ECKERT SEAMANS ATTORNEYS AT LAW

December 2023

Professional Liability Update

How Percentage of Revenue Impacts Analysis of Challenges to Venue

By Donald J. Brooks, Jr., Timothy J. Burke, Brooke A. Scicchitano, & Nermeen Karyaquos

INTRODUCTION

When analyzing venue, Pennsylvania courts employ a quality-quantity analysis. Under this analysis, a "business entity must perform acts in a county of sufficient quality and quantity before venue in that county will be established." *Zampana-Barry v. Donaghue*, 921 A.2d 500, 503-04 (Pa. Super. 2007).

The Superior Court has noted that "[q]uality of acts will be found if an entity performs acts in a county that directly further or are essential to the entity's business objective; incidental acts in the county are not sufficient to meet the quality aspect of the test." *Zampana-Barry*, 921 A.2d at 503-04. In other words, to evaluate the quality of acts, courts are to assess those acts that are directly advancing or are vital to a corporation's main objectives. *Purcell v. Bryn Mawr Hosp.*, 579 A.2d 1282 (Pa. 1990).

In evaluating quantity of acts, courts look for acts "that are sufficiently continuous so as to be considered habitual." *Id*. Historically, Pennsylvania courts considered evidence offered by defendant corporations of revenue in a given venue as compared to total venue to determine whether sufficient quantity of acts existed. Significantly, the Supreme Court of Pennsylvania previously found that a corporation that earned 1% of its total revenue in a given Pennsylvania county evidenced sufficient quantity for venue purposes. *Canter v. Am. Honda Motor Corp*., 31 A.2d 140, 143 (Pa. 1967).

However, this standard was recently challenged in *Hangey v. Husqvarna Professional Products, Inc., et al.,* which yielded a reformed analysis for the quality-quantity test. Through *Hangey*, the Supreme Court of Pennsylvania has explained that revenue percentages shall not necessarily dictate sufficient quantity; rather, sufficient quantity shall be established through evidence regarding **"regularity"** of activities in the venue.

HANGEY V. HUSQVARNA PROFESSIONAL PRODUCTS, INC., ET AL.

Relevant Facts/Procedural History

In 2016, Plaintiff was injured in Wayne County, Pennsylvania by a Husqvarna lawnmower purchased in Bucks County, Pennsylvania. Defendant Husqvarna Professional Products, Inc. (hereinafter "HPP") is a Delaware corporation with its principal place of business in North Carolina. Plaintiff commenced suit against Defendants on March 10, 2017, in Philadelphia County. Thereafter, HPP filed preliminary objections as to the propriety of venue in Philadelphia County.

The trial court found Defendant HPP did not regularly conduct business in Philadelphia County. The court determined that HPP's activities satisfied the quality prong since its business objective was to distribute products to retailers who then sell to consumers, and HPP distributed products to two Philadelphia retailers. However, venue in Philadelphia was nonetheless improper because HPP's activities did not satisfy the quantity prong. The court found that HPP's annual revenue from Philadelphia from 2014 to 2016 ranged between $70,000 to $80,

000, or 0.005%, of its total national revenue. The trial court also rejected Plaintiff's argument to include HPP's revenue from sales of third party 'big box' retailers in Philadelphia. Based on these determinations, the trial court found venue improper in Philadelphia and transferred the action to Bucks County.

The Superior Court reversed, finding that the trial court abused its discretion when it transferred the matter to Bucks County. The Superior Court explained that the essential question in determining quantity was "whether the acts are being 'regularly' performed within the context of the particular business[,]" *id*., quoting *Monaco v. Montgomery Cab Co*., 208 A.2d 252, 256 (Pa. 1965). The Superior Court found that the trial court relied too heavily on the percentage of HPP's business in Philadelphia when determining the quantity prong. The Superior Court held that while HPP was a multi-billion-dollar corporation, it had authorized dealers in Philadelphia and its sales in 2016 were $75,310 which considered together were "sufficiently continuous so as to be considered habitual.'" *Id.,* quoting *Zampana-Barry*, 921 A.2d at 504.

