

ORAL ARGUMENT – 02/13/02
00-0959
AMERICAN TYPE V. COLEMAN

SIPE: This case raises an important issue regarding the defendant's burden of negating grounds for personal jurisdiction in an action brought in Texas state court.

PHILLIPS: What in the CA's opinion gives us jurisdiction? What in the circumstances of this case?

SIPE: In the circumstances of this case, we believe the decision below is inconsistent with the SC's decision in the Siskind case setting out the standards for burden of proof and a special appearance. We also believe this case is important for the jurisprudence of Texas both with respect to the burden of proof issue and with respect to the CA's comparative jurisdiction test.

PHILLIPS: Do you believe there is a dissent in the CA or not?

SIPE: There was not a dissent from the 3-judge panel. There was a dissent from the denial of en banc rehearing by Justice O'Connor.

PHILLIPS: Is that dissent sufficient to provide us with jurisdiction or not?

SIPE: We believe it is for the reasons I've already stated. There are two principal grounds of error that we allege in this case. The first is that the CA misconstrued the burden of proof on defendant ATCC by requiring the defendant to _____ all possible bases of jurisdiction. The second error has to do with the court's establishment of other tests of comparative jurisdiction whereby the court faulted ATCC for not presenting more detailed evidence of its contacts with other jurisdictions outside Texas. We maintain that the CA erred in both instances.

This case arises out of a mass tort suit in which plaintiffs allege that ATCC among some 80 other defendants shipped materials to Iraq in the 1980s that form the basis for the Iraqis' to manufacturer chemical and biological weapons. As _____ here they claim that ATCC had sufficient contacts with Texas to permit its courts to exercise general jurisdiction.

I would point out at this point that everyone agrees this is not a specific jurisdiction case. There is no allegation that the cause of action arose from any act in Texas or from any of ATCC's limited contacts with Texas.

ATCC is a nonprofit corporation organized under the laws of the District of Columbia, which at all relevant times had its principal place of business in Rockville, Maryland. ATCC serves as a long term repository and distribution center for living microorganisms, viruses and cell lines, which it makes available to scientists and researchers around the world.

The jurisdictional facts are not in dispute. ATCC produced evidence at the special appearance hearing demonstrating that it was not authorized to do business in Texas, has no registered agent for the service of process in Texas, it doesn't have an office or other facilities, any real property, a bank account, any telephone listing in Texas, it does not recruit employees in Texas, it has no Texas distributors for its products, and it doesn't control the research performed by Texas entities that receive biological materials from ATCC.

The framework for establishing personal jurisdiction over a specially appearing nonresident defendant is well established in the decisions of this court, and in particular the Schlobaum(?) decision regarding royal exchange decision, CSR v. Lincoln(?) all enunciate the principles. The Texas Long Arm statute reaches as far as the due process clause that the US constitution permits. The critical test for general personal jurisdiction is the purposeful availment test set out in the US SC's decision in Burger King and reiterated in each of the three Texas SC decisions that I have referenced.

The constitutional touchstone of this determination is whether the defendant purposefully established minimum contacts in the forum state. The minimum contacts inquiry asks whether the nonresident defendant purposefully avails itself of the privilege of conducting business, thereby invoking the benefits and protections of the laws of the forum state.

There is language in the cases that discusses the concept of foreseeability. And the CA below seem to focus on foreseeability in suggesting that ATCC because it had numerous sales to Texas could have foreseen the possibility of being sued in Texas on an action that did not arise here. But all the cases link the concept of foreseeability to the governing purposeful availment standard. Contacts with a forum state are foreseeable precisely because the nonresident defendant directs his activities to the forum state. Here the CA uncoupled the foreseeability standard from the purposeful availment test and that's one of the essential bases of its error.

In both the SC's Guardian Royal decision and lower court decisions following that, there is a clear recognition that foreseeability may not be uncoupled from purposeful availment. The only way you can read that test is in the context of purposeful availment. Similarly, the other tests that have been articulated for personal jurisdiction, whether for example a defendant's contacts are random for _____ or attenuated need to be read in light of the governing purposeful availment standard.

