Lawyer Insights

4 Personal Jurisdiction Questions Defendants Should Ask

By Alexandra Cunningham and Elizabeth Reese
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Companies may find themselves sued in surprising locations, as novel theories associated with the COVID-19 pandemic unfold. Despite the U.S. Supreme Court's clear mandates restricting personal jurisdiction in Daimler AG v. Bauman and Bristol-Myers Squibb Co. v. Superior Court, plaintiffs still "forum shop" for jurisdictions with weak procedural safeguards and low expert admissibility standards — the perfect breeding grounds for questionable claims.

Leveraging arguments that challenge the way courts have thought about personal jurisdiction for decades can help companies level the playing field, and escape lawsuits in plaintiffs' preferred forums. Below, we offer four questions to ask when you find yourself litigating a case in a jurisdiction where it does not belong.

Are the jurisdictional allegations plausible?

In the wake of Daimler and Bristol-Myers, plaintiffs' jurisdictional allegations have become more creative, but in many cases less plausible.

While sanctions may be available for the most egregious claims, courts generally allow leeway for jurisdictional theories that may be novel but fall short of sanctionable. This is especially true when the merits are intertwined with the jurisdictional question, making courts reluctant to dispose of the claim without discovery.

A plausibility challenge offers a possible solution. Federal district courts in at least five different circuits have held that personal jurisdiction must be plausibly pled under Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal.[1] To pass muster, plaintiffs must do more than parrot the language of a long-arm statute — they must provide actual substance. A plausibility standard thus helps cull meritless claims before costly discovery.

And even when there may be some merit to a plaintiff's theory, a plausibility challenge may prompt the court to require plaintiff to produce evidence in support of jurisdiction through jurisdictional discovery. Particularly when the merits overlap with the jurisdictional question, jurisdictional discovery can be very effective in narrowing the issues in dispute and setting the stage for early resolution.

The plausibility defense may also be available in state courts. Nearly 30 states have pleading rules substantively identical to Federal Rule of Civil Procedure 8. While not all states have explicitly chosen to follow the rules set forth by Twombly and Iqbal, or have not yet addressed the question, defendants should leverage those decisions in state court cases where the allegations of personal jurisdiction are speculative.

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Is there jurisdiction over all of the claims?

Just because personal jurisdiction may exist over one of the plaintiff's theories does not mean that the court can hear the entire case.[2]

Three federal appellate courts have held that specific jurisdiction is a claim-specific inquiry, meaning that a plaintiff must prove personal jurisdiction as to each individual claim.[3] District courts in other circuits have followed suit.[4] And because personal jurisdiction is rooted in constitutional principles of due process, this analysis applies with equal force in state courts.[5]

Any individual claim over which a court does not have personal jurisdiction must be dismissed. This is true even if all of the claims arise from the same set of operative facts. What matters in the jurisdictional context is not the gist of the action, but rather the forum contacts forming the basis for each individual claim.

For example, in Seiferth v. Helicopteros Atuneros Inc., the U.S. Court of Appeals for the Fifth Circuit considered a products liability case involving a single injury that occurred when a helicopter work platform collapsed in Mississippi. The plaintiff brought suit in Mississippi, asserting claims for design defect, failure to warn, negligence and negligence per se against the platform designer, who had performed all design work in Florida.

Because none of the design-related conduct related to Mississippi, the court determined that personal jurisdiction over the design defect claim would be inconsistent with due process. The remaining claims survived because the designer had subsequently transported the helicopter and work platform to Mississippi, and later inspected it in the state.

A similar argument was made in March of this year before the Pennsylvania Supreme Court. In Hammons v. Ethicon Inc., defendant Ethicon (a subsidiary of Johnson & Johnson) argued that the $12.5 million verdict rendered against it in a pelvic mesh case should be set aside, because the trial court lacked personal jurisdiction over the only claims remaining at trial — design defect and failure to warn.

