

Personal Jurisdiction Under Florida Law

The Florida Legislature enacted a comprehensive long arm statute; its text follows, and is followed by three Florida Supreme Court decisions that apply it.

Chapter 48, Florida Statutes (2003) PROCESS AND SERVICE OF PROCESS

48.193 Acts subjecting person to jurisdiction of courts of state.--

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

- (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
- (b) Committing a tortious act within this state.
- (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
- (d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
- (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
 - 1. The defendant was engaged in solicitation or service activities within this state; or
 - 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
- (g) Breaching a contract in this state by failing to perform acts required by the contract to

be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

What is the relationship between the long arm statute and personal jurisdiction? The Supreme Court of Florida answered that question in the following case.

VENETIAN SALAMI COMPANY v. PARTHENAIS

554 So.2d 499 (Fl. 1989)

GRIMES, Justice.

This case involves the circumstances under which Florida may obtain jurisdiction over a nonresident defendant pursuant to its long-arm statute. Because it is relevant to our discussion, the complaint filed in this case is reproduced in full:

The plaintiff, J.S. PARTHENAIS, sues the Defendant, VENETIAN SALAMI COMPANY, a foreign corporation, and says:

1. This is an action for damages in an amount greater than Five Thousand and No/100 (\$5,000.00) Dollars.
2. Plaintiff's principal place of business is Alachua County, Florida.
3. On or about March 30, 1987, officer of the Defendant corporation contacted Plaintiff in Alachua County, Florida, and engaged the services of the Plaintiff to assist the Defendant

in determining the collectability and methods of collection of a large delinquent account due to Defendant.

4. The Defendant agreed to reimburse Plaintiff his expenses. Payment was to be made to Plaintiff at his place of business in Alachua County, Florida.

5. The Plaintiff performed the services, but the Defendant has refused to pay.

WHEREFORE, Plaintiff demands judgment against the Defendant for damages and costs of court.

Parthenais sought to obtain jurisdiction over Venetian Salami under section 48.193(1)(g), Florida Statutes (1987), which provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

....

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

Venetian moved to quash service of process for lack of jurisdiction over the defendant. Thereafter, the parties filed affidavits supporting their positions. The trial judge dismissed the suit on the ground that Parthenais had failed to establish that Venetian had sufficient minimum contacts with the State of Florida. The First District Court of Appeal reversed the order of dismissal. Acknowledging conflict among the district courts of appeal, the court held that jurisdiction may be obtained by meeting the statutory requirements of Florida's long-arm statute without the necessity of further showing that the defendant had sufficient minimum contacts with the State of Florida in order to satisfy due process. The court held that jurisdiction over Venetian Salami had been obtained because the complaint alleged facts sufficient to fall within the scope of section 48.193(1)(g) and that when these allegations were challenged, they were backed by affidavit.

Long ago, the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), held that in order to subject a defendant to an in personam judgment when he is not present within the territory of the forum, due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. More recently, the same Court stated that the test is whether the defendant's conduct in connection with the forum state is "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In essence, the court below held that the requisite minimum contacts are built into section 48.193. Otherwise, the statute would be held unconstitutional. We respectfully disagree. By

enacting section 48.193, the legislature has determined the requisite basis for obtaining jurisdiction over nonresident defendants as far as Florida is concerned. It has not specifically addressed whether the federal constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.

The principle that the determination of minimum contacts will depend upon the facts was highlighted by the United States Supreme Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In that case, Burger King, a Florida corporation, sued a Michigan resident for breach of a franchise agreement. Burger King sought to obtain jurisdiction under section 48.193(1)(g) by asserting that the defendant failed to make required payments under the agreement in Florida. After rejecting the defendant's jurisdictional arguments, the trial court held a bench trial and entered judgment in favor of Burger King. The Eleventh Circuit Court of Appeals reversed, concluding that the court did not have personal jurisdiction over the defendant. On petition for certiorari, the United States Supreme Court observed:

At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a "contact" for purposes of due process analysis. If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington*, *supra*, 326 U.S., at 319, or on "conceptualistic ... theories of the place of contracting or of performance," *Hoopston Canning Co. v. Cullen*, 318 U.S., [313] at 316. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.*, at 316-317. It is these factors--prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. at 478-79 (footnotes omitted). The Court then discussed the facts in detail and concluded that there was substantial record evidence to support the trial court's decision that the assertion of personal jurisdiction over the defendant in Florida did not offend due process. The Court went on to say:

We ... therefore reject any talismanic jurisdictional formulas; "the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." *Kulko v. California Superior Court*, 436 U.S. [84], at 92²⁹. The "quality and nature" of an interstate transaction may sometimes be so "random,"

²⁹This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair play and substantial justice" necessarily requires determinations "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'" *Kulko v. California Superior Court*, 436 U.S., [84] at 92.

