Acting as Local Counsel for a California Client?

Beware of *Brown v. Watson*

by MICHELLE M. McCLIMAN

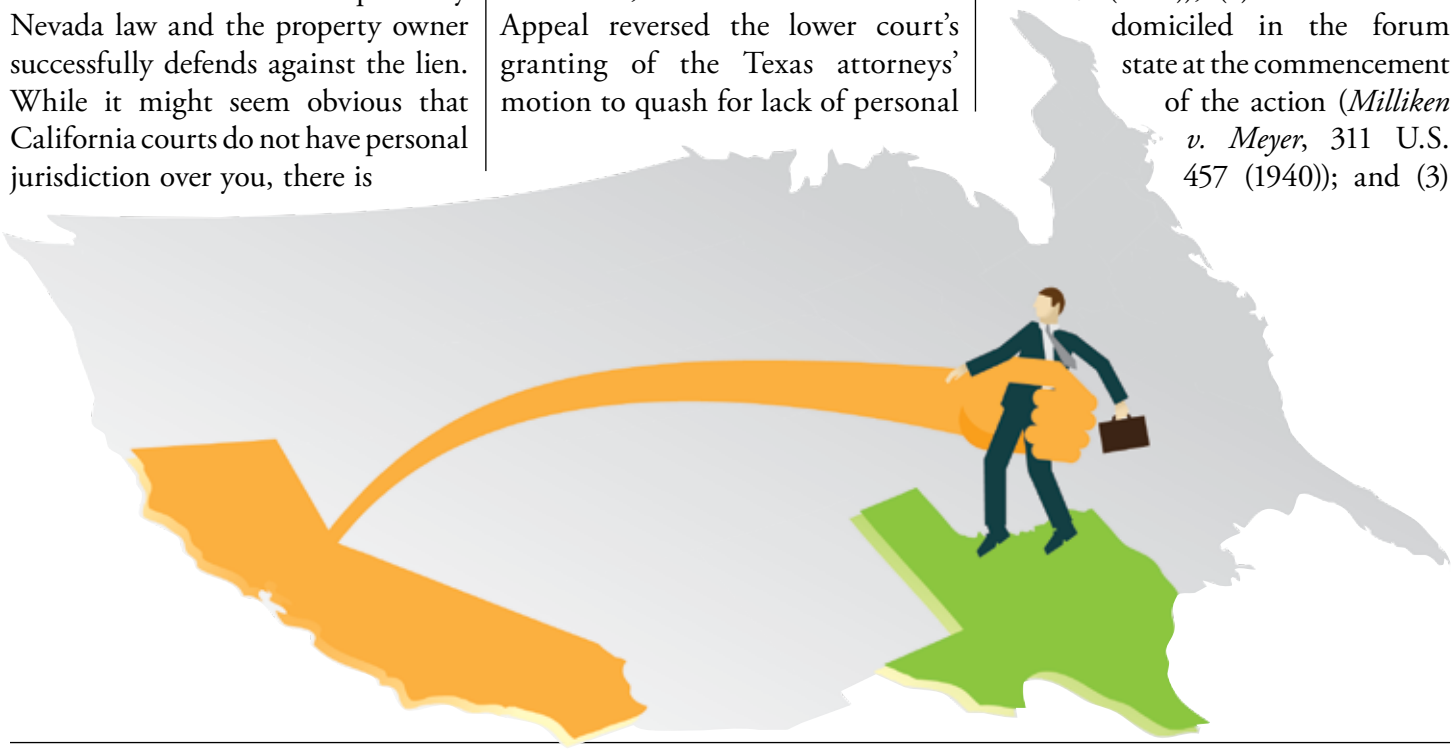
You are an out-of-state attorney who does not advertise or otherwise have a presence in California. You get a call from one of your former law school classmates, John Seamate, an attorney in California who is well-versed in California mechanic's lien law. His client, a California corporation, seeks to obtain a mechanic's lien on a Nevada property on which it performed construction services. Mr. Seamate wants to have you act as local counsel for his client, but he will do most of the drafting of the paperwork. You agree, but you never speak with the client, interacting only with Mr. Seamate. Unfortunately, unbeknownst to you, Mr. Seamate misses a notice deadline required by Nevada law and the property owner successfully defends against the lien. While it might seem obvious that California courts do not have personal jurisdiction over you, there is a case that may give you pause. That case is *Brown v. Watson*, 207 Cal. App. 3d 1306 (1989).

