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## 7th Circuit: Personal Jurisdiction & the Role of State Long-Arm Statutes

After far too many weeks of a congested schedule preventing my regular Friday installment on the Hoosier Litigation Blog, I return with a discussion of a topic that in many ways is long overdue: personal jurisdiction. Certainly we have touched upon personal jurisdiction briefly in prior posts, but the related concept of subject matter jurisdiction has garnered far greater attention on the HLB and has left a gapping hole for us to fill with today's discussion. (For the regular readers who recognize the intentional allusion back to a subject matter jurisdiction post on the gaping hole problem, kudos. For those who missed it, consider yourself on notice.)

Today's discussion stems from a decision out of the Seventh Circuit this morning: *Advanced Tactical Ordinance Systems, LLC v. Real Action Paintball, Inc.* If you are a regular reader then (1) you probably got the allusion above and (2) you will recognize that you can garner some insights about your author in a handful of posts, such as growing up on a small 90-acre farm with half-a-dozen horses and the time I was errantly signaled into an intersection and narrowly avoided a collision with a motorcyclist. Well, today you get to learn another tidbit. In my younger days—as a teenager—I was a tournament paintballer and worked as a referee for recreational players at a field in Niles, Michigan (just over the border from South Bend, IN). And because no story would be complete without pictures, here you go:



*A Portrait of [Your Author] as a Young Man*

So why the prelude of my bank ground here? I will let Chief Judge Wood explain:

Some readers of our opinions may be familiar with paintball, a type of war game in which the players shoot charges of paint at one another. Paintballs, it turns out, are not the only kind of nonlethal projectile that can be used in this way. Our case concerns a more serious product, known to Advanced Tactical Ordnance Systems . . . by the name PepperBall (a ball filled with a pepper-spray-like irritant). Police departments, private security firms, and comparable organizations are the primary consumers of these items. This is a trademark infringement action, brought by Advanced Tactical against a company that calls itself Real Action Paintball, Inc., and its president, K.T. Tran. . . . Although the parties have focused in their briefs on the preliminary injunction the district court granted, we have a more fundamental problem with the case. We conclude that the district court lacked personal jurisdiction over defendant Real Action, which preserved its objection on this point. We therefore reverse and remand with directions to dismiss on that basis.

For those unfamiliar with pepper-balls and similar products, they are part of a category generally referred to as less-than-lethal weapons. The most well known LTL weapons are tasers and pepper spray; the basic concept being to immobilize a person by inflicting the least physical harm possible. Pepper-balls utilize the pepper spray concept but change the vector from an aerosol deliver system to a gelatin capsule that mimics a paintball shell.

On the surface, this case was about an alleged trademark violation. The decision, to the contrary, brings us a procedural analysis of personal jurisdiction. Whereas subject matter jurisdiction asks the question does this particular court

have the authority to determine this type of case, personal jurisdiction asks an entirely different question: does this court have the authority to make the defendant appear before it. The most simple means of thinking about personal jurisdiction is to consider a person driving through Indiana on his way home to Oregon who gets sideswiped by a car driven by an Indiana resident. Certainly the Oregon driver could sue the Indiana driver in Indiana. Where things get tricky procedurally, though not conceptually, is if the Oregon driver tries to sue the Indiana driver in an Oregon court. Conceptually it makes sense why the Oregon driver can't do that. Presumably, the Indiana driver has never even been to Oregon, has no ties to Oregon, and would have a great difficulty showing up for a trial in Oregon. Consequently, the Oregon court lacks personal jurisdiction over the Indiana driver.

Now you may recognize that I added a sentence that limits our hypothetical to a person who has no ties to Oregon. Where things get really complicated is when we add a person who has some ties to Oregon. Where a person has established "minimum contacts" with another state, that state's courts may have sufficient personal jurisdiction to allow the case to go forward. That is where we find ourselves in this case.