"fortuitous," or "attenuated" that it cannot fairly be said that the potential defendant "should reasonably anticipate being haled into court" in another jurisdiction.

471 U.S. at 485-86 (footnotes omitted). If Parthenais's position is correct, the United States Supreme Court engaged in an unnecessary exercise of factual analysis because the parties had stipulated before the court of appeals that the court had jurisdiction over the defendant for purposes of section 48.193.

In a case involving an effort to obtain jurisdiction over a nonresident under section 48.193, the Fourth District Court of Appeal stated:

Admittedly, if the general principles of contract law can be applied so as to find a breach of the contract in Florida, then a literal reading of the statute would suggest that Florida has jurisdiction over the son-in-law. But, in our view, such an application of the statute would not pass constitutional muster.

Scordilis v. Drobnicki, 443 So.2d 411, 412 (Fla. 4th DCA 1984). In *Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674, 675 *502 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla.1988), the Fifth District Court of Appeal addressed the same issue as follows:

In determining whether long-arm jurisdiction is appropriate in a given case, two inquiries must be made. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.

As in the instant case, the plaintiff in *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla.2d DCA 1979), sought to obtain jurisdiction over a nonresident debtor on allegations that there was a breach of contract to pay the plaintiff money. The Second District Court of Appeal explained:

Section 48.193(1)(g), Florida Statutes (1977), provides that a person is subject to the jurisdiction of the court if he "[b]reaches a contract in this state by failing to perform acts required by the contract to be performed in this state." In *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082 (Fla.2d DCA 1977), our court in considering the reach of this section stated that where there is an express promise to pay and the contract does not state a place of payment, the debtor must seek the creditor and thus the breach occurs where the creditor is domiciled. In light of the principle announced in *Madax*, a literal reading of the statute suggests that the court had jurisdiction over the Society in this case.

Nevertheless, in cases involving jurisdiction over nonresidents, there are constitutional issues which we must also consider. A court may acquire personal jurisdiction over a nonresident only if the nonresident has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Thus, under

a given factual situation, even though a nonresident may appear to fall within the wording of a long arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state. *Harlo Products Corp. v. Case Co.*, 360 So.2d 1328 (Fla. 1st DCA 1978); *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So.2d 130 (Fla. 1st DCA 1977).

Id. at 874.

We approve of the foregoing analyses in *Scordilis*, *Unger*, and *Osborn*. The mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts. We do recognize, however, that implicit within several of the enumerated circumstances are sufficient facts which if proven, without more, would suffice to meet the requirements of *International Shoe Co.*

Our task does not end here because there must be a disposition of the instant case. With one notable exception, previous decisions of the district courts of appeal have outlined the procedure to be followed in cases such as this. Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts. Fla.R.Civ.P. 1.070(i). By itself, the filing of a motion to dismiss on grounds of lack of jurisdiction over the person does nothing more than raise the legal sufficiency of the pleadings. A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. In most cases, the affidavits can be harmonized, and the court will be in a position to make a decision based upon facts which are essentially undisputed. However, the question remains with respect to what should be done if the relevant facts set forth in the respective affidavits are in direct conflict. There is no Florida decision on this question, and the instant case highlights the dilemma.

In his affidavit, Parthenais stated that he had been contacted by Venetian at his place of business in Gainesville, Florida, and requested to investigate a large receivable owed to Venetian. He said that he and Venetian made an oral agreement that he would investigate the collectibility of the receivable in Florida, New York, and Canada and such other locations as might be required. It was agreed that Venetian would pay him at his business location in Alachua County, Florida. He further stated that he had performed services and incurred expenses in Florida, Canada, and New York. Parthenais also filed a supporting affidavit of Pierre Patenaude who was president of Venetian when the transaction in question took place. Patenaude said that in March of 1987 Venetian contacted Parthenais at his place of business in Alachua County and engaged his services to advise Venetian with respect to a large delinquent account due the company. He said that it was agreed that Parthenais would submit his statement and that Venetian would send its payment to Parthenais' place of business in Alachua County.

Venetian filed an affidavit of its president, Antoine Bertrand, stating that Venetian was a Canadian corporation which does no business in Florida. Bertrand said that Venetian did discuss with Parthenais a delinquent account which was located in New York. All discussions

concerning the account took place in New York and Montreal, and no discussions with Parthenais took place in Florida. He further stated that Venetian never reached any agreement with Parthenais, much less an agreement to pay any money in Florida.

