

Fairfax Circuit Court Expands Jurisdiction in Conspiracy Cases

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As a general rule, non-residents cannot be sued in a state unless they have minimum contacts with that state or have "intentional[ly] availed themselves of the benefits of the forum state." In August 2011, a Fairfax Circuit Court Judge entered a ruling greatly expanding the reach of this general rule in the context of conspiracy cases. Fairfax Circuit Court Judge Jonathan C. Thacher overruled the defendants motion to dismiss in *Nathan v. Takeda Pharmaceuticals* by way of an opinion letter entered on August 2, 2011.

The case involved plaintiff Noah Nathan, a Virginia resident, and defendants Takeda Pharmaceuticals America Inc. ("Takeda"), an Illinois company, Cassandra Smith and John Flood, both Illinois residents and Louis Savant, a Pennsylvania resident. Noah Nathan had been employed by Takeda as a sales representative. He sued Takeda as well as Smith, Flood and Savant, all either current or former employees of Takeda, for defamation, breach of contract and common law conspiracy, among other counts. The three individual defendants moved to dismiss for lack of jurisdiction because they were non-residents and did not transact business in Virginia to the extent required for the Commonwealth to exert jurisdiction over a non-resident.

Louis Savant was Takeda's regional sales manager with supervisory authority over "multiple sales territories in Virginia." He routinely exercised his professional authority through phone calls and emails directed to Virginia and on at least one occasion, "traveled to Virginia to conduct a ride along with Plaintiff." The court had no difficulty concluding that Savant had been transacting business in Virginia and was therefore subject to the jurisdiction of the Court.

The remaining two defendants, John Flood and Cassandra Smith, were similarly positioned and raised parallel arguments opposing the court's jurisdiction. Neither Flood nor Smith was a resident of Virginia and the court found that in both cases, their contacts with Virginia were incidental and insufficient to establish personal jurisdiction over them.

Nathan's next argument was that Flood and Smith had caused "a tortious injury in Virginia." As the court pointed out, this requires an allegation that at least one essential act of the alleged tort took place in Virginia. The qualifying acts Nathan identified consisted of allegedly defamatory emails or phone calls sent into Virginia from outside the state. Although this issue has not been considered by the Virginia Supreme Court, Judge Thacher took notice that under Virginia law, "defamatory remarks made by a nonresident over the telephone to a person receiving the call in Virginia are... not acts within the state." The judge cited relevant case law from outside Virginia to support this view and ruled that there was "insufficient factual basis to

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establish personal jurisdiction over Flood or Smith" under this theory.

Next, the court considered whether Flood or Smith had caused tortious injury in Virginia by an act or omission outside the state. Clearly, the allegation of tortious emails or phone calls satisfied the prong of the jurisdiction standard requiring an alleged act causing tortious injury, but when the act in question takes place out of state, then the defendant must either: regularly conduct business in the commonwealth; engage in a persistent course of conduct in the Commonwealth; or derive substantial benefit from goods used or consumed or services rendered in the state. The court concluded that the number, level and persistence of these contacts were not sufficient to meet this standard.

Nathan's final argument was that a sufficient basis for jurisdiction over Flood and Smith was established not through their own contacts with the state, but through the contacts of their alleged co-conspirators, including Louis Savant. Although the Virginia Supreme Court has not addressed this theory of jurisdiction, Judge Thacher noted that "several other courts interpreting Virginia law have recognized the validity of this basis for jurisdiction." On this basis, Judge Thacher denied the defendants' motion to dismiss. He concluded that when the allegations show that the defendants joined in a conspiracy with knowledge that subsequent acts in furtherance of the conspiracy would take place in Virginia, then a sufficient basis for personal jurisdiction over the defendants has been established.

Valid allegations of conspiracy can result in enhanced remedies and the litigation advantages that such remedies entail. For example, under the Virginia Business Conspiracy Statute (Code of Va Section 18.2-499 et seq.), a successful litigant may be entitled to an award of treble damages and attorney's fees. Assuming Judge Thacher's ruling is not overturned on appeal, *Nathan v. Takedamay* result in an enhanced perception that conspiracy allegations lead to litigation advantage with, perhaps, the abuses that sometimes accompany such developments.