Personal jurisdiction over foreign corporations

By Pete Kaufman and Greg Sonstein

In products liability litigation involving a foreign defendant, there are few threshold issues more litigated than whether the court can exercise personal jurisdiction over that defendant. Personal jurisdiction battles often resemble a mini-trial on the extent and nature of the defendant's contacts with the forum state. Common sense might try to inform you that, well, if a defendant's goods end up in the forum and injure my client – the defendant must be subject to jurisdiction in the forum where the injury occurred! Your common sense is, unfortunately, incorrect. When the traditional bases for exercising jurisdiction are not present (as is usually the case with a foreign corporation) – physical presence in the forum state when served, consent, domicile in the forum state, general appearance in the action – you'll need to show the court that the defendant has minimum contacts with the forum. (Robert I. Weil et al., *California Practice Guide: Civil Procedure Before Trial* ¶ 3:131 (2018).) Generally, a finding of minimum contacts, when the corporation is not at home in your forum, requires gathering evidence demonstrating the foreign company's intentional contact with the forum, relating that contact to the plaintiff's injuries, or a showing that the defendant was aware its products were marketed or sold in the forum and injured your client.

General Jurisdiction

The Supreme Court of the United States has held that a court's jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment, or that a defendant must have minimum contacts with the forum that do not offend "traditional notions of fair play and substantial justice." (*Int'l Shoe Co. v. State of Wash.* (1945) 326 U.S. 310, 316.) And the nature and the extent of those minimum contacts required will depend on the particular theory of personal jurisdiction you are asserting: general jurisdiction or specific jurisdiction.

Recent decisions from the Supreme Court of the United States have greatly favored the use of specific jurisdiction over general jurisdiction with regard to foreign defendants. (See *Daimler AG v. Bauman* (2014) 571 U.S. 117, 130, 132-33; *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 564 U.S. 915, 925-26.) Arguably, evidence of continuous and systematic contacts with a forum (no matter how substantial), when a corporation is not headquartered or incorporated in the forum, no longer serves as an independent basis for successful assertion of general jurisdiction when those contacts are causally unrelated to the underlying claims of the action. (*Daimler AG* at 137-39.)

Do Some Research

Do not always take the defendant's word or representations of where it is "at home" for the purposes of general jurisdiction. If you've discovered any facts that lead you to believe the defendant may be misrepresenting its corporate citizenship, scour the public record and do some internet searching for any materials relevant to where corporate decisions are made in your forum. (*Hertz Corp. v. Friend* (2010) 559 U.S. 77, 92-93 ["We conclude that 'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities … the place … called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)."].)

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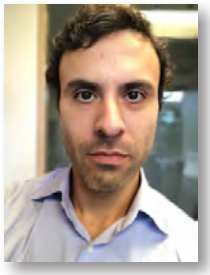

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Our firm is currently handling such a case where defendants removed to federal court, in part on the basis of complete diversity of the parties, and disputed our claims as to one of the defendant's homes being in California, in addition to New Jersey. Hoffmann-La Roche, Inc., a pharmaceutical company, maintained offices in New Jersey after its acquisition of Genentech, Inc. (another pharmaceutical company), a California corp. Defendant maintained it was not at home in California despite numerous and public representations that it had moved its headquarters to South San Francisco, California where the Genentech, Inc. campus was located following its acquisition of that company.

Digging deeper after discovering representations on Hoffmann-La Roche's website that it had moved its headquarters from New Jersey to California, we were able to ultimately put together a motion to remand featuring over 20 exhibits, from investor presentations, news articles, statements of information from Secretary of State filings, SEC filings, and other items, that the N.D. Cal. ultimately found to be persuasive evidence of California citizenship and remanded the case back to state court. (*Sheets v. F. Hoffmann-La Roche Ltd.* (N.D.Cal. Dec. 7, 2018), No. 18-CV-04565-JST, 2018 WL 6428460, at *1.)

