

BUSINESS ALERT

CURRENT LEGAL ISSUES FOR THE BUSINESS COMMUNITY

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LEGAL ISSUES WHEN CONDUCTING BUSINESS ON-LINE

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Most businesses are now operating on-line which poses certain business risks. Certain regulated industries, such as real estate brokerage, have a unique set of problems. As a licensed real estate broker, you are probably aware that you are prohibited from doing business in other states unless you meet that state's license reciprocity requirements. These requirements can be as simple as holding a valid license in your own state and submitting a form to another state or as stringent as going through the entire education and testing process in another state. However, you may not know if you send residents of other states information about listings or tips on buying and selling a home or even if you only post listings that can be viewed by residents of other states, the states in which those prospects are located could potentially have legal jurisdiction over your Web site.

For example, California Business and Professions Code Section 10131 states specifically the activities requiring a California broker's license. Under Regulation 2770, an out-of-state business (not licensed by the California Department of Real Estate) may not advertise real estate to California residents (See Regulation 2770). If the out-of-state company conducts activity which requires a broker's license, the company could be subject to a Desist and Refrain Order. Please note that in some states which require licenses, it may be unlawful to compensate an unlicensed person (See California Business and Professions Code Section 10137.)

Current trends in the law

In light of the increasing number of lawsuits based on a company's Web site content, courts have adopted an "interactive/passive" test to determine whether the plaintiff's state has jurisdiction over a business operating a Web site. Many courts have concluded that a company is subject to suit in a plaintiff's state when the company uses its Web site interactively within a state (*Zippo Mfg. Co v. Zippo Dot Com (1996) 952 F.Supp. 1119*). The courts have generally found that Web sites are passive that they merely contain information or advertising about a company or its products or services. Passive sites are generally not subject to the jurisdiction of the user/plaintiff's state. (*Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2nd Cir. 1997)*). A broker operating a passive site advertising to California residents must still be licensed under Regulation 2770.

In a real-estate related case (*Sublett v. Scott Wallin and Pillar To Post (2004) 94 P.3d 845*), a plaintiff who was living in California used a home-inspection company Web site to locate an inspector for a home in New Mexico. Later the plaintiff found the pipes in the home's radiant heating system were defective and filed an action against both the inspector and the company that maintained the Web site. The District Court of New Mexico dismissed the motion for lack of personal jurisdiction. The court held that the company's Web site was essentially passive. The site provided information about the nearest franchisee through an interactive "Locate an Inspector" search feature. The search requested only minimal information from the plaintiff and provided marketing information on inspector. The plaintiff initiated the transaction from California via a commercial search engine. All subsequent contact phone calls and meetings did not involve the Web site. However, in *Cody v Ward 954 F.Supp. 43 (D.Conn.1997)*, the court found that a defendant's telephone calls and e-mail to a plaintiff were sufficient contacts to satisfy due process. In this case the defendant communicated with potential stock investors through a computer bulletin board.

Another factor that affects jurisdiction decisions by the courts is the number of contact made in the state. In ***Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*** 334 F.3d 390, 399 (4th Cir. 2003), the court found that the company had insufficient contacts in Maryland to for the state to have jurisdiction. The court agreed that although CPC's Web site was accessible from Maryland, CPC had no physical presence in Maryland: no offices, no telephone listing, and no representatives in the state. The court also noted that the company did not directly solicit funds from individuals in Maryland. CPC received less than 1 percent of its donations from Maryland residents. The CPC site, said the court was not operated "with the manifest intent of targeting or engaging in business or other interactions within that state in particular."

Options to Limit Your Jurisdiction

Displaying a forum selection clause on the company's Web site that declares in what state suits directed toward the company must be filed is an important way to establish jurisdiction and hopefully limit expensive, out-of-state litigation. In ***White-Spinner Constr., Inc. v. Cliff***, 588 So.2d 865 (Ala. 1991), the court held that a properly drafted forum selection clause can effectively limit jurisdiction to a chosen state, usually the state in which a company is based. Although at one time forum selection clauses were viewed hostilely by the courts, the United States Supreme Court's decision in the ***Bremen v. Zapata Off-Shore Co.***, 407 U.S. 1 (1972) has now encouraged most courts to enforce such provisions. It is wise to make accepting a boilerplate agreement about the choice of a jurisdiction a condition of use of for the company's Web sites. Asking a visitor to click "I agree" effectively forms a binding agreement on jurisdiction selection with Web site visitors.

In a recent decision, ***Caspi v. The Microsoft Network, L.L.C.***, 323 N.J. Super 118 (App. Div.), the New Jersey Appellate Division agreed that Washington State-based MSN could not be named in a class action in New Jersey because of a forum selection clause it had placed on its Web site in its "Terms and Conditions of Use". The court concluded that the terms and conditions of use formed a contract with users for several reasons. Before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of information, including a membership agreement that contains the terms and conditions of use clause. MSN's membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices "I Agree" and "I Don't Agree." Prospective members assent to the terms of the agreement by clicking on "I Agree" using a computer mouse. Registration may proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement, including MSN's forum selection clause. No charges are incurred until after the membership agreement review is completed, and a subscriber has clicked on "I Agree."

In effect, the court held that a click of the mouse on an "I Agree" button in a pop-up dialog box bound each MSN subscriber to the lengthy fine print in the inconspicuously placed terms of use. Those terms of use included the following forum selection clause: "This agreement is governed by the laws of the State of Washington, U.S.A. You hereby consent to the exclusive jurisdiction and venue of courts in King County, Washington, U.S.A. in all disputes arising out of or relating to the use of this website. Use of this website is unauthorized in any jurisdiction that does not give effect to all provisions of these terms and conditions, including without limitation this paragraph."

Notice that this cyber-contract indicates which laws will be applied in any dispute and in which jurisdiction any disputes must be litigated. In addition, your Web site should list any states where you do not do business. Also include warranty disclaimers and clauses limiting liability.

In order to enforce the terms of an online sales contract, include mechanisms on your Web site that require the consumer to agree to the terms of use that includes a forum selection clause before the site can be used. Most courts handling Internet contract disputes have enforced the terms of such contracts where the Web site uses a "click" agreement approach prior to a purchase. Companies should record evidence of user acceptance, using a consistent, auditable process.

Protect yourself

Until the law regarding Internet jurisdiction becomes more settled, there are certain principals that should be kept in mind when operating any business on-line.

- Limit the amount of non-Internet promotion and solicitation you do to out-of-state prospects so that the courts are unable to identify the vital "other contact" that they mostly rely upon to obtain jurisdiction.
- Consider the use of technology that counts hits to the Web site and have it audited by a CPA firm to document the number of sales in the foreign state or country. This data may be useful in proving that the site does little or no business in the state where the plaintiff is bringing the lawsuit.
- Include disclaimers on the Web site's home page and in the terms of service agreement regarding states where the company will not operate. This may also limit liability with respect to licensing in certain jurisdictions.

While the Internet has opened up many new opportunities to reach nonlocal customers, it may also impose a risk of litigation. You should exercise care in limiting a plaintiff's rights to sue you in their venue. You should also be aware of the licensing requirements in the states where you target business.

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