9-1983

Calder v. Jones

Lewis F. Powell Jr.

Postpone jurisdiction

Important Q: Whether 1st Amend considerations are relevant in deciding whether personal jurisdiction exists over a non-resident.

Circuits are split on the issue.

s

PRELIMINARY MEMORANDUM

April 15, 1983 Conference
List 1, Sheet 1

No. 82-1401

CALDER, et al. (National Enquirer employees) — App. from Calif. Ct. App., 2d Dist. (Lillie, Spencer, Dalaimer)

v.

JONES, et al. (libel pls.) — State/Civil — Timely

SUMMARY: Appts contend that the court below incorrectly held that it is improper to give weight to the First Amendment in considering claims of personal jurisdiction, and that personal jurisdiction was improperly upheld.

FACTS AND HOLDING BELOW: In 1979, National Enquirer published an allegedly libellous story about appes, Shirley Jones and Marty Ingels. The story stated that appe Ingels "terrorized his staff, cheated stars, outraged advertisers and scandalized

Postpone jurisdiction. The issue is significant & there is much disagreement among CAs on the question whether reporters

Hollywood" and "has one of the most notorious casting couches in all of Hollywood," and that appe Jones "has been driven to drink by his bizarre behavior."

Appt South was the author of the article, appt Calder (who is also president of the Enquirer) was the editor. Neither has ever had an office or place of business in California, or engaged in business there; neither has ever owned assets, obtained employment, or had a bank account in California; in performing their respective services relating to the allegedly libellous article, neither was acting in his personal capacity and neither ever traveled to California. In the three or four years prior to the suit, Calder had visited California only once, for pleasure; South had gone there more than 20 times on business, staying one to two weeks each time. Two residents of California served as sources for the article in question; South communicated with them by telephone several times and had met one of them on earlier trips to California, but South did not leave Florida in researching and writing the article. Calder carried out his editorial duties entirely within Florida.

The TC (LA County Super. Ct.) granted a motion to quash service of process on appts, concluding that the California courts lacked personal jurisdiction over them. National Enquirer itself was also named as a defendant, and there was no suggestion that the California courts lack personal jurisdiction over the Enquirer. As to the individual defendants, though, the situation was different. The most substantial basis for asserting a claim against the individual defendants is that they both knew, or

should have known, that the article would be published and read in appes' home community in California, that appes' personal and business reputations were likely to be substantially damaged by the publication, and that such damage would occur in California. Moreover, unlike the situation in World-wide Volkswagen v. Woodson, 444 U.S. 286 (1980), the location of the damage to appes was not incidental or remote from the business of defendant.

The TC held, however, that further consideration was required because the case involves First Amendment freedom of expression. The test for personal jurisdiction is one of fundamental fairness in light of traditional notions of justice. The TC concluded that, in assessing the fundamental fairness of the proposed assertion of jurisdiction, it should weigh and consider additional factors where freedom of the press is concerned. California may not assert personal jurisdiction beyond the bounds of the U.S. Constitution, and federal court decisions, particularly from the CA5, indicate that First Amendment considerations should be weighed in the balance of fundamental fairness. See, e.g., New York Times v. Connor, 365 F. 2d 567 (CA5 1966); Edwards v. Associated Press, 512 F. 2d 258 (CA5 1975), and Buckley v. N.Y. Post, 373 F. 2d 175 (CA2 1967).

Applying First Amendment considerations the court concluded that the balance favors appts. Whether or not appts are required to appear, appes' rights can be fully satisfied, since the publisher will remain in the action. Appts can still be required to give testimony and engage in discovery. The principal practical

effect of keeping appts in the case would be to facilitate the claim for punitive damages against them.

> "Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness. On the other hand, if reporters and editors are required to appear in remote jurisdictions and defend against punitive damages, it is foreseeable that such actions would have a chilling efect on reporters and editors."

Prudent reporters and editors would have an incentive to avoid truthful but controversial stories. The public would be the loser. Finally, punitive damages might be recovered in any event, in an action brought in defendants' home jurisdiction or some other jurisdiction where they have greater contacts.

The California Court of Appeals reversed. The court rejected the TC's reliance on CA5 cases, noting that other federal courts have reached the opposite conclusion, see, e.g., Church of Scientology v. Adams, 584 F. 2d 893 (CA9 1978); Anselmi v. Denver Post, 552 F.2d 316 (CA10), cert. denied sub nom. Times Mirror Co. v. Anselmi, 432 U.S. 911 (1977). The latter view is the better one: First Amendment considerations are better considered in the context of substantive defenses on the merits than at the initial jurisdictional stage of a defamation proceeding.

