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# LIMITING EXPOSURE FOR INTERNET VENDORS: SEPARATING THE WHEAT FROM THE CHAFF

TODD V. MACKEY†

## I. INTRODUCTION

It's fast approaching 2004 and one no longer needs to introduce or explain the Internet.<sup>1</sup> It has become pervasive to the extent that e-mail addresses are nearly as necessary on business cards as fax numbers. The DotCom<sup>2</sup> bubble has burgeoned and burst, but not because the Internet is not a viable business model. Brick and mortar<sup>3</sup> businesses expanded operations onto the Internet, and stole some of the thunder of the DotCom stores.<sup>4</sup> One attraction of Internet marketing is that the vendor can reach a large, geographically diverse customer base at a relatively low cost. However, with this increased marketing exposure comes proportionately large legal exposure. National brick and mortar retailers may be accustomed to increased jurisdictional exposure, because they are likely to have a physical presence in multiple jurisdictions. While a national chain may anticipate multi-jurisdictional exposure as a cost of doing business, the local or regional vendor may not.

One particularly active dispute over electronic transactions is over the question of where they take place. Geographic boundaries are

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1. Early cases would begin by explaining that the Internet is an interconnected network of individual computer systems that grew out of the U.S. Department of Defense's efforts to maintain an emergency communications channel that would be resistant to single point failures. This network grew over time into what is now the Internet.

2. DotCom in this reference refers to those companies that emerged in the mid-nineties and began doing business on the Web. Some of the strongest have survived; Amazon ([www.amazon.com](http://www.amazon.com)) for example. Many more did not survive as traditional stores expanded and supplemented their operations by moving a storefront onto the Internet.

3. Brick and mortar refers to traditional stores as opposed to those that do business only on the Internet.

4. See *e.g.* Walmart <<http://www.walmart.com>>; Barnes & Noble <<http://www.bn.com>>; Sears <<http://www.sears.com>>.

largely irrelevant in e-commerce, but jurisdiction and choice of law problems are geographically derived. The jurisdictional issues are important and complex, but three models seem to gather varying numbers of proponents. The first is the information superhighway model. In this model, the party travels to the place of the party posting the information. The second is the spider web model. In this model, the party posting information sends it everywhere in the world, kind of like the stream of commerce on steroids. The third is the cyberspace model. It is descriptive of reality but does not settle issues of jurisdiction. In this model, transactions take place outside the temporal world in a kind of frontier like atmosphere. This may be akin to conducting transactions in international waters, or in space. One way to bring some certainty to this troubled sea is to allow the parties to agree upon these issues, at least in regards to legitimate goods and services. While certain jurisdictions may zealously reach into cyberspace, e-commerce is well served by allowing parties to agree upon important questions such as choice of law and jurisdiction.

This article will explain how using the Internet to market products may subject a vendor to exposure in unanticipated jurisdictions and concludes with a proposal to minimize those risks. In the first section, the author will discuss jurisdiction, beginning with the necessities for obtaining personal jurisdiction over out-of-state defendants and concluding with a review of Internet specific cases. The second section discusses adhesion contracts and forum selection clauses. The third section overviews the E-Sign statute and the *Uniform Electronic Transactions Act* ("UETA") model rules to familiarize the reader with the possibilities of total electronic contracting. The final section reviews and applies the elements from the previous sections into a theme for insulating an Internet vendor to reduce exposure to litigation in foreign jurisdictions.

## II. JURISDICTION

Jurisdiction is the power of the court to hear and render an enforceable decision over the parties ostensibly before it.<sup>5</sup> Two elements are required. First, the court must be competent to render the decision regarding the subject matter before it.<sup>6</sup> Second, the court must have power over the person or property before it.<sup>7</sup> An ancient illustration of competence over subject matter dates back to the chancery courts and the law courts of England. The dichotomy between law and equity has been largely abolished in the United States, but courts of limited juris-

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5. See *Black's Law Dictionary* 853 (6th ed., West 1990) (defining jurisdiction).

6. *Id.*

7. *Id.*

diction are still common.<sup>8</sup> While a state may separate its courts, the court system is wholly vested with general jurisdiction, and is competent to hear all causes. However, the court still has to meet the burden of having all parties before it. The ancient exercise of jurisdiction over a person was demonstrated by having the person brought physically before the court by the sheriff. In civil suits, this method has been replaced by a summons.<sup>9</sup> Failing to appear may result in a default judgment against the non-appearing party. For the purposes of this article, we will forgo the analysis of proper service, notice and other potential defects in service of process. The analysis will be restricted to whether the court may in accordance with law exercise jurisdiction over a party.

This article is written from the Internet vendor's perspective with the assumption that it is not inclined to submit to jurisdiction in all fora. This is an admittedly narrow perspective, but one that the author hopes will be practical. The perspective begs the question of why the vendor would choose to limit its jurisdictional exposure. The full and complete answer may require a comparative legal analysis of the various jurisdictions within the United States and a conclusion as to which is most conducive to the vendor's particular product. However, the theory is that generally it is more expensive to conduct a legal action in a foreign forum than it is in one's home forum. Limiting exposure to the home forum would allow the vendor the advantages of using its usual counsel, in a court where it is more certain of the applicable law, and which is more proximate to its usual place of business. The inverse may well apply to the plaintiff. An ultimate conclusion is withheld since the cost-benefit analysis varies based on the geography and products. Going forward from the perspective that the Internet vendor prefers its home jurisdiction, the following will discuss when the Internet vendor may be coerced into a foreign jurisdiction. It is also assumed for the purpose of this article that the Internet vendor is engaged in the sale of goods or services over the Internet.