It is evident that these affidavits cannot be reconciled. We believe that the facts set forth in Parthenais' affidavits would be sufficient to establish Venetian's requisite minimum contacts with the state. On the other hand, Venetian denies that the parties reached any agreement whatsoever. Furthermore, we do not believe that the mere failure to pay money in Florida, standing alone, would suffice to obtain jurisdiction over a nonresident defendant.¹ See *Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla.1988). Therefore, we hold that in cases such as this, the trial court will have to hold a limited evidentiary hearing in order to determine the jurisdiction issue.

We disapprove the decision in *Engineered Storage* and quash the decision below. We remand the case with directions that the trial judge hold an evidentiary hearing on the issue of jurisdiction over Venetian.

It is so ordered.

Notes and Comments

Venetian Salami properly separates the question of whether the defendant's contacts with Florida satisfy the requirements of its long arm statute from the question of whether those contacts are sufficient to satisfy the now familiar requirement of minimum contacts; to obtain personal jurisdiction, the plaintiff must demonstrate both that the defendant's contacts fall within the scope of section 48.193, and that those contacts satisfy the now familiar requirement of minimum contacts. The next two cases focus on the statutory requirements; unless those requirements are met, no inquiry into minimum contacts is necessary, for the defendant is not subject to personal jurisdiction.

DOE v. THOMPSON

620 So. 2d 1004 (Fl. 1993)

Jane Doe (Doe) was sexually assaulted while working alone on the evening of March 17, 1987, as a clerk in a convenience store in Florida owned and operated by Southland Corporation (Southland). Jere William Thompson (Thompson) is president and chief executive officer of

¹To put this statement in perspective, consider a scenario in which a New York company telephones a Florida resident and convinces him to buy a \$5 widget. The Florida resident returns the widget without payment because it does not work. Surely, it could not be said that the Florida resident had sufficient minimum contacts with New York such that he should reasonably contemplate being haled into court there to defend against a suit for nonpayment.

Southland. Doe's complaint charges Thompson with gross negligence in failing to take adequate security measures to make the store reasonably safe. Doe seeks personal jurisdiction over Thompson, a resident of Texas. The trial court determined that personal jurisdiction existed under Florida's long-arm statute, section 48.193, Florida Statutes (1987). The district court reversed and remanded with instructions to grant Thompson's motions to quash service of process and to abate for lack of personal jurisdiction. We approve the district court's conclusion.

This Court, in *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989), explained the two-step inquiry for determining long-arm jurisdiction over a nonresident defendant. A court first must determine whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of our long-arm statute. *Id.* at 502. A court then must determine whether sufficient minimum contacts exist between our forum state and the defendant to satisfy the Fourteenth Amendment's due process requirements--in short, whether a nonresident defendant "should reasonably anticipate being haled into court" in Florida. *Id.* at 500 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)).

We explained in *Venetian Salami* that a defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of insufficient minimum contacts must file an affidavit in support of his or her position. The burden is then placed upon the plaintiff to show by counter-affidavit the basis upon which jurisdiction is obtained. *Id.* If relevant facts set forth in the respective affidavits are in direct conflict, then the trial judge should hold a limited evidentiary hearing on the issue of jurisdiction. *Id.* at 503.

The district court in the instant case determined that the statutory requirement, the first step in the *Venetian Salami* inquiry, was not met. We agree, based on the clear language of the statute. Section 48.193 provides:

(1) Any person, whether or not a citizen or resident of this state, who *personally* or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(Emphasis added.)

"Personally" means: "In person; without the intervention of another." *The American Heritage Dictionary* 926 (2d college ed. 1985). Thompson's affidavit states that he did not *personally* do anything in Florida: he did not personally operate a business in Florida, commit a tortious act in Florida, or cause injury in Florida. The trial court permitted limited discovery consistent with *Venetian Salami*. Doe deposed Thompson relative to alleged decisions that he made within the scope of his employment by Southland; Doe focused particularly on Thompson's deposition statement that "the buck stops here." We find this phrase insufficient standing alone to refute Thompson's affidavit. While Southland Corporation, which operates businesses in Florida, could be haled into court because of its minimum contacts, its chief executive officer is not by virtue of his position subject to personal jurisdiction. Thompson's allegedly negligent actions are not alleged to have been taken outside his duties as Southland's president and chief

executive officer; rather, Doe alleges that he was acting within the scope of his employment. The distinction between a corporate officer acting on one's own and a corporate officer acting on behalf of one's corporation is set out clearly in *Bloom v. A.H. Pond Co.*, 519 F.Supp. 1162, 1170-71 (S.D.Fla.1981) (cited with approval in *Kennedy v. Reed*, 533 So.2d 1200, 1202 (Fla. 2d DCA1988)). This distinction is recognized in many other jurisdictions; it is referred to as the "corporate shield" or "fiduciary shield" doctrine. See *Estabrook v. Wetmore*, 129 N.H. 520, 529 A.2d 956 (1987) and cases cited there (acts of corporate employee performed in corporate capacity do not form the basis for jurisdiction over corporate employee in individual capacity). "The rationale of the doctrine is 'the notion that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer.'" *Id.* at 959 (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir.1981)). We approve this distinction.¹

