

Personal Jurisdiction in Georgia Over Claims Arising from Business Conducted Over the Internet (Part II) *By Steven W. Hardy*

I. Introduction

This two-part article examines the issues related to the exercise of jurisdiction over claims arising from business conducted over the Internet. The first part of the article discussed the application of Georgia's Long Arm Statute to a hypothetical fact pattern in which a client paid \$10,000.00 for furniture advertised and sold over the Internet that was never delivered. I concluded that a Georgia state court most likely would not exercise jurisdiction over the nonresident seller, but that a federal court in Georgia likely would.

The second part of this article will discuss the Constitutional due process requirements that must be satisfied in order to exercise personal jurisdiction over nonresidents who transact business over the Internet. I will briefly review the principles that apply to the exercise of jurisdiction over nonresidents, then look at how the courts have applied these principles to Internet transactions.



II. Minimum Contacts Analysis

A court exercising personal jurisdiction over a nonresident defendant must satisfy the familiar “minimum contacts” requirement first announced by the United States Supreme Court in International Shoe v. Washington, 326 U.S. 310, 316 (1945). Requiring the plaintiff to show minimum contacts between the defendant and the forum ensures that “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Id.

The Georgia Supreme Court has articulated three rules to determine whether the minimum contacts standard has been satisfied:

- (1) The nonresident must purposefully avail himself of the privilege of doing some act or consummating some transaction with or in the forum;
- (2) The plaintiff must have a legal cause of action against the nonresident, which arises out of, or results from, the activity or activities of the defendant within the forum; and
- (3) The exercise of jurisdiction must be consistent with the due process notions of ‘fair play’ and ‘substantial justice.’

Chung-A-On v. Drury, 276 Ga. 558, 558 (2003). While not stated as part of the three-part test, the Georgia Supreme Court has also recognized that the defendant must “‘reasonably anticipate being haled into court’ in Georgia.” Smith v. Smith, 254 Ga. 450, 454 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). These rules are derived from the United States Supreme Court cases interpreting International Shoe. They are substantially the same as the rules followed in the Eleventh Circuit (and in the other federal circuits), although the Eleventh Circuit has articulated the test slightly differently. See Francosteel Corp. v. M/V Charm, 19 F.3d 624, 627 (11th Cir. 1994).

The Internet raises difficult questions with respect to the application of the minimum contacts test because Internet websites are simultaneously accessible in every jurisdiction in the country. The next section will discuss how courts have determined whether conducting business over an Internet website subjects a party to jurisdiction outside the state of its residence.

III. The Zippo Sliding Scale Test

The leading case addressing the issue of personal jurisdiction based upon commercial activity over the Internet is Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997). Zippo was a trademark infringement case brought in Pennsylvania by the maker of the well-known cigarette lighter against a California-based Internet news service that used the domain name “zippo.com” and several similar domain names. Subscribers to the dot com’s news service would fill out an online application and could pay by credit card over the Internet, after which the subscriber was assigned a password enabling him or her to view and download newsgroup messages. The dot com had approximately 3,000 subscribers in Pennsylvania as well as agreements with seven Internet access providers in Pennsylvania to allow their subscribers to access the dot com’s news service. 952 F.Supp. at 1121.

The court in Zippo limited its discussion to the exercise of specific jurisdiction and focused upon whether the conduct of business over the Internet amounts to a company reaching beyond the boundaries of its state to conduct business with foreign residents. The court held that the dot com purposefully availed itself of the privilege of conducting business in Pennsylvania by conducting electronic commerce with Pennsylvania residents. 952 F.Supp. at 1125-26. The court articulated a sliding scale approach to determine whether the exercise of jurisdiction was proper:

[T]he 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. 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. 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 of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

