
First Circuit Clarifies Standards for Establishing Personal Jurisdiction Over Out-of-State Defendants

Defendants not domiciled in a forum generally cannot be subject to jurisdiction unless there is a sufficient relationship between the defendants' conduct relevant to the lawsuit and the forum. The lower courts have been divided, however, on how close that relationship must be to establish jurisdiction. Some courts have required showing a proximate cause relationship between the conduct leading to the alleged injury and the forum, while others have merely required a "but-for" relationship connecting the claim and the forum. Still others have held a causal relationship is required but have held causation depends on the circumstances.

In a recent decision by the United States Court of Appeals for the First Circuit, *Nandjou v. Marriott International, Inc.*, 985 F.3d 135 (1st Cir. 2021),¹ the court considered whether marketing materials for a Canadian hotel mailed directly to a family in Massachusetts could subject the advertisers to jurisdiction in Massachusetts for injuries later suffered by the family at the hotel pool. The court held that it could and, in doing so, found that in some cases plaintiffs did not have to meet the Circuit's traditional "proximate cause" requirement. The decision demonstrates that courts continue to apply a case-by-case approach to deciding this issue.

I. Background: Personal Jurisdiction

In *Walden v. Fiore*, the Supreme Court of the United States clarified and narrowed the circumstances in which an out-of-state defendant can be subjected to jurisdiction for conduct that occurred outside the forum. The Court held that an out-of-state defendant could only be subject to jurisdiction where there was a "relationship among the defendant, the forum, and the litigation" that arises out of contacts that the "defendant himself creates with the forum." 571 U.S. 277, 284 (2014).

While the *Walden* standard requires a link between the defendant, forum and underlying allegations, the Court has yet to clarify what precise level of "relatedness" is necessary. The Court has not established a uniform standard,² leaving the lower courts to determine what the appropriate standard is in a particular case.

¹ Unless otherwise cited, all quotations in this memo are taken from this decision.

² In *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), the Supreme Court held that the plaintiffs' claim must "arise out of or relate to" defendant's contacts with the forum, *id.* at 1025, but did not provide much guidance about what the "relate to" standard requires or when it applies.

The United States Courts of Appeals for the Ninth and Eleventh Circuits have developed a “but-for” test, in which a court cannot exercise jurisdiction over an out-of-state defendant unless that defendant’s forum-related conduct was a “but-for” cause of the plaintiff’s injury.³ The United States Courts of Appeal for the First and Sixth Circuits have held that a plaintiff’s injuries must be “proximately caused” by the defendant’s forum-related conduct for jurisdiction to be proper.⁴ Other federal appellate courts—such as the United States Courts of Appeal for the Second, Eighth, and Tenth Circuits—have recognized that some level of causal connection is required to exercise jurisdiction but have not developed formal standards for determining what meets this criteria.⁵

II. The District Court’s Decision

The First Circuit’s decision in *Marriott* arose out of a drowning accident at The Residence Inn by Marriott in Montreal, Canada. At the time of the incident, the plaintiff, Chimene Mbage Nandjou, resided in Massachusetts with her husband and three children, where they had received at least three direct mailings from Marriott advertising the Montreal hotel. In the spring of 2016, the family booked a trip to Montreal to stay at The Residence Inn, whereupon the plaintiff’s husband and two-year-old child tragically drowned in the hotel’s pool on April 20, 2016.

In September 2018, Nandjou sued Marriott International, Inc. (a Delaware corporation with its principal place of business in Maryland), Marriott Worldwide Corporation (a wholly owned subsidiary of Marriott International that is both incorporated and headquartered in Maryland), and Reluxicorp, Inc. (a Marriott franchisee that owns the Montreal hotel and is a Canadian corporation with its principal place of business in Montreal) in Massachusetts state court. Nandjou brought claims against all three defendants for wrongful death, negligent infliction of emotional distress on her surviving children (who witnessed the incident), and pain and suffering endured by her two-year-old son.

The defendants removed the case to the United States District Court for the District of Massachusetts based on diversity of citizenship and moved to dismiss based on forum non conveniens and lack of personal jurisdiction. The District Court denied the motion, and the defendants moved for reconsideration. On reconsideration, the court held that the defendants’ marketing activity in Massachusetts was sufficient for the exercise of jurisdiction. As to forum non conveniens, however, the court granted the defendants’ motion to dismiss subject to the limitation that the defendants continue to submit to personal jurisdiction in Canada on Nandjou’s claims in a parallel action in that country.

³ See *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (holding that the plaintiff “must show that he would not have suffered an injury ‘but for’ [the defendant’s] forum-related conduct.”); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018) (“In this Circuit, we have held that a tort arise[s] out of or relate[s] to the defendant’s activity in a state only if the activity is a ‘but-for’ cause of the tort.”) (internal citation omitted). It remains to be seen if the Supreme Court’s decision in *Ford* will require those Circuits implementing a causation requirement to reconsider their approach to personal jurisdiction.

