

## Legal Org. Backs Bid For Review Of 'Lax' Jurisdiction Ruling

By **Kelly Lienhard**

Law360 (December 11, 2023, 4:36 PM EST) -- The Atlantic Legal Foundation has urged the U.S. Supreme Court to overturn a Ninth Circuit decision finding that nationwide shipping was enough to establish jurisdiction in a trademark dispute, telling the high court the ruling "eviscerates" case law intended to avoid forum shopping.

In an amicus brief Friday in support of a petition that a group of Amazon **storefronts filed in November**, the nonprofit legal group said the Supreme Court should step in to resolve a five-circuit split over the jurisdiction question in order to protect due process, establish predictability for online sellers and keep costs low for consumers.


"The Ninth Circuit's lax standard for personal jurisdiction over online sellers creates incentives for even more injustice," the legal nonprofit's brief argues.

According to the Atlantic Legal Foundation, the Ninth Circuit's finding that wellness company Herbal Brands Inc.'s claims that unauthorized resellers on Amazon had sold products to customers in Arizona was enough to establish the Arizona federal court's jurisdiction "obliterates" the Supreme Court's personal jurisdiction principles and allows for forum shopping.

"The warp-speed growth of online sales makes it critical that the court decide how personal jurisdiction principles should apply to online sellers of products and services," the legal foundation said. "This is an ideal case to resolve the entrenched circuit split on this question."

In July, the **Ninth Circuit revived** Herbal Brands' trademark suit, which an Arizona federal court had dismissed over jurisdiction issues, finding that Herbal Brands' claims against allegedly unauthorized online resellers in New York met a jurisdictional standard that pivots on the phrase "expressly aimed."

With the July decision, the Ninth Circuit joined the Second Circuit and the Seventh Circuit in finding that nationwide shipping is sufficient to determine jurisdiction. However, the Fifth Circuit and Eighth Circuit previously found that nationwide shipping is not enough, creating disagreement at the appellate level.

The Atlantic Legal Foundation pointed to a 1984 Supreme Court holding in **Calder v. Jones**  that requires plaintiffs to show "express aiming" at a forum state to establish specific personal jurisdiction — in other words, to prove that the defendants specifically targeted its sales to a certain area.

According to the legal foundation, the Ninth Circuit should have determined whether Arizona was the "focal point" of resellers' conduct under *Calder*. Instead, the foundation's brief argues, the appeals court chose to find that nationwide shipping established jurisdiction, which enables those looking to sue online businesses to choose any state as a forum, taking due process away from online sellers.

"This holding eviscerates the court's carefully calibrated principles governing exercise of personal jurisdiction and enables nationwide forum shopping," the Atlantic Legal Foundation said.

The ruling hurts customers, as well, the foundation said, arguing that online sellers could be unwilling to ship products to areas that put them at risk for hostile litigation. Customers could also face higher prices as a result as online sellers try to maintain their profits, the Atlantic Legal Foundation added.

A group of Amazon storefronts — run by Photoplaza Inc., Goldshop 300 Inc., Goldshop Inc., InStock Goodies Inc., Tzvi Heschel, Shloma Bichler and Lali Dats — told the high court in a Nov. 9 petition that review of the case is necessary to clearly determine when a court can exercise jurisdiction over a nonresident based on nationwide shipping.

The original suit, filed in 2021, accused the seven New York-based Amazon storefronts of selling more than 25,700 Herbal Brands products through two Amazon storefronts without the Arizona-based company's permission.

The Atlantic Legal Foundation said in a press statement that bringing corporate defendants into hostile courts through forum shopping subverts their due process rights.

"Promoting forum shopping by allowing an online seller to be sued in any State to which its products are shipped violates due process and harms consumers," the legal organization said.

Counsel for the resellers, Serge Krimnus of Bochner PLLC, told Law360 on Monday that he is thankful that the Atlantic Legal Foundation filed an amicus brief in support of rehearing the case.

"The brief persuasively explains that the Ninth Circuit's rule, which effectively creates nationwide personal jurisdiction over e-commerce sellers, encourages forum shopping and will harm both sellers and consumers," Krimnus said. "We hope the Supreme Court grants certiorari on this important issue."

Herbal Brands did not immediately respond to a request for comment, and counsel information for Herbal Brands was not immediately available.

The Atlantic Legal Foundation is represented in-house by Lawrence S. Ebner and Hannah S. Marcley.

Photoplaza, Goldshop 300 Inc., Goldshop Inc., InStock Goodies Inc., Tzvi Heschel, Shloma Bichler and Lali Dats are represented by Serge Krimnus, Craig L. Uhrich, Andrew D. Bochner and John A. Rossler of Bochner PLLC.

The case is Photoplaza Inc. et al. v. Herbal Brands Inc., case number 23-504, in the U.S. Supreme Court.

--Editing by Amy French.