

# **Real Estate Transactions, the Internet and Personal Jurisdiction**

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## **Abstract**

The World Wide Web and the Internet are beginning to exert enormous influence on how real estate transactions are conducted. Real estate professionals are now subject to new challenges and opportunities since they may now market their services to potentially millions of prospective clients in multiple jurisdictions. However, the ability to transcend state boundaries may expose them to a potentially complex and important procedural legal issue: personal jurisdiction. Personal jurisdiction regulates where a plaintiff can sue a defendant in a civil case. This article discusses the concept and policies underlying personal jurisdiction, how the law is evolving in cyberbusiness, and how this may apply to real estate professionals engaged in multi-state activities.

## **Introduction**

The explosive growth of business on the Internet has spawned an increasing level of legal conflict, as businesses and consumers engage in traditional legal disputation in an environment of evolving case law and regulation. Finding ways to resolve conflict in electronic commerce is becoming a national imperative; indeed, the House Committee on Commerce reported that consumers spent \$2.6 billion in online transactions in 1996, which subsequently rose to \$32 billion in 1998 (Weintock and Leno, 2000). According to Forrester Research, online retail sales are expected to climb to \$130 billion by 2004 (Bagley, 2000). With this level of economic activity, businesses, the courts and consumers must have a clear understanding of the law of cyberbusiness.

Determining how best to resolve the legal challenges created by the growth of cyberbusiness presents a broad set of challenges to the American legal system. As Street (1997) has noted, attorneys and the courts alike are struggling with novel but critical substantive issues involving the Internet, such as the formation of electronic contracts, the determination of privacy rights, the protection of trademark and copyright, issues of defamation and censorship, computer crimes and taxation. These issues are continually addressed by the popular and academic press, which in turn, has helped to raise awareness of these issues among Internet users.

Yet, although an increasing number of Internet users, including those in real estate, are becoming better informed about the law of electronic commerce, there are a

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number of critical legal issues that, because of their complexity, remain largely unknown to all but a few in the scholarly and legal communities. Unfortunately, many of these more esoteric issues have critical ramifications for electronic commerce; as such, it is imperative that clear and understandable presentation of these issues be developed so that those operating in the cyberbusiness environment can create appropriate policy and operating procedures to protect themselves from legal jeopardy.

Possibly topping the list of obscure but critical legal challenges to electronic commerce is the issue of personal jurisdiction. Personal jurisdiction can be a crucial issue in a lawsuit because it allows a party in one state to exert jurisdiction over another, often to gain a legally or strategically advantageous position in a lawsuit. The importance of this concept to cyberbusiness cannot be underestimated. For example, before the existence of the Internet and the World Wide Web, customer, service provider, seller and buyer were often all in one geographic locale and likely knew one another. These types of face-to-face transactions often carried trust among the parties. Thus, a dissatisfied buyer would have quick recourse to remedy a problem with a product or service at a physical site. Now, these parties are flung across the planet. Indeed, the World Wide Web is built on the premise that consumers can literally jump from one site to another through the use of hyperlinks, find a good or service they find appealing, and enter into a transaction, at times a complex one, with someone they not only do not know, but may never have considered doing business with. With parties not knowing each other and obviously having no business relationship, much less a relationship of trust, misunderstandings in communication, if not outright fraud arise. This leads inevitably to conflict, some of which results in lawsuits (Furnari, 1999).

Moreover, at least the initial stages of transacting business on the Internet has even become easier due to the Electronic Signatures in Global and National Commerce Act or E-SIGN, which became law on October 1, 2000. Under E-SIGN, any "act of endorsement or execution that can be recorded and that manifests one's intent to be bound by a document can be deemed a signature," (Weinstock and Leno, 2000:B6). Also, according to Weinstock and Leno, [P]redictions abound that consumers will readily turn to the Internet to purchase homes."

While a number of legal commentators have discussed the topic of personal jurisdiction in general (*e.g.*, Bourque and Konrad, 1996; Zembek, 1996; Chamberlain, 1997; Flower, 1997; Harkin, 1998; Kalow, 1997; Leibowitz, 1997; Meyer, 1997; Stott, 1997; Vanderlaan, 1997; Aalberts, Townsend and Whitman, 1998; Carico, 1998; Kidd, 1998; Sheehan, 1998; and Stravitz, 1998), none have applied it directly to real estate related activities. The importance of personal jurisdiction, however, should not be underestimated. Personal jurisdiction can place many types of real estate businesses who may do business on the Internet, such as brokers, lenders, appraisers and title insurers, in serious legal jeopardy.

The purpose of this article is to evaluate the impact of personal jurisdiction issues relative to electronic commerce in real estate. Toward this end, how the Internet has begun to affect the manner in which real estate sales are conducted will be briefly

discussed. This will be followed by a more in-depth discussion of personal jurisdiction and how this area of procedural law is evolving with regard to the Internet. The article concludes with a discussion of how this may impact various real estate transactions in the electronic village with strategies on how Internet users might better manage this important legal issue.

