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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

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11 PATRICIA CALKINS, f/n/a/  
12 PATRICIA OETMAN,

13 Plaintiff,

14 v.

No. CIV. 08-2205 FCD DAD

MEMORANDUM AND ORDER

15 BANKERS LIFE AND CASUALTY  
16 COMPANY; MICHAEL A. NOWAK; THE  
17 BUNKER INSURANCE GROUP, INC.,

18 Defendants.

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20 This matter is before the court on defendant Michael A.  
21 Nowak's ("Nowak") motion to dismiss pursuant to Rule 12(b)(2)<sup>1</sup> of  
22 the Federal Rules of Civil Procedure.<sup>2</sup> Plaintiff Patricia

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25 <sup>1</sup> Nowak does not reference the Federal Rules of Civil  
26 Procedure in his motion; rather, he refers to the California Code  
27 of Civil Procedure and cites primarily to state law. In federal  
28 court, procedural issues are governed by federal law. Erie R.R.  
Co. v. Tompkins, 304 U.S. 64, 78 (1938). Because Nowak is  
challenging personal jurisdiction, the proper basis for this  
motion is Rule 12(b)(2).

<sup>2</sup> All further references to a "Rule" are to the Federal  
Rules of Civil Procedure.

1 Calkins' ("Calkins") opposes the motion. For the reasons set  
2 forth below,<sup>3</sup> defendant Nowak's motion to dismiss is GRANTED.

3 **BACKGROUND**

4 In October 1999, plaintiff Calkins purchased a Long Term  
5 Care Policy (the "Policy") from defendant Bankers Life and  
6 Casualty Company ("Bankers"). (Compl., Ex. 1 to Notice of  
7 Removal, filed Sept. 17, 2008, ¶ 9; Decl. of Michael A. Nowak in  
8 Supp. of Def.'s Mot. to Dismiss ("Nowak Decl."), filed Oct. 23,  
9 2008.) At the time, defendant Nowak was a sales agent for  
10 Bankers and sold the Policy to Calkins. (Nowak Decl. ¶ 4.)  
11 Plaintiff alleges that Nowak represented to her that the Policy's  
12 premiums would not increase. (Compl. ¶ 18.) However, on August  
13 4, 2006, defendant Bankers Life and Casualty Company ("Bankers")  
14 sent plaintiff a Billing Notice, informing her that her premiums  
15 had increased. (Id. ¶ 19.)

16 Defendant Nowak has been a resident of Michigan since  
17 approximately 1973. (Nowak Decl. ¶ 3.) He is licensed as a  
18 "Life and Health Insurance Agent" in the State of Michigan, and  
19 has been a sales agent in Michigan since 1998. (Id.) Nowak is  
20 not licensed, nor has he ever been licensed, to conduct business  
21 in California. (Id.) He has never solicited or conducted  
22 business in California, nor does he maintain any business  
23 presence in California. (Id. ¶¶ 6, 8.) Nowak has never been to  
24 California. (Id. ¶ 9.)

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27 <sup>3</sup> Because oral argument will not be of material  
28 assistance, the court orders the matter submitted on the briefs.  
E.D. Cal. L. R. 78-230(h).

1 At the time plaintiff Calkins purchased the Policy, she  
2 resided in Michigan. (Pl.'s Opp'n to Def.'s Mot. to Dismiss  
3 ("Opp'n"), filed Dec. 30, 2008, at 1.) All dealings with and  
4 surrounding the sale of the Policy took place in Michigan.  
5 (Nowak Decl. ¶ 4.) All of the work performed by Nowak on the  
6 Policy was performed in Michigan, pursuant to Michigan's laws  
7 regarding the sale of such policies. (Id. ¶ 5.) However, the  
8 Policy contains no residency requirements for benefits.  
9 (Supplemental Decl. of Michael A. Nowak ("Supp. Nowak Decl."),  
10 filed Dec. 15, 2008, ¶ 5.) Subsequently, plaintiff moved to  
11 California; she informed defendant Bankers of her Change of  
12 Address on or about October 8, 2007. (Compl. ¶ 23.) Calkins  
13 argues that her premiums increased while she was a resident of  
14 California and the she paid premiums on the Policy from  
15 California. (Compl. ¶ 11; Opp'n at 2, 6.) Nowak has not  
16 received any premium payments on renewals for the Policy since he  
17 left Bankers in approximately 1999 or 2000. (Supp. Nowak Decl. ¶  
18 4.)