952 F.Supp. at 1124 (citations omitted).

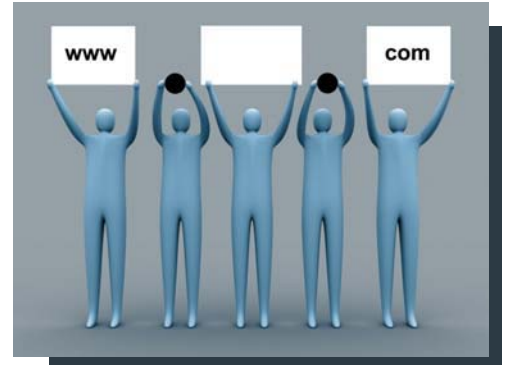
While the sliding scale test articulated in Zippo focuses on the level of interactivity and the commercial nature of the exchange of information on the website, the holding of the case turned upon evidence of transactions with residents of Pennsylvania. Consistent with this holding, cases citing Zippo have made it clear that the level of interactivity of a website is simply a means to determine whether the defendant has purposefully availed himself of doing business with the forum state. Thus, in Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3d Cir. 2003), the court considered whether a fully-interactive website created by a Spanish corporation to sell products to customers in Spain created a basis for exercising jurisdiction over the corporation in New Jersey. The court held that the mere fact that a website allows for the transaction of business over the Internet is not a sufficient basis for exercising personal jurisdiction; the plaintiff must introduce evidence that “the defendant ‘purposefully availed’ itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.” 318 F.3d at 454.

The Zippo sliding scale approach to analyzing Internet contacts has been followed by courts of appeals in most of the federal circuits as well as by district courts in the Eleventh Circuit. See, e.g., Lakin v. Prudential Securities, Inc., 348 F.3d 704, 710-11 (8th Cir. 2003); Barton Southern Co. v. Manhole Barrier Systems, Inc., 318 F.Supp.2d 1174, 1177 (N.D. Ga. 2004). Moreover, its application has not been limited to cases involving commercial transactions.

For example, in Zidon v. Pickrell, 344 F.Supp.2d 624 (D.N.D. 2004), the court applied the Zippo test to a claim for defamation based upon materials posted on a website created by the plaintiff's former girlfriend to criticize the plaintiff.

IV. Exercising General Jurisdiction Based Upon Internet Contacts.

Several courts have used the Zippo approach to analyze whether a nonresident's contacts with the forum were so "substantial" or so "continuous and systematic" as to authorize the exercise of general jurisdiction over a nonresident defendant. For example, in Gator.Com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), the court held that L.L. Bean was subject to general jurisdiction in California because, in addition to maintaining contacts with suppliers in California, it deliberately targeted electronic advertising at California and maintained a highly interactive website from which large numbers of California consumers regularly made purchases and interacted with L.L. Bean sales representatives. 341 F.3d at 1078. See also Lakin v. Prudential Securities, Inc., 348 F.3d 704 (8th Cir. 2003) (ordering jurisdictional discovery to determine the number of forum residents who used interactive features of website to determine if exercise of general jurisdiction was proper); Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002) (same).



V. Conclusion.

Most courts follow the Zippo sliding scale approach to determine if it is permissible to exercise personal jurisdiction over nonresident defendants based upon commercial activity conducted over the Internet. The Zippo test focuses on the level of interactivity of a nonresident's website and the level of commercial activity conducted on the website. However, even a highly interactive commercial website will not subject a nonresident defendant to personal jurisdiction within a forum unless there is evidence that the defendant directed its activities at the forum. The focus of the inquiry must always be to determine whether the defendant purposefully availed itself of the privilege of conducting some activity within the forum.

Steven W. Hardy practices at Friend, Hudak & Harris, LLP in Atlanta. He graduated from Brigham Young University (B.A. 1987) and earned his law degree from the University of California at Berkeley (Boalt Hall) in 1990. He may be reached at 770-399-9500 or shardy@fh2.com.



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Please contact:
Robert T. Neufeld, 2005-2006 Editor
404.572.3509
bneufeld@kslaw.com

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