Presumably one of the attractions of doing business on the Internet is reaching a broad audience. It is possible that customers from various jurisdictions would be enticed to purchase the vendor's products or services. What additional jurisdictional exposure does the vendor assume when he opens his Internet storefront? The next section reviews the constitutional limits as traditionally applied.

#### A. CASE HISTORY

The ultimate protections against being coerced into a foreign jurisdiction are the constitutional limitations placed on states by the due pro-

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8. *Id.*

9. *See e.g.* Fed. R. Civ. P. § 4 (2003).

cess clause of the Fourteenth Amendment. A state court is bound in its power to exercise jurisdiction over a person by the more restrictive of either the state's long-arm statute or constitutional due process.<sup>10</sup> *Pennoyer v. Neff* is the seminal case representing the proposition that a state's jurisdiction is defined and limited by its geographic borders.<sup>11</sup> As commerce has developed to become more national and international, the courts have recognized that a state may exercise jurisdiction over out-of-state parties consistent with "traditional notions of fair play and substantial justice."<sup>12</sup> *International Shoe v. Washington* recognized that an out-of-state entity that maintained substantial and continuous contacts with the state by maintaining a sales force and shipping goods regularly into the state was subject to the state's jurisdiction.<sup>13</sup> The dissent in *World-Wide Volkswagen Corp. v. Woodsen* sought to expand jurisdiction based on a "stream of commerce" theory.<sup>14</sup> While the majority reasserted the minimum contacts as espoused in *International Shoe*, Justice Brennan argued in dissent that it was applied too narrowly.<sup>15</sup> He would have used a "regular and anticipated flow" test to allow a New York auto dealer to be subjected to jurisdiction in Oklahoma.<sup>16</sup> This is an important note because later the California Supreme Court employed a "stream of commerce" theory in holding that a foreign component manufacturer of tire valves could be hailed into a California court merely on the basis that they introduced an item into the stream of commerce.<sup>17</sup> When the Supreme Court reversed the decision, Justice Brennan was a pivotal vote.<sup>18</sup> A substantial minority would have applied a broad "stream of commerce" test with its accompanying economic burden. Brennan had not abandoned a "stream of commerce" theory of jurisdiction, but had tempered it with the "fair play and substantial justice" language of *International Shoe* and a "regular and anticipated flow" test.<sup>19</sup> The result is that it is likely today that an Internet vendor who provides goods or services to a state's residents may be subject to jurisdiction in those states zealous about asserting the maximum jurisdiction allowable

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10. *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 294 (1980) (citing *Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)).

11. See generally *Pennoyer v. Neff*, 95 U.S. 714 (1877).

12. *Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 324 (1945) (citing *Millikin v. Meyer*, 311 U.S. 457, 463 (1940)).

13. *Id.* at 321.

14. *World-Wide Volkswagen*, 444 U.S. at 306 (J. Brennan, dissenting).

15. *Id.*

16. *Id.* (making the analogy to a river's flow and citing *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); the analogy is refined and reasserted in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 117 (1987)).

17. *Asahi*, 480 U.S. at 117.

18. *Id.*

19. *Id.*

under the Constitution.<sup>20</sup>

The practical result is that resisting personal jurisdiction will require substantial factual allegations and cases may be well into discovery before the jurisdictional issue is resolved. Even then, under the foregoing analysis, prospects for dismissal are not great. In addition, a defendant in some states may be held to have consented to jurisdiction by failing to take certain technical procedural steps.<sup>21</sup> Courts necessarily have jurisdiction to determine their jurisdiction. When hailed into a court in a foreign jurisdiction, the defendant has two options. They may either ignore the proceeding and attack jurisdiction collaterally, or contest jurisdiction at the outset of the proceeding. In the former tactic the court may issue a default judgment rather than dismiss on lack of jurisdiction *sua sponte*. A default and subsequent collateral attack leaves the defendant unable to argue the merits of the case if the jurisdictional challenge is unsuccessful at the time plaintiff seeks to enforce judgment. In the latter tactic the defendant must also be careful to raise jurisdictional challenges early. For example, in Illinois, a defendant will have consented to jurisdiction unless that defendant files a special appearance to contest jurisdiction before making a responsive pleading.<sup>22</sup> Therefore, once the plaintiff has chosen a foreign forum he places the defendant at an immediate disadvantage. The forum fight begins to add to the defendant's cost of defense immediately and uses funds that would otherwise be available for the defense on the merits. The best response a defendant could hope for is that the court declines jurisdiction, but the defendant may not prudently rely on such a fortuity. One fortuity in favor of the attorney is that application of traditional jurisdictional tests to Internet entities is no longer a novel issue. The following section discusses current case law as it relates to Internet jurisdiction.

## B. INTERNET JURISDICTION

Internet vendors may sell or provide similar services to their brick and mortar counterparts. Internet vendors may be subject to libel, breach of warranty, product liability, deceptive business practices, or various other tort actions.<sup>23</sup> In addition, an Internet vendor may have in-

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20. Zealous states in this context are those which limit their long-arm statutes to no less than what is permitted under Constitutional Due Process.

21. See 735 Ill. Comp. Stat. § 5/2-301 (2003) (providing that any substantive pleading or a general appearance filed before objecting to jurisdiction waives the opportunity).

