Finding Complexity in Simplicity: How Lower Courts Have Applied *Hertz Corp. v. Friend*'s "Nerve Center" Test to Determine a Corporation's Principal Place of Business

Contributed by Matt D. Basil, Stephen R. Brown, and Devin R. Sullivan, Jenner & Block LLP

It has been remarked that "[i]t is difficult to imagine more wasteful litigation than that aimed at determining whether the parties are in the right court." In *Hertz Corp. v. Friend*, decided in February 2010, the U.S. Supreme Court addressed the issue of "whether the parties are in the right court" by adopting the "nerve center" test for determining a corporation's principal place of business, an issue which often is dispositive on the question of diversity jurisdiction. The Court adopted the "nerve center" test, in large part, because of its "administrative simplicity."3

In this article, after briefly explaining the *Hertz Corp.* decision, we will analyze how courts have applied the "nerve center" test over the past fifteen months, focusing not on the simple cases but instead on the more difficult cases where the "nerve center" test did not "automatically generate a result." Drawing on the lessons from the cases discussed, we will also give suggestions on how a party can attempt to meet the burden of bringing forward "competent proof" of a corporation's "nerve center" when jurisdiction is challenged.

**Hertz Corp. v. Friend**

Diversity Jurisdiction for Corporations Before *Hertz Corp.*

The diversity jurisdiction statute, 28 U.S.C. § 1332, makes a corporation a citizen of (1) "any State by which it has been incorporated"; and (2) "the State where it has its principal place of business." If diversity of citizenship is invoked as the basis for federal court jurisdiction, a corporation's State of citizenship is important because federal courts will have jurisdiction only when there is complete diversity of citizenship—i.e., "only if there is no plaintiff and no defendant who are citizens of the same State." Resolution of where a corporation's principal place of business is located, therefore, often determines whether litigation will proceed in state or federal court.

Prior to *Hertz Corp.*, circuit courts had employed divergent tests to determine a corporation's principal place of business. Some circuits located the principal place of business in the State where a predominate amount of the corporation's "business activity" occurred. Under this "business activity" test, courts had to "try to weigh corporate functions, assets, or revenues different in kind, one from the other." Other circuits located the
principal place of business in the State where the corporation had its "nerve center"—the place of the corporation's "brain," ordinarily at the corporation's headquarters. The "nerve center" test "point[ed] courts in a single direction, towards the center of overall direction, control, and coordination."  

Hertz Corp.'s Resolution of the Circuit Split in Favor of the "Nerve Center" Test  

In Hertz Corp., the Supreme Court resolved this circuit split and adopted the "nerve center" test. The Court explained that, under this test, a corporation's principal place of business is the "single place . . . within a State" where the corporation's high level officers direct, control, and coordinate the corporation's activities. This will "typically" be the same location as the corporation's "headquarters." 

The Court emphasized that this test advanced administrative simplicity, which the Court described as a "major virtue." According to the Court, "complex jurisdictional tests complicate a case, eating up time and money as the parties litigate . . . which court is the right court to decide those claims" and "produce appeals and reversals [and] encourage gamesmanship." 

The Court concluded with two important points. First, the Court "recognize[d] . . . that, under the 'nerve center' test . . . there will be hard cases" and specifically noted that a corporation with diffuse leadership may present difficulties under the "nerve center" test. Second, the Court stated that the burden of persuasion for jurisdiction "remains on the party asserting it" and that, when challenged, "the parties must support their allegations by competent proof." Below, we will examine some "hard cases" that the Hertz Corp. Court forewarned of and suggest ways that a party can attempt to make a showing of competent proof.

Post-Hertz Corp. Application of the "Nerve Center" Test in Lower Courts  

Although detailed analysis under the "nerve center" test in lower courts has been limited post-Hertz Corp., some of the test's contours are beginning to appear. Below we will discuss two aspects of the test that have received some extended discussion: (1) the relevance of a corporation's day-to-day operations; and (2) the effect of diffuse corporate leadership. 

The Relevance of Day-to-Day Operations  

After Hertz Corp., courts have found that relevant activities of a corporation, for purposes of determining corporate citizenship, are direction, control, and coordination. For example, courts have held that the "amount of business" a corporation does in a State or the location of a corporation's "warehousing and distribution facility," will not be relevant to the corporate citizenship analysis. Potentially conflicting authority has emerged, however, regarding the relevance of control or management over day-to-day operations. 

