

Identifying information has been redacted from the following memoranda:

MEMORANDUM

To: My Customer
FROM: Bob Kovsky
SUBJECT: [Client]
DATE: September 4, 2001

I have reviewed the materials on this matter and have some initial conclusions, along with questions, most of them implicit.

From the materials, there appears to be a difference between the first check and the later three checks in that (1) the first check was explicitly confirmed through [potential corporate defendant] and (2) the first check cleared through [potential defendant] Bank. Neither of these circumstances appear to have occurred in connection with the later three checks. I use the word "appears" because the memo from the client is not crystal clear as to any of these facts and you may want to confirm with the client.

It also appears that some product was recovered, but that the recovered product has not yet been returned to the client. It will be significant what portions of shipments were recovered and whether any is being held by the authorities in Nigeria or elsewhere.

The case is strong as to the first check that was explicitly confirmed by [potential corporate defendant] and paid by [potential defendant] Bank (and any subsequent checks that were explicitly confirmed or paid — the memo from the client indicates that the [client's] Georgia account was debited with the full value of all four checks, which may indicate that they had all been paid).

Under UCC 3-418, which is in force in both California and Louisiana, a bank that pays or accepts a check may not revoke acceptance or recover the amount paid to a person who deposited the check in good faith and who gave value for the check. See esp. Commercial Code 3-418(c). My general source is the standard four-volume treatise White & Summers, Uniform Commercial Code (4th ed. 1995). I have not reviewed the law in Louisiana (which is unique in some ways as having been derived from the Code Napoleon), but in California there would be a cause of action against [potential corporate defendant] for negligent misrepresentation. See Civil Code § 1572 at least as to the explicit confirmation.

The difficult question in this case is jurisdiction. The approach to jurisdictional questions is derived from decisions of the United States Supreme Court and there is a practice of citing cases from other jurisdictions, at least when the forum's long-arm statute, like California's Code

of Civil Procedure § 410.10, allows an exercise of jurisdiction on any basis not inconsistent with the Constitution. I have encountered this question in a number of federal court cases involving Internet litigation and will recapitulate the rules derived from that experience. My source for general rules stated below is *Ziegler v. Indian River County* (9th Cir. 1995) 64 F.3d 470, 473.

There are two branches of doctrine used. First, general jurisdiction exists if the nonresident's contacts with the forum state are continuous and systematic and an exercise of jurisdiction satisfies "traditional notions of fair play and substantial justice." The question of general jurisdiction in this case would depend on the reach of activities of [potential corporate defendant] and (presumably) the Baton Rouge branch of [potential defendant] Bank. In the federal courts, we would be entitled to discovery on this (and related points), but I have not checked state court procedure.

Specific jurisdiction is based on the nonresident's acts with respect to the matters at issue. The defendant must have "purposefully availed" itself of the privilege of conducting activities in California and the defendant should not be haled into a jurisdiction through random, fortuitous or attenuated contacts. (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475.) The cases generally hold that jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state. Here, however, the effect was chiefly in Georgia and only secondarily in California, namely approval of shipment of goods from Georgia.

There is an arguable basis for the assertion of specific jurisdiction over [potential corporate defendant] because of the telephone conversation between the local [client] office and [potential corporate defendant] in Louisiana. See Code of Civil Procedure § 410.10 and Official Comment, subsection (9) ("Causing Effect in State by Act or Omission Elsewhere"), *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal.App.3d 696 *but see* *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750 and *Kaiser Aetna v. Deal* (1978) 86 Cal.App.3d 896.

I do not see any clear basis for asserting specific jurisdiction over the branch of [potential defendant] Bank located in Baton Rouge, Louisiana. (I doubt that there is sufficient affiliation with other states' [potential defendant] Banks, in and of itself, to justify an exercise of general jurisdiction, discussed above, but I can check further on this point.)

Even when jurisdiction may attach because of "purposeful availment," the court will decline to exercise jurisdiction if such an exercise would be "unreasonable." In evaluating "reasonableness," the court examines (1) the extent of the defendant's purposeful injection into the forum; (2) the defendant's burden in litigating in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

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The only evidence in California is testimony from [client's employee] (in the "corporate office," presumably in California). The other [client] testimonial witness is R. C. in Georgia. The major evidence is in Louisiana, including the [potential corporate defendant] employees and their documents and [potential defendant]Bank (to the extent it has any useful evidence). Hence, there is a substantial likelihood that, even as to [potential corporate defendant], a California court may decline to exercise jurisdiction.

(See also Code of Civil Procedure § 410.30 authorizing a court to dismiss or stay on the grounds of "inconvenient forum.")

I will anticipate hearing more from you on this before I proceed. Drafting a complaint against both [potential corporate defendant] and [potential defendant]Bank will be relatively straightforward and I can research the relevant law in greater detail at that time, if called upon to do so.

MEMORANDUM

To: Customer

FROM: Bob Kovsky

SUBJECT: [Client located in San Jose]

DATE: September 17, 2001

This memo accompanies the draft complaint. I want to delve a bit deeper into the law before signing off on it, but if you do not hear from me by Wednesday night, consider it ready for filing. I expect you will want to have reviewed by the client for factual accuracy and to obtain the full exhibits.

Defendants will have the right to remove to federal court based on diversity jurisdiction. Once in federal court, defendants will have the right to change venue to Louisiana pursuant to 28 U.S.C. § 1404 sometimes called "forum non conveniens" and similar to Code of Civil Procedure § 397(c).

I have been involved in § 1404 motions, including a motion made by our adverse parties that was denied by Judge Whyte last year, and there is an extreme reluctance to grant such a motion. Plaintiff is generally held to be entitled to choose its forum. However, because the vast majority of the evidence in this case is in Louisiana, such a motion might be granted here. The court can also transfer if jurisdiction is not proper in the court where the case has been filed as an alternative to dismissal.

One approach would be to file in federal court and then the proceedings would likely not be interrupted if the case is transferred to Louisiana.

Another possibility would be to file in state court and wait for removal. Removal without challenging jurisdiction might constitute a waiver of the jurisdictional challenge. I do not believe that a challenge to jurisdiction in state court would waive the right to remove. I have not researched either of these points, however, but can do so if you desire.