Suing Out-of-State Defendants in Illinois: Minimum Contacts after TCA, Ruprecht and Chalek

By Edward S. Margolis

This article alerts practitioners to a series of Illinois Appellate Court decisions that may affect their clients' rights to enforce business contracts in Illinois.

Two recent decisions by the Illinois Appellate Court, First District, Second Division, have cast an umbra of uncertainty over what has generally been recognized to constitute minimum contacts and the procedure for making such determination under the Illinois long-arm statute. In TCA International v B & B Custom Auto, Inc.,1 and, most recently, Ruprecht Company v Sysco Food Services of Seattle,2 the second division has reversed and remanded the actions to the trial court for evidentiary hearings on the issue of minimum contacts where the trial court had resolved the jurisdictional challenge on affidavits alone.

I. Burden of Proof and the Procedural Departure

In these two decisions, the second division ruled at the outset that the plaintiff has the burden to establish jurisdiction by a preponderance of evidence. While the court in TCA recognizes a "substantial line of authorities" (it cites 10 cases) that only requires a prima facie showing,3 it chooses to follow "[s]everal recent cases (it cites five) [which] have departed from this position."4 Under the latter approach, conflicts between affidavits should not be resolved in favor of the plaintiff but should be tested and weighed. The standard of review under this line of authority is not de novo, but one of determining manifest weight of evidence.5 The prima facie standard, however, was not completely discarded by the second division in TCA:

When the jurisdictional issue may be completely resolved from the face of the affidavits and pleadings, analysis need not go beyond the prima facie standard. However, this will only be the case when the relevant assertions are uncontradicted. In other cases, the proper mode of jurisdictional analysis will be a two-step process incorporating the tests from both lines of cases.

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Accordingly, it would appear that the first question in ruling on a special appearance is whether plaintiff has established a prima facie case of jurisdiction through the untraversed pleadings, documents and affidavits. In making this determination, the circuit court must resolve in favor of the plaintiff (or other party urging jurisdiction) any conflicts between affidavits. Concomitantly, at this juncture the court must also accept as true any facts averred by the defendant (or other party opposing jurisdiction) which have not been contradicted by an affidavit submitted by plaintiff.... If plaintiff has failed to establish a prima facie case, the inquiry is at an end and the defendant's motion should be granted.6

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However, in most cases a determination that plaintiff has established a prima facie case of jurisdiction will not end the inquiry. If the trial court finds plaintiff has established a prima facie case, it must next determine whether there are any controverted jurisdictional facts. If so, it must hold a hearing to resolve these facts.7

The Ruprecht court, citing its own opinion in TCA, adopted the position that the plaintiff must prove jurisdiction by a preponderance of the evidence and, applying its two-step approach, sent the case back to the trial court for an evidentiary hearing after determining that the parties' affidavits were in conflict on material issues.8

II. Chalek v Klein and the Issue of Minimal Contacts

The procedure the second division follows in resolving long-arm jurisdictional disputes is by no means revolutionary, and the court makes a logical argument that disputes of fact are best resolved by an evidentiary hearing. From a practical point of view,

however, conducting a full evidentiary hearing at such an early stage of the proceedings wastes valuable court time and, in the end, requires the out-of-state defendant to come into the state to litigate anyway. Consequently, the majority of Illinois courts have found that jurisdiction is proper where the plaintiff can make a prima facie case based upon the pleadings and affidavits construed in the most favorable light to the plaintiff.9

Until the Illinois Supreme Court speaks to this point, the two approaches will continue to exist side by side. While the decisions of the second division in TCA and Ruprecht on the issues of burden of proof and the procedure for determining jurisdictional disputes is of great importance to practitioners in the first district, of even more interest is the court's rationale for finding a conflict in the affidavits requiring that the cases be returned to the trial court for an evidentiary hearing.

A. Chalek v Klein: "Active" and "Passive" Purchasers

In both TCA and Ruprecht, the court discusses the 1990 second district appellate court case of Chalek v Klein.10 Chalek adopts a distinction between what it terms "active purchasers" and "passive purchasers", citing cases from other jurisdictions to determine when it is fair and reasonable to require a nonresident to defend an action in Illinois.

The plaintiff-appellant had filed two cases that were dismissed for want of jurisdiction by the trial court. On appeal, the appellate court granted a motion to consolidate the cases.

