Civil Procedure Notes

Professor Michael Green

9/14/17

1. Asahi Metal Industry Co v. Superior Court (U.S. 1987)
	1. We're finishing up specific jurisdiction today
	2. there is a tug of war between two view about specific in personam in cases with out of state actions that create in state effects
		1. you intend the natural and forseeable consequences of your actions (similar to the Stevens/Brennan approach for power in stream-of-commerce cases in Asahi)
			1. Green thinks that 5 justice in effect agreed on this in Asahi
		2. the theory that specific in personam does not arise unless you more intentionally reach out to the forum state (the O'Connor approach for power in stream-of-commerce cases in Asahi)
			1. 4 justices accepted this in Asahi
	3. In Asahi the question of power is dicta however, because 8 justices agreed that whatever reading of the Int’l Shoe power theory you use (O’Connor or Brennan/Stevens) the case was knocked out by the McGee factors
	4. McIntyre Machinery v. Nicastro is a similar case with 4 justices again in favor of O’Connor’s approach to power in stream-of-commerce cases
	5. 2 justices signed on to Breyer’s concurrence, which is like Brennan/Stevens approach to power in stream-of-commerce cases
		* 1. Breyer thought it wasn’t satisfied in McIntyre because there was not a regular flow of products into NJ
	6. 3 justices signed on to Ginsburg’s dissent
		1. - in cases in which a state court asserts PJ over a foreign defendant (at least in stream of commerce cases) the appropriate contacts should be between the foreign defendant and the united states, not the specific forum state
		2. that was satisfied in McIntyre no matter what standard one used for power (O’Connor or Brennan/Stevens)
		3. In international cases no US state is having its sovereignty violated when the forum state accepts the case
2. Constitutionally, a *federal* court can exert jurisdiction over anyone who contact the united states
	* 1. the reason that federal courts don't have national in personam jurisdiction is a federal rule of civil procedure 4(k)(1)(A)
3. For specific in personam jurisdiction a cause of action has **to arise from or be related to** the contact in the forum state
	1. there are a couple tests
		1. the broad “but for” test, where a cause of action would not have occurred if the contact had not happened
		2. the narrower “evidence” test requires that the contact be useful evidence of (or more likely constitutes) an element of the cause of action.
		3. Green often prefers the “but for” test
	2. Say a NY company ships widgets to every state. It sends a defective widget into Pennsylvania where P buys it. P takes it home to Ohio, where P is injured by it. PJ in Ohio state ct?
		1. NY company did not reach out to *Ohio* in a way that was related to P’s cause of action under either but for or evidence test, even though other widgets were sent to Ohio.
		2. But perhaps one can use an even broader understanding of “related to”…?
			1. P’s cause of action is related to the company’s Ohio contacts in the sense that it send the same type of widgets to Ohio that harmed P
				1. Green previously called this “category jurisdiction” \
				2. since the same kind of widgets were sold in Ohio, some courts used to be pretty aggressive about ruling that there was Specific In Personam Jurisdiction.
			2. A couple months ago SCOTUS killed category jurisdiction.
				1. Bristol-Meyers Squib v. Superior Court of California
				2. Even if there is a nationwide course of conduct of selling product, incl in Cal, that's not enough to give California specific in personal jurisdiction over out of state claims concerning the product
		3. If our Ohio plaintiff is a co plaintiff with another Ohio plaintiff who bought their widget in Ohio, there still is no PJ.
			1. The court must have PJ over every cause of action (this is assumed, but has not been litigated before SCOTUS)
				1. Constitutionally, just appearing before the court allows general personal jurisdiction under Pennoyer

that may still be good law – we don’t know

* + - * 1. Thus if the defendant appears for one cause of action, then the court should (Green's theory) be allowed to allow PJ for other claims, because they've already “consented” to be there, and the court has PJ *over them*.

again – that was true under Pennoyer (it is why a state does not have to allow special appearances)