Doe argues that *Streeter v. Sullivan*, 509 So.2d 268 (Fla.1987), supports the assertion of long-arm jurisdiction here. We recognized a corporate officer's liability for gross negligence toward a fellow employee in *Streeter*, where the officer's failure to provide a safe workplace resulted in the employee's death. The question presented in *Streeter* was whether a cause of action existed. We held that it did. The instant case, by contrast, presents the question whether long-arm jurisdiction exists over Thompson, not whether a cause of action exists against him. Doe may have a cause of action against Thompson, but the court does not have personal jurisdiction over him in Florida.

We conclude that section 48.193 does not apply to Thompson.

Note and Comment

Does it strike you as odd that Florida law creates a cause of action for Doe against Thompson, but that no Florida court can hear Doe's claim? Doe is free to sue Thompson in Texas, his home state, where he is subject to personal jurisdiction as a matter of course, but is there any reason to think Texas courts will apply Florida rather than Texas law to her claim? If Texas law does not create a cause of action, and Texas courts apply Texas rather than Florida law (and they are likely to apply Texas law), then Doe will find herself in a peculiar position – she cannot sue in Florida because she cannot obtain personal jurisdiction, and she cannot sue in Texas because Texas affords no remedy for the wrong of which she complains. Do you understand why

¹A corporate officer committing fraud or other intentional misconduct can be subject to personal jurisdiction, however. See, e.g., *Duke v. Young*, 496 So.2d 37 (Ala.1986); *Armstrong v. Pomerance*, 423 A.2d 174 (Del.Supr.1980); *Martin v. Ju-Li Corp.*, 332 N.W.2d 871 (Iowa 1983); *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 819 P.2d 1192 (1991), cert. denied, 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 550 (1992); *Vikse v. Flaby*, 316 N.W.2d 276 (Minn.1982); *CPC Intern. Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987); *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 388 S.E.2d 796, cert. denied, 498 U.S. 952, 111 S.Ct. 373, 112 L.Ed.2d 335 (1990).

personal jurisdiction fights matter so much?

WENDT v. HOROWITZ

822 So.2d 1252 (Fl. 2002)

PARIENTE, J.

We have for review *Horowitz v. Laske*, 751 So.2d 82 (Fla. 5th DCA 1999).

The conflict issue presented in this case is whether making telephonic, electronic, or written communications into this State can constitute "committing a tortious act" within Florida to subject a nonresident defendant to personal jurisdiction under section 48.193(1)(b), Florida Statutes (1999), of Florida's long-arm statute. For the reasons that follow, we hold that "committing a tortious act" within Florida under section 48.193(1)(b) can occur by making telephonic, electronic, or written communications into this State, provided that the tort alleged arises from such communications.²

BACKGROUND

Because this case arises from a motion to dismiss for lack of personal jurisdiction, we derive the facts from the affidavits in support of the motion to dismiss, and the transcripts and records submitted in opposition to the motion to dismiss. See *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502-03 (Fla.1989). Beginning in 1993, K.D. Trinh Investments, Inc. ("K.D. Trinh"), a Canadian corporation, held itself out as specializing in the purchase and quick sale of food products. K.D. Trinh derived capital for its operation from short term, high interest loans made almost exclusively to K.D. Trinh by Florida residents through independent agents who brokered the loans from Florida.

Initially, Alexander Legault was president of K.D. Trinh. At that time, Loren ("Ray") Reynolds was a salaried K.D. Trinh employee in charge of raising capital in Florida and enlisting

²We do not decide the broader issue of whether injury alone satisfies the requirement of section 48.193(1)(b), as that issue is not the basis for this Court's jurisdiction. However, we note that the federal courts that have addressed this issue, although acknowledging the confusion among Florida's district courts, have adopted a broad construction of section 48.193(1)(b), holding that the commission of torts out of state that cause an injury to an in-state resident satisfies Florida's long-arm statute. See, e.g., *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216-17 (11th Cir.1999); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 257 (11th Cir.1996); *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1033-34 (11th Cir.1991); *Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1109 (5th Cir.1976); *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1211-12 (5th Cir.1975); *Hollingsworth v. Iwerks Entm't, Inc.*, 947 F.Supp. 473, 478 (M.D.Fla.1996); *Interfase Mktg., Inc. v. Pioneer Techs. Group, Inc.*, 774 F.Supp. 1355, 1357 (M.D.Fla.1991).

independent agents who were Florida residents. Reynolds was a Florida resident, domiciled in Florida, and worked for K.D. Trinh from Florida. Moreover, George Hermann and his company, H & R Financial Services, Inc. (collectively "Hermann"), and petitioner Bernard Wendt served as resident agents who solicited investors. Hermann also was a Florida resident who was domiciled in Florida.

