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Supreme Court's Stealth Revolution in Civil Procedure

The U.S. Supreme Court steadily and without fanfare has been revolutionizing multiple areas of civil procedure to provide litigants with a battleplan to win their cases. The stealth procedural weapons include personal jurisdiction, venue forum selection clauses, gatekeeping rules for pleadings, arbitration protections for businesses and placement of limits on class actions.

Assessing the fairness of this revolution depends on where you sit. For plaintiffs and consumers the viewpoint is that the high court is limiting access to justice and arming opponents and businesses with powerful procedural tools. For defendants, particularly corporations, the Roberts Court is seen as responding to a wave of litigiousness and erecting procedural hedgerows against oppressive case costs and exposures.

One thing is for sure: you better know these new procedural battleplans and cases if you want to win what have often become the wars of civil litigation. And, may I say, you can get a GPS for such planning by reading The Wagstaffe Group Practice Guide and our weekly Current Awareness feature that highlights the newest in case decisions.

I. Personal Jurisdiction: Has International Shoe Been Untied?

Almost seventy-five years ago in the International Shoe case[1], the Supreme Court took a benign view of personal jurisdiction, ruling that out-of-state-defendants could force defendants to answer lawsuits if they had minimum contacts even with a distant forum. Such contacts could consist of the transmission of mail, launching advertising or causing an effect there from afar.

In the Nicastro case[2], the high court in an opinion little noted outside legal circles, began to alter the jurisdictional landscape when it held that a foreign manufacturer of an expensive metal shearing machine that caused serious injury to Mr. Nicastro in New Jersey was not subject to personal jurisdiction there. The Court reasoned, albeit in a plurality opinion, that while the British manufacturer used an American distributor (in Ohio) to sell one or more of these finger-cutting machines to Nicastro's employer in New Jersey, it did not expressly target that state and would not be called to answer for the injuries suffered there.

The stealth ruling was not lost on large companies who locate elsewhere (even overseas) and layer their distribution to avoid exposure to personal jurisdiction in faraway states. Having not issued a significant personal jurisdiction decision for decades, the Supreme Court recently has issued six significant personal jurisdiction opinions, each of which has held the defendant is not subject to litigation in the forum chosen by the plaintiff.

In Daimler[3], for example, the Court held that even if the corporation does a billion dollars of business in the forum (there with voluminous car sales and multiple dealerships), if the cause of action arose elsewhere and the company tactically elects to locate its headquarters out-of-state, it will not be subject to general jurisdiction. And in Bristol Myers[4], the Court continued the trend in immunizing mega-corporations from general jurisdiction adding that no amount of independent statewide activity (there selling hundreds of millions of allegedly defective pills to others in the forum) would subject the company even to specific jurisdiction if the plaintiffs in question and the product sales were located elsewhere – no matter how much judicial efficiency might be achieved by a consolidated action.

As a practical matter and even if would-be defendants have interactions with forum-based plaintiffs, entities and persons can avoid far away litigation exposure if the misconduct did not directly take place there. The Walden v. Fiore case[5] (where the individual plaintiffs from Nevada were damaged by alleged misconduct taking place in Georgia) provides an excellent jurisdictional battle map for defendants: if the

alleged responsible party commits acts while physically located elsewhere the mere fact the plaintiff happens to be located in the forum state standing alone will not authorize personal jurisdiction. And the Circuit courts have picked up the revolutionary message as they often strip plaintiffs of the choice of suing in their home state.[6]

These decisions self-consciously limit defense exposure to the geographical challenges of distant litigation. The revolutionary war map drawn by the Supreme Court harkens to the Pennoyer years where physical presence and direct impacts are the ones that create the real exposure to jurisdiction in distant sovereigns. Out-of-state defendants ignore such a defense to their own procedural detriment.

II. Capturing the Venue Flag Planted in Forum Selection Clauses

A good argument can be made that the Court's decision in Atlantic Marine[7] is the most significant procedural decision of the last 10 years. At a minimum, the court's decision there provided enormous litigation advantage to a contracting party who can control location through a tactically-inserted forum selection clause.

In Atlantic Marine, the Court held that a valid forum selection clause is presumptively enforceable, it trumps the plaintiff's choice of venue and eliminates any judicial reliance on the private interest factors including even the convenience of third-party witnesses or the location of evidence in the forum. Simply paraphrased, Justice Alito's ruling in Atlantic Marine in essence emphasized that when it comes to forum selection clauses "a contract is indeed a contract."

The battle grounds for this revolutionary development since Atlantic Marine have been on (1) whether the clause is enforceable, (2) whether it violates any public policy considerations under state law, and (3) what to do if there are other parties in the case that are not signatories to the clause.[8] Moreover, a party can even prevent a defendant from removing an action to federal court with a contractual clause exclusively designating state court as the designated forum.[9]

The forum selection battles are so intense because where the action goes forward so very often controls the result and the parties' amenability to settling the matter. Civil procedure matters.