Specific Jurisdiction

When a defendant cannot be held "at home" in the forum, you will need to argue for specific jurisdiction. The inquiry is focused almost exclusively on the relationship between the defendant, the forum and the litigation. (*Walden v. Fiore* (2014) 571 U.S. 277, 284, citing *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 775.) This means that the inquiry is focused on the nature of the defendant's contacts with the forum – as it relates to the conduct giving rise to your client's injuries. Typically, this will be some action(s) of the defendant reaching out to the forum state, that, arguably, gave rise to your client's injuries.

Purposeful Direction and Relatedness

As you probably remember from your civil procedure course or studying for the bar exam, the key terminology is: (1) "purposeful direction" (or availment); and (2) "arising out of" (or relatedness). (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472–73 ["Specific jurisdiction over an out-of-state defendant who has not consented to suit there … is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum … and the litigation results from alleged injuries that 'arise out of or relate to' those activities…."] The complete analysis is a three-factor test that also includes a reasonableness inquiry when you've completed your analysis on items 1 and 2.

The purposeful direction requirement is designed to "ensure that a defendant will not be hailed into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, ... or of the unilateral activity of another party or a third person." (*Burger King*, 471 U.S. at 475, quotations omitted.] You must be able to show something beyond mere foreseeability – and marshal evidence demonstrating deliberate contact with the forum. (*Id.* at 476.) Courts typically do not apply any one test to determine purposeful direction, however, certain guidelines or categories have been set forth such as: continuing relationships with forum state residents, exploitation of the forum state's market, and harmful effects felt in the forum state. (See e.g., *Old Republic Ins. Co. v. Cont'l Motors, Inc.* (10th Cir. 2017) 877 F.3d 895, 904–09.)

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The "arising out of" requirement acts like a filter to dispense with any activities that cannot be found somewhere on the causal chain between the alleged activities of the defendant relating to the forum and the plaintiff's injuries. (*Bristol-Myers Squibb Co. v. Sup. Ct. of Calif.* (2017) 137 S.Ct. 1773, 1780; *Morrill v. Scott Fin'l Corp.* (9th Cir. 2017) 873 F.3d 1136, 1142-43.) Some courts apply tests such as proximate causation (most restrictive), substantial connection, and but-for causation (least restrictive). (*Employers Mut. Cas. Co. v. Bartile Roofs, Inc.* (10th Cir. 2010) 618 F.3d 1153, 1160–61.) California courts have applied some form of the

substantial connection test in making this determination, or requiring proof of some "direct" relationship. (See *Snowney v. Harrah's Entertainment, Inc.* (2005), 35 Cal.4th 1054, 1068-69.)

Stream of Commerce

Using a stream of commerce argument is helpful when there is little contact with the forum other than a product causing injury there to your client. However, you must generally be able to find and cite to some evidence that the defendant was *actually aware* that its products were being sold or marketed in the forum – and this is not a foreseeability test. A stream of commerce argument for specific jurisdiction will use the same framework and factors as a purposeful direction and relatedness analysis, but you will ultimately need to show that: (1) the product at issue was placed into the stream of commerce by the defendant; (2) the product caused injury in the forum; and (3) the defendant possessed knowledge beyond mere awareness that its product(s) *might* end up in the forum state. (*People ex rel. Harris v. Native Wholesale Supply Co.,* (2011) 1296 Cal.App.4th 357, 364.)

Local Corporate Affiliates

Oftentimes a products liability case will involve multiple defendants from the same corporate family. This presents special jurisdiction problems when one of those defendants is not clearly "at home" in the forum. An affiliated local corporate entity's contacts with the forum will generally not serve as an entrée to your foreign defendant's required contacts in a minimum contacts analysis. So, when you're dealing with multiple defendants in one corporate family (or any group of affiliated companies), you will not automatically get jurisdiction over all of them even if the court indisputably has jurisdiction over some of them, and even when they are all in contact with one another before and leading up to the plaintiff's injuries.