K.D. Trinh retained respondent Marvin Horowitz, a Michigan attorney, and his law firm, Horowitz & Gudeman, P.C., a Michigan law firm, as outside counsel to advise it on a number of matters pertaining to the sale of its notes and other securities matters in the United States, including Florida. Horowitz revised and drafted the notes and certificates used by K.D. Trinh for loans from Florida residents, allegedly to conform to federal and Florida securities law. Horowitz advised K.D. Trinh and Florida investors that the notes and certificates were not securities under federal and Florida law, and that K.D. Trinh's agents were not required to be licensed securities brokers within the State of Florida to legally offer the loans evidenced by those instruments. Moreover, Horowitz advised that, even if the notes and certificates were deemed to be securities, they were exempt from registration under section 517.051(8) or section 517.061(11)(a), Florida Statutes (1993), or both.

On June 13, 1994, Lynn Chang, an investigator with the Office of Comptroller, Department of Banking and Finance of the State of Florida, wrote Hermann concerning "certain investments which may be 'securities' under Section 517.921, Florida Statutes," and inquired whether K.D. Trinh was relying on an exemption or if it anticipated registration of the securities. Hermann contacted Reynolds, who told Hermann to contact Legault. Legault sent Horowitz the letter from the Office of the Comptroller, and Horowitz called Hermann in Florida and assured him that he would take care of the investigation. Horowitz was involved in two separate investigations by the State of Florida for K.D. Trinh.

Investors Edward and Ruth Laske, individually and on behalf of similarly situated individuals, filed a class action lawsuit against Wendt. The lawsuit alleged that Wendt acted as a broker and a promoter for the sale of K.D. Trinh notes, which turned out to be worthless. The lawsuit claimed that the sale of these notes violated securities laws. Wendt filed a third-party complaint, and then an amended third-party complaint, against several parties, including Horowitz and his law firm. Wendt claimed that he relied to his detriment on legal advice Horowitz had given.

To establish personal jurisdiction over Horowitz as a nonresident defendant, Wendt's amended third-party complaint alleged that jurisdiction was proper under section 48.193(1)(a), (1)(b), and (1)(f)(1), Florida Statutes (1999). See Horowitz, 751 So.2d at 85. Specifically, regarding section 48.193(1)(b) Wendt alleged jurisdiction was proper concerning Horowitz because Horowitz:

Committed a tortious act in Florida by (1) negligently responding in writing to an investigation by the Division of Securities relating to the alleged sale of unregistered securities and (2) negligently drafting loan documents that were knowingly intended by him to be evidence of loans to be made by Florida residents to K.D. Trinh without appropriate consideration being given to Florida securities laws and restrictions on

allowable interest, all of which resulted in Florida residents' sustaining personal injuries and monetary losses and being subjected to administrative, civil, and criminal proceedings.⁴

Id. at 84. Horowitz moved to dismiss for lack of personal jurisdiction and filed an affidavit in support of his motion. *See id.* The affidavit stated:

[H]e was a resident of the State of Michigan; was duly licensed to practice law in Michigan; had never been a resident of the State of Florida; had never solicited or conducted personal business within the State of Florida; his contacts with any party or entity in the State of Florida had been on behalf of a client or employer and *those contacts had only involved telephonic or mail correspondence and never involved travel to Florida*; that he had not traveled to Florida within the past eight years; he had never knowingly received any compensation directly from a Florida resident or entity or a non-Florida resident or entity while that party was in Florida.

Id. (emphasis supplied).

After a hearing on Horowitz's motion to dismiss, Wendt submitted materials, including deposition transcripts, for the trial court to consider in making its ruling. *See id.* These transcripts and records revealed that Horowitz had some contact with parties and entities in Florida during 1994 and 1995 based on the two inquiries made by the State regarding whether K.D. Trinh was selling unregistered securities. *See id.* at 85. These materials also indicated that Horowitz prepared certain loan documents for K.D. Trinh, which K.D. Trinh then used in Florida. *See id.* Horowitz's contacts regarding the first state inquiry, which arose in mid-1994, included:

[A] letter on June 17, 1994 from Horowitz to George Hermann, a Florida-based K.D. Trinh broker, reassuring Hermann regarding the State's inquiry into the nature of the K.D. Trinh notes; a phone call from Horowitz to Hermann on June 20, 1994; a letter on July 7, 1994, to Lynn Chang, an investigator for the Florida Department of Banking and Finance, regarding the State's inquiry into K.D. Trinh; and some follow-up phone calls of this same nature to Lynn Chang.

