Chapter 20: Civil Procedure and Practice

Stephen N. Subrin

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Civil Procedure Commons

Recommended Citation
CHAPTER 20

Civil Procedure and Practice

STEPHEN N. SUBRIN

OBTAINING JURISDICTION OVER NONREGISTERED FOREIGN CORPORATIONS: A PRACTICAL DISCUSSION

§20.1. Introduction. In eight of the 15 previous surveys, authors have written about jurisdictional problems. In four of the last five survey years, cases which relate to obtaining jurisdiction over non-registered foreign corporations have been analyzed. In July 1968, Massachusetts became one of the last states to enact long-arm legislation, and it is therefore appropriate, despite our repeated forays into this area, to consider the impact of the new statute.

There is no dearth of literature about the new Massachusetts statute and other long-arm legislation. Harold Brown analyzed the new law shortly after its passage. Albert P. Zabin examined the new statute in light of our prior legislation, constitutional requirements, and decided cases in other jurisdictions with similar statutes. “Non-resident Jurisdiction and the New England Experience” surveys the pre-long-arm scene in Massachusetts. The Legal Periodical Index, under the heading “Jurisdiction,” shows that since September 1967 there have been at least 35 articles on long-arm legislation covering a minimum of 20 states.

STEPHEN N. SUBRIN is a partner in the law firm of Burns & Levinson, Boston. The author expresses his appreciation to Norman C. Spector for his assistance in the preparation of this article.


3 G.L., c. 225A.


7 This period, September 1, 1967, through December 31, 1969, covers approximately two survey years.
Although the Survey has an obligation to review such an important development as the recently adopted long-arm statute and its relationship to our other jurisdictional legislation, a different approach is clearly needed to avoid repetition. This article will concentrate on the practical considerations facing a lawyer confronted with a case involving nonregistered foreign corporations. It will examine both the language of the prior relevant jurisdictional statutes which have survived and the new Massachusetts statute, and suggest some general guidelines for the practitioner in analyzing the statutes and his case. A hypothetical case which involves obtaining jurisdiction over nonregistered corporations will then be posited, and suggestions will be made as to how plaintif's and defendant's counsels might wish to proceed.

A. PRIOR LEGISLATION

§20.2. "Contacts" and "notice." When the practitioner considers achieving in personam jurisdiction over any defendant, he might well think of two distinct problems. The first is whether the defendant has sufficient contact with Massachusetts to enable the Massachusetts courts, within the framework of Massachusetts legislation and Fourteenth Amendment requirements of due process, to bind the defendant in a Massachusetts proceeding. The second is whether the practitioner will be able to give the defendant notice of the proceeding commenced against him in a manner which is authorized by Massachusetts legislation and which is fair within the meaning of due process.

When one is dealing with an individual living in or passing through Massachusetts, the problem is usually relatively uncomplicated. If the sheriff hands the summons to the individual defendant, the contact requirement is usually met because the defendant is actually within the physical boundaries of the Commonwealth, and the notice requirement is simultaneously met because the defendant has actual in hand notice. A corporation, since it is not an actual person and always acts through representatives or agents, by its very nature presents more sophisticated and conceptional jurisdictional problems. If it is a foreign corporation not registered to do business in Massachusetts, the usual problem of finding sufficient contacts is complicated when the corporation is a subsidiary, a member of a conglomerate, or the result of a merger. On the notice side, one must determine how, to whom, where and when notice can be given so that one can determine that fair and reasonable notice of the proceeding has been given to the corporation.

§20.2. Where a defendant's presence in the Commonwealth is but transitory, objections have been raised on the grounds of violations of substantive due process. This article does not discuss this issue. The reader is referred to Zabin, The Long-Arm Statute: International Shoe Comes to Massachusetts, 54 Mass. L.Q. 101 (1969), for a discussion of this issue.
§20.3. **General Laws, c. 223, §§37 and 38: Service on officer or agent: The difference between “specific” and “general” jurisdiction.** Chapter 223, Section 37, a pre-long-arm statute, which is still in effect, says in part:

In an action against a domestic corporation . . . service shall be made upon the president, treasurer, clerk, resident agent appointed pursuant to section forty-nine of chapter one hundred fifty-six B, cashier, secretary, agent or other officer in charge of its business, or, if no such officer is found within the county, upon any member of the corporation.

**Chapter 223, section 38, states:**

In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or is soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of upon the commissioner of corporations and taxation under section three or section three A of chapter one hundred and eighty-one. [Emphasis added.]

Therefore, the contact portion of the problem is whether the foreign corporation:

(a) has a usual place of business in Massachusetts;
(b) is engaged in business in Massachusetts; or
(c) is soliciting business in Massachusetts.

Despite the broad language the Massachusetts decisions consistently seemed to require the defendant corporation to have more than just one type of business activity in Massachusetts, and sought activity in addition to mere solicitation. Notice is conveyed by in hand service to an actual officer or agent of the corporation if such person can be found in Massachusetts.

In considering this and the other statutes relating to jurisdiction over foreign corporations, it might be helpful for the practitioner to consider another distinction, which is advanced by Professors Von Mehren and Trautman. A foreign corporation might have a sufficiently continuous and substantial relationship with Massachusetts for a Massachusetts court to find that it can adjudicate any controversy with that corporation. This is called general jurisdiction. On the other hand a Massachusetts court may be limited or limit itself

---

to adjudicating only causes of action which arise from a foreign corporation's activity in or contacts with Massachusetts. This may be called specific jurisdiction.

