

Procedure--Service of Process--Designation of Agent in Contract Held Not Violative of Due Process Despite Absence of Provision for Actual Notice (National Equip. Rental, Ltd. V. Szukhent, 375 U.S. 311 (1964))

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The grounds for this criterion are that it is unjust for one guilty party, the plaintiff, to suffer while the defendant who is in *pari delicto* is rewarded; and that the penalty of not being able to maintain the action is utterly disproportionate to the offense.

Although Professor Wigmore's statement may appear correct it must be remembered that the public must also be protected. The question to be answered, in these cases, is whether the court is going to avail itself of every opportunity to discourage fraudulent conveyances. If the answer is in the affirmative the plaintiff should not prevail, regardless of the nature or form of the action.⁴¹ The courts should not allow a wrongdoing plaintiff to prevail merely because his pleadings follow a seemingly correct analytical approach. Although the defense of unclean hands does have its pitfalls, its application will notify debtors that a court will not sanction the circumvention of the fraudulent conveyance laws. By limiting the applicability of this defense the Court is not promoting justice but sanctioning its circumvention. It is endorsing a method by which a debtor can invoke the judicial machinery to evade his obligation to his creditor.⁴²



PROCEDURE—SERVICE OF PROCESS—DESIGNATION OF AGENT IN CONTRACT HELD NOT VIOLATIVE OF DUE PROCESS DESPITE ABSENCE OF PROVISION FOR ACTUAL NOTICE.—Plaintiff, a Delaware corporation doing business in New York, entered into a leasing contract with defendants, Michigan farmers. The contract was signed in Michigan and mailed to New York by defendants. A contract clause appointed a New York resident, the wife of one of the officers of the plaintiff corporation, as defendants' agent for service of process. There was no contractual provision for

(1950); CHAFEE, *op. cit. supra* note 16, at 21; WADE, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261, 301-05 (1947).

⁴¹ See RESTATEMENT, RESTITUTION §§ 46, 140 (1937).

⁴² Predicated on the holding of the principal case, a debtor could fraudulently convey his property and have the court aid him in his act. That is, a debtor could change the name of the owner of the property on the record, while retaining the deed. After an accord with his creditor he would institute an action to clear cloud on title. The debtor might also convey to a third party. The third party would then record the deed and simultaneously reconvey to the debtor. The debtor would then hold the deed without recording until he reaches an accord with his creditors.

the forwarding of any summons and complaint to defendants.¹ The agent was not aware of the contract at the time it was executed. Plaintiff served the agent and the agent promptly forwarded service to the defendants. In reversing the Court of Appeals for the Second Circuit,² the Supreme Court *held* that there was a valid agency for service of process created by the contract and that there need not be provision for transmission of such service to the principal. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

In order for a court to be able to adjudicate the rights of parties, it must have jurisdiction over the persons involved, otherwise any judgment subsequently rendered is void.³ The court in order to exercise this in personam jurisdiction must find that the individual had certain minimum contacts with the jurisdiction.⁴

Rule 4(d)(1) of the Federal Rules of Civil Procedure provides that one can obtain in personam jurisdiction over a defendant by serving his agent "authorized by appointment or by law to receive service of process."⁵ To comply with due process, the service on an agent must be reasonably calculated to be brought to the defendant's attention so that he will have sufficient notice and an adequate opportunity to be heard.⁶ Additionally, the agent must have no interests conflicting with those of his principal.⁷

By actually appointing an agent in a foreign jurisdiction to receive service one is, in effect, consenting to be sued⁸ in that

¹"This agreement shall be deemed to have been made in . . . New York . . . and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York." *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 313 n.3 (1964).

²*National Equip. Rental, Ltd. v. Szukhent*, 311 F.2d 79 (2d Cir. 1962).

³1 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 301.01 (1963).

⁴*Id.* at ¶ 301.03.

⁵FED. R. CIV. P. 4(d)(1).

⁶*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Tarbox v. Walters*, 192 F. Supp. 816 (E.D. Pa. 1961); *Underwood v. McBride*, 182 F. Supp. 361 (D. Del. 1960).

⁷*Hartsock v. Commodity Credit Corp.*, 10 F.R.D. 181, 184 (S.D. Iowa 1950); *MECHEM, AGENCY* § 298 (3d ed. 1928).

