2022 Product Liability & Complex Torts Seminar

June 1-3, 2022

DISSECTING THE FRANKENSTEIN:

A Product Liability Play in Three Acts

Jacob C. Lehman
Moderator
GERMAN GALLAGHER & MURTAGH
Philadelphia, PA
lehmanj@ggmfirm.com

Gregory Farkas
FRANTZ WARD
Cleveland, OH
gfarkas@frantzward.com

Jennifer Pedevillano
HALLORAN SAGE
New Haven, CT
pedevillano@halloransage.com

PERSONAL JURISDICTION – DOES EVOLVING CASE LAW MAKE IT THE "FIRST BEST DEFENSE?"

For most lawyers both in-house and in their firms, the law school civil procedure course is a distant (and perhaps not too pleasant) memory. *International Shoe* rings a bell, but why exactly? And yet, for everything there is a season, and the season for contesting personal jurisdiction is now. Early and correct assertion of a jurisdictional defense can be an effective and efficient way for product manufacturers to get out of unfavorable Plaintiff-friendly jurisdictions and, on occasion, to get out of a case altogether.

As vague memories of civil procedure may inform us, the ability of a court to exercise jurisdiction over a party can come in two flavors. The first, specific jurisdiction, is just that. It relates to a party's activities in a forum state and whether the cause of action at hand arises out of or relates to those activities. For instance, a manufacturer who makes a product in a forum state or, who's product injures the plaintiff in the forum state might be subject to personal jurisdiction there.

The second type of personal jurisdiction is general personal jurisdiction. Where general personal jurisdiction exists, a defendant can be haled into court for any type of claim even if the claim or product has no relationship to the forum where suit is filed.

For decades the product liability plaintiffs' bar focused their efforts on the latter proposition, bringing claims in a small number of jurisdictions that because of case law, court setup, judiciary and jury composition were and are known to be extremely plaintiff friendly. St. Louis, Philadelphia, East Texas – these forums and a few others hosted a disproportionately large percentage of product liability lawsuits, regardless of where the injured plaintiff resides or where the allegedly defective product was made. This trend became particularly pronounced in toxic tort and drug and device litigation, where some court systems developed a cottage industry centered around administering litigation brought by out-of-state Plaintiffs against out-of-state manufacturers. A Philadelphia jury ends up deciding the fate of an Ohio manufacturer and a Mississippi plaintiff and so on and so forth.

Defendants have long thought this extremely unfair and yet, up until recently they have had few effective tools to combat this trend. In the past, whether general personal jurisdiction could exist revolved around the High Court's pronouncement in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, (1945), that the defendant must have engaged in a "substantial, continuous, and systematic course of business" in the forum state. Case law developed following this decision such that a when a defendant that had some connection to the forum state – namely that it did business there – this often rendered the corporate defendant subject to general personal jurisdiction. For national and international product manufacturers this meant they were subject to suit almost everywhere including in those problem jurisdictions.

Starting in 2014, things took a turn. Through a series of decisions, most notably *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) and ***Bristol-Myers Squibb Co. v. Superior Court***, 137 S. Ct. 1773 (2017) the United States Supreme Court drastically limited general personal jurisdiction rejecting claims by out-of-state plaintiffs against out-of-state defendants for out-of-state injuries. In *Daimler,* the Supreme Court held that the due process clause of the 14th Amendment to the United States Constitution requires not just that a defendant's contacts with the forum be substantial and continuous but that they be so continuous and systematic as to render it essentially "at home" in the forum State. Justice Ginsburg, writing for the majority noted the two places where a defendant is clearly at home are where the defendant is incorporated and where it has its principal place of business. Thus, post-*Daimler*, the universe of jurisdictions where suit might be brought against a defendant on the basis of general personal jurisdiction were drastically reduced to the state of incorporation, the state which held the defendant's principal place of business, and maybe a state where the defendant somehow consented to jurisdiction.

