

# ***ELECTRONIC JURISDICTION IN FLORIDA***

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## **I. INTRODUCTION**

### **A. Florida possesses one of the largest and most complex demographics of any state:**

1. Florida is currently the fourth largest state by population, even though it is just the 22nd largest state when it comes to physical size (65,795 square miles).
2. Florida has approximately 16 million residents. Statistics show Florida grows an average of 26,803 people per month (957 daily).
3. The gross state product of Florida is \$596 billion, which is growing at a rate of 7.7% annually.
4. Two of the countries' 25 largest Metropolitan Statistical Areas (MSA) are located in Florida (Miami and Tampa). 38 of Florida's 67 counties are in an MSA. In fact, Florida has seven MSAs with populations over 500,000.

### **B. Florida is a geographically isolated forum (not a major crossroads for railroad, trucking and related transport of goods – except for marine transport):**

1. Because of this, attempting to substantiate general jurisdiction within Florida can be arduous.
2. Previously, there had been a trend to allege a non-resident defendant's maintenance of a website is ground for satisfying jurisdiction. This has greatly fallen out of favor with Florida courts.
3. However, there is a new line of cases which suggests that a defendant's sending of email within Florida may provide a basis to accord general jurisdiction.
4. This outline provides highlights of those cases, and warns that there is a new trend growing with regard to the general jurisdiction inquiry – "Electronic Jurisdiction."

## **II. JURISDICTION THROUGH WEBSITES**

### **A. Public policy issues that favor a finding of general jurisdiction through maintenance of a website.**

1. E-commerce through on-line purchases has become a standard method for purchasing goods and services (especially in the software arena).

2. Many Florida residents and businesses purchase goods and services on-line.
  3. Many more out-of-state companies have developed websites that specifically target Florida residents.
  4. These websites allow Florida residents to purchase goods and services, even though these out-of-state companies do not have stores, employees, or agents in Florida.
- B. Public policy issues which do not support general jurisdiction through maintenance of a website:
1. While a company's website may allow Florida resident's to purchase its goods, the out-of-state company may not specifically target or advertise to Florida residents and/or businesses (*i.e.*, snow shoe manufacturer).
  2. While a company's website allows anyone to purchase its goods, it specifically targets consumers in foreign countries, or other areas in the United States (*i.e.*, Lacrosse stick maker).
  3. There is no way for a company to block access to Florida residents of its website.
  4. Simply maintaining a website, should not mean a company is subject to suit in all 50 states . . . how does that conform with traditional notions of fair play and substantial justice?
  5. Such a rule would only create a public policy disfavoring the use and maintenance of websites . . . as a potential liability.
- C. Florida's adoption of *Zippo Mfg.* to allow websites to create basis for general jurisdiction.
1. The Third District Court of Appeals was one of the first courts in the United States to address whether on-line conduct could constitute a basis for general jurisdiction (and suggested it should not.) *Pres-Kap, Inc. v. Sys. One*, 636 So. 2d 1351 (3rd DCA 1994).
    - (a) This was a contract dispute in a Florida court by a Delaware corporation against its New York customer.
    - (b) Plaintiff (Delaware Corp.) owned and operated a computerized airline reservation system. The computer base for the system was located in Miami, Florida.

- (c) Plaintiff would rent computer terminals to travel agencies to allow the agencies to access through telephone lines, the plaintiff's Miami based computer to book airlines, automobile, and hotel reservations.
  - (d) Plaintiff sued defendant in Miami regarding rental agreement for computer terminal located in New York - arguing general jurisdiction was proper.
  - (e) Basis for general jurisdiction was that defendant routinely accessed via network the Miami computers in order to conduct its travel agency business.
  - (f) In finding general jurisdiction did not exist, the Third DCA stated:

“the computer database for the contracted-for information happens to be located in Florida cannot change this result. There is no showing on this record that the defendant was even aware of the exact electronic location of the subject computer database, as this clearly would have been of little importance to it.”
2. Eastern District of Pennsylvania was the first court to directly find that a non-resident's maintenance of an active website could serve as a basis to accord general jurisdiction. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).
  3. Two years later, the Southern District of Florida relied upon the Zippo Mfg reasoning to find general jurisdiction existed over a non-resident. *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 1999 U.S. Dist. LEXIS 21084, at \*13 (S.D. Fla. Aug. 27, 1999) (finding non-resident defendant had minimum contacts with Florida based upon its “use of the Internet . . . to conduct business in the state of Florida.”)
  4. The Middle District of Florida even attempted to expand *Zippo Mfg.*, arguing that a passive website designed to target Florida residents and solicit their business could serve as a basis to accord general jurisdiction. *Kim v. Keenan*, 71 F. Supp. 2d 1228, 1234 (M.D. Fla.) (ruling that “active Internet solicitation may subject a defendant to personal jurisdiction” where website provided only a toll free telephone number, and asked Florida customers to call about defendant's services).
  5. “The fact that many companies have established virtual beachheads on the Internet and the fact that the Internet is now accessible from almost any point on the globe have created complex, new considerations in counting minimum contacts for purposes of determining personal jurisdiction.” *Nida Corp. v. Nida*, 118 F. Supp. 2d 1223, (M.D. Fla. 2000) (citing *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1267-8 (M.D. Ala. 2000) (finding general jurisdiction existed through non-resident's maintenance of a website).