⁴ See *Harlow v. Children’s Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (holding that “due process demands something like a ‘proximate cause’ nexus.”) (internal citation omitted); *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507–508 (6th Cir. 2014) (“[P]laintiff’s cause of action must be proximately caused by the defendant’s contacts with the forum state.”).

⁵ See *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (“In this Circuit, the standard applied depends on the relationship among the defendant, the forum, and the litigation.”) (internal citation omitted); *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912–913 (8th Cir. 2012) (“While we have applied the [relatedness] requirement, we have yet to elaborate on its scope.”) (internal citations omitted); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2008) (“As between the remaining but-for and proximate causation tests, we have no need to pick sides today.”). Similarly, the United States Courts of Appeal for the Third and Seventh Circuits have rejected both the but-for and proximate cause tests but have not adopted an alternative, bright-line standard. See *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007) (observing that “our precedents foreclose the application of a single, mechanical test”); *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010) (holding that “neither but-for causation nor proximate causation is a satisfactory guide.”).

III. The First Circuit's Decision

On appeal, the First Circuit overruled the lower court's holding on *forum non conveniens* and affirmed the district court's holding that it had personal jurisdiction over the defendants.⁶

Regarding personal jurisdiction, the court analyzed whether “the claim is sufficiently related to the defendant's contacts with Massachusetts.” The court rejected the defendants' arguments that to the extent they were connected to the drownings, such a connection would have arisen out of failing to prevent the drownings in Canada, and not out of Marriott's mailing of marketing materials into Massachusetts. The mailers, Marriott argued, could only be considered a “but for” cause of the drownings, which would contravene First Circuit precedent establishing proximate cause as the proper standard for a relatedness inquiry.

Citing a prior First Circuit case, *Nowak v. Tak How Investments, Ltd.*, the court held that “strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive.” 94 F.3d 708, 715 (1st Cir. 1996). Therefore, the court held, “even if the Marriott defendants are right that their direct-mail campaign, in and of itself, did not proximately cause the drownings, that fact alone would not end our inquiry with respect to whether that campaign could nonetheless suffice to satisfy the relatedness requirement.”

The court cited two important factors in deciding that the Marriott defendants were subject to jurisdiction. First, the court distinguished the targeted mailers from non-targeted online advertising. The defendants argued that exercising jurisdiction over them would place any hotel at risk of being sued in any forum where a guest books a reservation in response to an online advertisement. However, the court held that the defendants' conduct was not “merely having posted an advertisement for the Canadian hotel on the internet for all the world to see.” Rather, the court found, the defendants “deliberately... cultivated business from Nandjou and her family in Massachusetts by sending direct mail to her home in the Commonwealth that promoted the very hotel in which the drownings occurred and that even described that hotel's pool.”

Second, the court noted there was no dispute that the mailers influenced Nandjou and her family to stay at the hotel. The case was not, the court observed, an “in-forum-state attempt to cultivate the plaintiff's business [that] played no role in the plaintiff's decision to enter into the business relationship that grounds her tort claims.” Rather, the record was clear that “through those materials, the Marriott defendants induced her family to stay at that hotel.”

The court also held that jurisdiction was proper as to Relucicorp, the Canada-based Marriott franchisee. Although the Marriott defendants, and not Relucicorp, sent the marketing materials, the court held that Relucicorp could be legally responsible for the materials under a theory of agency by estoppel. The court found that because Nandjou and her husband acted in reliance on the belief that the mailers were sent by Relucicorp, and the franchisee did not try to disabuse the family of this notion, that contact with Massachusetts could be attributed to Relucicorp for personal jurisdiction purposes.

IV. Implications

In *Marriott*, the First Circuit found an exception to its traditional requirement that a plaintiff must show a “proximate cause” relationship between an out-of-state defendants' conduct leading to the alleged injury and the forum. In doing so, the court demonstrated that the lower courts continue to apply case-by-case standards in

⁶ As to *forum non conveniens*, the Court of Appeals considered whether an adequate alternative forum existed and weighed public and private interest factors. In its opinion, the court observed that private interest factors—including that critical witnesses were located in Massachusetts and the emotional burden that would be placed on the surviving children if forced to return to the country of the incident—weighed in favor of not depriving Nandjou of her chosen forum.

determining whether there is a sufficient relationship to maintain personal jurisdiction over out-of-state defendants. That approach will likely continue as each Circuit grapples with the impact of the Supreme Court's *Ford* decision on their approach to personal jurisdiction.

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If you have questions about the issues addressed in this memorandum, or if you would like a copy of the materials mentioned, please call or email authors Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam S. Mintz (counsel) at 212.701.3981 or amintz@cahill.com; or Benjamin Lash (associate) at 212.701.3312 or blash@cahill.com; or email publications@cahill.com.

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