HECHT: Would any amount of business ever be determinative by itself, quantitative amount?

SIPE: I don't believe so. Standing by itself without evidence of some intent to direct conduct to the forum state the laws and the prior cases of this court would suggest that is not a purposeful availment. Now I think we could hypothesize that in a case where there was a very high percentage of sales to a particular jurisdiction, a percentage that vastly exceeded the proportion of residents or whoever the purchasers were for the relevant materials, that there might be other facts

suggesting that the defendant had directed its contacts to the forum state.

HECHT: Would one of those facts be the nature of the business? For example, if you were making equipment, rendering services for a particular kind of industry that might naturally be isolated in 2 or 3 or 5 or 8 locations?

SIPE: I don't think the case law gives us much guidance on that. However, I think it's a reasonable inference that if a particular state had a very strong association with a particular commercial activity and the defendant's activities focused strongly on that particular activity, one might want to delve into the facts more thoroughly. And I believe in that circumstance, for example, if the plaintiff had alleged, and this goes to the burden issue, that a particular defendant focused its commercial activities on a particular sector and the forum state also emphasized that particular sector, the allegation might be that the defendant had intended to focus its activities there. And there is an instance where if the plaintiff had so alleged, the defendant would have a burden I believe under the decisions of this court to respond with evidence denying that allegation.

All the cases that we've cited in our briefs and all the cases of this court and with the exception of the CA below in one or two decisions that it's followed every other case that we have found indicate this burden of mitigation is only a burden to address and negate the jurisdictional facts as alleged by the plaintiff. It's not a burden to mitigate all conceivable bases of jurisdiction.

BAKER: Would you tell me how you think the CA actually applied what they said was the burden to negate all possible grounds and whether that application reaches that level or whether it makes the level that Siskind and the other cases say would just negate all grounds of personal jurisdiction?

SIPE: I think there are several ways in which the CA imposed this unreasonable burden on ATCC and relied on it in this case. For example, the CA faulted ATCC for failing to offer proof demonstrating that no Texas residents requested or were provided with ATCC's applied science services or newsletters and manuals. But there was no allegation in the record from plaintiff that ATCC had done so. Similarly, the CA repeatedly insisted that ATCC should have offered affirmative proof of its contacts with other jurisdictions to satisfy its burden.

And in the matter of ATCC's limited contracts with Texas defendants, the CA faulted ATCC for failing affirmatively to show that there was a choice of law provision indicating the contract would be adjudicated under the laws of another state. Those instances of imposition of burden seem to us to have been decisive elements in the court's reasoning.

The other decisive element in the court's reasoning, and this is the bedrock fact that the CA referred to in its rehearing decision, is the quantity and volume of sales that ATCC made to Texas. There is evidence in the record of sales to Texas over an 18-month period that represented approximately 3.5% of ATCC's worldwide sales, and there is evidence that these sales

were on a continuing basis over time. However, the courts have made clear that the test is not the quantity and volume of sales. The test is the quality and nature of the sales, and that is to be determined by looking back to indications of the defendant's intent to establish contacts with the forum state. Here there is no indication that ATCC structured its sales so as to reach out to Texas. It had no specific advertisements addressed to Texas residents. It has no sales force here. It structured its sales so they were all consummated FOB Rockville, Maryland...

BAKER: But your opponent says that you allege that but there was never any proof that that actually was the way you sold it.

SIPE: The briefs and the CA's decision are very clear on this. The CA found that ATCC made its sales FOB Rockville, Maryland. The respondents in their briefs below have repeatedly asserted that the CA correctly stated the facts in this case.

BAKER: But they complained that the only proof was an affidavit by one of your employees that said that's the way we sell it, but there was nothing to support that.

SIPE: There is additional proof in the record. There are two affidavits. The affidavit of Mr. Walden and the affidavit of Mr. Price. Both assert that the sales are FOB Rockville. And Mr. Walden was deposed at length by the plaintiff's below. Ex. 6 to his deposition which is in the record, is an excerpt of ATCC's catalog which states on the cover in the lower left hand corner that sales are FOB Rockville by a carrier of ATCC's choice.