Authority Suggesting Management of Day-to-Day Operations Is Not Relevant  

Recently, in Central West Virginia Energy Co. v. Mountain State Carbon, LLC (Central Energy), the U.S. Court of Appeals for the Fourth Circuit held that day-to-day management of corporate operations did not constitute direction, control, and coordination for purposes of determining corporate citizenship. There, plaintiff Central Energy sued defendant Severstal Wheeling, among others, alleging that Severstal Wheeling, as part of a scheme to "shift the costs of the 2008–2009 economic downturn onto Central Energy," had illegally refused coal shipments under a coal supply contract.

Central Energy was a West Virginia corporation. In an attempt to challenge the federal court's subject matter jurisdiction, Severstal Wheeling argued that it also was a citizen of West Virginia because its principal place of business was in West Virginia. In support of its motion to dismiss in the district court,
Severstal Wheeling provided an affidavit from its Vice President and General Manager stating that corporate officers located in Dearborn, Michigan, "[we]re responsible for certain significant corporate decision-making . . . but not the day-to-day operations, which [we]re performed in Wheeling[, West Virginia]."28 The district court, focusing on the proof that Severstal Wheeling's "day-to-day operations . . . [we]re all handled in Wheeling," held that Severstal Wheeling's "nerve center" was located in Wheeling, West Virginia.29 The district court therefore dismissed the case for lack of diversity jurisdiction.30

On appeal, the Fourth Circuit reversed, holding that Severstal Wheeling's "nerve center" was in Michigan. In reaching this decision, the court noted that seven of Severstal Wheeling's eight officers were located in Michigan and pointed to statements in the record demonstrating that those officers "set corporate policies and oversaw significant corporate decisions."31 In addition to the affidavit stating that the officers in Michigan were "responsible for certain significant corporate decision-making," Severstal Wheeling had argued to the district court that even though "Severstal Wheeling's officers and directors in Michigan [we]re responsible for setting policy and overseeing significant corporate decisions," Michigan was not the "nerve center" because these officers "did not conduct the corporation's day-to-day operations."32 According to the Fourth Circuit, with these statements, Severstal Wheeling had "concede[d] the very 'direction and control' at the heart of the Supreme Court's 'nerve center' discussion in Hertz."33

Authority Suggesting that Day-to-Day Decisions Are Relevant

In Centrue Bank v. Golf Discount of St. Louis, Inc.,34 a case decided by the U.S. District Court for the Eastern District of Missouri before Central Energy, the court determined that a corporation's "nerve center" was located at the place where the "primary day-to-day decisions were made and implemented."35

To demonstrate complete diversity of citizenship, plaintiff Centrue Bank needed to show that its principal place of business was located in a State other than Missouri. Centrue Bank admitted that its President and CEO worked in Missouri and had "ultimate responsibility for implementing policies and decisions of the board."36 But, Centrue Bank argued, this alone did not establish that its "nerve center" was located in Missouri. Rather, Centrue Bank noted, its President and CEO did not have sole responsibility and "regularly interacted with and delegated to key members of his management team" located in Illinois.37 Additionally, Centrue Bank's main offices and a majority of its employees, executives, and board members were located in Illinois.38

In weighing this jurisdictional proof, the court pointed out that the "nerve center" test in Hertz Corp. did not turn on "ultimate authority."39 Therefore, even though ultimate authority may have been located in Missouri, the court held that Illinois was the "nerve center" because "the day-to-day direction, control, and coordination by the officers of the corporation [we]re made in the [Illinois] office."40

Based on a somewhat similar principle, the U.S. District Court for the Eastern District of Pennsylvania in Evernu Technology, LLC v. Rohm & Haas Co.41 held that a corporate subsidiary's principal place of business was not automatically the same as the parent's, even though "a parent will reserve to itself its subsidiary's most significant decisions."42 A contrary rule would dictate that "every subsidiary's 'nerve center' would necessarily be the location of its parent."43 The court instead "focused on the location of day-to-day control and coordination of the company's business operations."44

Centrue Bank and Evernu Technology suggest that the "nerve center" is not determined solely by the
location where a corporation's ultimate veto power resides. But these cases also found relevant the location of a corporation's day-to-day control. If Central Energy and Centrue Bank are actually in conflict, how to resolve that conflict is an issue to be litigated in future cases.

