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When vacations lead to lawsuits

How to analyze cases involving injuries abroad to gain jurisdiction over a nonresident defendant

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Many Californians travel to exotic places to do interesting and fun things, thinking that they are in for a care-free vacation. Whether they're involved in sporting activities like jet skiing, deep-sea fishing, river-rafting and scuba diving or simply taking a cruise, severe injury or death can and does occur. If you're asked to take on such a case, there are many issues to consider both in contract and tort claims arising from these foreign recreational pursuits.

Jurisdiction – How to establish it

Many of the more exotic (and appealing) travel destinations include countries in which there is no civil law system and the only remedy available may be on home soil. Therefore, the single-most important issue when dealing with an injury taking place abroad is establishing jurisdiction in a U.S. court, whether state or federal. As has been well recognized, issues in establishing jurisdiction relate to the "minimum contacts" doctrine, whether to establish general jurisdiction or specific jurisdiction.

However, all that we know from *Pennoyer*, *International Shoe*, *Asahi* and *Burger King* must be balanced against the backdrop of the Internet. Very rarely does someone contact the actual hotel or resort where they desire to stay; today, most travel is booked through the Internet, which leads to new and creative ways to establish jurisdiction.

• ***Representative services doctrine***

Technically a breed of agency, the representative services doctrine may allow you to assert jurisdiction over a foreign defendant in a U.S. court by virtue of actions taken by a local agent. This should

always be considered when you or your potential client books a trip abroad by way of a U.S. booking or travel agent.

The 'representative services' doctrine "supports the exercise of jurisdiction when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 543 [99 Cal.Rptr.2d 824, 840].) In other words, "'[i]f a parent uses a subsidiary to do what it otherwise would have done itself, it has purposely availed itself of the privilege of doing business in the forum.'"(*Ibid*.)

Even in the absence of a formal parent-subsidiary relationship, one entity (the "parent") may be subject to local personal jurisdiction where the related entity (the "subsidiary") performs functions that the "parent" would otherwise have to perform itself as part of its own business (*Paneno v. Centres For Academic Programmes Abroad Ltd*. (2004) 118 Cal.App.4th 1447, 1456 [13 Cal.Rptr.3d 759, 765].)

The Ninth, First, Fifth and Eleventh circuits have all reached similar conclusions: a court's jurisdiction over an agent imputes to the foreign principal when the agent's conduct, on behalf of the principal gives rise to the cause of action. (*Doe v. Unocal Corp.* (9th Cir. 2001) 248 F.3d 915, 928-930; *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands* (9th Cir. 1998) 174 F.3d 969; *Wells Fargo & Co. v. Wells Fargo Exp. Co*. (9th Cir. 1977), 556 F.2d 406; *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.* (5th Cir. 1991) *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A*. (1st Cir. 2002) 290 F.3d 42, 56)

Essentially, the representative services doctrine would allow all of the forum-related contacts of a U.S. based agent to be imputed to a foreign entity if the foreign entity has the agent do what the foreign entity would have otherwise done itself (i.e. book travel). Discovery must be conducted regarding the relationship between the agent and the principal. For example: Does the principal book travel on its own? Does the booking agent have an exclusive right to book travel to the particular resort/hotel? Is there a discernable difference to the public between the principal and the agent? Are there common owners or members of the boards of directors for the two entities?

If it can be established that the agent acts at the behest of, and for the benefit of the principal, then the agent's contacts may subject the foreign principal to jurisdiction. This, of course, assumes that the nature of the contacts of U.S. agent rises to the level required by the state's long-arm statute.

• ***Interactive Web sites***

With the proliferation of travel and vacation deals advertised and offered online, whether through Expedia, blogs, or independent travel agents, close to 70 percent of travel reservations are booked online. (J.D. Power and Associates, *Independent Travel Web site Satisfaction Study* (2008) <http://www.jdpower.com/travel/articles/2008-independent-travel-Web-site-satisfaction-study/> [as of August 1, 2011].) While the main benefit is finding a great deal, another benefit may come in the form of jurisdiction over a nonresident defendant. Whether personal jurisdiction over a nonresident can be based solely on Internet activities, however, depends on the nature and quality of the acts involved. The more "interactive" the Web site, the more likely a court will find it has jurisdiction over a nonresident defendant. While this may seem like a boon, it is fairly difficult to establish; many courts view this as uncharted territory and are hesitant to find jurisdiction, however, it is an evolving theory that should still be considered.

