

LOCATION, LOCATION, LOCATION

A brief overview of personal jurisdiction, forum selection clauses and why they matter

Where a case is heard can make a critical difference to a company that is being sued.

Will the company have the “home court” advantage and a jury that will know the company’s business, that the company employs people in the community and that it has a reputation for giving back to the community? Or will the jury be composed of people with no connection at all to the company, but who are in the other side’s back yard? Will the case take place where there is greater access to evidence and witnesses resulting in cost savings? Will the case take place where there are favorable local rules regarding the make-up of the jury and where there is a better potential jury pool? All of these factors can be powerful assets — or detriments — in positioning a case for success both at trial and in attempting to resolve a case before trial.

Before a civil litigation can proceed, the court must have jurisdiction over the case and parties. Simply put, not every court is the right place to sue a particular defendant. There are two overall types of jurisdiction. Subject matter jurisdiction is jurisdiction by the court to hear the type of case. For instance, patent and bankruptcy cases can only be heard in federal courts. Personal jurisdiction refers to jurisdiction by the court over the parties involved in the case. As explained more fully below, a court might have proper jurisdiction over a local defendant, but not over one based in a different state that does no business in the state.

Since the plaintiff in a case is the party that files the lawsuit, the plaintiff chooses the initial forum. Obviously, the plaintiff will try to select the location believed to be most favorable to its case. But that choice may not be proper over a given defendant. So, while the plaintiff will decide where to sue, a defendant does not necessarily have to accept the plaintiff’s choice and may be able to successfully challenge the court’s personal jurisdiction over it. Such a challenge should be evaluated immediately upon being sued as the defense can be waived if proper steps are not taken to preserve and act on it.

Personal jurisdiction is broken down into two sub-categories, general and specific jurisdiction, and the exercise of personal jurisdiction must always comport with due process under the Constitution. General jurisdiction is also known as “all purpose” jurisdiction and indicates that the defendant can be sued in a given forum state for its activities occurring anywhere. The legal landscape of general jurisdiction has been significantly altered in the past several years. The most recent U.S. Supreme Court case, *Daimler A.G. v. Bauman*, clarified that a company is subject to this type of

business, and the lawsuit is directed at alleged acts occurring entirely outside the state where the lawsuit is brought.

Specific jurisdiction, unlike general jurisdiction, focuses on a defendant’s particular activities in a given forum. Courts look at whether a defendant “purposefully availed” itself of the privilege of conducting business in a given state, and whether the allegations in the case are connected to the defendant’s contacts with that forum, i.e., whether there is a nexus between the plaintiff’s claims and the defendant’s business activities in the state.

Another recent Supreme Court case, *Walden v. Fiore*, explained that the inquiry centers on the relationship between the defendant, the forum

out of the contract can be brought. Such clauses must be carefully drafted to best ensure that they are effective. Another relatively recent U.S. Supreme Court case, *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, confirmed that forum selection clauses are typically enforceable. However, some courts have already applied a limited interpretation of the *Atlantic Marine* decision to distinguish between “mandatory” and “permissive” forum selection clauses. A mandatory forum selection clause is one that states in specific language that a case must be brought in a particular forum, i.e., that the forum is the exclusive jurisdiction in which a case may be brought. A permissive clause, on the other hand, would name a particular forum but not clearly specify that jurisdiction in any other forum is precluded. At least some courts have held that *Atlantic Marine*, and its favorable view of the enforceability of forum selection clauses, only applies to mandatory clauses. Accordingly, ensuring that a well-crafted forum selection clause is contained in contracts can provide important protection in the event of a lawsuit, and, under the current state of the law, it appears that mandatory forum selection clauses would have a better chance of being enforced than permissive clauses.

In sum, the law governing personal jurisdiction and other methods of controlling the location of a lawsuit has changed significantly over the past few years and the key Supreme Court cases on these issues are still being fleshed out through decisions from lower state and federal courts. Thus, issues surrounding personal jurisdiction should be evaluated as soon as a company is sued, and companies also should apply careful scrutiny when crafting, negotiating or agreeing to forum selection clauses as a preemptive measure to ensure that any dispute is brought in a favorable forum, or at least a neutral one.

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broad, “all purpose” jurisdiction only where that company is “essentially at home.” The *Bauman* case explained that, absent particular and exceptional circumstances, general jurisdiction will exist only in two forums — where a company is incorporated and where it has its principal place of business.

While it is possible that exceptional circumstances could render a company subject to general jurisdiction in another location, following *Bauman* those circumstances would need to be activities on a level akin to being incorporated or having a principal place of business, and merely doing some business in a state should not be enough to establish general jurisdiction. Accordingly, jurisdiction over a defendant might not be proper if a plaintiff files suit in a state other than the place where a defendant is incorporated or has its principal place of

and the lawsuit at issue. The *Walden* decision also made clear that a defendant’s suit-related conduct must create a “substantial connection” with the forum state. The plaintiff cannot be the only connection between the forum and the defendant, and jurisdiction over a defendant cannot be based on the activity of another party or a third person not a party to the suit at issue. Thus, jurisdiction over a defendant might not be proper where the defendant is not local and does no business in the state that can be related to what the plaintiff is claiming in a lawsuit.

In addition to careful evaluation of personal jurisdiction, companies can use forum selection clauses in contracts as a critical tool to avoid litigation in an unfavorable forum. Forum selection clauses are provisions in contracts that specify the location in which any dispute arising