While certainly a coup for defendants, as always is true, plaintiffs' lawyers are creative and dedicated advocates for their clients, and a good thing can't hold, or hold 100%, forever. In recent years two lines of attack on this limiting principle have developed.

The first, and less successful line of attack focuses on general personal jurisdiction and the idea that a defendant might subject itself to general personal jurisdiction by "consenting" to it through some activity in the forum state. While *Daimler* concerned itself principally with when a non-resident defendant has significant enough contacts with a forum state to impose general personal jurisdiction it also recognized consent as a long-standing third possibility for general personal jurisdiction. Clearly, a non-resident defendant can consent to suit in a jurisdiction once they have been sued, or by means of a forum selection clause regardless of whether they are "at home". Clever plaintiffs now attempted to take this one step farther arguing that by registering to do business in a forum state, the defendant had consented to general personal jurisdiction there. Pre-*Daimler*, courts in states like Pennsylvania upheld this concept. *See Simmers v. Am. Cyanamid Corp.,* 394 Pa. Super 464; 576 A.2d 376, 382 (1990). Post-*Daimler* critics argued such clauses violate the due process clause of the 14th Amendment to the United States Constitution. Many jurisdictions have already rejected the consent by registration theory as inconsistent with *Daimler*. *See, e.g., Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016); *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 179 (D. N.J. 2016) although in some, like Pennsylvania, the concept still is subject to ongoing appellate litigation.

The other big jurisdictional fight, and the other way Plaintiffs are hoping to keep suits in favorable jurisdictions, revolves not around general personal jurisdiction but around its sister concept, specific personal jurisdiction and how broad the reach of this concept can be. The key case here is a recent one, *Ford Motor Company v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021) decided by the Court on March 25th of 2021.

Ford involved claims by a Montana and Minnesota plaintiff against Ford each alleging defects in the design of a vehicle involved in a crash. Ford argued that because it was not "at home" in either of these states it could not be subject to general personal jurisdiction there. It also argued that it could not be subject to specific personal jurisdiction in these states because the claims did not "arise out of" any activity Ford engaged in in them. In other words, because Ford did not design or make or sell the cars (these were resold used) in Montana or Minnesota, Ford could not be subject to suit there.

Personal jurisdiction has two components. First, the defendant must have purposefully availed itself of the privilege of conducting activities in the forum state. Or put another way, the defendant must have "deliberately 'reached out beyond' its home—by, for example, 'exploiting a market' in the forum State or entering a contractual relationship centered there." Ford, which sells, repairs and markets vehicles in both states clearly met this prong of the test.

The second prong is the important one -whether the plaintiffs' claims "arise out of or relate to" Ford's in-state activities. Ford maintained these lawsuits did not arise from its general commercial dealings in the two states. According to Ford, the Supreme Court's prior cases imposed a causal connection requirement, meaning that the defendant's conduct in the forum must give rise to the plaintiffs' claims. Ford asserted that personal jurisdiction was thus precluded because Ford first sold the vehicles at issue in Washington and North Dakota rather than in the forum states. In other words, Ford's activities with respect to ***these particular vehicles*** took place exclusively outside Montana and Minnesota. The vehicles' original owners subsequently sold them to individuals who, unbeknownst to Ford, later relocated or resold the vehicles, which ended up in Montana and Minnesota.

Justice Kagan, writing for the majority rejected this approach. Holding that "Ford's causation-only

approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities. "She explained that its specific jurisdiction test, as articulated in prior cases, can be satisfied when the suit *either* "arises out of" *or* "relates to" the defendant's contacts with the forum. "The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing.'" In this case the Court found that Fords ongoing business relationships and contacts in the forum states around selling, repairing, and marketing vehicles clearly was enough for the claims to "relate to" them, even if they did not "arise" out of the engagement.