The court then examined whether personal jurisdiction was appropriate, absent the First Amendment factors. California clearly does not have general jurisdiction over appts, but California courts may assert jurisdiction over appts with respect to this particular article. The requisite minimum contacts need not arise from physical activity within the state. Intentionally causing tortious injury within the state is generally a suffi-

cient basis for personal jurisdiction. Assuming, for jurisdictional purposes, that the complaint was correct in alleging that Calder and South intended to cause injury, personal jurisdiction was properly asserted. In addition, South had other contacts with California, since he had gathered information for the article during at least one visit to California and several telephone calls.

The court rejected appts' contention that the court could not assert jurisdiction over them because they had performed the acts in their capacities as officer and employee of the corporate defendant, and not as individuals. The court rejected the "fiduciary shield" theory of Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (EDNY 1981), under which jurisdiction must be based on personal acts, and not those on behalf of the corporate entity. The California court regarded the better reasoning as that of Donner v. Tams-Witmark Music Library, 480 F. Supp. 1229 (ED Pa. 1979), where the court concluded that it would be anomalous to allow a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not protect himself from substantive liability in the same way.

Balancing various factors, including availability of evidence, the interest of a state in providing a forum for its residents, the ease of access to another forum, and the extent to which the cause of action arose from appts' local activities, the court concluded that personal jurisdiction was properly asserted in California. The Calif. Supreme Court denied review.

Sharp conflict as to "effects"

CONTENTIONS: APPTS--(1) There is a widening split of authority over whether courts should consider the effect of extraterritorial jurisdiction on the exercise of First Amendment rights, in deciding whether to assert personal jurisdiction. The decision below conflicts with holdings in six circuits and by a state supreme court. The CA5, CA11, and CADC hold that federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel. See, e.g., Cox Enterprises, Inc. v. Holt, 678 F.2d 936, rehearing on other grounds, 691 F.2d 989 (CA11 1982); Edwards v. Assoc. Press, supra; Wolfson v. Houston Post Co., 441 F.2d 735 (CA5 1971); N.Y. Times v. Connor, supra; Margoles v. Johns, 333 F. Supp. 942 (D.D.C. 1971), aff'd, 483 F.2d 1212 (CADC 1973). The CA2 has adopted a similar position, Buckley v. N.Y. Post, supra, 373 F.2d, at 183-84, holding that the First Amendment gives "forum non conveniens special dimensions and constitutional stature in actions for defamation against publishers." District courts in two other circuits have reached the same conclusion, McCabe v. Kevin Jenkins and Assocs., 531 F. Supp. 648 (ED Pa. 1982); Gonzales v. Atlanta Constitution, 4 Media L. Rptr. 2146 (N.D. Ill. 1979); as has the Georgia Supreme Court, Bradlee Management Serv's, Inc. v. Cassells, 249 Ga. 614, 292 S.E.2d 717 (1982). The court did not follow these authorities, though, but instead relied on the contrary rule announced by three other federal courts, Church of Scientology v. Adams, supra (CA9); Anselmi v. Denver Post, supra (CA10); and David v. National Lampoon, 432 F. Supp. 1097 (D.S.C. 1977).

"Line-up"
"Fiduciary Shield"

As the lineup now stands, therefore, four Circuits, DC's in two other Circuits, and one state have held that First Amendment considerations must be given weight; 2 Circuits, a DC in one other Circuit, and California (in this case) have reached the opposite conclusion. (The position of the CA1 is unclear, since it cited with approval from both lines of cases in rejecting personal jurisdiction in Keeton v. Hustler Magazine, 682 F.2d 33 (CA1 1982), cert. granted, No. 82-485 (Jan. 24, 1983).) The conflict is clear and current. This Court should resolve it.

(2) The decision below also conflicts with five CA's and two state courts that have recognized the "fiduciary shield" theory of personal jurisdiction. In Forsythe v. Overmyer, 576 F.2d 779, 783-84 (CA9), cert. denied, 439 U.S. 864 (1978), for example, the CA9 concluded that "a corporate officer who has contact with a forum only with regard to the performance of his offictal duties is not subject to personal jurisdiction in that forum." Other courts reaching the same conclusion include the EDNY, in Bulova Watch, supra; the CA1, in Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (CA1 1980); the CA6; the CA10; and numerous district and state courts. The only authority cited by the court below was Donner v. Tams-Witmark, supra, which in turn relied on two DC decisions in the CA3, but acknowledged that its holding appeared to conflict with decisions from the CA2, CA6, and CA10.

