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U.S. Court of Appeals for the Fifth Circuit Takes a Narrow Approach to Personal Jurisdiction Over Out-of-State Website

Now more than ever, courts are being asked to decide when website operators are subject to personal jurisdiction and can, therefore, be sued—a potentially vexing problem because websites can be accessed from almost anywhere on the globe. The problem is particularly acute in cases where the causes of action arise out of speech posted on the Internet. A single tweet can be broadcast worldwide with the click of a button and potentially subject the speaker to liability anywhere in the world. Courts have generally rejected the notion that jurisdiction in such cases lies anywhere in the world and have attempted to devise a test for jurisdiction that will fairly apply current due process jurisprudence.

The Supreme Court of the United States provided the basic framework for tackling these questions in its seminal decision in *Walden* v. *Fiore*. While not an Internet speech case, *Walden* emphasized that specific jurisdiction (i.e., jurisdiction over a particular dispute) must arise out of contacts that the "defendant *himself* creates with the forum." 571 U.S. 277, 284 (2014) (emphasis in original). How exactly that test applies to cases arising out of speech on the Internet has proven to be complicated, and the lower federal courts have been divided about when a website publisher can be subject to jurisdiction in a particular forum.

On December 23, 2021, in *Johnson* v. *TheHuffingtonPost.com, Inc.*, a divided panel of the U.S. Court of Appeals for the Fifth Circuit found that Charles Johnson, a Texas citizen, had failed to establish jurisdiction over the HuffingtonPost, a news- and commentary-oriented website ("HuffPost"), in a libel suit filed in the Southern District of Texas for publishing on its website an allegedly defamatory story portraying the plaintiff as a white nationalist and Holocaust denier. The court rejected plaintiff's claim that HuffPost could be subject to jurisdiction in Texas because its website is regularly accessed in Texas. In doing so, the court adopted a stringent test for jurisdiction that requires the plaintiff to establish specific ties between the story and the forum. If other courts follow the Fifth Circuit's approach, the locations in which website operators will be subject to suit will be dramatically circumscribed.

I. Background: Personal Jurisdiction, the Internet, and Speech

Determining which court has jurisdiction over cases based on claims arising out of the defendant's speech has long been hotly contested, but the advent of the Internet and recent developments in the law of personal jurisdiction has made the question increasingly important.

Before *Walden*, courts analyzing jurisdiction over an out-of-state speaker routinely used an "effects" test that considers whether the forum was the "focal point" of both the speech and the injury, such that the effects of the speech were felt in the forum. The leading case was *Calder* v. *Jones*, 465 U.S. 783 (1984). There, a California-resident actress sued employees of a Florida-based national magazine in California for allegedly libelous comments made about her in a magazine article. The Court held that the publication's contacts with California were sufficient to

establish jurisdiction there. Those contacts included phone calls to "California sources" for the information in the article, a story about the plaintiff's activities in California, and reputational injury to the plaintiff in California caused by an allegedly libelous article that was widely circulated in the state. *Id.* at 788-89. The Court concluded that, because California was the "focal point" of both the story and the injury, jurisdiction over the magazine company was proper in California based on the "effects" of its conduct within that state. *Id.*

In *Walden*, the Supreme Court clarified and strengthened the test for specific jurisdiction established in *Calder*, finding that, for jurisdiction to lie, there must be a "relationship among the defendant, the forum, and the litigation" that arises out of contacts that the "defendant *himself* creates with the forum," rather than contacts created by the plaintiff or third parties. *Walden*, 571 U.S. at 284 (emphasis in original). *Walden* found that a mere injury in the forum "is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." 571 U.S. 277, 290. Therefore, an injury to a forum resident, by itself, is insufficient to confer jurisdiction over an out-of-state defendant. Instead, the Court held, the proper question was "not where the plaintiff experienced a particular injury or effect" but whether "the defendant's conduct connects him to the forum in a meaningful way." *Id.*

When speech occurs on the Internet, the inquiry is even more complicated because the speech can be accessed and arguably cause injury almost anywhere. Before *Walden*, courts analyzing jurisdiction over website operators typically used an "interactivity" test that considers the degree of interaction between a website and its users. For example, in *Zippo Mfg. Co*. v. *Zippo Dot Com, Inc*., 952 F. Supp. 1119 (W.D. Pa. 1997), the court held that, where a website does business over the Internet or contracts with residents of a foreign jurisdiction, the exercise of jurisdiction over the website is proper. *Id.* at 1124. The *Zippo* court also held that "passive" websites, or those that merely post information that is accessible to out-of-forum viewers, are not subject to jurisdiction in the forums in which users access them. *Id.* For websites in the "middle ground," or those where users can exchange information with the host computer, the court examined "the level of interactivity and commercial nature of the exchange of information" that occurs on the site to determine whether exercising jurisdiction would be proper. *Id.*

After *Walden*, however, courts have gradually moved away from the interactivity test and have instead applied the general standards of personal jurisdiction. This has given rise to a potential split in authority on the issue.