Only the plaintiff's manufacturing defect claim — which she never seriously pursued, and on which Ethicon was granted summary judgment — was arguably connected to Pennsylvania, because a component was manufactured by a third party in the state. All other conduct occurred elsewhere.

Ethicon maintains that its contacts related to the manufacturing defect claim should be disregarded for purposes of analyzing whether personal jurisdiction exists as to the design defect and failure to warn claims — meaning the trial court should never have heard those claims. The case is awaiting decision.

Did the contacts actually cause the claim?

Defendants should keep a close eye on the U.S. Supreme Court and Illinois Supreme Court, both of which are set to decide cases that ask what it means for a claim to "arise from or relate to" the defendant's contacts.

Courts have typically applied one of two tests: the "proximate cause" test, which asks if the defendant's contacts were the legal cause of the plaintiff's injury; and the less stringent "but for" test, which asks if the

defendant's contacts occurred anywhere in the chain of events leading to the plaintiff's injury. In many cases, the distinction between the two tests may not matter. But in some cases, especially product liability cases, the distinction may make all the difference.

Take Ford Motor Company v. Montana Eighth Judicial District Court, for example, now before the U.S. Supreme Court. The plaintiffs in Ford purchased their vehicles secondhand, and were then involved in vehicle accidents in Montana and Michigan. In Ford's view, the fact that it did not directly sell the plaintiffs their vehicles means its in-state conduct (such as marketing — of which there was admittedly plenty) cannot have given rise to the plaintiffs' claims.

The Illinois Supreme Court is facing a slightly different question. In March, in it heard arguments in Rios et al. v. Bayer Corp. et al., involving Bayer's Essure birth control device.[6] In Rios, nonresident plaintiffs who obtained and were injured by the device in other states claim that Illinois has specific jurisdiction over their claims, because the Essure marketing campaign and physician training program were developed in Illinois.

Bayer has argued that those contacts are too far removed from the actual injuries allegedly suffered by the plaintiffs. Moreover, according to Bayer, it is disputed whether those specific contacts were with Illinois or rather with another state, like Missouri, as plaintiffs in similar Essure cases have alleged.

Oral argument in Ford has been postponed in light of COVID-19. The Illinois Supreme Court's decision in Rios/Hamby is pending. In the meantime, defendants should search for opportunities to challenge the nexus between their alleged contacts and the plaintiff's claims in order to preserve issues for appeal pending those decisions.

Did this defendant have contacts in the right capacity?

Because personal jurisdiction is a waivable defense, defendants should tread especially carefully when they are named in more than one capacity (for example, both individually and as a successor-in-interest, or individually and as an administrator of an estate).

In most cases, a defendant will have potential liability to a plaintiff only in one capacity. In other cases, a defendant may have liability in both capacities, but only maintains contacts with the forum state in one of those capacities. Sorting out these issues early is critical, because early dismissal means cost avoidance for the entity sued in the wrong capacity.

Consider, for example, the case of Stauffer v. Nicholson. In Stauffer, a woman filed a lawsuit in probate court against her brother, asserting claims against him both individually and as successor trustee to a trust their mother had created.

The claims against the brother in his capacity as successor trustee were dismissed, because the evidence showed that any contacts he had with Texas were made in his individual capacity rather than his successor trustee capacity. The remaining claims were general tort claims that were not within the jurisdiction of the probate court, so the court dismissed the entire action.

As Stauffer counsels, the contacts forming the basis for personal jurisdiction should match the capacity in which the defendant is sued. Unless a defendant sued in the wrong capacity timely challenges personal jurisdiction, it could find itself forced to participate in the action. That could translate to significant and

unnecessary discovery costs — and even verdict exposure.

Conclusion

Defendants should not take the rulings in Daimler and Bristol-Myers for granted. As plaintiffs have seen access to their favorite forums restricted in the wake of those decisions, they have responded by crafting more creative theories connecting their claims to the courts they prefer. Defendants should be prepared to defend against those claims just as creatively by challenging plaintiffs — and courts — to answer these questions.