Does *Ford* mean that the limitations on jurisdiction of the past years are out the window? Clearly not. General personal jurisdiction remains strictly limited, except where consent might expand it. Specific jurisdiction, while not so strictly limited that an injured plaintiff cannot ever sue where he purchased the product of where the accident occurred, still requires some relationship between the product or manufacturer and the forum in question. All this is good news for defendants. Jurisdiction, always raised at the outset of a lawsuit, continues to be a great way to get out of a case, maybe permanently, maybe temporarily, but also a way to avoid those unfavorable jurisdictions that seem to bend over backwards to favor the plaintiff.

TO DEFER OR NOT TO DEFER – PLAINTIFF'S CHOICE OF FORUM IN CLASS ACTION LITIGATION

1. The Legal Standard

Pursuant to 28 U.S.C. § 1404(a), "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The first issue in evaluating such a motion to transfer venue is whether the transferee court is a proper venue. This is usually an easy threshold for a defendant to overcome because the analysis is governed by 28 U.S.C. § 1391, which provides that the judicial district where the defendant resides, among other options, is a proper venue.

The second step in the transfer analysis can be more problematic as the court must balance numerous factors while taking into consideration the convenience of the parties and the interests of justice. The party moving for transfer bears the burden of establishing that the suggested venue is a "more convenient forum." *Van Dusen v. Barrack*, 376 U.S. 612, 645-46 (1964). The difficulty for the moving party is compounded by the general principle of law that a plaintiff's choice of forum is to be given considerable deference. "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

2. Reduced Deference to a Plaintiff's Choice of Forum in Class Action Litigation

Despite the general deference to a plaintiff's choice of forum, courts in most jurisdictions have held that in class action litigation "the weight accorded to plaintiff's choice of forum is considerably reduced in class and derivative suits." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *West v. Wilco Life Ins. Co.*, No. 3:20-cv-00464, 2020 U.S. Dist. LEXIS 210232, *12 (M.D. Tenn. Nov. 10, 2020); *Geraci v. Re Robin Int'l, Inc.* No. 1:18-cv-15542, *9-13 (D.N.J. June 21, 2019) (discussing different degrees of deference provided in various jurisdictions); *Donia v. Sears Holding Corp*., No. 1:07-cv-02627-KMO, 2008 U.S. Dist. LEXIS 43532, *13 (N.D. Ohio May 30, 2008) (ruling "the importance of the plaintiff's choice of forum is nonetheless diminished where the plaintiff has intentionally broadened the geographic scope of the action by seeking to certify the class"); *Allen v. Sears Roebuck & Co*., No. 07-11706, 2007 U.S. Dist. LEXIS 60770, *7 (E.D. Mich. Aug. 20, 2007); *Beesley v. International Paper Co*., No. 06-cv-703-DRH, 2007 U.S. Dist. LEXIS 62534, *7 (S.D. Ill. Aug. 24, 2007); *Goldstein v. RadioShack Corp*., No. 6:06-CV-285, 2007 U.S. Dist. LEXIS 32278, *5 (E.D. Tex. May 1, 2007); *Jones v. Walgreen Co*., 463 F. Supp. 2d 267, 274 (D. Conn. 2006); *Lucas v. Family Dollar Stores of Okla*., No. CIV-04-536-M, 2005 U.S. Dist. LEXIS 45521, *7 (W.D. Okla. Mar. 9, 2005); *Saleh v. Titan Corp*., 361 F. Supp. 2d 1152, 1157 (S.D. Cal. 2005) (stating "[t]he Ninth Circuit, like

other courts, has noted that the weight to be given the plaintiff's choice of forum is discounted where the action is a class action"). *See also Anderson v. Family Dollar, Inc.*, No. CIV-04-0210-F, 2004 U.S. Dist. LEXIS 30579, *5 (W.D. Okla. Apr. 30, 2004) ("significantly less deference"); *Bolton v. Tesoro Petroleum Corp.*, 549 F. Supp. 1312, 1314 (E.D. Pa. 1982). Although it is difficult to predict the exact degree of "reduced" deference in class actions, a few general patterns have emerged.

