



## *Where can we be sued?*

*The evolving landscape of personal jurisdiction.*



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December 3, 2020

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# Where can we be sued?

- Personal jurisdiction:

“A court’s power to bring a person into its adjudicative process”

Black’s Law Dictionary (11th ed. 2019)

# Personal Jurisdiction

- Power to bring defendant under the court's power
- All about protecting defendants' rights
- Plaintiff is already there voluntarily

# Personal jurisdiction

- Where can you be sued?
  - Organizing corporate presence/activities
  - Evaluating litigation risk
- Where can we sue?
  - Early consideration in every dispute
- Forum selection provisions

# Personal Jurisdiction Analysis

- State long-arm statute
- Due process

# Federal Court Analysis - FRCP 4(k)

- Long-arm statute:
  - Borrowing state court long-arm statute
  - Specific statutes conferring jurisdiction
  - Statute for international defendants
- Then due process

# State long-arm statutes

- Vary in scope
- Some states: to the full limit of due process
  - Analysis of statute “collapses” into due process analysis
- Other states: closely analyze statute



# Due process analysis

- Sufficient “**minimum contacts**” between defendant and state
- So the suit does not offend “traditional notions of **fair play and substantial justice**”



# Due process analysis - trend

- General trend: **more restrictive**
- So more defendant-friendly
- But trend means some uncertainty, so proceed with care

# Due Process analysis

4 ways to satisfy—

Less Common	More Common
<ol style="list-style-type: none"><li>1. Consent/Waiver</li><li>2. Tagging</li></ol>	<ol style="list-style-type: none"><li>3. General jurisdiction</li><li>4. Specific jurisdiction</li></ol>

# Consent or Waiver

- Explicit consent
- Constructive Consent/Waiver

# Constructive Consent/Waiver

- Appearing without making timely defense
- Forum selection clause
- Registering to do business/appointing a registered agent?

# Forum-selection clause = Consent?

- Can consent by submitting to jurisdiction in a forum-selection clause
- Needs to be specifically directed to the kind of dispute at issue
- Clause can be “mandatory” or “permissive”:
  - Mandatory - “exclusive”/“sole”/“only” / “must be brought”
- Either way, can be held to jurisdiction there

# Circuit split: does registration/appointing agent = Consent?

- Some circuits: never confers general jurisdiction
- Other circuits: can confer it
  - Only if the law of the state of registration/agent specifically equates those actions to consent.

# Personal Service / “Tagging”

- Personal service in the forum state
- Served while there even for short time

**BUT** doubtful whether tagging is valid to confer jurisdiction over corporations/partnerships/associations

- So, if a corporate officer is served in a foreign state, perhaps no PJ unless contacts are otherwise sufficient. See *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014)



# Personal Service / “Tagging” con’t

Even if tagging is permitted...

- Exceptions (tagging not valid):
  - (a) Presence secured by fraud
  - (b) Presence secured by force
- Many states recognize a third exception:
  - (c) In the state to comply with a subpoena in an unrelated action

# General jurisdiction

Defendant’s “affiliations with the State are so continuous and systematic as to render them **essentially at home** in the forum State.”

*Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011).

# General jurisdiction - corporations

- State of **incorporation**
  - State of **principal place of business**
  - Potentially other states when “its **continuous corporate operations**” are **so substantial** to justify jurisdiction in a case “**entirely distinct**” from those activities (*very rare*)
    - Must be “exceptional case” - not just big company doing business everywhere
- Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014)

# General jurisdiction con't

- “A corporation that operates in many places can scarcely be deemed at home in all of them.”

*Daimler*, 571 U.S. at 138

# General jurisdiction con't

- LLCs/LLPs/Partnerships:
  - Less clear. Possible approaches:
    - State of formation and principal place of business (slight majority); or
    - Also all members' home states.

# Example: General jurisdiction

- Marriott has 90 hotels in SC
- Certificate to do business in SC
- SC residents can book online to stay at any Marriott hotel
- General jurisdiction? **No.**

*Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124 (4th Cir. 2020)

# Specific jurisdiction

- Not about general contacts/conduct
- About suit-related conduct only



# Specific Jurisdiction con't

- “Specific jurisdiction” is where the corporation’s contacts with the forum state are **continuous, systematic, and purposeful**, *and* the specific claims in the lawsuit **arise from** those particular contacts. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017).

# Specific jurisdiction con't

3-pronged test:

1. Defendant **purposefully availed** itself of the privilege of conducting activities in the state;
2. Plaintiff's claim "arose out of" or was "**related to**" those activities; and
3. Exercise of PJ would be **reasonable**.

