

Reproduced with permission from The United States Law Week, 80 U.S.L.W. 1035, 02/07/2012. Copyright © 2012 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Civil Procedure—Personal Jurisdiction

Personal Jurisdiction Is Lacking in Suit Against Foreign Distributor in Mississippi

A food manufacturer's lawsuit against a Costa Rican distributor in Mississippi must be dismissed for lack of specific personal jurisdiction, the U.S. Court of Appeals for the Fifth Circuit held Jan. 31 (*ITL International Inc. v. Constenla SA*, 5th Cir., No. 10-60892, 1/31/12).

Judge Patrick E. Higginbotham's opinion for the court concluded that "[t]here is little nexus between the defendants' contacts with Mississippi and the plaintiffs' contract and trademark claims," which meant the lawsuit fell short of Due Process Clause requirements.

Nicholas Wittner, a professor at Michigan State University's School of Law, East Lansing, Mich., told Bloomberg BNA Feb. 3 that he agreed with the court that specific jurisdiction was lacking. Wittner explained that "[a]lthough there was a long-arm statute and minimum contacts, the dispute did not arise out of the contacts, so [there was] no specific jurisdiction."

He added that general jurisdiction also was lacking in the case because the contacts were not "anywhere near" the requirements provided by the U.S. Supreme Court in *Goodyear Dunlop Tires Operations SA v. Brown*, 79 U.S.L.W. 4696 (U.S. 2011), or *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408 (1984). *Goodyear*, for example, requires that a foreign corporation's contacts with a state are so "continuous and systematic" so as to render the company "at home" in the forum state.

Costa Rican Distributor. The case centered around a controversy between ITL International Inc., and its parent company Mars Inc., and Constenla SA. Constenla operated as the Costa Rican distributor for Mars; the parent company is known for candy brands such as M&Ms, Snickers, and Twix.

A 1992 exclusive distribution agreement between the U.S. company and Ciamesa, which was later acquired by Constenla, provided that the agreement was personal to Ciamesa and prior written approval was required before any assignment or transfer.

Thus, ITL alleges that the agreement became void once Constenla acquired Ciamesa in 1996. However, the court noted that the two companies continued abiding by the agreement for years, until Mars decided to provide its products directly to Costa Rican retailers.

Costenla disputes that the agreement was voided and said it acquired the distribution rights. It also argued

Costa Rica Law 6209 requires a termination penalty of more than \$7 million.

ITL sought a declaratory judgment in the U.S. District Court for the Southern District of Mississippi that the agreement is no longer valid, it does not owe a \$7 million termination penalty, and Costenla cannot use its trademarks.

The lower court held that Mississippi's long-arm statute covered the dispute and Constenla had minimum contacts with the state. Nonetheless, it found personal jurisdiction wanting because "this case is one of the rare instances when exercising jurisdiction would be unreasonable despite the presence of minimum contacts."

That court cited respect for Costa Rica's sovereignty, most of the witnesses and evidence are in Costa Rica, and an expert testified that Costa Rican courts would not enforce the U.S. judgment applying Costa Rican law.

Wittner said he believed the concern regarding an unenforceable judgment was "at the bottom of the lower court's decision." He added the court likely wondered, "Why go through all of the litigation, taking up the court's time, only to end up with nothing?"

The Fifth Circuit affirmed the ruling, although it offered a different explanation of the due process concerns.

'Little Nexus' Between Minimum Contacts, Claims. Ultimately, the court found the case doomed because ITL's contract and trademark claims had little to do with Constenla's contacts with Mississippi—the location in which it took possession of products 55 times since 2009.

The court began by addressing whether the case fit within the Mississippi long-arm statute, which it said had a contract prong, tort prong, and doing-business prong. The lower court found the case fit within the contract prong. The Fifth Circuit did not directly address that ruling because it held the doing-business prong was fulfilled.

It explained that Mississippi has a very broad definition of doing business, quoting *Estate of Jones v. Phillips*, 92 So. 2d 1131 (Miss. 2008): "As it stands now, the long-arm statute, by its plain terms, applies to any person or corporation performing any character of work in this state."

The court held that Constenla's use of a Gulfport, Miss., site for 55 shipments counted as doing business because it was some "character of work."

The next step was to address the due process requirements of specific jurisdiction. The court said those requirements are (1) the defendant had minimum contacts purposefully directed at the state, (2) a nexus be-

tween the contacts and plaintiff's claims, and (3) the exercise of jurisdiction is fair and reasonable.

The Fifth Circuit held that the 55 shipments fulfilled the first prong and rejected Constenla's allegation that it had no choice but to use Gulfport, given factors outside its control. It noted that Constenla used a different port 36 times during the same period.

The court ruled, however, that the case faltered on the second prong because of the weak nexus between the contacts and claims.

"[T]his lawsuit is oriented almost exclusively toward activity that has taken place or may eventually take place in Costa Rica, and nothing in the facts, claims, causes of action, or prayer sections of the complaint

makes reference to Mississippi or to activity that took place there. This case is not about damaged goods delivered in Gulfport but rather about distribution in Costa Rica and associated contract and trademark issues," it concluded.

Judges Priscilla Richman Owen and Catharina Haynes joined the opinion.

Michael E. Whitehead, Page, Mannino, Peresich & McDermott, PLLC, Biloxi, Miss., represented ITL and Mars. Michael L. Hood, Haynes & Boone, LLP, Dallas, represented Constenla.

BY MICHAEL O. LOATMAN

Full text at <http://pub.bna.com/lw/1060892.pdf>.