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Civil Procedure:

*Plaintiff Personal Jurisdiction and Venue Transfer*

Scott Dodson

The general venue-transfer statute allows a federal court in one state to transfer a case to another state for the convenience of the parties and witnesses and in the interest of justice. In *Hoffman v. Blaski*, the Supreme Court held that transfer to a court that lacked personal jurisdiction over the defendant was improper. Congress then amended the statute to allow transfer to a court that otherwise would lack personal jurisdiction over the defendant if the parties consent to the transfer.

But what about plaintiffs? The Due Process Clauses protect “persons,” not just defendants, so personal jurisdiction protects plaintiffs, too. A plaintiff effectively consents to the personal jurisdiction of the court where the plaintiff files, but what if the case is whisked out from under the plaintiff to a remote destination in a faraway state, against the plaintiff’s choice and without the plaintiff’s consent?

To date, neither courts nor commentators have satisfactorily interrogated the personal-jurisdiction implications for plaintiffs in venue-transfer cases. Yet the problem is a prevalent one, for such venue transfer—including MDL transfer—occurs in a sizable percentage of federal cases. In this Chapter, I shine a light on the problem and offer guidance for analyzing it.

*Statutory Authorization of Nationwide Personal Jurisdiction*

In federal courts, the Fifth Amendment’s Due Process Clause supplies the constitutional authority for personal jurisdiction, and that grant is broader than the Fourteenth Amendment’s authority, at least for cases involving domestic parties. Congress could, for example, create a single

district for the United States, with nationwide personal jurisdiction over all domestic parties, and, if so, personal jurisdiction would not limit transfers of federal cases within the United States.

But Congress has instead created discrete districts for the district courts, and, in the process, statutorily limited each district court’s personal-jurisdiction reach to its own district. As the Supreme Court long ago wrote:

The judiciary act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the district. . . . We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established; without the special authority of law therefor.

Of course, the law has overridden this default by authorizing more expansive district-court personal jurisdiction in a number of ways, including through Rule 4 service and specific statutory provisions enacted by Congress. And Congress undoubtedly could give a transferee court personal jurisdiction over a plaintiff in all cases in which the plaintiff is a U.S. citizen or resident or has sufficient national contacts to comport with the Fifth Amendment’s Due Process Clause, even if the plaintiff has never had any contacts or connections to the transferee court’s district or state. The question, then, is whether the venue-transfer statutes grant such nationwide jurisdiction.

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Some federal courts have construed the MDL-transfer statute to provide for just such a grant of nationwide personal jurisdiction.11 As for the general venue-transfer statute, courts infer transferee personal jurisdiction over the plaintiff because the general venue-transfer statute authorizes transfer without regard to personal jurisdiction.12

These statutory constructions cannot withstand scrutiny. The first problem is that, in other contexts, Congress has authorized nationwide jurisdiction only by using clear jurisdictional terms or the established equivalent of nationwide service of process, neither of which is present in either transfer statute. The language of the statutes says nothing about personal jurisdiction, and the authorization of transfer to “any district” cannot sensibly be read as an express or implicit authorization of personal jurisdiction. Further, these are eponymously venue statutes, which generally operate under—rather than supplant—the normal limits of personal jurisdiction, as the Supreme Court recently confirmed in BSNF Railway v. Tyrrell.13 In light of that backdrop, the statutes should not be read to create nationwide personal jurisdiction.

The second problem is that the state-based scope of personal jurisdiction set out in Rule 4(k) undeniably applies to both forms of venue transfer, at least for defendants, which is inconsistent with a construction of the statute that supplants Rule 4(k)’s limits with nationwide personal jurisdiction. Rule 4(k) applies to general venue transfer to protect defendants from transfer to a transferee court that lacks personal jurisdiction over them, as assessed under the normal state-based standard of Rule 4(k).14 Rule 4(k) also applies in MDL cases. For one, the JPML recognizes that an MDL transferor court must still have personal jurisdiction under Rule 4(k) and that MDL transfer does not “expand the territorial limits” of Rule 4(k).15 For another, plaintiffs cannot file directly in the MDL court if the MDL court would lack personal jurisdiction over the defendant under Rule 4(k), unless the defendant consents.16 These Rule 4(k)-based restrictions could not exist were the venue statutes to authorize

11. E.g., Howard v. Sulzer Orthopedics, Inc., 382 F. App’x 436, 442 (6th Cir. 2010); In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987).
12. E.g., In re Genentech, Inc., 566 F.3d 1338, 1346 (Fed. Cir. 2009).
nationwide personal jurisdiction over all parties. And because the venue-transfer statutes do not distinguish between plaintiffs and defendants, it would strain statutory construction to read them as authorizing personal jurisdiction over plaintiffs but not defendants, especially without language even mentioning personal jurisdiction. For these reasons, the statutes cannot be read to authorize expanded personal jurisdiction.