### **Literature Review: The Internet and Real Estate**

A review of the literature concerning the relationship between the Internet and real estate reveals a growing number of articles with a few dominating themes. One direction is how the Internet has become and continues to be a very important tool for marketing real estate and real estate related services. Many of these articles have come from the popular or trade press (*e.g.*, Fletcher, 1997,a,b,c; Kirkpatrick, 1997; and Nelson, 1998). In one of the earliest academic efforts on this topic, Rodriquez, Lipscomb and Yancey (1996) discuss in detail four kinds of real estate related sites, including those that offer both real estate for sale and real estate services and provide an extensive list of these sites. Baen and Guttery (1997) examine how the Internet threatens the traditional relationship between licensees and real estate buyers and sellers, and how these developments will create savings for real estate consumers. Thrall (1998) also discusses these new changes in the Internet world for other real estate service providers, including lenders, appraisers and commercial brokers. Bond, Seiler, Seiler and Blake (2000) examine the explosive growth of real estate related websites. They present the results of an empirical study conducted with Ohio real estate brokerage firms concerning the reasons why they do or do not use websites in their businesses, the information contained on their sites and the technical requirements that are necessary for maintaining them.

In a related topic, Thompson and Hills (1999) discuss how landlords of office buildings can create greater demand for their properties by providing value-added services in the form of Internet connectivity for their tenants.

A more extensive and growing amount of literature exists on the effect of the Internet on retail sales, property and service (*e.g.*, Mander, 1996; Wheaton, 1996; Schwarz, 1997; Borsuk, 1999; Buss, Futrell and Dorries, 1999; Hemel and Schmidt, 1999; Baen, 2000; and Miller, 2000). For example, Miller (2000) discusses the implications to shopping centers and consumers of a wired and integrated networked communication systems and how that will affect their use of physical space. Likewise, Baen (2000) examines the impact of e-commerce on traditional retail sales as well as its potential impact on commercial property values and percentage rents.

It is noteworthy that none of these articles address the legal issue of personal jurisdiction. In fact, while there is no doubt that the Internet now provides great business opportunities or risks for real estate related businesses and retailers in general, those who might reap great advantages when exploiting this significant technological development, could in fact be highly vulnerable to the legal environmental risk of personal jurisdiction. Conversely, those who are legally harmed, are seeing the emergence of a body of procedural law, which will allow them recourse

against those who violate crucial areas of the law such as contract law and intellectual property law.

## Real Estate Sales and the Internet<sup>1</sup>

Because the real estate industry is information-intensive and information-driven, the information-intensive Internet has proven to be a very attractive medium to that industry. And, as Baen and Guttery (1997) have observed, while the Internet threatens some of the traditional relationships between licensees and their clients, it has also created greater cost savings and opportunity for the development of new roles for the real estate licensee and other real estate professionals involved in the real estate transaction. Hence, according to Thrall (1998) real estate licensees as well as other real estate professionals, including lenders, appraisers and commercial brokers, are searching for ways to adapt and even prosper in this new and uncertain environment using the latest technology. Some agents, for example, are launching their own websites and conducting a significant amount of their business on the web. Others are offering discounts and savings on the final transaction by relinquishing some traditional services offered to clients, all made possible by the speed and efficiencies that e-commerce provides.

According to Wofford and Clauretje (1992), real estate sales have customarily involved five stages: listing, prospecting, servicing, negotiation and agreement, and closing. In the following, the impact of the Internet on each of these areas is briefly discussed. Later, how these functions can subject a real estate professional to personal jurisdictional problems should a lawsuit arise is discussed.

- **Stage 1: Listing.** Traditionally, agents listed houses and entered them into a database known as the Multiple Listing Service or MLS. In effect, the MLS created a cartel-like role in controlling information and virtually insured the agent a pivotal role in the real estate transaction. But, as Fletcher (1997a) writes, many homes are now being listed onto websites by their owners (FSBOs). Although these websites do not yet enjoy the prestige of official licensee listing, they nonetheless offer an increasingly attractive alternative to listing with licensees for a fee.
- **Stage 2: Prospecting.** Traditionally, real estate agents prospected for interested buyers for their listings through referrals, phone calls, etc. Of course, potential buyers could search on their own for homes by scanning newspaper ads, or calling those owners seeking to sell their homes directly (FSBOs). Still, most prospective buyers generally sought agents who had access to the MLS listings. Now buyers can do their own searching. In fact many MLS listings can now be reached directly. The National Association of Realtors' site ([www.realtor.com](http://www.realtor.com)), for example, contains more than a million listings. Traditional players, such as Coldwell Banker ([www.coldwellbanker.com](http://www.coldwellbanker.com)) and Prudential ([www.realbid.com](http://www.realbid.com)) also feature their own listings (Kirkpatrick, 1997). There are, moreover, many upstarts doing the same, including the FSBO

listings and others. Not surprisingly, Microsoft has entered this market with its Homeadvisor® ([www.homeadvisor.msn.com](http://www.homeadvisor.msn.com)), which features over a half-million homes.<sup>2</sup>

