

Nebraska Court of Appeals Interprets the *Zippo* “Sliding Scale” Test

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Does your business have customers in multiple states? Does it operate a website? If the answer to either of these questions is yes, then you should consider whether your business’s operations might make you subject to the jurisdiction of states other than the one where your business is based.

Have you wondered if you could be sued in a different state just because someone in that state used your website? The issue of when and how a party’s actions on the internet make them subject to a lawsuit in a different state has been largely left to individual state and federal courts with jurisdictions fashioning their own rules. Recently, the Nebraska Court of Appeals encountered this very question and ruled that a specific website’s “interactivity” must be analyzed to determine whether a company can be sued in Nebraska based solely on their internet activity.

In *Wheelbarger v. Detroit Diesel ECM, LLC*, the Nebraska Court of Appeals applied the widely used *Zippo* “sliding scale” test to answer this question in the context of a party that used its website to act as a matchmaker that connected software designers with semi-truck mechanics in need of software services. The court determined that Nebraska courts were powerless to hear a lawsuit involving claims against various Michigan defendants who served only as “middlemen” for connecting software designers to semi-truck mechanics in need of such software. The court of appeals determined that, since the Michigan defendants did not actively solicit business in Nebraska through their website, and did not directly contract for, or sell, the at-issue software themselves, Nebraska

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courts lacked personal jurisdiction over the defendants.

Personal jurisdiction refers to a court’s power to bind a defendant to the court’s judgment. In order to have personal jurisdiction over a defendant, both the Constitution and Nebraska law require the plaintiff to first demonstrate that the defendant has sufficient “contacts,” or connections, with the state where the lawsuit was brought to justify forcing the defendant to appear in court in that state.

The most widely recognized test to determine if a court has personal jurisdiction over a defendant based on the defendant’s internet conduct is the *Zippo* test. This “sliding scale” test considers a website’s “interactivity” and the nature of the defendant’s commercial activities on the internet to determine whether a court’s exercise of personal jurisdiction would be lawful. At one end of the “sliding scale,” the answer is clear: for passive, non-interactive websites—“digital billboards,”—a court lacks personal jurisdiction over the would-be defendant. At the other end of the scale are highly interactive websites that target advertising at a given state, and from which the potential defendant actively enters into contracts with a state’s residents; there, an exercise of personal jurisdiction is proper. The *Wheelbarger* case provides guidance on websites that are in the middle – those that employ some interactivity but which do not involve targeted advertising or direct contractual relations with residents of the at-issue state. The *Wheelbarger* case explains that a website’s mere “interactivity” is insufficient if the defendant did nothing to purposefully direct business into the particular state.

In *Wheelbarger*, the plaintiff alleged that the Michigan defendants were liable for damages caused to the plaintiff’s semi-trucks resulting from the installation of certain engine software. The mechanics who would eventually perform the work on the trucks had reached out to the Michigan defendants after finding their website online. The Michigan defendants—who act as “middlemen” between software designers and mechanics—then connected the mechanics with a software designer, who then worked with the mechanics directly.

The *Wheelbarger* Court observed that the *Zippo* “sliding scale of interactivity” test was merely a starting point for the personal jurisdiction inquiry; a plaintiff must still demonstrate that the defendant has sufficient “contacts” with the state to justify an exercise of personal jurisdiction by the court. Nevertheless, the *Wheelbarger* Court, citing the United States Court of Appeals for the Eighth Circuit, noted that whether a defendant has sufficient “contacts” with the state in question is “directly proportionate to the nature and quality of the commercial activity that [the defendant] conducts over the Internet.”

Because the Michigan defendants did not actively solicit, negotiate, or contract for business in Nebraska, they lacked the necessary “contacts” with Nebraska to support a Nebraska court’s exercise of personal jurisdiction over them. Likewise, the court noted that, because none of the

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plaintiff’s claims related to the Michigan defendants’ role as middlemen, relaying information between the mechanics and software designers, but instead concerned the (third-party’s) products themselves, an exercise of personal jurisdiction would be inappropriate.

Takeaway

The *Wheelbarger* case is consistent with decisions in other states which conclude that simply having a website which potential customers can interact with in Nebraska is insufficient, without more, to subject a company to personal jurisdiction in Nebraska. This type of activity will not constitute sufficient “contacts,” or connections, with Nebraska to justify being haled before a Nebraska court. Businesses outside of Nebraska should consider the “interactivity” of their respective websites, whether the websites employ any advertising specifically targeted at Nebraska customers, and the volume of information being actively exchanged between Nebraskans and the business. For questions on the likelihood that a company’s online business presence might subject it to suit in Nebraska courts, please reach out to one of the members of our Litigation Practice Group.

*Special thanks to Summer Associate Addison Schneider for her help in writing this article.