# Prong 1 - Contacts/Purposeful availment

- Focus on D's intentional conduct - not just “random,” “fortuitous” or “attenuated” contacts

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)

# Prong 1 - Contacts/Purposeful availment: Stream of commerce

- Placing in stream of commerce with expectation that consumers will purchase in the forum state
- Splintered SCOTUS decisions = confusion

# Prong 1 - Contacts/Purposeful availment: Stream of commerce

- Stream of commerce not explicitly overruled. Some still apply.
- Some commentators and courts consider stream of commerce dead given recent restrictive SCOTUS decisions.

# Prong 1 - Contacts/Purposeful availment: online activities

*Zippo* sliding scale test from *Zippo Mf'g v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)

1. Directly entering into contracts with forum residents: generally purposeful availment.
2. Passive - just posting information: not purposeful availment.
3. Gray area: exchanging information but not directly entering into contracts. Depends on:
  - Level of interactivity
  - Commercial nature of activity



## Prong 2 - “Arose out of” or “related to”

- When there is no connection between the suit and the contacts with the state, “specific jurisdiction is lacking **regardless of the extent of a defendant’s unconnected activities in the State.**”

*Bristol-Myers Squibb*, 137 S. Ct. at 1780.



# Prong 3 - “Reasonable”

- Burden shifts to D to show PJ unreasonable
- Courts consider:
  - (1) extent of D’s purposeful interjection into forum state's affairs;
  - (2) burden of defending in the forum;
  - (3) extent of conflict with the sovereignty of D’s state;
  - (4) forum state's interest in adjudicating the dispute;
  - (5) most efficient judicial resolution of the controversy;
  - (6) importance of the forum to the plaintiff's interest in convenient and effective relief; and
  - (7) existence of an alternative forum.

# Example: Cease-and-desist letter

- Iowa company sends C&D to Vermont company, threatening a trademark suit
- Personal jurisdiction in VT? **Likely not.**
  - Arises out of activity directed at Vermont
  - But not reasonable
  - Unless some other action, e.g., interfering with suppliers or customers in Vermont

Example: *Avocent Huntsville Corp. v. Aten Int'l Corp.*, 552 F.3d 1324 (Fed. Cir. 2008)

## Example - Ford Motor case (S. Ct., No. 19-368)

- Ford HQ in MI; incorporated in DE
- Car designed in MI, assembled in Ontario, sold to ND dealership
- 5 owners later, registered in MN
- Passenger injured in MN
- Sued in MN state court

# Ford example con't

- No general jurisdiction - not “at home” in MN
- Specific personal jurisdiction:
  - 1. Minimum contacts / Personal availment? **Yes.**
  - 2. “Arise out of” contacts? **Disputed.**
  - 3. Reasonable? **Yes. Not burdensome.**
- **Dispute: when does a claim “arise out of” the contacts?**

# Ford example con't

- Ford's argument:
  - Ford sells cars in MN and injury was in MN
  - But this car wasn't sold there
  - D's contact with MN must be “**suit-related**”
    - Conduct with MN must have caused the injury
  - “**Similar**” not enough

# Ford example con't

- Injured motorist's argument:
- “Arise out of” and “relate to” not the same
- “Relate to” is broader. Includes situation here.

# Special case: Mass tort or class actions

Mass tort:

- 600 plaintiffs sue drug company in CA
- Some Ps are CA residents; specific jurisdiction met as to them
- But not met for the non-resident Ps' claims. Injuries not related to D's contacts with CA.

*Bristol-Myers Squibb*, 137 S. Ct. 1773.

- So nationwide mass tort actions perhaps survive only where D subject to general jurisdiction?



# Special case: Mass tort or class actions con't

- *Bristol-Myers Squibb* was not a class action; aggregated claims like MDL
- Will this reasoning extend to **class actions**?
  - 3 circuits have considered so far. All said no - absent class members in class actions not “parties” for determining PJ

# Special Case: Intentional torts

- Can use “effects test” as alternative to “traditional test”  
(though arguably just an application of the traditional test for intentional torts)
- Connection among the defendant, the forum, and the litigation

Still can't be based on random/fortuitous/attenuated connections or on the plaintiff's connections

- So mere harm to forum resident not enough

# Intentional torts examples

1. Tortious article written in FL, about person in CA. Harm felt in CA because of CA readership. CA court had PJ. *Calder v. Jones*, 465 U.S. 783 (1984).
2. DEA agents seized cash from NV residents while in Atlanta airport on way back to NV. NV court did not have PJ. Ties with NV were only based on plaintiffs. *Walden v. Fiore*, 571 U.S. 277 (2014).

# Thank you

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