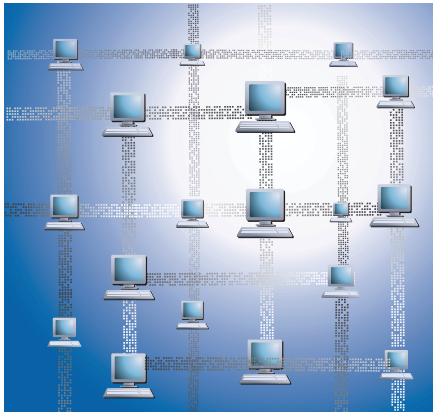


Personal Jurisdiction in Georgia Over Claims Arising from Business Conducted Over the Internet (Part I)

By Steven W. Hardy

I. Introduction

A long-time client makes a frantic phone call to you. He paid \$10,000.00 to an online seller of furniture, but the furniture was never delivered. The seller is located in North Carolina and has no offices or employees in Georgia. Your client's only contact with the seller was through the seller's website. After your client complained, the seller posted some false statements about your client on the site. After some investigation, you conclude that you may be able to plead claims for breach of contract and for fraud, as well as a claim of defamation. Can you establish personal jurisdiction over the seller in Georgia?



As with all questions regarding personal jurisdiction, the answer to this question involves a two-part inquiry. First, is there a statute that authorizes the exercise of jurisdiction over the seller and, second, does the exercise of jurisdiction comport with the requirements of due process under the United States Constitution? This two-part article will discuss each of these questions. This part of the article will address the considerations that apply under the Georgia statute authorizing the exercise of personal jurisdiction over non-residents. The second part of the article will discuss the federal due process issues.

II. The Statutory Basis For Exercising Personal Jurisdiction Over Non-Residents.

A. The Long Arm Statute

The Georgia Long-Arm Statute, O.C.G.A. § 9-10-90, et seq., authorizes the exercise of jurisdiction over non-residents for most commercial cases. The following provisions of the Long-Arm Statute apply to tort and contract claims:

A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

- (1) Transacts any business within this state;
- (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; [or]
- (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor 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 state; . .

O.C.G.A. § 9-10-91.

B. Contract Claims

Subsection 9-10-91(1) – which provides for the exercise of personal jurisdiction over a party who “[t]ransacts any business within this state” -- applies only to actions sounding in contract. Allen v. Black, 214 Ga. App. 450 (1994). The Georgia courts have held that the statute applies if a contract is negotiated face-to-face in Georgia, signed in Georgia, or performed in substantial part in Georgia. Lightsey v. Nalley Equip. Leasing, 209 Ga. App. 73 (1993) (execution in Georgia constitutes transacting business); Genesis Research Institute v. Roxbury Press, 247 Ga. App. 744 (negotiations in Georgia constitutes transacting business). However, only one case in the Georgia courts has discussed the application of the Long Arm Statute to a company doing business over the Internet. In Object Technologies, Inc. v. Marlabs, Inc., 246 Ga. App. 202 (2000), the court held that no jurisdiction existed over a claim for breach of a contract for computer services advertised on the Internet and negotiated on the phone, through the Internet, and by mail and fax.

The holding of Object Technologies is consistent with other cases involving telephone and mail contracts. In these cases, the courts have held repeatedly that such contacts do not constitute purposeful business activity for the purpose of satisfying the “transacts any business” requirement of O.C.G.A. § 9-10-91(1). Catholic Stewardship Consultants v. Ruotolo Assocs., 270 Ga. App. 751 (2004); McHale v. HJGM, Inc., 252 Ga. App. 641 (2001) (accepting orders out of state over the telephone to deliver goods to Georgia does not constitute transacting business in Georgia). Thus, it appears, at least at first blush, that your client will be unable to assert personal jurisdiction under the Long Arm Statute for a claim of breach of contract. There are, however, two exceptions to this rule.

