

WE'VE BEEN SUED WHERE?

A Houston Business Lawyer's Comment on Jurisdiction Over Nonresident Businesses

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Even mid sized businesses today sell products and services in more than one city, and oftentimes, in more than one state. Houston's business law climate, like other commercial centers in the United States, has a national presence, catering to businesses that offer a diverse line products and services. In such a national business environment, it is conceivable that a business and its officers may be hauled in as defendants into a court of another state, with nothing more than cursory business contacts, if any, with that state. Consent to jurisdiction in another state should not go unchallenged. In addition to the simple logistical and economical reasons that defending a lawsuit in a foreign state is inconvenient and expensive, federal law requires the court in a foreign state to justify why a non-resident business should be forced to defend a lawsuit in a forum in which it has little, if any, business dealings. If the non-resident's contacts with the state are shown to give rise to the claims alleged in the lawsuit, the Due Process concerns are satisfied, and the case will proceed in a foreign state as pled by the plaintiff.

The analysis becomes more complicated when we leave the comfort of brick and mortar operations and consider on-line business ventures. The Internet has no single location or jurisdiction, so can an online business expect to be haled into court? As presented in this article, the traditional "minimum contacts" analysis is considered, as well as recent developments in federal law addressing the burgeoning on line commerce concerns.

Due Process and Minimum Contacts

It is now an established rule that an individual or business is protected from being unfairly brought into the courts of a foreign state if doing so would violate the Due Process clause of the United States Constitution (and its state constitution counterpart). The Due Process clause protects a person's or business' liberty interest, by not subjecting them to the binding judgment of a state with which no meaningful "contacts, ties, or

relations"¹ is established. The United States Supreme Court held that the Due Process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."² When, then, is the Due Process clause satisfied, thus allowing a business to be sued in a foreign state?

The answer depends on whether and to what extent a business avails itself of the laws and business climate of a particular state, and involves itself in a transaction in that foreign state. If so, the general rule is that Due Process clause could be satisfied, and the lawsuit may proceed. To satisfy the due process requirement, however, the plaintiff bringing the lawsuit must show that the out of state business (the defendant in the lawsuit) has "certain minimum contacts with [the state in which it is being sued] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."³ Where the claims in the lawsuit "arise out of" a "relationship among the defendant, the forum, and the litigation" the court may exercise specific jurisdiction over the out-of-state defendant.⁴ This has also been referred to as *in personam* jurisdiction, or jurisdiction over the person.

There is an important qualification that must be made between specific jurisdiction and general jurisdiction. If the out of state business has a continuing and substantial connection with the state in which it is sued, such as maintaining a business office, sales force, etc., the business may be deemed to be doing business within the state, and a court in that state may exercise general jurisdiction over the business, just as it would over a resident individual or business in that state.⁵ Such continuous and prevalent contacts would subject a business to the general jurisdiction of courts in that state, and the specific jurisdiction analysis becomes moot. This article does not discuss general jurisdiction, but specific jurisdiction, which is required to subject a nonresident entity to a

¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), citing *International Shoe Co. v. Washington*, 326 U.S. 310, (1945).

² *Burger King*, 471 U.S. at 474, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

³ " *International Shoe*, 326 U.S. at 316, quoting *Milliken v. Meyer*, 311 U.S. 457 (1940).

⁴ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). See also, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

⁵ *International Shoe*, 326 U.S. at 318 (general jurisdiction may be maintained if a non-resident maintains continuous corporate operations within a state that are so substantial and of such a nature as to justify suit against that non-resident defendant in the state).

state court's jurisdiction, based on the acts of the nonresident entity in that state.

Specific Jurisdiction Arises from Specific Conduct

A court in another state may exercise jurisdiction over a non-resident business when the nonresident defendant's contacts with the forum become the basis of the claim brought by a plaintiff in that state.⁶ The standard used by courts to determine whether the due process requirements are met in a particular case is to examine the relationship among the defendant, the state in which the lawsuit is brought, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice.⁷ Some of the factors a court may consider are whether the non-resident business negotiated contracts within the state, had a sales force visit a client (who is now the plaintiff in the lawsuit), or engaged in other business activities which gave rise to the claims in the lawsuit. This is usually done on a case-by-case basis, with evidence presented to the presiding judge.

Texas Rules and Claims of Alter Ego

Texas courts have also opined on Due Process requirements when subjecting foreign businesses and their senior personnel to a Texas state court's jurisdiction.⁸ In addressing whether executives in companies may be sued in Texas, the Texas Supreme Court, citing the United States Supreme Court, has noted that,

[a]bsent some allegation of a specific act in Texas, or one with reasonably foreseeable consequences within this state's borders, a nonresident employee of a foreign corporation cannot be sued in Texas simply because his or her employer solicits business here. Constitutional considerations of due process forbid this bootstrapping of minimum contacts.⁹

This analysis also applies to related business entities, such as subsidiaries and sister companies. Courts begin with the presumption of institutional independence of related corporations, such as parent and subsidiary, when determining if one corporation's

⁶ *x Helicopteros*, 466 U.S. at 414 n. 8.

⁷ *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977).

⁸ *Siskind v. Villa Foundation for Educ., Inc.* 642 S.W.2d 434, 438 (Tex. 1982).