- **Stage 3: Servicing.** After prospecting for buyers and finding a property with promise, an agent often arranges for a walk-through or showing. Agents have always greatly simplified this step by having access to a house through a lock box. Yet now, by using the web, Fletcher (1997,b) has observed that it is possible to conduct a “virtual” walk-through. One such tour ([www.hometours.com](http://www.hometours.com)) displays the home, rooms and neighborhood with panoramic photos. It even allows the viewer to zoom in on various features. Of course, the idea of buying a home without actually being there is something that few buyers might want to do at this time. Nevertheless, virtual evaluations will likely speed up and improve the overall search and create greater cost efficiencies. Still, as computer technology inevitably improves the quality of these tours, they could offer the biggest threat yet to the real estate agents’ traditional role in showing their listings and thus requiring those that remain to use the Internet.
- **Stage 4: Negotiation and Agreement.** Negotiating the purchase agreement is one of the most crucial and personal roles the agent plays with his or her client. It involves advice regarding price, offers and counteroffers, and contract contingencies, among other things. This step also brings in other real estate professionals, including lenders (Cocheo, 1996), appraisers (O’Donnell, 1995), title companies and insurers and attorneys (Baen and Guttery, 1997) with the agent taking the role of facilitator of the agreement process. Even this critical role has changed, as a buyer can now identify their own appraisers, lenders, title companies and attorneys, and negotiate directly with these parties through the web. For example, one lender, Myers Internet Services ([www.myer.com](http://www.myer.com)), is expecting to be doing 12% of its loan origination through the web by 2001 (Myer, 1997).
- **Stage 5: Closing.** The traditional role of the escrow agent or attorney in directing the closing will likely be more difficult to accomplish on the web. Still, at least one company is trying. Property Transaction Network ([www.theptn.com](http://www.theptn.com)) offers an “Electronic Closing Table.” The Table furnishes a secured area and allows the parties, including their agents, lenders, insurers, etc., to exchange documents in private.

The foregoing makes it clear that the role of the agent as the critical intermediary in a traditional real estate transaction is being seriously challenged. As Baen and Guttery (1997) have noted, the transaction of the future (if not the present) will become much more efficient and partially or totally displaced by the web. For those who remain, new and untested relationships will arise between buyers, sellers, real estate agents, lawyers, lenders and any other parties involved in the transaction. These relationships will inevitably spawn legal challenges, at least partly because strangers are much more prone to sue each other than are neighbors. And as these legal challenges develop,

the interstate nature of the transaction will force the issue of jurisdiction to the forefront; as such, personal jurisdiction and its application to the Internet and other forms of electronic commerce becomes a critical area of law.

### **Personal Jurisdiction: A General Overview**

Under the American legal system, a court in a particular state cannot impose its authority to resolve a case unless it has jurisdiction. This includes jurisdiction over the persons involved in the case, referred to as personal or *in personam* jurisdiction. Legal issues surrounding personal jurisdiction generally arise when the party commencing the lawsuit, the plaintiff, seeks to bring a defendant from another state or country, into a state or forum, chosen by the plaintiff.

If the plaintiff's efforts to bring the defendant into a court are challenged, the plaintiff must show that the defendant had some minimum level of presence or contacts with the forum state. In the past, these contacts were often physical in nature and therefore relatively easy to demonstrate, e.g., a contract sent and executed in the forum state or an accident committed there. Such contacts also revealed an intention by the defendant to do business or to be present in and therefore subject to the laws of the forum state.

The Internet has, in many instances, radically altered the physical dimensions of these kinds of relationships. The Internet, as discussed, knows no boundaries or territory. A business website, for example, can be downloaded by millions around the world in seconds. In most cases, the site's owner has no prior awareness by whom, much less where they are. Thus, what in the past might have consisted of a business transaction, which could usually only be directed intentionally at another, say a telephone sale of a product from a seller in one state to a buyer in another, today involves an Internet site whose owner can advertise and offer services that are accessible to millions of people nationwide and worldwide instantly. Once this occurs, the seller might be considered to have availed itself of doing business in those states and so could then be subject to the jurisdiction of those states' courts in a lawsuit that he never would have anticipated. This is in contrast to pre-Internet days, when those conducting business generally knew where their business activity was situated.

Of course, for prospective plaintiffs, the Internet may also be changing the legal game plan significantly. In the past, the plaintiff often was not able to or wished not to argue personal jurisdiction over the defendant due to the complexity and cost of asserting it. This forced the truly aggrieved plaintiffs to either give up their legitimate claims or seek out and find defendants and incur the cost and strategic disadvantage of suing them on their home turf. Now, as some of the following cases, such as *Maritz v. Cybergold, Inc.* (1996) suggest, electronic contacts can, at least in some instances, be more easily determined by those plaintiffs. This may facilitate their efforts of proving that there is a sufficient amount of minimum contacts for hauling in defendants from other states. In the past, these defendants might have been able to wrongfully evade the long-arm of the law.