First, the Court of Appeals several times has upheld the exercise of personal jurisdiction where a non-resident transacted a large volume of business over the telephone and by mail with a resident over an extended period of time. HTL Sp. Z O.O. v. Nissho Corporation 245 Ga. App. 625 (2000) (finding jurisdiction based upon large quantity of sales to Georgia resident); White House, Inc. v. Winkler, 202 Ga. App. 603 (1992) (same); Habersham Metal Products Co. v. Huntsville Fastener & Supply, Inc., 216 Ga. App. 646 (1995) (finding jurisdiction based upon large quantity of purchases from Georgia resident). The holdings of these cases would not apply to a one-time sales transaction, like the hypothetical here. However, these holdings may apply if you can show that the seller transacted a high volume of business with other persons or entities in Georgia, particularly if the transactions continued for an extended period of time.

Second, the Court of Appeals has upheld the exercise of personal jurisdiction based upon telephone and mail contacts in cases involving defaults on large loans because of the substantial impact of a default within the Georgia. Georgia R.R. Bank & Trust Co. v. Barton, 169 Ga. App. 821 (1984) (defendant transacted business within the state by entering into a loan agreement for \$125,000 with a Georgia bank). It is not clear, however, that the reasoning of Georgia Railroad would apply to a case involving the sale of goods, since the Court of Appeals has refused to allow the exercise of jurisdiction over non-residents

even with respect to sales transactions of substantial size if negotiations were conducted over the phone, by mail and outside of Georgia. See Maycamas v. Gulfstream Aerospace Corp., 190 Ga. App. 892 (1989) (suit against non-resident for breach of contract to purchase airplane from Georgia corporation for contract price of \$13,470,000).

C. Tort Claims (Other Than Defamation).

The provisions of O.C.G.A. § 9-10-91(2) & (3) apply to claims arising in tort. Subsection 3 applies to tortious acts committed outside the state that cause injury within the state. This subsection contains a limitation that the defendant must regularly conduct business, engage in a persistent course of conduct, or derive substantial revenue from goods used or consumed in this state. If the non-resident defendant is involved in only the transaction at issue and the contacts are by telephone, a Georgia court will not exercise personal jurisdiction over a tort claim under that subsection. Gust v. Flint, 257 Ga. 129, 130 (1987); Worthy v. Eller, 265 Ga. App. 487, 488 (2004). This same principle should apply to contacts over the Internet.

Subsection 2 of O.C.G.A. § 9-10-91 applies only to claims arising from tortious acts committed within the state. This subsection does not, by its terms, contain the limitation that a party must engage in a persistent course of conduct in Georgia in order for a court here to exercise personal jurisdiction over that party. A clever plaintiff's attorney may argue that a fraud perpetrated over the Internet involves acts within the state, so the exercise of personal jurisdiction is proper. However, the Georgia Supreme Court held in Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 301 (1979) that “limitations similar to those present in subsection [3] are constitutionally mandated in subsection [2].”

The court in Clarkson equated the statutory limitation in 9-10-91(3) with the requirement that minimum contacts exist, and held that “there is no essential difference between subsections [2] and [3].” 244 Ga. at 302. Thus, even if you could convince a court that your case involves acts that occurred in Georgia, you likely will not be able to establish that the exercise of personal jurisdiction is proper unless you can satisfy one of the limitations in subsection 3.

D. Defamation Claims

Defamation claims are treated differently than other tort claims under the Long Arm Statute. Subsection 2 excludes actions for defamation, and the Court of Appeals has interpreted this to bar all defamation claims against non-residents. Worthy v. Eller, 265 Ga. App. 487 (2004). However, if you satisfy subsection (3) by showing minimum contacts other than the commission of the tort itself, you may still be able to bring a defamation claim. Bradlee Mgmt. Svcs., Inc. v. Cassells, 249 Ga. 614 (1982).

III. General Jurisdiction.

The Long Arm Statute provides for the exercise of “specific jurisdiction,” that is, it allows for the exercise of jurisdiction only over claims arising out of the non-resident’s contacts with the state. Yukon Partners, Inc. v. Lodge Keeper Group, Inc., 258 Ga. App. 1 (2002); Pratt & Whitney Canada, Inc. v. Sanders, 218 Ga. App. 1 (1995). The United States Supreme Court has also recognized the concept of “general jurisdiction,” which is the exercise of jurisdiction over claims unrelated to a non-resident defendant’s contacts with the forum state based upon the fact that the defendant has a substantial level of contact with the state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n. 9 (1984).