19 On July 25, 2008, plaintiff filed a complaint in the  
20 Superior Court of California for the County of Placer, alleging  
21 claims for (1) Negligent Misrepresentation against all  
22 defendants; (2) Intentional Misrepresentation against all  
23 defendants; and (3) Professional Negligence against defendant  
24 Michael A. Nowak ("Nowak") and The Bunker Insurance Group, Inc.  
25 ("Bunker"). (Compl., Ex. 1 to Notice of Removal, filed Sept. 17,  
26 2008.) Defendant Bankers removed the case to this court on  
27 September 17, 2008, on the basis of diversity jurisdiction.

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1 A court may exercise either general or specific jurisdiction  
2 over a non-resident defendant. "General jurisdiction exists when  
3 a defendant is domiciled in the forum state or his activities  
4 there are 'substantial' or 'continuous and systematic.'" Panavision Int'l, L.P. v. Toepfen, 141 F.3d 1316, 1320 (9th Cir.  
5 1998) (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall,  
6 466 U.S. 408, 414-416 (1984)). When a defendant does not reside  
7 in the forum state, the contacts must be such that they  
8 "approximate physical presence in the forum state."  
9 Schwarzenegger v. Fred Martin Co., 374 F.3d 797, 801 (9th Cir.  
10 2004) (quoting Bancroft v. Masters, 223 F.3d 1082, 1086 (9th Cir.  
11 2000)). "This is an exacting standard, as it should be, because  
12 a finding of general jurisdiction permits a defendant to be haled  
13 into court in the forum state to answer for any of its activities  
14 anywhere in the world." Id. (citing Brand v. Menlove Dodge, 796  
15 F.2d 1070, 1073 (9th Cir. 1986) (collecting cases where general  
16 jurisdiction was denied despite the defendants' significant  
17 contacts with forum)). Plaintiff concedes that defendant Nowak  
18 does not have systemic and continuous physical contacts with  
19 California sufficient to justify general personal jurisdiction.  
20 (Opp'n at 3.)

22 Where general jurisdiction does not exist, the court may  
23 still determine whether the defendant has had sufficient minimum  
24 contacts with the state, as it relates to the pending litigation  
25 against it, in order to justify the exercise of specific  
26 jurisdiction. See Omeluk v. Langsten Slip & Batbyggeri A/S, 52  
27 F.3d 267, 270 (9th Cir. 1995). In determining whether a district  
28 court can exercise specific jurisdiction over a defendant, the

1 Ninth Circuit has articulated the following three-part test:

- 2 (1) the nonresident defendant must purposefully direct  
3 [its] activities or consummate some transaction  
4 with the forum or resident thereof; or perform  
5 some act by which [it] purposefully avails  
6 [itself] of the privilege of conducting activities  
7 in the forum, thereby invoking the benefits and  
8 protections of its laws;
- 9 (2) the claim must be one which arises out of or  
10 relates to the defendant's forum-related  
11 activities; and
- 12 (3) the exercise of jurisdiction must comport with  
13 fair play and substantial justice, i.e. it must be  
14 reasonable.

15 Core-Vent, 11 F.3d at 1485 (citation omitted).

### 16 1. Purposeful Direction

17 In order to satisfy the first prong of the three-part test,  
18 Calkins must establish either that Nowak (1) purposely availed  
19 himself of the privilege of conducting business in California; or  
20 (2) purposely directed his activities at California. Pebble  
21 Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006). The  
22 Ninth Circuit has clarified that although courts sometimes use  
23 the phrase "purposeful availment" to include both purposeful  
24 availment and direction, they are two distinct concepts. Id.  
25 "Evidence of availment is typically action taking place in the  
26 forum that invokes the benefits and protections of the laws in  
27 the forum." Id. at 1156 (emphasis added). In contrast,  
28 "[e]vidence of direction generally consists of action taking  
place outside the forum that is directed at the forum," such as  
distribution and advertising. Id. (citing Schwarzenegger, 374  
F.3d at 802) (emphasis added).

