

Steven Ranum
Croker Huck Law Firm
2120 S. 72nd Street #1200
Omaha, NE 68124
402-391-6777
sranum@crokerlaw.com

Personal Jurisdiction in the Business Dispute

In a vast majority of lawsuits filed, no question exists as to whether the forum state has jurisdiction over the defendant. The defendant is often the resident of the forum state, and even if not, the underlying cause of the lawsuit—be it the car accident that occurred in the forum or a title issue over real estate located in the forum—is such that the forum’s jurisdiction over the defendant is intuitive and never questioned.

But one area where personal jurisdiction questions often arise is a business dispute. If plaintiff is in State A, the defendant is in State B, and the contract called for the plaintiff to ship goods from State Y to State Z, deciding whether A, B, Y, or Z is an appropriate forum is not instinctual and needs to be thought through.

This article is meant to help you analyze the issue of whether personal jurisdiction exists in a business dispute. In addition to a refresher on the law of personal jurisdiction, this article will address some key points to help you think about the issue of personal jurisdiction with respect to your case. This article will also touch on the effect of a forum selection clause, an important but often glossed-over aspect of a contract.

Summary of Personal Jurisdiction

Personal jurisdiction is chockful of lawyerly jargon to the extent that the topic can seem quite dense, but personal jurisdiction is essentially a question of fairness: is it fair for the defendant to have to defend a lawsuit in the forum state? For jurisdiction to exist, the defendant must have

enough minimum contacts with the forum state so that the defendant could expect to be sued there.¹ Personal jurisdiction exists in two forms: general or specific.² A court has general jurisdiction over a defendant who has continuous and systematic contacts with a forum state even when the alleged injuries at issue did not arise out of defendant's contacts with the forum.³ Specific jurisdiction exists when a plaintiff's claim arises out of or relates to a defendant's purposeful contacts with the forum, such that there is a substantial connection between the defendant's contacts with the forum state and the operative facts of the litigation.⁴

You can find a very good, highly quotable summary of the law of personal jurisdiction in any of the several personal jurisdiction cases decided by our Nebraska appellate courts,⁵ and the law remains stable in this area.⁶ Given that the issue of personal jurisdiction depends on a defendant's contacts with the forum state, the issue is highly factual in nature, and case specific. With that said, the following is a series of tips that may be helpful for you in thinking about your case and deciding how to proceed.

There are a vast amount of cases to cite as authority in your brief.

Nebraska law confers jurisdiction to the fullest extent permitted by the due process clause of the United States Constitution.⁷ This means that any case analyzing personal jurisdiction under the minimum contacts analysis established by the United States Supreme Court is authority worth citing, even if it is from another jurisdiction. In doing your research, you should go beyond researching just the black letter law and search in multiple jurisdictions (including federal courts) to find cases with similar factual patterns. While the ideal case to find is a case from Nebraska with similar facts (and Nebraska appellate courts have decided numerous personal jurisdiction cases), a case with a similar factual pattern from another jurisdiction that applies a minimum

contacts analysis is more persuasive authority than a case from Nebraska that states the black letter law but is not factually analogous.

If you are questioning whether jurisdiction exists, general jurisdiction is probably lacking.

In order for general jurisdiction to exist, a defendant must have continuous and systematic contacts with the forum state. The United States Supreme Court recently explained the high bar to establish general jurisdiction against a corporate defendant in the case of *Daimler AG v. Bauman*.⁸ In *Daimler*, residents of Argentina sued the German car manufacturer in federal court in California under the Alien Tort Statute and the Torture Victim Act of 1991, based on allegations that a Argentinian subsidiary of Daimler collaborated with state security forces to kidnap and kill workers of the subsidiary.⁹ The plaintiffs argued that the California contacts of Daimler's United States subsidiary was enough to establish personal jurisdiction.¹⁰ The district court disagreed, but the Ninth Circuit Court of Appeals reversed.¹¹

The United States Supreme Court found that no personal jurisdiction existed over Daimler. The Court's opinion explained that continuous and systematic contacts with a forum state are not enough to establish general personal jurisdiction, but rather a corporation's contacts with a state must be so continuous and systematic as to render the company essentially at home in the forum.¹² The Court stated that, absent exceptional circumstances, a corporation is only at home in two places: the state of incorporation and the state where its principal place of business is located.¹³ This would mean that if a Delaware corporation had its headquarters in Georgia, general jurisdiction would likely exist in only Delaware or Georgia.