6. Evidence that Florida residents had placed at least five (5) orders on non-resident defendant's interactive website was sufficient to subject non-resident to jurisdiction in Florida. *Hartoy, Inc. v. Thompson*, 2003 U.S. Dist. 3185, at \* 14 (S.D. Fla. Jan. 29, 2003).

D. Websites that provide catalog-like descriptions or printable order forms, do not serve as a basis to accord general jurisdiction.

1. A purely active website which provides only information about the non-resident defendant's products cannot serve as basis to accord general jurisdiction. *Miller v. Berman*, 289 F. Supp. 2d 1327, 1335 (M.D. Fla. 2003).

"The website at issue here is a passive one which merely makes information available to individuals who are interested in purchasing sailboats. Thus, the exercise of jurisdiction over Defendants in the State of Florida is not proper because *placing an informational website on the Internet does not amount to sufficient contacts with the forum.*"

2. A website that simply allows a customer to print out an order form, and mail in that form to purchase goods is insufficient to serve as a basis for general jurisdiction. *World Triathlon Corp. v. Zefal, Inc.*, 2006 U.S. Dist. LEXIS 20550, at \*17-19 (M.D. Fla. Apr. 18, 2006).
3. A website that is neither purely active or purely passive should not serve as basis to accord general jurisdiction. *Adstep, Inc. v. Freeman Decorating Co.*, 2003 U.S. Dist. LEXIS 25728, at \*19 (M.D. Fla. Sept. 16, 2003).

"To hold the existence of an internet website, such as the one in the present case, constitutes continuous and systematic contact with any location from which the site can be accessed would *turn the notion of federal personal jurisdiction on its head*, eliminating the protections that jurisdictional requirements were designed to safeguard."

E. The growing trend in Florida against allowing a non-resident's active website, by itself, to provide basis for general jurisdiction.

1. Simply because a website allows customers in all 50 states to complete on-line transactions is not sufficient to accord general jurisdiction. *Mvisible Techs., Inc. v. Mixxer, Inc.*, 2007 U.S. Dist. LEXIS 18308 (S.D. Fla. March 15, 2007) (dismissing plaintiff's content that defendant's active website was sufficient to satisfy Florida long-arm statute general jurisdiction arguments as "any website that allows completion of transactions would be subject to personal jurisdiction in all fifty states.").
2. Arguing general jurisdiction exists, based solely upon an active website, is improper when there is no evidence Florida residents actually purchased goods or

services from implicated website. *Instabook Corp. v. InstantPublisher.com*, 469 F. Supp. 2d 1120 (M.D. Fla. 2006).

- (a) Plaintiff brought patent infringement lawsuit against Defendant, a Tennessee corporation. Defendant moved to dismiss for lack of personal jurisdiction and improper venue.
  - (b) Attached to motion, was affidavit of Defendant's Chairman who attested that Defendant, among other things (1) never contracted with an internet service provider located in Florida, (2) never participated in Internet chat with Florida residents, (3) has never transmitted products or services over the Internet to Florida residents, and (3) never remotely operated computers within Florida.
  - (c) While plaintiff argued that general jurisdiction nonetheless existed, but "relie[d] solely on Defendant's websites."
  - (d) Specifically, just because Florida residents could place orders through Defendant's website – this was insufficient to satisfy Fla. Stat. §48.193(2).
  - (e) The court reasoned that "the availability of even an interactive website in a forum does not amount to the discretion of activity at that forum." Put another way, "the construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdictional analysis." (quoting *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d. 537, 543 (E.D. Pa. 1999).
  - (f) The court further stated that "website interactivity is important only insofar as it reflects commercial activity, and then only insofar as the commercial activity demonstrates purposeful targeting of residents of the forum state." The court granted the motion to dismiss.
3. Maintenance of active website, maintained outside of Florida, which was directed to residents outside the state of Florida was insufficient to provide a basis for general jurisdiction. *Baker v. Carnival Corp.*, 2006 U.S. Dist. LEXIS 85114 (S.D. Fla. Nov. 20, 2006)
- (a) Baker sued Defendant, a fellow-passenger on a Carnival cruise for sexual assault and rape. The cruise boarded and departed from Puerto Rico, not Florida. Defendant, a resident of California, moved to dismiss for lack of personal jurisdiction.
  - (b) Defendant argued that he had not been in Florida in the last seven years, does not own property in Florida, and does not have any business ties to the state. Plaintiff argued that Defendant "maintains a substantial commercial presence in Florida through three highly interactive websites marketing nutritional products, skin creams, exercise equipment, and other devices."