In summarizing the Massachusetts Supreme Judicial Court's interpretation of Chapter 223, Section 38, the United States Court of Appeals for the First Circuit has in effect recognized this distinction:

... despite the language of Mass. G.L. c. 223, §38, and despite the court's intimations to the contrary, it has never extended jurisdiction over a corporation whose activities in the state amounted to no more than the constitutionally permissible "minimum contact"—it has regularly found more than "mere solicitation"; ... even when it has found solicitation plus some other activity it has not extended jurisdiction when the cause of action did not arise out of the activities in Massachusetts [specific jurisdiction]. On the other hand, where the corporation's activities more closely approximated the regular conduct of a domestic corporation—that is to say, where the defendant was clearly "doing business" in Massachusetts—the court has allowed jurisdiction for a transitory cause of action [general jurisdiction].

§20.4. General Laws, c. 227, §§2 and 3: Cross actions and service on attorney in fact. Chapter 227, Sections 2 and 3, state, in effect, that if a nonresident of Massachusetts sues in a Massachusetts court, one can bring a cross action by serving his attorney of record in Massachusetts:

§2. Cross Actions. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other ...

§3. Service of Writ. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth.

These provisions have been construed to cover foreign corporations. Although this method of achieving service over a foreign corporation is limited to when that corporation is suing one's client in Massachusetts, it is enormously useful in those instances; it grants general jurisdiction whenever a judgment under the cause of action one wishes to bring can be set off against the judgment in the original action. The cause of action to be commenced need bear no relationship to Massachusetts.

§20.4. 1 Aldrich v. Blatchford & Co; 175 Mass. 569, 370, 56 N.E. 700 (1900).


http://lawdigitalcommons.bc.edu/asml/vol1969/iss1/23
§20.5 CIVIL PROCEDURE AND PRACTICE

§20.5. General Laws, c. 181, §§3, 3A and 4: Service on the state secretary. Chapter 181, Sections 3, 3A and 4, are the statutory provisions permitting service on the secretary of the Commonwealth in order to gain jurisdiction over certain foreign corporations. Note that Section 3 lists those contacts which require the corporation to appoint the secretary as an agent to receive service of process. Section 4 spells out the actual notice which the foreign corporation will receive.

§3. State Secretary to Be Appointed Attorney for Service of Process. Every foreign corporation, which does business in this commonwealth or which has a usual place of business in this commonwealth, or owns real property therein without having such a usual place of business, or which is engaged therein, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, or in the construction or repair of roads, highways or waterways, or in any other activity requiring the performances of labor, shall, before doing business in this commonwealth, in writing appoint the state secretary and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall be filed in the office of the said secretary, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process in duplicate with a fee of two dollars in the hands of the secretary, or his deputy, or in the office of the secretary, and such service shall be sufficient service upon the corporation.

§4. Notice of Service of Process to Be Given by Secretary. When legal process against any such corporation is served upon the secretary, he shall immediately give notice to the corporation of such service by mail, postage prepaid, directed, in the case of a corporation established in a foreign country, to the resident manager, if any, in the United States; and shall, within two days after such service, forward in the same manner a copy of the process served upon him to such corporation or manager, or to any other person designated by the corporation by a writing filed in the office of the secretary. The fee of two dollars paid by the plaintiff to the secretary at the time of service shall be taxed in his costs, if he prevails in the suit. The secretary shall keep a record of all such processes, which shall show the day and hour of service.
In the case of service of process on a corporation which has not complied with section three, or which is not allowed under section six to comply with said section three, the notice herein provided for shall be mailed by the secretary to the proper address of the corporation which shall be furnished to him by the plaintiff or his attorney.

If the foreign corporation has in fact appointed the state secretary in writing as attorney for receipt of process, the task is easy. One may merely serve the secretary, and if the offices of the sheriff and the secretary of state act properly, one may obtain specific jurisdiction and perhaps even general jurisdiction,\(^1\) over the corporation.

Chapter 181, Section 8A, deals with the situation where the foreign corporations described in Section 3 have not appointed the state secretary to accept service:

\textit{§8A. Certain Foreign Corporations Failing to Register to Be Deemed to Have Appointed Secretary Attorney for Service of Process.} Any such corporation which does business in this commonwealth without complying with the provisions of section three, including a corporation as to which the secretary is required by section six to refuse appointment as attorney for service, shall, without affecting any penalty, liability or disability imposed by section five, be deemed and held, \textit{in relation to any cause of action or proceeding arising out of such business}, to have appointed the secretary and his successor in office to be its true and lawful attorney, and any process in any such action or proceeding against it served upon the secretary or his successor in office shall be of the same legal force and validity as if served on such corporation. [Emphasis added.]

Note that unlike Chapter 223, Section 38, Chapter 227, Section 2, and Chapter 181, Section 3, this Section 8A is \textit{explicitly} limited to causes of action "arising out of such business" and therefore grants only specific jurisdiction.

The contacts that permit jurisdiction under Section 8A (as it refers back to Section 3), are, however, varied and broad, for one may show that the defendant: (a) Does business in Massachusetts; (b) Has a usual place of business in Massachusetts; (c) Owns real property in Massachusetts; (d) Is engaged in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind in Massachusetts; (e) Is engaged in the construction or

\textit{§20.5.} \(^1\)There has not yet been a decision on the appellate level in Massachusetts which answers the question of whether G.L., c. 181, §5, permits general jurisdiction. The use of the words in §8A, "arising out of such business," and the absence of such language in §3 support the theory that §3 allows general jurisdiction. Moreover, the act of appointing the secretary of state as agent, may implicitly show a sufficient quantum of activity in Massachusetts to permit general jurisdiction.
repair of roads, highways, or waterways in Massachusetts; or (f) is engaged in any activity requiring the performance of labor in Massachusetts.