3. Deference Greatly Reduced: Nationwide Class Actions and Plaintiffs Who Engage in Forum Shopping

A number of cases demonstrate that deference to the plaintiff's choice of forum is most reduced in the context of nationwide class actions. *See, e.g., Teamsters Loc. 237 Welfare Fund v. Servicemaster Global Hldgs., Inc.*, No 3:20-cv-457, 2020 U.S. Dist. LEXIS 134848, *16 (July 30, 2020); *Gueorguiev v. Max Rave, LLC,* 529 F. Supp. 2d 853, 857 (N.D. Ill. 2007); *Stock v. Integrated Health Plan*, No. 06-CV-002150DRH, 2006 U.S. Dist. LEXIS 86041, *5 (S.D. Ill. Nov. 28, 2006); *Berernson v. NationalFin. Services, LLC*, 319 F. Supp. 2d 1, 3 (D.D.C. 2004). When class members are scattered throughout the country, deference to venue should be reduced because "each of many potential plaintiffs may claim the right to have the action heard in his home forum," and "the nominal plaintiff's role in the litigation is likely to be quite minimal." *Ingram v. Family Dollar Stores of Ala., Inc.*, No. CV-06-BE-1507-S, 2006 U.S. Dist. LEXIS 96845, *6 n.2 (N.D. Ala. Sept. 29, 2006). Courts therefore rationalize this reduced deference because of the numerous potentially valid forums in which to bring the case and the often-weak ties of the class representative to the selected forum.

Under such circumstances, some courts in the Seventh Circuit have gone so far as to find that a plaintiff's forum selection should be afforded no weight. *Nelson v. AIM Advisors*, No. 01-cv-0282-MJR, 2002 U.S. Dist. LEXIS 5101, *15 (S.D. Ill. Mar. 8, 2002) (holding that "where a plaintiff alleges a nationwide class action, plaintiff's home forum is irrelevant"), *citing Georgeouses v. NaTec Res., Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997); *Genden v. Merrill Lynch Pierce Fenner & Smith*, 621 F. Supp. 780, 782 (N.D. Ill. 1985).

In addition, deference to a plaintiff's choice of forum is greatly reduced in class actions when there is evidence of forum shopping. In fact, courts in the Ninth Circuit have ruled, "Where forum shopping is evident . . . courts should *disregard* plaintiff's choice of forum." *Foster v. Nationwide Mutual Insurance Co.*, No. C 07-04927 SI, 2007 U.S. Dist. LEXIS 95240, * 6 (N.D. Cal. Dec. 14, 2007) (emphasis added), *citing Italian Colors Rest. v. American Express Co.*, No. C-03-3719, 2003 U.S. Dist. LEXIS 20338, *4 (N.D. Cal. Nov. 10, 2003); *but see Harris v. Lord & Taylor, LLC*, C.A. No. 18-521, 2019 U.S. Dist. LEXIS 70303, *8 (D. Del. April 19, 2019) (rejecting argument that plaintiff's reason for choosing a venue impacts the venue analysis).

4. Deference Somewhat Reduced: Class Action Where Plaintiff Asserts State Law Claims, But Substantially Similar, Nationwide Litigation is Pending Elsewhere

At first blush, in cases where an in-state plaintiff files a state-wide class action asserting state law claims only, it may seem that plaintiff's choice of forum would be given great weight. However, where parallel, nationwide class actions are pending, courts have found that judicial economy and convenience of the parties and witnesses justify transfer to the alternative venue. *See, e.g., Donia v. Sears Holding Corp.*, No. 1:07-cv-02627-KMO, 2008 U.S. Dist. LEXIS 43532, *13 (N.D. Ohio May 30, 2008) (granting defendant's motion to transfer where "the factors strongly favor transfer" because plaintiff's "lawsuit simply represents a sub-class of the national class action already proceeding in the Northern District of Illinois"). The "pendency of a similar action in the transferee court is a universally recognized reason for granting a change of venue." *Pacific Coast Federation v. Gutierrez*, No. C-05-3232, 2006 WL 194507, at *2 (N.D. Cal. Jan. 24, 2006) (*quoting Weltmann v. Fletcher*, 431 F. Supp. 448, 451 (N.D. Ohio 1976)).