The foregoing, however, should not suggest that the issue of personal jurisdiction will be greatly simplified. The law is still in its early stages, and will need to be addressed by courts in more jurisdictions, including the U.S. Supreme Court, before a more predictable legal environment will exist. Moreover, other mediums of electronic commerce, such as e-mail, online conferencing, bulletin board systems (BBSs), information retrieval and telnet further often complicate the issue of personal jurisdiction. All of this discussion obviously begs the question of *where* can a plaintiff sue a defendant? For example, if a website featuring mortgage loans contains material (such as a similar trade name or trade dress), which those in other jurisdictions find legally objectionable, does that mean the defendant can be exposed to lawsuits in virtually any state or country in the world in which the information is received?

The following will discuss the concept of personal jurisdiction and how the courts have struggled with this issue. In particular, a sliding scale test, first enunciated in the case of *Zippo Manufacturing v. Zippo Dot Com, Inc.*, (1997) will be introduced to illustrate the likely direction the law is heading. The ways in which real estate professionals, both prospective plaintiffs and defendants, who are conducting business on the Internet can better manage and understand the legal risks of conducting business in multiple jurisdictions is also discussed.

### ***Determining Personal Jurisdiction***

In order to gain personal jurisdiction over a defendant, a plaintiff must show there is some connection or nexus to a particular jurisdiction. Put another way, personal jurisdiction is a geographical restriction placed on where the plaintiff can sue the defendant and, thus, limit the territory where he or she can prosecute his or her case against the defendant and prevent a practice known as “forum shopping.” For example, imagine that a citizen of California enters Arizona and negligently injures an Arizona citizen in a car accident. Where could the Arizona plaintiff sue the California defendant? If the plaintiff sued the defendant in Minnesota, there would be no personal jurisdiction in that state since the accident bore no relationship with Minnesota. However, the defendant could be sued in Arizona since, by driving there, he created a connection or relationship with that state.

The concept of personal jurisdiction was instituted to prevent unfair burdens on defendants. Unconstrained plaintiffs will seek strategic advantage by seeking the territory or forum that affords them the most favorable juries and legal precedents, while also attempting to create logistical and economic hurdles for the defendant.

Of course, defendants have also readily taken advantage of the protections this concept affords by, at times, vigorously arguing that minimum contacts are not sufficient to be hauled into the plaintiff’s jurisdiction. Since the concept of minimum contacts is highly fact specific, it has offered the defendant the ability to maintain an apparently sincere defense, even if one does not exist, sometimes forcing the plaintiff to give up or settle early. Since such behavior can have little, if anything to do with the substantive merits of a case (*e.g.*, did the defendant drive negligently?) the law

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governing personal jurisdiction attempts to erect a fairer playing field by limiting the plaintiff's territorial options.

### ***Minimum Contacts: A Required Element for Determining Personal Jurisdiction***

The Due Process Clause of the U.S. Constitution provides the basis for determining personal jurisdiction. The Due Process clause, contained in the Fifth Amendment, and applied to the states and their actions, through the Fourteenth Amendment, requires that the legal procedures used in criminal and civil cases must be fundamentally fair, including how defendants in civil cases are treated in court. Hence, a state cannot exert its territorial power to decide a case unless it is fair and reasonable. What is constitutionally fair and reasonable is determined by whether "minimum contacts" exist.

According to Street (1997), minimum contacts with a certain forum can be based on three factors: *domicile*, *consent* or *specific jurisdiction*:

- **Domicile.** Personal jurisdiction based on domicile is determined by where the defendant maintains continuous and substantial contacts, such as his home. In the example, since the defendant lives in California, his ongoing presence there constitutes continuous and substantial contacts with that state and therefore exposes him to its courts. Accordingly, the Arizona plaintiff can, if he chooses, sue the California defendant in California, the state of the defendant's domicile. This is true even though the cause of action (the defendant's negligent act) did not arise in California. In fact, a defendant can generally be sued in his own state for any cause of action that arises anywhere in the United States. Since most defendants obviously prefer that the plaintiffs come and sue them on their home turf, this option normally does not raise legal objections.
- **Consent.** A defendant can simply agree to be subject to the jurisdiction of a particular state. This often occurs when a contract contains a choice of forum clause (a topic discussed later). Should a lawsuit arise in such a case, the defendant has already consented to a prescribed jurisdiction or forum and so must submit to it.
- **Specific Jurisdiction.** The commission of certain actions in a state, also referred to as *specific jurisdiction*, is the last way minimum contacts can be established. Asserting personal jurisdiction cannot "offend traditional notions of fair play and substantial justice," (*International Shoe v. Washington*, 1945). This means that the cause of action or the facts that give rise to the lawsuit, must relate in some manner to the forum state, and the defendant must have purposely availed him or herself of doing business in the forum state. The defendant must also have reasonably anticipated that he or she could have been brought into court there. Thus, in the example, the California defendant, after entering Arizona and injuring a citizen of that state, should have reasonably expected to be sued there.