Id. The contacts as to the second State inquiry, which arose in 1995, consisted of:

[A] series of brief letters and phone calls as to this inquiry, primarily to Marsha Perkins, a

⁴Moreover, in order to establish personal jurisdiction over Horowitz & Gudeman, P.C., Wendt's amended third-party complaint alleged:

Horowitz-Gudman is a Michigan professional corporation which through its agent Horowitz held itself out as a law firm knowledgeable in commercial and securities laws and which through its agent Horowitz engaged in the activities and committed the acts described in paragraph 4 hereof.

financial investigator in the Office of the Comptroller for the state. Horowitz made one phone call to Wendt regarding this second inquiry in March, 1995. Also, at K.D. Trinh's request, Horowitz reviewed a subpoena Wendt received from the state during this second inquiry.

Id.

The trial court denied Horowitz's motion to dismiss for lack of personal jurisdiction without indicating which specific section of the long-arm statute was applicable. *See id.* Horowitz appealed to the Fifth District, which reversed and remanded. *See id.* at 86. The Fifth District held that jurisdiction was improper under either section 48.193(1)(a) or section 48.193(1)(b).⁵ *See id.* at 85. Regarding the application of section 48.193(1)(a), the Fifth District held that "[b]rief phone calls and letters initiated in Michigan and performed wholly in Michigan, and the preparation of loan documents, all done on behalf of a Canadian client doing business in Florida, does not amount to a general course of business activity in Florida by Horowitz." *Id.* The Fifth District also held that the affidavit Horowitz filed in support of his motion to dismiss refuted the allegations made in the third-party first amended complaint. *See id.* at 86.

Moreover, the Fifth District held that personal jurisdiction was not proper under section 48.193(1)(b), because no tortious act was committed in Florida. *See id.* The Fifth District explained that the "tortious acts" alleged in the complaint were the negligent response to the State of Florida regarding the sale of K.D. Trinh's unregistered securities and the negligent drafting of loan documents for use by K.D. Trinh, a Canadian corporation, for use in its Florida business. *See id.* The Fifth District concluded that these acts, if committed at all, were committed in Michigan. *See id.* Therefore, because the Fifth District held that Wendt failed to meet his burden of establishing jurisdiction under Florida's long-arm statute, the Fifth District did not address the second inquiry as to whether "sufficient minimum contacts" had been demonstrated to alleviate due process concerns. *Id.*

DISCUSSION

This Court must conduct a de novo review of a trial court's ruling on a motion to dismiss for lack of personal jurisdiction. *See Execu- Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So.2d 582, 584 (Fla.2000), *cert. denied*, 531 U.S. 818 (2000). This Court has articulated a two-step inquiry for determining whether long-arm jurisdiction over a nonresident defendant in a given case is proper:

First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether

⁵The parties agreed in the Fifth District that jurisdiction in this case turns upon either section 48.193(1)(a) or 48.193(1)(b). *See Horowitz*, 751 So.2d at 85. Therefore, the jurisdictional allegations referring to section 48.193(1)(f)(1) were not discussed by the Fifth District, and we decline to address the application of section 48.193(1)(f)(1) in this opinion.

sufficient "minimum contacts" are demonstrated to satisfy due process requirements. The first prong--i.e., the statutory prong--of the *Venetian Salami* standard is governed by Florida's long-arm statute and bestows broad jurisdiction on Florida courts. A court can exercise personal jurisdiction, *inter alia*, whenever a foreign corporation commits a "tortious act" on Florida soil. The second prong--i.e., the constitutional prong--is controlled by United States Supreme Court precedent interpreting the Due Process Clause and imposes a more restrictive requirement. A court can exercise personal jurisdiction only if the foreign corporation maintains "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Id. (citations and footnote omitted).

At issue in this case is the first prong--that is, whether Wendt's complaint alleges sufficient jurisdictional facts to satisfy section 48.193(1)(b). Wendt asserts that jurisdiction over Horowitz is proper under section 48.193(1)(b), which confers personal jurisdiction over parties that commit a "tortious act" in Florida.

Specifically, Wendt alleges that Horowitz committed two "tortious acts" within the state. First, he alleges that Horowitz negligently responded in writing to an investigation by the Florida Division of Securities relating to the alleged sale of unregistered securities. Second, Wendt alleges that Horowitz negligently drafted loan documents that Horowitz knowingly intended to be evidence of loans to be made by Florida residents to K.D. Trinh without giving appropriate consideration to Florida securities laws and restrictions on allowable interest, all of which resulted in Florida residents sustaining personal injuries and monetary losses and being subjected to administrative, civil, and criminal proceedings.

