

## PERSONAL JURISDICTION IN THE INTERNET WORLD

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As lawyers, one of the first classes we took in law school was civil procedure. Civil procedure requirements are the rules of the road for when our clients end up in court. The underlying issues of whether the claim is valid, defensible or unjustified must initially be shelved as the litigator side of our brain considers the top level issues of jurisdiction: which court should we be in; which forum may be better for our clients to address those underlying issues; and does the court in which the matter was filed have the right to hear the case?

In defending a case, the first question to be asked is: does this court have the right to hear this case? Does this court have jurisdiction over my client? There are two types of jurisdiction: subject matter jurisdiction and personal jurisdiction. The focus of this paper will be personal jurisdiction, especially in as it is created in and affected by commerce in cyberspace.

### *Personal Jurisdiction and Related Issues*

For those attorneys not practicing in litigation, the rules of civil procedure must seem like a past dream, you remember the basic concepts but none of the requisite detail. Litigators, however, typically maintain the civil procedure manual as an essential part of their daily practice. The logistical rules are fairly clear and simple: how to file a complaint (size of font to use, margins on the paper and number of copies); when to serve the complaint (local rules may require that a sheriff serve or may allow for service by mail); how long the complaint can be; and requirements for responding to the complaint. There are those considerations, however, which need to be made before the logistics are even begun. For strategic reasons, litigators often want their case to be in a specific venue and a specific court system as this may give them a tactical advantage in knowing the judge, the local rules, or the possibility on the type of damages to be awarded.

The concept of personal jurisdiction arises from the United States Constitution's due process clause. Over time our legal system has determined that a person should not be forced to address a case in any court in any location simply at the behest of a claimant who may, or may not, have a valid claim. Personal jurisdiction mandates that the defendant must have some connection to the location of the court in order for that court to have the right to proceed against him or her. Case law development has been based upon well-developed and long established personal jurisdiction doctrines. It is critical to understand these doctrines in order to effectively analyze the emerging law related to Internet use.

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Personal jurisdiction is based on the interaction between established law dictating the scope of the court's jurisdiction and limitations on the jurisdiction imposed by constitutional due process rights. State courts can always assert jurisdiction over an entity or things physically present in the state.<sup>2</sup> State courts also assert personal jurisdiction over entities located outside of the state using "long-arm statutes." Long-arm statutes differ from state to state, but tend to be similar. The Uniform Interstate and International Procedure Act is typical.

#### 1.02 [Personal Jurisdiction Based upon Enduring Relationship]

A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this state as to any [cause of action].

#### 1.03 [Personal Jurisdiction Based on Conduct]

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] arising from the person's:

- (1) transacting any business in this state;
- (2) contracting to supply services or things in this state;
- (3) causing tortious injury by an act or omission in this state; [or]
- (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state...

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] arising from acts enumerated in this section may be asserted against him.

#### *Jurisdiction in a Traditional Setting*

Courts can exercise two types of jurisdiction over a party: general jurisdiction over all cases and controversies, or specific jurisdiction, which covers only actions depending on the nature of the contacts with that state. In determining whether the court has jurisdiction, the first step is to examine the applicable long-arm statute, or common-law equivalent, to determine whether the statute grants the court jurisdiction over the out-of-state defendant. The second step is to evaluate whether the exercise of jurisdiction in the particular case violates due process rights granted under the United States Constitution. In *Pennoyer v. Neff*, the rule was established that every state has exclusive jurisdiction over the persons and property in its state and that states may not evoke jurisdiction over persons or property outside its state. This original rule was modified in the seminal case, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

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<sup>2</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)

With *International Shoe*, the court shifted from an emphasis on in-state service to requirement of minimum contacts with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” The law regarding due process is now reasonably uniform in deciding jurisdictional reach: whether the nonresident party has "minimum contacts" with the forum state;<sup>3</sup> whether the defendant could expect to be haled in court in that state;<sup>4</sup> whether the contacts are purposeful and deliberate;<sup>5</sup> and whether being haled into court offends "traditional notions of fair play and substantial justice."<sup>6</sup> In determining whether exercising jurisdiction will satisfy "traditional notions of fair play and substantial justice" the court should focus on the contacts in light of other factors such as:

- the burden on the defendant;
- the forum state's interest in adjudicating the dispute;
- the plaintiff's interest in obtaining the most efficient resolution of the controversy;
- the interstate judicial system's interest in most efficient resolution of controversies; and
- the shared interest of the several states in furthering fundamental substantive social policies.

*Id.*

Establishing jurisdiction requires "some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Activities within a state that can result in a party subjecting itself to suit in that state include purposefully selling goods in the state, maintaining a physical office or store in the state, entering into a contract with someone in the state, or committing a tortious act within the state. In general, the more passive the defendant was with respect to a transaction, and the fewer events related to the transaction occurred within the forum state, the less likely the court will exercise jurisdiction over the defendant. The difficulty arises in determining when maintaining a Web site, accessible to people in a state, is an activity directed at a state sufficient to allow the state to exercise personal jurisdiction over the Web site owner.

#### *Jurisdiction Over Activities on the Internet—Protecting Against Borderless Personal Jurisdiction*

Over the past five years, courts have grappled with applying these factors to website activities on the Internet. Several cases have been decided on the basis of the forum's long-arm statute, but most have dealt with the constitutional due process inquiry. Three different court-developed categories of websites have emerged from this process: passive websites, interactive websites, and websites used for the purpose of conducting business.