Using the guidance of the United States Supreme Court, the Nebraska Supreme Court, in *Lanham v. BNSF Ry. Co.*,¹⁴ held that Nebraska did not have general jurisdiction over BNSF despite the railroad's significant presence in Nebraska, because the company was incorporated in

Delaware and headquartered in Texas.¹⁵ Given the guidance in *Daimler* and *Lanham*, the issue of general jurisdiction over a corporate defendant should be clear at the outset and a matter of common sense. If you are questioning whether general jurisdiction exists, it probably does not, and your focus should instead be on analyzing whether specific jurisdiction exists.

The plaintiff's contacts with the forum are not important in the personal jurisdiction analysis.

A specific jurisdiction analysis should focus on the relationship between the defendant, the forum, and the litigation, not the plaintiff's contacts with the forum state. This concept was stressed relatively recently by the United States Supreme Court in the case of *Walden v. Fiore*.¹⁶ In *Walden*, a police officer working at the Atlanta airport seized cash from Nevada residents passing through the Atlanta airport on their way home from a trip to Puerto Rico (the Nevada residents claimed to be professional gamblers).¹⁷ The police officer subsequently helped draft an affidavit to show probable cause for forfeiture of the cash.¹⁸ The Nevada residents eventually got back their funds, but then filed a civil suit against the police officer in federal court in Nevada alleging their Fourth Amendment rights were violated.¹⁹

The United States District Court for Nevada dismissed the lawsuit for lack of personal jurisdiction, but on appeal, the Ninth Circuit Court of Appeals (quite unbelievably) found personal jurisdiction existed, reasoning that the police officer's affidavit was submitted with knowledge that it would affect people who had a significant connection to Nevada.²⁰

In the context of United States Supreme Court cases, the *Walden* case had to be one of the easier cases for the justices to decide, and they unanimously held that the Nevada court lacked personal jurisdiction over the police officer.²¹ In so doing, the Court stressed that the contacts with the forum for specific jurisdiction must be contacts that the defendant creates, not simply contacts

between the plaintiff and the forum.²² Furthermore, the defendant's contacts must be with the forum itself, not simply with persons who happen to reside there.²³ While the *Walden* case does not have any factual similarity to a business dispute, the facts of the case perfectly illustrate the concept that the plaintiff's contacts with the forum state do not matter.

This concept was applied in the business context in *Fastpath, Inc. v. Arbelo Technologies Corp.*,²⁴ a case decided by the Eighth Circuit Court of Appeals following *Walden*. I think the *Fastpath* case is highly instructive for business lawyers. In *Fastpath*, the appellate court affirmed the district court's dismissal for lack of personal jurisdiction of a lawsuit by an Iowa corporation against a California company for breach of a confidentiality agreement.²⁵ Representatives for the plaintiff and defendant met at various trade shows and conferences in Atlanta, Las Vegas, and Houston, and exchanged emails and held a conference call to discuss a potential partnership and agreed to a confidentiality agreement.²⁶ Later, the parties participated in a conference call and webinar together, and representatives from each party attended a trade conference in Seattle.²⁷ But the parties never met in Iowa, the defendant had no employees or offices in Iowa, the defendant never traveled to Iowa for purposes of the agreement, and the defendant's alleged breach occurred outside of Iowa.²⁸

Citing *Walden*, the Eighth Circuit Court of Appeals stated that the plaintiff's contacts with Iowa could not form the basis of personal jurisdiction over the defendant.²⁹ Even though the defendant may have aggressively pursued a business relationship with plaintiff, this alone was of no consequence because the defendant's contacts must be with the forum state itself, not just with a company that happens to reside in the forum.³⁰

I like the *Fastpath* case because it reflects a modern business arrangement—where two parties become familiar with each other at national trade shows and then conduct business over

the phone and through email thereafter. The plaintiff in *Fastpath* could have been located anywhere, and it would not have really changed the relationship between them or the relationship the defendant had with Iowa.