To determine whether a nonresident defendant's Web site is sufficient to establish purposeful availment so as to assert jurisdiction over a nonresident defendant, courts look to a sliding scale analysis: on one end of the scale are situations where the defendant clearly does business over the Internet and personal jurisdiction is proper, at the opposite end are situations where the nonresident defendant has simply posted information on a Web site and is not grounds for jurisdiction, and the "middle ground" is occupied by interactive Web sites where the exercise of jurisdiction is determined by examining level of interactivity and commercial nature of the exchange of information. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1065 [29 Cal.Rptr.3d 33, 41].)

In examining whether an Internet site falls in that "middle ground," courts have been less than consistent. Some have held sufficient minimum contacts are established, and a defendant is "doing business" over the Internet where a defendant's Web site is capable of accepting and does accept orders from residents of the forum state. (*Shamsuddin v. Vitamin Research Products* (D.Md.2004) 346 F.Supp.2d 804, 810.) Others suggest something more is necessary – some type of "deliberate action" within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state." (*Millennium, supra,* 33 F.Supp.2d at p. 921; see also *Toys "R" Us, Inc. v. Step Two, S.A.* (3d Cir. 2003) 318 F.3d 446, 454. Others require that the Web site expressly targets residents of the forum state. (*Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.* (W.D.Wis.2004) 297 F.Supp.2d 1154, 1160).

In the case of *Snowney v. Harrah's Entertainment, Inc., supra,* 35 Cal.4th 1054, the court held that Harrah's Web site, which quotes room rates to visitors and permits visitors to make reservations at their hotels, is interactive, and therefore fell into the "middle ground." The court then went on to investigate the nature of the interactivity. It held that because Harrah's touted the proximity of their hotels to California and provided driving directions from California to their hotels, Harrah's Web site specifically targeted residents of California. "As such, defendants have purposefully derived a benefit from their Internet activities in California

and have established a substantial connection with California through their Web site. In doing so, defendants have "purposefully availed [themselves] of the privilege of conducting business in" California "via the Internet." (*Enterprise Rent-A-Car Co. v. U-Haul International, Inc.* (E.D.Mo.2004) 327 F.Supp.2d 1032, 1042-1043 [holding that a Web site that specifically targeted the forum state and its residents established purposeful availment].) (*Snowney at. p.* 1064-65.)

Therefore, as with any other jurisdictional analysis, the nature, content, and quality of the contacts the nonresident defendant has with the forum state or residents of the forum state, can cumulatively lead to establishing jurisdiction via the Internet.

Liability releases

Once jurisdiction is established, a common issue related to foreign travel involves releases. Anthony Label's April 2011 Plaintiff Magazine article, "Sports and Recreation Cases: Hope Springs Eternal," explains in-depth the issues related to liability releases.

Forum selection clauses

One of the things that many contractual documents have relating to a resort, a recreational activity or a cruise is forum selection clauses. A forum selection clause is a contractual agreement that in the event of a dispute, the dispute will be litigated in a specific forum. Both California and federal law presume contractual forum selection clauses to be valid and place the burden on the party seeking to overturn the clause. (*Schlessinger v. Holland America, N.V.* (2004) 120 Cal.4th 552, 558, 16CR3d 5, 9.) Courts will refuse to enforce a forum selection clause if (1) it lacks of notice; (2) it violates local public policy; or (3) is unreasonable.

Lack of notice is fairly difficult to prove, as actual notice is not always required. For example, limitations printed on a ticket issued by an airline are enforceable, even if not read by the passenger (*Deiro v. American Airlines, Inc.* (9th Cir. 1987) 816 F2d 1360, 1364.) Similarly, a forum selection clause may be enforced even if a party never even read it, as long as she had an opportunity to, even if that required requesting a copy of a contract from a travel agent. (*Schlessinger v. Holland America, N.V., supra* 120 Cal.4th 552, 559.)