22. *Id.*

23. See e.g. *Zeran v. Am. Online*, 129 F.3d 327 (4th Cir. 1997) (describing where a defamation action was successfully transferred to the U.S. Circuit Court for the Eastern District of Virginia); see also *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (describing a defamation action in which the D.C. Circuit exercised jurisdiction over an out-of-state party).

creased exposure to intellectual property actions, such as trademark dilution, or copyright violations.<sup>24</sup> An analysis of these causes of action on an Internet vendor is beyond the scope of this article, however the cause of action may have an effect on the jurisdictional analysis. Jurisdiction in non-contract actions may be analyzed based on where their effects are "felt," rather than on where the parties directed their actions. Two examples in the trademark infringement or dilution context are *Panavision International, L.P. v. Toeppen*<sup>25</sup> and *Cybersell, Inc. v. Cybersell, Inc.*<sup>26</sup>

In *Panavision*, the U.S. District Court for the Central District of California exercised jurisdiction over an Illinois resident.<sup>27</sup> Toeppen, a resident of Illinois registered the domain name "panavision.com."<sup>28</sup> On a page associated with that name he displayed a picture of Pana, Illinois.<sup>29</sup> Panavision notified Toeppen that they considered his use an infringement upon their trademark.<sup>30</sup> Toeppen offered to sell the domain name to Panavision, and when Panavision refused the offering price, Toeppen registered another domain name using a Panavision trademark.<sup>31</sup> When Panavision brought suit in California, Toeppen asserted a lack of personal jurisdiction.<sup>32</sup> The California Court applied the *Calder v. Jones* test and determined that the registering of the domain name, the attempted sale, and the subsequent registration of another domain name using a Panavision owned mark, was sufficient contact with the forum to allow the exercise of jurisdiction over Toeppen.<sup>33</sup>

Reaching a different result is *Cybersell, Inc. v. Cybersell, Inc.*<sup>34</sup> In that case, Cybersell registered the trademark "Cybersell" in Arizona and used it in its business of offering advertising and marketing services, as well as some consulting.<sup>35</sup> Cybersell used the same name to offer Web page construction services in Florida. The Ninth Circuit used a three-part test from *Ballard v. Savage* to determine whether a district court could exercise specific jurisdiction over a nonresident defendant.

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24. See e.g. *Panavision Intl. v. Toeppen*, 938 F. Supp. 616, 620 (C.D. Cal. 1996).

25. *Id.*

26. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

27. See *Panavision*, 938 F. Supp. at 618.

28. *Id.*

29. *Id.* at 619.

30. *Id.*

31. *Id.*

32. See *Panavision*, 938 F. Supp. at 619.

33. *Id.* at 621 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984) for the proposition that "effects" of the act and the "harm suffered" occurred in California and that therefore the exercise of personal jurisdiction was appropriate).

34. See generally *Cybersell*, 130 F.3d 414 (9th Cir. 1997).

35. *Id.*

(1) The nonresident defendant must do some act or communicate some action with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of or results from the defendant's forum related activities; and (3) exercise of jurisdiction must be reasonable.<sup>36</sup>

Citing *Hanson v. Denckla*, the court determined that a party must purposefully direct its actions toward the forum, and such direction can be manifested by directing its acts toward the forum's residents.<sup>37</sup> The court noted the decisions in *CompuServe v. Patterson*<sup>38</sup> and *Bensusan v. King*.<sup>39</sup> The court held that the passive nature of the Florida Web site did not give rise to an appropriate exercise of jurisdiction in this instance.<sup>40</sup> The court cited the fact that no Arizona residents had contracted for Florida services.<sup>41</sup>

The *Cybersell* decision stands for the proposition that a passive Web site does not subject one to personal jurisdiction in all the fora it reaches. The court favorably reviewed the *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, stating that "[i]n sum, the common thread, [is] well stated by the district court in *Zippo*."<sup>42</sup>

As the Ninth Circuit attested, the *Zippo* sliding scale is a very popularly used test for determining the appropriateness of jurisdiction.<sup>43</sup> The *Zippo* court reviewed the then existing cases and determined that "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."<sup>44</sup> The court set the endpoints of the sliding scale such that those sites merely providing information are at one end, and those sites "doing business over the Internet" are at the other end.<sup>45</sup>

Revisiting the anticipated focus of this article, that of the Internet vendor selling goods or services, it is clear that the Internet vendor is

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36. *Id.* at 416 (citing *Ballard v. Savage*, F.3d 1495, 1498 (9th Cir. 1995)).

37. *Id.* at 416-17 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

38. *CompuServe v. Patterson*, 89 F.3d 1257, 1266 (6th Cir. 1996) (seeking a declaratory judgment, CompuServe filed an action in Ohio against Patterson, a Texas resident). The Sixth Circuit held that a choice of forum together with transmission of files to Ohio were sufficient minimum contacts to exercise personal jurisdiction over Patterson. *Id.*

39. See generally *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (holding that a jazz club in Missouri that advertised on the Internet could not be subject to personal jurisdiction in New York because of the advertisement alone).

40. See *Cybersell*, 130 F.3d at 414.

41. *Id.*

42. *Id.* at 419 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997)).

43. *Id.*

44. See *Zippo Mfg.*, 952 F. Supp. at 1124.

45. *Id.*



rather solidly into that portion of the spectrum "doing business over the Internet," which is most likely conducive to a finding of specific personal jurisdiction. The process of soliciting customers and providing services or shipping goods is therefore very likely to subject the vendor to various forums. While it may be possible to conduct business operations in a way to minimize contacts with foreign jurisdictions, such contrivances are likely counter to the advantages of marketing on the Internet.<sup>46</sup> If a vendor wishes to maximize its marketing exposure while minimizing its risk of being subject to foreign forms, then the vendor may agree with the customer upon an appropriate forum. This is a cost shifting measure and the risk is that the consumer will not be amenable to the forum selection.

