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Old Dog Learns New Trick: Using Forum Selection Clauses On Websites

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Forum selection clauses have been used in written contracts for many years to designate exclusive venues for the resolution of contract disputes. Two recent New Jersey court decisions-*Caspi v. The Microsoft Network, L.L.C.*, 323 N.J. Super. 118 (App. Div.), certif denied, 162 N.J. 199 (1999), and *Decker v. Circus Circus Hotels*, 49 F. Supp. 2d 743 (D. N.J. 1999)-establish that forum selection clauses may also be an effective and inexpensive way for website owners to minimize the risks of being sued outside of their home states in disputes arising from internet-based commerce.

Although they may not realize it, companies that conduct business over the internet potentially are subject to being sued in any state into which they sell products or services. The advent of internet business has created incredible opportunities for companies to expand the markets in which they conduct business. Along with the lucrative benefits of internet marketing, however, come new risks. A New Jersey business whose customer base normally does not extend beyond Pennsylvania or New York might never expect to have to defend against lawsuits filed in places such as California or Alaska. A company's use of the internet to expand its markets, however, creates the possibility that it could be sued in the home state of any unsatisfied customer who purchased products through the company's website.

Fortunately, use of a website forum selection clause is a promising means to limit such distant and expensive litigation. To businesses wanting to increase their sales, website forum selection clauses are a more attractive risk reduction measure than the alternative, which is to refuse orders from distant customers.

In a traditional forum selection clause, parties to a contract expressly agree to litigate all disputes arising from the contract in a specific state. In the context of a website, a forum selection clause can be implemented such that a website visitor would effectively agree to litigate all disputes arising from website use in the website owner's home state. Well-written and strategically-placed forum selection clauses are inexpensive to implement on a website, and have the potential to sharply limit the exposure of any company-small or large-to to the added expense in time, money and resources that usually comes with being sued outside of the company's home state. Although no court has yet addressed it, website-based mandatory arbitration provisions-which are in many respects similar to forum selection provisions-may be the next step in risk-reduction measures employed by website owners. Internet Contacts Can Create Personal Jurisdiction

In recent years, numerous courts have held that a company's internet commerce can create the

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minimum contacts necessary for personal jurisdiction. See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Although the law is still developing, certain general principles have emerged. Personal jurisdiction has been determined by the courts on a sliding scale that turns largely on the degree of inter-activity that occurs between the website owner and its visitors. See generally, *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah 1998). Companies that enter into commercial contracts over the internet are likely to be subject to personal jurisdiction in the states in which they have contracted. See, e.g., *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). Interactive sites with more limited commercial purposes, however, are less likely to give rise to personal jurisdiction, but can nevertheless do so depending on the circumstances. Compare *Maritz Inc. v. Cybergold Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (finding personal jurisdiction based on acceptance of subscribers to informational e-mailing list) with *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997) (finding lack of personal jurisdiction based solely on collection over the internet of user names and addresses). For the most part, purely “passive” sites, which can only be viewed, but through which no sales orders can be placed or other interactions can occur, have been found not to give rise to personal jurisdiction. See *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2nd Cir 1997).

Courts Generally Enforce Forum Selection Clauses

Properly-drafted forum selection clauses can effectively limit jurisdiction to a chosen state. Companies routinely insist on the inclusion in contracts of boilerplate forum selection clauses that require all lawsuits to be filed in the companies’ home states. Although at one time forum selection clauses

were viewed by courts with hostility, since the United States Supreme Court’s decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), most courts have enforced such provisions. See Annotation, *Validity of Contractual Provision Limiting Place or Court In Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984). Nevertheless, a few states still refuse to enforce forum selection provisions. See *White-Spunner Constr., Inc. v. Cliff*, 588 So.2d 865 (Ala. 1991) and *State ex rel. Polaris Industries, Inc. v. District Court*, 695 P.2d 471 (Mont. 1985).