The Effect of Diffuse Corporate Leadership

In Hertz Corp., the Court commented that "hard cases" might arise when a corporation "divide[s] [its] command and coordinating functions among officers who work at several different locations."45 The Centrue Bank case, discussed above, somewhat fits the Court's description of a hard case, as the corporation's president and CEO lived and worked in a different State than the remainder of the corporation's senior leadership.46 As noted above, the Centrue Bank court held that the corporation's principal place of business was in the State where the non-president and non-CEO senior leadership worked.47

An additional example of diffuse corporate leadership can be found in Health Facilities of California Mutual Insurance Co. v. British American Insurance Group, Ltd., a case from the U.S. District Court for the Central District of California.48 There, Health Facilities sued a reinsurance intermediary, British American Group, seeking a return of overpaid premiums.49 To support diversity jurisdiction, Health Facilities needed to demonstrate that its principal place of business was in a State other than Louisiana. Attempting to meet this burden, Health Facilities offered the following proof:

(1) there [w]ere seven members of [Health Facilities'] board of directors who control[led], coordinate[d] and direct[ed] the corporation's activities: four based in various parts of California, two in Louisiana and one in Nevada; (2) two outside vendors [ran] the day to day financial, regulatory and claims operations from Colorado and Texas, respectively; and (3) the board ha[d] convened board meetings in California, Nevada or via telephone conference, but never in Louisiana.50

Responding to Health Facilities' efforts to demonstrate corporate citizenship in a State other than Louisiana, British American Group offered the following proof: (1) Health Facilities' physical and mailing address on its website were located in Louisiana; (2) the offices of Health Facilities' president and one of its directors were located at that same Louisiana address; (3) contracts were negotiated at that same Louisiana address; and (4) the individuals with signing authority were all located at that same Louisiana address.51

Weighing this evidence, the court concluded that Health Facilities had not demonstrated that its principal place of business was located in a State other than Louisiana.52 In reaching this conclusion, the court emphasized that after Hertz Corp., a principal place of business is a "single place within a state."53 Importantly, the court noted that Health Facilities failed to identify any single place and merely argued that "the principal place of business must [have] be[en] somewhere in California."54 The court's holding rested on Health Facilities' failure to carry its jurisdictional burden.55

Health Facilities highlights the importance of identifying for the court a particular location within a State that is the corporate "nerve center." Courts have found that a corporation has only one principal place of business, and it is proving difficult to persuade a court that a principal place of business is not somewhere without a compelling argument that the principal place of business is somewhere. Health Facilities also demonstrates the importance of the burden of persuasion on jurisdictional issues. A litigant attempting to invoke federal jurisdiction must be especially aware of this burden in a close case.

Competent Proof
In light of the case discussions above, we next examine how courts have found that a litigant can meet the burden of showing "competent proof" when jurisdiction is challenged.

The court in Guitar Holding Co., L.P. v. El Paso Natural Gas Co., a recent case from the U.S. District Court for the Southern District of Texas, drew upon the cases applying the "nerve center" test prior to Hertz Corp. to provide a list of "some of the most common" facts tending to show that high level direction, control, and coordination are exercised in a particular place:

1) location of corporate and executive offices; 2) the site where day-to-day control is exercised; 3) the exclusivity of decision making at the executive office and the amount of managerial authority at that location; 4) the location where corporate records and bank accounts are kept; 5) where the board of directors and stockholders meet; 6) where executives live, have their offices, and spend their time; 7) the location where corporate income tax is filed; 8) the location designated in the corporate charter; and 9) the location where a) major policy, b) advertising, c) distribution, d) accounts receivable departments and e) finance decisions originate.

A litigant attempting to demonstrate the "nerve center" of an opposing-party corporation should point to as many of these factors as are favorable. Although all can be relevant, courts have specifically discounted the persuasiveness of several factors. For example, a corporation's listing of a particular address on public filings or in its bylaws has been held insufficient to establish a principal place of business at that listed address when other proof points to a different location.

On the other hand, a corporation attempting to demonstrate its own "nerve center" can submit an affidavit of a corporate employee actually averring that high level officers direct, control, and coordinate the corporation from a particular place. Courts have accepted affidavits from various corporate employees, including a corporation's president, chief operating officer, general counsel, and vice president.

