The Judges' Book

Volume 3 Article 6

2019

Civil Procedure: Personal Jurisdiction and Aggregation

Scott Dodson

Civil Procedure:
Personal Jurisdiction and Aggregation[1]

Scott Dodson

Personal jurisdiction—the adjudicatory authority of a court over a party—nominally has little directly to do with the ability of claims or parties to join together. But recent decisions from the Supreme Court cabining the reach of courts' personal jurisdiction over defendants—including last Term's bombshell *Bristol-Myers Squibb v. Superior Court*[2]—have imbued personal jurisdiction with a powerful disaggregation effect by requiring a close connection between the forum state, each defendant, and each claim. The Court's new restrictive approach to personal jurisdiction means that similarly situated plaintiffs injured in different states are unlikely to be able to sue codefendants from different states in the same lawsuit. Even as against a single defendant, plaintiffs residing in the same state might not be able to join together in the same lawsuit if they were injured in different states.[3] The resulting disaggregation causes waste and unfairness to the parties and the system. In this chapter, I tell the story of personal jurisdiction and aggregation.

The Law's Preference for Aggregation

Nearly everyone benefits in some form from aggregation. Courts, plaintiffs, defendants, and witnesses alike benefit from increased efficiency, the avoidance of duplicative litigation, and consistency in judgments and precedent.

The law thus prefers aggregation. Joinder of claims under Rules 13 and 18 are liberally permissive and sometimes even compulsory.[4] Joinder of parties under Rules 14, 19, 20, and 24 is likewise easy and sometimes mandatory.[5] Federal law permits class actions and

---

1. Summarized and excerpted from Scott Dodson, *Personal Jurisdiction and Aggregation,* 113 NW. U. L. REV. 1 (2018).

2. 137 S. Ct. 1773 (2017).

3. Plaintiffs could join together in the defendant's home state, but only if the home state (or country, if the defendant is not a U.S. citizen) allows such aggregation.

4. FED. R. CIV. P. 13, 18.

5. FED. R. CIV. P. 14, 19, 20, 24.

collective actions for efficient purposes.[6] Principles of claim preclusion enforce these liberal-joinder norms. The law even encourages consolidation of separate cases together for coordinated resolution, through Rule 42 or multidistrict litigation.[7] Supplemental jurisdiction and other special statutes facilitate joinder by supplying broadened federal-court subject-matter jurisdiction.[8]

Of course, aggregation is not an unalloyed good. Aggregation can generate confusion, delay, and unfairness. But for the most part, aggregation's risks are minor compared to its upside.[9] And the rules of aggregation already contain tools to mitigate its risks, by prioritizing only efficient joinder and enabling judicial discretion to disaggregate when warranted.[10] The point here is that regulating the scope of aggregation on its own terms makes sense. But recent decisions from the Supreme Court have drastically curtailed aggregation even though the decisions themselves address an issue having little to do with aggregation doctrinally: personal jurisdiction.

The Turning of Personal Jurisdiction

The story of personal jurisdiction is a tortuous one, but, until 2011, it was largely in tandem with the law's preference for aggregation. Under general personal jurisdiction, plaintiffs could join together to sue a single defendant in any forum in which the defendant had continuous and systematic contacts, even if the plaintiffs' claims arose in different states.[11] And the combination of broad general jurisdiction, fairness-based specific jurisdiction, and enhancement from the plaintiff's forum contacts often enabled a plaintiff to find a common forum with personal

6. 29 U.S.C. § 216(b); FED. R. CIV. P. 23.

7. 28 U.S.C. § 1407; FED. R. CIV. P. 42.

8. 28 U.S.C. § 1335 (interpleader), 1367 (supplemental jurisdiction).

9. Some parties strategically oppose aggregation for reasons unintended by the law. Class-action defendants, for example, may oppose aggregation of plaintiffs because they suspect that many cases will be too costly for plaintiffs to litigate individually. But the law rightly denies that such a reason is a legitimate basis to oppose aggregation; to the contrary, a primary goal of aggregation is to enable litigation that might be too inefficient or uneconomical to pursue individually.

10. *See, e.g.*, FED. R. CIV. P. 21.

11. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014).

jurisdiction over multiple opponents, thus facilitating joinder of defendants.[12]

When a conflict between personal jurisdiction and aggregation did arise, the conflict was invariably resolved in favor of aggregation. A plaintiff opposing a counterclaim was deemed to have consented to personal jurisdiction for that claim.[13] Personal jurisdiction over class plaintiffs was relaxed to enable class certification.[14] Congress expanded the statutory reach of federal court personal jurisdiction when necessary to enable joinder by interpleader.[15] And lower courts adopted a doctrine of "pendent personal jurisdiction" to cover all related claims by a single plaintiff against a single defendant when some of the claims would subject the defendant to personal jurisdiction in the forum but others would not.[16]

The story of personal jurisdiction—and of its relationship to aggregation—took an abrupt turn in 2011 with a series of cases that narrowed personal jurisdiction. In a trio of general jurisdiction cases, the Court replaced the "continuous and systematic" test with the "essentially at home" test, which limits general jurisdiction to one (for individuals) or at most two (for corporations) states.[17] And in a different trio of specific-jurisdiction cases, the Court required, for specific jurisdiction, a direct links among the forum, the defendant, and the claim,[18] connections that limit the number of common forums in a case involving multiple parties or claims.

These cases narrowing personal jurisdiction affect aggregation in a variety of ways. The Court's insistence on a connection between the

---

12. *E.g.*, Calder v. Jones, 465 U.S. 783, 784–89 (1984).

13. Adam v. Saenger, 303 U.S. 59, 67–68 (1938).

14. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

15. 28 U.S.C. § 2361.

16. *See* Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180–81 (9th Cir. 2004).

17. BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Ops., S.A. v. Brown, 564 U.S. 915 (2011).

18. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (holding that plaintiffs not harmed in California could not join with plaintiffs harmed in California to assert personal jurisdiction over Bristol-Myers Squibb in California for the same kinds of harm); Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (constraining specific jurisdiction to the contacts that the defendant—as opposed to the plaintiff—creates with the forum); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality) (demanding purposeful contacts by the defendant with the particular forum rather than with the United States as a whole).

claim and the forum calls into doubt the doctrine of pendent personal jurisdiction for claim joinder. As for party joinder, plaintiffs seeking to join together as a class or under Rule 20 against a single defendant,[19] or a plaintiff seeking to sue multiple defendants, will have more difficulty finding a common forum with personal jurisdiction for all claims—and there may be *no* common U.S. forum for a foreign defendant.[20] And although case consolidation under the MDL statute is, according to the JPML, essentially immune from personal-jurisdiction strictures,[21] recent scholarship has challenged that assessment,[22] meaning that the Court's restrictive turn in personal jurisdiction may drastically limit MDL as well.

Expanding Personal Jurisdiction for Aggregation

The solution in federal court to these tensions between personal jurisdiction and aggregation is to expand the statutory or rule authorization for federal courts to exercise personal jurisdiction in aggregation cases.

The typical way for Congress or the rulemakers to establish the scope of personal jurisdiction in federal courts is through authorization of service of process. The broadest grant of personal jurisdiction to federal courts would be to allow nationwide personal jurisdiction to the extent permitted by the Constitution over all parties and claims in a multiclaim or multiparty lawsuit. This would give maximum flexibility for aggregation purposes by essentially removing all personal-jurisdiction barriers to aggregation, with the possible exception of alien

---

19. Class action joinder presents trickier issues than ordinary joinder because a class action exhibits some features of an independent entity. *See* Snyder v. Harris, 394 U.S. 332, 340 (1969) (looking only to the named representatives' citizenships for determining the citizenship of a non-CAFA class for diversity-jurisdiction purposes); 28 U.S.C. § 1332(d)(2) (specifying that the entire amount claimed by a CAFA class is the amount in controversy for purposes of diversity jurisdiction). It is unclear how the Court's new conception of specific jurisdiction applies to Rule 23 joinder.

20. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018) ("For alien defendants, by contrast, the likelihood is that *no* U.S. state will be able to exercise general jurisdiction.").

21. *In re* FMC Corp. Patent Litig. 422 F. Supp. 1163, 1165 (J.P.M.L. 1976); *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969).

22. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165 (2018); Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. (2019).

defendants whose connections to the United States are so attenuated that the exercise of personal jurisdiction by a federal court would violate the Constitution.

The breadth of this formulation could lead to some odd results from the perspective of personal jurisdiction. For example, a single plaintiff from California could sue a single defendant from Oregon in Florida federal court for two claims arising in California; based solely on the presence of multiple claims, Florida would have personal jurisdiction despite the lack of any Florida connection to the parties or the claims.