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RESPONDENT

LEE: I would like to first discuss jurisdiction. Second, I would like to talk about Justice Hecht's question in terms of is there any amount of business that can be done by an out-of-state company that confers general jurisdiction without more(?). And then I would like to address Justice Baker's question concerning what did the CA's do in this case that has ATCC so upset.

With regard to jurisdiction. The two items that are being suggested to the court confers jurisdiction over this appeal is because there is a conflict with the Siskind case, and because there is a dissent. With respect to the conflict. That's not a jurisdictional conflict. Siskind is a case that jurisdiction of the specially accepting defendant was held by the lower court and affirmed by the courts all the way through. It gets to the same result that the CA did in this case.

Siskind is a case that doesn't even talk about general jurisdiction. Siskind is a 1982 case and it relies on Uanker(?) v. Bert. It's not on the same facts. It's not discussing the same law. It is simply not a jurisdictional conflict sufficient to concur jurisdiction on this _____.

BAKER: But isn't there complaint about the conflict based on the legal proposition of the burden of proof? Siskind says we recognize that it was incumbent upon these individuals to

negate all bases of personal jurisdiction. The CA in this case said the burden of proof to negate all possible grounds for personal jurisdiction. Would you agree or disagree that those are not the same statements?

LEE: I would agree that the same words are not being used. I do not think that the CA in this case is suggesting a modification or a change of the traditional Texas...

BAKER: Well but his argument is what this statement really means is negate all bases of personal jurisdiction that the plaintiff alleges to exist that would lead a court to deny a special appearance. And all possible grounds for personal jurisdiction could lead you to a conclusion that whatever there may be out there you are supposed to require them to negate them all whether pled or not.

LEE: And certainly the respondents do not contend that that is the effect of the CA's decision.

BAKER: I understand that. But they are just saying, they've stated a improper burden of proof which conflicts with Siskind, and that's why we have jurisdiction.

LEE: But I think the only way that you get there is if you read the CA's opinion to say something that is clearly, or at least it seems to us to be clear, that it is not saying. The CA is not saying that the burden is on ATCC to deal with issues that are raised by no party at the special appearance hearing. What the CA is saying in my judgment is that if an issue is raised at the evidentiary hearing on the special appearance, then the burden is upon the specially appearing party to negate it.

BAKER: Well are you suggesting then we should be able to glean from what they said and how they reached their conclusion whether they followed Siskind or what they said? In other words if they only dealt with things that you pleaded. And if we find that they went further as is suggested by the comparative jurisdiction dissent, or whatever you want to call it, that that then would be a conflict?

LEE: I certainly think that if the majority of the court of civil appeals predicates its opinion on some sort of comparative jurisdiction concept, that that probably is a departure from Siskind, because the first person in this case to talk about comparative jurisdiction was Judge O'Connor. Comparative jurisdiction is certainly not a basis that was alleged or argued by either of the parties in the sense that ATCC is talking about it before this court, and in the sense that Justice O'Connor is talking about it in her dissent.

Now it's our position that the CA is doing no such thing. Thus what we see here is straw issues being raised to create an arguable conflict with a standard that we don't believe the CA was even confused about in the least.

BAKER: As I recall there is comments in the CA that it would have been nice if they had produced evidence to show how this 3.5 sales percentage in Texas compared with other jurisdictions. And then we could see by that this was really a substantial contact with the State of Texas. But they didn't do that, so we'll move on and so forth. Those kind of comments.

LEE: Yes. And I do not view those as creating a new or independent burden upon the specially appearing party. What I think the CA was doing, and if you go through the opinion and you look at every instance in which that court is talking about volume of sales to Texas verses whatever is happening in other jurisdictions, you will find it in one of two contexts. One context is comparing this case with other special appearance cases. And in that context the court says a couple of times: yes, it would be good if we knew more about what these numbers mean because that might bring us - saying essentially - that might bring us within the Reyes(?) case or whatever case they happen to be discussing.