5. Plaintiff's Choice of Forum Afforded Most Deference: Certain Statutory Class Actions

However, in certain class actions, courts adhere to traditional rules of deference to a plaintiff's choice of forum. Specifically, courts have taken this approach in the context of class action litigation involving federal statutes that contain venue provisions, such as ERISA, federal securities statutes, and the FLSA. Both the Federal Exchange Act and ERISA statutory venue provisions have been interpreted to provide plaintiffs with the broadest possible forum choices. *See, e.g*., *In re Amkor Tech*., No. 06-298, 2006 U.S. Dist. LEXIS 93931, *11-12 (E.D. Pa. Dec. 28, 2006) (securities law class action), *citing SEC v. Elecs. Warehouse, Inc*., 689 F. Supp. 53, 74 (D. Conn. 1988); *Shanehchian v. Macy's, Inc*., No. 1:07-CV-00828, 2008 U.S. Dist. LEXIS 31484, *13 (S.D. Ohio Apr. 15, 2008) (ERISA class action), *citing Winnett v. Caterpillar, Inc*., No. 3:06-cv-00235, 2006 U.S. Dist. LEXIS 95973, *5 (M.D. Tenn. June 20, 2006). In addition, the "opt-in" nature of class actions under the FLSA also "suggests that Congress intended to give plaintiffs considerable control over the bringing of an FLSA action." *Hernandez v. Texas Capital Bank*, No. 07-0726-CV-W-ODS, 2008 U.S. Dist. LEXIS 8408, *11-12 (W.D. Mo. Feb. 5, 2008), *quoting Onyeneho v. Allstate Ins. Co*., 466 F. Supp. 2d 1, 6 n.2 (D.D.C. 2006).

6. Conclusion

The deference afforded to a plaintiff's choice of forum is significantly reduced in most class action litigation. Some exceptions exist to this general rule, and the practical significance of this "reduced" deference varies from jurisdiction to jurisdiction. However, the emerging body of authority on this topic gives additional options to defendants faced with class action litigation in federal courts.

REMOTE DEPOSITIONS OF CORPORATE REPRESENTATIVE – DOES IT MAKE A DIFFERENCE?

Prior to March 2020, it was the exception, not the rule, for depositions to proceed via video conference technology. Even if one person involved in a deposition appeared remotely, whether that was a client or attorney, anyone else involved was in the room with the witness. Then came March 2020 and everything changed. For a while, everyone was rescheduling depositions for a few weeks or months out, hoping Covid-19 would quickly become a thing of the past, a story we would tell our grandkids of when everything stopped for a few short weeks. Obviously, that did not happen. Now when discussing the logistics of a deposition words such as remote and Zoom, or any other video platform, are the norm.

When preparing for a remote deposition, there is more to consider than simply "Is my wi-fi fast enough?" or "Do I need to put on pants" (the answer is yes by the way). First, you should know whether your jurisdiction requires any specific procedures or has set rules for remote depositions. For example, there may be a rule regarding the location of the court reporter or a rule requiring you to provide exhibits a certain number of days prior to the deposition. Second, take time before the deposition to discuss a protocol with opposing counsel. The protocol should address who can be in the room with the witness, communication with others (such as whether cell phones should be off and email closed), and how to handle exhibits, among other things. While there are many generalities a protocol may include that would apply to any remote deposition, it is important to revisit the protocol for each witness and adjust as needed. You also need to consider the location where your witness will testify from – the location should be professional, but comfortable for the client, quiet, and have adequate lighting. Third, you will want to practice using the technology to become familiar with the platform. You should make sure you understand the control options, including sharing exhibits in case it becomes necessary. You also need to make sure your witness is comfortable with the platform – which often means practicing with your witness.