Courts respect and often give deference to corporate formalities even when they fly in the face of common sense. You cannot simply impute a local affiliate's contacts to your foreign defendant, often even when your defendant and the local corporate affiliate are in extensive contact with one another. (See *Daimler AG*, at 136.) The general rule is that existence of a parent-subsidiary relationship by itself, or any other affiliation, does not support the exercise of jurisdiction over a corporation that does not itself have minimum contacts with the forum. (*Sonora Diamond Corp. v. Superior Court* (5th Dist. 2000) 83 Cal. App.4th 523, 546–52.)

Other than asserting an agency or alter ego theory, which requires a showing of a substantial degree of control and direction by one affiliate over another such that the two companies are arguably indistinguishable, it may still be possible to assert jurisdiction under the "representative services doctrine"; but the United States Supreme Court's ruling in *Daimler AG* has made that argument much more difficult. (See *Daimler AG*, 571 U.S. at 134-36 ["the inquiry … stacks the deck, for it will always yield a pro-jurisdiction answer."]) The representative services doctrine is a species of

agency theory and allows you to impute an affiliate's contacts to a foreign parent when that local affiliate is performing essential or important functions. (*Sonora Diamond Corp.* at 542.)

Our firm has recently dealt with these issues in multi-forum litigation against a major medical device manufacturer headquartered in Japan. This company is part of a corporate family in which it is the principal designer and manufacturer of the device (and the *de facto* parent), but outsources its US sales, marketing, and distribution to two other members of the same corporate family which are headquartered in the US and conduct extensive sales and marketing in all 50 states on its behalf. Despite the fact that the foreign defendant has extensive contacts with other members of its own corporate family headquartered in the US, and the US corporations are indisputably subject to jurisdiction where plaintiffs' injuries occurred, and where the devices were sold, the foreign defendant itself has been much harder to pin down in any given forum without conducting jurisdictional discovery.

Because a jurisdictional inquiry is necessarily fact-intensive and requires some evidentiary showing of relevant contacts, when you file an opposition to the defendant's motion to dismiss for lack of personal jurisdiction, it will almost always be wise to ask the court for leave to take jurisdictional discovery in the event it finds jurisdiction lacking. You can then send out requests for production or take a PMQ deposition limited to the issue of jurisdiction.

Agency Without Extensive Control

The FDA mandates that a local affiliate undertake certain actions (e.g., filing for clearance or approval of a medical device) for a foreign corporation when that foreign corporation is the manufacturer or designer of a medical device. (See U.S.C.A. Sec. 360(i)(1)(A)(ii); 21 C.F.R. Sec. 803.58, 807.40.) In this subset of cases, the foreign corporation's lack of a physical presence should not be dispositive of the court's decision on jurisdiction. Our recent appellate victory in *Vaughan v. Olympus America* (2019) 2019 PA Super. 112, No. 3101 EDA 2017, demonstrates that a kind of unique agency argument can work when the foreign corporation is using the local affiliate to disseminate key safety information about its product – as required by the FDA. In a published April 10 opinion, the Pennsylvania Superior Court ruled that claims over a woman's death allegedly caused by a contaminated endoscope can stay in Pennsylvania despite the fact that the scope manufacturer is based in Japan and the death occurred in North Carolina. The three-judge panel of the Superior Court unanimously reversed a Philadelphia trial judge's rulings that sustained defendant Olympus Medical System Corp.'s (OMSC) preliminary objections seeking dismissal for lack of personal jurisdiction and dismissed claims against three remaining defendants – Olympus America (OAI), Olympus Corporation of the Americas (OCA) and Custom Ultrasonics (Custom) – for forum non conveniens.

Defendants argued that the *only* presence OMSC had in Pennsylvania was a few employees it posted there to work as liaisons between its sister corporations and its home in Japan; and predictably their activities were unrelated to the plaintiff's injuries. OMSC relied on its red herring argument that there is a lack of physical presence – as if that is the dispositive test for specific jurisdiction in every single case. Thankfully for our client, the court saw through this deception that it mattered where the decisions were made – the device would never have been marketed in the US at all without direction from Japan to Pennsylvania. Laying out the relationship with any local affiliate and how that relationship gives rise to the injuries can work when you cannot demonstrate complete control of an affiliate for a typical agency argument. ■