⁹ *Id.* citing *Rush v. Savchuk*, 444 U.S. 320, 329 (1980).

contacts with a forum can be the basis of a related corporation's contacts.¹⁰ In some cases, plaintiffs have cleverly attempted to argue that there is an indistinguishable relationship between two related companies, claiming that one business is the *alter ego* of the other. Courts have held, however, that “the burden of making a *prima facie* showing of such symbiotic corporate relatedness is on the proponent of the agency/alter ego theory.”¹¹ In other words, making such a bold statement is insufficient. The Plaintiff must proffer some evidence of indistinguishable corporate identities of the two defendants.

In *Product Promotions, Inc. v. Cousteau*, the plaintiffs attempted to drag foreign defendants into the forum state by ascribing the minimum contacts of a corporate entity to its parent companies and common directors. In that case, although there was some evidence that the foreign corporations were related in some way to each other and to a principal individual, the United States Court of Appeals for the Fifth Circuit held that “unfortunately, that is not enough; it was for appellant to sort out those business relationships, and the failure to do so is jurisdictionally fatal.”¹² The issue with this jurisdictional analysis is that minimum contacts within the state, to subject a non-resident business to a court’s jurisdiction in that state, must relate to and arise from those factors giving rise to the plaintiff’s complaint. Thus, although a non-resident may have some contacts with a state, unless those contacts are relevant and related to the action brought, jurisdiction over the non-resident business should fail.

Although this analysis makes sense in traditional business terms, this doctrine in on somewhat shifting sands when dealing with online business ventures. The reality is that many businesses have a significant or exclusive presence online. A web presence does not fit in nicely with the traditional rules applicable to the brick and mortar businesses. Or does it?

¹⁰ *Dickson Marine Inc., v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir.1999) See also *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

¹¹ *Dickson Marine* at 338, citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492-93 (5th Cir.1974), overruled on other grounds; see also, *Burstein v. State Bar of California*, 693 F.2d 511, 518 n. 12 (5th Cir.1982), citing *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702- 03 (1982).

¹² *Cousteau*, 495 F.2d at 493.

On Line Businesses and Specific Jurisdiction

The Internet now allows many organizations to reach persons who are physically distant from the organization's headquarters. A number of recent cases have examined how a defendant's Internet "presence" within the forum state can justify the exercise of personal jurisdiction.¹³ Commentators have noted that "this issue is likely to spawn a great deal of litigation because "the Internet gives individuals who would not have the financial ability or business experience to engage in traditional commerce with other states and countries to distribute documents and other electronic products worldwide."¹⁴ Two of the leading cases on the subject are *Cybersell, Inc. v. Cybersell, Inc.*,¹⁵ and *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,¹⁶ recognize three categories of Internet presence: active, passive and interactive.

"Active" Internet sites are those that are used to consummate business transactions over the Internet, such as where the Internet itself is used regularly both to transmit the product or services purchased, such as computer software, and to obtain payment, such as by transmission of the purchaser's credit card number or banking information. An out of state businesses' use of an active Internet site, to collect payment for products and services, then, may subject that business to the jurisdiction of a court in another state.

The second category, "passive" sites, by contrast, are sites that do "little more than make information available to those who are interested in it," such as by posting information about the site sponsor's product.¹⁷ The use of a passive site is not sufficient to justify the exercise of personal jurisdiction, even if the site is accessed frequently by residents of the forum state, and the plaintiff must establish personal jurisdiction by establishing the existence of traditional "minimum contacts."¹⁸

¹³ See generally, Wright & Miller, 4 Fed. Prac. & Proc. 2d § 1067 (West 1987).

¹⁴ *Id.*

¹⁵ 130 F.3d 414 (9th Cir. 1997).

¹⁶ 952 F. Supp. 1119 (W.D. Pa. 1997).

¹⁷ See *Id.*

¹⁸ *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997); *Resnick v. Manfredy*, 52 F. Supp. 2d 462 (E.D. Pa. 1999); *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, 64 F.

A decision from Pennsylvania held that even when the use of a passive site is coupled with posting of messages to listservs, containing addressees within the forum, as well as to newsgroups accessible within the forum, minimum contacts still do not exist, at least for purposes of general personal jurisdiction, without proof of more traditional contacts with the forum.¹⁹

The third category-constituting the majority of Internet sites-consists of "interactive" sites, whereby the product or service being sold (such as a paper book or an automobile) cannot be directly transmitted via the Internet, but where the site itself allows for the exchange of information between the visitor to the site and the site's sponsor. Here, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website."²⁰ In close cases where traditional contacts with the forum also exist, the defendant's maintenance of an interactive Internet site will tip the balance in favor of a finding of personal jurisdiction.²¹ Also, where the litigation itself has a strong connection to the defendant's Internet activities, such as where the defendant is accused of creating an Internet site that violates the plaintiff's copyrights or trademarks, specific jurisdiction will be found even where the site's level of interactivity is relatively low.²²

Conclusions

The new online jurisdictional analysis does not introduce new standards for online ventures. Whether a business operates online in a foreign state, or engages in specific conduct in that state, the minimum contacts analysis, showing specific conduct in that state that gives rise to the claims in the lawsuit, must be satisfied. The issue seems to be whether a foreign party to a business transaction engaged in significant activities with the

¹⁹ *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999) recently held

²⁰ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

²¹ See *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996); *EDIAS Software Intern., L.L.C. v. BASIS Intern. Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

²² *Quokka Sports, Inc. v. Cup Intern. Ltd.*, 99 F. Supp. 2d 1105 (N.D. Cal. 1999); *Panavision Intern., L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), judgment aff'd, 141 F.3d 1316 (9th Cir. 1998).

business to 'close the deal.' If so, a court in the foreign party's state may subject the business to its jurisdiction.

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