With regard to specific jurisdiction, the law requires that it must be “reasonable” to permit the plaintiff to sue the defendant in the forum state. To test whether bringing the defendant into the forum state of the plaintiff’s choosing is reasonable, the Supreme Court requires that five factors be considered. They are:

1. The burden on the defendant;
2. The forum state’s interest in adjudicating the dispute;
3. The plaintiff’s interest in convenient and effective relief;
4. The interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and
5. The shared interest of the several states in furthering substantive social policies (*Burger King v. Rudzewicz*, 1985).

Lastly, Street (1997) writes that in specific jurisdiction cases, a plaintiff cannot assert personal jurisdiction over a defendant in another state unless a state’s long-arm statute permits him to do so. Long-arm statutes, which exist in all states, give the legal authority to haul an out-of-state citizen back to the plaintiff’s forum. This generally poses few legal obstacles since most long-arm statutes allow personal jurisdiction to the limit allowed after applying the Due Process analysis presented earlier.

## Personal Jurisdiction in Cyberspace

The foregoing method of establishing minimum contacts to assert specific jurisdiction has, to this date, generated all of the litigation surrounding personal jurisdiction and the Internet. Accordingly, the remainder of this article will attempt to clarify how specific jurisdiction is asserted in the unique environment of the Internet in general and to real estate transactions in particular.

### *The Zippo Sliding Scale Test*

In the quite recent case of *Zippo Manufacturing Co. v. Zippo Dot Com* (1997), the federal court in the Western District of Pennsylvania, articulated a sliding scale test for determining personal jurisdiction in a case involving the Internet. Although *Zippo* did not elicit a great deal of response at the time, Aalberts, Townsend and Whitman (1998) observed that it has been followed by a growing number of courts. In fact, in a recent issue of the *Berkeley Technology Law Journal* (2000), the author discusses how the legal conceptual framework enunciated in the *Zippo* continues, with its most recent adoption in a case (*Mink v. AAAA Development LLC*, 1999) decided by the influential federal Fifth Circuit Court of Appeals, which covers the states of Texas, Louisiana and Mississippi.

Essentially, the *Zippo* test divides Internet cases into three categories or scenarios. In the first scenario, the defendant does business in the forum state that involves the intentional and repeated transmission of computer files on the Internet. This might be the proffering of terms, transmittal of an offer or counteroffer, or an acceptance that involves the forum state. Here, defendant’s contacts are usually enough to establish personal jurisdiction in the plaintiff’s forum. The second scenario, or middle ground, is comprised of cases in which an interactive website exchanges information with a

host computer. In this situation, the courts examine the "level of interactivity and commercial nature of the exchange of information" on the website before it can be determined whether the defendant's contacts are sufficient to constitute personal jurisdiction. In this "gray area" of the law, the cases are highly fact-specific and subject to interpretation. The other end of the spectrum consists of cases in which a defendant's website is passive; that is, it simply posts information and is analogous to a magazine. In these cases, the defendant's contacts are usually not sufficient to establish personal jurisdiction with the plaintiff's forum.

The application of the *Zippo* standards is next illustrated by analyzing some of the important cases that have contributed to the delineation of these three scenarios and how each type of scenario could be represented within the context of real estate transactions and business.

### ***Scenario #1: Direct Business Over the Internet***

*CompuServe, Inc. v. Patterson* (1996) indicates how the courts will react when the parties conduct business with each other over the Internet. This ruling binds courts in the 6<sup>th</sup> Federal Circuit, consisting of Michigan, Ohio, Kentucky and Tennessee, and has been cited approvingly by a number of other courts. This means that it will likely be persuasive in additional judicial decisions in other circuits.

In *CompuServe, Patterson*, a Texas resident, subscribed to CompuServe's computer information network service located in Columbus, Ohio. Patterson subsequently entered into a separate agreement with CompuServe to sell his software over the net as well. When CompuServe allegedly began to sell its own software with names and markings very similar to Patterson's software, he demanded (via e-mail) a minimum of \$100,000 for trademark infringement. CompuServe then filed a declaratory judgment to decide the issue in Ohio. Patterson objected to the jurisdiction, arguing that his business activities did not constitute minimum contacts with Ohio.

The court concluded that Patterson had "reached out" to Ohio by maintaining the minimum amount of contacts with that forum and had availed himself of the privilege of doing business there. Likewise, the court ruled that the cause of action of trademark infringement, arose, at least in part, in Ohio. This occurred when Patterson's software was placed on CompuServe's Ohio-based system, where it was advertised and sold, with the proceeds flowing through Ohio. Finally, the court, after factoring in the five elements to determine "reasonableness," ruled that Ohio's selection as the forum should not be disturbed.