- (c) In reviewing whether Defendant maintained continuous and systematic contacts in Florida sufficient under Fla. Stat. §48.193(2), the court stated:

*Mindful of the ever-expanding growth of the internet, the courts, both federal and state, have been careful to limit the reach of personal jurisdiction when based on contacts established by the use or maintenance of internet websites.*

- (d) Specifically, the court found that while two of Defendant's websites were interactive in nature sufficient to allow products to be sold over the internet, the websites did not target residents of Florida. Accordingly, the court found that while the websites were interactive in nature, they did not provide a basis to support any finding of general jurisdiction over Defendant in Florida.
4. Recently, the Southern District of Florida has stated that "a website is not well-suited to serve as a basis for general jurisdiction." *Rexam Airspray, Inc. v. Arminak*, 471 F. Supp. 2d. 1292 (S.D. Fla. 2007).
- (a) Plaintiff was a Florida-based manufacturer of foam dispensers used in packaging. Defendant was a California-based provider of packaging. In 1999, the parties entered into an agreement where Defendant would promote and market Plaintiff's products in several western states. The agreement was amended from time-to-time.
- (b) In certain versions, the contract contained a non-compete and confidentiality provision. In 2006, plaintiff sued for breach of contract, and sought injunctive relief regarding the non-compete portion of agreement. Defendant moved to dismiss complaint, based upon lack of personal jurisdiction and improper venue.
- (c) Plaintiff's argued that Defendant's website, which provided a catalog of Defendant's products, created a sufficient basis for finding of general jurisdiction under Fla. Stat. §48.193(2).
- (d) The court found that the "website is passive and informational only, and does not allow a prospective customer to purchase [Defendant's] products online." The court also found that, in general, "a website is not well-suited to serve as a basis for general jurisdiction."
- (e) Here, Defendant's website was "ill-suited to provide a basis for general jurisdiction" because it "does not allow direct contracting."
- (f) Put simply "Florida residents cannot contract with [Defendant] through the website to make purchases" and thus the site "is insufficient to confer jurisdiction." The court granted Defendant's motion to dismiss.

### III. JURISDICTION THROUGH EMAIL

- A. Public policy issues favoring according general jurisdiction through maintenance of a website.
1. Targeted bulk email distribution has become a standard means of advertising and obtaining business.
  2. Companies like Harte-Hanks and infoUSA maintain active advertising units which target Florida consumers.
  3. Unlike maintaining a website, the act of a non-resident company emailing a Florida resident to solicit business is an overt act (not typically an automated process).
  4. Email also evidences more of a direct and specific contact into Florida.
  5. Email is also very easy to quantify.
- B. Public policy issues which do not support general jurisdiction through maintenance of a website:
1. An out-of-state company may not be aware it is contacting a resident located in Florida, based upon that individual's email address (*ie*, [rhthornburg@yahoo.com](mailto:rhthornburg@yahoo.com)).
  2. The act of sending an email is relative easy (unlike writing a letter, signing the letter, licking the stamp, and placing it in the mailbox).
  3. Email is typically very informal and conversational to constitute "doing business" in Florida.
- C. Limited numbers of emails into Florida, without more, cannot serve as basis to accord general jurisdiction.
1. Jurisdiction based upon a single email sent into Florida insufficient to accord jurisdiction under Fla. Stat. 48.193. *Corneal v. CF Hosting, Inc.*, 187 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001) ("the only jurisdictional fact alleged in plaintiffs' complaint is a single e-mail sent by [defendant] to plaintiffs . . . motion to dismiss is granted.")
  2. Website job posting, coupled with email by non-resident into Florida in response to job posting was insufficient to accord general jurisdiction. *Einmo v. Aecom Gov't Servs.*, 2007 U.S. Dist. LEXIS 63293, at \* (M.D. Fl. Aug. 7, 2007).

“The undisputed facts demonstrate that AGS recruited for the position by placing an advertisement in the Houston Chronicle (both hard copy and online versions); responded to Plaintiff’s email response to the posting; communicated with Plaintiff during an approximate one-month period by email, cell phone, and facsimile; and telephoned a Florida resident listed as one of Plaintiff’s references. As for the online posting, there is no evidence that the job advertisement that AGS placed in a Texas newspaper was purposefully directed at Florida or even that Plaintiff viewed the site in Florida.”

