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Jurisdiction over E Commerce

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ABSTRACT

Expansion of business onto the Internet crosses national borders and creates uncertainty as to the propriety of jurisdiction by the courts of nations and their internal political units. Analysis of jurisdiction in United States law reveals that traditional rules provide guidance for resolving the question of constitutional jurisdiction in cases that cross geopolitical lines.

1. INTRODUCTION

Web commerce provides opportunities for international trading at low cost. Maintenance of Web sites and use of banner ads and search engines allow companies to enter highly desired United States markets and reach consumers who would otherwise be out of reach.

While both government and private businesses seek to take advantage of the annual estimated \$110 billion in U.S. imports,¹ this expanded commercial presence through the Internet means additional risk as American consumers and competitors turn to United States courts for redress of commercial injury.

The question of forum selection and jurisdiction has long been a central one in civil litigation in the United States.² Where can an aggrieved party seek redress: Where the injury took place, where the plaintiff resides or where the defendant lives? The question is complicated by the nature of e-commerce which bypasses national borders. For many Internet business models, the nationality of the consumer is relevant only in terms of exchange rates. That changes with the filing of a civil lawsuit. Then, the location of the forum in which the case is to be decided will be of great importance.

2. TRADITIONAL JURISDICTION ANALYSIS

¹<http://www.usashow.net/bmsc1.asp?id=381>

²Jurisdiction can be found as either general jurisdiction or specific jurisdiction. In general jurisdiction, the defendant will have an ongoing relationship and general activity in the state that is unrelated to the controversy at hand. See, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, (1984). An airline that operates in a state would be subject to general jurisdiction on the basis of its ongoing business presence. Specific jurisdiction arises when a defendant has sufficient contacts with the forum state that exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. See, *International Shoe Co. v. State of Washington, Office of Unemployment*, 66 S.Ct. 154 (1945).

At the heart of jurisdiction is the due process clause of the Fourteenth Amendment of the United States Constitution. That clause has placed limits on which courts a defendant may be brought to answer for civil wrongs. That power of a court, tested in the enforcement of its judgments, is decided by the application of the Fourteenth Amendment, specifically the due process clause.³

The Supreme Court has dealt with the issue of defendant conduct and jurisdiction in three significant pre-Internet cases: *International Shoe Co. v. State of Washington, Office of Unemployment*, 66 S.Ct. 154 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559 (1980); and *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985).

International Shoe focused on the activities of an out-of-state corporation. *International Shoe* had between 11 and 13 salesmen who exhibited samples of the company shoes and solicited Washington residents to place orders with company headquarters in Missouri. The state of Washington sued to force the company to pay into the state unemployment fund.

The case reached the U.S. Supreme Court where *International Shoe* argued that due process restrictions would not allow the Washington courts exercise jurisdiction. Chief Justice Harlan Stone delivered the opinion affirming that *International Shoe* was subject to the power of that state courts. The key was the conduct of the shoe company in the state.⁴

³U.S.C.A. Amendment XIV II persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁴*International Shoe Co. v. State of Washington, Office of Unemployment*, 66 S.Ct. 154, at 159-160, (1945).

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not cannot be simply mechanical or quantitative.

Whether due process is satisfied must depend rather on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.

As a general proposition, Stone wrote, single or irregular activity by a corporation agents in a state did not make it liable to suit there. But International Shoe had done considerable business in Washington and, in so doing, benefited from the state⁵

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559 (1980) helped to refine the scope of the application of jurisdiction. In Volkswagen, a family purchased a car⁶ from a dealership that operated in New York. A year later, the family was involved in an accident in Oklahoma while en route to Arizona. The family brought a products-liability suit in Oklahoma. The Oklahoma Supreme Court ruled that the family could sue in an Oklahoma state court. It reasoned:⁷

The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma.

Further, the Oklahoma Supreme Court reasoned, World-Wide could reasonably anticipate being brought into an

⁵ Ibid. At 160.

⁶ The car happened to be an Audi. The family was Harry and Kaye Robinson and their two children.

⁷ Quoted in World-Wide Volkswagen v. Woodson, 585 P.2d 351, 354 (Okla. 1978).