This case is particularly instructive when considering Internet real estate transactions. In conducting his business with CompuServe, Patterson had filled out a number of electronic forms and signed an electronic contract for services to be provided by CompuServe. This level of business activity is very similar to what might be expected during a variety of stages of a real estate transaction: clients living in one state and seeking to purchase a property in another could easily argue that because the licensee

had contacted them in their home state, provided them with information there, etc., that the licensee had made minimum contacts with the client's home state. Likewise two licensees conducting similar interstate transactions over the Internet might find themselves in jeopardy of being hauled into the other's jurisdiction, since their Internet activity may have placed them within both venues.<sup>3</sup> In fact, it is possible in a real estate transaction that there may be even a greater amount of disaggregation of locations. For example, a buyer may live in State A, but then move after the sale to State B, where the property is located. The seller may be an absentee owner who, up to the sale, lived in State C. The procuring agent may, particularly if she communicates on the Internet and has a website, live in State D. It becomes even more problematical, if the lender is located in State E.

Consider this rather simple example. Hames, a resident of Louisiana, contacts Joe Gilbert Realty through the e-mail address on Gilbert's website in Massachusetts and asks him to represent him as a buyer's agent. Gilbert subsequently finds a property in Massachusetts he believes Hames will like, and shows it to Hames through a web-based virtual tour. Hames decides to tender an offer to purchase, and directs Gilbert to deliver the offer to the seller's agent. Gilbert, however, fails to tender the offer to the seller for three days. In the meantime, a competing broker tenders an offer, which is accepted by the seller, and the property is sold. Hames, now feeling aggrieved, seeks to file a suit for negligence and breach of fiduciary duties against Gilbert in Louisiana. Under *Compuserve*, Gilbert would likely be forced to appear in the Louisiana courts because he had reached out to Louisiana through his website and had subsequently engaged in ongoing business contacts there.

### ***Scenario #2: Indirect Business and Competition***

In *Maritz v. Cybergold, Inc.* (1996), an indirect interaction among the parties leads to an assertion of personal jurisdiction. In *Maritz*, the court examines "the level of interactivity and commercial nature of the information exchanged" to determine if personal jurisdiction exists. *Maritz* pits a Missouri-based operation, Gold Mail (owned by Maritz) against a California defendant, Cybergold. Gold Mail offered e-mail advertising and free e-mail service to individuals willing to complete a variety of marketing questionnaires. Soon after Gold Mail began operation, California-based Cybergold began to offer the same type of services. Maritz (the owner of Gold Mail) sued Cybergold for trademark infringement and unfair competition.

At trial, Cybergold argued that its only contact with Missouri was through its computer in Berkeley, California, which was equally accessible to computers worldwide. The court, however, maintained that this contact made it accessible to Missouri users and that it had thus purposely availed itself of the privilege of doing business in Missouri. Therefore, the court argued, the possibility of being brought into a court there should have been anticipated. The court also pointed out that Cybergold had made active solicitations and that a total of 131 Missouri users had accessed Cybergold's website. When these facts were taken together, the court ruled that the Missouri courts could assert personal jurisdiction over Cybergold.

For licensees, mortgage brokers and others involved in real estate sales, the *Maritz* decision is again particularly important; because a website is available to Internet users anywhere, offers and solicitations that are made on the website may be being made in countless jurisdictions across the country. Consider the following example: Kohl, a startup mortgage broker operating in Portland, Oregon calls his business Northwest Mortgage, Inc. and operates a website offering residential mortgage service nationwide, except in those states requiring specific licensure. Further, Kohl had been contacted by, among others, numerous persons from the state of Minnesota. His interactive website comes to the attention of Norwest Mortgage Inc., which has long held its trademarked name and which offers residential mortgages in all fifty states. Norwest seeks to enjoin Kohl from using the Northwest name, as it may cause confusion among prospective customers because of its similarity with its trademarked name. Norwest files its action in federal court in its home state of Minnesota, arguing that, in line with the reasoning in *Maritz*, Kohl had availed himself of doing business in Minnesota. If Kohl had foreseen this problem, and had specifically excluded contact with clientele in Minnesota, Norwest might be equally justified to haul Kohl into court in any of the other states in which they overlapped (assuming Kohl had minimum contacts in these states), such as nearby Wisconsin. Although the Internet is a great place to advertise and offer services, users must remember that services advertised on the Internet versus those made in the local paper differ significantly in whom they legitimately include as potential consumers.

It should be emphasized that cases falling into Scenario #2 are fact-specific and, therefore, possibly subject to a great deal of interpretation and variations among the courts. Stott (1997), for example, has called the *Maritz* decision, "alarming" presumably for its breadth, arguing that it "strayed" from the Due Process analysis developed in *CompuServe*.