As long as we're talking about this concept of comparative jurisdiction, I think it would be helpful if the court is clear on what at least we think the CA was trying to say on the subject. What the evidence before the TC was, is this is a company that manufactures biological agents, does it entirely by mail order, and ships them to 50 states. Of those 50 states...

O'NEILL: Why does it matter what state they ship to if title passes in Maryland?

LEE: The CA, and I think properly says that, where title passes is not irrelevant, but it's not dispositive. For jurisdictional purposes to make title passage the dispositive fact, which is what ATCC would like to see the result in this case, is going to allow mail order operations to immunize themselves from the exercise of general jurisdiction by the simple expedient of saying, we're sending this stuff out FOB. I think that the correct analysis is the one that the court uses. And that is, we'll look at what the title status of the product is. We'll look at what the title status of supplies that the specially appearing defendant buys in the forum state. And we're going to weight that in the mix, but we are not going to make whether or not the product is FOB or not a dispositive kind of point.

BAKER: Are you saying that if ATCC sells FOB in Maryland, but buys FOB in Texas that that cancels out as a dispositive issue?

LEE: I don't think that is what the court is saying at all. I think what the court is saying is we'll look at what they're doing up in Maryland, because it probably is significant with respect to what kinds of efforts are they taking to avoid the jurisdiction of other courts.

O'NEILL: Well if that's where title passes, that doesn't seem - I mean I understand your point of where that could lead you in mail order catalogs and things like that. But let's say this was a store. You come to the store, you pick up the goods there, which is sort of what FOB Maryland implies, that that's where you're going to pick up the goods. Why would that be any different?

LEE: In that set of circumstances, I think the situation is different because the marketing efforts of the sticks and bricks kind of store is designed to attract customers to it for purchases. Whereas, what this defendant is doing is intentionally availing itself of customers in 50 states, and is marketing in an outward fashion, and they are doing about \$500,00 worth of business in Texas in the sense that they are selling to Texas residents. That's where their market is.

HECHT: If comparative jurisdiction doesn't matter has it subjected itself to personal jurisdiction in all 50 states?

LEE: No, I don't think so.

HECHT: Why not?

LEE: The way that the evidence seems to shake out in this case is that this company does business in all 50 states. We do know that. Of the 6 largest states that it does business in, they are in California for about 16% of their market, Maryland which is where they are domiciled for about 10% of their market, and they've got 4 other states, including Texas, all of whom are lurking around in the mid single digits, and then the market share drops off very dramatically. I think that it's a much different case if we're in Wisconsin or Vermont where the profit share from that forum is .1%...

HECHT: But why unless you are comparing it?

LEE: Because what you're looking at is not as much the number of contacts, but the quality and significance of the contacts.

HECHT: You say that, but then when I ask you, you say well if there were this many dollars or this much market share it would matter. And that's what the CA seem to say. We wish we knew this because it would help us decide this case. And if that's true, then there is comparative jurisdiction.

LEE: I think market share kinds of evidence can matter at a special appearance hearing. I think that how much of a profit stream comes out of a jurisdiction can matter. And I guess I was unclear because I do think that if a defendant or the plaintiff as far as that goes would choose to present it, that evidence of what's going on in other jurisdictions can matter. Where I disagree with ATCC is the suggestion that this opinion somehow places a burden upon a specially appearing party to present that kind of evidence.

HECHT: Is there anything about this product that is addressed particularly in Texas or any other jurisdiction?

LEE: No. This is apparently the only source in the US of the kind of products and services that they provide. At least some of their products and services. So of necessity if you're

looking for germs you apparently have to go to ATCC. That really is basically what the underlying lawsuit is all about and hopefully some day somebody will get to discuss those issues.

If you're asking is there anything that ATCC does that is specifically directed at Texas do we have a special product for the Texas market...

HECHT: Like the oil fields.

LEE: Yes. Or brucellosis product. Or something of that effect. The record does not reflect that to be the case, and any reasonable inference drawn from the record would suggest that there isn't anything like that going on except to the extent that Texas is a fairly big market. So perhaps one would infer they might be doing something special for the med center. But nothing directly and very little inferentially suggesting that they are specifically targeting Texas.