Oklahoma court.⁸ In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. World-Wide appealed to the U.S. Supreme Court and, in an opinion by Justice Byron White, the Court reversed. Justice White wrote that World-Wide had no contacts with Oklahoma, certainly not enough to give Oklahoma courts jurisdiction over the company.⁹ Here, there is a total absence in the record of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.

Justice White disposed of the Oklahoma Supreme Court analysis of the foreseeability of World-Wide being subjected to Oklahoma jurisdiction. Justice White acknowledged that World-Wide might foresee one of its cars being driven to Oklahoma and that such a car might be involved in an accident. But that was not the proper analysis of foreseeability, White wrote.¹⁰

The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state, but rather that the defendant conduct and connection with the forum are such that he should reasonably anticipate being haled into court there.

The mere fact that World-Wide injected a product into the stream of commerce that wound up in Oklahoma was not enough to create jurisdiction even though there was a claim that the product caused injury. In terms of libel, this case appears to foreclose most, if not all, jurisdictions outside the home state of the defendant publisher.

The Supreme Court fourth case in the quartet of jurisdiction decisions is Burger King v. Rudzewicz.¹¹ That case, involving a contract interpretation dispute between a fast-food franchisee and franchising company is relevant to the extent that it deals with the question of injuries that arise out of actions purposefully directed at forum residents.

Burger King sued Rudewicz, the franchisee, in a Florida court. Rudewicz opposed the exercise of jurisdiction and won in the 11th Circuit. Justice William Brennan delivered the opinion for the Court which reversed the 11th Circuit panel finding that jurisdiction was appropriate for the court in Florida.¹²

⁸ Ibid.

⁹ World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559, 566, (1980).

¹⁰ Ibid.

¹¹ Burger King v. Rudzewicz, 105 S.Ct. 2174 (1985).

¹² Ibid. At 2186.

Eschewing the option of operating an independent local enterprise Rudzewicz deliberately reach[ed] out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.

When Rudzewicz failed to meet the terms of the contract, he caused foreseeable injuries to Burger King. Those injuries reasonably would lead to an accounting for the harm, Justice Brennan wrote. Rudzewicz availed himself of Florida laws before the relationship soured and his purposeful acts directed at Florida were enough to find jurisdiction.

3. APPLICATION OF FORUM ANALYSIS IN INTERNET COMMERCE

A case involving two United States companies from different states provides some direction to the question of jurisdiction over E Commerce. *Zippo Mfg. v. Zippo Dot Com* was a state law trademark dilution case brought by the Pennsylvania light maker against a California Internet company that maintained a Web site and provided an Internet news service.¹³ The Internet company did not have any offices or employees in Pennsylvania and so moved to dismiss the case because the Pennsylvania court lacked jurisdiction.

U.S. District Judge Sean McLaughlin began his analysis by citing the traditional three-part test for jurisdiction from *International Shoe and Burger King*: (1) sufficient minimum contacts in the forum state, (2) whether the claim arose from those contacts and (3) whether the exercise of jurisdiction would be reasonable.

He then turned to the changes that had taken place with respect to jurisdiction, running from physical to virtual presence.¹⁴ The Internet makes it possible to conduct business throughout the world entirely from a desktop. Judge McLaughlin then suggested a structure for deciding when jurisdiction clearly is and is not proper based on the quality and kinds of activity conducted over the Internet.¹⁵

This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that

involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *E.g. CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. *E.g. Bensusan Restaurant Corp., v. King*, 937 F.Supp. 295 (S.D.N.Y.1996).

Judge McLaughlin put interactive Web sites, sites that allow users to exchange information with the host, in a middle ground. The test for those sites would be¹⁶ the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *E.g. Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328 (E.D.Mo.1996).

