Illinois Bar Journal

June 2001 • Volume 89 • Number 6 • Page 317

Civil Practice

Special Appearance Revisited: Preserving a Jurisdictional Challenge Without an Evidentiary Hearing

By Edward S. Margolis

Section 2-301 of the Code of Civil Procedure may just be the answer.

The death of the special appearance

With the publication of Professor Keith Beyler's article, "The Death of Special Appearances," in the January 2000 *Journal* (vol 88, p 30), the demise of the special appearance in Illinois was duly memorialized. In his article, Professor Beyler records the changes in section 2-301 of the Code of Civil Procedure, 735 ILCS 5/2-301, which concerns itself with the Illinois procedure for challenging jurisdiction over the person.

He concluded that in addition to removing "special appearance" from the lexicon of Illinois procedure, the amended section 2-301, effective January 1, 2000, would make it less likely for practitioners to inadvertently waive their client's jurisdictional challenge.

In particular, amended subsection (a) allows the pleader to combine a motion to dismiss for want of jurisdiction with motions to strike under 2-615 and for voluntary dismissal under 2-619 in the form of a single combined 2-619.1 motion. As long as the defendant refrains from arguing its 2-615 or 2-619 motions prior to the disposition of the jurisdictional challenge, it does not submit to the court's jurisdiction. Section (a-5) permits the pleader to ask for an extension of time without that request being construed as a submission to the court's jurisdiction.

Professor Beyler further notes that subsection (b), which deals with the procedures for disposing of the motion, and subsection (c), which allows for a preservation of the pleader's objection, were carried over intact to the new section.

Is an evidentiary hearing necessary to determine jurisdiction?

In a recent *Journal* article entitled *Suing Out-of-State Defendants in Illinois: Minimum Contacts after* TCA, Ruprecht, *and* Chalek, 88 Ill B J 458 (Aug 2000), I argued that conducting a full evidentiary hearing in connection with a motion to quash service for want of personal jurisdiction "wastes valuable court time and, in the end, requires the out-of-state defendant to come into the state to litigate anyway."

The article was written in response to recent Illinois Appellate Court case law. The new cases suggest that the procedure followed in the federal district courts; and previously by the majority of Illinois courts; whereby these motions were disposed of without an evidentiary hearing was improper under Illinois procedural law because of important substantive differences between federal and state court procedure.

The question is whether the changes in section 2-301 that do away with the special appearance affect how Illinois courts should determine the outcome of a motion to dismiss for want of jurisdiction. Professor Beyler notes that subsections (b) and (c) of the special appearance statute are carried over into the new section 2-301 virtually unchanged:

> (b) ... A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made.
>
> (c) ... Error in ruling against the defendant on the objection is waived by the defendant taking part in further proceedings in the case, *unless the objection is on the grounds that the defendant is not amenable to process issued by a court of this state.*
>
> Emphasis added.

In fact, under section 2-301(c) there always has been a way for defendants to preserve a jurisdictional objection and continue with the litigation. This section has been overlooked by practitioners, scholars, and judges. As a consequence, appellate courts are suggesting an additional costly and time-consuming layer of evidentiary hearings to determine the issue of jurisdiction.

***TCA International* and its progeny**

The move toward sending back cases for evidentiary hearings after a trial court has decided jurisdiction on affidavits alone is represented in the first district cases of *TCA International v B & B Custom Auto, Inc.*, 299 Ill App 3d 522, 701 NE2d 105 (1st D 1998), and *Ruprecht Co. v Sysco Food Services of Seattle*, 309 Ill App 3d 113, 722 NE2d 694 (1st D 1999), and is recognized in *Kalata v Healy*, 312 Ill App 3d 761, 728 NE2d 648 (1st D 2000).

The underpinning of the court's reasoning in *TCA* is set out at 299 Ill App 3d 522, 529-30:

> Professor Michael in his treatise on Illinois procedure (R. Michael, *Illinois Practice* (1989))...points out that *Kutner* and the other cases which hold that the plaintiff need merely establish a *prima facie* case are based solely on federal precedent. According to Michael, "[t]he federal cases are, however, clearly inapplicable because of a difference in federal procedure." 3 Michael § 6.2, at 61. See *Finnegan [v Les Pourvoiries Fortier, Inc.]* [citation omitted]. *Finnegan* observed, in reliance on Professor Michael, that whereas in federal courts personal jurisdiction is only preliminarily addressed before trial but may be fully litigated on the merits at trial (similar to summary judgment), "in Illinois, the special appearance [citation omitted] is a defendant's 'sole opportunity to defeat the jurisdiction of the court'. (3 R. Michael, § 6.2, at 61. We agree with Professor Michael's observation.

Even a cursory reading of subsections (b) and (c) of section 2-301 reveals that Professor Michael and the Illinois Appellate Court are wrong. Under subsection (b), a defendant whose motion to dismiss for want of jurisdiction is unsuccessful may reassert its position by way of defense, and under section (c), the defendant may participate in the trial without waiving the jurisdictional objection.

Indeed, the Illinois Appellate Court has already recognized a defendant's right to defend its case while preserving the jurisdictional objection. In *Presley v P & S Grain*, 289 Ill App 3d 453, 683 NE2d 901 (5th D 1997), the appellate court refused to find waiver after the defendant's motion to dismiss and subsequent motion to certify the question were denied by the trial court.