Regardless of an affiant's job title, an affidavit supporting a corporate citizenship argument should include an explanation of the affiant's personal knowledge sufficient to support the citizenship assertions. In the Martinez v. Morgan Stanley & Co. case from the U.S. District Court for the Southern District of California, for example, the court refused to accept the declaration of an Assistant Secretary employed in Morgan Stanley & Co.'s Legal and Compliance Department. Although the declaration tracked the relevant Hertz Corp. language, stating that "Morgan Stanley's executive officers direct, control, and coordinate Morgan Stanley's activities from the New York headquarters," the court rejected the declaration because the Assistant Secretary failed to state how she had personal knowledge of the executive officers' activities.

A corporation also should ensure that it diligently investigates facts related to its principal place of business and that any affidavit is consistent with the "nerve center" facts stated in previous cases. In the Monroe v. SmithKline Beecham Corp. case from the U.S. District Court for the Eastern District of Pennsylvania, for example, the court found that the defendant corporation had its principal place of business in Pennsylvania, in part, because of previous "cases in which [the corporation] called[ed] Pennsylvania its 'principal place of business.'" There is also a possibility that a party opposing jurisdiction will argue that jurisdiction is lacking through operation of judicial estoppel or by issue preclusion. For example, imagine that a court had accepted a corporation's arguments in a previous case that its principal place of business was in New York. Then, in a later case brought by a plaintiff from New York, the corporation seeks removal to federal court on the basis of diversity jurisdiction.
these circumstances, the plaintiff may argue that the corporation should be judicially estopped from arguing that its principal place of business is in a State other than New York. Alternatively, if a court had previously held—despite a corporation’s arguments to the contrary—that the corporation’s principal place of business were in New York, the New York plaintiff may argue that the corporation’s New York principal place of business had already been conclusively decided in the earlier litigation.

In summary, an affidavit supporting a corporation’s principal place of business assertions should include at least the following:

- the affiant’s job title and responsibilities;
- a statement tracking the "high level officers direct, control, and coordinate" language from the Hertz Corp. opinion;
- the spot within the management structure that the identified "high level officers" occupy;
- the particular location within one State where this direction, control, and coordination is exercised from;
- the source of the affiant’s knowledge of the activities of the corporation and the corporation’s high level officers; and
- as many of the Guitar Holding 74 "nerve center" facts as are favorable.

Conclusion

The Hertz Corp. case should have its biggest impact in arguably non-controversial cases—i.e., those cases where the corporation’s executives are all located at the headquarters and, as is typical, exercise control from the headquarters’ location. But as the Supreme Court acknowledged in Hertz Corp., even under the "nerve center" test, "hard"—i.e., fact intensive—cases will arise. We hope that the analysis provided here helps parties and their counsel address those hard cases.

Matt D. Basil is a partner in Jenner & Block’s Chicago office, and is a member of the Firm’s Litigation Department and its Complex Commercial Litigation and Communications Practices. Stephen R. Brown and Devin R. Sullivan are associates in Jenner & Block’s Chicago office and members of the Firm’s Litigation Department.

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2 130 S. Ct. 1181 (2010).
3 Id. at 1193.
4 See id. at 1194.
5 Id. at 1195.
7 Id. § 1332(a).
8 Wis. Dept’r of Corrections v. Schacht, 524 U.S. 381, 388 (1998); see also 28 U.S.C. § 1332(a)(1). Section 1332(d) makes an exception to this complete diversity rule for certain class actions. See 28 U.S.C. § 1332(d).
9 See, e.g., Tosco Corp. v. Cmties. for a Better Env’t, 236 F.3d 495, 500–02 (9th Cir. 2001) (per curiam), overruled by Hertz Corp., 130 S. Ct. at 1181. Under Ninth Circuit precedent, if no State had a predominant amount of the corporation’s business activity, a court would then apply the "nerve center" test. Id. at 500.
10 See Hertz Corp., 130 S. Ct. at 1194.
11 See, e.g., Wis. Knife Works v. Nat’l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986).
12 Hertz Corp., 130 S. Ct. at 1194.
13 Id. at 1186.
14 Id. at 1193.
15 Id. at 1186.
16 Id.
17 Id. at 1193. The Court also noted that the "nerve center" test was consistent with (1) Section 1332’s language, which suggested that a principal place of business was one particular place, like the headquarters, rather than one particular State; and (2) Section 1332’s legislative history, where a proposed—but rejected—version of the statute had deemed a corporation a "citizen of the State that accounted for more than half of its gross income." Id. at 1192–94.
18 Id. at 1193 (internal citation omitted).
19 Id. at 1194.
20 Id.
21 Id. at 1194–95 (citations omitted).
22 See id.