(3) The court's alternative holding that personal jurisdiction can be based on telephone calls into the state is in conflict with holdings of other courts, including the CA9.

no weight

(4) The decision below conflicts with the statement in Hanson v. Denckla, 375 U.S. 235 (1958), that "it is essential in each case that there be some act by which the defendant purposefully avails (him)self of the privilege of conducting activities within the forum State." Moreover, the court below ignored World-wide Volkswagen and Kulko v. Superior Court, 436 U.S. 84 (1978), in holding that the burden for two Florida individuals of defending a multimillion dollar suit in California state court is not a substantial inconvenience to them.

(5) Finally, the issue is an important one, as this Court has recognized by granting review in Keeton v. Hustler Magazine, supra. The present case is even more compelling for review than that one, since here the court has gone beyond the out-of-state publisher to reach its out-of-state employees, and here the First Amendment issue was argued and decided below. The Court should hear this appeal in conjunction with Keeton.

APPES--(1) This case is not within the Court's appellate jurisdiction. The state statute in issue is California's long-arm statute, which provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." The clear language of the statute makes it impossible for it to be either unconstitutional on its face or as applied. The only question is whether the California court properly interpreted the federal Constitution. In Kulko, supra, which dealt with the identical statute, the Court postponed jurisdiction and then treated the action as a petition for certiorari, holding that no appellate jurisdiction

existed. Just as this Court recognized in that case, "The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction." 436 U.S., at 90 n.4.

(2) Treating the appeal as a petition for cert, no substantial federal question warranting review is presented. The case is very different from Keeton, supra, which involves plaintiff's choice of a forum different from her own to avoid a statute of limitations bar, and raises no First Amendment issue.

(3) The First Amendment issue is not a significant issue dividing the courts. The alleged widening conflict is more apparent than real. Leaving out the DC opinions, the only authority for the First Amendment rule urged by appts is the CA5 (along with the post-split CA11). In contrast, the federal authorities on the other side are impressive in their scope and logic (citing, in addition to those opinions noted by appts, three DC opinions between 1968 and 1970). Even if a First Amendment jurisdiction preference were required, appts would be subject to jurisdiction based upon their intentional wrongdoing

(4) Contrary to appts' statement of the issue, the court below held only that one is not automatically insulated from jurisdiction by the fact that he has carried out activities on behalf of his employer. Most of the cases cited by appts for the "fiduciary shield" theory involve long-arm statutes much narrower than California's. The others are simply wrong.

(5) Finally, appts' intentional acts are sufficient to warrant jurisdiction in California.

APPTS' REPLY: (1) In arguing that the conflict is just big, not enormous, appes ignore the Ga. S.Ct., CA2 and CADC opinions.

(2) While appes are right that some of the "fiduciary shield" cases are based on narrower jurisdictional statutes, many of the opinions are based on the Due Process clause.

(3) This Court has appellate jurisdiction. Kulko is inapposite. There, the defendant did not challenge the constitutionality of the statute in the California courts. Here, in contrast, the California long-arm statute was challenged below on the ground that it was unconstitutional as applied to appts In rejecting that argument, the court below upheld the validity of a statute against a challenge that it violates the Constitution, and appellate jurisdiction exists under 28 U.S.C. §1257(2). If appes were right, decisions upholding state statutes challenged as applied could never be heard on appeal if the statutes were drafted so as to be constitutional on their face. But this was rejected as long ago as 1921, in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921); see, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 440-41 (1979).

AMICUS REPORTERS COMM. FOR FREEDOM OF THE PRESS--Amicus supports review, either on appeal or by treating this as a petn, to resolve the conflict on whether First Amendment interest should be considered before a court asserts personal jurisdiction.

DISCUSSION: JURISDICTION--This case is quite similar to Kulko. Both involve lower court interpretations of the same

statute, which on its face states that it extends no farther than the U.S. Constitution. There is one potentially crucial difference, however. In Kulko, the appts apparently never asserted in the California courts that the statute would be unconstitutional if applied to them; they simply argued over the proper interpretation of constitutional standards. Here, however, appts apparently also asserted that, if the statute were construed to allow personal jurisdiction, it would be unconstitutional as applied to them. The lower court thus upheld the application of this statute to appts, in the face of a contention that the statute would be unconstitutional if so applied.

