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# JURISDICTION IN CYBERSPACE: THE DIMINISHING IMPORTANCE OF WEBSITE INTERACTIVITY FOR DETERMINING JURISDICTION BASED ON INTERNET ACTIVITY

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Business conducted over the internet (sometimes referred to generally as “E-commerce”) is growing exponentially. A recent Nielson report estimated that one-third of the world’s population is online, an increase of 528% since 2002.<sup>2</sup> E-commerce sales in the American retail industry reached \$194 billion in 2011, an increase of nearly 3,800% since 1999.<sup>3</sup> E-commerce presents unique challenges to courts attempting to apply rules and legal concepts developed in the last century when business was traditionally conducted in person, through personal mail, or even over telegraphs and telephone wires. Personal jurisdiction is perhaps one of the more common and esoteric of those concepts, and transactions conducted through cyberspace do not neatly fit into the established frameworks for analyzing when a state court’s exercise of jurisdiction over a defendant is constitutionally permissible.

The Due Process Clause requires that individuals have fair warning of where their conduct will subject them to a lawsuit. As most remember from first year civil procedure courses, in 1945 the Supreme Court announced in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that the Constitution permits personal jurisdiction to be exercised by the courts of a state only when a defendant maintains certain “minimum contacts” with that forum. Although subsequent Supreme Court personal jurisdiction decisions (particularly several from the 1980’s) apply the *International Shoe* minimum contacts concepts to transactions reflecting an increasingly globalized economy, the fundamental analysis articulated in *International Shoe* and its progeny remains relatively unchanged. The proper exercise of personal jurisdiction turns on the defendant’s *purposeful* activities in the forum and the quantity and nature of the contacts sufficient to satisfy the “minimum contacts” test varies depending on the jurisdiction asserted. In cases of “specific” jurisdiction—where the plaintiff’s claim relates to the defendant’s activities within the forum—a defendant’s contacts need only be purposefully directed towards the forum state. In cases of general jurisdiction—where the plaintiff’s claim does not relate to the defendant’s activities within the forum—continuous and systematic contacts are required. In addition to the minimum contacts requirement, the exercise of personal jurisdiction must align with traditional notions of fair play and substantial justice.

Courts have wrestled to apply this analysis to the World Wide Web where the defendant’s activity “within the forum” is in

the nature of a website that can be accessed and fully utilized from essentially any forum. As some courts have noted, to exercise personal jurisdiction based on an abstract virtual presence in the forum risks the nullification of traditional due process requirements:

[T]he argument could still be made that the Internet’s electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received. Under this argument, the electronic transmissions “symbolize those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process.” *Int’l Shoe*, 326 U.S. at 316–17, 66 S. Ct. 154. But if that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.

*ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F. 3d 707, 712-13 (4th Cir. 2002).

Although the Supreme Court has recognized that the internet is “a unique and wholly new medium of worldwide human communication,” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997) (citation and quotation marks omitted), it has not provided guidance on the application of *International Shoe* and its progeny to questions of personal jurisdiction involving online activity.<sup>4</sup> Without applicable Supreme Court precedent, many courts followed the so-called “sliding scale test” first enunciated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119 (W.D. Pa. 1997), which has been regarded as the seminal case for analyzing a defendant’s internet activity in the personal jurisdiction context.

In *Zippo*, the court concluded that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>5</sup> If a defendant maintains an interactive website and thereby “enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over

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The Special Committee also wanted to recognize, where possible, advancements in technology and the impact of technology on everyday practice. Therefore, the Committee is recommending a New Guideline 6, which encourages attorneys to exchange discovery requests and responses in commonly-accepted word processing format in an effort to reduce the clerical effort required to prepare responses to discovery and motions. While exchanging electronic versions of discovery documents is not required under the Maryland Rules, it is a frequent occurrence in today's practice and benefits clients, attorneys, and their staff. It is the hope of the Special Committee that New Guideline 6 will encourage attorneys and parties to take a more practical and efficient approach to paper discovery that will save time, money, and resources.

