

THE NEXT FRONTIER OF PERSONAL JURISDICTION: VIRTUAL PRESENCE

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In the current business environment, electronic communications and the web-based exchange of information (“e-contacts”) make it increasingly likely—despite never setting foot in the State of New York—that your client may be subject to suit in a New York Court. As technological advances impact the stream of commerce, courts have had to adapt jurisdictional guidelines to keep up. An entity may be subject to personal jurisdiction in the State if it is “transacting business” in New York through e-contacts, and may have to defend itself here. This is a risk never before contemplated.

Obviously, “transacting business” can entail a wide variety of activities, and New York Courts have identified a spectrum of cases involving a defendant’s use of e-contacts with regard to personal jurisdiction. At one end of the spectrum, merely making information available on a website (passive advertising) or simply maintaining a website which individuals in another state may visit is not sufficient to confer jurisdiction over a defendant. At the other end of the spectrum, New York Courts have consistently conferred personal jurisdiction on a defendant with an interactive website that results in direct sales to consumers in New York, regardless of the percentage of sales actually derived from the State. Whether the defendant purposefully availed himself of the privilege of conducting business in the State of New York is the key which clearly distinguishes the above passive and active conduct.

In the middle of the spectrum sit “cloud computing” cases where an out-of-state defendant maintains an interactive website which permits the exchange of information between users in New York and the defendant. These types of cases involve file sharing websites, off-shore databases, and virtual data rooms, and they present an interesting mix of passive and active conduct which forces the courts to examine the totality of the circumstances and analyze the nature and quality of the defendant’s e-contacts before conferring personal jurisdiction. Whatever the end result in an individual case, the exercise of jurisdiction should be directly proportionate to the nature and quality of the defendant’s internet activity.

In a recent decision, Forward Foods LLC, v. Next Proteins, 2008 WL 4602345 (N.Y.Sup. 2008), a New York Court held that in an action involving the sale of a business, a virtual data room used by the defendant, a California entity, to upload documents for prospective buyers to review, including one prospective buyer in New York, in addition to a singular meeting in New York for the purpose of discussing the proposed sale, were sufficient contacts with New York to confer personal jurisdiction over the California defendant on the grounds that it transacted business in the State.

However, even more recently in Capitol Records, LLC v. VideoEgg Inc., 2009 WL 614727 (S.D.N.Y. 2009), a New York Court held in an action that involved a social networking site which allowed users, including users in New York, to upload videos that mere interactivity, without more, was insufficient to confer personal jurisdiction over the defendant. The Court reasoned that the defendant’s conduct regarding New York users was “neither volitional nor distinguishable from its interaction with other users in any other jurisdiction.” The Court found personal jurisdiction over the defendant, however, based on other contacts with New York.

Reading the above cases together, it appears New York Courts agree that in order to confer personal jurisdiction in cloud computing cases on an out-of-state defendant there must be some purposeful conduct directed at New York users distinguishable from contact with users in other jurisdictions. Purposeful conduct may be a single meeting in New York as in Forward Foods.

In another recent case, repeated and systematic emails, phone calls and facsimiles to entities in the State amounted to transacting business in New York. Though an entity may not realize it at the time, e-contacts with New York individuals and businesses may result in its defending an action within the State.

The following members of our Litigation Department can assist you in assessing the risk and nature of a “virtual presence”:

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