The appeal thus appears to lie within the rule set forth in Dahnke-Walker, supra, and reaffirmed as recently as 1979, in Japan Line, supra, that appellate jurisdiction will lie if a state court upholds the validity of a statute in the face of an as applied constitutional challenge. This case is a bit different from earlier cases in the Dahnke-Walker line, in that the California long-arm statute states on its face that its standards are identical to those of the U.S. Constitution; but I see no reason this should affect the result. Rather than now deciding the jurisdictional question (which requires examination of the pleadings to ascertain that the as applied challenge was properly asserted), though, I recommend postponing jurisdiction. The juris. stmt. would be timely if treated as a petn, and I believe the action warrants review, whether on appeal or by certiorari.

MERITS--(1) There is substantial conflict over whether First Amendment considerations should be taken into account in deciding

whether to assert personal jurisdiction over nonresident defendants. Appts' listing of the courts on each side is accurate. Appes are right that some of the opinions listed by appts are from district courts; but 6 CA's are already in the fray, 3 going one way, 2 another, with the CA2 leaning toward appts' approach. In addition, the Georgia and California courts have adopted opposite sides, and several district courts have reached varying results. Some of the opinions date back over 15 years, but there have been several recent opinions going both ways. Appts thus are correct that there is a current substantial conflict.

The question, moreover, strikes me as a difficult one. There is something to be said for leaving the First Amendment factors for the ruling on the merits, rather than considering them in connection with the personal jurisdiction question. On the other hand, there is much weight to the view that simply being called into a remote forum to defend a libel action may have substantial "chilling" effects on authors and publishers, and that First Amendment concerns therefore should be taken into account at the jurisdictional stage.

This strikes me as a difficult and rather important question, on which the lower courts have split. I therefore believe review is appropriate.

It is possible that the First Amendment argument will arise in connection with Keeton v. Hustler Magazine, cert. granted, No. 82-485 (Jan. 24, 1983). Yet that issue was not discussed by the court below in Keeton or by the parties in connection with the petn for cert. Rather, the parties focussed on the small volume

of sales of Hustler Magazine in N.H. and on the plaintiff's forum-shopping to obtain a more favorable statute of limitations. I therefore see little reason to hold this appeal for Keeton. I recommend postponing jurisdiction, and perhaps setting this case for argument on the same day as Keeton.

(2) Appts are also correct that there is a conflict over whether a corporate officer or employee can be subjected to personal jurisdiction based on his actions in the forum state on behalf of the corporation, or whether jurisdiction must be based only on the individual's actions in his personal capacity. In the context of this case, where it appears that the author had considerable leeway in deciding which topics to cover, and presumably chose to focus on appeals in California, I question whether the fact that he carried out the work on behalf of a corporation should shield him from suit in California (if he is otherwise amenable to personal jurisdiction). Nevertheless, the "fiduciary shield" theory has generated considerable conflict. That theory was discussed and rejected by the court below, and can be considered along with the First Amendment issue on review.

In sum, I recommend postponing jurisdiction and setting this case for plenary review, possibly in conjunction with Keeton v. Hustler Magazine, No. 82-1085.

There are a response, a reply, and an amicus brief.

March 30, 1983 Foote Ops in petn

have greater protection from personal jurisdiction than others. This appears to be a good case in which to consider these personal jurisdiction issues.

Mark

April 15, 1983

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 82-1401

CALDER

vs.

JONES

BRW vote here are complete

Postponed & set at same time as Keeton

	HOLD FOR	ORIG. D	JURISDICTIONAL STATEMENT POST	DIS	APP	MERITS REV	AFF	MOTION G	D	JUDGMENT	NOT VOTING
Burger, Ch. J.				✓							
Brennan, J.				✓							
White, J.			✓								
Marshall, J.				✓							
Blackmun, J.			✓								
Powell, J.			✓								
Rehnquist, J.			✓								
Stevens, J.				✓							
O'Connor, J.			✓								

- REJECT SUGGESTION
- DISMISS APPEAL AS TO INGELS

Caldwell

OK

May 26, 1983 Conference
List 3, Sheet 5

No. 82-1401

CALDER, et al.

v.

JONES, et al.

Suggestion of Mootness as to Appellee Ingels

SUMMARY: Because Appts suggest mootness regarding one of the Appees in this case, Mr. Marty Ingels, appts seek an order dismissing his case as moot and vacating the judgment below as to him alone.

FACTS: This suit was generated by an allegedly libelous story published by the National Enquirer About appees, Shirley Jones and Marty Ingels. In this Court the case seeks to resolve jurisdictional issues, particularly whether First Amendment considerations should be taken into account in deciding whether personal jurisdiction exists over nonresident defendants.