In this case, Calkins fails to present any evidence that any  
actions by Nowak were taken in California. Rather, the evidence

1 reveals that Nowak has never been in California and has never  
2 conducted business in California by himself or through a  
3 representative. As such, this type of evidence supports the  
4 application of the purposeful direction test. See id.

5 In determining whether a defendant has purposely directed  
6 its activities at a forum in order to give rise to specific  
7 jurisdiction, courts apply the "effects test" set forth by the  
8 Supreme Court in Calder v. Jones, 465 U.S. 783 (1984). Core-  
9 Vent, 11 F.3d at 1485-86. In order to satisfy this test, a  
10 plaintiff must show that the defendant "(1) committed an  
11 intentional act, which was (2) expressly aimed at the forum  
12 state, and (3) caused harm, the brunt of which is suffered and  
13 which the defendant knows is likely to be suffered in the forum  
14 state." Bancroft, 223 F.3d at 1087.

15 The intentional act in this case is defendant Nowak's sale  
16 of an insurance policy to plaintiff, including the attendant  
17 alleged representations made during that sale. However, all  
18 dealings with and surrounding the sale of the Policy took place  
19 in Michigan through a Michigan insurance sales agent to a  
20 Michigan resident. There is no evidence that the sale of the  
21 insurance policy was aimed at California.

22 Plaintiff asserts that the harm occurred in California  
23 because she was residing in California when the premiums were  
24 increased. She also asserts that Nowak knew that the Policy did  
25 not have a residency requirement, such that she did not have to  
26 live in Michigan to receive the benefits of the insurance.  
27 However, plaintiff fails to make any allegations or present any

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1 evidence<sup>4</sup> that Nowak knew or could have reasonably expected  
2 plaintiff to move to California. Moreover, Nowak has not  
3 received any premium payments on renewals for the Policy since he  
4 left Bankers in approximately 1999 or 2000. While plaintiff  
5 fails to present any evidence of when she moved to California,  
6 she did not inform defendant Bankers of her change of address  
7 until on or about October 8, 2007, at least seven years after  
8 Nowak had left his employment with Bankers. In any event, there  
9 is no evidence that Nowak derived any benefit from plaintiff when  
10 she was in the forum state.

11 As such, because plaintiff has failed to demonstrate that  
12 defendant Nowak intentionally directed any act towards California  
13 or that Nowak knew that any harm was likely to be suffered by  
14 plaintiff in California, Calkins fails to satisfy the Calder  
15 "effects test" and thus, fails to demonstrate purposeful  
16 direction. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S.  
17 286, 298 (1980) (holding that where there was no evidence that  
18 defendants sold, marketed, or distributed products to the forum  
19 state, that the products were capable of use in another state and  
20 that harm was suffered in the forum state was insufficient to  
21 satisfy purposeful availment); Brand v. Menlove Dodge, 796 F.2d  
22 1070, 1075 (9th Cir. 1986) (holding that a corporation that did  
23 not engage in affirmative conduct to deliver its product to the  
24 forum state, but passively made a sale it allegedly knew would  
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27 <sup>4</sup> Plaintiff fails to submit an declarations or other  
28 evidence to support her assertion that the court has personal  
jurisdiction over defendant Nowak.



1 affect that state, was insufficient to amount to purposeful  
2 direction).

3 **2. Reasonableness**

4 "Jurisdiction may be established with a lesser showing of  
5 minimum contacts 'if considerations of reasonableness dictate.'" Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1189  
6 n.2 (9th Cir. 2002) (quoting Haisten v. Grass Valley Med.  
7 Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986)).