> Ken-Mo filed a request to certify the court's order denying Ken-Mo's motion to quash service as a final and appealable order so that Ken-Mo might appeal the court's decision. We construe this action as another special and limited appearance by Ken-Mo to continue to contest the court's *in personam* jurisdiction, as Ken-Mo continued to argue that it was not amenable to process in Illinois.... Only after Ken-Mo had utilized these arguments to contest the court's jurisdiction over it, and the trial court continued to direct Ken-Mo to answer the complaint, did Ken-Mo file a general appearance by filing a motion to dismiss.... Ken-Mo did not waive its objection to jurisdiction, since Ken -Mo did not participate in the&proceedings until the court had denied its motion to quash service and its request for certification. These actions preserved Ken-Mo's jurisdictional objection.

Id, 289 Ill App 3d 453, 459.

The appellate court then recited subsection (c) and concluded that "even though Ken-Mo participated in the trial below, it was only after it had no further recourse" and concluded that "the exception provided in section 2-301(c) applies to these facts, and Ken-Mo has not waived its objection to jurisdiction." Id at 460.

The overriding concern of the *TCA* court in mandating an evidentiary hearing where the trial court must decide between conflicting affidavits is set out at 299 Ill App 3d 522, 530:

> To extend [the federal] rule to Illinois...is, at best, to reverse the burden of proof, and at worst [to] deprive the defendant of the constitutional right to due process of law by holding the defendant subject to jurisdiction whenever there is a conflict in the evidence without resolving that conflict. (3 R. Michael, § 6.2, at 61.)

Historically, the out-of-state defendant has faced enormous pressure to waive its jurisdictional challenge. On the one hand, a defendant who firmly believes there is no jurisdiction over his or her person may refuse to participate in the Illinois proceedings. The Illinois plaintiff then obtains a default judgment in Illinois and is left with the problem of collecting against a defendant who typically has no assets in this state.

The usual vehicle for collection of such a judgment is to register it in the defendant's home state under the Uniform Enforcement of Foreign Judgments Act. 735 ILCS 5/12-650 et seq. The defendant at this point is free to attack the judgment collaterally, but if the jurisdictional challenge fails, the foreign court will not rehear the case on its merits because the judgment is entitled to full faith and credit and is res judicata as to the nature and amount of the plaintiff's claim. *Ayers Asphalt Paving v. Allen Rose Cement & Construction*, 109 Ill App 3d 520, 440 NE2d 907 (1st D 1982).

Another approach is for the defendant to participate in the Illinois proceedings and make its jurisdictional challenge pursuant to section 2-301. If, however, the foreign defendant loses its challenge at trial, the alternative is either to file an appearance, thereby waiving the jurisdictional challenge, or to allow the matter to go to default and to appeal the default judgment on jurisdictional grounds.

While this would work in theory for defendants sure of a favorable appellate court (never a sure thing), it still too risky for most defendants because a refusal to defend on the merits renders the judgment res judicata. This nightmare scenario was played out in *Empress International, Limited v. Riverside Seafoods, Inc.*, 112 Ill App 3d 149, 445 NE2d 371 (1st D 1983), where the defendant refused to abandon its challenge to jurisdiction. By pursuing and losing its jurisdictional challenge at the trial and appellate levels, the plaintiff was able to proceed against the defendant's appellate (supersedeas) bond in Illinois and collect the judgment in full without the impediment of any of the defendant's defenses on the merits.

It is the fear of such an "unfair" result that drives the current push for an evidentiary hearing. This fear, however, does not appear warranted.

The 2-301(c) solution

In reality, section 2-301 of the Illinois Code of Civil Procedure is not at variance with Rule 12 of the Federal Rules of Civil Procedure, which provides that a lack of jurisdiction over the person may be pleaded by way of defense. Under the Federal Rules of Civil Procedure, upon a defendant's motion to dismiss, the court determines from the pleadings and affidavits whether the plaintiff has presented a prima facie case on the issue of personal jurisdiction over the defendant. *Saylor v Dyniewski*, **836 F2d 341** (7th Cir 1988).

If the motion is denied, the defendant may plead lack of personal jurisdiction and continue defending the lawsuit without waiving its rights. This procedure seems to work well in the federal district courts, which operate in every state under the federal rules.

The Illinois code, under its former "special appearance" procedure and amended section 2-301, provides that a defendant may raise the jurisdictional defense after a motion to dismiss for want of jurisdiction has been denied. In *Presley*, the pleader took an additional step of asking the court to certify the question for immediate appeal and only filed his answer after the motion was denied.

To be on the safe side, Illinois practitioners should take the approach outlined above. More generally, they should familiarize themselves with section 2-301(c) and pursue their clients' rights to the fullest extent of the law. Likewise, the appellate court should reexamine its rationale for imposing an additional costly and time-consuming evidentiary hearing on Illinois litigants.

---

*Edward S. Margolis <**emargolis@ tellerlevit.com**> is a principal of the law firm of Teller, Levit & Silvertrust, P.C., where he heads the commercial litigation department.*