Sup. Ct. J. 190 (Feb. 24, 1982), *withdrawn*, 638 S.W.2d 870 (Tex. 1982).

84. 25 Tex. Sup. Ct. J. at 191. This interpretation is plainly at odds with the Fifth Circuit's interpretation in *Prejean*. *See supra* notes 71-72 and accompanying text.

85. 25 Tex. Sup. Ct. J. at 191. Although § 4 of art. 2031b specifies several acts that constitute "doing business," the section indicates that it does so "without including other acts that may constitute doing business." TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon Supp. 1982-1983).

86. 25 Tex. Sup. Ct. J. at 191.

87. *Id.* at 192.

88. *Id.*

89. *Id.* Stated another way, the defendant's "general business presence" in Texas must be established. This presence is characterized by "substantial, continuous, and systematic" activities. *Id.* at 193 (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-48 (1952)).

90. 25 Tex. Sup. Ct. J. at 194.

91. *Id.* at 195 (Wallace, J., dissenting). Justices Spears and Ray joined in the dissent. In particular, Justice Wallace found that the majority's reliance on World-Wide Volkswagen v. Woodson was "unfounded" because he considered it distinguishable from *Helicol* on the facts. *Id.* at 195-96.

of the *O'Brien* test.[92] Justice Wallace stated that the "arising out of" requirement was met because the insurance contract negotiated in Houston named the deceased workers as third-party beneficiaries of the contract.[93] Thus, the dissent disagreed with the majority's application of the *O'Brien* test to the facts.

On motion for rehearing the court withdrew its original opinion and reversed itself.[94] Justice Wallace delivered the substituted opinion for a plurality of the court. The plurality opinion reaffirmed the court's position set forth in the original opinion and in *U-Anchor* that article 2031b reaches as far as the constitutional requirements of due process will permit.[95] The plurality also reiterated the court's approval of the *O'Brien* test as the proper due process standard.[96] Justice Wallace, however, gave an even broader reading of the second prong than had the majority in the court's original opinion. In its plurality opinion the court found that while the nexus requirement was useful whenever a jurisdictional question existed, it was only necessary when the defendant maintained a single or few contacts with the forum.[97] The court concluded that due process does not require that the cause of action arise out of the defendant's contacts with the forum when those contacts are "numerous."[98] The court found that Helicol's contacts were sufficient, under this standard, to maintain jurisdiction.[99] In reaching this conclusion the court noted the following contacts: Helicol negotiated the contract in Houston; Helicol purchased virtually all its helicopters and helicopter equipment in Fort Worth; Helicol sent pilots to Fort Worth to fly its newly purchased helicopters out of Texas; Helicol trained its pilots and maintenance personnel in Texas; Helicol had employees in Texas year-round; and Helicol both received and made payments through a Houston bank.[100]

Justice Campbell, joined by Justice McGee, wrote a concurring opinion.[101] The concurring opinion focused on the parties involved and concluded that the application of due process must be broader in scope when the jurisdictional conflict is between citizens of different countries rather than of different states.[102] Although the plaintiffs were not Texas residents, Justice Campbell argued that requiring the widows and children who sought relief to prosecute their action in a foreign country was unrea-

92. *Id.* at 195-96. Justice Wallace concluded that "fair play and substantial justice" was best served by providing a forum for the survivors of four workmen, hired in Texas by a Texas citizen to fulfill a contract negotiated in Texas, against Helicol, which had a long history of substantial contacts with Texas. *Id.* at 196.

93. *Id.* at 195.

94. 638 S.W.2d 870 (Tex. 1982).

95. *Id.* at 872. For the *U-Anchor* language quoted by Justice Wallace, see *supra* text accompanying note 57.

96. 638 S.W.2d at 872.

97. *Id.*

98. *Id.*

99. *Id.* at 874.

100. *Id.* at 871-72.

101. *Id.* at 874-77. Both justices had joined in the majority opinion prior to rehearing.

