TERMINATING CALDER: “EFFECTS” BASED JURISDICTION IN THE NINTH CIRCUIT AFTER SCHWARZENEGGER V. FRED MARTIN MOTOR CO.

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I. INTRODUCTION

In Calder v. Jones, the Supreme Court clearly and succinctly\(^1\) determined that personal jurisdiction is appropriate over a defendant whose only contact with the forum state is its intentional actions aimed at and having harmful “effects” in the forum state.\(^2\) Illustrating the extent to which the law of personal jurisdiction had been relaxed from the time of Pennoyer v. Neff\(^3\) and International Shoe Co. v. Washington,\(^4\) Calder also extended the reach of state courts by permitting jurisdiction over out-of-state defendants on the strength of the plaintiffs’ connections with the forum state.\(^5\) Although Calder provided a welcome and much needed infusion of clarity and simplicity into the law of personal jurisdiction by providing a straightforward standard that courts could apply to evaluate assertions of jurisdiction over intentional tortfeasors,\(^6\) and by unifying the purposeful availment, relatedness, and reasonableness inquiries where intentional torts are at issue, many lower courts have been reluctant to embrace the broad jurisdictional ramifications of the decision and have opted instead to interpret the case in ways that narrow the scope of its jurisdictional grant.\(^7\) The result of this reluctance has been the denial of jurisdiction in cases where a proper application of Calder’s holding would suggest that jurisdiction is appropriate,\(^8\) and the continued utilization of complex and unpredictable approaches to determining the propriety of assertions of personal jurisdiction over intentional tortfeasors. More importantly, lower courts’ continuing reluctance to embrace fully the jurisdictional vision of Calder frustrates plaintiffs’ ability to sue in their home states and impedes the effort initiated by the Calder Court to empower states to resolve all disputes arising from harms directed into their territory.

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1. The published version of the Court’s opinion occupies less than four full pages in West’s Supreme Court Reporter.
3. 95 U.S. 714 (1878).
5. Calder, 465 U.S. at 788 (stating that plaintiff’s contacts “may be so manifold as to permit jurisdiction when it would not exist in their absence”).
6. The term “tortfeasor” as used in this Article refers to perpetrators of common law and statutory torts, as well as to those who commit statutory violations akin to torts, e.g. copyright and trademark infringement.
7. See e.g. U.S. v. Swiss American Bank, Ltd., 274 F.3d 610, 624 (1st Cir. 2001) (holding that “Calder’s ‘effects’ test is relevant only to the purposeful availment prong” of a minimum contacts analysis and stating, “whether Calder was ever intended to apply to numerous other torts, such as conversion or breach of contract, is unclear”); Remick v. Manfredy, 238 F.3d 248, 258-59 (3d Cir. 2001) (requiring forum targeting beyond mere targeting of a plaintiff residing within the forum); Carefirst of Md., Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 397-98 (4th Cir. 2003); Brokerwood Intl. (U.S.) v. Cuisine Crostone, Inc, 104 Fed.Appx. 376, 382 (5th Cir. 2004) “‘[T]he effects test is not a substitute for a nonresident’s minimum contacts that demonstrate purposeful availment of the benefits of the forum state.’” Id. (citing Alford v. Moore & Peterson, 117 F.3d 278, 286 (5th Cir. 1997); Bancroft & Masters, Inc. v. Augusta Natl. Inc., 223 F.3d 1082, 1087 (9th Cir. 2000). “Subsequent cases have struggled somewhat with Calder’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.” Id.
8. See e.g. Swiss American Bank, 274 F.3d at 625; Remick, 238 F.3d at 259; Young v. New Haven Advoc., 315 F.3d 256, 262 (4th Cir. 2002).
Last June, in \textit{Schwarzenegger v. Fred Martin Motor Co.}, the United States Court of Appeals for the Ninth Circuit illustrated this phenomenon when, faced with a claim of infringement on actor Arnold Schwarzenegger’s right of publicity, it held that the unauthorized use of the movie star’s image and likeness in an Ohio advertisement was an insufficient basis for subjecting defendant Fred Martin Motor Co. to personal jurisdiction in California courts. By so doing, the Ninth Circuit in \textit{Schwarzenegger} refused to allow jurisdiction under a set of facts that clearly met the standard articulated by the Supreme Court in \textit{Calder}. This error was an outgrowth not only of the Ninth Circuit’s use and misapplication of its own adulterated version of the \textit{Calder} test, but also of the court’s confusion—a confusion shared by many courts—regarding the proper scope of state court jurisdiction in the intentional torts context in the wake of \textit{Calder}.

Part I of this article will discuss the \textit{Calder} opinion and argue that its jurisdictional vision was an expansive one that intended to permit the assertion of jurisdiction by states over all disputes arising out of harms directed into their territory. Part II will review Ninth Circuit cases interpreting and applying the \textit{Calder} decision, revealing a string of decisions that eventually misconstrued the jurisdictional ideal suggested in \textit{Calder}. Part III will discuss the \textit{Schwarzenegger} decision and where the \textit{Schwarzenegger} court’s analysis went wrong, ultimately concluding that the court’s shift of focus to the aim of Fred Martin’s advertisement rather than of the tort allegedly contained within it allowed the court to find the requisite “express aiming” to be lacking. Part IV suggests that the \textit{Schwarzenegger} decision is a manifestation of deeper doctrinal confusion in the Ninth Circuit, arguing that the Ninth Circuit’s iteration of the \textit{Calder} “effects” test used in \textit{Schwarzenegger} is unfaithful to the standard established in \textit{Calder}. The Article concludes with a proposal for a much needed revision to the Ninth Circuit test.

9. 374 F.3d 797, 807 (9th Cir. 2004).