### **Scenario #3: Passive Website**

In the case of *Bensusan Restaurant Corp. v. King* (1996), a Missouri citizen who maintained a passive website for its club called The Blue Note (which of course could be accessed worldwide), was sued for trademark infringement by the owner of a club in New York with a similar, trademarked name. The defendant challenged the plaintiff's choice of New York as the forum, arguing there were no minimum contacts with that state. The contacts with New York were tenuous; if for example, a New Yorker accessed the Missouri website, and then wished to see a show in Columbia, Missouri (the website offered no national services), he or she would have to telephone the box office there to reserve tickets and then drive to the club in Missouri to pick them up. Again, the New Yorker would be doing all of this only to see a show in Missouri; the defendant's website advertised no service that would have materially interfered with the plaintiff's New York establishment. Accordingly, the court ruled that any cause of action for infringement would have to be tried in Missouri, not New York. Put another way, since there were not enough contacts in New York, the plaintiff from that state would have to pursue the defendant for trademark infringement in the latter's home turf of Missouri.

Despite the holding in the *Bensusan* case, courts continue to scrutinize passive website cases on their specific facts. In *Inset Systems, Inc. v. Instruction Set, Inc.* (1996), a case that appears very similar to *Bensusan*, a court found that a Connecticut plaintiff had personal jurisdiction over a Massachusetts' defendant, who had claimed to maintain a passive website. In this case however, the defendant maintained a toll-free number on its site, and its website had been accessed at least 10,000 times by access sites in Connecticut. Under these facts, the court argued, the defendant had availed itself of the benefits of that state and should have anticipated being hauled into court there. The court also stated that its decision was reasonable, because, among other things, it would not be burdensome for a defendant in Connecticut to have to defend his case in neighboring Massachusetts.

As an increasing number of real estate and mortgage brokerages develop a web presence, issues of trademark infringement may become significant. Local firms may find that their name can be challenged by trademarked firms in other states, as those firms become aware of the local operation through their website. For example: Harrison operates a small mortgage brokerage company in Port Townsend in northwest Washington state; he calls his firm Seaside Mortgage and advertises his service on a website that simply gives Seaside's address, phone number and list of services. The website also states clearly that Seaside Mortgage is Port Townsend's local home lender. Seaside Mortgage, Inc. (a trademarked name), based in Atlantic City, New Jersey (which only does business in New Jersey, Delaware and Maryland) sees Harrison's website and files suit to enjoin his use of the name Seaside. According to the rationale in *Bensusan*, Seaside probably could not haul Harrison into a New Jersey court to seek the injunction, although it would not be precluded from seeking this action in Washington.

What *Bensusan* and *Inset Systems* really define, however, are the factors that transform a passive website into an active one; the more that a website provides for, and encourages interaction with contacts in other states, the more likely it is to be found to be availing itself of business there and thus be susceptible to that state's jurisdiction. Because real estate is essentially fixed in a single location, most services involved with real estate tend to be geographically fixed as well; further, because of licensing requirements, etc., firms operating in multiple states are usually already placed under their courts' jurisdictions by their licenses, charters, etc. Where Internet activity creates a particular threat is among firms operating near state borders, where there are customers across state lines looking to buy in the licensee's state or where the licensee is competing with a licensee in another state for essentially the same customer pool. Here, the goodwill and reputation of a firm's name may lead to legal challenge and the assertion of personal jurisdiction by an out-of-state plaintiff with a similar and trademarked name. The more active a website is in this type of situation, the more likely its operator is to be called into another state's jurisdiction.

### **Reducing Legal Risk**

One issue that was hopefully made clear from this article is that legal problems are an unavoidable, albeit not certain, risk of doing business, both in general, as well as

in real estate in particular. Those who conduct legitimate business practices and then suffer a loss due to another party's illegal behavior, must at time pursue these parties as plaintiffs. Conversely, there are parties who are wrongfully (as well as rightfully) accused of illegal activity and are sued as defendants. The law is both a sword and a shield, and for those who use the system ethically, there should be methods to reduce their risk exposure to lawsuits, including those that may arise due to business conducted on the Internet or emanating from a website.

In light of these cases, those transacting and soliciting real estate sales and other transactions on the Internet might wish to minimize the legal risks discussed above. Various commentators (*e.g.*, Bourque and Konrad, 1996; and Chamberlin, 1997) have suggested ways of doing this.

1. **Limit the amount of interaction.** As the *Bensusan* case points out, the inability of New Yorkers to have tickets sent to them from the defendant in Missouri greatly aided the defendant's case argument that it could not be hauled into a New York court. This shows that the defendant is not purposely availing himself of the benefits of that state, since no business is to be conducted there, and so it should not have expected to be brought into court there. Conversely, such things as sign-on for services, posting messages and ordering products and services on the website or by a toll-free number, may increase legal risk.

Plaintiffs, on the other hand, who advertise their business on the web, must be vigilant of those who may try to usurp their goodwill by using, diluting or causing confusion in the minds of consumers on an interactive website.