Notes

1. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). See, e.g., Dudnikov v. Chalk & Vermilion Fine Arts Inc., 514 F.3d 1063, 1060 (10th Cir. 2008); Penrod v. K&N Eng'g, No. 18-cv-02907, 2019 U.S. Dist. LEXIS 74361 (D. Minn. May 2, 2019); Storms v. Haugland Energy Corp., No. 18-CV-80334, 2018 U.S. Dist. LEXIS 141122 (S.D. Fla. Aug. 17, 2018); Lapaglia v. Transamerica Cas. Ins. Co., 155 F.Supp.3d 153 (D. Conn. 2016); Long v. Arfaania, No.13-2533-JAR-GLR, 2014 U.S. Dist. LEXIS 71631 (D. Kan. May 27, 2014); Haley Paint Co. v. E.I. DuPont De Nemours & Co., 775 F.Supp.2d 790 (D. Md. 2011).

2. See 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 3d § 1351, at 299 n.30 (2004) ("There is no such thing as supplemental specific personal jurisdiction; if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim").

3. Seiferth v. Helicopteros Atuneros Inc., 472 F.3d 266, 274-75 (5th Cir. 2006); Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001); Phillips Exeter Acad. v. Howard Phillips Fund Inc., 196 F.3d 284, 289 (1st Cir. 1999).

4. See, e.g., J.M. Smucker Co. v. Promotion in Motion Inc., No. 5:19-cv-1116, 2019 U.S. Dist. LEXIS 193896 (N.D. Oh. Nov. 7, 2019); Advantus, Corp. v. Sandpiper of Cal. Inc., No. 3:18-cv-1368, 2019 U.S. Dist. LEXIS 169337 (M.D. Fla. Sept. 30, 2019); Greene v. Mizuho Bank Ltd., 289 F.Supp.3d 870 (N.D. Ill. 2017); Addelson v. Sanofi S.A., No. 4:16-CV-01277, 2016 U.S. Dist. LEXIS 147359 (E.D. Mo. Oct. 25, 2016); Evergreen Int'l Airlines Inc. v. Anchorage Advisors LLC, No. 3:11-cv-1416, 2012 U.S. Dist. LEXIS 118737 (D. Or. July 9, 2012); Gatekeeper Inc. v. Stratech Sys., 718 F.Supp.2d 664 (E.D. Va. 2010); SKI Racing Inc. v. Johnson, No. 09-CV-1181, 2010 U.S. Dist. LEXIS 143645 (D.N.M. July 21, 2010); RJM Aviation Assocs. v. CP Aviation Servs. LLC, No. 3:06-CV-2007, 2008 U.S. Dist. LEXIS 2447 (D. Conn. March 28, 2008).

5. See, e.g., Moncrief Oil Int'l Inc. v. OAO Gazprom, 414 S.W.3d 142 (Tex. 2013); Miller v. Provident Adver. & Mktg., 155 So.3d 181 (Miss. Ct. App. 2014); Monarch Natural Gas v. V., No. 2017-CV-31409, 2018 Colo. Dist. LEXIS 1973 (Colo. Dist. Ct. June 6, 2019); Small v. Blue Cross Blue Shield of Mich., No. BER-L-4141-18, 2019 N.J. Super. Unpub. LEXIS 661 (N.J. Super. Ct., Bergen Cty. March 20, 2019); Blume Law Firm PC v. Pierce, 741 N.W.2d 921 (Minn. 2007); GoInternet v. SBC Communs. Inc., No. 3348, 2003 Pa. Dist. & Cnty. Dec. LEXIS 168 (Pa. County Ct., Dec. 17, 2003).

6. Rios et al. v. Bayer Corp. et al., No. 125020 (Ill.) and Hamby et al. v. Bayer Corp. et al., No. 125021 (Ill.).

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