Practicing with your witness involves more than a five-minute session to verify the witness knows how to sign in, turn on the camera, and can hear you speaking. If a deposition will be done remotely, it is best practice to prepare your witness remotely as well. This allows you to observe how the witness will appear to opposing counsel and provide feedback on any necessary adjustments to maximize the witness's effectiveness. The key to remote

depositions is preparation, for everyone.

Often the identify of a witness is set in stone, it is the driver of a vehicle, a witness to an event, or a doctor who treated a patient. But what if the defendant is a corporation and the witness is a corporate designee? Who do you choose? How do you prepare the witness?

The selection of a corporate designee, or designees if appropriate, is of critical importance. A corporate designee deposition notice with five topics does not mean five separate witnesses must be produced. Rather, the federal rules provide for the ability to educate a selected corporate representative and have that person act as a spokesperson for the company. A corporate designee is intended to represent the collective knowledge of the corporation and testimony provided by the designee will bind the corporation.

Although it may seem helpful, or strategic, to select a designee with limited knowledge, that is not recommended and can lead to a second deposition or even sanctions. While "I don't know" is a perfectly acceptance response in most depositions, it can raise issues unless it is the corporation that does not know, rather than the designee. Likewise, if a designee answers a question based on that individual's personal knowledge that falls outside the topics listed in the deposition notice, the corporation becomes bound by the response.

On the other hand, selecting the most knowledgeable individual is not always the right choice. Sometimes that individual is unavailable or perhaps that person becomes easily flustered and nervous or is a poor communicator. Perhaps even that person has made public statements that damage your case. Designating such a person may cause unnecessary issues and impact the perceived strength of your case.

The selection of a corporate designee should be done carefully and strategically. In selecting a corporate designee, one should consider the individuals appearance and familiarity with the deposition process, existing knowledge that can be helpful or harmful, ability to be educated on topics as required, the individuals own subjective believes and opinions and whether the individual can separate those from that of the corporation, and the likelihood the individual will also be deposed in a personal capacity.

Once selected, the corporate designee will need to be prepared to testify. When preparing a corporate witness, especially remotely, you should set aside ample time to cover the topics, review documents, interview other witnesses as needed, and address any technology issues that may arise. Remote preparation often progresses slower than in person preparation and preparing a witness the morning of a deposition will likely be insufficient. Remember, if a corporate designee is unfamiliar with a topic in a deposition notice there must be sufficient time to educate the designee or find an additional representative to testify on that topic. Sufficiently preparing a corporate designee often involves the review of a variety of documents, such as past depositions, financial records, sales records, design records, employee files, and other corporate documents for the designee to become educated enough to speak on behalf of the organization on a variety of topics. The designee may have to meet with others at the company, perhaps even former officers, directors, or employees, in order to become sufficiently educated. Do not be afraid to select two corporate representatives and identify them on specific topics if that is the best option.

When preparing a corporate designee, use the subject areas identified in the notice as the starting point. Organize key documents on these subject areas as soon as you receive the deposition notice and make sure the designee has sufficient time to review documents. Review with your designee the corporation's answers to written discovery requests such as interrogatories and requests to admit. Meet with key witnesses as necessary to educate the designee. Prepare your designee to testify as to the narrative the corporation wishes to convey – including the company's positions, subjective beliefs, and interpretation of events. Review potential questions you expect to be asked of the designee and responses to those questions. And do not forget to prepare the

corporate designee to testify as to the preparation of the designee, including what documents were reviewed in preparation.

When handled correctly, corporate designee testimony can work to your advantage and convey a position of strength to opposing counsel, but that takes preparation, even more so if the deposition will take place remotely.