636 F.3d 101, 102–05 (4th Cir. 2011).
Id. at 102.
Id. at 103.
Id. at 105 (internal quotation omitted).
Id. at 103.
Id.
Id. at 102.
Id. at 105.
Id. at *5.
Id. at *4.
Id.
Id. at *3.
Id. at *5.
Id.
Id. at *7.
Id.
Id. at *4.
Hertz Corp., 130 S. Ct. at 1194.
Centrue Bank, 2010 BL 247460, at **3-4.
Id. at **4-5.
Id.
See id. (citations omitted).
Id.
Id.
Id.
Id.
Id. (internal citations omitted).
Id.


This is consistent with Hertz Corp., where the Court noted that a corporation's listing its address on an SEC Form 10-K would not be sufficient to establish the corporation's principal place of business. 130 S. Ct. at 1195 ("[W]e reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's 'principal executive offices' would, without more, be sufficient proof to establish a corporation's 'nerve center'.")

Id.
Martinez, No. 09-cv-02937 (S.D. Cal. Aug. 9, 2010).
Id.
Id. (internal quotation omitted).
See id.
No. 10-cv-02140, 2010 BL 146133, at *7 (E.D. Pa. June 23, 2010) (jurisdiction lacking because defendant corporation was a citizen of the State in which the action was brought in violation of 28 U.S.C. § 1441(b)).
defendant corporation "should be judicially estopped from asserting that their principal place of business is in Delaware or [Ontario]" because corporation had previously asserted to court that principal place of business was in New York.

There is some authority suggesting that judicial estoppel can be used to defeat jurisdiction. See Selected Risks Ins. Co. v. Kobelinski, 421 F. Supp. 431, 434 (E.D. Pa. 1976) (holding that "the [Small Business Administration]'s contention in the former action that the Court lacked jurisdiction, and its procurement of a dismissal on that ground, estops it, under the doctrine of 'Judicial Estoppel,' from now asserting a contrary view in this Court"). But there is also strong authority to the contrary. See In re Sw. Bell Tel. Co., 535 F.2d 859, 861 (5th Cir. 1976), aff'd en banc 542 F.2d 297 (5th Cir. 1976), rev'd on other grounds, Gravitt v. Sw. Bell Tel. Co., 430 U.S. 723 (1977) ("Whatever the scope of the doctrine may be, so far as we have been able to discover it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. Persons who meet those criteria have a statutory, and indeed a constitutional, right to resort to the federal courts."); 188 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477, p. 599 n.83 (2d ed. 2002) ("Special care should be taken in considering whether judicial estoppel should apply to matters affecting federal subject-matter jurisdiction . . . ."). There is also authority suggesting that judicial estoppel should not be used to create jurisdiction when it is lacking. See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (noting that "principles of estoppel do not apply" to support jurisdiction because "no action of the parties can confer subject-matter jurisdiction upon a federal court"); Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC, 232 F.3d 79, 82 (2d Cir. 2000) (per curiam) (noting that a party cannot be judicially estopped "from arguing . . . that diversity jurisdiction [is] absent in [a] case").


Application of issue preclusion outside of the circumstances in Dozier—dismissing a second suit for lack of subject matter jurisdiction when the jurisdictional dismissal in the first suit was appealed and affirmed—is more complicated. First, a corporation's principal place of business is often decided in a remand order, and "[t]here is a considerable amount of disagreement as to whether remand orders . . . may trigger collateral estoppel in subsequent proceedings." Andrews v. Modell, 636 F. Supp. 2d 213, 218 (S.D.N.Y. 2008) (jurisdiction lacking). Second, it is unclear whether preclusion would apply in a second action that was not between the same parties. See 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4465.2, p. 762 n.14 (2d ed. 2002) (citing Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 391–96 (5th Cir. 1998)) (noting that in Winters "[t]here . . . is at least a hint that nonmutual preclusion is inappropriate with respect to a question of federal subject-matter jurisdiction").