The Internet allows global access, but also the possible risk of global jurisdiction if there is no jurisdiction or forum selection clause in the online contract. For example, in *Gator.com Corp., v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003), the Ninth Circuit found general

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<sup>3</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>4</sup> *World-Wide Volkswagen Corp. v. Woodson*, 44 U.S. 286 (1980).

<sup>5</sup> *Burger King*, 471 U.S. at 475.

<sup>6</sup> *Id.*, at 477-78.

jurisdiction based on both the “continuous and systematic contacts” test and the “sliding scale” test. The Court noted: “It is increasingly clear that modern businesses no longer require an actual physical presence in a state in order to engage in commercial activity there. With the advent of ‘e-commerce,’ businesses may set up shop, so to speak, without ever actually setting foot in the state where they intend to sell their wares. Our conceptions of jurisdiction must be flexible enough to respond to the realities of the modern marketplace.” *Id.* at 1081.<sup>7</sup>

General jurisdiction exists when there are “substantial or “continuous and systematic” contacts with the forum state, even if the cause of action is unrelated to those contacts. *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984).) “[C]ourts have focused primarily on two areas. First they look for some kind of deliberate ‘presence’ in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation. . . . In addition, courts have looked at whether the company has engaged in active solicitation toward and participation in the state’s markets, i.e., the economic reality of the defendant’s activities in the state.” *Gator*, 341 F.3d at 1077. The *Bancroft* case held that the Internet presence in the state was passive and not directed at the state so no general jurisdiction was found. The *Gator* court held L.L. Bean’s Internet presence was directed at California and the interaction with California consumers was consistent, ongoing and a sophisticated sales effort. *Id.* at 1078.

The “sliding scale” test has been used in assessing whether an Internet presence is sufficient to find general jurisdiction. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). “This test requires both that the party “clearly do business over the Internet,” *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), and that the Internet business contacts with the forum state be substantial or continuous and systematic. *See Revell v. Lidov*, 317 F.3d 467, 470-71 (5th Cir. 2002); *accord Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 571 (E.D. Va. 1999).” *Gator*, 341 F.3d at 1079. (footnote omitted.) *See also Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512-13 (D.C. Cir. 2002); and *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713-15 (4th Cir. 2002). However, the Eighth Circuit has limited the “sliding scale” test as being appropriate in cases dealing with specific jurisdiction looking only for “minimum contacts”. *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 711 (8th Cir. 2003). The Eighth Circuit continued that the general personal jurisdiction consideration needs to view the “sliding scale” as only one factor in a three factor review: quantity of the contacts; nature and quality of the contacts; and the source and connection of the cause of action with those contacts. *Id.* *See also, Hy Cite Corp. v. BadBusinessBureau.com, L.L.C.*, \_\_ F.Supp.2d \_\_, 2004 WL 42641 (W.D. Wis. 2004) (holding that the “sliding scale” is not conclusive but merely one factor to be considered in determining personal jurisdiction.)

Forum selection clauses are generally enforced under United States contract law and this is true even in an online contract. *Freedman v. American Online, Inc., et al.*, \_\_ F.Supp.2d \_\_, 2003 WL 22900942 (D. Conn. Dec. 05, 2003) (No. Civ.3:03CV1048 (PCD) (forum selection clause in online membership agreement is valid and enforceable absent a claim of “‘exceptional’

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<sup>7</sup> This concept isn’t even a new one. *See Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958) (recognizing that technological progress may require evolution of the personal jurisdiction requirements, but do not eliminate the requirement for “minimal contacts” with the forum state.)

circumstances in which the forum selection clause should not be enforced because it is unreasonable.”) *Id.* at \*2. *See, however, America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1 (2001) (held forum selection clause contravenes California public policy.) The consumer may fight the validity of this type of clause as being unreasonable or against public policy. The consumer may even challenge the validity of the contract as a whole depending on the evidence available for showing all three basic elements have been met, especially acceptance.

Even the traditional concept of a contract made directly between the two parties has been modified slightly in online case law as an intermediary may be deemed to have acted on behalf of the offeror or offeree through the law of agency. *See, Network Solutions, Inc. v. Hoblad, B.V.*, 2003 WL 22989688 (4th Cir.(Va.)) (not selected for publication in the federal reporter) (4th Cir.(Va.), Dec 19, 2003) (NO. 03 1226) (online registration agreement’s jurisdiction clause held enforceable even though accepted through intermediaries who were deemed agents of the defendants.)

### *Conclusion*

While the rules for Internet jurisdiction are getting clearer, there are still grey areas that may be avoided with the use of forum selection clauses. Generally, if a company uses its website to target a forum in conducting its business, the court will permit the exercise of personal jurisdiction. If a company is not directing its website marketing at a particular forum, then the website alone is not sufficient basis for a court to exercise personal jurisdiction. This is consistent with traditional analyses in other non-physical areas such as telephone calls and post office mail correspondence.

The law on jurisdiction for interactive websites is still unpredictable and clear case law has not yet developed. Courts should look at the extent of interaction possible at each website individually to decide whether or not the defendant has reached into the forum sufficiently to be subject to personal jurisdiction by the courts in that forum. However, the actual degree of interaction on a website required to subject a defendant to personal jurisdiction in states where the site is accessed is still being developed.