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WHERE TO SUE? WEBSITES CAN AFFECT JURISDICTION

In a nation of 50 different systems of state courts and a highly interconnected national economy, the issue of when one state's courts can assert jurisdiction over a nonresident person or business has always been fertile ground for litigation. State legislatures have addressed the matter with laws that are the civil counterparts to the notion that criminals cannot escape the "long arm of the law." But "long-arm statutes," as they are known, do have their limits. Essentially, nonresidents can be sued in the courts of any state where they have had such contacts inside the state that it is reasonable to conclude that they have submitted themselves to the authority of the courts in that state. The principle is vague, but it has to be to cover the almost endless ways in which we conduct business.

In the business world, conventional arguments over the application of long-arm statutes have involved questions such as whether a party sought to be sued had an office or personal representative in the forum state, or whether a contract was signed by the parties in that state. Those issues still arise, but in the information age, courts increasingly have had to adapt the rules to business conducted over the Internet. Just because a company's website is accessible by customers in a given jurisdiction does not necessarily mean that the company can be sued there. The emerging rule of law is that the more that a customer can have online interactions with a business based elsewhere, the more likely it is that if things go wrong the business can be forced to play an "away game" in court.

Close, but No Cigar

Examples make the point better than statements of rules of law. A Vermont furniture

store used a trucking company to deliver furniture to a customer in North Carolina. When the buyer was injured during unloading, he tried to sue the furniture company in a North Carolina court. In this case, the "long arm" was not long enough to reach the Vermont company. The furniture had been bought and paid for in Vermont. The only respect in which the store had any connection to North Carolina was that its website could be accessed there, like anywhere else. But it was a passive site, giving information about products, but not allowing purchases through the site.

When an Oklahoma resident bought a laptop computer from a Georgia company, then returned it for repairs, never to see the laptop again, he was unable to sue the company in Oklahoma. The customer had learned about the computer from the Georgia company's website, but he had ordered it by telephone and had not used the website to make the transaction.

Caught by the "Long Arm of the Law"

At the other end of the spectrum are cases in which businesses could be sued in the states where their customers lived because the businesses had a more substantial online "presence" in those states. A dog breeder in Illinois could make a similar Oklahoma business defend a lawsuit in Illinois because the Oklahoma business operated an interactive website and also used chat rooms to reach potential customers all over the country.

A California customer of a hotel run by a Nevada casino was able to haul the casino into a California court to defend allegations that it had imposed an energy surcharge on customers without notice. The plaintiff alleged that nothing in the casino's promotional activities, including its website, informed customers of the charge. It was important to the ruling that the casino used an interactive website where out-of-state customers could get quotes and book rooms. In addition, there was a close connection between the alleged wrong—the misleading promotions—and the casino's website that targeted millions of California residents.

PROPERTY TRANSFERS AND MEDICAID ELIGIBILITY

An applicant for Medicaid may have eligibility for benefits delayed if he or she has recently transferred real property to an individual for less than the fair market value of the property. A penalty period is imposed if the transfer took place during a span of time known as the "look-back" period. This provision is meant to prevent duplicitous gaming of the Medicaid system, but, as a court recently noted, the provision does not justify viewing every property transfer with skepticism and disapproval merely because it precedes Medicaid eligibility.

In the case before the court, a 67-year-old who suffered from Alzheimer's disease and other ailments applied for Medicaid assistance. The state agency that oversaw Medicaid rejected the application on the ground that the applicant had transferred real property for less than its value within the look-back period. The applicant, in fact, had conveyed the home where she lived to her three children as a gift, and the deed to the property was recorded shortly before she applied for Medicaid.

Nonetheless, the court overturned the agency decision because the agency had not properly pegged the point in time when the property transfer became effective as a matter of law.

For various reasons, there had been a lengthy delay in getting the executed deed recorded, but the deed had been executed and delivered to the children well before the look-back period began. The court favored a "benevolent" interpretation of the family's well-intentioned but haphazard attempts to follow up more promptly with recording the deed, rather than seeing it as part of a scheme to delay the transfer until it was apparent that the mother needed nursing home care and Medicaid money to pay for it.