A contract will violate public policy if it evades a statute enacted for the specific protection of the forum citizens. For example, a forum selection clause that designates a forum that does not allow class actions in consumer protection cases would be unenforceable as it is in direct contravention with the Consumers Legal Remedies Act. (*Doe 1 v. AOL LLC* (9th Cir. 2009) 552 F.3d 1077, 1083.)

In a case involving travel abroad or to an exotic location, the most likely way to attack a forum selection clause is by asserting that enforcement would effectively deprive the complaining party of her day in court or deprive her of any remedy. (*M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 2 [92 S.Ct. 1907].)

The quintessential unfair forum is one in which "the alterative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law."(*Piper Aircraft Co. v. Reyno*, (1981) 454 U.S. 235, 254 [102 S.Ct. 252].)

A case recently handled by our firm highlights this unique issue involving a forum selection clause scenario. A client was injured in Fiji; upon arriving at her destination, she signed a forum selection clause designating the law of Fiji as controlling. However, a recent military coup in the nation of Fiji resulted in the suspension of the Fijian constitution and judiciary. Fiji was therefore neither available nor suitable as there was no way for plaintiff to achieve "substantial justice." Since the suspension of Fiji's constitution, the United States Department of State issued a Travel Advisory Report stating that the judicial system in Fiji is not currently functioning properly and that basic rights of due process are being abrogated.

In order for the court to consider the Travel Advisory, it was necessary to establish its admissibility. This was accomplished by showing via declaration that the Travel Advisory for Fiji is an official publication, and is therefore self-authenticating pursuant to Federal Rule of Evidence 902(5). In order to defeat a potential hearsay objection, it was necessary to establish that the document was a report made by a public agency setting forth matters observed pursuant to a duty as to which there was a duty to report (Fed. Rules Evid., rule 803(8)(B).) This was done by providing the court with pertinent parts of the U.S. Department of State Foreign Affairs Manual, which outlines the duties imposed by law upon the Bureau of Consular Affairs, including the duty to issue Country Specific Information, Travel Warnings, Travel Advisories and Worldwide Causations on behalf of the Department of State.

The court agreed that the judicial system in Fiji was an unreasonable forum and therefore the forum selection clause was held to be unenforceable. If you or your client is involved in a contractual or tort dispute in a foreign country, be sure to check the U.S. State Department's Web site for issues relating to the country's legal system, you may be surprised how much it can help.

Choice of Law

Assuming for a moment that you have been able to establish jurisdiction in either a U.S. federal or state court, there undoubtedly will be a conflict between the law of the foreign forum where the event took place and the law of the selected hometown forum. The June 2011 Plaintiff Magazine article by Kimberly Wong highlights the many issues relating to Choice of Law. Essentially, it is important to realize that the rules vary; each state may have its own view on how to remedy a choice of law dispute. For example, in some jurisdictions, choice of law rules in tort actions provide for the application of the law of the place of the wrong (lex loci delicti),

others apply the law of the place where the plaintiff was injured, others still look to the law of the state which has the most significant relationship to the occurrences and the parties.

California uses the government interest analysis described in *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 74 [105 Cal.Rptr.3d 378, 381].

Further complicating matters, if the injury takes place on navigable waters, federal maritime law ordinarily governs the action. (28 U.S.C.A. § 1333.) Thus, despite diversity of citizenship between parties, where an alleged injury occurred on navigable waters, maritime law controls the substantive issues. In the absence of applicable maritime law, courts are free to apply the reasoning used in other federal circuit courts. (*Kossick v. United Fruit Co.* (1961) 365 U.S. 731, 739 [81 S.Ct. 886, 892].

Theories of liability

Assuming that you are still interested in pursuing an action, next you must determine which theories will match up with the appropriate party. A few examples of possible combinations: Using maritime law, direct liability against the ship-owner for injury; direct liability against a travel agent acting as more than a "mere ticket agent"; direct liability as to tour conductor who assumes a duty; direct liability against a tour organizer for failure to investigate accommodations; booking agent vicarious liability for negligence of tour guide; and tour conductor or agent liable for failure to warn of a dangerous condition. Courts are hesitant to impose liability against travel agents, travel guides and the like; for every case on the books where a plaintiff established a duty, another case stands for the opposite proposition. How the courts decide the issue often depends on how they view the relationship between the traveler, the travel agent or similar party, and the party responsible for the injury.


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