The facts in Chalek are critical:

The facts of these cases are essentially undisputed. Plaintiff operates a sole proprietorship in Oak Brook, Illinois, and sells a computer software system for use by commodities traders. Defendant Lee, a California resident, and defendant Klein, a New York resident, both ordered the software system. Lee sent plaintiff a check for $3,500; Klein's company, Mattco Equities, Inc., sent plaintiff a check for $3,000. After receiving the software, Lee and Klein decided it was not satisfactory, returned it to plaintiff, and stopped payment on the checks. Plaintiff subsequently filed separate suits against Lee and Klein. Lee was served with summons at a California address, and Klein was served at a New York address.11
In upholding the trial court's decision dismissing the cases for want of jurisdiction, the court found that the two out-of-state purchasers were passive rather than active purchasers. The court cited the United States Supreme Court case of Burger King Corp. v Rudzewicz12 for the proposition that the due process clause of the federal Constitution requires that individuals have fair warning that an activity could subject them to jurisdiction in a foreign state. This fair-warning requirement provides predictability to the legal system, allowing individuals to structure their activities with some assurance about where they will or will not be subject to suit as a result of their conduct.13

While the test announced by the United States Supreme Court in Hanson v Denckla14 and restated in Burger King is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," Chalek refines this principle by making a distinction between active and passive purchasers:

Under this approach, if the nonresident buyer is a passive party who merely places an order by mail, telephone, or to a salesperson and accepts the seller's price as stated in advertising or other forms of solicitation, the courts in the seller State will not be able to exercise in personal jurisdiction over the buyer. If the buyer departs from a passive role by dictating or vigorously negotiating contract terms or by inspecting production facilities, the unfairness which would be associated with the exercise of long arm jurisdiction over that buyer dissipates, and he or she will be subject to personal jurisdiction in the courts of the seller's State.

The type of conduct which would characterize an active purchaser is far more typical in dealings between major business organizations than in transactions in which a consumer or even a small shopkeeper is the purchaser. Distinguishing between active and passive purchasers therefore protects the ordinary mail order consumer who merely orders an item of merchandise from a company in a distant State from having to submit to the jurisdiction of the courts of that State while at the same time it protects sellers who manufacture custom-built products according to a nonresident buyer's specifications.15 (Citations omitted.)

At the heart of Chalek is the protection of the consumer or small businessman who accepts an offer or places an order by mail or telephone. To make these defendants in a single isolated transaction come to Illinois to defend a case for $3,000 is clearly such an onerous ordeal as to cry out for relief.

In the later case of G.M. Signs, Inc. v Kirn Signs, Inc.,16 the second district (the Chalek appellate district) noted that the defendant was an active purchaser because he was not "in the category of an ordinary mail order consumer who merely orders a stock item of merchandise from another State." The specific language of G.M. Signs is as follows:

On the contrary, defendant was an "active purchaser" who deliberately reached out beyond its home State to avail itself of the benefits of commercial ties with an Illinois company. Its contacts with the forum State cannot reasonably be characterized as random, fortuitous, or attenuated. Defendant's actions should have enabled it to predict that it might be subject to the jurisdiction of this State. Plaintiff has a legitimate interest in using Illinois courts to enforce the obligations that defendant actively and knowingly undertook.17
What distinguished G.M. Signs from Chalek was the "ongoing commercial relationship with plaintiff, an Illinois seller (commercial business signs)."18 This is the same type of ongoing commercial relationship that existed between the plaintiff and the defendant in TCA International.

B. TCA and Ruprecht: Increasing the Burden of Proof

In TCA, the trial court found that the defendant, a commercial supplier of auto parts who purchased parts from an Illinois distributor over a period of 18 months, was a "passive purchaser." The second division, in reversing the trial court, noted that "J&B's attempt to portray itself as a 'mere passive purchaser' is unavailing, primarily because of the ongoing nature of the relationship between TCA and J&B."19 (Citation omitted.) Having said this, the second division, citing conflicts in the affidavits, inexplicably returned the case to the trial court for an evidentiary hearing.

In Ruprecht, the subject of the transaction was the purchase of meat by the defendant, a marketer and distributor of food service products, from an Illinois meat wholesale business. The court found that the defendant faxed its orders to the plaintiff in Illinois

where the orders were accepted in accord with defendant's specifications. The meat was then boxed as required and shipped from Illinois to the defendant.20 The second division, however, again sent the case back for an evidentiary hearing with the following instructions:

We find, however, that certain crucial statements in Sommers' affidavit are contradicted by statements in Sysco's affidavits. In particular, Opray stated in his affidavit that the meat products at issue were common cuts of beef available in many fine dining restaurants and steak houses and that he could obtain identical products from several meat companies in the Seattle market. Further, Opray stated that he obtained a description of the products from Sommers and entered the information into Sysco's product database so that he could generate a purchase order form. We also note that the meat products were identified by manufacturer identification numbers on the order forms. Opray's statements, taken together with the identification numbers on the order forms, indicate that the meat products were not "custom manufactured" for Sysco. Lastly, the affidavits do not account for the changed prices on the faxed orders. If Ruprecht changed the prices and faxed the orders back to Sysco, the contract may not have been formed until Sysco accepted the new prices in Washington.21

In returning these cases to the trial court, the second division increased the burden of proof on the plaintiff, requiring not merely a demonstration of prima facie jurisdiction but a finding of jurisdiction by the greater weight of evidence. More than that, though, the court called to question the commonly accepted notions of minimal contacts in Illinois, suggesting that Illinois manufacturers or suppliers of such commodities as auto parts and meat are not guaranteed their right to enforce their contracts of sale to out-of-state businesses in Illinois courts.