New Jersey courts typically enforce forum selection clauses. See *McNeill v. Zoref*, 297 N.J. Super. 213 (App. Div. 1997). Nevertheless, several recognized but limited grounds for invalidating such provisions are:

- (1) the presence of fraud or overweening bargaining power;
- (2) violation of state public policy; or
- (3) when enforcement will result in serious inconvenience at trial.

Wilfred MacDonald, Inc. v. Cushman, Inc., 256 N.J. Super. 58 (App. Div. 1992). Given the current judicial amenity toward forum selection clauses, however, a leading treatise on contract law has noted that exceptions to enforcement are “difficult if not impossible to meet”. 7 WILLISTON ON CONTRACTS §15.15 at 317 (4th ed. 1997); but cf. *Kubis & Perszyk, Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176 (1996) (interpreting New Jersey Franchise Act to require greater justification for forum selection clauses in franchise agreements).

Website Use of Forum Selection Clauses

Just as companies routinely insist on forum selection clauses in their sales contracts, they can also

make agreements to such provisions a condition of use of their websites, and in effect forming a binding agreement on forum selection with website visitors.

In the recent decision in *Caspi*, the New Jersey Appellate Division allowed Washington-based Microsoft Network to avoid being sued in a class action in New Jersey, based on a forum selection clause that it had placed on its website in its “Terms and Conditions of Use”. The following fact-finding by the trial court, affirmed on appeal, formed the basis on which the court concluded that the forum selection clause was part of a binding and enforceable contract between the Microsoft and its website subscribers: Before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of information, including a membership agreement which contains the above 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. Prospective members have the option to click “I Agree” or “I Don’t Agree” at any point while scrolling through the agreement. 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.” *Caspi*, 323 N.J. Super.

In effect, the Appellate Division held that a click of the mouse on an “I AGREE” button in a pop-up dialog box bound each Microsoft Network subscriber to the lengthy fine print “Terms of Use” as if he or she had signed a written agreement. Those terms of use

included the following forum selection clause, which could only be viewed after scrolling through pages of text, in the middle of a section inconspicuously titled “GENERAL”: 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 Web site. 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.

MSN, Terms of Use (visited August 10, 1999). In *Decker*, the federal district court refused to weigh Circus Circus Hotel’s internet-based reservation system as a New Jersey “contact” to establish personal jurisdiction, because the website allowed hotel reservations to be made only by persons who agreed to a forum selection clause that the *Decker* court held was valid and enforceable. *Decker*, 49 F. Supp. 2d at Although the claims in *Decker* were not based on an internet transaction, the plaintiff had argued that the hotel’s acceptance of reservations on-line from other New Jersey residents evidenced purposeful contact with New Jersey sufficient, together with other factors, to support personal jurisdiction. *Id.* The district court rejected this argument, finding that the use of the on-line reservation system was conditioned on agreement to terms that included a forum selection clause choosing Nevada as the exclusive venue for lawsuits. Accordingly, the court found that “[t]he forum selection clause in defendant’s website demonstrates that it could not reasonably anticipate being haled into court in New Jersey.” *Id.*

Although not stated in the *Decker* opinion, unlike the Microsoft site, the “terms of use” screen of the Circus Circus Hotel (now known as Mandalay Resort

Group) website does not pop up and require the website user to click on an “I AGREE” button to conduct a transaction. Instead, the forum selection provision can only be viewed by clicking a small-print hypertext link titled “Copyright and Legal Information” located in the bottom right-hand corner of the opening page. That provision states that: By placing an order or making a reservation for goods or services offered or promoted herein, you will be deemed to have agreed to the exclusive jurisdiction of the State and Federal courts of the State of Nevada for resolution of any dispute you have relating to such goods or services. See Copyright and Legal Information (visited August 10, 1999) (accessible through).

Effective Website Forum Selection Clauses

Much has been written about the various forms of forum selection clauses that can be used. See, e.g., Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133. The same principles that govern forum selection clauses in written agreements will likely also be applied to such clauses as used on websites.

Good practice to ensure maximum protection for the party implementing a forum selection clause requires attention to several details. First, the forum selection clause must be exclusive to be effective. A forum selection clause that does not expressly specify a mandatory or “exclusive” forum for the resolution of disputes can be construed as merely permitting, but not requiring litigation to be filed in the designated forum. See discussion in *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 979 (2d Cir.1993).