By analogy, the terms of a sale are subject to competitive forces in the market. For example, a policy accepting returns is more advantageous to an all-sales-final policy, all other variables remaining equal. It is reasonable to assume that an all-sales-final policy would allow a lower price, and will therefore attract a customer willing to trade the risk of being dissatisfied with the product for that lower price. The airline industry differentiates its products almost entirely based on the terms of the transportation. A customer willing to commit in advance to a specific itinerary will be able to attain a lower price than the customer who requires flexibility in the itinerary. These examples are meant to illustrate that some customers may not be as willing to make a purchase with terms such as a forum selection clause and a choice of law as they are without them. The terms of the sale are part of the value offered to the customer. The most efficient way to bundle the terms of the sale with the offered product or service is with a contract of adhesion.

### III. FORUM SELECTION IN ADHESION CONTRACTS

#### A. ADHESION CONTRACTS

Adhesion contracts, also referred to herein as contracts of adhesion, and popularly known as "standard form contracts" are those contracts in which the terms are not negotiable between the parties. The party wishing to do business with the offering party must *adhere* to the offered terms or forgo the transaction. Adhesion contracts are pervasive in the business world. They are incorporated into order forms, printed on product packaging, sent accompanying credit cards, incorporated into airline tickets, tickets for shows, and tickets for cruises. These terms are binding on the consumer as long as they are not deceptive or over-reaching. Adhesion contracts regarding the sale of goods are enforceable unless the

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46. One such contrivance may be arranging an intermediary to ship products in order to isolate the vendor from the destination jurisdiction.

provisions are unconscionable.<sup>47</sup>

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.<sup>48</sup>

## B. FORUM SELECTION

Whether forum is a term that can be decided between the parties to a contract was decided in the United States by the Supreme Court's 1972 decision in *Bremen v. Zapata Off-Shore Co.*<sup>49</sup> This case was originally brought in a U.S. district court in Florida.<sup>50</sup> The parties had contracted to tow a drilling rig from Louisiana to Italy, and within the contract there existed a clause stipulating that all disagreements would be submitted to the High Court of Justice in London, England.<sup>51</sup> The district court denied the motion to dismiss and the Eleventh Circuit affirmed.<sup>52</sup> The U.S. Supreme Court reversed and held that a forum selection clause should be enforced unless there are facts to show that it was unreasonable, unjust, or obtained through fraud or overreaching.<sup>53</sup> The result is that forum selection clauses would be enforced in federal courts so long as they were reasonable. The parties in *Bremen* were both businesses negotiating at arm's-length.<sup>54</sup> Many years later in 1991, the doctrine would be extended to consumer transactions and contracts of adhesion.<sup>55</sup>

In *Carnival Cruise Lines v. Shute*, a district court in Washington granted summary judgment for the petitioners and the plaintiff appealed to the Ninth Circuit, which reversed stating that the provision had not been bargained for.<sup>56</sup> The U.S. Supreme Court in a seven-to-two decision held that the forum selection clause was valid.<sup>57</sup> Of particular note in this case is that the forum selection clause was included on a contract distributed with the tickets.<sup>58</sup> Acceptance and use of the tickets constituted acceptance and use of the accompanying terms.<sup>59</sup> The court noted that plaintiff had conceded notice of the terms, and having notice, contin-

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47. U.C.C. § 2-302.

48. U.C.C. § 2-302, off. cmt. 1.

49. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

50. *Id.* at 3-4.

51. *Id.* at 2.

52. *Id.* at 6-7.

53. *Id.* at 15.

54. *Bremen*, 407 U.S. at 17.

55. See generally *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

56. *Id.* at 589.

57. *Id.* at 597.

58. *Id.* at 587.

59. *Id.*

ued with the trip.<sup>60</sup> The court further explained that although the passenger was not entitled to bargain for the choice of forum, that the clause was not unreasonable since the cruise line had a legitimate interest in trying to limit the number of fora to which it would be exposed.<sup>61</sup> The choice of forum in Florida was based upon the location of its principal place of business and the fact that many of its cruises originated and terminated in Florida.<sup>62</sup> The decision was roundly criticized and was statutorily overturned in 1992 in the *Ocean's Act* to keep the sky from falling; however, the decision was statutorily reinstated in 1993 as part of the *Coast Guard Authorization Act*.<sup>63</sup> Since that time, *Bremen* and *Carnival Cruise* have been providing guidance on the applicability of forum selection clauses.

There are still some differences in how the circuits will apply a forum selection clause. The Eleventh Circuit handles a forum selection clause under Federal Rules of Civil Procedure ("FRCP") § 12(b)(3).<sup>64</sup> The First Circuit treats a motion on a forum selection clause as a motion to dismiss under FRCP § 12(b)(6).<sup>65</sup> The following case applies the Fourth Circuit rule for handling contractual forum selection clauses.

The District of Maryland in *Koch v. America Online* applied the Fourth Circuit rule as follows: if the underlying action is based on diversity jurisdiction, then the applicable state law applies to the forum selection clause.<sup>66</sup> Otherwise, the federal rule in *Bremen* is applied.<sup>67</sup> The *Koch* court noted that both Maryland and Virginia State laws allowed forum selection clauses.<sup>68</sup> The District of Maryland then applied the following test from *Bremen*.