one might argue that it is still good law now

this was a missed opportunity in Bristol-Meyers

1. The Internet
	1. Zippo Manufacturing Co. v. Zippo Dot com Inc. (W.D. Pa. 1997)
	2. in Zippo, the courts ruled that PJ was available in PA against a CA website for a trademark action on the basis of internet contacts if the website was active, but not if the website was “passive” – interactive, sometimes yes sometimes no depending upon level of interactivity
		1. An active site sends products to the forum state electronically
		2. a passive site is just information – reader cannot interact
		3. an interactive site is sorta in-between
	3. Zippo dot com was active (gave many PA subscribers access to usenet services) so there was PJ in PA
	4. Green: this works here but it should not be used across the board
2. Jackson v. California Newspapers Partnership
	1. Defamation Case
	2. CNP operated a website which alleged that Bo Jackson was abusing steroids
	3. Bo Jackson sued in Illinois for defamation
	4. CNP's website was operated in California, and the court thought it was passive (with respect with to Illinoisians).
	5. Green thinks that the interactivity of a website is a bad heuristic for determining PJ
	6. The court also looked to *Calder* to determine PJ
	7. In Calder there had been contact to witnesses in the forum state, the story was about an event in the forum state, and it was important to the court that the magazine was intended for publication in the forum state.
	8. In this case there was no contact with people in Illinois, the story was not about anything Illinois related (didn’t described the steroid use in Ill) and the website was primarily intended for Californians, especially because No Illinoisians subscribed to the website.
	9. Maybe don't use *Zippo* with the internet all the time, just use other similar cases. (e.g. if examining a defamation case, look to *Calder*, not Zippo)
	10. We've basically dealt with a lot of problems in PJ that are similar to internet problems before, don't panic, it's a lot more like old law than you might think.
3. General In Personam Jurisdiction over Ccorporations
	1. With human beings Tagging and Domicile both allow General PJ
	2. Int'l Shoe also allows general PJ over corporations (and unincorporated associations)
	3. The standard in Int'l Shoe is substantial, continuous activity in the forum state (e.g. General Motors or Wal-Mart would be subject to GPJ almost everywhere), although at least some of the contacts would have to be current
	4. This gets addressed by *Goodyear Dunlop Tires Operations v. Brown*
	5. A bus accident outside Paris kills two boys, and their parents sue Goodyear Turkey in NC state court
	6. The court held no PJ
		1. No specific PJ because Goodyear Turkey did not reach out to North Carolina in a way that was related to the cause of action
			1. The tire was made in Turkey and malfunctioned in France
			2. Green: maybe category jurisdiction (or using a very broad understanding of “related to”)? Goodyear Turkey shipped (via a distributor) tires to NC but they were not the same type as the one that caused the accident
		2. Most important: no general PJ
			1. The Supreme court changed the standard to where a Corporation can be “fairly regarded as “at home””
			2. Now Wal-Mart is arguably only “at home” in Arkansas (its PPB) and Del (its state of incorporation)
	7. In Daimler Ag v. Bauman the “other shoe drops”
4. Daimler Ag v. Bauman
	1. During the Argentinian Dirty war, a subsidiary of Daimler (MB Arg) kidnapped and killed Argentinian workers in collaboration with Arg government
	2. Bauman sues Daimler in California federal court many years later
	3. Daimler (Owner of Mercedes-Benz) is based out of Germany
	4. Plaintiff probably failed to state a claim
		1. The main action was the Alien Tort Statute
			1. Probably inapplicable to corporations, probably does not create derivative liability (of parent for sub), probably does not apply to torture etc.
	5. nevertheless, the court had to consider Personal Jurisdiction
	6. why is connection with Cal and the 14th Amendment relevant, given that we are in federal court?
		1. Because of FRCP 4(k)(1)(A) – with a few exceptions, a federal district court cannot assert PJ unless a state court in the state where the federal court is located could
	7. No Specific Jurisdiction because Daimler (or MB Arg) is not torturing these people in California
	8. general jurisdiction?
		1. Obviously a bad forum for action
			1. Forum non conveniens: a court can refuse to take a case even though it has PJ because it thinks it is a bad forum (will discuss later)
		2. But why not simply claim (like in Asahi) that whether or not there is power, PJ does not exist because it is unreasonable
			1. *McGee* factors. (Although those have never been brought up in the context of General Jurisdiction)
			2. Sotomayor says that rather than erecting a new theory of general jurisdiction of corps, they should reject this case on the basis of reasonableness
		3. Daimler's connections with California
			1. Daimler has nothing in California, except...
			2. a contract with Mercedes-Benz USA (MBUSA), an independent US based distributor
			3. MBUSA is a New Jersey company, but has a lot of facilities in California, and does a lot of business there
			4. can MBUSA's contacts be imputed to Daimler for the purpose of PJ?
			5. Two theories discussed
				1. Only if the corporations are “alter egos” of each other. (The corporate form is being ignored, the subsidiary is the same company as the larger corporation) (Very hard to satisfy)
				2. agency theory – this is the one used by the 9th Circuit

If the subsidiary acts as the parent's agent then imputation works

In fact the “agency relation” here is broader even than normal agency law - the test appeared to be whether the parent would do what the subsidiary is doing if the subsidiary didn’t

SCOTUS clearly does not like agency test

But does not decide matter

* + - 1. SCOTUS assumes that even if MBUSA were at home in California, and its contacts can be imputed to Daimler, the court still doesn't have PJ,
			2. Daimler still isn't at home in California, even though its subsidiary is.
			3. Daimler is only really “at home” in Germany.
			4. The court meant what they said in Goodyear
			5. Int'l Shoe is not good law anymore w/r/t/ substantial, continuous activity giving a state GPJ over a corporation.
			6. Relevance of Hertz?
				1. Hertz talked about what a corporation’s principle place of business is…
				2. it held the ppb was the nerve center
				3. BUT Hertz is not relevant w/r/t/ “at home” test, because Hertz is only speaking of what a corps PPB is for *SMJ* - 28 USC 1332.
				4. we just look to a corporations “home” – that may be a corp’s verve center or may be its bulk of activity – we just don’t know
				5. Where is a corporation at home?

We don't know, but don't cite Hertz, it only determines the meaning of Principle Place of Business w/r/t/ diversity jurisdiction

* + - * 1. Daimler does reference *Hertz*, but uses a cf. - only by analogy
		1. Generally don't assume that word definitions are globally scoped.
		2. Daimler does say that except in exception cases a corporation is at home only in the state of incorporation and at its principle place of business
		3. “at home” is relative. Even if a corporation has overwhelming presence in a state, if it is more present in another state, no general PJ.
		4. This is kinda ridiculous.
		5. The court was probably worried about ridiculous forum shopping against e.g. Walmart.
		6. This could be legitimate. Imagine being allowed to sue Walmart in basically any state. That would be a lot of procedural power!
		7. Green contends that this is still somewhat problematic