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No Consensus On Conspiracy Theory Of Personal Jurisdiction

By **Jack Figura** (January 31, 2018, 11:51 AM EST)

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Courts are divided — and the U.S. Supreme Court has yet to rule — on the question of whether the conspiracy theory of personal jurisdiction is proper under due process requirements. Under this doctrine, defendants who are alleged to be part of an unlawful conspiracy can be subject to jurisdiction in a state they have never set foot in based on acts committed in the state by co-conspirators.

The doctrine was developed in the 1970s, with New York taking a leading role,[1] and has been adopted in numerous other jurisdictions, including Delaware, Florida, Ohio and Virginia, and in decisions of the U.S. Courts of Appeals for the District of Columbia Circuit and the Tenth and Eleventh Circuits.[2] Several courts have questioned or rejected the theory, however, particularly on due process grounds. These include the U.S. Courts of Appeals for the Third and Ninth Circuits, the Seventh Circuit (questioning an earlier decision) and the Supreme Court of Texas.[3]

Decisions interpreting the theory can be roughly grouped into two categories: those that are based on traditional agency theory and those based on the concept of substantive conspiracy liability. The agency-centered approach to the doctrine is shown by a number of decisions under New York law, where courts have reasoned that an exercise of jurisdiction is proper if a co-conspirator committed tortious acts in New York as the agent of a nonresident defendant.

In the 1980 decision of Dixon v. Mack, for example, Judge Leonard Sand of the Southern District of New York set forth a three-part test under which an exercise of jurisdiction was proper if (1) the in-state co-conspirator (the agent) acted at the direction or request of, on behalf of or under the control of the out-of-state defendant (the principal); (2) the activity in New York was for the benefit of the out-of-state defendant; and (3) the defendant was aware of the effects of the activity in New York.[4]

Two more recent decisions under New York law, both by Judge Alison Nathan of the Southern District, illustrate where these requirements may or may not be met. In LaChapelle v. Torres, decided in 2014, a New York art dealer argued that conspiracy-based jurisdiction was proper over the CFO of the studio of the dealer's former client, the famed photographer David LaChapelle, who had allegedly caused co-conspirators in New York to steal artwork and other property from the dealer's New York offices.[5]

Judge Nathan agreed, reasoning that a prima facie case for personal jurisdiction was satisfied as to the Oregon-based CFO, as the principal of agents in New York, because she allegedly (1) instructed that the

theft take place, (2) knew that it would occur in New York and (3) would have benefited from the theft based on her extensive involvement with LaChapelle's studio.[6]

Judge Nathan reached the opposite conclusion as to a defendant in a 2017 decision, City of Almaty v. Ablyazov, where the City of Almaty, Kazakhstan, alleged that its former mayor and others stole hundreds of millions of dollars from it and then laundered some of the funds through the purchase of New York real estate.[7] The court concluded that the City of Almaty sufficiently pled that the mayor was involved in a money-laundering scheme generally, but failed to establish that he was involved in, directed, controlled or was even aware of laundering activity in New York, as required to establish personal jurisdiction over him.[8]

In other decisions, courts have conceived of the conspiracy theory of personal jurisdiction more broadly, couching it not in agency law but in the more far-reaching concept of substantive conspiracy liability. For example, in Textor v. Board of Regents of Northern Illinois University, the U.S. Court of Appeals for the Seventh Circuit reasoned, "[I]f plaintiff's complaint alleges an actionable conspiracy then the minimum contacts test [for due process] has been met. The 'conspiracy theory' of personal jurisdiction is based on the 'time-honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.'"[9]

In sum, "[t]o plead successfully facts supporting application of the conspiracy theory of jurisdiction a plaintiff must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state."[10]

Under the standard of Textor, a defendant arguably would be subject to personal jurisdiction based only on (1) its membership in a conspiracy and (2) any tortious acts by a co-conspirator in the forum state — regardless of whether the defendant conspirator was aware of or involved in those acts. In November 2017, the Supreme Court of Alabama issued a decision in Ex Parte The Maintenance Group Inc. that quoted Textor and reflected reasoning consistent with it.[11]

In Maintenance Group, an Alabama aircraft purchaser alleged that a defendant in Georgia conspired with others to defraud the plaintiff by causing it to buy a plane that was in need of repair.[12] The court reasoned that the Georgia defendant would be subject to jurisdiction if its co-conspirators engaged in acts in furtherance of the conspiracy in Alabama (a requirement that was not met) — without discussing whether it need be shown that the Georgia defendant was aware of the acts in Alabama or whether the co-conspirators in Alabama were acting on its behalf.[13]

Several courts have rejected the conspiracy theory of personal jurisdiction as inconsistent with due process. An early critic was the Supreme Court of Texas, which rejected the theory in a 1995 decision, National Industrial Sand Association v. Gibson.[14] In 2010, many years after its decision in Textor, the Seventh Circuit questioned the viability of the theory in Smith v. Jefferson City Board of Education.[15]

A new round of criticism of the theory was sparked in recent years by language in the U.S. Supreme Court's decision in Walden v. Fiore in 2014.[16] Walden did not concern conspiracy- or agency-based jurisdiction; the issue in that case was whether a Georgia police officer could be haled into court in Nevada based on a tort he allegedly committed against a Nevada resident while she was traveling through Georgia.[17]

The court decided that an exercise of jurisdiction was not proper because the officer had not shown sufficient minimum contacts with Nevada.[18] In reaching that conclusion, the court reasoned that "the

relationship [among the defendant, the forum state and the litigation] must arise out of contacts that the 'defendant himself' creates with the forum State," and that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[19]