I was looking last night to see if I could uncover a similar situation where a party was suggesting that dissent to jurisdiction was conferred by a dissenting judge on a motion for en banc rehearing. And I will confess that I was unable to do that. I don't think that there is any precedent out there at this time addressing the situation. If there is, I have certainly missed it.

O'NEILL: By why shouldn't that be the basis of jurisdiction if you've got a sitting justice who follows a substantive dissent? I mean I might agree if there were just dissent noted, but she actually writes an opinion on the merits. So why should that not be considered for purposes of dissent jurisdiction?

LEE: Because I think that it is important to contain the dissent jurisdiction to the tribunal that is making the decision that is getting reviewed. It would be one thing if a motion en banc had been granted and you had picked up a dissent at that point in time.

BAKER: But our O'Connor case says that the particular judge that's at issue here is part of the court that made the decision and that she has a right to such a dissent as being part of the court even if she doesn't sit on the panel.

LEE: Yes. And I don't think that it is inconsistent to say that there is that right but that dissent from a completely different procedural question is not a jurisdiction producing dissent.

PHILLIPS: She disagrees on question of law.

LEE: I agree. It would seem to me that the purpose of the statute is to focus on that part of the court that's making the decision that's going to be reviewed. The practical effect, and perhaps this is not a concern for the court, but the practical effect of saying that a dissent to a motion for rehearing en banc confers jurisdiction to this court is that everybody will always file the en banc rehearing in hopes of picking up a dissent and thus getting a jurisdictional free ride.

BAKER: Well isn't that the whole purpose of asking for an en banc? You hope if you get 9 people looking at it instead of 3 that you might get a change. And so if you're a judge that's committed to a view point on a question of law, that case says you have the right to dissent and state the reason why you disagree.

LEE: Yes.

BAKER: So that there seems to me to be a disagreement on this court as to an issue of material law to the disposition of this case.

LEE: And I do not disagree with that. What I would submit is that the purpose of the jurisdictional statute is to be looking at the decision of the court or part of the court that is making the decision this court is going to review so that it seems to me like there is a difference between drawing a dissent on an en banc rehearing. And you're certainly right. The reason the lawyers file for en banc rehearings in the unusual circumstances that they do in Texas appellate courts is to try to get the panel decision turned around. But it doesn't seem to me like you should encourage them to be filing those motions for the purpose of gathering a dissent on the denial of the motion.

O'NEILL: Well what I'm curious about is this becomes the opinion of the 1st CA, and it binds the court in future cases does it not?

LEE: Correct.

O'NEILL: Well then why would not the dissent on a question material in the case not give us dissent jurisdiction if it is the opinion of the court?

LEE: The decision the court is making that attracts the dissent is to not hear...

O'NEILL: I understand the distinction. I don't understand the difference. You've got a substantive dissent on a point of law, and this 3-judge panel opinion binds the court and is the court's decision. So I understand the procedural difference, but substantively I don't understand why it should be treated any differently. And if Judge O'Connor is going to be bound by this decision in the panel she sits on, I don't understand why her dissent on this point of law would be...

LEE: If she is not sitting on the panel that's deciding the case, she should not be the one who is triggering this court's jurisdiction to review that panel decision. That would be my response.

O'NEILL: And my response is, I don't understand why if she is bound by that panel's decision in later cases.

LEE: Because she did not sit on the panel to begin with.

OWEN: But she can't dissent in the future cases - if she's truly bound the next time the issue comes up she can't dissent?

LEE: She has to follow the law. It is impurically not true that she can't dissent as CA judges do dissent...

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REBUTTAL

SIPE: I'm afraid I wasn't very helpful on the initial jurisdictional question posed by J. Phillips. I had my mind full of other jurisdictional matters. I would note that the respondents below did not challenge our assertion of jurisdiction based on the code provision referred to by J. Phillips...

JEFFERSON: We can have jurisdiction simply because they didn't make the _____?

