Making Courts Attractive to Plaintiffs

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Daniel M. Klerman & Greg Reilly, *Forum Selling* (December 31, 2014), available at SSRN.

Have you read Supreme Court cases on personal jurisdiction and wondered about the utilitarian basis for restricting the power of a court to assert jurisdiction over the parties in a case? The court opinions have often left me wondering what problem jurisdictional restrictions are designed to address. Finally, someone has provided an answer. Dan Klerman (USC Law School) and Greg Reilly (California Western Law School), in their recent working paper, "Forum Selling," provide a theory of inefficient jurisdiction grabbing by courts. If courts have a tendency to grab jurisdiction excessively under certain conditions, as Klerman and Reilly argue, then society's welfare could be enhanced by restricting their power to assert jurisdiction.

The authors note that limitations on jurisdiction would probably not be necessary if all legal disputes arose out of contracts. The parties to contracts have incentives to choose the courts that optimize the value of their contracts, provided both sides to the contract are reasonably sophisticated. An accurate, fair, and efficient court enhances the joint value of the contract, leaving more surplus to be divided between the parties. To be more specific, sophisticated contract parties will choose the court that maximizes the difference between the joint governance benefits of the contract and the dispute resolution costs. Thus, there is little basis on social welfare grounds for preventing sophisticated parties from forum shopping through contract. The same can be said when the parties jointly agree on the dispute resolution forum, because if a forum gets a reputation for being too one-sided in favor of plaintiffs or defendants, few parties will jointly choose it as a place to resolve disputes.

Klerman and Reilly argue that the matter is different when the plaintiff chooses the forum for a tort or similar action, such as patent infringement. The plaintiff will choose the forum that provides the highest expected rewards for plaintiffs. To be more precise, the plaintiff will choose the forum that offers the greatest difference between the expected judgment—that is, the probability of a judgment multiplied by its value—and the cost of bringing suit. The plaintiff has no reason to take into account the potential losses to the defendant. But the incentive problem does not end there. Because plaintiffs forum shop in a self-interested manner, courts have a corresponding incentive to cater to their tastes. Courts in this context are selling their services, in effect, to plaintiffs. The greater the number of plaintiffs that come to the court, the more prestige and power the court gains—and there may be a boost to the local economy surrounding the court as well. The process of forum shopping by plaintiffs generates "forum selling" by courts.

Once a process of forum shopping and forum selling gets underway in the court system, it can result in distortions in the law. Judicial hellholes can develop, to which corporations find themselves continually dragged to face unsympathetic judges and juries. While the resulting case outcomes may not reflect general trends in the law, they can present a sufficient risk to cause potential defendants to change their conduct, and to act as if the law that operates is the law of the hellhole. Congress and courts may respond to biased decision making by making changes in the law that are unnecessary and sweep too broadly given the localized nature of the problem.

The best example Klerman and Reilly offer of jurisdiction grabbing is the Eastern District of Texas, which

accounted for almost 25 percent of patent infringement filings in 2012 and 2013. The court made itself especially attractive to patentee plaintiffs by adopting procedures that make it easier to get to trial. Another famous example is Madison County, Illinois, which became an especially attractive site for mass tort claims.

Klerman and Reilly do not appear to take the position that variation among courts with respect to similar legal cases is socially undesirable. Some forum shopping may result because of a perception that juries in a particular location may favor a particular type of plaintiff. Instead, Klerman and Reilly refer to incentives of judges to alter procedural rules, or their own interactions with juries, in order to attract plaintiffs.

The net harm created by jurisdiction grabbing has yet to be determined empirically. Still, it is important to have a sound theory for why it happens, and Klerman and Reilly have thankfully provided one.

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