Appts advise in their motion--and Appees confirm-- that the Los Angeles County Superior Court has at the request of Mr. Ingels entered an order dismissing Appe Ingels' claims against all defendants in this litigation.

Agree w/ Joe.

MR

CONTENTIONS: Appts argue succinctly that the dismissal below renders the present appeal moot as to him. Accordingly, they seek an order to that effect vacating judgment below as to him alone and taxing costs as to him, citing United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) and DeFunis v. Odegaard, 416 U.S. 312, 320 (1974).

In response, appees argue that the dismissal below has no effect on this appeal, and that it provides no basis for vacating the judgment of the Calif. Ct. App. or taxing costs against appees. Appees maintain that dismissing as moot and vacating the judgment below is warranted only when the entire case becomes moot. See, e.g., Crowell v. Mader, 444 U.S. 505 (1980); Kremers v. Bartley, 431 U.S. 119, 129 (1977). Hence appees suggest dismissal only as to appe Ingels.

DISCUSSION: Certainly a case does not of necessity become moot when a party is removed either voluntarily or involuntarily from the litigation. Here a controversy remains as regards appe Jones. Therefore the proper question, as Appees have suggested, is whether the appeal of appe Ingels should be dismissed in this Court, not whether the judgment below should be vacated.

I recommend: (1) that the suggestion of mootness be rejected; (2) that the Appeal as to appe Ingels be dismissed since the parties agree on that disposition; (3) that the issue of costs be deferred until completion of plenary review.

There is a response.

5/25/83 Caldwell

PJC

May 26, 1983

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 82-1401

CALDER

vs.

JONES

Suggestion of mootness to appellee Ingels.

(1) Dismiss appeals as to Ingels.
~~(Unanimous)~~
(Dissenting votes: HAB & JPS)

(2) ~~Dismiss~~ Deny motion to vacate judgment

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	SUMMARY	NOT VOTING
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

LFP/djb
8/25/83

No. 82-1681
Calder & South, Appellants, v. Jones & Ingels, Appellees

Memo to File:

This is an important First Amendment case. I believe it is on the summer "Bench Memo" list - not yet received. I have read preliminarily the opinions and briefs, and dictate this merely as a basis for refreshing my recollection.

This is a libel suit brought in California by appellee (the plaintiff) against appellants (the defendants). The plaintiff, Shirley Jones is a TV star, and she and her husband Marty Ingels both are celebrities in Hollywood. The defendants are the editor and president of National Enquirer, a weekly periodical with a national circulation including a substantial paid circulation in California and the L.A. area. The Enquirer is a Florida corporation, its offices are based in Florida, where both of the defendants work and live. The story - apparently a lengthy article - is grossly libelous as to both Jones and her husband unless the accusations "drunkenness, cheating, etc." can be proved to be true.

In addition to the individual defendants, the Enquirer also was sued. This case, however, involves only the individual defendants, and their motion to quash service of process made on them in Florida by mail pursuant to California's "long-arm" statute.

The trial court granted defendants' motion to quash, emphasizing that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." Citing Rebozo v. Washington Post, a CA 5 case.

The California Court of Appeals reversed. It held that there is a conflict as to whether First Amendment considerations should be given weight in determining whether a state "can compel a non-resident defendant to appear and defend an action". (See jurisdictional statement, 4A-5A. In holding that the necessary minimum contacts existed with California, the Court of Appeals applied what is called an "effects" test:

Calif S/Ct found sufficient "contacts"

> "Every state has a natural interest in effects occuring within its territory ... If a defendant commits an act outside the forum state with the intent to cause a tortious effect within the state, the state may exercise jurisdiction ... . The intent to cause tortious injury within the state where the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction."

The defendants are represented by Williams and Connelly, and have filed an excellent brief. Defendants attack the "effects" theory of jurisdiction, arguing that it has been

applied "only by a few state courts, and only to companies that manufacture physically hazardous products and market them generally. When such hazards of physical danger are not present, even the same courts have refused to apply the effects theory."

As would be expected, defendants argue that they were acting solely within the scope of their authority as editor and reporter for the corporation that published the Enquirer, and that they are not personally subject to extraterritorial jurisdiction.

Also, as would be expected, the argument is made that in determining the due process issue under a long-arm statute, a court is entitled to consider "all significant factors and policies, and certainly ... the First Amendment".

A more sweeping argument is made that even if there were no due process clause and no First Amendment, the California long-arm statute - as applied in this case - still would be invalid under the decisions of this Court that have applied the commerce clause to invalidate state laws that unduly burden interstate commerce.