In *Bremen*, the court found that a forum selection clause may be unreasonable if: (1) it was the result of "fraud or overreaching;" (2) "trial in the contractual forum will be so gravely difficult and inconvenient [for the complaining party] that he will for all practical purposes be deprived

60. *Carnival Cruise Lines*, 499 U.S. at 587.

61. *Id.* at 594-95.

62. *Id.*

63. Gehringer Axel, *After Carnival Cruise and Sky Reffer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. Air L. & Comm. 633, 647-49 (Spring 2001).

64. See e.g. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998) (holding that a motion to dismiss based on a forum-selection clause is properly brought pursuant to FRCP § 12(b)(3) instead of FRCP § 12(b)(1)).

65. *Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993) (holding that in a removed action, the proper procedural vehicle for pursuing dismissal under a forum-selection clause is FRCP § 12(b)(6) instead of FRCP § 12(b)(3)).

66. *Koch v. America Online*, 139 F. Supp. 2d 690, 693 (D. Md. 2000).

67. *Eisaman v. Cinema Grill Systems, Inc.*, 87 F. Supp. 2d 446, 448 (D. Md. 1999) (citing *Nutter v. New Rents, Inc.*, 945 F.2d 398 (4th Cir. 1991)).

68. *Koch*, 139 F. Supp. 2d at 693.

of his day in court;” or (3) “enforcement would contravene a strong public policy of the forum in which suit is brought.”<sup>69</sup>

The Sixth Circuit in *Kerobo v. Southwestern Clean Fuels Corp.* refused to enforce a forum selection clause where the action was initiated in state court in Michigan and the defendant transferred to the U.S. Circuit Court for the Eastern District of Michigan based on diversity jurisdiction.<sup>70</sup> The Sixth Circuit reasoned that the transfer to district court did not give rise to an automatic enforcement of the forum selection clause.<sup>71</sup> The District Court for the Eastern District of Michigan was the only proper venue under 28 U.S.C. § 1391.<sup>72</sup> The forum selection clause could not then be challenged pursuant to § 12(b)(3).<sup>73</sup> The motion was then considered a motion to transfer pursuant to 28 U.S.C. § 1404(a). The court applied the reasoning from *Stewart Org., Inc. v. Ricoh Corp.*<sup>74</sup> and determined that the forum selection clause is not dispositive in this context and quoted the following language from *Stewart*: “a forum-selection clause [in a contract] will be a significant factor that figures centrally in the district court’s calculus.”<sup>75</sup>

Therefore, there are some weaknesses remaining even in a properly drafted and published forum selection clause. If the case is brought in federal court, attention will have to be paid early to the form and grounds for the motion based on the forum selection clause. In addition, an impulsive removal to federal court based on diversity may work against the defendant trying to enforce the forum selection clause, as illustrated by the foregoing Sixth Circuit case. The removal to federal court may be advantageous if the state court does not enforce forum selection clauses as against public policy.<sup>76</sup> In the event that the state court enforces forum selection clauses similarly to the *Bremen* rule it may be more advantageous to bring the motion to dismiss based on the forum selection clause, rather than removing to federal court.

State court dismissal may be challenging on a couple of fronts. The first and most obvious is that a motion to dismiss will not likely be granted based on a forum selection clause in those states that hold them contrary to public policy. These are the times when it may be advantageous to remove to a federal court and make FRCP § 12(b)(3) motions or motions to transfer under 28 U.S.C. § 1404(a) as appropriate. The plain-

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69. *Bremen*, 407 U.S. at 12-19.

70. See generally *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531 (6th Cir. 2002).

71. *Id.* at 536.

72. *Id.* at 534.

73. *Id.* at 538.

74. *Id.* at 533-34 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988)).

75. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

76. *Id.*

tiff may resist removal on lack of sufficient amount in controversy, or by joining a local defendant to destroy diversity jurisdiction.

The second opportunity for attack may be on the validity of the forum selection clause under contract law. The adhesion contract may be attacked as unconscionable. Since the plaintiff may not be willing to go quietly down the road to dismissal, it will be particularly important to have sufficient facts to support a motion for summary judgment. With that in mind, a signed contract to attach as an appendix to the memorandum supporting the motion would be a good thing to have. The following section discusses federal legislation and the uniform rule for states that makes obtaining such a contract expedient in an online environment.

#### IV. E-SIGN & UETA

##### A. *ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT* ("E-SIGN")

What started as Senate Bill 761 became Public Law No. 106-229 ("E-Sign").<sup>77</sup> E-Sign became effective October 1, 2000 with limited exceptions.<sup>78</sup> The fundamental benefit of this act is that it governs in a unified fashion the essentials of an electronic contract. That is, it allows parties to signify their intent to be bound by the provisions presented even when those provisions are presented electronically and where the traditional hand-written signature is impracticable. E-Sign, in addition, raises the credibility of electronic documents; with exceptions E-Sign relieves the burden of printing and using paper documents where electronic documents will suffice.<sup>79</sup> The law preempts federal and state laws contrary to the provisions of E-Sign.<sup>80</sup> E-Sign does not require "any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party."<sup>81</sup> E-Sign does not alter obligations under any law except for requirements that records or contracts be "written, signed, or in non-electronic form."<sup>82</sup>

In addition to express limitations upon its application, E-Sign defers to state implementations of the UETA so long as the state has adopted

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77. Pub. L. No. 106-229 (June 30, 2000).