⁸"Citizens of different states may, if they deem it desirable, agree that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of the state of one of the parties." *Erlanger Mills, Inc. v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956). It has long been recognized that one can consent to be sued in a foreign jurisdiction. *E.g.*, *Mississippi Publishing Co. v. Murphee*, 326 U.S. 438 (1946); *Nierbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165

jurisdiction.⁹ This eliminates the necessity for serving the principal within the confines of the forum state, thereby facilitating the acquisition of in personam jurisdiction over a defendant. Consent to be sued in a particular state constitutes consent to be sued in the federal courts of that state as well as the state courts.¹⁰

To constitute an agency relationship there must be a manifestation of consent by the principal that the agent is to act for him¹¹ and an acceptance by the agent to so act.¹² "Consent is the basis of authority,"¹³ but this need not be express, for the actual appointment can be inferred from the facts and circumstances.¹⁴

While one may be an agent for some purposes, he need not be an agent for service of process. Thus, one must first determine if the agency relation exists and then ascertain its extent. In the case of *Fleming v. Malouf*,¹⁵ defendant left the state and directed his tenants to pay rent to his real estate agent who had the power to pay bills and supervise the management of the building. When the question arose as to whether the agent could be served with process, it was held that there was no "actual" appointment for the purpose of service of process. Another case wherein a court did not find an agency for service was *Osterling v. Commonwealth Trust Co.*¹⁶ In that case, a South Carolina resident gave his co-executor, the defendant, a power of attorney which authorized him "to accept service of any summons or suit arising in any manner out of the administration of the Estate of F. J.

(1939); *De Dood v. Pullman Co.*, 57 F.2d 171 (2d Cir. 1932); *Emerson Radio & Phonograph Corp. v. Callander Distrib. Corp.*, 116 F. Supp. 926 (S.D.N.Y. 1953).

Among the methods by which a person can consent are appearance, waiver of service, stipulation in a contract, actual appointment of an agent to receive process, carrying on business and state statute. Note, 44 HARV. L. REV. 1275, 1276 n.2 (1931).

⁹ He also waives his venue rights to be sued in the district of either the plaintiff's or the defendant's residence and can be sued in any district within the state. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, *supra* note 8; *Owens v. Harkens*, 18 F.R.D. 62 (N.D. Ala. 1955).

¹⁰ *Mississippi Publishing Corp. v. Murphee*, *supra* note 8. "[T]he appointment of an agent by a foreign corporation to receive service . . . removes all questions as to jurisdiction over the person where service is duly made on that agent." *Kenny v. Alaska Airlines*, 132 F. Supp. 838, 843 (S.D. Cal. 1955).

¹¹ *In re Zacoum's Estate*, 115 N.Y.S.2d 42 (Surr. Ct. 1952); RESTATEMENT (SECOND), AGENCY §§ 1, 7(b), 15, 26(a) (1958); MECHEM, AGENCY § 23 (4th ed. 1952).

¹² *Sternaman v. Metropolitan Life Ins. Co.*, 170 N.Y. 13, 62 N.E. 763 (1902).

¹³ MECHEM, *op. cit. supra* note 11.

¹⁴ *Rubenstein v. Small*, 273 App. Div. 102, 75 N.Y.S.2d 483 (1st Dep't 1947); MECHEM, *op. cit. supra* note 11, at § 24.

¹⁵ 7 F.R.D. 56 (W.D.N.Y. 1947).

¹⁶ 35 F. Supp. 704 (W.D. Pa. 1940).

Osterling, Deceased.”¹⁷ The court held that the defendant rightfully refused to accept service of process as agent of his co-executor where the plaintiff alleged that the defendant and his principal were tortfeasors. The power of attorney “was quite evidently designed . . . to facilitate the administration of the estate . . .”¹⁸ but the *intention* of the principal did not include appointing defendant as his agent for service of process generally. It is apparent that the courts will not find an agent as an agent for service where the latter form of agency is not shown to be expressly intended by the principal.¹⁹

Most jurisdictions have provided for a statutory designation of an agent for service of process.²⁰ The consent of the principal can be either express, as by formal filing in the designated state office, or implied from designated acts committed within the state.²¹ In the case of *Wuchter v. Pizzutti*,²² the Court held a New Jersey out-of-state motorist statute, which did not require the secretary of state to forward the process to the defendant, unconstitutional because it deprived him of his property without due process of law. A statute requiring a designation of an agent must contain a reasonable provision for notice to be transmitted to the defendant, “otherwise . . . it will be entirely possible . . . [to] obtain a default judgment against a non-resident . . .”²³ without his ever receiving notice of the pending suit. This is logical, for while such statutes may constitute constructive appointment of an agent for service of process, in many instances the defendant may not actually know of such statutory designation.²⁴ Often the sole link between defendant-principal and agent, when the principal has not formally designated the agent, is the statute. Likewise, the sole source of the agent's duties is also statutory, and if the statute does not provide for notifying the principal it is possible that such notice may never be forwarded. This would be a violation of due process.²⁵

Prior to the present case, the *Wuchter* principle was thought to apply to private contracts.²⁶ In the principal case, one of the clauses of the contract between plaintiff and defendants designated

¹⁷ *Ibid.*

¹⁸ *Id.* at 705.

¹⁹ *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956) (wherein the court did imply an agency for service of process).

²⁰ *E.g.*, N.Y. BUS. CORP. LAW § 304; ILL. ANN. STAT. ch. 32 § 157.13 (Smith-Hurd 1957).

²¹ N.Y. VEHICLE & TRAFFIC LAW § 253.

²² 276 U.S. 13 (1928).

²³ *Id.* at 19.

²⁴ *Supra* note 21.

