

Litigation Trends in Florida

www.bergersingerman.com

September 2011

Personal Jurisdiction in Florida Over Non-Residents Through Internet Activities

The rapid growth of the internet and company websites is creating new issues for courts to consider in the personal jurisdiction analysis. This expanding area of law has been sometimes identified by courts as the law of "internet jurisdiction." In what is now considered an emerging body of law, courts are considering whether personal jurisdiction is justified over non-resident defendants based upon the defendants' internet activities.

In *Caiazza v. American Royal Arts Corp.*, 2011 WL 2135585 (Fla. 4th DCA June 1, 2011), the Fourth District Court of Appeal addressed the role of the internet plays in analyzing whether a non-resident defendant can be subject to personal jurisdiction in Florida.

The court considered this issue to be of great public importance because it involves a confusing area of the law that is mainly scattered across the federal courts and has not been addressed head-on by a Florida court and because of the ever-increasing role of technology and the internet in commerce. Thus,

the court issued its opinion even though the appellant filed a notice of voluntary dismissal.

The defendant in this case operated a sole proprietorship known as "Beatles Autographs" and specialized in buying, selling, and authenticating Beatles memorabilia. The plaintiff, a seller of rock-n-roll memorabilia that has several galleries in the South Florida area, entered into an agreement with one of its customers to sell a Beatles album. The customer, in turn, sent a computerized scan of the album cover to an auction house for an evaluation. The auction house then forwarded the scan to the defendant. The defendant opined that the signatures on the album were forgeries from a southern California forgery ring. As a result, the customer informed the plaintiff that he would not be purchasing the album. The plaintiff sued for violation of Florida's Deceptive and Unfair Trade Practices Act, defamation, and unlawful restraint of trade under Florida's unfair competition statute.

The defendant filed a motion to dismiss alleging, among other issues, that Florida did he was not subject to personal jurisdiction in

Florida. The trial court denied the defendant's motion to dismiss. The defendant appealed.

After an extensive review of the law developing in different states, the Fourth District Court of Appeal held that Florida should apply its normal jurisdictional test to internet entities, rather than creating a separate set of rules. Accordingly, the court applied Florida's long-arm statute and held that the trial court correctly determined that the defendant was subject to specific long-arm jurisdiction. The defendant resided in, and ran his business from, Florida from November 2004 to December 2005, and made defamatory statements which were published and circulated in Florida, including telephone calls made directly to the plaintiff's employees in South Florida.

However, the appellate court found that the trial court erred in finding that it had general jurisdiction over the defendant based on his website, which did not solicit business from Florida, did not target Florida, and only 4.35% of the defendant's total sales came from Florida from 2003 to 2007. Thus, the defendant's website did not have

substantial, continuous, and systematic business contacts with Florida.

Protecting Companies Who Store Data in the Cloud from Intentional Torts

In the context of the developing data-driven economy, and particularly of note for companies who store their proprietary intellectual property in the cloud, the Middle District of Florida entered a seemingly benign opinion discussing personal jurisdiction which provides those companies with substantial protection in case they are victims of intentional torts affecting that cloud-stored intellectual property.

In *Enviracarbon v. Couch*, 23 Fla. L. Weekly Fed. D27a (M.D. Fla. June 20, 2011), the United States District Court, Middle District of Florida discussed personal jurisdiction over Defendants who commit intentional torts causing injury to Florida citizens despite those Defendants lacking the traditional contacts with the state of Florida required to find jurisdiction.

Plaintiff, a Florida corporation involved in the development of clean-coal technology, sued two of its former employees, alleging tortious interference, conversion of intellectual property owned by Plaintiff, and solicitation of Plaintiff's investor to directly compete with Plaintiff.

Defendants filed motions to dismiss asserting that the

Court lacks personal jurisdiction over Defendants because the Complaint failed to satisfy Florida's Long-Arm statute or the Due Process Clause of the Fourteenth Amendment of the US Constitution, and attached affidavits averring that they are residents of Tennessee, are not engaged in substantial activity within Florida, do not own any real or personal property in Florida, or maintain any Florida bank accounts, and only have had isolated contact with Florida. Plaintiff's opposition to the Motion to Dismiss argued that because Defendant's acts harmed Plaintiff in Florida, jurisdiction is proper.