But unless plaintiff's counsel can show that the defendant has engaged in the specific activities enumerated in (b) through (f) above, he will have to rely on the does business clause of Sections 3 and 3A. This will be defined in much the same way as "engaged in business" in Chapter 223, Section 38.2

§20.6. Constitutional change. Prior to the 1968 enactment of the long-arm statute, Massachusetts statutes, as interpreted by Massachusetts courts, took a restricted view of those contacts necessary for obtaining jurisdiction and of permitted methods of giving notice. Jurisdictional problems tended to be thought of in terms of the total quantity of contacts, and the courts talked in terms of "solicitation plus" other activity.1 On the notice side, the statutes necessitated in hand service on an officer or agent in Massachusetts,2 an attorney in fact for the defendant,3 or the secretary of state, who had impliedly been appointed as agent by virtue of the nonregistration of the foreign corporation.4

In the past 30 years, however, the United States Supreme Court's view of due process so far as it relates to jurisdictional issues has become less wooden and more related to the actual ends sought. As to notice, Milliken v. Meyer stated in 1940 that

... so far as due process is concerned the adequacy of notice is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice ... implicit in due process are satisfied. [Citations omitted.]5

Five years later, in International Shoe Co. v. State of Washington, the Supreme Court spelled out a flexible approach to the contacts required:

... due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with


2 G.L., c. 223, §§37, 38.
3 G.L., c. 227, §§2, 3.
it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The court pointed out that the jurisdictional determination "cannot be simply mechanical or quantitative." The court seems to have particularly broadened the scope of what has been called specific jurisdiction:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. [Emphasis added.]

It was within the background of these and other constitutional decisions, the Massachusetts statutes discussed above, the restricted Massachusetts interpretation put by courts upon those statutes, and the efforts of other states to modernize their jurisdictional statutes, that Massachusetts commentators urged long-arm legislation for the Commonwealth.

B. CHAPTER 223A: THE NEW LONG-ARM STATUTE

§20.7. Introduction to the new statute. Chapter 223A, which became effective on August 24, 1968, deals with other matters besides jurisdiction over, and notice to, nonresidents. It covers such diverse matters as depositions outside of the Commonwealth, and proof of domestic records, foreign records, and lack of records. We shall concern ourselves herein, however, solely with the effect of this chapter on achieving jurisdiction over foreign corporations.

Section 1 of the new chapter defines "person" to include every type of "legal or commercial entity, whether or not a citizen or domiciliary of the commonwealth and whether or not organized under the laws of this commonwealth," including corporations.

The new statute deals with both the "special" and "general" ju-
risdiction dichotomy which we have already discussed and the jurisdic-  

tional questions of "contacts" and "notice." Sections 2 and 3  
deal with the question of what contact is needed in Massachusetts  
for a corporation to be subject to jurisdiction. Section 4 states that  
"when personal jurisdiction is authorized by this chapter, service  
may be made outside the commonwealth"; and Sections 6 and 7 de-  
scribe how service may be made outside the Commonwealth, the  
individuals who may make such service, and how such service may  
be proved.  
§20.8. Specific and general jurisdiction under the long-arm statute.  
Section 2 of Chapter 223A states those facts which permit gen-  
eral jurisdiction:  

§2. Personal Jurisdiction Based upon Continuing Contact  
with Commonwealth. A court may exercise personal jurisdic-  
tion over a person domiciled in, organized under the laws of,  
or maintaining his or its principal place of business in, this com-  
monwealth as to any cause of action. [Emphasis added.]  

This general jurisdiction provision of Chapter 223A is more lim-  
ited in scope than prior jurisdictional statutes. It requires the corpo-  
ration's principal place of business to be in Massachusetts, in contrast  
to Chapter 223, Section 38, where a usual place of business, being  
engaged in business, and soliciting business in Massachusetts are the  
foundations to jurisdiction. One should recall, though, that the Mas-  
sachusetts courts under the prior legislation seemed to require solic-  	itation plus other activity.1 Also, under Chapter 223, Section 38,  
in hand service in Massachusetts on an officer or agent of the foreign  
corporation was the only proper method of notice. Sections 4, 6 and  
7 of the new statute permit out of state service which can be accom-  
plished in more varied methods.  

Chapter 223A, Section 3, enumerates these acts or conduct within  
the Commonwealth which may allow jurisdiction "as to a cause of  
action arising from" those acts or conduct, which is "specific jurisdic-  
tion."  

§3. Personal Jurisdiction Based upon Acts or Conduct within  
Commonwealth. A court may exercise personal jurisdiction over  
a person, who acts directly or by an agent, as to a cause of action  
in law or equity arising from the person's  
(a) transacting any business in this commonwealth;  
(b) contracting to supply services or things in this common-  
wealth;  
(c) causing tortious injury by an act or omission in this com-  
monwealth;  
(d) causing tortious injury in this commonwealth by an act or  

omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

(e) having an interest in, using or possessing real property in this commonwealth; or

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting. [Emphasis added.]