Advanced Tactical is the manufacturer of PepperBalls and is headquartered in Indiana, though the company has an office in California as well. Prior to 2012, when Advanced Tactical purchased the PepperBall trademark, the products were owned by PepperBall Technologies, Inc. When PepperBall Tech was running the show, it purchased much of its projectiles from a company called APON. In August 2012, APON sold its line of irritant projectiles to Real Action Paintball (better known as RAP4), a California company. RAP4 sent an email announcement stating "that it had acquired the 'machinery, recipes, and materials once used by PepperBall Technologies Inc.'" Advanced Tactical sent a cease-and-desist letter in response. The lawsuit soon followed.

This brings us to the issue of personal jurisdiction. Advanced Tactical filed the case in the federal court for the Northern District of Indiana in Fort Wayne, IN. In the complaint, Advanced Tactical alleged a basis for personal jurisdiction over RAP4, a California company with no offices in Indiana, under Indiana's long-arm statute. A long-arm statute is where a state lists the bases for personal jurisdiction over a person based upon minimum contacts. Because personal jurisdiction over persons from other states is a function of constitutional law, the statute must not be so broad as to go beyond the limitations imposed by the federal constitution: Indiana's long-arm statute does not go too far. Oddly, the name "long-arm statute" is a bit of a misnomer in Indiana, because it is contained in Indiana Trial Rule 4.4(A) – a rule adopted by the Indiana Supreme Court for civil trial procedures, but

no longer a statute adopted by the Indiana legislature.

Establishing personal jurisdiction is a burden carried by the plaintiff. This makes sense because it is the plaintiff who is asking the court to begin a case against the defendants. Even if the court does not initially have personal jurisdiction over a defendant, the defendant can consent to such jurisdiction or, through failure to timely raise an argument, may waive the issue. A common way in which you'll see a party consent to jurisdiction is in a choice of venue provision in a contract. This is starkly different from subject matter jurisdiction, which may be raised at any time and cannot be waived by the parties. In fact, the court can raise the issue of subject matter jurisdiction on its own and decide that the case must be dismissed.

Here, Advanced Tactical argued that RAP4 met the long-arm statute by “doing any business in Indiana, via an interactive website capable of accepting orders from citizens of Indiana (4.4(A)(1)); engaging in tortious acts outside Indiana while knowing they would harm citizens of Indiana (4.4(A)(3)); causing damage in Indiana while deriving substantial revenue from goods sold in Indiana (4.4(A)(3)); and conspiring to engage in tortious conduct calculated to harm a citizen of Indiana (4.4(A)(3)).” RAP4 contested jurisdiction to the trial court. Advanced Tactical relied on the email that included many recipients in Indiana. Advanced Tactical also argued that RAP4 routinely emails customers in Indiana and all over the country. After an evidentiary hearing, the trial court decided that there was personal jurisdiction. On appeal, the Seventh Circuit found otherwise.

Because Indiana's long-arm statute is in accordance with federal constitutional requirements for due process, the Seventh Circuit's analysis was not limited to Indiana case law and deciding what the Indiana Supreme Court would do with the case; which would be how it usually goes when a federal court decides issues of Indiana law. Looking to federal law, the court first acknowledged the distinction between general jurisdiction and specific jurisdiction. A person who lives in a state is governed by general jurisdiction: it does not matter what the case is about, that state's courts have jurisdiction over him. When a person does not reside within the state, a court could still have general jurisdiction if the defendant can be said to be “at home” in the state. An example of this would be my grandmother – a quintessential snowbird. She summers in Indiana but lives most of the year in her home in Florida. She certainly has sufficient contacts with both Indiana and Florida to be dragged into an Indiana court, even though her state of residence is Florida.

Specific jurisdiction allows a court to have personal jurisdiction over a defendant for limited purposes. For a good example, let's go back to the Oregon driver who gets into a car accident in Indiana. If the Indiana driver is a salesman

that does extensive business with Oregon buyers he may be sued in Oregon for a breach of contract on one of his sales. But if he never drives on an Oregon road or even goes to the state, he cannot be sued in Oregon for a car accident in Indiana. Specific jurisdiction is the basis argued by Advanced Tactical.