The Court analyzed the issue using a two-pronged approach. First, the Court considered whether the Florida Long-Arm Statute (§ 48.193, Florida Statutes) provides a basis for jurisdiction. Second, the Court considered whether "sufficient minimum contacts exist between the defendant and the forum state so as to satisfy 'traditional notions of fair play and substantial justice' under the Due Process Clause of the Fourteenth Amendment."

The Court held that jurisdiction was proper pursuant to the Florida Long-Arm Statute because the Defendants committed international torts that impacted Plaintiff in the state of Florida, despite doing so from outside of the state. The Court recognized that Florida's state courts are split on whether Fla. Stat. § 48.193(1) (b) allows for the exercise of personal jurisdiction where a tortious act committed outside

the state results in injury within Florida. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216 (11th Cir. 1999); see also *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1206 n.6 (Fla. 2010) [35 Fla. L. Weekly S349a] (recognizing but declining to resolve the conflict among appellate courts).

However, Florida's federal courts consistently broadly construe the Long Arm Statute to find that the physical presence of a defendant in Florida is not required if the intentional tort causes an injury in Florida. The opinion noted, however, that the conflict among the Florida state courts circuits has not been resolved by the Florida Supreme Court.

The Court then analyzed whether the finding of personal jurisdiction complied with the United States Constitution's Due Process Clause, found in the Fourteenth Amendment. The inquiry is two-fold: (1) a non-resident defendant must possess minimum contacts with the forum; such that (2) maintenance of the suit comports with traditional notions of fair play and substantial justice. The Court held that, where the claim is one of an intentional tort then the Court will use the "effects" test noted above and find that personal jurisdiction is proper if the plaintiff alleges that the defendant (1) committed an intentional tort; (2) the intentional tort was aimed at the plaintiff; and (3) the plaintiff felt the effects of the intentional tort in the forum state. The Court

concluded that finding personal jurisdiction over the Defendants comports with traditional notions of fair play and substantial justice.

Companies who store their intellectual property in “the cloud” should take note of this opinion, as it signals the federal court’s willingness to protect those company’s interests against intentional torts, such as

conversion, whether or not the converted intellectual property is physically stored in Florida, or whether or not the converted intellectual property is converted by a Florida resident, so long as the beneficial owner of the property- that is, the Florida company- is injured in Florida. ■

**Courtesy of Berger Singerman’s Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

The information in this newsletter is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. Berger Singerman is not responsible for any loss or damage occasioned to any person in connection with acting on or refraining from action as a result of any material in this publication.

The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Berger Singerman’s Dispute Resolution Team

Berger Singerman’s Dispute Resolution Team has earned its reputation for successfully and efficiently handling complex commercial litigation matters. Our Team members are committed to delivering appropriately aggressive litigation and creative dispute resolution.

Mitchell W. Berger	MBerger@bergersingerman.com	Andrew M. Hinkes	AHinkes@bergersingerman.com
Leigh-Ann A. Buchanan	LBuchanan@bergersingerman.com	Elaine Johnson James	EJames@bergersingerman.com
Anthony J. Carriuolo	ACarriuolo@bergersingerman.com	Sharon Kegerreis	SKegerreis@bergersingerman.com
Samuel C. Cozzo	SCozzo@bergersingerman.com	Charles H. Lichtman	CLichtman@bergersingerman.com
James C. Cunningham, Jr.	JCunningham@bergersingerman.com	Etan Mark	EMark@bergersingerman.com
Amos Elberg	AElberg@bergersingerman.com	Stefanie C. Moon	SMoon@bergersingerman.com
Sasha Funk	SFunk@bergersingerman.com	Kelly A. O’Keefe	KOKeefe@bergersingerman.com
James D. Gassenheimer	JGassenheimer@bergersingerman.com	Monica Rossbach	MRossbach@bergersingerman.com
David L. Gay	DGay@bergersingerman.com	Leonard K. Samuels	LSamuels@bergersingerman.com
Gavin C. Gaukroger	GGaukroger@bergersingerman.com	Frank Scruggs	FScruggs@bergersingerman.com
Fred O. Goldberg	FGoldberg@bergersingerman.com	Daniel H. Thompson	DThompson@bergersingerman.com
Rita Goldberg	RGoldberg@bergersingerman.com	Laurie Weinstein	LWeinstein@bergersingerman.com
Melanie A. Hines	MHines@bergersingerman.com	Michel O. Weisz	MWeisz@bergersingerman.com
		Jeffrey S. Wertman	JWertman@bergersingerman.com