III. The History of Minimal Contacts in Illinois

Illinois has been in the forefront of protecting its resident corporations and individuals in their commercial dealings with foreign corporations. Going back to the seminal case of Cook Associates v Colonial Broach and Machine Co.,22 the court exercised jurisdiction over a Michigan defendant based upon a single phone call made by the defendant into the state of Illinois in response to the plaintiff's advertising of available job applicants for defendant's Michigan office.

The court held that there was no obligation to respond to the plaintiff's advertising and, therefore, that the defendant initiated the business transaction by telephoning the plaintiff. Further, the court held that the contract was performed in Illinois by the plaintiff, an employment agency, that arranged to have a candidate contact the defendant in Michigan. The court noted that "[t]he fact that the interviewing and hiring took place in Michigan is of no consequence since the services which were the basis of the contract and for which defendant would be liable for payment to plaintiff had already been performed in Illinois."23

In Cook Associates, the court noted that the defendant knew that it was dealing with an Illinois agency and the agency would perform its services from its offices in Illinois, and that the fee would be paid to Illinois and if the fee were not paid as promised the defendant might be liable to suit in the Illinois courts.24 Since Cook Associates, there has been an unbroken line of cases through Empress International, Ltd. v Riverside Seafoods, Inc.25 and up to Allerion v Nueva Icacos S.A.de C.V.26 finding that a single business transaction can constitute the minimum contacts necessary to give a court in personam jurisdiction over a nonresident defendant.

IV. Autotech and Illinois Public Policy

In Autotech Controls Corporation v K. J. Electric Corporation,27 the Illinois plaintiff sold and delivered merchandise over a period of time to an out-of-state defendant. The defendant placed telephone purchase orders and faxed written purchase orders to the plaintiff in Illinois and paid the plaintiff for the products that it purchased by mailing checks to the plaintiff in Illinois. The defendant distributed the plaintiff's products in New York. The plaintiff filed its complaint for a balance due in the amount of $16,666. In ruling that the Illinois court had jurisdiction over the defendant, the Autotech court stated as follows:

[T]his action arises out of defendant's contacts with an Illinois corporation. This is a collection suit against defendant to obtain money due and owing for labor and circuit boards which defendant ordered through numerous telephone and fax orders. Therefore, this action arises out of defendant's contacts with the forum state.28

The court in Autotech noted that the defendant had fair warning that it would be required to defend itself in Illinois. Citing Burger King Corporation v Rudzewicz, the court wrote that "[t]he fair warning requirement may be satisfied by showing that defendant purposefully directed its activities at Illinois residents, reached out to create continuing relationships with the citizens, or purposefully derived benefits from the activities with Illinois. Defendant's activities of maintaining the contractual relationship through its telephone and fax purchase orders is sufficient to satisfy due process."29

Finally, the Autotech court summarizes its position as follows30:

It is reasonable to require defendant to submit to jurisdiction in Illinois because the State, its resident corporations, its residents and its workers all have a substantial economic interest in the payment for goods sold and services rendered by its residents. Illinois has a greater interest in the controversy than New York. Thus, the exercise of jurisdiction over defendant complies with federal due process standards and traditional notions of fair play and substantial justice.

V. The Impact of TCA and Ruprecht on Illinois Practice

As far back as 40 years ago, the United States Supreme Court recognized the dawning of a new age of commercial transactions brought about by advances in communications and technology.

Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.31

As we begin the new millennium, requiring a defendant to physically visit a jurisdiction before holding it accountable in that state for a transaction it voluntarily initiated is, to say the least, anachronistic. Forty years ago, the United States Supreme Court recognized that business routinely was conducted by mail across the country. Today, business transactions are conducted electronically by a stroke of a keyboard and millions of dollars can be transferred from one location to another in a nanosecond.

Since the Cook Associates case in 1973 through the present date, Illinois has had one of the most liberal policies for protecting its commerce by allowing Illinois businesses access to the Illinois courts when a defendant has purposefully engaged in business transactions in Illinois. In 1990, the Illinois Supreme Court in Rollins v Ellwood held that the Illinois long-arm statute and constitution may restrict the power of Illinois courts to bring nonresidents before them to a greater extent than do the federal due process clause and the "minimum contacts" test recognized by the federal courts.32 Under state due process guarantees, a court can require a nonresident to defend an action in Illinois only when it is fair, just, and reasonable to do so considering the quality and nature of the acts by the defendant that occur in or affect interests located in Illinois.33

Clearly, the Illinois Supreme Court has given lower courts the green light to decide when it is just to compel a defendant either to defend in Illinois or risk entry of judgment. This, however, should not be an invitation to turn the clock back 40 years by placing impossible stumbling blocks in the way of any Illinois business that chooses to operate in interstate commerce.