The Special Committee also recommends the addition of New Guideline 11, which deals with disputes regarding expert witness fees. After reviewing the Federal Discovery Guidelines that deal with this issue, the Committee thought that the addition of a Guideline on expert witness fees would assist practitioners in dealing with a dispute that has become more common as expert witness fees have increased. New Guideline 11 encourages counsel to familiarize themselves with Maryland Rule 2-402(g)(3) concerning fees associated with expert depositions. New Guideline 11 also states that, even if a dispute regarding expert fees arises, counsel should make good faith efforts to resolve the dispute without the assistance of the Court; if no resolution can be reached, the expert's deposition should proceed as scheduled unless otherwise ordered by the Court, and the parties should thereafter promptly raise the fee dispute with the Court. Since the adoption of the February 1990 Discovery Guidelines, the Court of Special Appeals of Maryland, in *Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600 (1995), has provided practitioners with factors that may be considered by the Court in determining the reasonableness of an expert's fee. Therefore, New Guideline 11 specifically references that case to guide practitioners with regard to the factors that should be addressed in resolving the dispute.

While revising the Discovery Guidelines, the Special Committee went to great lengths to keep in mind the purpose of the Guidelines. The Maryland State Bar Association strives to encourage professionalism and civility among practitioners in this State. In proposing its revisions to the Discovery Guidelines, the Committee sought to provide practical advice to assist practitioners in avoiding discovery disputes and, if necessary, in resolving such disputes more efficiently. Our profession and the public stand to benefit greatly if attorneys utilize the Discovery Guidelines to efficiently and effectively resolve discovery issues in a civil and professional manner.

The Litigation Section anticipates unveiling the proposed revisions to the Discovery Guidelines at the Litigation Section's Business Meeting at the Maryland State Bar Association Annual Meeting on June 13, 2014 at 8:00 a.m.

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the Internet, personal jurisdiction is proper."<sup>6</sup> On the other end of the spectrum, where the exercise of jurisdiction would not be justified, are so-called "passive websites"—sites "where a defendant has simply posted information...which is accessible to users in foreign jurisdictions."<sup>7</sup> For websites occupying the "middle ground" between interactive and passive, the jurisdictional analysis focuses "on the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."<sup>8</sup>

A few courts rejected *Zippo's* sliding scale from the outset, concluding that the principles set forth in *International Shoe* and its progeny sufficiently equip courts to settle jurisdictional questions involving the internet.<sup>9</sup> For the most part, however, the *Zippo* sliding scale test proved initially to be the most influential and widely endorsed framework for assessing the personal jurisdiction question in the context of internet activity. Nevertheless, its validity as a "one-size-fits-all" test for deciding internet personal jurisdiction issues has come under increasing attack.

Some of the strongest criticism of *Zippo's* sliding scale test has come from courts considering its application to questions of general jurisdiction. Indeed, many courts have rejected the idea that even a highly interactive website, alone, can support the exercise of general jurisdiction.<sup>10</sup>

Instead of relying on the interactive vs. passive dichotomy prescribed by *Zippo*, other courts are shifting the personal jurisdiction focus to the purposeful availment requirement of the jurisdictional analysis by focusing on whether the defendant's website "targets" the forum. For example, in *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25 (1st Cir. 2010), the plaintiff argued that general jurisdiction could be exercised in New Hampshire over a hospital in Maine because the