²⁵ *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

²⁶ *National Equip. Rental, Ltd. v. Szukhent*, 311 F.2d 79 (2d Cir. 1962) (Moore and Smith, J.J.).

the agent for service of process upon the defendants. This appears to be the first Supreme Court case which has adjudicated the legality of such contractual designation, wherein there was no provision for notice to be forwarded to the principal. The Court in the principal case held that as long as the contract is not excessively lengthy and the clause appointing the agent is not buried in the extra-fine print, there need be no provision for transmission of service. It is to be noted that in this case notice was forwarded; if notice were not forwarded it might have invalidated the agency. However, the Court did not concern itself with this possibility, stating that "no due process claim has been made."²⁷

Designation of an agent is not sufficient to establish the agency relation, since there must be an acceptance by the agent. In the present situation, how could the agent accept the defendants' offer when she was not aware that the plaintiff and defendants had even entered into a contract? The Supreme Court held that the agent's instantaneous compliance with her agency responsibilities, *i.e.*, "prompt acceptance and transmittal"²⁸ to the defendants of the summons and complaint, constituted the validation of the agency, in that her acts manifested her acceptance.²⁹ This raises the question as to whether she would have been the defendants' agent if she had not "promptly" forwarded the summons and complaint. The Court, however, did not set any standard for determining what is "promptly."

It is an elementary principle of the law of agency that an agent must not have a conflict of interest with his principal.³⁰ However, in the present case where the defendants' agent was also the wife of one of the officers of the plaintiff corporation, the Court said "an agent with authority so limited can in no meaningful sense be deemed to have an interest antagonistic to the respondents, since both the petitioner and the respondents had an equal interest in assuring that, in the event of litigation, the latter be given that adequate and timely notice which is a prerequisite to a valid judgment."³¹

This case indicates that an individual may consent in advance, by contract, to the in personam jurisdiction of a foreign tribunal

²⁷ National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964).

²⁸ *Ibid.*

²⁹ The Supreme Court did indicate that under New York law the provision would be valid. The more recent New York cases have held that a contractual designation of an agent for service of process does not violate the due process clause even where the principal was a non-resident. *E.g.*, National Equip. Rental, Ltd. v. Graphic Art Designers, Inc., 36 Misc. 2d 442, 234 N.Y.S.2d 61 (Sup. Ct. 1962); Emerson Radio & Phonograph Corp. v. Eskind, 32 Misc. 2d 1038, 228 N.Y.S.2d 841 (Sup. Ct. 1957).

³⁰ *Supra* note 7.

³¹ National Equip. Rental, Ltd. v. Szukhent, *supra* note 27, at 317-18.

and that the contract need not contain a provision requiring notice to be transmitted to him. The designated tribunal can then adjudicate any conflicts arising out of their contractual relationship.

In the present case, this consent was achieved through use of a contractual designation of an agent for service of process in such foreign forum. The Court stated that due process was satisfied even though the contract did not provide for notice to be given to the defendants. The principal case would not appear to sustain jurisdiction on similar facts if no effort is made to give the defendant actual notice. However, the Court did not consider a situation in which no such notice had been given.

It is now certain that such in personam jurisdiction can be obtained in the chosen forum without violating due process. That conclusion has no bearing, however, on the doctrine of forum non conveniens, which may cause the court to refuse to entertain the case though it has unquestionably acquired jurisdiction.³²

It is probable that the state courts will now more readily uphold the validity of such contractual designation. Since the constitutionality of this clause has been upheld we can expect an ever increasing use of such consent jurisdiction.



SECURITIES — INVESTMENT ADVISERS ACT — “SCALPING” HELD TO BE FRAUDULENT PRACTICE. — Defendant, a registered advisory service,¹ published a report which apprised its five thousand² subscribers of the investment potential of particular stocks. The service, on at least five occasions, purchased listed stocks and, without disclosing these prior purchases, recommended such stocks for long-term investment. Following each recommendation the price of such shares rose, and within two weeks the defendant sold its shares at a substantial profit. The SEC, alleging violation of the Investment Advisers Act of 1940 [hereinafter referred to as the Act] commenced a proceeding to enjoin this practice.

³² Emerson Quiet Kool Corp. v. Eskin, 32 Misc. 2d 1037, 228 N.Y.S.2d 839 (Sup. Ct. 1957).

¹ “Investment Adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publication or writings, as to the value of securities. . . .” Investment Advisers Act § 202 (a)(11), 54 Stat. 847 (1940), 15 U.S.C. § 80b-2 (11) (1958). It is unlawful for an unregistered investment adviser to use the mails or any other means of interstate commerce in connection with his advisory business. Investment Advisers Act § 203(a), 54 Stat. 850 (1940), 15 U.S.C. § 80b-3 (a) (1958).

² On several occasions the report was distributed to an additional 100,000 non-subscribers. SEC v. Capital Gains Research Bureau, Inc., 306 F.2d 606, 612 (2d Cir. 1961) (Clark, J., dissenting), *rev'd*, 375 U.S. 180 (1963).