78. *Id.*

79. E-Sign does not apply to contracts or records pertaining to wills, family laws, or state enactment of U.C.C. provisions other than 1-107, 1-206, Article 2, and Article 2A. See 15 U.S.C. § 7003. E-Sign also does not apply to court orders, notices, other court documents, termination of utility notices, creditor notices of default for a primary residence, cancellation of health or life insurance, product recalls, documents for transportation of dangerous materials. *Id.*

80. 15 U.S.C. § 7001(a).

81. *Id.* § 7001(b)(2).

82. *Id.* § 7001(b).

the act substantially intact and consistent with § 7001 of E-Sign.<sup>83</sup> E-Sign's language is a compromise that recognizes the states' interest in controlling transactions within their jurisdictions yet fostering consistency among the states by requiring substantially uniform adoption.<sup>84</sup> E-Sign and UETA each limit their effect as much as possible to allow the substantive law governing the transaction to remain unchanged.<sup>85</sup> The purpose of each is to recognize a new medium of contract and transaction.

### B. *THE UNIFORM ELECTRONIC TRANSACTIONS ACT*

UETA began in the summer of 1999 when the National Conference of Commissioners on Uniform State Laws ("NCCUSL") completed a two-year effort focused on bringing more certainty in the area of electronic commerce.<sup>86</sup> By approving UETA and sending it to the state legislatures for their consideration, a uniform framework recognizing electronic transactions could be established. The idea was to bestow upon electronic transactions the authority and legitimacy of their paper counterparts.<sup>87</sup> UETA Section Six, Construction and Application, states:

This [Act] must be construed and applied: (1) to facilitate electronic transactions consistent with other applicable law; (2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and (3) to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.<sup>88</sup>

UETA, like E-Sign, expressly exempts certain records. Commercial transactions are the particular focus of the legislation.<sup>89</sup> UETA addresses important transactional concerns such as: "Section Five: Use of Electronic Records and Signatures;" "Section Seven: Legal Recognition of Electronic Records, Electric Signatures and Electric Contracts;" "Section

83. *Id.* § 7002.

84. *Electronic Signatures in Global and National Commerce (E-Sign) Act, 2000*: Hearing on HR 1714 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 106th Cong. 3 (2000) (statement of Howard L. Berman, Rep. Calif.).

85. *See id.*; 15 U.S.C. § 7001(b) (2000); The Natl. Conf. of Commrs. of Unif. St. Laws, *The Uniform Electronic Transactions Act*, prefatory n. 1 (available at <<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.>>) (1999) [hereinafter UETA].

86. National Electronic Commerce Coordinating Counsel, *Background Informational Bulletin no. 2000.01* <<http://www.ec3.org/PrivacyBull01.htm>> (stating that the "Uniform Electronic Transaction Act (UETA) . . . was ratified by the National Conference of Commissioners on Uniform State Laws in July 1999").

87. UETA, prefatory n 1.

88. *Id.* § 6.

89. *Id.* § 3, cmt. 1 (stating that "transactions with no relation to business, commercial, or governmental transactions would not be subject to this Act").

Eight: Provision of Information in Writing;" "Section Nine: Attribution and Effect of an Electronic Record and Signature;" "Section Ten: Effect of Change or Error;" "Section Twelve: Retention of Electronic Records;" "Section Thirteen: Admissibility in Evidence;" "Section Fourteen: Automated Transactions;" "Section Fifteen: Time and Place of Sending and Receipt;" and "Section Eleven: Notarization and Acknowledgment."<sup>90</sup>

Electronic records and signatures are not imposed upon the parties. The parties must agree to use electronic transactions. It is not necessary that the agreement be expressed; it may be inferred from the circumstances. Including an e-mail address on a business card implies a willingness to communicate by e-mail at least to the business or purpose surrounding the circumstances that led to giving the business card.<sup>91</sup> Completing an electronic form would also manifest consent to conduct transactions electronically.<sup>92</sup> However, either of the parties may withdraw consent regarding future transactions, and that right may not be waived.<sup>93</sup>

If the parties have agreed to transact electronically, the electronic transaction cannot be denied legal effect because the transaction is electronic. This is true even if a writing is required because Section Seven provides that an electronic record is sufficient as a writing and an electronic signature is sufficient as a signature.<sup>94</sup>

Generally the recipient must be able to store or print the electronic record if the sender wishes to make a required delivery of information electronically.<sup>95</sup> Laws or regulations that require certain formats, compliance posting, or delivery methods are still in force without regard to the electronic information, except to the extent the other laws allow the parties to agree otherwise.<sup>96</sup> If the parties are allowed to agree to other methods of delivery under the applicable law or regulation, UETA allows that agreement to be electronic.

To facilitate identifying a party electronically, Section Nine provides that:

[a]n electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or

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90. See generally UETA.

91. UETA § 5, cmt. 4, ex. B.

92. *Id.* at cmt. 4, ex. C.

93. *Id.* § 5 (c).

94. *Id.* § 7.

95. *Id.* § 8.