The Georgia courts have not discussed the concept of general jurisdiction except as it applies to corporations. Foreign corporations registered to transact business in Georgia are “residents” for purposes of personal jurisdiction such that they are subject to the exercise of general jurisdiction by courts in Georgia. Allstate Ins. Co. v. Klein, 262 Ga. 599 (1992). The exercise of personal jurisdiction over foreign corporations that are not registered to do business in Georgia is limited by the Long Arm Statute to claims arising from the corporation’s contacts with the state. Pratt & Whitney Canada, 218 Ga. App. at 2. Interestingly, federal courts in Georgia approach this issue differently than the state courts and routinely apply the concept of general jurisdiction in cases involving non-residents. E.g. Exeter Shipping Ltd. v. Kilakos, 310 F.Supp.2d 1301, 1312 (N.D. Ga. 2004).

IV. Claims in Federal Court.

State courts in Georgia almost always determine whether jurisdiction exists under the Long Arm Statute before moving to the question of whether the exercise of jurisdiction satisfies the requirement of due process under the Constitution. In cases based upon diversity jurisdiction, federal courts should do the same. Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 747 (11th Cir. 2002). In fact, however, the federal courts in this state routinely ignore the Long Arm Statute when they address whether personal jurisdiction exists over non-resident defendants. They do this because of an unresolved conflict in the Georgia Supreme Court’s case law regarding the Long Arm Statute.



In 1982, the Supreme Court stated that “the policy of our Long Arm Statute is to exercise jurisdiction over nonresident defendants to the maximum extent permitted by procedural due process.” Bradlee Mgmt. Svcs. v. Cassells, 249 Ga. 614, 617 (1982) (citing Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58 (1973)). The Eleventh Circuit has interpreted this statement to allow courts “to bypass the literal language of the state law and to proceed directly to the due process analysis.” Vermeulen v. Renault, U.S.A., Inc., 965 F.2d 1014, 1022 n. 14 (11th Cir. 1992), modified and superseded on other grounds by, 985 F.2d 1534 (11th Cir.), cert. denied, 508 U.S. 907 (1993). Thus, federal courts sitting in Georgia typically ignore the requirements of the Long Arm Statute when they decide whether they can exercise personal jurisdiction over a non-resident. E.g., Horsley v. Feldt, 128 F.Supp.2d 1374, 1378 (N.D. Ga. 2000).

However, it is questionable whether that approach is appropriate because of the Georgia Supreme Court's holding in Gust v. Flint, 257 Ga. 129 (1987). In Gust, the court held that the plaintiff's tort claims should be dismissed on the ground that the uncontroverted evidence was that defendants' contact with the state did not satisfy the Long Arm Statute. The court stated that "[t]he rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction." 257 Ga. at 130.

The Georgia Supreme Court in Gust did not overrule the prior case law providing that the Long Arm Statute is to be interpreted to allow the exercise of jurisdiction to the maximum extent allowed by due process. The Georgia Court of Appeals has recognized that the statute should be interpreted broadly, but has viewed Gust as requiring that plaintiffs introduce evidence to satisfy one of the provisions of the Long Arm Statute before a court can exercise personal jurisdiction over a defendant. First National Bank of Ames, Iowa v. Innovative Clinical Consulting Services, LLC, 266 Ga. App. 842 (2004). The federal courts, on the other hand, have held that Gust did not overrule the prior case law, so there is no requirement to consider the literal terms of the Long Arm Statute when deciding whether the exercise of personal jurisdiction is proper. Vermeulen, 965 F.2d at 1022 n. 14; Horsley, 128 F.Supp.2d at 1378 n. 2. Thus, whether the Long Arm Statute will apply to your case could depend upon whether you are in state court or federal court.

V. Conclusion.

The first part of this article has examined the application of Georgia's Long Arm Statute to the exercise of personal jurisdiction over non-residents who transact business over the Internet. The Georgia Courts have interpreted the Long Arm Statute so that it is very difficult to establish the prerequisites of exercising personal jurisdiction over such non-residents. Federal courts in Georgia, on the other hand, generally ignore the Long Arm Statute when they determine whether the exercise of personal jurisdiction is proper. The second part of this article will discuss the Constitutional due process requirements that must be satisfied in order to exercise personal jurisdiction over such non-residents who transact business over the Internet.

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