SIPE: No. My point was simply that I wish we could have been more helpful to the court and if they had brought the issue before the court and briefed it, we obviously would have replied. And we would do so now if the court would like us to take a look at that issue and request further briefing. But I don't think it's necessary based on the literal language of the statute, and also the other grounds of jurisdiction that we have alleged.

On the question of whether the CA did in fact impose a different burden standard below, I think the answer is clear. If you read their decision carefully they say the specially appearing defendant has the burden of proving all possible (that's the key word that's in there) bases of jurisdiction. And it goes on to refer to possible bases of jurisdiction that have not been alleged by the plaintiff below. That is a departure from the law of this court. The word 'possible' appears only in one case. Also in a 1st CA decision, the Garner case. And if you go back and look at Garner, they cite to this court's decision in Kawasaki when they use the word possible. But there's nothing in the Kawasaki decision. That standard of negating all possible jurisdictional facts is a new standard, and I submit that given the number of special appearances that you have in the Texas courts, it's important to straighten out this issue so that other CA's and TC's are not misled by the decision below.

O'NEILL: Could a mail order company escape liability or jurisdiction in any of the 50 states simply by making a delivery FOB in its home state?

SIPE: I think that's similar to the question I tried to respond to earlier from J. Hecht. And I believe the answer is without more, yes. If that's the only evidence in the record that you've made sales to the forum in question, but the sales have been structured FOB, then there would be no basis for jurisdiction because there would be no indication of purposeful availment.

BAKER: Is that a statement then in your view that if that's the only evidence then there

is no personal jurisdiction?

SIPE: Yes. That's our position.

BAKER: But that's not the only evidence at least from the view point of the CA.

SIPE: It's not the only evidence in this case. But clearly the bedrock fact that plaintiffs relied on and the CA relied on was the volume and repetitive nature of ATCC's sales to Texas. Everything else in the record was...

BAKER: The rule which you cited to us earlier is on general jurisdiction whether the defendant purposefully established minimum contacts with the forum state. Minimum suggests in some respects at least as far as the evidence that it doesn't have to be much. But then the second part of the inquiry is does it comport with due process, etc. Which I read the CA saying, well we're looking at these things that happened. This standing alone may not be enough, that standing alone may not be enough, but when put altogether and it is purposefully established minimum contacts with the forum state in their view. Even though it talks about well you could have given us some comparative evidence. But what they state if you put it altogether in their view was purposeful minimum contact.

SIPE: The CA did seem to put it altogether or to use the language of the denial of the rehearing add additional _____ to _____ scale, but you can put a lot of things together and if there's not the glue to hold them together they don't belong together. And clearly in personal jurisdiction cases the glue is the defendant's intent, the intent to reach out and purposefully avail itself with the privilege of business in the forum.

BAKER: Couldn't you make a broad statement here, when you look at all of these facts that they talked about and put them together, that it appears to a rational person that your company intentionally wanted to make sales and make profits out of Texas residents as their customers, and they sent international or national catalogs then advertising what they do, that they came to trade shows, set up booths and told people what they did, and they bought supplies from Texas people and took title in Texas, that that's enough to establish purposeful minimum contacts?

SIPE: I don't think - I'm not going to say no one would ever make that inference, but I don't think that's the plausible inference on the facts of this case. The plausible inference on the facts of this case is that ATCC held itself out to serve the world-wide medical and biological research community from its offices in Rockville. And if people wanted to deal with ATCC, in effect they had to come to Rockville to do it.

BAKER: Well why do you think they chose to go to Texas at least 4 or 5 times and had booths to talk to Texas people in Texas?

SIPE: The evidence of record is clear that those trips were meetings of national

scientific organizations that happened to be in Texas. That's precisely the fortuitous kind of contact with a forum state.

BAKER: Well what if you add the fact that they set up a booth and told people: here's what we sell and here's how you can buy, you just have to send your order to our office in Maryland and we'll be happy to sell to you.

SIPE: I would say that the more logical inference in that circumstance is that ATCC representatives went to Texas to attend a scientific meeting and everybody was setting up booths. That's what happens at these scientific meetings. It's not as if they singled out Texas as a market.