The action or conduct which can justify specific jurisdiction is significantly more encompassing in this new section as compared to the list in the constructive service statute, Chapter 181, Sections 3, 3A. In addition, Section 3 of the new statute specifically states that “transacting any business,” “contracting to supply services or things,” or “causing tortious injury by an act or omission” in Massachusetts will allow specific jurisdiction, as will the other specific actions named in the section. One will recall that the doing business test Chapter 181, Section 3A, had been narrowly construed. The more expansive language of the legislature in the new statute should result in the death of the solicitation plus standard.

It is curious to note that the Uniform Interstate and International Procedural Act, from which Chapter 223A was derived, has an additional paragraph not found in our long-arm statute:

When jurisdiction over a person is based solely upon this section, only a [cause of action] arising from acts enumerated in this section may be asserted against him.2

Although this paragraph does not appear in the new statute, the fact that Section 3 of Chapter 223A specifically is limited to a cause of action arising from the person’s acts indicates that the omission is perhaps one of inadvertence and not one of design. One should recall that in any event the broadening language of International Shoe Co. v. State of Washington, which authorized long-arm legislation, is limited to “so far as [the foreign corporation’s] obligations arise out of or are connected with the activities within the state. . . .”3

§20.9. Service of process under the long-arm statute. The service of process provisions of Chapter 223A present an even more striking contrast to prior legislation. Chapters 223, 227 and 181, so far as they relate to service on foreign corporations, all contemplate some type of in hand service in the state of Massachusetts: on an officer or agent in fact,1 on an attorney in fact,2 or on the secretary of state, followed

2 Uniform Interstate and International Procedure Act §1.03(b), 9B Uniform Laws Annotated 310 (1966).

§20.9. 1 G.L., c. 223, §§37, 38.
2 G.L., c. 227, §§93, 9.
by mail notice to the foreign corporation. §20.9 Section 4 of Chapter 223A states, however, that whenever "personal jurisdiction is authorized by this chapter, service may be made outside this commonwealth." (Emphasis added.) Section 6 of the new statute authorizes three principal types of service outside of Massachusetts, as long as they are "reasonably calculated to give actual notice":

(1) by personal delivery in the manner prescribed for service within this commonwealth;
(2) in the manner prescribed by the law [of the foreign jurisdiction where service is made];
(3) by any form of mail addressed to the person to be served and requiring a signed receipt...

Additional potential means, which will probably not be widely used, are "(4) as directed by the foreign authority in response to a letter rogatory; or (5) as directed by the court."

Section 7 states that an individual outside the Commonwealth may make service if: (a) he is permitted to make service of process under the law of Massachusetts; (b) he is permitted to make service of process under the law of the place in which service is made or (c) he is designated by a court of the commonwealth.

When service is made outside of Massachusetts, Section 6(b) says it may be proven in any of the following ways: (a) by affidavit of the individual who made the service; (b) in the manner prescribed by the laws of Massachusetts—which evidently means a return of service on the writ as is done by a Massachusetts sheriff; (c) as prescribed by the order pursuant to which service is made; or (d) as prescribed by the law of the place in which service is made. In addition, "[w]hen service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court."

One should note that Chapter 223A does not enlarge the methods for serving a foreign corporation when jurisdiction is based on the older statutes, even if there are sufficient contacts in Massachusetts to permit jurisdiction under the old statutes. Chapter 223A, Section 6, which gives the broader methods of service, applies only "[w]hen the law of this commonwealth authorizes service outside this commonwealth," and Section 4, permitting service outside of Massachusetts, applies only "[w]hen the exercise of personal jurisdiction is authorized by this chapter."

The practitioner should also bear in mind that Massachusetts courts have in the past literally and strictly construed jurisdictional and service of process statutes relating to nonresidents. The fact that constitutionally a longer long-arm statute could be drafted which

8 G.L., c. 181, §§3, 5A, 4.
could reach foreign corporations or causes of action with less relationship to Massachusetts is not the test. The Uniform Interstate and International Procedure Act, upon which the Massachusetts long-arm statute is based, may not reach constitutionally permitted limits. One must consider how far the legislature has chosen to go, and not how far it could go. The practitioner, in attempting to gain jurisdiction over foreign corporations, should at all times gear his case to specific statutory provisions.

C. A HYPOTHETICAL CASE

§20.10. The facts. In September 1969, you receive a call from your friend and golf tutor, Peter Pro (Pro), who is the professional at Happy Hours Country Club, Inc. (Happy Hours), in Weston. Pro starts to tell you his tale of woe over the phone, and you suggest that he come to your office.

Pro, with bandaged right eye, recites his story. When he was a golf pro in Cleveland, Ohio, some time ago, an acquaintance and sports lover, Ted Traveler (Traveler), asked him to lend money to a newly formed sports equipment merchandizer, Sports Equipment, Inc. (Sports Equipment), an Ohio corporation with its only office in Cleveland. Traveler worked as a traveling salesman for Sports Equipment. Pro lent this new company $5000 on July 1, 1966, on a three-year note, the third installment of which is overdue. On July 8, 1969, Pro received a call from Traveler saying that Sports Equipment was making arrangements to obtain additional capital, and that the note would soon be repaid. He also said that Sports Equipment was now exclusive selling agent for a new, improved golf ball manufactured by Slice Corporation (Slice), an Ohio corporation with a plant and office in Canton, Ohio. Traveler said he had recently made a selling trip through New England, representing Slice and other manufacturers, but he had not realized at the time that Pro was in the Boston area. Pro said he was interested in the new balls, and toward the end of July 1969, received order forms from Sports Equipment to order Slice golf balls and other golf products manufactured by Slice and other companies.