96. *Id.*; but see 15 U.S.C. § 7001(d) (preventing circumvention of E-Sign by adoption of contrary statutes by state legislatures).

electronic signature was attributable.<sup>97</sup>

This signature can be any act that is meant to identify the first party to the second party.<sup>98</sup> All that may be required is the typing of one's name in an e-mail.<sup>99</sup> Measures taken to assure the identity of a party may be considered in evaluating the credibility of a later repudiation of the signature.<sup>100</sup> For example requiring a sign-in to a system where the system administrator has given a user an identifier and password presents a less refutable presumption of identity than does merely typing one's name. This example may be analogous to use of a check stamp or signing device, in that care of the identifier and password must be given just as care must be taken to prevent unauthorized access to a signing device. Appropriately therefore, the authorized acts of agents are attributable to the principal even if that agent is a machine or program that has been designed to perform an authorization or authenticating process.<sup>101</sup>

However, if there is an error or change in a record after or during processing the effect is dependent on whether there were security procedures agreed upon, and whether a party is an individual or not.<sup>102</sup> If the parties agree on security procedures to protect the integrity of the record, and one party conforms and the other party does not, the party who conforms may avoid the effect of the change or error.<sup>103</sup> If one party is an individual dealing with an electronic agent of another, the individual may avoid the error or change if the e-agent does not give an opportunity for change, and the individual informs the other party of his intention not to be bound, and the individual does not receive or keep any valuable consideration resulting from the erred transaction.<sup>104</sup>

Once the transaction is completed without errors and presuming the information is accurate, it must be stored in a way that ensures the integrity of the record.<sup>105</sup> This means that the records may be stored electronically as long as the relevant information regarding the transaction is stored and the information is stored in a manner that it can later be retrieved without error or undue inconvenience.<sup>106</sup> Record retention requirements are not otherwise altered except to allow the retention of

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97. UETA § 9.

98. *Id.* at cmt. 1.

99. *Id.* at cmt. 1, ex. A.

100. *Id.* at cmt. 4.

101. *Id.* at §§ 2, 14.

102. UETA § 10.

103. *Id.*

104. *Id.* at § 10(2).

105. *Id.* at §12.

106. *Id.* at cmts. 1, 3.



electronic records.<sup>107</sup> Electronic records have an additional requirement in that they may not by themselves be readable, and so the storage system and procedures may require updating records so that they remain in a retrievable medium and at the same time ensuring that the integrity of the record remains intact.<sup>108</sup> This integrity requirement may require the reformatting of data to make it readable by new computer systems and programs. The amount of information retained need be only the relevant information, but if practicable, retaining all information precludes a later analysis of what information is relevant. Information that is used solely to enable the information to be sent, communicated, or received is not required to be kept.<sup>109</sup> It is permissible to engage third parties to store information as long as it is stored consistently with the provisions of section twelve.<sup>110</sup> The purpose of storing information is so that it may be referred to in the event of disagreement or dispute. Section Thirteen recognizes the value of electronic records for evidentiary purposes.<sup>111</sup>

Much of the efficiency of e-commerce would be lost without the ability to allow computers and programs to perform the routine tasks involved in transactions. In recognition of this UETA makes provision for electronic agents.<sup>112</sup> These are the machines and programs that facilitate electronic transactions. These transactions can take place without direct human intervention or supervision by relying on their programmed routines.<sup>113</sup> These agents acting without human interaction bind their principals.<sup>114</sup> An example of this type of electronic agent is the auto-bidding function built into online auctions.<sup>115</sup> The bidder enters the maximum bid, and the e-agent increases the bid by the minimum required increment until the bidding is closed or the maximum programmed bid is reached.<sup>116</sup> More involved agents may be programmed in advance and monitored only occasionally.<sup>117</sup> The human principal may

107. UETA at cmts. 5-7.

108. *Id.* at cmt. 3.

109. *Id.* at § 12(b)-(c), cmt. 4.

110. *Id.*

111. *Id.* at § 13 (specifically stating that “[i]n a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form”).

112. UETA §§ 2, 14.

113. *Id.* at prefatory n. B, § 2(6) (defining an “Electronic Agent” as “a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual”).

114. *Id.* at § 9, cmt 1, § 14(1)-(2), § 14 cmts. 1-2.

115. See Yahoo!, *Auctions – About Bidding* <<http://auctions.yahoo.com>> (accessed Mar. 21, 2003) (explaining how the bidder places the maximum bid and the service will increment the bid by the minimum amount until the maximum is reached).

116. *Id.*

117. Programmed Web forms take orders for merchandise to programmed trading on NYSE and NASDAQ. See Amazon.com <<http://www.amazon.com>> (demonstrating interac-

become aware of the transaction only after the e-agent completes the transaction and binds the principal.

When “notice and receipt” occur is defined in UETA Section Fifteen.<sup>118</sup> Generally, an electronic record is sent when it is in a form usable by the recipient and when it leaves the sender’s system or that portion of the sender’s system within the sender’s control or enters the recipient’s system.<sup>119</sup> Receipt generally occurs when the record enters the recipient’s system in a form usable by the recipient whether or not recipient actually retrieves and views it.<sup>120</sup> The recipient need not be aware of receipt to have received the record.<sup>121</sup> When an electronic agent informs the sender of receipt, it shows that the record is received, but does not necessarily mean that the message was received as sent.<sup>122</sup> What all this means is that language in another statute that requires sending by a certain date can be met by ensuring that the sender has done all within his control to send the message. Because an electronic message is subject to corruption, though rare, in transit a message may be received in an altered state or not received at all.<sup>123</sup> The recipient is not relieved of any burdens placed upon him by receipt of the record if the record has entered the recipient’s system, unless the sender actually knows that the recipient has not actually received it.<sup>124</sup> These are electronic rules analogous to the physical delivery of mail: an “e-mailbox rule.”<sup>125</sup> In both situations there are periods where the records are out of the control of both the recipient and the sender. If the record is within the control of the respective agents, though the agent may be a computer system, the record is sent or received respectively.<sup>126</sup> A significant requirement is that the record be in a format usable by the recipient, albeit with help from recipient’s system.<sup>127</sup>

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tive order forms) (accessed Mar. 21, 2003); see Walter Maner, *The Special Status of Computer Ethics*, ex. 4 <<http://www.cs.bgsu.edu/maner/ethicomp95/keynote3-THE.html>> (discussing the use of programmed trading and speculating the proliferation of it even to the individual investor level) (1995).