102. *Id.* at 875.

sonable and that Texas therefore had an interest in adjudicating the dispute.[103] He supported this conclusion by holding that Helicol's contacts with Texas were numerous and purposefully conducted to benefit the company.[104] The concurrence concluded that due process would not be violated by subjecting Helicol to the jurisdiction of the Texas courts.[105]

The dissent, written by Justice Pope,[106] considered article 2031b and the Fifth Circuit cases construing the statute's scope and concluded that article 2031b does not reach as far as due process permits.[107] Justice Pope found that while due process does not always require that the cause of action arise from the defendant's contacts with the forum, the wording of the Texas statute demands that such a nexus be shown.[108] As such, Justice Pope stated that the statute expresses the legislative will and must be enforced by the courts.[109] The dissent also agreed with the Fifth Circuit's determination in *Prejean v. Sonatrach, Inc.*[110] that the *U-Anchor* language construing the reach of article 2031b[111] was not inconsistent with the need for showing a nexus.[112] Justice Pope sharply differed from the plurality on his reading of the facts and charged that the other justices had relied on incorrect findings in recognizing jurisdiction.[113] He concluded that because Helicol was not "doing business" in Texas, and because the plaintiff's cause of action did not arise from Helicol's contacts in Texas, the statutory requirements for assertion of jurisdiction had not been met.[114]

Justice Pope also argued, as he had in the court's original opinion, that even if the requirements of article 2031b had been met, due process pre-

---

103. *Id.* In the plurality opinion Justice Wallace also had argued that Texas had an interest in the litigation because it involved employees of a Texas resident, particularly in light of the "countless" number of international companies headquartered in Texas. *Id.* at 873.

104. *Id.* at 875.

105. *Id.* at 876. Several factors indicate that Justices Campbell and McGee would agree that art. 2031b reaches as far as due process permits. Both joined in the court's original majority opinion, which so held, and both concurred without objection in Justice Wallace's plurality opinion, which also so held. Perhaps just as significantly, both declined to join in the restrictive treatment given the statute by Justice Pope in his dissent. The fact that Justice Campbell turned immediately to due process considerations in his concurring opinion is also consistent with this view. Whether Justices Campbell and McGee agree, however, with the expansive treatment given the nexus requirement by Justice Wallace is unclear. Given their joinder in the court's original majority opinion and their concurrence with Justice Wallace, Justices Campbell and McGee would probably agree that a nexus is not a rigid due process requirement. *See supra* note 88 and accompanying text. Justice Campbell found that Helicol had a "continuous general presence in Texas." *Id.* at 875. He also found that Helicol had "substantial contacts" in Texas and had "purposefully conducted activities within the state." *Id.* at 875, 877. The fact that Justice Campbell felt obliged to make such findings indicates support for the more limited construction given the nexus requirement by Justice Pope in the original majority opinion. *See infra* note 123.

106. Chief Justice Greenhill and Justice Barrow joined in the dissent.

107. 638 S.W.2d at 877.

108. *Id.* at 879.

109. *Id.* at 880.

110. *See supra* notes 68-74 and accompanying text.

111. *See supra* text accompanying note 57.

112. 638 S.W.2d at 881; *see supra* note 72 and accompanying text.

113. 638 S.W.2d at 877.

114. *Id.* at 881.

cluded assertion of jurisdiction over Helicol.[115] In this context Justice Pope reasserted his view that absent a showing of a nexus between the cause of action and the defendant's contact, jurisdiction could not be asserted unless the defendant had engaged in "substantial and continuous activity in the forum."[116] He argued that the plurality had therefore been mistaken in applying the minimum contacts standard.[117] Justice Pope concluded that Helicol's activities did not satisfy that standard and warned that the plurality's expansive reading of the Texas long-arm statute established Texas as a "magnet" forum, attracting lawsuits against any defendant who has ever done business in Texas.[118]

The two most significant aspects of *Helicol* are Justice Wallace's conclusion that article 2031b reaches as far as due process will permit, and the expansive treatment he gives the "arising under" requirement of the *O'Brien* test. The practical impact of these points is, however, somewhat problematic since Justice Wallace was writing for only a plurality of the Texas Supreme Court. Nevertheless, several factors indicate that Justices Campbell and McGee support the view that article 2031b is coextensive with due process standards.[119] Similarly, the alignment of Justices Campbell and McGee with the majority in the original opinion, and their concurrence with Justice Wallace's substituted opinion, indicates that neither would require a nexus between the cause of action and the defendant's contacts with the forum, at least when the defendant has engaged in numerous and purposeful activities within the state.[120]

Whether the Fifth Circuit will retreat from the restrictive reading it gave article 2031b in *Prejean*[121] is also problematic and depends on the reading that it gives to Justice Campbell's concurrence. In view of the fact that only three justices explicitly adopted the *Prejean* interpretation, the Fifth Circuit may adopt Justice Wallace's view that article 2031b reaches to the constitutional limits of due process. The Texas Supreme Court's interpretation of federal due process is not, however, binding on the Fifth Circuit.[122]

---

115. *Id.* at 882-83.