In early August, Pro ordered for the Happy Hours pro shop 100 dozen “high compression” Slice specials priced at $1 per ball if payment were made in advance. About five days later Pro received written confirmation, and Happy Hours paid in advance.

The balls arrived in early September, shipped from Cleveland in a Sports Equipment carton, and Pro immediately tried a few out. The balls consistently sliced, although Pro knew that his swing was fine. He then asked the club champion and several other skilled golfers at Happy Hours to try the Slice specials. These golfers also found the balls to fly consistently to the right. Pro decided to send all of the Slice balls back for a refund, but first he chose to give them one more

chance. He teed up a new Slice special and took his natural swing; the ball exploded and fragments of the ball or its cover lodged in Pro's right eye. The particles had been removed surgically and he is now in your office, seeking to sue for personal injuries, for a refund on the golf balls, and for the last installment of his note.

Pro tells you that he has already put Slice and Sports Equipment on written notice about the accident and that, despite written demand, Slice refuses to take back the balls for refund, and Sports Equipment refuses to take the balls back for refund, or to pay off the note. Both Slice and Sports Equipment have denied responsibility for the accident. You tell Pro that there are some complicated questions concerning whether you can sue Slice and Sports Equipment in Massachusetts, since they are foreign corporations, and that you will get back to him.

Possible causes of action. First of all, you consider your possible causes of action: (a) suit by Pro against Slice in negligence, warranty, and implied warranty for personal injuries; (b) suit by Pro against Sports Equipment on the note; (c) suit by Pro against Sports Equipment on implied warranties for personal injuries, and perhaps on negligence, if Sports Equipment mishandled the goods after manufacture; (d) suit by Happy Hours against Slice Corp. and/or Sports Equipment for refund on defective balls (this will probably be an action for breach of implied warranties, unless actual warranties were given); (e) suit by Pro in negligence for personal injuries against unknown additional parties who supplied materials or parts for the balls, like the cover.

Contacts with Massachusetts. You check the latest edition of the paperback book put out by the commissioner of corporations and taxation entitled Massachusetts Corporations and Foreign Corporations Subject to an Excise in order to see if either Slice or Sports Equipment has qualified to do business in Massachusetts up to the date of the book; or you call the State House in Boston (telephone 617-727-2855) and ask for the same information, which has the advantage of being up to date. You find that neither corporation has qualified to do business in Massachusetts. You check the Boston telephone directory and yellow pages, thinking that Slice or Sports Equipment may have a regional office in the Boston area, but you find no listing.

You consider the possibility of obtaining general jurisdiction over Slice. It is unlikely you can show the intense activity required for establishing general jurisdiction under Chapter 223, Sections 37 and 38, and in any event, you know of no Slice officer or agent in charge of business to serve in Massachusetts under those provisions. Chapter 227, Sections 2 and 3, the cross-action statute, does not help, because Slice Corporation has not brought suit against Pro or Happy Hours. Slice apparently has no place of business in Massachusetts, yet alone a principal one, so that the general jurisdiction provisions found in the new long-arm statute, Chapter 223A, Section 2, do not help.

This narrows your possibilities to the two specific jurisdiction stat-
utes: Chapter 181, Section 3A, and Chapter 223A, Section 3. Chapter 181 permits service on the secretary of state if Slice does business in Massachusetts and if the cause of action arises from that business; but, you remember, the Massachusetts courts have construed this section to mean solicitation plus other activity. You are also bothered by the fact that Slice's sale was probably through an agent.

The new provisions of Chapter 223A, Section 3, give you the most comfort. First, you see that Section 3 says that "a court may exercise personal jurisdiction over a person who acts directly or by an agent. . . ."

Second, although the section is limited to "a cause of action arising from specific acts, or conduct in Massachusetts," subparagraphs (a) and (b) give you a chance in respect to collecting the refund for Happy Hours from Slice, and (a), (b) and (d) all give you hope in respect to Pro's battered eye:

(a) transacting any business in this commonwealth; (b) contracting to supply service or things in this commonwealth; . . . (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth.

You will note that under (d) you will not necessarily have to prove that Slice itself does or solicits business in Massachusetts, if Slice "derives substantial revenue from goods used . . . in this commonwealth."

Knowing that the service of process provisions under Chapter 223A are extremely broad and varied, you next consider whether Sports Equipment has sufficient contacts with Massachusetts to permit suit against it in Massachusetts. You would particularly like to gain general jurisdiction over Sports Equipment because you cannot see how Pro's cause of action under the promissory notes arises from any acts of Sports Equipment in Massachusetts. Chapter 223A, Section 2, is of no help, because Sports Equipment does not have a principal place of business in Massachusetts. The cross-action statute, Chapter 227, Sections 2 and 3, is of no value here. Chapter 223, Sections 37 and 38, give you little hope, since, although Sports Equipment may solicit a substantial amount of business in Massachusetts and engage in other activities like servicing complaints and although Traveler may even be an officer in Sports Equipment or the agent in charge of its business in Massachusetts, there are problems of proof. Furthermore, you will have to find Traveler in Massachusetts in order to serve him.

Since the outstanding note does not represent a substantial collection matter, you decide that you will probably forward this suit to Larry Lawyer, your law school friend who now lives in Cleveland. You consider forwarding the other law suits to Ohio as well but you decide

that in Pro's case for personal injuries you will want Massachusetts doctors to testify in his behalf and Pro himself to be a witness. You will also want Pro to testify in the Happy Hours case for a refund. You also feel that the Ohio corporations will be at a tactical disadvantage by having to prove their cases away from home.