A Nebraska decision that also elaborates this point is *RFD-TV, LLC v. Wildopenwest Finance, LLC*³¹, where the Nebraska Supreme Court held that no personal jurisdiction existed over out-of-state cable companies, when the programming received from the Nebraska plaintiff was produced in Tennessee and the only contacts with plaintiff in Nebraska were occasional communications to discuss and pay invoices.³² All these cases make clear that if you are defending a motion to dismiss for lack of personal jurisdiction, you need to be able to articulate the defendant's contacts with Nebraska, not your client's contacts with Nebraska.

A contract alone is not enough to establish personal jurisdiction.

A defendant having a contract with a resident of the forum is alone not sufficient to establish personal jurisdiction, and for good reason: think of all the one-off consumer transactions you have with out-of-state companies and how unfair it would be if you could be sued in the company's home state. You should view a contract as an indication of the contacts that will matter in personal jurisdiction—the negotiations, the course of dealing, the expectations of the parties—but the contract itself is not sufficient enough to establish the requisite minimum contacts.³³

This is not to say that a multitude of contacts is needed to establish personal jurisdiction over a defendant. In *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Nebraska, Inc.*,³⁴ personal jurisdiction existed over an out-of-state guarantor of a lease of Nebraska real estate.³⁵ This result is similar to the finding that personal jurisdiction existed in *24th & Dodge Limited Partnership v. Commercial National Bank of Chicago*,³⁶ where an out-of-state lender never made the loan, but delivered a loan application to the Nebraska borrower, accepted an application

fee, and had a loan officer travel to Nebraska to evaluate the real estate that would serve as the collateral.³⁷ These two cases suggest that when the defendant's contacts relate to transactions involving Nebraska real estate, even if the defendant's contacts with Nebraska are just a few, the contacts that do exist are sufficient to create jurisdiction.

Then there is the case of *Quality Pork Int'l v. Rupari Food Services, Inc.*,³⁸ a case which remains good law (it was cited by the Nebraska Supreme Court in the 2018 opinion in *Hand Cut Steaks*), but should be viewed somewhat skeptically, as the defendant's contacts with Nebraska seem insufficient to confer jurisdiction, contrary to the Court's opinion. In *Quality Pork*, a Florida defendant orally agreed to pay for orders made by a Texas food distributor with a Nebraska pork producer, who was to then ship the products to Texas.³⁹ The Nebraska Supreme Court reasoned that personal jurisdiction existed over the Florida defendant because it induced the Nebraska company to ship the products, and therefore could expect to be sued in Nebraska.⁴⁰ The decision in *Quality Pork* appears to be out-of-step with more recent specific jurisdiction cases given the Florida company's limited contacts with Nebraska. But it remains good law. If you are a defendant filing a motion to dismiss, you should be prepared to distinguish your case from *Quality Pork*, as it will likely be cited by the plaintiff due to its finding that personal jurisdiction existed even though the defendant's contacts with Nebraska were minimal.

Forum selection clauses should not be overlooked in negotiating a contract.

Forum selection clauses are typically enforceable, under the rationale that the defendant could expect to be sued in a state where the defendant agreed jurisdiction was appropriate.⁴¹ If the forum selection clause is the sole basis for establishing jurisdiction, the validity of a forum selection clause is evaluated under the Model Uniform Choice of Forum Act (the "Forum Act"), Neb. Rev. Stat. § 25-413, et. seq.⁴² The chosen forum will usually be upheld, and you should

assume the clause will be upheld when negotiating a contract. Clients rarely wish to discuss the forum selection clause when working on a contract, but it has real implications when a dispute arises. If you are representing a small business in Nebraska, you should think about whether a forum selection clause that requires disputes to be resolved in New York or California has the practical effect of making the contract unenforceable if breached, due the high cost of litigation in those forums compared with the damages that may be at issue. It is worth pushing back on these clauses. If the clause is a sticking point in negotiations, you might propose to add Nebraska as an acceptable forum along with the other party's chosen forum, such that your client could sue in Nebraska if needed, while accepting the risk of being sued in the other party's chosen state.