Horowitz does not deny that he sent letters to Florida in response to an investigation by the Florida Division of Securities or that he drafted loan documents intended for use in Florida. Rather, he claims that neither action constitutes "committing a tortious act" in Florida.

At the outset, we distinguish the question of whether communications into Florida can constitute "committing a tortious act" for the purposes of Florida's long-arm statute from the question of whether those acts may satisfy the minimum contacts required to comply with the constitutional prong of *Venetian Salami*. There is no question that physical presence is not necessarily required to satisfy the constitutionally mandated requirement of minimum contacts. *See Execu Tech*, 752 So.2d at 586; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("[W]e have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."). As the United States Supreme Court has observed in dealing with the constitutional issue of minimum contacts in relation to interstate communications:

[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat

personal jurisdiction there.

Burger King, 471 U.S. at 476 (citations omitted).

The question presented in this case is whether making telephonic, electronic, or written communications into Florida from outside of the State can constitute "committing a tortious act" under section 48.193(1)(b). The Fourth District has held that physical presence is not required in order to establish personal jurisdiction under section 48.193(1)(b). For example, in *Carida*, 424 So.2d at 851, the plaintiff, a Florida resident, asserted that the nonresident defendant committed a tortious act in Florida by virtue of his slanderous telephone conversations made to the plaintiff. The Fourth District held that committing a tortious act under section 48.193(1)(b) did not require that a physical tort occur in this State. *See id.* Similarly, in *Silver*, 648 So.2d at 241, the mailing of a letter into Florida from an out-of-state defendant formed the basis for a defamation claim. The Fourth District concluded that because the tort of libel was not completed until the statements were published, the mailing of the letter into Florida constituted the commission of a tortious act in Florida. *See id.* at 242.

In *Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So.2d 716, 718 (Fla. 4th DCA 1998), the plaintiff alleged that the nonresident defendant had defamed it by making statements to "distributors in Palm Beach County and elsewhere that Achievers is not a good company and that Achievers has been selling products on the side directly to retailers." The defendant did not contest that he made the statements to distributors in Palm Beach County, or that the statements, if made, would establish the tort of defamation. *See id.* In reversing the trial court's order of dismissal, the Fourth District held that "[m]aking a defamatory statement to a listener in Florida, even via telephone" constitutes the commission of a tortious act for purposes of section 48.193(1)(b). *Id.*

More recently, in *Acquadro*, 778 So.2d at 1035, the plaintiff alleged that the two defendants, while in Massachusetts, engaged in telephone conversations with persons in Florida, during which one of the defendants allegedly defamed the plaintiff and both defendants made statements that formed the basis of claims for false arrest and malicious prosecution. The Fourth District concluded that the trial court properly denied the motion to dismiss because the defendants did not deny that the telephone conversations occurred and that these telephone conversations formed the basis for personal jurisdiction. *Id.* The Fourth District did not decide whether the defendant had committed the torts alleged, because that would have required a full-blown trial, not the limited evidentiary *1259 hearing contemplated by *Venetian Salami Co.* *See Acquadro*, 778 So.2d at 1035.

In a slightly different twist, in *Koch v. Kimball*, 710 So.2d 5, 6 (Fla. 2d DCA 1998), the Second District was confronted with a jurisdictional question involving a nonresident defendant who tape-recorded a telephone call placed to the plaintiff in Florida. The plaintiff claimed a violation of the Florida Security of Communications Act. *See id.* The Second District held that the tortious act occurred in Florida where the interception occurred because that is where the recorded communication was uttered, and thus, the out-of-state defendant was subject to personal jurisdiction under section 48.193(1)(b). *See id.* [FN6]

FN6. However, in *Texas Guaranteed Student Loan Corp. v. Ward*, 696 So.2d 930, 932 (Fla. 2d DCA 1997), the Second District held that sending debt collection letters and making phone calls from out of state to a Florida resident is insufficient to establish jurisdiction under section 48.193(1)(b). The Second District did not consider whether the cause of action alleged arose from sending the debt collection letters and making phone calls. We note that in dicta in *Texas Guaranteed*, the Second District stated that injury alone does not satisfy section 48.193(1)(b), whereas in *Koch*, the Second District conversely stated that injury alone does satisfy section 48.193(1)(b).

The Fifth District has taken a more restrictive view of "committing a tortious act" to establish personal jurisdiction under section 48.193(1)(b), suggesting that a nonresident defendant must be physically present to commit a tortious act. For example, in *McLean Financial Corp. v. Winslow Loudermilk Corp.*, 509 So.2d 1373, 1374 (Fla. 5th DCA 1987), the Fifth District held that making fraudulent representations in Virginia by telephone to a Florida resident was insufficient to establish jurisdiction under section 48.193(1)(b). *See also Intercontinental Corp. v. Orlando Reg'l Med. Ctr.*, 586 So.2d 1191 (Fla. 5th DCA 1991) (holding that the "mere act of communicating with the promisee in Florida, in an effort to convince the promisee not to insist on contractual rights, does not constitute commission of a tortious act in this state").