D. Recent case law in Florida suggests that email can serve as a basis for general jurisdiction:

1. Seven emails (7) into Florida, coupled with a visit to the state may be sufficient to accord jurisdiction. *Perry Ellis Int’l, Inc. v. URI Corp.*, 2007 U.S. Dist. LEXIS 16000 (S.D. Fla. March 7, 2007).

(a) Plaintiff, a Florida corporation, filed a trademark infringement lawsuit, against Defendant, a California corporation.

(b) Defendant had previously entered into a license agreement, which allowed use of Plaintiff’s trademarks in connection with the manufacture and sale of footwear. Defendant began manufacturing and selling goods beyond the scope of the license agreement, and Plaintiff terminated license. Plaintiff then sued.

(c) Defendant moved to dismiss for lack of personal jurisdiction. Defendant contended that its only contacts with Florida were “seven emails, three phone calls, one visit and one mailed payment” to Plaintiff.

(d) Plaintiff argued that such contacts, coupled with forum selection clause in license agreement, were sufficient to confer jurisdiction. Court found that personal jurisdiction existed under Fla. Stat. §48.193(2).

E. A foreign corporation’s sending of hundreds of emails into Florida, for purposes of maintaining business relationship with Plaintiff, is a sufficient basis to accord jurisdiction. *Clover Systems, Inc. v. Almagran, S.A.*, 2007 U.S. Dist. LEXIS 41416 (S.D. Fla. June 7, 2007)

1. Plaintiff, a Florida corporation headquartered in Miami, filed a declaratory suit against Columbian based Defendant, to establish rights regarding a dispute over lost cargo. Both parties entered into a contractual agreement in 1999, where Defendant would provide logistics, customs support, and cargo transport between Columbia and Miami. This contractual agreement represented 15% of Defendant’s total annual revenue.

2. After filing suit, Defendant moved to dismiss Plaintiff complaint for want of personal jurisdiction and improper venue.
  3. Plaintiff argued jurisdiction over Defendant was proper under Fla. Stat. §48.193(2) based largely in part of Defendant's "electronic communications and internet activity in the instant forum [and because] the parties exchanged 'hundreds and thousands of emails and electronic communications' in order to further business operations.'" These electronic communications and internet activity including, among other things, included the wiring of funds by Defendant to Miami-based banks.
  4. The Court agreed that jurisdiction and venue were proper, as Plaintiff had "transmitted thoughts of electronic communications, including telephone calls, into Florida . . . and wired money on 101 occasions to Plaintiff's Florida-based banks . . ." The court denied the motion, as "Defendants on-going contacts with the State of Florida would provide Defendants with the reasonable anticipation of being hailed into this Court."
- F. To ward off claim of general jurisdiction through electronic means, defendants are submitting affidavit testimony of lack of both email and website presence in Florida. *Mvisible Techs., Inc. v. Mixxer, Inc.*, 2007 U.S. Dist. LEXIS 18308 (S.D. Fla. March 15, 2007).
1. Plaintiff, based in Florida, sued a Seattle-based company for trademark infringement, cybersquatting, and unfair and deceptive trade practices. Both parties were direct competitors in business of providing musical content for cellular telephones.
  2. Defendant moved to dismiss for want of personal jurisdiction and improper venue.
  3. In support of the motion to dismiss, Defendants put forth an affidavit of its CEO. The affidavit stated that Mixer's only presence in Florida was a computer server. Defendant did not solicit via email to potential Florida customers, and evidence suggested that Defendant's web-traffic from Florida accounted for 6% of total traffic in 2006.
  4. In response, Plaintiff argued that this constituted sufficient evidence to satisfy Fla. Stat. §48.193(2), or at the very least to warrant further jurisdictional discovery.
  5. The Court reasoned that general jurisdiction was "a very close issue." However, simply because the website allowed customers in all 50 states to complete on-line transactions, was not sufficient to accord general jurisdiction over the Seattle-based Defendant.

6. Under such logic “any website that allows completion of transactions would be subject to personal jurisdiction in all fifty states.” Thus, the crucial inquiry was the percentage and amount of revenue Defendant received through on-line transactions with Florida customers. Thus, the Court allowed limited jurisdictional discovery on these issues, but stayed all other discovery until resolution of the motion to dismiss.

#### **IV. JURISDICTION THROUGH WIRING OF FUNDS TO FLORIDA BANKS**

##### **A. Wiring of funds to a Florida based bank can serve as a basis to accord general jurisdiction.**

1. Electronic wiring of misappropriated funds from foreign country to a Florida based bank may be sufficient to accord general jurisdiction in Florida. *Walz v. Van Schweiger*, 575 So. 2d 788 (Fla. 3rd DCA 1991) (in a *quasi-in-rem* action seeking a constructive trust filed by a Western German against a Brazilian, both jurisdiction and venue were proper in Florida, as Miami was location where defendant deposited some \$1.464 million).