118. UETA § 15.

119. *Id.* at § 15(a) and cmts.

120. *Id.* at § 15(b) and cmts.

121. *Id.* at § 15(e).

122. *Id.* at § 15(d).

123. UETA § 15 and cmts.

124. *Id.* at § 15(g).

125. The “mailbox rule” would be the counterpart for paper transactions under contract law governing the time an offer was accepted. See *Black’s Law Dictionary* 657 (6th ed. Abr. 1991).

126. UETA §§ 2(5)-(9), 14.

127. *Id.* at § 15(a)-(b).

## V. APPLICATION

The objective to be accomplished now that I have discussed in varying detail the foregoing, is to combine the various aspects into a model that may be used to insulate the Internet vendor from the multifarious jurisdictions lying in wait, and yet still be able to conduct business over the Internet. The keyword is insulate. Insulation cannot prevent heat or cold but it can reduce the harmful effects on the insulated entity. While judicious use of contractual language cannot prevent all lawsuits, it may reduce their adverse effects to some degree.

Doing business<sup>128</sup> over the Internet brings new customers because of the increased exposure. Unfortunately the exposure is not all positive. Doing business on the Internet is the activity most likely to subject the business to specific jurisdiction in a variety of forums. Fortunately the jurisdiction can generally be agreed between the parties.

The first step is to get the customers to agree to pursue any legal remedies in the vendor's chosen forum. The choice of forum should be specific, mandatory, and reasonably related to the business. One such forum may be the vendor's principal place of business. This gives the vendor the opportunity to use its usual counsel, to avail itself of known law, and to conduct the suit in proximity to its operation.<sup>129</sup> The *Bremen* test for validity of forum selection is a "reasonableness" test.<sup>130</sup> One of the grounds for refusing to enforce a forum selection clause is overreaching. The factual situation supporting the choice of forum should be calculated to support a motion for summary judgment, since if it does not then the cost of going forward with the case begins to erode any advantage the forum selection was meant to provide.

With summary judgment in mind, notice of the provisions is an important issue. In *Carnival Cruise*, the plaintiff acknowledged the terms.<sup>131</sup> The practical difficulty of obtaining consent is that marketing interests may militate against an affirmative acknowledgement of all the terms and conditions of the sale. Any extra step between the decision to buy and closing the deal is an opportunity for the customer to change their mind. However, that is exactly the idea involved in a forum selection clause. If the customer has an opportunity to refuse the contract, they will have less of an ability to refute it. A signed contract is very nice to have as an exhibit when presenting that motion.

In this regard, E-Sign legislation fits the bill quite nicely. The signature can be incorporated into the sale process. An "I Accept" button accompanying the terms of the transaction cannot be denied legal effect

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128. *Zippo Mfg.*, 952 F. Supp. at 1124.

129. *Carnival Cruise Lines*, 499 U.S. at 593-594.

130. *Bremen*, 407 U.S. at 14.

131. *Carnival Cruise Lines*, 499 U.S. at 593-594.

merely because the signature is not written in the traditional sense. The E-Sign legislation is applicable as federal law and preempts any contrary state provisions. In those states which have enacted UETA substantially intact the results are the same, with the added bonus that certain other records retention, delivery, and agency rules may apply. The critical advantage to this legislation is the ability to elicit consent efficiently. Critical provisions can even be separately affirmed. The vendor can have the consumer affirm that they have read, understand, and agree to the terms of the sale. This advantage obviates one prospective hole in the necessary reasonableness analysis that accompanies the enforcement of the forum selection clause. The vendor is able to provide proof of notice and acceptance of the terms.

If the transaction cannot be completed without the acceptance process, then a refutation of the "signature" by plaintiff is difficult. This is especially true to the extent that plaintiff is relying on the sale of the item to haul the vendor into his jurisdiction. The extent of contacts for general jurisdiction is greater than that required for specific jurisdiction.<sup>132</sup> That being said, it is important that the acceptance be a necessary antecedent to the completion of the transaction.

The customer can be sent a copy of the agreement with the shipment if any, or by e-mail. The contract can be maintained on the vendor's system until it is needed, or until its document retention period has run. An additional affidavit or declaration, depending on the jurisdiction, may be required from the custodian of documents authenticating the transcribed contract for its presentation as an exhibit to the court.

There is still the matter of having local counsel file special appearances and make the necessary motions, however, by coordinating through "home counsel," the vendor may build on the body of law and successful motions previously relied upon. This should reduce the amount of work and expense chargeable by local counsel.

## VI. CONCLUSION

While the perfect world for the Internet vendor may be complete immunity from suit in foreign jurisdictions, the reality is that with the increased customer base comes increased jurisdictional risk. By using contracts of adhesion, including mandatory forum selection clauses, and having them executed by the customer in the course of the transaction, the vendor can insulate itself from those jurisdictional risks.

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132. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414-416 (1984) (holding that the mere fact that purchases have been made in a certain state is not sufficient for personal jurisdiction where the action did not arise from the instate activities).