You decide that the Happy Hours action against Sports Equipment for the refund, and Pro's potential actions against Sports Equipment for personal injuries, give you the same opportunities for obtaining jurisdiction under Chapter 228A, Sections 6 (a), (b) and (d), as against Slice. You also decide you have a good chance against Sports Equipment under Chapter 181, Section 8A, for it may not be difficult to show that Sports Equipment does business in Massachusetts, including solicitation plus other activities. This would permit service on the secretary of state in order to obtain specific jurisdiction for the causes of actions arising out of the sale of the golf balls.

§20.13. Choice of court. You have tentatively decided on two distinct law suits in Massachusetts: Pro against both corporations for personal injuries, and Happy Hours against both corporations to recover its money paid for the defective golf balls. You quickly see that the Happy Hours suit cannot be brought in federal court because, although there is diversity, the ad damnum falls far short of the $10,000 jurisdictional minimum.1 Pro's suit will probably justify such an ad damnum, since his injury is severe, but you decide to stick to state court since the same statutes permitting suits against foreign corporations apply in both state and federal courts, and since Supreme Judicial Court Rule 15 will permit you broad oral discovery in Massachusetts, similar to the federal rules.2 Although you are permitted an unlimited number of interrogatories in federal court which may be of value in establishing jurisdictional facts, and although you will probably get a trial sooner in federal court, you decide that on the whole you feel more comfortable with the Massachusetts procedure, which you have used more often, and that you have had good luck lately in the state courts. You pick Superior Court, because you want a jury trial in each case.3 You must choose Middlesex Superior Court as a matter of venue, because Pro is a resident of Weston, which is in Middlesex County, and the foreign corporations have no usual place of business in any Massachusetts county.4

§20.14. Service of process. You now confront the service of process questions. As to Sports Equipment, you have decided to serve the Massachusetts secretary of state in order to obtain Chapter 181 jurisdiction, and also to have Sports Equipment served directly in Ohio under Chapter 223A. At first you consider just mailing the service,
return receipt requested, under Chapter 223A, Section 6(a)(3); you recall, however, that you have to file the receipt signed by the addressee under Section 6(b), and since Sport Equipment is a corporation, an office worker or clerk would probably sign it, possibly presenting problems of proof. Also, with mail service, you have no person who can testify or provide an affidavit that service was in fact made. You have some doubts about Section 6(a)(1), permitting service in Ohio in the method prescribed in Massachusetts, because you are afraid that our procedures will confuse the Ohio sheriff. Section 6(a)(2) strikes you as the most sensible. You can make service “in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.” Your proof of service under Section 6(b) can be in the manner prescribed by “the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction.” By this method, you can have an Ohio sheriff make service on the Ohio corporation just as he would have if the suit was in an Ohio court, and he can make the same return of service as he would have in Ohio. For the small amount of money it will cost you to get Larry Lawyer to help you in Cleveland, you will find out from him exactly what you will need, and you will have him handle the Ohio service aspects for you. Had you not known a lawyer in Ohio and did not wish to seek one out, you could call the clerk of courts in the Ohio county where you wish to make service or call a sheriff in that county, whose name you can receive from calling the clerk of courts. This method has the advantage that the defendant Ohio corporations will also be familiar with the type of service they receive and may well answer without questioning it. Since you are serving Sports Equipment both ways, at the secretary of state’s office in Massachusetts and through an Ohio sheriff, you decide to do the same with Slice Corporation, because Chapter 181 may also give you good service against Slice if anything goes wrong with the Chapter 223A service.

Since you are serving both the secretary of state’s office in Massachusetts and an officer or agent for the defendant corporations in Ohio, you will want as much time as possible between the date of the writ and summons and the return day when you must file the writ and declaration in court. You are permitted up to 90 days, but the return day must be on the first Monday of the month.¹

For purposes of discussion, let us just consider now the actual documentation in the case of Pro v. Slice Corp. and Sports Equipment, Inc., since the questions of what will physically be done in respect to service will be the same for both the Pro and the Happy Hours law suits. You will send a writ and four summonses (two for each defendant) to the Suffolk deputy sheriff, for service on the secretary of state, and ask that service be made promptly so that the writ can be quickly returned to you. Some cautious lawyers also give the sheriff a copy of the declaration, even though it is not due in court yet,

¹ G.L., c. 223, §§22, 24.
since most lawyers for foreign corporations are confused if their client does not receive the initial pleading at the time of service. Put the addresses of the principal officers of Slice Corporation and Sports Equipment on your writ and summonses.2

The sheriff will make enough xerox copies of each document to provide the secretary of state’s office with sufficient file copies and copies for each defendant. The sheriff will pay the secretary of state $2 for each defendant, for which you will reimburse the sheriff when you pay him for service, travel, and copying. The sheriff will return the writ to you, if you ask him to do so (otherwise, the sheriff will sometimes return a writ directly to court), showing on the back of the writ that he has made service on the secretary of state.

The division of the secretary of state’s office which handles this type of service is in a room adjacent to Room 130 at the Massachusetts State House. They will first check to see if Slice Corporation and Sports Equipment, Inc., have registered to do business in Massachusetts. In this case, they will find that they have not and will send a copy of each of the documents by regular mail to each defendant to the address you have placed on the writ. The secretary of state’s office will keep a copy of each document which it sends out.