The Temporary Nature of MDL Transfers

The MDL-transfer statute specifically limits transfer “for coordinated or consolidated pretrial proceedings” and directs that “[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”17 According to the Joint Panel on Multidistrict Litigation (JPML), because of this temporary, limited-purpose nature of MDL transfer, the authority of the transferee court over plaintiffs (or defendants, for that matter) is “simply not encumbered by considerations of in personam jurisdiction.”18 In essence, the JPML’s theory is that when transfer is temporary, the transferee court has personal jurisdiction derived from the transferor court—and that personal-jurisdiction authority flows through, unchanged, to the transferee court.

There are both legal and practical problems with this reasoning. The legal problem is that nothing in the Supreme Court’s caselaw suggests that personal jurisdiction is different when the proceedings are temporary and confined to pretrial matters. To the contrary, courts adhere to personal-jurisdiction principles in contempt proceedings19 and in enforcing discovery matters, especially against nonparties.20 True, the Supreme Court has indicated that “[personal] jurisdiction is vital only if the court proposes to issue a judgment on the merits” and that a court may dismiss a case on nonmerits grounds without confirming personal jurisdiction,21 but that principle has not been extended to full pretrial delegation to a

19. E.g., Reebok Int’l Ltd. v. McLaughlin, 49 F.3d 1387 (9th Cir. 1995).
20. E.g., In re Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998).
different court whose pretrial rulings will bind the parties and shape any final judgment. That is for good reason: the JPML’s rationale essentially bars any personal-jurisdiction objection to the decisions of the court that will render significant and important rulings in the case. Even if the transferee court does not purport to enter judgment on the merits, personal jurisdiction protects parties—including plaintiffs—from being bound by the transferee court’s pretrial rulings.

The practical problem is that any characterization of MDL transfer as temporary borders on the fictional. More than 97% of transferred MDL cases are resolved by the transferee court. Many of those terminations are on the merits in dispositive motions like summary judgment, and these merits adjudications undeniably require the personal jurisdiction of the transferee court. The premise that an MDL transfer is for temporary pretrial matters that are just a prelude to remand for disposition in the transferor court is mistaken. For both legal and factual reasons, then, that premise cannot justify ignoring the strictures of personal jurisdiction in MDL-transfer cases.

Consent

One could argue that a plaintiff consents to personal jurisdiction in the transferee court by filing the lawsuit in the first place. Personal jurisdiction can, of course, be waived or consented to, and consent is exactly what justifies the personal jurisdiction of the plaintiff’s chosen court over the plaintiff. A plaintiff who files a lawsuit in a Texas court submits to the personal jurisdiction of that court for purposes of adjudicating the claim, even if the plaintiff lacks any other contacts with Texas. I have no quibble with that unremarkable application of the consent doctrine of personal jurisdiction.

But it is a significant extension to say that consent to personal jurisdiction in the plaintiff’s chosen court also extends to any other court

where the lawsuit ultimately may end up. Consider a plaintiff from New Jersey who is injured in New Jersey by a machine manufactured in California by a California company and distributed into New Jersey by a New Jersey distributor. The plaintiff sues both the manufacturer and the distributor in New Jersey state court for state-law claims, and both defendants conceded personal jurisdiction over them in New Jersey. The case is eligible neither to be filed in federal court nor to be removed to federal court because of the presence of a non-diverse defendant, the distributor. By all expectations, this case will be resolved in New Jersey.

But what if, six months into the lawsuit, the distributor agrees to a default judgment and exits the case? The manufacturer now can remove the case to federal court and then, once there, can move to transfer the case to federal court in California based on the convenience of the parties and over the objection of the plaintiff. The upshot is that the plaintiff filed a case in New Jersey state court with no reasonable expectation that it could ever be transferred without his consent to California for trial on the merits before a California jury, and yet it was. To take it a step further, perhaps after transfer to California, the defendant asserts a significant counterclaim against the plaintiff, forcing the plaintiff to defend against that claim in California and exposing the plaintiff to the risk of a California-based money judgment. I think consent to personal jurisdiction in California under these circumstances cannot be rationalized from the filing of a non-removable lawsuit in New Jersey, and no Supreme Court case supports such an attenuated notion of consent.