But even were such oddities to occur under the broad version of nationwide personal jurisdiction, they would be largely corrected by the venue statute,[23] which would limit proper venue in the case above to a federal court in Oregon (where the defendant resides) or a federal court in California (where the claims arose). For unusual cases that the venue statute does not catch, the venue-transfer statute will allow transfer to a more sensible forum.[24] Plaintiffs could try to use nationwide personal jurisdiction to shop for particularly favorable state law,[25] but the Constitution imposes limits on the application of the law of states with no connection to the dispute.[26] And Congress could easily change the choice-of-law rules for venue transfer in this context to protect against unfair law-shopping.

If national personal jurisdiction is unpalatable, more limited permutations are possible. For example, the doctrine of pendent personal jurisdiction could be codified to allow a federal court to exercise personal jurisdiction over a defendant as to all claims asserted by a single plaintiff if the federal court has personal jurisdiction under Rule 4(k) as to at least one of those claims. Or, personal jurisdiction could be expanded to track the supplemental-jurisdiction statute, effectively providing for personal jurisdiction whenever joinder is allowed by the rules and not prohibited by limitations of subject-matter jurisdiction, as long as personal jurisdiction under Rule 4(k) is proper for one of the original claims. Like the supplemental-jurisdiction statute, and consistent with the joinder-based protections against prejudice, such joinder-based personal jurisdiction could even be discretionary, such that a court could decline to exercise personal

23. 28 U.S.C. § 1391.

24. 28 U.S.C. § 1404(a).

25. *See* Ferens v. John Deere Co., 494 U.S. 516 (1990).

26. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1980).

jurisdiction over a defendant for a particular claim if doing so would be unfair or intrude upon notions of interstate federalism.

Any such expansion of personal jurisdiction exercised by federal courts would be constitutional. Although the question of whether the Constitution permits federal courts to exercise nationwide personal jurisdiction has never been decided by the Supreme Court,[27] the Court has hinted in the affirmative,[28] and commentators nearly uniformly agree that the Constitution permits federal courts to exercise nationwide personal jurisdiction based upon a national-contacts test.[29] After all, Congress already has provided for nationwide personal jurisdiction in federal court on a number of specified claims,[30] some of which were specifically for purposes of facilitating joinder.[31]

An important objection is that aggregation is already too liberal, and expanding personal jurisdiction will enable more opportunities for aggregation. Even were that true, the appropriate way to address excessive aggregation is on aggregation's own terms, not through a doctrine having little to do with aggregation. The aggregation rules and statutes are up to the challenge of balancing the virtues and vices on their own; there is no need to complicate matters through the convoluted morass of personal jurisdiction.

---

27. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (leaving "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court"); Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103 n.5 (1987) (reserving the same question); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality) (same).

28. *See, e.g.*, Miss. Pub'g Co. v. Murphree, 326 U.S. 438, 442 (1946) (stating that "Congress could provide for service of process anywhere in the United States"); Toland v. Sprague, 37 U.S. 300, 328 (1838) (stating that "Congress might have authorized civil process from any circuit court, to have run into any State of the Union"); *cf.* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting) (stating that the Fifth Amendment requires minimum contacts with the United States as a whole).

29. *See, e.g.*, Dodge & Dodson, *supra* note 20 (calling this "an easy proposition").

30. *E.g.*, 9 U.S.C. § 9 (Federal Arbitration Act); 15 U.S.C. § 5 (Sherman Act); 15 U.S.C. § 22 (Clayton Act); 15 U.S.C. § 77v (Securities Act of 1933); 15 U.S.C. § 78aa (Securities Act of 1934); 18 U.S.C. § 1965 (RICO); 29 U.S.C. § 1332(e)(2) (ERISA); 42 U.S.C. § 9613 (CERCLA).

31. *E.g.*, 28 U.S.C. §§ 1332, 1397, 2361 (interpleader); FED. R. BANKR. P. 7004(d), (f) (bankruptcy).

Conclusion

A new restrictive turn in personal jurisdiction threatens the salutary benefits of aggregation in federal civil litigation. The solution is for Congress or the rulemakers to authorize expanded personal jurisdiction for aggregation cases. Such an effort would be constitutional and consistent with the spirit of the federal rules of joinder.

***