If the documents sent by the secretary of state’s office are returned by the post office as undelivered mail, the envelope and its contents will be kept in a separate file at the secretary of state’s office. If, after several days, the documents are not returned, the secretary of state’s office assumes that they have arrived at the address you gave. In either event, the secretary of state’s office does not, as a matter of course, file anything in court showing what it has done.3 You may, however, specifically request a letter of compliance from the secretary of state’s office, which it will provide for $2. You may file this in court, and most judges will receive it in evidence as presumptive compliance with Chapter 181’s requirements if you can prove that the address given for the foreign corporation is accurate. Upon inquiry at the secretary of state’s office, no one could recall anybody there ever being subpoenaed into court for proving that service has been made correctly pursuant to Chapter 181, Section 3A.

When there is service on a nonregistered foreign corporation, and that corporation does not answer within 21 days after the return date as required under Massachusetts law,4 Suffolk and Middlesex County clerks’ offices do not automatically enter a default. Plaintiff’s counsel must move for a default so that the court can consider the service of process and jurisdiction questions.

2 According to information gathered at the secretary of state’s office, the failure of the practitioner to provide the correct address of a defendant is a prime cause of service being regarded in the courts as deficient.

3 Note that his procedure is in substantial contrast to that under G.L., c. 223, §§37, 38. Under the latter, the mailing is by return mail, return receipt requested. Furthermore, the secretary of state is required under §37 to file in court a certificate of compliance together with the return receipt of the undelivered letter.

4 Superior Court Rule 25.
Let us assume that the writ has now been returned from the Suffolk County sheriff, showing that service has been made on the Massachusetts secretary of state, and that you now desire to have service made by an Ohio sheriff on Slice and Sports Equipment in Ohio. You find out from Larry Lawyer or a clerk of courts in Ohio that an Ohio case normally starts as follows. Plaintiff's counsel files a petition (similar to our declaration) in the court, with a separate document, called a praecipe, attached to the end of it. The praecipe tells the clerk of courts in the Ohio county in question what type of service the plaintiff wants. The clerk then prepares a summons and a copy of it for each defendant and has one copy of the petition for each defendant, furnished by plaintiff's counsel. The clerk gives the documents to the sheriff. The sheriff serves a summons and a copy of the petition on an officer, statutory agent or person in charge of the business for each corporate defendant. The sheriff returns a summons for each defendant to the clerk of courts with a return of service on it. Larry Lawyer explains to you that Ohio sheriffs, when serving complaints, declarations or petitions from foreign states, want these documents to be certified by the foreign court. You explain to Larry Lawyer that in Massachusetts the declaration is not filed until service has already been made, and he suggests that you send him two copies of your declaration, one for each defendant, and attach to the end of each a notarized affidavit that it is an exact copy of the declaration which you intend to file. He also asks that you send him the original writ and two summonses for each defendant. Although writs are not used in Ohio, both you and he feel it is wise to get a return of service on the writ as well, since the Massachusetts long-arm statute also permits service to be made by the method authorized by Massachusetts law.

Larry Lawyer instructs the sheriff in Cuyahoga County to serve Sports Equipment and to place the normal Ohio return of service underneath the Suffolk sheriff's return of service on the back of the writ and on the copy of the summons to him. Larry Lawyer then sends the writ, two summonses and a copy of the declaration to the Stark County sheriff to serve Slice in the same manner. Larry Lawyer gets the writ, with both returns by Ohio sheriffs on it, and two summonses showing the return for each defendant and sends them to you, together with the sheriff's bill. If you are dealing directly with an Ohio sheriff, bear in mind that he will not know you or your credit, and may well want to be paid in advance. If there is a problem you can ask the Ohio sheriff whether he will determine how much it will cost and bill you in advance, or whether after service he will send you a bill before sending you the writ.

You file the original writ in Middlesex Superior Court and the two summonses with Ohio returns on them prior to the return day with your $5 entrance fee, a general appearance for Pro, the original of

---

5 It is good practice to file a separate appearance slip. If you do not, however, the clerk will probably take your name from the declaration and get your address from the cover letter.
§20.15. Raising, preparing and arguing jurisdictional issues. If Sports Equipment or Slice Corporation retain Massachusetts counsel to fight Pro on jurisdictional issues, Pro may consider removing the case to federal court if the ad damnum on the writ is in excess of $10,000. The Ohio corporations may feel, justifiably or not, that they will have less provincial treatment in federal court, and their counsel may feel that it is easier to raise and try jurisdictional issues in federal court. In federal court, defendants’ counsel is not required to file a special appearance and he may raise jurisdictional issues with a Rule 12(b) motion to dismiss. Interrogatories and depositions, often limited to jurisdictional facts, are frequently used prior to the court’s hearing a 12(b) motion, and it is common practice in federal court for the judge to decide jurisdictional questions without live testimony, using only depositions, interrogatory answers and affidavits presented to him by both sides. If either counsel does want a full scale hearing, he must formally request a hearing and have that request allowed by the judge. If either party wishes to present oral argument, he must request this in his motion or in his written opposition to the motion.

Massachusetts procedure on raising and proving jurisdictional facts in state court is generally more formal than the federal procedure, and a defendant might well conclude that he does not want to remove the case to federal court because the plaintiff may have a harder time proving jurisdictional facts in state court. If the case is not removed, defendant’s counsel will have to file for special appearance, specifically stating thereon that it will be limited to raising jurisdictional issues. He will also file a motion to dismiss if the jurisdictional problem is apparent from the writ and declaration, or an answer in abatement, if it is not apparent from the record. For instance, if the writ does not show any return of service, it is obviously a jurisdictional failing apparent on the record and a motion to dismiss would be appropriate. If the issue requires the adjudication of outside facts, for example, whether or not Slice or Sports Equipment transacted acts in Massachusetts from which the cause of action arose, then an answer in abatement is appropriate.