116. *Id.* at 883; *see supra* note 89 and accompanying text; *cf. supra* note 92 (Justice Wallace, originally dissenting, concluded that the facts supported a finding of jurisdiction); *supra* note 105 (Justice Campbell, concurring in the substituted opinion, found sufficient contacts to justify assertion of jurisdiction).

117. 638 S.W.2d at 883.

118. *Id.* Justice Pope also rejected the notion that a broader due process standard is to be applied when the defendant is a resident of a foreign nation rather than of another state. *Id.*

119. *See supra* note 105.

120. *Id.*

121. *See supra* notes 71-72 and accompanying text; *infra* note 123 for Fifth Circuit treatment of article 2031b subsequent to *Helicol* and the writing of this Note.

122. In Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980), the district court had concluded that jurisdiction was lacking over the defendant based on the Texas Supreme Court's language in *U-Anchor*. The Fifth Circuit disagreed, stating that it was not bound by the Texas court's holding on lack of minimum contacts. "This is so because the Texas Supreme Court's holding in *U-Anchor* was predicated on the due process clause of the United States Constitution, and the federal courts are not bound by state court determinations of what the Constitution requires." *Id.* at 152 (footnote omitted).

The other noteworthy aspect of *Helicol* is the willingness of Justices Wallace and Campbell to apply a broader due process standard with respect to non-American defendants. Whether or not this willingness will establish Texas as a "magnet" forum, as Justice Pope suggests, remains to be seen. It does suggest, however, increased prospects for obtaining jurisdiction over a foreign corporation doing business in Texas.[123]

IV. CONCLUSION

In *Hall v. Helicol* a plurality of the Texas Supreme Court reaffirmed the court's view that the Texas long-arm statute reaches as far as the constitutional limits of due process will permit. Support for that position is implicit in the position of two concurring justices. The court also attempted to clarify the interpretation Texas courts are to give the *O'Brien* test. The plurality's construction almost obviates the need to show a nexus between the cause of action sued upon and the defendant's contacts in Texas. While the concurring justices may not support the broad reading of the plurality, they seem at least to have dispensed with the nexus requirement when the defendant has engaged in numerous and purposeful activities with the state. The Texas Supreme Court also exhibited a willingness to subject residents of foreign nations, particularly foreign corporations, to the jurisdiction of Texas courts. Since numerous international concerns conduct business in Texas, such a willingness may have a significant impact.

Thomas P. Arnold

123. In this context, note two developments concerning art. 2031b since the second *Helicol* decision. The first is the Texas Supreme Court's unanimous decision in Siskind v. Villa Found. for Educ., Inc., 26 Tex. Sup. Ct. J. 78 (Nov. 3, 1982). In *Siskind* the plaintiffs brought suit against an Arizona corporation, which operates a school for problem students in Arizona, and against individual employees of the corporation. Numerous causes of action were asserted, including breach of contract, misrepresentation, and deceptive trade practices. Justice McGee, writing for the court, held that in the case of a defendant's having only a single or few contacts with Texas, the court would apply the three-pronged *O'Brien* test. *Id.* at 79. Applying that standard, the court concluded that jurisdiction was appropriate as to the corporation since the cause of action arose out of misrepresentations both made and relied on in Texas, but was inappropriate as to the individual defendants. *Id.* at 80-81. The court noted that because the nexus requirement was satisfied the case did not involve an art. 2031b question, but was limited to the constitutional question of minimum contacts. *Id.* at 79. For that reason, the court made no mention of *Helicol*, although the two opinions are largely consistent.

The second development is at the federal level. Several weeks after the second opinion in *Helicol* became final, the Fifth Circuit granted rehearing in Placid Invs. Ltd. v. Girard Trust Bank, 662 F.2d 1176 (5th Cir. 1981), *withdrawn and vacated on rehearing*, No. 81-1273, slip op. (5th Cir. Oct. 28, 1982). After noting the salient aspects of *Helicol*, including the Texas court's judgment that art. 2031b reaches to the limits of due process, the Fifth Circuit concluded that there could "be no doubt that [its] earlier views no longer [accorded] with Texas authority." No. 81-1273, slip op. at 3. The court therefore vacated the district court's order of dismissal, withdrew its original opinion, and remanded for further proceedings consistent with *Helicol*. *Id.*