The Supreme Court of Pennsylvania

On appeal, the Supreme Court held that the trial court erred when analyzing the quantity prong and held that venue in Philadelphia County was appropriate. Agreeing with the Superior Court, the Supreme Court found that the trial court erred when it "gave dispositive weight to the percentage of HPP's national revenue attributable to direct sales in Philadelphia County."

The Court expounded that "there is no ambiguity as to why the trial court found the quantity prong unsatisfied: it considered 0.005% too low." However, the Supreme Court found that this was an improper application of the law because the Court explicitly held and reaffirmed that the word "regularly" is the focus, not "principally", and a business can act "regularly" even when those acts are but a minor portion of its total activities. *See Canter*, 231 A.2d at 142 (emphasis added). The Court rejected the argument that the words "continuous and sufficient" required courts to "quantify a company's business in comparison to its total national business."

The Court reasoned that if the analysis was based on sales percentages, then "a small business and a large business could theoretically conduct the exact same amount of business in the same county, and the small business could be subject to venue in the county while the large business is not." Rather than measuring the quantity of acts through sale percentages, the Court reasoned that "business can be measured in days out of the year a business is open to the public, in units of product sold, or in hours billed by employees."

The Court explained that its holding does not mean that courts are never to consider percentages of national revenue. Rather, percentage of national revenue can be considered as one part within a larger context of the case facts. The focus "is whether the acts are being 'regularly' performed within the context of the particular business." *Monaco*, 208 A.2d at 256 (emphasis added). Therefore, the Court affirmed the Superior Court's holding as to the trial court's error in the application of law pertaining to the quantity prong.

The Court then turned its analysis on the quality prong. It reasoned that, year after year, HPP preserved its business relationships and sales with two Philadelphia based dealers which established that HPP's activities were "so continuous and sufficient to be termed general or habitual." *Monaco*, 208 A.2d at 256. Additionally, the Court reemphasized that the word 'regularly' is to be construed by the courts in this analysis, thus even if HPP's products with the Philadelphia dealers made little money, "its business activities still satisfy the quantity prong when . . . consider[ing] the regularity of those activities." While the revenue HPP generated from Philadelphia was not great (in terms of the company's total earnings), the Court concluded HPP was at least trying to generate income in the county and as such it was acting with the Philadelphia dealers to directly further its business objective which meets the requirements of the quality prong.

Ultimately, a business may be found to act regularly within a county while not generating a large revenue from that county. Therefore, the Court held it was improper to transfer venue from Philadelphia to Bucks County as the trial court employed the improper analysis to reach its conclusion.

IMPLICATIONS AND RECOMMENDATIONS

The Supreme Court of Pennsylvania's holding in *Hangey* clarifies how Pennsylvania courts should apply the decades-old quality-quantity test when analyzing a venue challenge. This Court's analysis on the "continuous and sufficient" language rids of any per se rules as to a corporate revenue in a given venue. The Court makes clear that the test rests on "regularity" of business.

Ultimately, the Court's holding aligns with the purpose of the two-pronged test such that a business must be "at home" before being required to defend a suit in the forum. Business defendants who do not want to be subjected to a specific forum will need to show by way of venue challenge, that defending against a matter in a specific venue does not satisfy the quality and quantity prongs even if the revenue produced from said forum is insignificant when compared to its national sales. Instead, following this ruling, courts must analyze a defendant corporation's presence in a forum using a more inclusive contextual and fact specific analysis to reach the appropriate conclusion.

As for healthcare providers, this ruling does not foreclose all avenues to raise via venue challenge since the change to the venue rule that went into effect on January 1, 2023. For example, counsel may still build defenses based on improperly named defendants. Specific to the healthcare context, entities that were not involved in the care and treatment of a patient are often named in order to establish venue. However, these non-involved entities are, often times, improperly named defendants. Building this defense may be an effective way to remove these improperly named parties and to seek proper venue. Our professional liability team at Eckert Seamans will continue to develop our cases based on the individually named defendants, highlighting those named for improper purposes.

ECKERT SEAMANS ATTORNEYS AT LAW

This Professional Liability Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Don Brooks at 215.851.8470 or dbrooks@eckertseamans.com, Tim Burke at 215.851.8413 or tburke@eckertseamans.com, Brooke Scicchitano at 215.851.8455 or bscicchitano@eckertseamans.com, Nermeen Karyaquos at 215.851.8486 or nkaryaquos@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.