In *Brown*, the pertinent facts were that the plaintiffs hired California attorneys to represent them in a personal injury and wrongful death action arising out of an accident occurring in Texas. The California attorneys associated Texas attorneys to assist in handling plaintiffs' action. The attorneys allegedly failed to file and serve the summons and complaint within the time period provided for by Texas law, and therefore the court dismissed the case for failure to file and serve within the prescribed time frame.

When the plaintiffs sued the attorneys for legal malpractice in California, the California Court of Appeal reversed the lower court's granting of the Texas attorneys' motion to quash for lack of personal jurisdiction. The Court of Appeal based its reversal on a finding that information was relayed through California counsel necessary for the prosecution of the action, and that the Texas attorneys were to be paid through a fee-splitting arrangement with the California attorneys, both sufficient minimum contacts within California to assert jurisdiction over the Texas attorneys. *Brown*, 207 Cal. App. 3d at 1314.

Personal Jurisdiction in California

There are three bases for personal jurisdiction in California: (1) service of the summons on a person physically (and voluntarily) within the forum state (*Burnham v. Superior Court of California,* 495 U.S. 604, 615 (1990)); (2) a defendant is domiciled in the forum state at the commencement of the action (*Milliken v. Meyer*, 311 U.S. 457 (1940)); and (3)



consent or appearance in the action (*Fireman's Fund Ins. Co. v. Sparks Const., Inc.*, 114 Cal. App. 4th 1135, 1145 (2004)). In our set of hypothetical facts, none of these bases for asserting personal jurisdiction over you exist. *See* Cal. Civ. Proc. Code § 418.10(d) (2012). The personal jurisdiction question turns on California's long-arm statute.

California's Long-Arm Statute

California's long-arm statute is the broadest kind of long-arm statute; it confers personal jurisdiction over you only if you have sufficient "minimum contacts" with California. Engaging in commercial activities of a "substantial, continuous, and systematic" basis (*i.e.*, "doing business in California") will subject you to general personal jurisdiction.

Courts consider the following factors to determine whether California may require an out-of-state defendant to defend an action in its courts: (1) the extent to which the lawsuit relates to defendant's activities or contacts with California; (2) the availability of evidence and the location of witnesses; (3) the availability of an alternative forum in which the claim could be litigated; (4) the relative costs and burdens to the parties of bringing or defending the action in California rather than elsewhere; and (5) whether there exists a state policy providing a forum for the particular litigation. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Fisher Governor Co. v. Super. Court*, 53 Cal. 2d 222, 225–26 (1959).

So, what can you do when faced with a legal malpractice action in California based on your acting as local counsel for plaintiff's California attorney? Does *Brown v. Watson* carry the day? While the answer may well be "no," out-of-state defendants should be aware of *Brown* and argue accordingly.

Remember that *Brown* asserted personal jurisdiction over the out-of-state defendants based on contacts with the California client's in-state attorneys. A California plaintiff may attempt to shoehorn jurisdiction over you by imputing your classmate's contacts with California to you. If the court follows *Brown*, then this may be problematic for you. However, in *Edmunds v. Superior Court*, 24 Cal. App. 4th 221 (1994), the court specifically stated that:

> [E]ven where other parties involved in the action have considerable contacts with California, if the nonresident defendant did not evidently intend to conduct business in California or in any other way directly or indirectly gain from California dealings, *the purpose of the other parties cannot be imputed to the nonresident defendant for the purpose of assuming personal jurisdiction over [it].* [citation] Thus, jurisdiction over a nonresident must be based on an analysis of the relationship between *that* defendant and the forum state.

Id. at 235 (emphasis added).

Jurisdiction may be invoked only where the actor committed an out-of-state act intending to cause effects in California . . . .

In *Tri-West Ins. Servs., Inc. v. Seguros Monterrey Aetna, S.A.*, 78 Cal. App. 4th 672, 675–76 (2000), the court found that contacts through an independent third party are insufficient to assert personal jurisdiction over a defendant. Another district court held that "out-of-state legal representation does not establish purposeful availment of the privilege of conducting activities in the forum state, where the law firm is solicited in its home state and takes no affirmative action to promote business within the forum state." *Francis v. United States*, 2008 U.S. Dist. LEXIS 70245, at *19–20 (N.D. Cal. Sept. 16, 2008) (quoting *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)).