* * *

I have been interrupted several times while dictating this rough memorandum, and have failed to include a good deal of relevant information. The issue of jurisdiction was tried on the basis of the allegations of the complaint and the affidavits of the parties. It was accepted that the article was libelous and also was written with the purpose and intent of injuring the defendants in the State of California where they live.

The parties do debate the extent of "contacts" of the individual defendants with the State of California. In my view, Calder fairly can be said to have had no personal contacts. South, the reporter, made a number of telephone calls to a "stringer" in California, and also had visited California a number of times. I do not think these contacts alone would have conferred in personam jurisdiction unless an "effects" test is accepted by us as the law in a First Amendment case.

The plaintiff's brief also is excellent, and the case may be close. I am inclined to think, however, that the Williams & Connelly brief presents the sounder arguments. If we affirm, any reporter who writes an arguably libelous article could be sued in any state - and perhaps any country - in which the magazine or newspaper circulates. Libel suits, of course, should be maintainable by defamed individuals wherever the newspaper or magazine is circulated. But where the publishing corporation or entity is not merely a "cover" for the individual libel defendants, it seems to me that such suits should be against the corporate or legal entity rather than individuals in its employ.

I need help from my Clerk on this case.

L.F.P.

L.F.P.

82-1401 CALDER v. JONES

Argued 11/8/83

Kester (Petro)

Calder was editor & publisher of Nat. Examiner.

South made no visits to Calif in connection with this story.

(The Publisher has not contacted juris in Calif)

Only personal liability of Petro is at issue here.

(Individual Δs could be liable for jurisdictional damages in Calif)

[WJB suggested we never have said 1st Amend is a juris matter]

Kester argues that policy considerations in determining juris.

Individuals could be sued in Fla – Kester conceded this.

B.R.W. asked if there were no corp. Δs. Kester conceded Δs could be sued.

Also if corp. were bankrupt Kester conceded individuals could be sued.

Calder

Calder was editor & President & ~~[illegible]~~ had sig. involvement in this article. He knew Ps had denied truth of story before article published.

Injury to P greatest in Calif.

Ps did nothing to induce the label. Why, therefore, should it be required to sue in Fla.

Relies on effects doctrine - ~~[illegible]~~ knowing ~~[illegible]~~ label would be ~~[illegible]~~ do injury to Ps in Calif.

Relies on Church of Scientology v. Adams (see Br 20, 33

good point | Stronger case for "effects test" than in a products liab. case. Here the libel was directed against a Calif resident

Verdict { "Calder telephoned Ps & read article ~~[illegible]~~ prior to publication."

82-485 Keeton v. Hustler

82-1401 Calder & South v. Jones

"Effects" doctrine probably applies to libel.

1. Rationale of doctrine requires no distinction between prods. liability & defamation liability.

Where the Δ places the article into the "stream of commerce" with intention that it be read in forum state, there should be no difference.

> An author or publisher should not avoid liability merely by circulating in another state — particularly a commercial publication.

2. First Amend concern should not control.

"no Const. value in false speech" Gertz

The Q is personal juris — not whether 1st amend applies.

First Amend interests are protected by substantive defenses - eg. N.Y.T. & Gertz

3. Fiduciary Shield - employee (reporter)

82-485 Keeton v. Hustler 11/7
82-1401 Calder + Smith v Jones

"Effects" doctrine or test

Products liability: (World-Wide Volkswagen)

Personal juris. can be based on conduct that occurs outside of the State that has effects expected or intended w/in the State.

In Volkswagen: product put in "stream of commerce" with expectation it will be purchased in forum state.

~~Also~~

This is accepted doctrine.

Only argument is over degree of intent or expectation that the action will have an effect in the forum state. Eg. must be intent to serve or reach the "market" there.

The question in both cases:
Does this doctrine extend to defamation actions.

No. 82-1401 Calder v. Jones Conf. 11/11/83

The Chief Justice Affirm

Libel widely circulated in Calif.

South wrote article in Fla. & made telephone calls & received calls.

Calder, Pres & Ed., reviewed article.

Same presumptions as in Hustler apply.

Justice Brennan Aff'm

Agree with Chief.

Both Δs knew article would be circulated in Calif.

Justice White Affirm

Immaterial whether Δs had contacts in Calif.

May know article would be circulated in Calif

Justice Marshall Affirm

Justice Blackmun Affirm.

