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Aviation Law

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The Internet has completely changed airline travel, as a passenger can now routinely buy a ticket on a home computer. Airlines are closing ticket offices, discouraging the use of "paper" tickets and promoting "e-tickets."

The ease of access to Internet tickets has also helped spur the growth of a new wave of low-cost "infant airlines," which accept reservations only via the Internet. Many of these new carriers are located in foreign countries. Although the new foreign airlines don't have offices or operate flights in the United States, virtual ticketing has enabled a large number of American travelers to take advantage of these airlines' cheap fares and numerous travel routes in Europe, the Indian subcontinent and the Far and Middle East. These new carriers — which include the burgeoning Kingfisher (India), Air Asia (Malaysia) and Qatar Airways — are by far the largest growing segment of the worldwide aviation industry.

'Certain Circumstances'

The convenience of garnering business in the United States through the Internet raises interesting questions regarding whether the new foreign carriers are subject to personal jurisdiction in American courts for deaths and injuries that occur in accidents abroad. There is scant case law regarding the exercise of personal jurisdiction over a foreign airline solely on the basis of Internet-related commerce. While this area of aviation law is uncharted, an examination of the developing law in other analogous Internet business situations indicates that foreign airlines that rely on Internet commerce to attract American passengers may under certain circumstances be subject to personal jurisdiction in the United States.

A federal court in Illinois explained that the exercise of specific jurisdiction based upon Internet contacts "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."¹

Passive Web sites in which there is "no exchange of information" do not provide a basis for the exercise of personal jurisdiction.² For instance, the U.S. District Court for the Southern District of New York refused to exercise jurisdiction based upon Internet contacts alone where a defendant jazz club's Web site only consisted of a calendar of upcoming events and ticketing information.³ Courts have consistently recognized that personal jurisdiction cannot rest solely on maintaining a "passive" Web site since these sites do "little more than make information available to those who are interested in it."⁴

By contrast, defendants who enter into contractual relationships with individuals in a particular state via the Internet may be subject to personal jurisdiction in that forum. One Pennsylvania federal court articulated a "sliding scale of Internet activity," finding that an online computer news service was doing business in Pennsylvania and subject to personal jurisdiction there by operating an Internet site to advertise and solicit customers for its services and by entering into contracts with approximately 3,000 Pennsylvania residents.⁵

Level of Cyber Activity?

There is not yet an agreed-upon test on the requisite level of cyber activity needed to confer personal jurisdiction.⁶ Some courts have held that a defendant is "doing business" in a particular state where the defendant's Web site can and does accept purchase orders over the Internet from residents of that state. For example, the U.S. District Court for the Northern District of Illinois held that a defendant "clearly [was] doing business over the Web site" because it purposefully designed "a Web site with a high level of interactivity, enabling customers to browse through an online catalog and place orders via the Internet."⁷

By contrast, other courts have held that a Web site does not subject a company to jurisdiction where goods have simply been bought over the Internet. A federal court in Oregon, for example, concluded that "[t]he fact that someone who accesses [a] defendants' Web site can purchase [one of defendants' products] does not render defendants' actions 'purposefully directed' at this forum."⁸

As articulated by a federal court in Pennsylvania, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."⁹

The following issues have been considered by courts in determining whether to find personal jurisdiction over a defendant based upon cyber-contacts:

(a) *What is the qualitative nature of the cyber activities?* Is defendant's Web site "interactive" (e.g., communication and contractual relations can be exercised by parties electronically) or "passive" (e.g., information publishing Web site)? In addition to business transactions, does defendant also conduct cyber-banking with financial institutions in the subject forum?

(b) *What is the quantitative nature of the cyber activities?* What percentage of the defendant's business is generated in the subject forum? What percentage of defendant's business is conducted via the Internet? What is the frequency of defendant's "e-sales" activity with resident of the subject forum?

(c) *Where is the cyber presence headquartered?* Is the defendant's Web site maintained by an Internet Service Provider (ISP) located in the subject forum?