6 Superior Court Rule 33A. This is to show that if plaintiff prevails he will in "reasonable likelihood" recover more than $2000 and thus the case will not be remanded to district court.

§20.15. 1 Fed. R. Civ. P. 12(b) See, e.g., Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943); Orange Theater Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (8th Cir. 1944), cert. denied, 322 U.S. 740.
6 See Browning-Drake Corp. v. Amertran Sales Co., 274 Mass. 545, 175 N.E. 45
An answer in abatement must be marked like a motion, by either party, with at least seven days notice to the other side. It will then come up in a regular motion session. Since our hypothetical case is in Middlesex County, you will wish to consider that there is no stenographer in the motion session and that the judge will probably send the case to a judge sitting jury waived for a full scale hearing. Some state judges, if requested, will hear jurisdictional issues solely on affidavits, apparently treating an answer in abatement like a motion. Superior Court Rule 46 specifically says:

The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or are apparent upon the records and files, or are agreed or stated in writing signed by the attorneys for the parties interested.

If you do intend to rely on affidavits, you would be wise to check with your opposing counsel and see whether the two of you can agree that the case will be presented by affidavits or whether you can agree on a stipulated statement of facts. Without such stipulation or agreement, you run the risk of appearing before a judge who wants live testimony and who feels that an answer in abatement is not merely a motion but a matter to be heard like any other trial. In some instances, there have even been jury trials in Massachusetts solely on jurisdictional issues, but that is not the normal practice today.

There appears to be no reason in Massachusetts state court why the plaintiff cannot, prior to a hearing on the answer in abatement, pursue discovery on jurisdictional facts through interrogatories, motions to produce documents under Supreme Judicial Court Rule 15, and oral depositions under the rule. Although the defendant corporation will not usually require discovery in order to find its jurisdictional facts, defendant’s counsel should bear in mind that if he does use interrogatories, depositions or motions to produce in state court, this may be interpreted as a waiver of his special appearance. This, however, is not a problem in federal court.

As Pro’s counsel, you should bear in mind that whether in state or federal court, the burden of proof will probably be on you to show that you have jurisdiction, which will involve showing that the defendant corporation has the necessary contacts under one or more of the states statutes, and that legal service has been made in accordance with Massachusetts statutes. The federal cases in Massachusetts make abundantly clear that the burden of proof is on the plaintiff, and although the state cases are not squarely on point, the net result in them seems to be that the ultimate burden is on the plaintiff.
As Pro's counsel, you will want to gear your discovery to the precise language of the jurisdictional statutes you are trying to utilize. Since you have served under Chapter 181, Section 8A, you are going to want to show that Slice and Sports Equipment "do business in Massachusetts," which will require your asking questions about how much solicitation is done in Massachusetts, who does it, how, and what else is done in Massachusetts. You will also have to establish facts, showing that the cause of action arose from that business. Under the long-arm statute, you are going to want to ask questions concerning the specific sale of golf balls, the relationship between Slice and Sports Equipment and the amount of revenue derived from goods used in Massachusetts. Also, if you are relying on the language in Section 3(d) concerning "causing tortious injury in this commonwealth by an act or omission outside this commonwealth if [it] regularly does or solicits business... in this commonwealth," you will want to ask detailed questions about the actual manufacturing process done by Slice. The "causing tortious injury" language of Section 3(d) raises the issue of whether or not you have to prove or make a prima facie case on the merits in order to prove jurisdiction.

Both sides will undoubtedly want to provide the court with a brief as to the legal propositions relating to the jurisdictional issues. If the long-arm statute is being relied upon, you may wish to cite New York, Tennessee or Illinois cases which have arisen under similar statutes. One should remember, however, as Zabin reminds us in his comprehensive article, that the legislature, in passing the long-arm statute, was dealing with Massachusetts needs, and that "slavish adherence to New York or Illinois decisions may well be unjustified." Examination of the Uniform Interstate and International Procedure Act and the accompanying commissioner's notes and annotations can also be helpful.

It is not the purpose of this article to analyze cases in other jurisdictions, nor to analyze whether Pro or Happy Hours will prevail in their attempt to obtain jurisdiction over Slice or Sports Equipment in our hypothetical case. We do suggest, however, that in arguing an answer in abatement or a Rule 12(b) motion on a jurisdictional point, you tell the court specifically which provisions and statutes you are relying upon and recite those specific facts which show that these statutory requirements are either met or not met. The simple approach is the best.

As plaintiff's counsel be sure to recite the language concerning necessary contacts, show the judge that those contacts exist, and if you rely upon specific jurisdiction, show him how the cause of action

---

13 Id. at 117.
arises from those contacts. If service is in issue, recite the statutory language concerning service of process and notice, and show the court that the service falls within that language. Check the return of service or affidavits concerning service carefully in advance. The officer's return of service is usually conclusive "as to all matters which are properly the subject of the return."15

As defendant, you must tell the judge specifically which statutory requirements have not been met; and if plaintiff relies on several possible theories, patiently go one by one and reveal how there are insufficient facts to support each theory. One cannot be too simple or too precise in a controversy over jurisdiction. The maze of Massachusetts statutes is complex; the court will appreciate all the help you can give.