2. **Limit access to certain locales.** It is now obvious that doing business in a state creates a risk of being sued and brought to that state. Thus, a website might wish to prevent access to it from certain places that it would not wish to be sued in. For example, users might be required to give their state or zip code, some of which might be deemed off limits to their use of the site. Stating that the site is directed toward certain users in certain places may also help. In the *Bensusan* case, the website stated that it was intended to provide information only for those in the Columbia, Missouri area.
3. **Choice of forum and law clauses.** Much business today conducted between different states and nations routinely insert choice of forum and law clauses. A choice of forum clause would specify beforehand in a contract what state or country would be the forum for a lawsuit, should one arise. Generally these clauses are enforceable if reasonable.

A choice of law clause provides which state or nation's law would be applied to a lawsuit. Generally it is the law of the forum selected in the forum clause. This clause would further serve to reaffirm a party's tie to



the forum and that it is reasonably foreseeable that if litigation arises, it would be in that locale. Choice of law clauses are generally enforceable too unless there is no reasonable basis for its application, or if the choice of law violates public policy. Thus, if an Iowa-based business operating a website with most of its users from the U.S., chooses Iowa as the forum and Iowa law as the choice of law, both of these clauses would be reasonable. It could not, however, select Peru as its forum (no connection, too burdensome, etc.) and the law of Libya (no reasonable basis and connection, likely public policy conflicts).

There have, however, been cases in which public policy has been successfully argued, although they are not numerous. Courts tend to favor laws that diminish procedural complexity and promote efficiencies. However, if these clauses should violate the public policy of a state they are considered void. Thus, if a plaintiff objects to the fact, the clause forces him to initiate his lawsuit in the defendant's state, rather than his own, he could assert that either or both the choice of law and forum clauses violates the public policy of his state. Still, public policy arguments have prevailed in certain instances, such as in a number of states with statutes designed to protect consumers (*Business Incentive Co., v. Sony Corp. of America*, 1975). Thus, if a plaintiff who feels he has been victimized by fraud in a consumer transaction is forced to go to the defendant to prosecute his case due to the choice of forum clause, he may be able to void the clause and force the defendant to come to his forum. Some of these kinds of protections may also afford protection for those involved in real estate transactions and lending.

## Conclusion

As the real estate industry becomes increasingly dependent on e-commerce, it is imperative that real estate licensees and those in allied industries become aware of the legal ramifications of participating in these media. Although personal jurisdiction is a somewhat esoteric area of law, Internet users are subject to it in ways that most users never anticipate. Savvy real estate professionals will want to protect themselves from unwanted personal jurisdiction through judicious design of their websites and related services. Conversely, those professionals who are aggrieved now know that the law is becoming more clear in how they may pursue those who have violated their rights.

The foregoing discussion raises significant public policy issues regarding personal jurisdiction. Personal jurisdiction serves an important role in safeguarding the legal system. For example, those who may engage in such procedural sleights of hand as forum shopping must litigate in the proper forum based on the case's substantive merits. Many believe that business conducted on the Internet and the World Wide Web may change the rules of this game substantially. Now, unwary businesspersons can find that they are subjected to the jurisdictional reach of vengeful plaintiffs in virtually all the states, and even around the world.

However, despite the appearance of vulnerability, the conceptual framework first enunciated in the case of *Zippo Manufacturing v. Zippo Dot Com, Inc.* (1997), a

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framework extensively discussed in this article, a fair and workable means of regulating lawsuits arising out of cyberbusiness is laid out. The *Zippo* case offers a three-prong approach taking into account the kinds and amount of contacts necessary for determining personal jurisdiction. And, although the cases that rely on the reasoning in *Zippo* are continuing to develop in the courts, the guidance and underlying policy this conceptual framework puts forward will enable real estate professionals, both those who must sue or those who must defend their actions, to operate in a future with a more predictable legal environment.

## Endnotes

1. When we refer to the Internet, we refer not only to the communication medium of the World Wide Web, but also to the numerous supporting and corollary technologies, such as e-mail, bulletin boards, computer information services, etc.
2. For an expanded list of real estate websites, see Baen and Guttery (1997).
3. It should be noted that this article does not discuss the legal issue of a state's regulation of real estate sales when the listed homes appear on websites accessible worldwide. For instance, if a prospective buyer from Kentucky sees a Florida listing and e-mails a message to the listing's broker who happens to be in North Dakota, can the Florida Real Estate Commission regulate the sale and, if necessary, go after the broker if he violates Florida real estate brokerage laws? According to James Mitchell, assistant attorney general of Florida and legal counsel to its Real Estate Commission, the ability of Florida to exert jurisdiction over the listing broker is uncertain. This is because real estate brokerage law governs where the activity is. Since the broker's activity is not in Florida, Florida may not be able to regulate the broker's activities (Sheridan, 1997).

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