A court will obviously balance these factors against its obligation to exercise jurisdiction in a "reasonable" manner. This decision will often turn on the following issues with respect to the burden on defendant in defending in the forum; the extent of conflict with the sovereignty of defendant's state; the judicial economy; the plaintiff's interest in seeking effective relief; and the existence of an alternative forum.¹⁰

Under current case law, a foreign airline conducting a sufficient amount of business with U.S. passengers over the Internet may be subject to personal jurisdiction in the United States based on the cyber contacts alone. As one court observed, "[d]ifferent results should not be reached simply because business is conduct[ed] over the Internet . . ." rather than through traditional means.¹¹ Airlines regularly benefit from use of the Internet to enter into ticket contracts with passengers and the Internet is rapidly supplanting ticket offices and agents.

It is important to note, however, that jurisdiction in the United States over a foreign carrier may be limited to travel that is completely within a foreign country and not part of an international trip. That is because suits involving international flights must meet the jurisdictional requirements of the 1929 Warsaw Convention or the 1999 Montreal Convention.

Internet Contacts Differ

Those jurisdictional requirements were not drafted with the Internet business contacts in mind. Indeed, establishing personal jurisdiction over a defendant does not equate to jurisdiction under the Warsaw/Montreal treaties, which provide that the international passenger or his representative can only bring suit in one of four nations, including the carrier's domicile and principal place of business, the ultimate destination of the passenger's transportation and the carrier's "place of business through which the contract was made . . ." The last provision has been interpreted to require a actual physical office of the airline in the nation where suit is brought.¹² A "fifth jurisdiction" was added in the Montreal Convention in the nation of the passenger residence provided, however, that the airline operates flights to that nation either on its own planes or through a commercial agreement (such as a "code-share") with another carrier.

As a result, a foreign carrier that does substantial business in the United States but only via the Internet may well be sheltered from jurisdiction here for an accident on an international flight — unless the ultimate destination of the passenger's trip is inside the United States.

Conclusion

In sum, pertinent case law indicates that the Internet activities of foreign carriers within a forum state can support the exercise of personal jurisdiction if the quantitative and qualitative nature of the "e-contacts" shows an active, continuous and systematic relationship with forum residents. In cases involving international transportation, however, the jurisdictional requirements of the Warsaw and Montreal conventions must be consulted to determine if suit can be brought in the United States.

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Endnotes:

1. *Breschia v. Paradis Vacation Club, Inc.*, No. 02-3014, 2003 WL 22872128, *5 (N.D. Ill. Dec. 4, 2003).
2. *Id.*
3. *Bensusan Rest. Corp. v. King*, 937 FSupp 295, 399-400 (S.D.N.Y. 1996).
4. *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
5. *Id.* at 1122-23.
6. *Id.* at 1124.
7. *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 FSupp2d 824, 838 (N.D. Ill. 2000); see also *Stomp v. Neato LLC*, 61 FSupp2d 1074, 1078 (C.D. Cal. 1999) (holding that defendant's two online sales "constitute conducting business over the Internet, and therefore under the test enumerated in *Zippo* . . . asserting personal jurisdiction is proper").
8. See *Millennium Enters., Inc., v. Millennium Music, LP*, 33 FSupp2d 907, 921 (D. Or. 1999).
9. *Zippo Mfg. Co.*, 952 FSupp at 1124; see also *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (holding specific jurisdiction is proper if defendant enters into contracts with residents of a foreign state that involve the knowing and repeated transmission of computer files over the Internet).
10. See generally *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F2d 1080, 1088 (1st Cir. 1992) ("We have termed these five criteria the 'Gestalt factors'" (citation omitted)).
11. *Zippo Mfg. Co.*, 952 FSupp at 1124.
12. *Eck v. United Arab Airlines, Inc.*, 360 F2d 804, 813 (2d Cir. 1966)("[T]his provision . . . [will] prevent the maintenance of suit in the courts of the country where the ticket was purchased if the airline has no ticketing and booking office there.").