While Illinois courts should be fair to the consumer or small business owner who engages in an isolated mail order transaction with an Illinois business, they should distinguish these defendants from a commercial enterprise engaging in interstate commerce with Illinois businesses where the subject matter is the likes of auto parts or meat. The Illinois long-arm statute provides that a defendant is subject to the jurisdiction of the Illinois courts if it transacts business within Illinois or if the lawsuit is about the making or performance of a contract or promise substantially connected with Illinois.34 If these criteria are met, an out-of-state defendant is subject to Illinois' jurisdiction if it does not offend general notions of due process.

Such arcane considerations as whether an offer accepted in Chicago was actually a counter-offer are not material where the commercial defendant orders meat products from an Illinois supplier who, as in Ruprecht, performs the contract by filling orders in Illinois and shipping to the out-of-state defendant. Likewise, in TCA, it should be immaterial who initiated the contacts when the court has accepted that the Illinois plaintiff supplied to the defendant auto parts over an 18-month period.

Yet in both cases, the Illinois Appellate Court, First District, Second Division, has sent these cases back to the trial court for a hearing without telling the court what, exactly, it is supposed to decide. Taken to its logical extreme, one could imagine a foreign business ordering a thousand tons of nondescript Illinois coal, steel, or grain, receiving it, and not paying for it while claiming immunity from prosecution in the Illinois courts as a passive purchaser because it made an "isolated purchase," it bought goods that were not "custom manufactured," or it really didn't initiate the contacts with the Illinois seller. Such a result would make even the strongest advocate of Chalek blush.

In the absence of a definitive statement by the Illinois Supreme Court, the Illinois long-arm statute and federal and state due process give Illinois trial courts sufficient guidance to decide for themselves on affidavits alone when it is fair and reasonable to require an out-of-state business to defend a lawsuit initiated in Illinois.35 The alternative gives Illinois the appearance of being a hostile business environment in which courts seem uncertain of their power to enforce contracts made or performed in Illinois.

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1. 299 Ill App 3d 522, 701 NE2d 105 (1st D 1998).

2. 309 Ill App 3d 113, 722 NE2d 694 (1st D 1999).

3. 299 Ill App 3d at 528.

4. Id at 529.

5. Id.

6. Id at 530-31.

7. Id at 531.

8. Ruprecht, 309 Ill App 3d 113. See unabridged full text of TCA opinion under Docket No 1-98-0252.

9. See Allerion v Nueva Icacos, S.A. de C.V., 283 Ill App 3d 40, 669 NE2d 1158 (1st D 1996).

10. 193 Ill App 3d 767, 550 NE2d 645 (2d D 1990).

11. Id at 769.

12. 471 US 462 (1985).

13. Id at 770-71.

14. 357 US 235 (1958).

15. Id at 772-73.

16. 231 Ill App 3d 339, 596 NE2d 212 (2d D 1992).

17. Id at 344-45.

18. Id at 344.

19. 299 Ill App 3d at 534, n 4.

20. 309 Ill App 3d at 123.

21. Id at 123-24.

22. 14 Ill App 3d 965, 304 NE2d 27 (1st D 1973).

23. Id at 971.

24. Id at 970.

25. 112 Ill App 3d 149, 445 NE2d 371 (1st D 1983).

26. 283 Ill App 3d 40.

27. 256 Ill App 3d 721, 628 NE2d 990 (1st D 1993).

28. Id at 726.

29. Id at 725.

30. Id at 726.

31. McGee v International Life Insurance Co., 355 U.S. 220, 222-23 (1957).

32. 141 Ill 2d 244, 565 NE2d 1302 (1990).

33. Id at 275.

34. 735 ILCS 5/2-209.

35. Rollins, 141 Ill 2d at 261, where the court states as follows:

The circuit court relied on the following facts when it held that, under the rule that all conflicts in the evidence be resolved in favor of the plaintiff (Kutner, 96 Ill App 3d at 247,...), Rollins has established a prima facie case of personal jurisdiction over Baltimore by means of an agency relationship.
It is interesting to note that the second division in TCA concedes that in making the above statement "our supreme court did not explicitly criticize that approach" but goes on to say that it "[does] not read Rollins as endorsing an extreme prima facie approach, where a prima facie case ends the analysis, even if the facts are controverted," TCA, 299 Ill App 3d at 533.

Practitioners are encouraged to make their own determination as to what the supreme court meant in Rollins when it approved the procedure in Kutner whereby all conflicts in the evidence are resolved in favor of the plaintiff in establishing a prima facie case of personal jurisdiction.

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