Applying that test to *Zippo Dot Com*, Judge McLaughlin noted that *Zippo* had some 3,000 Pennsylvania subscribers to its news service. While instructive, Judge McLaughlin's analysis is little more than an application of the principles enunciated in *International Shoe and Burger King*. Even *Burger King*, which predates the Internet phenomenon, recognized the power of interstate communication to confer jurisdiction.¹⁷

Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

A case involving international parties followed a different approach. In *Hy Cite Corp. V. Badbusinessbureau.com, L.L.C.*,¹⁸ a U.S. district court in Wisconsin was called on to determine whether it could exercise jurisdiction in a dispute between an American company and a West Indian concern. In that case, the West Indian company operated a Web site called the Rip-Off Report, which featured critical statements about *Hy Cite* sued alleging unfair competition,

¹³*Zippo Mfg. Co. v. Zippo Dom Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997).

¹⁴*Ibid.* At 1123.

¹⁵*Ibid.* At 1124.

¹⁶*Ibid.*

¹⁷*Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2184 (1985).

¹⁸*Hy Cite Corp. V. Badbusinessbuearu.com. L.L.C.*, 297 F.Supp. 2d 1154 (W.D.Wisc. 2004).

false advertising, disparagement and trademark infringement claims under both state and federal law.¹⁹

Badbusinessbureau.com replied with a motion to dismiss for lack of personal jurisdiction. Judge Barbara Crabb, chief judge for the judicial district, concluded that the court did not have jurisdiction over badbusinessbureau.com either through general personal jurisdiction or specific personal jurisdiction. Judge Crabb cited the American constitutional requirements that a defendant have minimum contact in the forum state and, citing *International Shoe* and other federal cases, noted that those contacts must be purposeful and not random, isolated or fortuitous.²⁰

But where Judge McLaughlin in *Zippo* found jurisdiction based on a Web presence and the level of interactivity of the defendant business, Judge Crabb reached an opposite conclusion in *Hy Cite*. Judge Crabb rejected the *Zippo* approach on two bases: (1) Use of the interactivity test, and, (2) The lack of legal authority to craft a mechanical test for determining jurisdiction. Judge Crabb said it was not clear why interactivity should be a determining factor for jurisdiction.²¹

As even courts adopting the *Zippo* test have recognized, a court cannot determine whether personal jurisdiction is appropriate simply by deciding whether a website is "passive" or "interactive" (assuming that websites can be readily classified into one category or the other). And, Judge Crabb noted, operators of passive Web sites have been subjected to jurisdiction of courts when those sites have been used to harm plaintiffs intentionally.²²

4. CONCLUSION

The risk of lawsuits and the question of where those suits can be brought will profoundly affect e-commerce. A developing model sends advertising messages to Web users based on information they provide, either directly or through analysis of their site visitation. This advertising is not targeted to particular states, but rather looks to individual consumers and is based on a market for information. The Web site is not interacting with the residents of a particular state within the borders of the United States, but rather is seeking all persons interested in travel. The fact that a Web visitor is from a particular state in a particular country, becomes fortuitous and

happenstance contacts should not be enough to maintain jurisdiction.²³

Where, on the other hand, a business uses the Web to target consumers in a particular geographic or political entity, then jurisdiction should be proper in that foreign forum. The result from that system is foreseeability for businesses engaged in e-commerce that allows them to prepare to deal with litigants in foreign forums.

TABLE OF CASES AND AUTHORITIES

- [1] *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2184 (1985).
- [2] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, (1984).
- [3] *Hy Cite Corp. V. Badbusinessbuearu.com. L.L.C.*, 297 F.Supp. 2d 1154 (W.D.Wisc. 2004).
- [4] *International Shoe Co. v. State of Washington, Office of Unemployment*, 66 S.Ct. 154 (1945).
- [5] *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473 (1984).
- [6] *Noonan v. Winston Co.*, 135 F.3d 85, 92, (1st Cir. 1998).
- [7] *Panavision International, LP v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998).
- [8] U.S.C.A. Amendment XIV.
- [9] *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559, 566, (1980).
- [10] *Zippo Mfg. Co. v. Zippo Dom Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997)

¹⁹ *Ibid.*

²⁰ *Ibid.* At 1158, citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473 (1984).

²¹ *Ibid.* At 1160.

²² *Ibid.* Citing *Panavision International, LP v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998).

²³ *Noonan v. Winston Co.*, 135 F.3d 85, 92, (1st Cir. 1998).