But forum selection clauses are not automatically enforced in litigation.

While I recommend assuming a forum selection clause is valid when negotiating a contract, you should not blindly assume the forum selection clause is valid if you are in litigation. If the only basis for personal jurisdiction is the forum selection clause, the clause will be enforced if four factors are met, the most applicable being that Nebraska is a reasonably convenient place for trial.⁴³ In *Ameritas Investment Corp. v. McKinney*,⁴⁴ the Nebraska Supreme Court stated that “the plaintiff's choice of forum should rarely be disturbed,” but said the trial court should consider practical factors that are important in litigation (location of evidence, witnesses, etc.), and whether the trial court would have to deal with difficult choice of law issues and unfamiliar laws.⁴⁵ In *Applied Underwriters Captive Risk Assurance Company, Inc. v. E.M. Pizza, Inc.*,⁴⁶ the Nebraska Court of Appeals, applying essentially the same concepts as stated in *Ameritas*, held that Nebraska was not a reasonably convenient place for trial because a Nebraska court would have to apply California's workers' compensation law, which the Court noted was complex and would be best

administered by a California court.⁴⁷ It appears to be a high bar to have a forum selection clause disregarded, but the enforcement of a forum selection clause is not automatic.

You should challenge the existence of personal jurisdiction if you think it is lacking.

Clients often wish to pursue the most cost-effective means to resolve a dispute and are looking for advice from their attorney on how to accomplish this. You might, therefore, question whether the issue of personal jurisdiction is worth fighting about at all (it can be waived), given that it doesn't actually resolve the merits of the lawsuit. Why spend time and attorney fees on arguing about the forum, just to fight the dispute later in a proper forum?

If cost-effectiveness is the client's goal, the proper way to think about the issue is to assess how likely it is that the plaintiff would sue the defendant in the proper forum if a motion to dismiss is successful. I have found that a successful motion to dismiss is often dispositive of the litigation, in that the plaintiff does not thereafter sue in the proper forum and the dispute is either settled favorably or goes away altogether. To put it another way, the inconvenience upon the plaintiff to fight the dispute in the proper forum was the reason the plaintiff did not sue there in the first place, so the plaintiff could very likely just drop the matter altogether rather than fight in the inconvenient forum after dismissal.

The cost-conscious client should also consider whether the costs associated with fighting in an inconvenient forum, which include the defendant's travel, increased deposition costs for deposing out-of-state witnesses, and getting local counsel up to speed on the dispute, would be greater than simply trying to get the case dismissed on the basis of lack of personal jurisdiction.

You should raise the issue of personal jurisdiction in a motion to dismiss.

Personal jurisdiction needs to be asserted as a defense and can be asserted in a pre-answer motion to dismiss or as a defense in your answer.⁴⁸ But if you are serious about getting the case

dismissed on personal jurisdiction grounds, you will want to raise the issue of personal jurisdiction in a motion to dismiss, in order to isolate the issue at the outset of the litigation and limit any discovery by the plaintiff to the issue of personal jurisdiction.

Conclusion

The words “personal jurisdiction” has no meaning to lay people, but I have found that clients who are sued in a state that they have had little contact with are able to very acutely articulate the fundamental unfairness of it, and take it very seriously. I think it is easy for lawyers to look at personal jurisdiction as a dry procedural issue, due in part to the lawyerly jargon that accompanies it (“minimum contacts”, “general jurisdiction,” etc.). But the concept exists to preserve a defendant’s constitutional right to due process, and at the core of personal jurisdiction lies a simple question of fairness. Hopefully this article helps you to cut through the jargon and think about the issue in a more practical way.

¹ *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb., Inc.*, 298 Neb. 705, 724, 905 N.W.2d 644, 661 (2018).