The court here looked back to the 70-year old Supreme Court case *International Shoe Co. v. Washington* – a case familiar to every law student. The rule from *International Shoe* is that a defendant must have “certain minimum contacts with the forum state such that the ‘maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” This rule has remained unchanged since it was created in 1945. As the court here noted, “Crucially, not just any contacts will do: ‘For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.’” Thus, just because the actions of a defendant affected a person located in a certain state will not automatically create personal jurisdiction in that state.

The contacts that the trial court had thought sufficient were: RAP4 delivered orders of the product to purchasers in Indiana; RAP4 knew Advanced Tactical was an Indiana company; its emails went to people in Indiana; it had a website accessible by people in Indiana; and it added “customers to an email list when they made a purchase, thereby giving the company some economic advantage.” That last contact seems the most tenuous, but the explanation for it, I think, is that it indicates that RAP4 had some economic interest that was furthered by conducting business in Indiana. I’m not entirely sure how this is independently meaningful in light of the fact that they had sold and shipped products to people in Indiana, which would seem a sufficient economic benefit to make the email list argument unnecessarily strained.

The Seventh Circuit rejected these bases. The court found that the problem was a lack of correlation between the bases and the specifics of this case.

While it is true that Real Action fulfilled a few orders after putting the allegedly infringing message on its website and in emails, Advanced Tactical provides no evidence that those sales had any connection with this litigation. We do not know, for example, whether the Indiana residents saw Real Action’s post before making their purchases. There is also nothing to suggest that any Indiana purchaser thought that Advanced Tactical had started selling PepperBalls. Looking at the over 600 sales that Real Action allegedly made to Indiana residents in the two years before suit was filed does not help matters. Specific jurisdiction must rest on the litigation-specific conduct of the

defendant in the pro- posed forum state. The only sales that would be relevant are those that were related to Real Action’s allegedly unlawful activity. Advanced Tactical—which has the burden of proof here—has not provided evidence of any such sales.

But the few sales were not linked to the alleged trademark violation. Further, knowing that Advanced Tactical was an Indiana company and could therefore “foresee that [ ] misleading emails and sales would harm [it] in Indiana” is also not enough. As the court recognized, “The relation between the defendant and the forum ‘must arise out of contacts that the defendant himself creates with the forum State.’” Relying on the Supreme Court’s decision this year in *Walden v. Fiore* to resolve a potential conflict between two prior Seventh Circuit cases, the court found that “there can be no doubt that ‘the plaintiff cannot be the only linke between the defendant and the forum.’”

The final issue was the role of online activity in meeting minimum contacts. This is a very important question in the modern world and is one that has intentionally been left wide open by the Supreme Court. Following Seventh Circuit cases, Chief Judge Wood found that the Seventh Circuit has “faced the problem on several occasions [ ] and thus far” it is an issue that can be handled without creating a new set of rules. The “inquiry boils down to this: has [defendant] purposefully exploited the [Indiana] market’ beyond simply operating an interactive website accessible in the forum state and sending emails to people who happen to live there?” Thus, the email list alone is not enough. The emails alone, are not enough. And together, they are still not enough.

The court also looked to the nature of the RAP4’s website as interactive. This is terminology and a consideration that has often come up in personal jurisdiction cases involving internet based companies. Some courts have found interactive websites to be meaningful in the analysis. The Seventh Circuit is not one of those courts.

The interactivity of a website is also a poor proxy for adequate in-state contacts. We have warned that “[c]ourts should be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if that site is ‘interactive.’” This makes sense; the operation of an interactive website does not show that the defendant has formed a contact with the forum state. And, without the defendant’s creating a sufficient connection (or “minimum contacts”) with the forum state itself, personal jurisdiction is not proper.

With the trial court's bases rejected, the Seventh Circuit concluded that federal court in Fort Wayne, Indiana did not have jurisdiction over the California company for the alleged trademark violations. As a procedural matter, because the Seventh Circuit decided that the trial court lacked personal jurisdiction over RAP4, it did not need to address the merits of whether the injunction imposed by the trial court should stand: the injunction was dissolved automatically due to the lack of jurisdiction for the trial court's decision in the first place.

Join us again next time for further discussion of developments in the law.

### Sources

- *Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, --- F.3d ---, No. 13-3005 (7th Cir. May 9, 2014) (Wood, C.J.).
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