It is a well-settled principle of property law that a transfer of real property is complete upon the execution and delivery of a deed and its acceptance by the recipient of the property, and nothing in the Medicaid regulations contradicts that principle. In the case at hand, there was no reason to suspect that the mother did not mean to convey the property as soon as the deed was executed and delivered. Since the transfer of the property was effective when the deed was transferred, the transfer occurred outside the look-back period and the applicant was eligible for Medicaid assistance.

ADA PROTECTS EMPLOYEES WITH CANCER

Now 15 years old, the Americans with Disabilities Act (ADA) protects disabled persons from discrimination in employment settings. When you first think of individuals with disabilities, the millions of Americans who have some history of cancer may not immediately come to mind. But, as the Equal Employment Opportunity Commission (EEOC) discusses in a recently published guide, a cancer victim may well be entitled to the protections afforded by the ADA.

Cancer as a Disability

Cancer is a "disability" within the meaning of the ADA when the cancer itself or its effects substantially limit one or more of a person's major life activities. The limiting condition needs to be more than just temporary in nature. Just what constitutes a major life activity is difficult to succinctly describe, but an exhaustive list would be a long one. Interacting with others, sleeping, eating, and walking are but a few examples. As with other types of conditions, cancer will be treated as a disability if it does not, in fact, significantly affect a major life activity *but an employer treats the individual as if it does.* This reflects the ADA's goal of attacking discriminatory stereotypes and assumptions when they motivate an employer's decisionmaking.

Information Gathering

During the time period before any offer of employment has been made, an employer may not ask an applicant if he or she has (or has had) cancer, or about cancer-related treatments. The employer is permitted to ask if an applicant can perform particular job requirements. If an applicant has volunteered the information that he or she has (or has had) cancer, the employer still may not question the applicant about the cancer or the applicant's prognosis, but the employer may ask questions about whether the applicant will need an accommodation and, if so, what kind.

Once a job offer has been made, the employer may ask health-related questions and require a medical exam, as long as the employer treats all applicants for the same type of position

in the same manner. The discovery that an applicant has (or has had) cancer cannot be used to withdraw a job offer if the applicant can perform safely all of a job's fundamental duties, with or without reasonable accommodation. When an offer has been accepted, the employer can ask questions about the employee's health or require a medical exam only when it has a legitimate reason to believe that the cancer may be affecting the employee's ability to do the job, and to do it safely. With a few exceptions, an employer must keep confidential any medical information learned about an applicant or employee.

Reasonable Accommodations

Within reason, the ADA requires employers to make adjustments or accommodations to enable people with disabilities to enjoy equal employment opportunities. An employer is not required to subject itself to undue hardship (that is, significant expense or difficulty) in order to accommodate someone. Nor must an employer remove an essential function from a job, although it may choose to do so. As for cancer-related disabilities, some individuals may need, and are entitled to, reasonable accommodations because of the cancer itself, the effects of cancer medication and treatment, or both. A request is necessary to trigger the duty to make a reasonable accommodation, but no "magic words" are required and, in fact, the request may come from someone acting on behalf of the disabled person. The guidance is available on the EEOC's website at *www.eeoc.gov/facts/cancer.html*.

SOCIAL SECURITY NUMBER VERIFICATION FOR EMPLOYERS

The Social Security Number Verification Service (SSNVS), set up by the Social Security Administration (SSA), allows employers to use the Internet to match their records of employee names and Social Security numbers with those of the Government's before preparing and submitting W-2 forms. You can access the SSNVS at *www.socialsecurity.gov/bso/bsowelcome.htm*. This is a faster and easier method to use than submitting requests to the SSA by other means, including the telephone verification option.

Verification of data is important for both the employer and its employees. Correct names and numbers are critical to successful processing of wage reports, and unmatched records can cause additional processing costs for the employer. From the employees' standpoint, verified names and numbers allow the Government to properly credit employees' earnings records. Any uncredited earnings can adversely affect future eligibility for Social Security's retirement, disability, and survivors programs.

AEDs HELP TREAT HEART ATTACKS . . .

But Can Cause Legal Headaches

An automated external defibrillator (AED) is used to treat people suffering sudden cardiac arrest whose hearts have an irregular heartbeat. Since September of 2004, when the Federal Food and Drug Administration approved over-the-counter sales of AEDs, it has been

possible for individuals and businesses to have AEDs on hand, instead of waiting for them to be brought by medical personnel.