Agree with "effects" test

Ask HAB → { "Test need not be limited to products lawfully sold" } 4. write

Justice Powell Affirm

(See my notes)

Justice Rehnquist Aff in

Agree

Justice Stevens Aff in

Dennis appellate juris
Grant cert & aff in

Justice O'Connor Aff in

Agree
Effects test OK

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Rehnquist**

Circulated: DEC - 7 1983

Recirculated: _____

Reviewed 12/8 Join

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1401

IAIN CALDER AND JOHN SOUTH, APPELLANTS *v.* SHIRLEY JONES

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[December —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Shirley Jones brought suit in California Superior Court claiming that she had been libeled in an article written and edited by petitioners in Florida. The article was published in a national magazine with a large circulation in California. Petitioners were served with process by mail in Florida and caused special appearances to be entered on their behalf, moving to quash the service of process for lack of personal jurisdiction. The superior court granted the motion on the ground that First Amendment concerns weighed against an assertion of jurisdiction otherwise proper under the Due Process Clause. The California Court of Appeal reversed, rejecting the suggestion that First Amendment considerations enter into the jurisdictional analysis. We now affirm.

Respondent lives and works in California. She and her husband brought this suit against the National Enquirer, Inc., its local distributing company, and petitioners for libel, invasion of privacy, and intentional infliction of emotional harm.[1] The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the

[1] Respondent's husband subsequently filed a voluntary dismissal of his complaint.

next highest State, are sold in California.[1] Respondent's and her husband's claims were based on an article that appeared in the Enquirer's October 9, 1979 issue. Both the Enquirer and the distributing company answered the complaint and made no objection to the jurisdiction of the California court.

Petitioner South is a reporter employed by the Enquirer. He is a resident of Florida, though he frequently travels to California on business.[2] South wrote the first draft of the challenged article, and his byline appeared on it. He did most of his research in Florida, relying on phone calls to sources in California for the information contained in the article.[3] Shortly before publication, South called respondent's home and read to her husband a draft of the article so as to elicit his comments upon it. Aside from his frequent trips and phone calls, South has no other relevant contacts with California.

Petitioner Calder is also a Florida resident. He has been to California only twice—once, on a pleasure trip, prior to the publication of the article and once after to testify in an unrelated trial. Calder is president and editor of the Enquirer. He "oversee[s] just about every function of the Enquirer." J.A., at 24. He reviewed and approved the initial evaluation of the subject of the article and edited it in its final form. He

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[1] A geographic analysis of the total paid circulation for the September 18, 1979 issue of the *Enquirer* showed total sales, national and international, of 5,292,200. Sales in California were 604,431. The State with the next highest total was New York, with 316,911. J.A., at 39–41.

[2] South stated that during a four-year period he visited California more than 20 times. J.A., at 32. A friend estimated that he came to California from 6 to 12 times each year. J.A., at 66.

[3] The superior court found that South made at least one trip to California in connection with the article. South hotly disputes this finding, claiming that an uncontroverted affidavit shows that he never visited California to research the article. Since we do not rely for our holding on the alleged visit, see note 6, *supra*, we find it unnecessary to consider the contention.

also declined to print a retraction requested by respondent. Calder has no other relevant contacts with California.

In considering petitioners' motion to quash service of process, the superior court surmised that the actions of petitioners in Florida, causing injury to respondent in California, would ordinarily be sufficient to support an assertion of jurisdiction over them in California.[3] But the court felt that special solicitude was necessary because of the potential "chilling effect" on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked. The court also noted that respondent's rights could be "fully satisfied" in her suit against the publisher without requiring petitioners to appear as parties. The superior court, therefore, granted the motion.

The California Court of Appeals reversed. 138 Cal. App. 3d 128 (1982). The court agreed that neither petitioner's contacts with California would be sufficient for an assertion of jurisdiction on a cause of action unrelated to those contacts. See *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437 (1952) (permitting general jurisdiction where defendant's contacts with the forum were "continuous and systematic"). But the court concluded that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to petitioner in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.[4] The court rejected the superior court's conclusion

[3] California's "long-arm" statute permits an assertion of jurisdiction over a nonresident defendant whenever permitted by the state and federal Constitutions. Section 410.10 of the California Code of Civil Procedure provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

[4] The Court of Appeals further suggested that petitioner South's investigative activities, including one visit and numerous phone calls to California, formed an independent basis for an assertion of jurisdiction over him in

that First Amendment considerations must be weighed in the scale against jurisdiction.