**Analyzing Plaintiff Personal Jurisdiction**

The somewhat extreme example above means that the doctrine of consent cannot support a blanket extension of personal jurisdiction over plaintiffs in all transferee courts. But consent can be relevant to personal jurisdiction in some circumstances. If the plaintiff files a case in federal court in a state either lacking serious connection to the lawsuit or otherwise under circumstances in which a transfer under § 1404(a) or even § 1406(a) is obvious, perhaps because of a valid forum-selection clause, then the invocation of federal court under these circumstances could be construed as consent to the expected transferee court’s personal jurisdiction.

Say, for example, a plaintiff from California is injured in Arizona by a device manufactured by a Texas defendant with its principal place of

27. 28 U.S.C. § 1446(b)(3).
business in Texas. The device was designed and manufactured entirely in Texas. The plaintiff sues the defendant in federal court in Arizona, claiming the device had a design defect. No one disputes the injury or the accident. The only dispute is whether the defendant is liable for a design defect. The plaintiff can reasonably expect the defendant (or the court) to transfer the case to Texas, where the defendant is headquartered, where the product was designed and manufactured, and where most witnesses are likely to be. To be sure, transfer may not happen. But by filing in federal court in these circumstances, the plaintiff can reasonably expect the case to end up in Texas and should be deemed to have consented to personal jurisdiction in Texas on that basis, even if the plaintiff has no contacts with Texas.

Or say the same accident occurred on the same facts, except that a multidistrict litigation under the MDL statute against the defendant for the same design defect currently is pending in the District of Delaware, consolidating hundreds of existing cases. The plaintiff’s act of filing a case in Arizona that is highly likely to be transferred to the District of Delaware for consolidation in the MDL should be deemed consent to personal jurisdiction in Delaware on those facts.

Myriad variations exist, and some may present difficult cases, but the key point is that they should be dealt with on grounds of plaintiff consent (or normal minimum contacts) in ways consistent with the operation of ordinary precepts of personal jurisdiction. That inquiry demands fact-sensitive appreciation for the circumstances at hand.

Practicalities

How should plaintiffs invoke objections to a transferee court’s personal jurisdiction over them?

I propose that the lack of personal jurisdiction of the transferee court be considered as part of the transfer or retransfer decision. Happily, the language of both the general venue-transfer statute and the MDL-transfer statute can be read to incorporate consideration of the personal jurisdiction of the transferee court. Each statute uses the word “may” to lodge discretion in the transferor court and demands that transfer be “just” or “in the interest of justice.” 28 Transfer to a court that lacks personal jurisdiction cannot be just, and such a transfer would be an abuse of discretion. Thus, the plaintiff’s primary opportunity to invoke personal jurisdiction will be

28. 28 U.S.C. §§ 1404(a), 1406(a), 1407(a).
in the transferor court in the briefing on the propriety of a transfer order, with the remedy for a finding of lack of personal jurisdiction being a denial of transfer.

If erroneous transfer is made nonetheless, the plaintiff’s timely objection to transfer in the transferor court is enough to preserve the issue for appeal for all intracircuit transfers and for those intercircuit transfers into circuits that allow review of out-of-circuit orders. In circuits that hold themselves without authority to review an intercircuit transferor order, or if the transferor court did not offer the plaintiff an opportunity to object to or contest the transfer, the plaintiff should immediately move, in the transferee court, to retransfer the case back to the original transferor court. The law-of-the-case doctrine should not prevent the transferee court from revisiting the personal-jurisdiction determination made by the transferor court, particularly when the question is the transferee court’s own jurisdiction. The transferee court’s denial of such a motion then would be reviewable by the transferee court’s circuit court, with the circuit court empowered to order retransfer. Appeal of an erroneous transfer order may have to await a final judgment, but that is no different from the denial of a defendant’s motion to dismiss for lack of personal jurisdiction under Rule 12.

Conclusion

Personal jurisdiction over plaintiffs in venue-transfer cases has long been sidestepped. It ought not be. Plaintiffs are entitled to the same personal-jurisdiction protections as any other parties. And it is time for courts and commentators to treat the issue with the seriousness and sensitivity it deserves.

29. If a district court is inclined to transfer a case sua sponte, it should give the parties an opportunity to be heard prior to ordering transfer to a court where personal jurisdiction could be challenged.