

Ninth Circuit Considers Personal Jurisdiction Over Online Businesses

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In the age of e-commerce, many consumer class actions involve goods and services purchased online. Those online purchases have created legal challenges for determining when an online sale may subject a party to personal jurisdiction.

In 2023, the Ninth Circuit Court of Appeals (which covers much of the Western United States, including California) clarified that a defendant who “sells a physical product via an interactive website and causes that product to be delivered to the forum” has “purposefully directed its conduct at the forum” and may be subject to personal jurisdiction there. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1088 (9th Cir. 2023). But the Ninth Circuit soon reached a different result in *Briskin v. Shopify, Inc.*, where it held that an online payment processor was not subject to personal jurisdiction in California simply because it processed payments for goods sold to California residents. 87 F.4th 404, 409 (9th Cir. 2023).

“When a company operates a nationally available e-commerce payment platform and is indifferent to the location of end-users,” the Ninth Circuit reasoned, “the extraction and retention of consumer data, without more, does not subject the defendant to specific jurisdiction in the forum where the online purchase was made.” *Id.* The Ninth Circuit distinguished *Herbal Brands* because it involved the “online sale of physical products.” *Id.* at 422. And even if defendants like Shopify “benefit[] from consumers who are present in California,” the *Briskin* court found that this did not subject those defendants to personal jurisdiction there. *Id.* at 423.

Many payment processors and other online businesses were relieved by this opinion. So long as they do not ship physical products into California and do not expressly target their activities toward California, they could rest easy knowing that they would not be subject to personal jurisdiction in California—one of the world’s largest hotbeds of consumer class action litigation. But those businesses should be aware that the Ninth Circuit granted rehearing en banc in *Briskin* and agreed to reconsider whether online businesses like Shopify could be subject to personal jurisdiction in California. And while it is unclear whether the Ninth Circuit will reach a different result in its en banc opinion, several judges expressed concern during oral argument that Shopify’s position—which the Ninth Circuit initially adopted—would leave consumers without redress in *any* jurisdiction.

Until the Ninth Circuit issues its new opinion, there is no way to know whether online-only businesses like Shopify will be subject to personal jurisdiction in California going forward. The court will want to ensure that those businesses will be subject to personal jurisdiction *somewhere* without subjecting them to personal jurisdiction *everywhere* their websites are accessible. But in the meantime, businesses that operate websites that are accessible to California consumers should remain vigilant. After all, California has some of the strictest consumer privacy laws in the United States, and those laws have led to a proliferation of consumer privacy class actions involving defendants' websites. *Briskin* gave some of those defendants a viable personal jurisdiction defense, but that defense could soon disappear.

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