Courts have pointed to this language from Walden in recent decisions criticizing the conspiracy theory. In October 2017, Judge Brian M. Cogan of the Eastern District of New York did so in a decision in In Re Dental Supplies Antitrust Litigation.[20] The plaintiffs in Dental Supplies alleged a price-fixing conspiracy that was operated in New York and elsewhere by dental supply companies, including one which sold primarily to western states and had limited contact with New York.[21]

These allegations arguably would have satisfied the standard set forth in Textor, but Judge Cogan rejected the theory out of hand, reasoning that "there is no doctrinal support for 'conspiracy jurisdiction'" under established jurisdictional principles and that "it is highly unlikely that any concept of conspiracy jurisdiction survived the Supreme Court's ruling in Walden."[22]

The Supreme Court has not yet determined the propriety of the conspiracy theory of personal jurisdiction. In 2016 the petitioner and amici curiae including the U.S. Chamber of Commerce attempted to bring a challenge to the doctrine before the court in Fitch Ratings Inc. v. First Community Bank N.A., challenging a decision of the Tennessee Supreme Court, but the petition for appeal was denied.[23]

In view of the reasoning of Walden — and of the U.S. Supreme Court's ongoing project of limiting the reach of theories of personal jurisdiction — it is reasonable to expect that at some point the court will narrow the permissible reach of the conspiracy theory of personal jurisdiction. Conceivably, the court, like Judge Cogan, could reject the doctrine entirely.

Even absent a categorical decision of that sort, the decisions at the greatest risk of reversal may be those following a standard based on substantive conspiracy liability, as expressed in Textor, which conceivably could allow a defendant to be haled into court based solely on the acts of co-conspirators inside the jurisdiction, without regard for the defendant's own actions or knowledge.

Perhaps on safer ground are those decisions that rest on agency law, such as LaChapelle and City of Almaty. If the in-state tortious actor is the defendant's agent based on commonly accepted principles of agency — not on the mere fact that both participated in a conspiracy — there seems a greater chance that the court would recognize at least some form of the conspiracy theory as a viable basis for personal jurisdiction.

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[1] E.g., Neilson v. Sal Martorano Inc., 36 A.D.2d 625, 625 (N.Y. App. Div. 2d Dep't 1971).

[2] J & M Assocs. Inc. v. Romero, 488 F. App'x 373, 375 (11th Cir. 2012) (applying Alabama law); Melea,

Ltd. v. Jawer SA, 511 F.3d 1060, 1069-70 (10th Cir. 2007) (applying Colorado law and citing Lolavar v. de Santibanes, 430 F.3d 221, 229 (4th Cir. 2005)); Second Amend. Found. v. U.S. Conference of Mayors, 274 F.3d 521, 523 (D.C. Cir. 2001); United States v. Maruyasu Indus. Co., 229 F. Supp. 3d 659, 673–74 (S.D. Ohio 2017) (decision in criminal antitrust matter with citation to decisions in civil cases); FireClean LLC v. Tuohy, No. 1:16-CV-0294, 2016 WL 3952093, at *8 (E.D. Va. July 21, 2016) (quoting Unspam Tech. Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013)); Dow Chem. Co. v. Organik Kimya Holding A.S., No. CV 12090-VCG, 2017 WL 4711931, at *11 (Del. Ch. Oct. 19, 2017); NHB Advisors Inc. v. Czyzyk, 95 So. 3d 444, 448 (Fla. Dist. Ct. App. 2012).

[3] LaSala v. Marfin Popular Bank Pub. Co., 410 F. App'x 474, 478 (3d Cir. 2011) (applying New Jersey law); Smith v. Jefferson Cty. Bd. of Educ., 378 F. App'x 582, 585-86 (7th Cir. 2010) (applying Illinois law); but see Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1392-93 (7th Cir. 1983) (discussed herein); Chirila v. Conforte, 47 F. App'x 838, 842-43 (9th Cir. 2002) (applying Nevada law); Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995); see also Angelini Metal Works Co. v. Hubbard Iron Doors Inc., No. CV 11-6392-GHK (PLAx), 2016 WL 6304476, at *6 (C.D. Cal. Jan. 5, 2016);

[4] 507 F. Supp. 345, 349 (S.D.N.Y. 1980).

[5] 1 F. Supp. 3d 163, 167-68 (S.D.N.Y. 2014).

[6] Id. at 170-71.

[7] — F. Supp. 3d —, No. 15-CV-5345 (AJN), 2017 WL 4586127, at *1 (S.D.N.Y. Sept. 26, 2017).

[8] Id. at *23.

[9] 711 F.2d at 1392.

[10] Id. at 1392-93.

[11] — So. 3d —, No. 1160914, 2017 WL 5623326, at *1 (Ala. Nov. 22, 2017)

[12] Id. at *1, *10.

[13] Id. at *8-10 (quoting, inter alia, Textor, 711 F.2d at 1392).

[14] 897 S.W.2d at 773.

[15] 378 Fed. Appx. at 585-86.

[16] 134 S. Ct. 1115 (2014).

[17] Id. at 1119-20.

[18] Id. at 1124.

[19] Id. at 1122-23 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)) (emphasis in Burger King).

[20] No. 16 Civ. 696 (BMC)(GRB), 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017).

[21] Id. at *1-2.

[22] Id. at *7; but see City of Almaty, 2017 WL 4586127, at *23 (recognizing but not applying conspiracy-based jurisdiction as viable under New York law just six days after Judge Cogan's decision was issued in Dental Supplies); Maintenance Group, 2017 WL 5623326, at *10 (in November 2017, quoting Walden but still treating the conspiracy theory as a viable doctrine).

[23] E.g., Br. of Amicus Curiae Chamber of Commerce of the U.S.A. in Supp. of Pet'r, Fitch Ratings Inc. v. First Cmty. Bank N.A., 136 S. Ct. 2511 (2016).