A Two-Pronged Test Becomes One

Why the Superior Court's Venue Decision in *Hangey* Departs from Decades of Prior Precedent

By Michael A. Salvati

"Location, location, location." A common threshold dispute in civil litigation involves where in Pennsylvania a case should be heard. The Rules of Civil Procedure delineate the venues in which plaintiffs may file suit and afford defendants the opportunity to challenge the propriety of plaintiffs' choice of forum.

One question that is frequently litigated during these venue disputes is how much business must a corporate defendant do in a particular county to support venue there? The Superior Court significantly relaxed that standard in *Hangey v. Husqvarna Professional Products*, a recent case that is currently on appeal to the Pennsylvania Supreme Court. *Hangey* reached its result by relying on a subtle rewording of the Supreme Court's venue standard that collapsed what had been a two-prong test into one. This article will advocate for the pre-*Hangey* standard and argue that — contra *Hangey* — the percentage of business done by a corporate defendant in the forum county, if small enough, can be dispositive of the issue of venue.

The Legal Framework for Improper Venue

Let's start with the basics. Generally speaking, venue only needs to be proper as to one defendant for venue to be proper for the entire case. If a defendant is a corporation or similar entity, venue will be proper where the defendant has its headquarters, where the cause of action arose, or — the provision at issue in *Hangey* — where the defendant "regularly conducts business."

The Pennsylvania Supreme Court's seminal decision on the issue, *Purcell v. Bryn Mawr Hospital*, explained that the business activities of a corporate defendant must be evaluated for their "quality" and their "quantity." For venue purposes, a quality contact is business activity that is necessary to the existence of the business. As an example, the purpose of a restaurant is to serve food on its premises, whereas the sale of gift certificates is secondary and collateral to the venue analysis.

Relevant to this article, a defendant's business activities must also be evaluated in terms of quantity. The *Purcell* court

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explained that a defendant's business activities in the forum must be both "continuous and sufficient" to satisfy the quantity prong of the venue analysis. For three decades after *Purcell* was decided, the courts of Pennsylvania regularly looked, therefore, to both the frequency and the amount of a defendant's activity. Results varied, given the discretion afforded to the trial court: some cases found that 1-2% of a defendant's business activity was sufficient to constitute "regularly conducting business"; others found that 3% was insufficient. A general rule of thumb was that business activity below 1% was not enough to justify venue in a particular forum, but all seemed to agree that the percentage of a defendant's business was a relevant metric.

Hangey Changes the Quantity Prong of the Standard

In 2021, the Pennsylvania Superior Court turned that analysis on its head in *Hangey v. Husqvarna Professional Products*. The Superior Court in *Hangey* found venue proper in Philadelphia County, despite only one defendant doing 0.005% of its business there, a far lower percentage than any prior decision.

Hangey was a personal injury case in which a Wayne County resident fell from his riding lawnmower and sustained serious injuries. He and his wife filed suit in Philadelphia County and a venue challenge ensued. One of the defendants, Husqvarna Professional Products, whose business activities provided the link to Philadelphia, is a large, multibillion-dollar corporation that conducts business throughout the United States. Of its $1.4 billion dollars in annual sales in 2016, just $75,310 were made to customers in Philadelphia, including a Husqvarna authorized dealer, to whom most of the Philadelphia sales were made. Again, those Philadelphia sales constituted just 0.005% of Husqvarna's total sales for that year. However, because Husqvarna had an authorized dealer in Philadelphia through which many of its sales were made, the Superior Court found that those contacts were "sufficiently continuous" so as to satisfy the quantity prong of the venue test.

Husqvarna also sold an unquantified number of products to big-box retailers, like Home Depot and Sears. In such cases, Husqvarna would send its products to the retailer's distribution center, from which the retailer would send the products to one of its many stores for sale to the ultimate customer. Some of these big-box retail stores were located in Philadelphia, but it was the big-box company, not Husqvarna, that chose the specific store where a given item would be sold. The court expressly declined to consider these indirect Philadelphia sales, finding venue to be proper solely on the basis of the approximately $75,000 of Husqvarna's direct sales in Philadelphia.

As the dissent lamented, "If five one-thousandths of a percent is sufficient to establish quantity, it is difficult to imagine a percentage that is too small." Indeed, the majority opinion in *Hangey* retreated from that long-standing measure of a defendant's business activity, stating that "the percentage of a company's overall business that it conducts in a given county, standing alone, is not meaningful."

Hangey Was Inconsistent With Prior Case Law

This holding from the Superior Court is surprising; in the decades preceding *Hangey*, Pennsylvania courts regularly and expressly considered the percentage of business conducted in the forum county when ruling on venue challenges.

As a case in point, the Superior Court considered a venue challenge made by Villanova University in *Singley v. Flier*. Villanova has its campus in suburban Delaware County, but — at least at the time of *Singley* — offered three graduate-level courses at the Philadelphia Naval Yard and had done so for many years. The Superior Court found this connection insufficient to support venue in Philadelphia because "the quantity of these contacts — three graduate level courses — is lacking when viewed in light of the University's entire academic program." Despite the continuous nature of the courses — offered for many years and presumably meeting one or more times per week, semester after semester — the proportion of those courses to the university's overall catalog was expressly found to be dispositive of the issue.

