

jury. Once this threshold determination has been met, the issue is then for the fact finder to determine the weight to be given any particular factor, and its relevance ... " 955 N.E.2d at 1155.

Applying this, the Court analyzed the plaintiffs' claims and, in rejecting them all, rendered important and defense-friendly rulings:

- Once Ford established it complied with industry standards, plaintiffs were required to prove that, despite such compliance, Ford's conduct was unreasonable. *Id.*, 955 N.E.2d at 1157.
- In presenting their alternative design, plaintiffs failed to meet their burden because their expert only mocked up the design, but conceded it was not "proven out by crash testing or some sort of design process." *Id.*, 955 N.E.2d at 1158-59.
- No post sale duty to warn exists in the state of Illinois and the *Jablonski* Court refused to adopt a post-sale duty to warn. *Id.*, 955 N.E.2d at 1160, 1162.
- Despite Ford's work with law enforcement officials to develop a trunk pack meant to reduce post-crash tank punctures as a result of high-speed crashes, Ford did not undertake to protect civilian customers and owed no duty to plaintiffs. *Id.*, 955 N.E.2d at 1163.

The impact of *Jablonski* for manufacturers is profound. First, *Jablonski* further minimizes the impact of the consumer-expectation test, reducing it to a mere factor in the analysis, no matter if presented in strict liability or negligence. Second, a plaintiff must now prove the feasibility of an alternative design and a "mock up" is not enough. Third, defendant's compliance with industry standards shifts the burden to plaintiffs to establish that defendant's conduct was still unreasonable. Fourth, industry custom is relevant toward determining reasonableness. Fifth, no post sale duty to warn exists in Illinois. Though the Illinois Supreme Court has yet to adopt the defense-friendly Restatement (Third), *Jablonski* moves the state closer, if not in form than certainly in substance. ■

The Internet Jurisdiction: Can Your Non-Resident Clients' Online Contacts Expose Them to General Jurisdiction in Illinois?

by Patrick W. Stufflebeam

Business and personal websites are ubiquitous today and their uses vary from merely providing information to initiating business relationships that result in large revenue. The level of interactivity varies as much as website designs. As the ways to connect with one another continue to increase, a new level of analysis is required to determine how these activities fit within the *doing business doctrine* in Illinois and the exercise of general jurisdiction by Illinois courts over non-resident clients.

Illinois courts may assert personal jurisdiction over a nonresident only if the assertion comports with Illinois' long-arm statute and the due process guarantees of both the Illinois and the United States Constitutions. *Viktron Ltd. Partnership v. Program Data, Inc.*, 326 Ill. App. 3d 111, 759 N.E.2d 186 (2001).

As set forth in *International Shoe* and its progeny, due process requires a defendant to have certain minimum contacts with Illinois such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The long-arm statute expressly allows Illinois courts to assert general jurisdiction in any action against a natural person or corporation *doing business* in Illinois. 735 ILCS 5/2-209(b)(4). The party asserting the existence

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of jurisdiction bears the burden of establishing a *prima facie* basis upon which jurisdiction over the non-resident may be exercised. *Khan v. Van Remmen, Inc.*, 325 Ill. App. 3d 49, 53, 756 N.E.2d 902 (2nd Dist. 2001).

So how are online activities contemplated in the context of the doing business doctrine for jurisdictional purposes? First, in order to exercise general jurisdiction over a nonresident, the Illinois courts have held a nonresident's contacts with Illinois must be continuous, permanent, ongoing, and systematic, as opposed to occasional or casual. *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 1025, 526 N.E.2d 404, 406-07 (1st Dist. 1988). Once the doing business standard is satisfied, the defendant is deemed a resident of Illinois and subject to general jurisdiction by Illinois courts. *Alderson v. S. Co.*, 321 Ill. App. 3d 832, 849, 747 N.E.2d 926, 940 (1st Dist. 2001).

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"Traditional" contacts with Illinois such as owning property, maintaining employees in Illinois, attending trade shows in Illinois, and direct solicitations to Illinois residents, among others, may be easily identified. Online contacts, such as a website, however, may be more discreet. Where does a website exist if it was designed and maintained in a foreign jurisdiction but accessible from Illinois? What information is contained on the website? Can anyone contribute to the content of the website? Can someone order goods or services from the website? Can something really be deleted from the Internet or will it permanently exist?