Second, the choice of designated forum must be thought through. Choices to consider include whether to specify state or federal courts. Forum

selection clauses frequently specify both the state and federal courts in a given state, but for various tactical reasons that may apply in a business’s particular circumstances, it may be advisable to limit venue to the state courts for all claims other than claims as to which federal jurisdiction is exclusive. Such exclusions of federal court jurisdiction have been enforced by federal courts. See, e.g., *Jones v. Weibrecht*, 901 F.2d 17 (2d Cir. 1990). One benefit to doing so would be to minimize the possibility of a “transfer for convenience” to a federal district in another state under 28 U.S.C. §1404(a), which can occur notwithstanding a valid forum selection clause. See Case Comment, *Stewart Organization v. Ricoh Corp.*: Judicial Discretion in Forum Selection, 41 RUTGERS L. REV. 1379 (1989). Although some courts have implied from forum selection clauses a waiver of the right to remove a suit to federal court, see, e.g., *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1262 (11th Cir. 1999), to ensure that an election of state court is not circumvented, an express “non-removal” provision prohibiting removal to federal court should be used.

In addition, while forum selection clauses often specify an entire state as the designated forum, one should consider the benefits of designating a specific county or federal judicial district. This decision is obviously of consequence in states as large as California or Texas, but even in smaller states, choosing the corporation’s home county and/or federal judicial district can still provide a litigation advantage.

Third, although consent to personal jurisdiction is implicit in a forum selection clause, it is always advisable to include an express “consent to personal jurisdiction” provision. This will remove any doubt that the other party to the contract has consented to

be sued in the selected forum. In addition, a choice of law provision will ensure not only that litigation occurs in your home court, but also under the law of your state.

An issue that arises in the context of websites that does not occur in the ordinary contract context is how to obtain the agreement of the website user to the forum selection clause. In an ordinary written contract, a forum selection clause is a term that the contracting parties agree to by their signing of the contract. As the *Caspi* and *Decker* cases show, however, a website owner can obtain either implicit or express agreement to a forum selection clause.

In *Decker*, the Circus Circus Hotel placed the forum selection clause in a remote location within its website that would only be viewed by visitors curious enough to click on a small print "Copyright and Legal Information" link hidden in the bottom corner of its opening page. Agreement to the forum selection clause, if any, must be implied from the visitor's use of the website. Although the *Decker* court did not address this fact, one can well envision other courts refusing to enforce such a provision because of the lack of any attempt by the website owner to bring this condition to the visitor's attention, and the lack of any meaningful affirmative act by the website visitor to accept that term. Since internet jurisdiction remains a developing area of law, a more cautious approach would be to use a method such as that used by Microsoft.

Under the method used by Microsoft and many other websites, the visitor cannot proceed to interact with the website to conduct a transaction until he or she has, in effect, "signed" an agreement containing the website's terms of use, by clicking on an "I AGREE" box. Such an action closely resembles the ordinary act of signing a written sales form or

contract, and is much less likely to be susceptible to claims of lack of notice or assent, or other arguments that may be found persuasive by the courts to deny enforcement of the forum selection provision. Although arguments can be made that the "I AGREE" box was clicked without reading or understanding the terms to which agreement is made, such arguments are commonly rejected when made with respect to boilerplate contained in written contracts. Rejecting such an argument in the context of a website, the *Caspi* court stated, "[t]he scenario presented here is different because of the medium used, electronic versus printed; but in any sense that matters, there is no significant distinction." *Caspi*, N.J. Super., 1999 WL 462175 at *5.

Conclusion

The internet provides tremendous opportunities for businesses of any size to sell their products to customers nationwide. All companies that permit customer interaction with their website-and in particular those that sell goods and services over the internet-should employ forum selection clauses at their websites. Such clauses can minimize costly out-of-state litigation, are unlikely to deter customers from conducting business over the internet, and can easily and inexpensively be implemented as part of the standard terms and conditions placed on the use of a website.

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