On petitioners' appeal to this Court, probable jurisdiction was postponed. 51 USLW 3756 (April 18, 1983). We conclude that jurisdiction by appeal does not lie. *Kulko* v. *California*, 436 U. S. 84, 90, and n. 4 (1978).* Treating the jurisdictional statement as a petition for writ of certiorari, as we are authorized to do, 28 U. S. C. § 2103, we hereby grant the petition.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Milliken* v. *Meyer*, 311 U. S. 457, 463.* *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In judging minimum contacts, the proper focus is on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977).

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this action. In light of our approval of the "effects" test employed by the California court, we find it unnecessary to reach this alternate ground.

*Kulko involved an assertion of jurisdiction under the same California statute at issue here. The Court held that the case was improperly brought to the Court as an appeal, since no state statute was "drawn into question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States," 28 U. S. C. § 1257(2). Petitioners attempt to distinguish *Kulko* on the ground that the defendant in that case argued only that the Due Process Clause precluded the exercise of in personam jurisdiction over him, whereas petitioners argued below that the California statute as applied to them would be unconstitutional. We are unpersuaded by this shift in emphasis. The jurisdictional statute construed by the California Court of Appeal provides that the State's jurisdiction is as broad as the Constitution permits. See n. 5, *supra*. As in *Kulko*, the opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction. Under the circumstances, we find an appeal improper regardless of the terminology in which the petitioners couch their jurisdictional defense.

See also *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980). The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction, see *Keeton* v. *Hustler Magazine, Inc.*, *post.*, but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises. See *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.[1] The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen* v. *Woodson*, 444 U. S. 286, 297–298 (1980); Restatement (Second) of Conflicts of Law § 37.

Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor is the ordinary employee able to control his employer's marketing activity. The mere fact that they can "foresee" that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction. *World-Wide Volkswagen* v. *Woodson*, 444 U. S., at 295; *Rush* v. *Savchuk*, 444 U. S., at 328–329. They do not "in effect appoint the [article their] agent for service of process." *World-Wide Volkswagen* v. *Woodson*, 444 U. S., at 296. Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that

[1] The article alleged that respondent drank so heavily as to prevent her from fulfilling her professional obligations.

jurisdiction will be proper over the manufacturer, *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P. 2d 57 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.

Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that was bound to have a devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. *World-Wide Volkswagen v. Woodson*, 444 U. S., at 297; *Kulko v. Superior Court*, 436 U. S. 84, 97–98 (1978); *Shaffer v. Heitner*, 433 U. S. 186, 216 (1977). An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. See *Rush v. Savchuk*, 444 U. S., at 332 ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction."). In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.

each D's contacts must be assessed individually

We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. *Estin* v. *Estin*, 334 U. S. 541, 545 (1948). Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc.* v. *Sullivan*, 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e. g.*, *Herbert* v. *Lando*, 441 U. S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson* v. *Proxmire*, 443 U. S. 111, 120 n. 9 (1979) (implying that no special rules apply for summary judgment).

We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California. The judgment of the California Court of Appeal is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 8, 1983

Re: 82-1401 - Calder v. Jones

Dear Bill:

Please join me.

Respectfully,

Justice Rehnquist

Copies to the Conference

December 8, 1983

82-1401 Calder v. Jones

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1983

Re: 82-1401 Calder v. Jones

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 12, 1983

No. 82-1401 Calder v. Jones

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 14, 1983

Re: No. 82-1401 - Calder v. Jones

Dear Bill:

Please join me.

I must confess that I do not fully understand some of the material on page 5 of the opinion, with its emphasis on the nature and extent of the plaintiff's "contacts" with the forum. I have the same comment with respect to material on page 9 of the Keeton opinion. I suspect these respective observations will breed further litigation. While I would prefer to have the plaintiff's aspect of the jurisdictional question deemphasized, I join the opinion.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1983

Re: 82-1401 - Calder and South v. Jones

Dear Bill,

Please join me.

Sincerely,

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1984

Re: Calder v. Jones, No. 82-1401

Dear Bill:

Please join me. My apologies for postponing release of the Court opinion, but until now I was uncertain whether my separate writing in Helicopteros would affect my decision in this case.

Sincerely,

WJB, Jr.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 19, 1984

Re: No. 82-1401-Calder v. Jones

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

482-1401 Calder v. Jones (Joc)

WHR for the Court 11/14/83
1st draft 12/7/83
2nd draft 12/12/83
3rd draft 2/21/84
Joined by LFP 12/8/83
Joined by JPS 12/8/83
Joined by SOC 12/12/83
Joined by CJ 12/12/83
Joined by HAB 12/14/83
Joined by BRW 12/19/83
Joined by WJB 3/16/84