

Personal Jurisdiction in the Internet Age: A Virtual Learning Case Study, Preservation Issues, and a Sockdolager

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The First Circuit Court of Appeals recently confronted the "frontiers of personal jurisdiction in the internet age" in *Chen v. United States Sports Academy Inc.* There, the court was faced with a dilemma: applying personal jurisdiction principles in the context of a national online education provider. In resolving the issue and affirming the trial court's dismissal of the plaintiff's claims, the First Circuit discussed some preservation issues related to the record. United States Sports Academy Inc. (USSA) offers a distance learning program that allows students to complete their coursework through an online learning platform that is "accessible twenty-four hours a day in all fifty states." The Plaintiff Kuan Chen started his work on a doctoral degree in sports management in Alabama, where USSA has its principal place of business. Before finishing his degree program, however, he moved to Massachusetts. At some point thereafter, he sought to resume work on his degree. A disagreement arose between the plaintiff and USSA as to what he needed to do to finish his degree, and he filed suit in Massachusetts. USSA moved to dismiss for want of personal jurisdiction, relying on an affidavit executed by its president. The district court granted the motion, concluding that the plaintiff did not establish a sufficient basis for general or specific jurisdiction. The First Circuit affirmed in a comprehensive, colorful, and highly readable opinion from Judge Selya. He was joined in his opinion by Judge Kayatta and Justice Souter (retired), sitting by designation. The First Circuit agreed with the district court that there was no sufficient basis for either general or specific jurisdiction, holding that "it is nose-on-the-face plain that USSA's general business operations are not sufficiently entrenched in Massachusetts as to render USSA at home there" and that the "sockdolager is that all of USSA's alleged case-specific contacts with Massachusetts - apart from its general maintenance of a website and online learning platform accessible in all fifty states - stem from Chen's unilateral activity." Notwithstanding, the panel was clear that virtual businesses do not automatically get a free pass: "We do not discount the possibility that a corporation's pervasive

virtual presence in a forum may be the linchpin for a finding that its business contacts are so continuous and systematic as to render it at home in the forum - especially since a corporation, like an individual, may have a number of homes. But the mere whiff of a virtual presence will not suffice." Although the court's decision did not solely turn on preservation principles, those principles permeate the analysis. For example, the plaintiff did not offer any evidence to counter the contents of USSA's affidavit. Consequently, the First Circuit held, the district court had the right to treat the factual assertions embedded in the affidavit as undisputed and to rely on those facts when resolving the motion to dismiss. The plaintiff still had "another arrow in his quiver. He argues that the affidavit's validity was 'unchecked' inasmuch as the parties 'had not yet commenced discovery.'" The First Circuit, however, concluded that "[t]his arrow, too, flies wide of the mark. Chen had ample opportunity to move for jurisdictional discovery but failed to do so. A party who chooses not to avail himself of an opportunity for discovery can scarcely be heard to complain when the lack of such discovery thereafter redounds to his detriment." Further, the plaintiff never moved to strike the affidavit, nor did he object to the district court's consideration of it. These omissions proved fatal to his belated attempt to challenge the affidavit on appeal, with the First Circuit explaining: "If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." Neither was the First Circuit swayed by the plaintiff's argument that USSA "affects the Massachusetts economy by drawing students away from Massachusetts educational institutions," as the plaintiff had offered "nothing in the way of proof, apart from his own bare statements, to support these charges." Likewise, the plaintiff had offered no evidence that USSA aimed its informational website specifically at prospective students in Massachusetts, derived significant revenue from Massachusetts-based individuals through its maintenance of this website, or solicited the plaintiff's enrollment or reenrollment through the website while he was in Massachusetts.

Tips:

- The evidentiary record often matters in personal jurisdiction challenges, even when resolved without a formal evidentiary hearing. Here, the First Circuit stressed that point in a case in which the motion was resolved by the prima facie approach without an evidentiary hearing. Under the prima facie approach, an inquiring court asks whether the plaintiff proffered evidence, which, taken at face value, suffices to show all facts essential to personal jurisdiction. A plaintiff cannot rely solely on conclusory averments but must "adduce evidence of specific facts." At the same time, "the court must consider undisputed facts proffered by the defendant that bear on jurisdiction."
- Preservation of the record is not just a technical formality; it is good advocacy. Often, naked arguments are not sufficient. Consider a request for jurisdictional discovery or the use of affidavits to build your record to present or defend a personal jurisdiction issue.

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