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hospital's website permitted users to "make online charitable donations to the hospital, complete patient pre-registration, register for classes and events, find a doctor, and apply for an employment position at the hospital."<sup>11</sup> Despite these interactive features and the availability of the website to New Hampshire residents, the First Circuit concluded that general jurisdiction was unavailable because there was insufficient evidence that the website targeted New Hampshire residents in particular.<sup>12</sup> Similarly, in *Richter v. INSTAR Enters. Int'l, Inc.*, 594 F. Supp. 2d 1000 (N.D. Ill. 2009), although the New Jersey defendant's website allowed Illinois residents to purchase its products, the court concluded that the mere "potential of Illinois customers to purchase products from defendant's website" was "not enough to demonstrate continuous and systematic contacts with Illinois."<sup>13</sup> In *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245 (Fla. Dist. Ct. App. 2011), the out-of-state defendant maintained a website where he advertised his services, merchandise and enabled users to contact him directly, and made \$100,000 in sales to Florida residents. Nevertheless, because the court did not find that the website targeted Florida residents, and because the defendant's sales to Florida residents represented less than 5% of his total sales, the court declined to exercise general jurisdiction.<sup>14</sup> Other courts have stepped back from the rigid application of the *Zippo* test as the dispositive framework for deciding personal jurisdiction, recognizing it instead as merely one useful tool in measuring a defendant's contacts.<sup>15</sup>

In the absence of Supreme Court decisions applying the *International Shoe* "minimum contacts" analysis to situations involving commerce conducted entirely over the internet, the *Zippo* sliding scale test had carried the day as the framework likely to be applied in such situations. Under that approach companies with highly interactive websites (which have become more and more common as internet technology and popularity improves) run the risk of courts in the most problematic jurisdictions exercising general jurisdiction over any claim brought against them. More recent decisions, however, suggest that *Zippo* may not be dispositive of such issues and the analysis requires more intentional, purposeful contacts directed at a specific jurisdiction even when websites are highly interactive and available to citizens of any forum. Owners of websites that do appear to be specifically targeting residents of particular states may find that they are opening themselves up to assertions of general jurisdiction on claims that have little to do with the state.

### Endnotes

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opinions expressed and any legal positions asserted in the article are those of the authors and do not necessarily reflect the opinions of Miles & Stockbridge or its other lawyers.

<sup>2</sup> See NIELSEN, HOW DIGITAL INFLUENCES HOW WE SHOP AROUND THE WORLD 1 (2012).

<sup>3</sup> See E-STATS REPORT, UNITED STATES CENSUS BUREAU, <http://www.census.gov/econ/estats/2011/all2011tables.html>.

<sup>4</sup> See *J. McIntyre Mach., Ltd. v. Nicasastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., dissenting) ("I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents.").

<sup>5</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002) ("Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet."); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 544 (E.D. Pa. 1999) ("The construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis trod by the Supreme Court and innumerable other federal courts, which leads to the exercise of personal jurisdiction only when a foreign corporation has had sufficient minimum contacts with the forum state. I conclude today that a web site alone does not minimum contacts make.").

<sup>10</sup> See, e.g., *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075-76 (9th Cir. 2011) ("If the maintenance of an interactive website were sufficient to support general jurisdiction in every forum in which users interacted with the website, the eventual demise of all restrictions on the personal jurisdiction of state courts would be the inevitable result.") (citation and quotation marks omitted); *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 712 (8th Cir. 2003) ("Under the *Zippo* test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous, but not substantial. This is untenable in a general jurisdiction analysis."); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) ("[R]egardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action or unless the contacts through the website are so substantial that they may be considered 'systematic and continuous' for the purpose of general jurisdiction.").

<sup>11</sup> *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 35 (1st Cir. 2010).

<sup>12</sup> *Id.* at 36.

<sup>13</sup> *Richter v. INSTAR Enters. Int'l, Inc.*, 594 F. Supp. 2d 1000, 1009 (N.D. Ill. 2009).

<sup>14</sup> *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 260-61 (Fla. Dist. Ct. App. 2011)

<sup>15</sup> See, e.g., *Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 n.7 (5th Cir. 2012) ("Although interactivity along the *Zippo* sliding scale can be an important factor in an internet-based personal jurisdiction analysis because it can provide evidence of purposeful conduct, internet-based jurisdictional claims must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction." (citations omitted)); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007) ("While analyzing a defendant's conduct under the *Zippo* sliding scale of interactivity may help frame the jurisdictional inquiry in some cases . . . it does not amount to a separate framework for analyzing internet-based jurisdiction. Instead, traditional statutory and constitutional principles remain the touchstone of the inquiry.") (citations and quotation marks omitted).