8 "Under this analysis, there will be cases in which the defendant  
9 has not purposely directed its activities at the forum state, but  
10 has created sufficient contacts to allow the state to exercise  
11 personal jurisdiction if such exercise is sufficiently  
12 reasonable." Brand v. Menlove Dodge, 796 F.2d 1070, 1074 (9th  
13 Cir. 1986).  
14

15 Where a defendant has not directed its activities at a forum  
16 state, there is no presumption of reasonableness. Brand, 796  
17 F.2d at 1075. In determining whether the exercise of specific  
18 jurisdiction is reasonable, the court must weigh the following  
19 seven factors:

- 20 (1) the extent of the defendant['s] purposeful  
interjection into the forum state's affairs;
- 21 (2) the burden on the defendant of defending in the  
forum;
- 22 (3) the extent of conflict with the sovereignty of the  
defendant['s] state;<sup>5</sup>
- 23 (4) the forum state's interest in adjudicating the  
dispute;
- 24 (5) the most efficient [forum for] judicial resolution  
of the controversy;
- 25 (6) the importance of the forum to the plaintiff's  
interest in convenient and effective relief; and,
- 26 (7) the existence of an alternative forum.

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27 <sup>5</sup> The parties do not discuss any conflict with the  
28 sovereignty of defendant's state.

1 Core-Vent, 11 F.3d at 1487-88 (citation omitted).

2 In this case, there is no evidence that Nowak purposely  
3 interjected himself into California's affairs. Defendant Nowak  
4 has never been to California. (Nowak Decl. ¶ 9.) He has never  
5 solicited or done business in California. (Id. ¶ 6.) He has no  
6 offices, representatives, or employees in California. (Id. ¶ 7.)  
7 He has never actively sought clients or maintained a business  
8 presence in California. (Id. ¶ 8.) The only tangential  
9 connection that Nowak has to California is that he sold an  
10 insurance policy that did not have a residency restriction to an  
11 individual who subsequently moved to California. However, there  
12 is no evidence that he ever received any premiums or benefits  
13 from plaintiff while she was in California. As such, Nowak's  
14 attenuated interjection in California's affairs is minimal, if  
15 not non-existent. Cf. Plant Food Co-op v. Wolfkill Feed &  
16 Fertilizer, 633 F.2d 155, 159 (9th Cir. 1980) (holding that  
17 jurisdiction was proper where distributor, who shipped product  
18 directly to Montana on the orders of Washington middlemen, knew  
19 the product was bound for the forum state and received financial  
20 benefit).

21 Plaintiff asserts that California has an interest in  
22 protecting its citizens from fraud by insurance companies and  
23 their agents. However, Nowak is not licenced to conduct business  
24 in California, nor is there any evidence that he conducted  
25 business with plaintiff in California. Rather, plaintiff lived  
26 in Michigan when the alleged misrepresentations were made.  
27 Further, while plaintiff conclusorily asserts that California is  
28 the "only state in which Calkins can bring her claim," she fails

1 to offer any explanation, argument, or legal support for why she  
2 could not bring this claim in Michigan.

3 Plaintiff asserts that it would be more convenient and  
4 effective to have her claim adjudicated in California because she  
5 moved to California to be with her family and was 71 years old at  
6 the time the complaint was filed.<sup>6</sup> While it may be more  
7 convenient for Calkins to litigate all claims in this forum, such  
8 convenience does not outweigh the interests of due process.  
9 Rather, Nowak has presented evidence that he has had virtually no  
10 contacts with California.

11 Accordingly, under the circumstances presented by the  
12 parties in this case, the exercise of personal jurisdiction over  
13 Nowak is not reasonable.

14 **CONCLUSION**

15 For the foregoing reasons, defendant Nowak's motion to  
16 dismiss for lack of personal jurisdiction is GRANTED.

17 IT IS SO ORDERED.

18 DATED: January 9, 2009.

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FRANK C. DAMRELL, JR.  
22 UNITED STATES DISTRICT JUDGE  
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26 <sup>6</sup> Plaintiff notes that the burden on Nowak appearing in  
27 California is slight due to ease of modern travel and  
28 communication. However, such argument could similarly be applied  
in requiring Calkins' to litigate her claims against Nowak in an  
alternative forum in which he has greater contacts.