² *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 820-21 (8th Cir. 2014).

³ *Lanham v. BNSF Ry. Co.*, 305 Neb. 124, 132-33, 939 N.W.2d 363, 370 (2020).

⁴ *Fastpath*, 760 F.3d at 821.

⁵ The above is a brief summary, not an extensive recitation of the black letter law in this area. One aspect not described is that certain factors can be considered in addition to evaluating the defendant’s contacts to determine whether the exercise of jurisdiction would be fair. See *Hand Cut Steaks*, 298 Neb. at 725, 905 N.W.2d at 661-62 (citing these factors). These factors are often not consequential in a decision as to whether personal jurisdiction exists, so a discussion of them was not included in this summary.

⁶ See, e.g., *Lanham*, 305 Neb. at 128-30, 939 N.W.2d at 367-68; *Ameritas Inv. Corp. v. McKinney*, 269 Neb. 564, 570, 694 N.W.2d 191, 199 (2005); *24th & Dodge Ltd. P’ship v. Com. Nat’l Bank*, 243 Neb. 98, 101-02, 497 N.W.2d 386, 389-90 (1993).

⁷ *Hand Cut Steaks*, 298 Neb. at 724, 905 N.W.2d at 660-61.

⁸ 571 U.S. 117 (2014).

⁹ *Daimler*, 571 U.S. at 120.

¹⁰ *Id.*

¹¹ *Id.* at 124-125.

¹² *Id.* at 139.

¹³ *Id.* at 137.

¹⁴ 305 Neb. 124, 939 N.W.2d 363 (2020).

¹⁵ *Lanham*, 305 Neb. at 137-38, 939 N.W.2d at 372-73.

¹⁶ 571 U.S. 277 (2014).

¹⁷ 571 U.S. at 279-80.

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- ¹⁸ *Id.* at 280-81.
- ¹⁹ *Id.* at 281.
- ²⁰ *Id.* at 281-82.
- ²¹ *Id.* at 282.
- ²² *Id.* at 284.
- ²³ *Id.* at 285.
- ²⁴ 760 F.3d 816 (8th Cir. 2014).
- ²⁵ *Fastpath*, 760 F.3d at 819.
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.* at 822.
- ²⁹ *Id.* at 822-23.
- ³⁰ *Id.*
- ³¹ 288 Neb. 318, 849 N.W.2d 107 (2014).
- ³² *RFD-TV*, 288 Neb. at 328, 849 N.W.2d at 116.
- ³³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Crete Carrier Corp. v. Red Food Stores, Inc.*, 254 Neb. 323, 330, 576 N.W.2d 760, 765-66 (1998).
- ³⁴ 298 Neb. 705, 905 N.W.2d 644 (2018).
- ³⁵ *Hand Cut Steaks*, 298 Neb. at 734, 905 N.W.2d at 667.
- ³⁶ 243 Neb. 98, 497 N.W.2d 386 (1993).
- ³⁷ *24th & Dodge Ltd. Partnership v. Commercial Nat'l Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993).
- ³⁸ 267 Neb. 474, 675 N.W.2d 642 (2004).
- ³⁹ *Quality Pork*, 267 Neb. at 477, 675 N.W.2d at 646-47.
- ⁴⁰ *Id.* at 484, 675 N.W.2d at 651-52.
- ⁴¹ *Ameritas Investment Corp. v. McKinney*, 269 Neb. 564, 571, 694 N.W.2d 191, 200 (2005).
- ⁴² *Ameritas*, 269 Neb. at 572, 694 N.W.2d at 200.
- ⁴³ Neb. Rev. Stat. § 25-414.
- ⁴⁴ 269 Neb. 564, 694 N.W.2d 191 (2005).
- ⁴⁵ *Ameritas*, 269 Neb. at 575, 694 N.W.2d at 202.
- ⁴⁶ 26 Neb.App. 906 (2019).
- ⁴⁷ *Applied*, 26 Neb.App. at 919-921.
- ⁴⁸ Neb. Ct. R. of Pldg. § 6-112(b)(2).