Cases upon cases may be cited that expressly consider percentages in this manner. In a 2012 decision, *Brennan v. Spohn*, a Philadelphia trial court considered the business activities of a school bus service and synthesized the law as follows: "Appellant's analysis based on the actual number of Philadelphia field trips and the actual hours spent does not hold consistent with current law on venue. Courts have consistently decided issues of venue based on the proportional amount of business done in a county ... While Appellee did, on average, 35 field trips to Philadelphia each year, the percentage of income generated from the trips (approximately 0.2089%) is extremely minimal."In an unpublished decision, the Superior Court approved simply and clearly: "We agree with the trial court's analysis."

How do we square that position with *Hangey*? Recall the Supreme Court's 1990 *Purcell* decision, discussed at the start of this article. *Purcell* defined the quantity prong of the venue test to require that a defendant's business contacts with the forum be both "continuous and sufficient." The *Purcell* court had taken that disjunctive language from the much earlier *Shambe* case, decided by the Pennsylvania Supreme Court in 1927, and it was that disjunctive test that was applied in case after case after case following *Purcell* in 1990.

The *Hangey* decision, though, relied on a slightly different wording of the venue test: Was the defendant's forum business "sufficiently continuous"? That small change in wording creates a big difference in meaning by collapsing two requirements into one.

By way of analogy, a baseball is largely white, but it is not large and white. The opposite could be said of the Washington Monument. Put another way, a timid eater might enjoy Buffalo wings that were "mild and appetizing," but we'd all probably be underwhelmed by wings that were advertised as "mildly appetizing."

Changing the wording changes the test. "Continuous and sufficient" calls for consideration of both the frequency and the volume of a defendant's business contacts within a chosen forum. Under such a test, three courses might be a drop in the bucket of a university's course catalog. By contrast, "sufficiently continuous" shifts the focus to frequency alone and might support a finding that 0.005% of in-county business was sufficient, if that business relied on an ongoing relationship with an authorized dealer.

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The Pre-*Hangey* Approach to "Quantity" Is a More Equitable One

Aside from being the law, the two-pronged test, "continuous and sufficient," is the more equitable one as it better serves the purpose of the venue rules.

There are a number of bases on which to assert venue over a corporate defendant. Several of them require a connection to the specific claims being asserted in that particular lawsuit; for example, if the plaintiff's cause of action arose out of a transaction or occurrence in the forum county or if equitable relief is sought with respect to property located in the forum county.

When venue is premised, though, on a defendant "regularly conducting business" in the forum county, that in-forum business need not be related to the claims in the lawsuit. The Supreme Court in *Purcell* held instead that the business activities themselves can establish venue in the forum, independently of where the cause of action arose. The *Purcell* court expressly likened this to the exercise of general personal jurisdiction over a company: the extent of the defendant's connections to the forum can justify compelling it to defend itself there, despite the cause of action arising elsewhere.

The Supreme Court's analogy of this venue test to general jurisdiction is an apt one, as both analyses consider when it is proper to compel a company to defend itself in a particular forum on claims unrelated to that forum. As the U.S. Supreme Court has explained, for a court to exercise general personal jurisdiction over a defendant, that defendant's conduct must be so continuous and systematic as to render the defendant "at home" in that forum. Even ongoing and substantial business activities in the forum state will not suffice; a company must truly be on its home turf to be subject to lawsuits arising anywhere and everywhere in the world.

The same reasoning applies with even greater force to the venue analysis because Pennsylvania's "venue as to one is venue as to all" rule means that one defendant's business contacts with a forum county is imputed to the entire case and can require any number of far-flung parties to defend themselves in a court that is entirely foreign to them.

As a purely hypothetical example, an incident at an industrial plant in Erie County might see negligence claims brought in Philadelphia against individual workers and their employers, as well as product liability claims against the manufacturers of the machinery and personal protective equipment involved in the incident. The incident might draw a response from EMS crews and other first responders. It might also involve treatment by medical personnel from the Erie County area, all of whom might be witnesses at the eventual trial. Even if none of those witnesses and none of those parties is located in Philadelphia, if just one defendant — say, an out-of-state supplier of one of the components of one of the machines — makes 0.005% of its sales to Philadelphia customers, that might be enough to require everyone involved to travel to the City of Brotherly Love for litigation and trial. That is a slender reed indeed upon which to premise venue for the entire case.

A much more equitable approach is to reclaim the disjunctive "continuous and sufficient" test and expressly consider the quantity of the defendants' business in the forum county. That test was espoused by the Pennsylvania Supreme Court in *Purcell* and has nine decades of pedigree, tracing back to *Shambe* in 1927. The two-pronged test is more consistent with the general jurisdiction analogue, which requires a company to be "at home" before requiring it to defend suits arising anywhere and everywhere. The "continuous and sufficient" test is also more equitable to the extent that all parties to a case are bound to the forum by the business activities of one, likely unrelated, defendant.

Hangey is an outlier decision and is currently on appeal. The Pennsylvania Supreme Court has the opportunity to clarify this commonwealth's venue analysis by standing by the 1990 *Purcell* decision and reiterating that "continuous and sufficient" is the proper standard. ⚖

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