III. Gatekeeping at the Pleading Stage Through Twombly/Iqbal

The "Twiqbal" revolution has been the most transparently impactful. It used to be that Rule 8 and its notice pleading aspect meant that federal cases were dismissed only if there was some legal defect with the theory of the claim for relief. It was often said that motions to dismiss were "playpens for infant lawyers."

The Twombly/Iqbal decisions[10] changed all that allowing judges, in the court's words, to gatekeep at the pleading stage foreclosing reliance on conclusory or implausible allegations. And the Court emphasized that judges can rely on their experience when measuring plausibility.

Don't get me wrong – the well pled allegations are still accepted as true and leave to amend is freely given to correct technical defects. However, the revolutionary case law following Twiqbal has resulted in the weeding out of facially weak claims using the analytic weapons of implausibility and deficiency.[11]

IV. Arbitration Frustration

The arbitration revolution also has been hatching in recent Supreme Court jurisprudence. Concededly, the high court has stressed for some fifty years that the alternative dispute resolution mechanism of arbitration is highly favored.[12] And it is no surprise that plaintiffs generally detest and defendants generally love the arbitration model as it can truncate discovery, avoid the risk of jury sympathy and at least nominally trigger the sense of a predisposed factfinder in favor of the repeat players in the corporate world.

The not road so stealth revolution in arbitration picked up pace in Supreme Court battles starting with the Concepcion case[13] and its progeny. The high court in a series of consistent decisions in the last five years, including just recently in Lamps Plus[14], has provided a Star Wars defense

to entities and corporations to avoid class actions by inserting arbitration clauses in individual consumer contracts that preclude just such a joinder procedure.

The area of arbitration, like personal jurisdiction and venue, has produced multiple defense-supportive decisions from the high court. Uniformly, the Supreme Court revolution, at least for now, seems to be siding with the notion that litigation barricades must be erected against overzealous plaintiffs who arguably use litigation and the expense of discovery to extract unfair settlements.

V. The Bygone Era of Mass Plaintiff Class Actions

There indeed was a revolution with the implementation of the "modern" class action in Rule 23 – only that was then (50+ years ago) and this is now. However, starting with the Wal-Mart case and then its progeny, the Roberts Court is narrowing the interpretation of the Rule 23(a) commonality requirement. Lower courts, following the Wal-Mart lead are more and more often denying class certification reasoning that the variations in class members' claims outweigh those that are common and typical. While class actions were and remain a somewhat boutique industry, the old-time notion of filing a class, getting it certified and negotiating a large settlement (with even larger legal fees at times) is fighting with the techniques of the last war. The courts seem to be saying "no more" to lawyers who are viewed as planting fruit trees in their own class action gardens.

Concluding Thoughts

High court revolutions – even in the field of civil procedure – are by no means unprecedented in the annals of judicial history in this country. Supreme Court historians have talked about the "revolution" of the Lochner era, the Erie Railroad progressive response to the corporate bias of general federal common law, the Warren Court's judicial activism and now the stealth procedural revolution. For litigators, however, there is nothing academic about all this – the battle strategies are to identify these weaponizing decisions and utilize them in the best interest of our clients. Thus, harnessing the power of these decisions and rigorously tracking developments at the battalion level (i.e. Federal circuit and district court decisions) is monumentally vital. I am very proud that my practice guide and its Current Awareness component provide helpful maps in this regard.

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

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[1] *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).
[2] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).
[3] *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *see also BNSF Ry. v. Tyrrell*, 137 S.Ct. 1549 (2017).
[4] *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).
[5] *Walden v. Fiore*, 571 U.S. 277, (2014).
[6] *See, e.g., Brook v. McCormley*, 873 F.3d 549 (7th Cir. 2017) (no jurisdiction against out-of-state attorney simply by representing in-state party); *Axiom Foods, Inc.v. Acerchem Int'l, Inc.*, 874 F.3d 1064 (9th Cir. 2017) (sending infringing newsletter to some forum residents insufficient for jurisdiction); *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018) (forum plaintiff injured elsewhere does not trigger jurisdiction over out-of-state defendant); The Wagstaffe Group Practice Guide: Fed. Civ. Pro. Before Trial, § 10.258.
[7] *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49 (2014).
[8] *See, e.g., Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (no violation of state public policy to enforce forum selection clause); *In re Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017) (enforcement rules as against non-signatories).
[9] *See, e.g. Bartels v. Saber Healthcare Group, LLC*, 880 F.3d 668 (4th Cir. 2018); *Medtronic Sofamor Danek, INc. v. Gannon*, 913 F.3d 704 (8th Cir. 2019).
[10] *Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Aschcroft v. Iqbal, 556 U.S. 662 (2009).*
[11] *See, e.g., Wysong Corp. v. Apri, Inc.*, 889 F.3d 267 (6th Cir. 2018) (implausible allegation that product consumers confused); *Munro v. Lucy Activewear*, 899 F.2d 585 (8th Cir. 2018) (inadequate allegation of promissory fraud).
[12] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
[13] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
[14] *Lamps Plus, Inc. v. Varela*, 2019 U.S. LEXIS 2943 (April 24, 2019).
[15] *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338 (2011).

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