While *Brown* appears to remain good law, other courts have criticized it or refused to follow it. In particular, the court in *Sher v. Johnson* criticized the *Brown* holding and refused to follow it. *Sher*, 911 F.2d at 1362. The *Sher* court based its refusal to follow *Brown* on its perception that federal constitutional law is different than California constitutional law with regard to assertion of personal jurisdiction. *Id.* at 1363. "Although we address jurisdiction in this case pursuant to the California personal jurisdiction statute, we are not bound by the decisions of California courts; the ultimate question here is one of federal constitutional law. . . . [Therefore,] we disagree with the holding in *Brown* and decline to follow it." *Id. Cf. R. E. Sanders & Co. v. Lincoln-Richardson*, 108 Cal. App. 3d 71, 78 (1980) (finding mail and telephone communications to California plaintiff in connection with out-of-state investment do not constitute purposeful availment). Later cases and, in particular, the case of *Edmunds v. Superior Court*, 24 Cal. App. 4th 221 (1994) indicate that the courts would likely construe the *Brown* case differently today.

In *Edmunds*, the court reversed a denial of a motion to quash against an out-of-state attorney, Edmunds, who was performing legal services for a California respondent in connection with an out-of-state litigation. There, respondent hired Edmunds with the assistance of his California attorneys to represent respondent in a litigation matter in Hawaii. As part of that representation, Edmunds traveled to and stayed in California for three days to defend respondent in a deposition. While in California and afterwards, Edmunds reviewed documentation and discussed with respondent and California counsel various issues related to respondent's partnership, but not necessarily related to the Hawaii litigation. It was this conduct for which respondent sued Edmunds. Edmunds testified that he believed those issues to be within the purview of California counsel, and that he was only hired to represent respondent in the Hawaii litigation. The *Edmunds* court found these facts insufficient to assert jurisdiction over Edmunds, especially since everything Edmunds did for plaintiff was in his capacity as Hawaii counsel. As such, to the extent that Edmunds' conduct injured plaintiff in California, that was still not a sufficient basis for exercising jurisdiction over Edmunds. *Id.* at 230. "Jurisdiction may be invoked only where the actor committed an out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result." *Goehring v. Super. Court*, 62 Cal. App. 4th 894, 909 (1998) (citations omitted).

In addition to finding no factual support to assert jurisdiction over Edmunds, the *Edmunds* court cited public policy concerns. To wit, the *Edmunds* court said that exercising jurisdiction "over an out-of-state attorney who represents California clients in an out-of-state action, and who" has a "limited degree of contact with California . . . would effectively be to penalize out-of-state attorneys by subjecting them to suit here on a highly attenuated theory." *Edmunds*, 24 Cal. App. 4th at 236 (citations omitted); *see also Crea v. Busby,* 48 Cal. App. 4th 509, 515 (1996) (affirming granting of motion to quash out-of-state attorney where the only contact with California was the maintenance of the attorney's California law license).

Notably, the facts of *Edmunds* show that the out-of-state attorney actually had *more* contacts with California than you, in our hypothetical scenario. Nevertheless, the *Edmunds* court rejected the applicability of *Brown v. Watson*.

So, what are some ways the California courts will assert jurisdiction over an out-of-state attorney? Obviously, if the out-of-state attorney advertises or solicits clients in California, this qualifies. For intellectual property attorneys, sending a letter to a California corporation requiring it to sue or lose the domain name at issue is enough. *See Bancroft & Masters, Inc. v. August National, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000), *overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (*en banc*). Likewise, requiring Mr. Seamate's client to execute a deed of trust to California property in order to secure the attorney's fees owed to you would subject you to personal jurisdiction. *McKesson Corp. v. Arthur Anderson LLP*, 2005 U.S. Dist. LEXIS 34295, at *14–15 (N.D. Cal. Nov. 30, 2005) (*citing Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990)). A California court may also assert jurisdiction over you if you hire a California attorney to perform "legal services governed by California law for California residents seeking recourse before California courts." *Simons v. Steverson*, 88 Cal. App. 4th 693, 697 (2001).

Conclusion

So, when asked to act as local counsel for a California firm, an out-of-state attorney ought to be aware that should things go awry, she may find herself named as a defendant in a California case. Hopefully, she would be able to successfully argue against personal jurisdiction by demonstrating to the court that *Brown* is no longer followed in all such cases.

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