This Court recently addressed the application of section 48.193(1)(b) to a nonresident defendant who was not physically present in Florida in *Execu-Tech*, 752 So.2d at 582. In *Execu-Tech*, a Florida company filed a class action lawsuit in Florida against a Japanese company that manufactured and sold thermal fax paper, alleging that the Japanese company conspired with others, including Florida corporations, to fix the wholesale price of the paper. *Id.* at 582. The Japanese company asserted that the Florida court lacked personal jurisdiction because it sold thermal fax paper only in Japan, it did not maintain an office in Florida, and the plaintiff failed to show that any of the Japanese company's paper was sold in Florida during the class period. *See id.* at 584. The trial court granted the motion to dismiss and the district court affirmed.

This Court reversed, holding that the Florida company's "complaint alleged sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute." *Id.* at 585. The Court explained that the complaint alleged that the Japanese company deliberately conspired with others to fix the wholesale price of their product throughout the United States, including Florida, which constituted a violation of the Florida Deceptive and Unfair Trade Practices Act. *See id.* Thus, the Court held that "according to ... the complaint, [the Japanese company] and the other conspirators committed a tortious act (i.e., a violation of the Act) on Florida soil and subjected themselves to the jurisdiction of Florida courts." *Id.* Because in *1260 *Execu-Tech* the defendant was not physically present in Florida, implicit in *Execu-Tech* is the notion that physical presence in Florida is not required to "commit a tortious act" in Florida under section 48.193(1)(b).

What was implicit in *Execu-Tech* we now make explicit. First, in order to "commit a tortious act" in Florida, a defendant's physical presence is not required. Second, "committing a tortious act" in Florida under section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida. However, the cause of action must arise from the communications. This predicate finding is necessary because of the connexity

requirement contained in section 48.193(1). [FN7] *See* § 48.193(1) (stating that "[a]ny person ... who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself ... to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts").

FN7. This is in contrast to the general jurisdiction statute, section 48.193(2), Florida Statutes, which does not require connexity between the defendant's activities and the cause of action. *See Woods v. Nova Companies Belize Ltd.*, 739 So.2d 617, 620 (Fla. 4th DCA 1999).

Although we hold that telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction under section 48.193(1)(b) if the alleged cause of action arises from the communications, we expressly do not determine whether personal jurisdiction under section 48.193(1)(b) has been established in this case. The threshold question that must be determined is whether the allegations of the complaint state a cause of action. *Cf. 8100 R.R. Ave. Realty Trust v. R.W. Tansill Constr. Co.*, 638 So.2d 149, 151 (Fla. 4th DCA 1994) (where the threshold question of personal jurisdiction turns on whether a tort is committed in Florida, the court necessarily must review the allegations of the complaint to determine if a cause of action is stated); *Silver*, 648 So.2d at 241 (same). If the complaint does state a cause of action, then it must be determined whether the alleged cause of action arises from these communications. [FN8]

FN8. Although Wendt's complaint alleged causes of action against both Horowitz and his law firm, the Fifth District's decision appears to have treated them collectively for purposes of its personal jurisdiction analysis. Moreover, the parties in this case have not argued before this Court that a distinction should be made between the satisfaction of personal jurisdiction under section 48.193(1)(b) for Horowitz's alleged acts and the law firm's alleged acts. Therefore, just as we do not reach the issue of whether personal jurisdiction is satisfied for Horowitz's alleged acts, we also do not reach the issue of whether personal jurisdiction is satisfied for the law firm's alleged acts, which personal jurisdiction apparently would be based on the allegedly tortious acts of its agent.

We thus quash the Fifth District's decision to the extent that it concludes that physical presence is required to establish personal jurisdiction under section 48.193(1)(b). We also disapprove of *McLean Financial Corp.* and *Intercontinental Corp.* to the extent that these decisions are inconsistent with this opinion and our holding in *Execu-Tech*. We remand this case for further proceedings consistent with this opinion.

It is so ordered.

Service of Process in Florida

Florida has enacted over a dozen statutes setting forth methods for service of process;

though you are not responsible for those statutes on the exam, you will need to familiarize yourself with them for the bar examination. They can be found on line at http://www.flSenate.gov/statutes/index.cfm?App_mode=Display_Statute&URL=Ch0048/titl0048.htm&StatuteYear=2003&Title=%2D%3E2003%2D%3EChapter%2048 from section 48.031 through section 48.19. You will have to paste both lines of the URL into your browser as a single uninterrupted URL.