Although the traditional contacts cannot be ignored in the analysis of whether a nonresident is present and doing business in Illinois, in our wired era, the so-called "internet jurisdiction" must also be examined.

As with the evolution of any technology, the understanding and analysis of online activities are evolving in the area of general personal jurisdiction analysis. Often referred to as the "sliding scale" approach, attempts have been made to analyze the interactivity of websites to determine whether general jurisdiction can be conferred on a defendant not present in Illinois. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the court observed:

[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... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. [citation.] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

952 F.Supp. 1119, 1124 (W.D. Pa. 1997).

At least two appellate courts in Illinois have acknowledged that the type of Internet activity sufficient to establish general personal jurisdiction is a developing area of jurisprudence but acknowledged the adoption of the sliding scale approach by some courts. See *Larochelle v. Allamian*, 361 Ill. App. 3d 217, 225, 836 N.E.2d 176, 184 (2nd Dist. 2005); see also *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114, 824 N.E.2d 1175, 1180 (3rd Dist. 2005).

The Fifth District Appellate Court, however, has rejected the "sliding scale" approach. In *Howard v. Missouri Bone & Joint Ctr., Inc.*, the Fifth District held:

[W]e find that the web page's level of interactivity is irrelevant. In reality, an interactive website is similar to telephone or mail communications. A passive website is much the same as advertising on the radio or in a magazine. An ad on the Internet is no different than an ad in any other medium that provides a telephone number or other means to contact a potential defendant. It is mere advertisement or solicitation of business. Illinois courts have long held that a mere advertisement or solicitation is not enough to sustain personal jurisdiction in Illinois.

373 Ill. App. 3d 738, 743, 869 N.E.2d 207, 212 (2007).

In analyzing the potential online contacts one could have with Illinois without being subject to general personal jurisdiction, it must be remembered that under a traditional general jurisdiction analysis, the contacts with Illinois is not a quantitative analysis, but is rather an evaluation of the quality and nature of the activities in the forum state. *Wiggen v. Wiggen*, 2011 Ill. App. 2d 100982, 954 N.E.2d 432, 437 (2nd Dist. 2011). Whether a defendant is "doing business" is a determination that must be made on a case-by-case basis. *Hendry v. Omda Health Corp., Inc.*, 318 Ill. App. 3d 851, 853, 742 N.E.2d 746, 749 (2nd Dist. 2000).

Another important consideration is "the distinction between the transaction of business in Illinois and the transaction of business with an Illinois [resident]." *Kadala v. Cunard Lines, Ltd.*, 226 Ill. App. 3d 302, 310, 589 N.E.2d 802, 807 (1st Dist. 1992). The *Kadala* Court held:

[I]f the mere payment of money, shipment of goods into, or advertisement in Illinois were sufficient to confer long arm jurisdiction it would follow that the very existence of a business relationship with an Illinois resident would automatically sustain Illinois jurisdiction. It is clear that no federal or state court would confer such a broad grant of personal jurisdiction.

Kadala, 589 N.E.2d at 807.(N.D. Ill. 1973).

The Second District Appellate Court recently ruled in a case involving a Texas art dealer, who among other things, maintained a website that was not only accessible in Illinois but also led to the negotiation and purchase of a piece of art from an Illinois resident. Considering all of the defendant's activities in Illinois, including the website, the Second District found the defendant did not carry on business activity in Illinois with any degree of permanence or continuity to exercise general jurisdiction over the defendant. See *Wiggen v. Wiggen*, 2011 Ill. App. 2d 100982, 954 N.E.2d 432, 439 (2nd Dist. 2011).

As it appears having an online presence is here to stay and with more and more people blogging, tweeting, facebooking, etc., the relationship to these activities and the doing business doctrine in Illinois for purposes of general jurisdiction may still be evolving. I hope, however, I have shown how the traditional analysis for the doing business doctrine is still applicable and should be applied to situations where online contacts are at issue. ■