The greater availability of AEDs has been a mixed blessing from a legal standpoint. Businesses most likely to put an AED to use (and what business cannot foresee that a customer might have a heart attack on its premises?) are now in the position of having to decide whether they should have an AED at their facilities. If they do not, there is a risk that a customer who needed an AED could cite the failure as negligence in a lawsuit. That is the "damned if you don't" part, but the rest of the saying may apply as well.

If a business—for example, a fitness center—decides that it would be prudent to have its own AED, it may be commended for preparing for an emergency, but it also may have created a legal headache. Under the right set of facts, the business could be liable for a range of acts or omissions, such as not training its personnel to properly use the AED, or even something as simple as not keeping fresh batteries in the AED. There are already lawsuits in which such allegations have been made, and court cases from the period before over-the-counter sales began suggest that businesses can be held liable if the AED is not kept in good working order or if the use (or non-use) of the AED is especially negligent.

Businesses with AEDs on premises should think in terms of having a comprehensive AED program, not just the piece of equipment. With a view toward quick and effective use of the AED, the program should include:

- good means of communication about emergencies requiring an AED;
- training of workers in the use of the AED;
- procedures for regular checking and maintenance of the AED, and;
- storage of the AED in an accessible location, identified by clear signs.

NEW 401(K) INVESTMENT OPTION

As of January 1, 2006, employers are able to offer a new retirement savings option, the Roth 401(k). The new account allows the features of a Roth IRA to be incorporated into the setting of a 401(k) account, but without the income restrictions that limit a Roth IRA. Contributions will be made with after-tax dollars, but the account will grow tax-free, and withdrawals taken in retirement will also be tax-free, assuming an individual is at least 59-1/2 years old and has held the account for at least 5 years.

Roth 401(k) accounts will be subject to the same contribution limits as regular 401(k)s. In 2006, this means a contribution limit of $15,000, or $20,000 for individuals 50 and over. The contribution limits apply to regular and Roth 401(k) plans combined, so, for example, an individual could not put $15,000 in a regular 401(k) and $15,000 in a Roth 401(k). Still, the opportunity to put more money into a retirement account that will have tax-free withdrawals will be enhanced, given that in 2006 the contribution limits for a regular Roth IRA will be $4,000, or $5,000 for those 50 or older. If an employer matches the employee's contributions to a Roth 401(k), the matches will be made with pre-tax dollars in a regular 401(k) account that will be taxed as ordinary income at withdrawal.

Although it is only now becoming available, the Roth 401(k) originated in a big piece of

tax legislation that was enacted in 2001, with a sunset provision to take effect in 2010. Thus, it remains to be seen whether over the long run the Roth 401(k) will be seen as an option that was available in a small window of time, or a permanent fixture in retirement planning.

LANDLORD/TENANT

Insurer May Sue Renter for Fire Damage

Unless there is a contract or lease that provides otherwise, a tenant generally is liable to a landlord for negligently damaging the landlord's property, such as by accidentally starting a fire. But, depending on the language in the landlord's fire insurance policy, the tenant could end up defending himself against a powerful insurance company rather than the landlord.

Many insurance policies provide for subrogation, meaning that if the insurer pays a claim from the landlord for losses due to a negligently started fire, the rights of the landlord against the wrongdoer are transferred to the insurance company. In effect, the insurance company steps into the shoes of the landlord.

This scenario played out in two recent cases that were consolidated because of their similarity. In one case, a person renting a single-family home caused a fire by leaving a flammable item unattended on an electric stove. In the other case, an apartment tenant accidentally started a fire with candles left burning in the bedroom. In both instances, the insurers had subrogation clauses in the policies taken out by the landlords.

Without success, the tenants argued that they should be treated as co-insureds, and therefore they should not be subject to a lawsuit by the insurers. The court ruled that tenants may well have an insurable interest in the leased premises, but they are on their own in terms of liability, unless a contract provides otherwise. The court reasoned that allowing an insurance company to sue a tenant avoids a double recovery by the landlord (from the insurer and the tenant), and it prevents culpable tenants from evading responsibility for their conduct.