For example, the U.S. Courts of Appeal for the Fourth and Ninth Circuits addressed the issue and adopted conflicting approaches. The Fourth Circuit in *UMG Recordings* found that the dispute at issue arose out of the defendant foreign website operator's contacts with Virginia, which included the site's (i) deriving its revenue through the use of third-party advertising brokers, who "geo-targeted" unique advertisements to visitors from Virginia; (ii) large Virginia user base; (iii) registration of domain names with a U.S.-based registrar with a Virginia-based administrator; (iv) decision to host its servers with a company with technical infrastructure in Virginia; and (v) registration of a Digital Millennium Copyright Act agent with the U.S. Copyright Office. *UMG Recordings, Inc.* v. *Kurbanov*, 963 F.3d 344, 353-54 (4th Cir. 2020). Given the prevalence of ad-supported websites, this expansive approach could subject foreign website operators to jurisdiction for claims in any forum where their website is frequently accessed.

At the other end of the spectrum, in *AMA Multimedia*, the Ninth Circuit reached the opposite conclusion of the Fourth Circuit on substantially similar facts and held that it could not exercise personal jurisdiction over the foreign website operator, because the site's use of geo-targeted ads, large U.S. viewer base, and use of a U.S.-based domain name server were contacts that lacked a forum-specific focus. The court explained that jurisdiction is improper unless the website operator directed specific conduct at the forum, and that finding jurisdiction based on location-based advertising would result in the defendant being subject to jurisdiction anywhere its site was accessible, which would run afoul of jurisdictional and due process principles.

The U.S. Court of Appeals for the Sixth Circuit followed the Ninth Circuit's approach in *Blessing* v. *Chandrasekhar*, 988 F.3d 889 (6th Cir. 2021). There a group of students from Kentucky that attended a "March for

Life" rally in Washington, D.C. had an incident with a Native American activist that resulted in widespread media attention. Kathy Griffin, a professional comedian who resides in California, and Sujana Chandrasekhar, a New Jersey resident, tweeted about the incident with messages critical of the students. The students sued in Kentucky. The Sixth Circuit held that posting allegedly tortious messages on Twitter, without more, could not expose the posters to jurisdiction wherever the subjects of the tweets resided and that there must be additional contacts by the defendant connecting them to the forum for the exercise of jurisdiction to be proper.

II. The Fifth Circuit's Decision in *HuffingtonPost*

HuffPost is a company incorporated in Delaware with its principal place of business in New York that publishes online articles and commentary for view across the globe. The website gets its revenue from marketing ads, merchandise, and ad-free experiences available to all visitors.

Charles Johnson, a Texas citizen, was identified in a HuffPost story as a white nationalist and a Holocaust denier. Johnson sued HuffPost for libel in the Southern District of Texas, notwithstanding that HuffPost had no physical ties to Texas, no office in Texas, no employees in Texas, and owned no property in Texas. The story did not did not recount alleged conduct that occurred in Texas, or use Texas sources, or even refer to anything about Texas. The Southern District of Texas granted HuffPost's motion to dismiss for lack of personal jurisdiction, holding that Johnson failed to show that the story was "directed at Texas residents more than residents from other states."

On appeal, the Fifth Circuit evaluated HuffPost's website under the "interactivity" test and then under the "effects" test from *Calder* as clarified by *Walden*. The Fifth Circuit determined that HuffPost was an interactive website but concluded that Texas did not have personal jurisdiction under the *Calder* test. The court highlighted that precedent required this result, as HuffPost's story had no ties to Texas. It did not mention Texas or conduct that occurred in Texas and used no Texas sources.

In support of this conclusion, the Fifth Circuit referenced its previous decision in *Revell* v. *Lidov*, 317 F.3d 467 (5th Cir. 2002). There, the court concluded that an out-of-state website operator, Columbia University, was not subject to personal jurisdiction in Texas because the article at issue did not mention Texas, never discussed the plaintiff's activities there, and was not aimed at Texans more than at residents of other states. *Id.* at 476.

Johnson attempted to distinguish *Revell* because HuffPost showed ads and sold merchandise on the same page as the story containing the alleged libel, whereas the site in *Revell* solicited subscriptions on a separate page. The court found this distinction to be specious because, like the subscriptions in *Revell*, Johnson's claim against HuffPost did not arise from its ads or merchandise.

The Fifth Circuit rejected Johnson's argument that interactivity is all that matters for personal jurisdiction. On this point, the court explained that "interactivity reflects only a website's *capacity* to avail itself of a place," but "just because a site *can* exploit a forum does not mean that it *has*" done so (emphasis in original). The court continued, "Accessibility alone cannot sustain our jurisdiction. If it could, lack of personal jurisdiction would be no defense at all."

In dissent, Judge Catharina Haynes argued that the majority failed to apply the Fifth Circuit's precedent in *Fielding* v. *Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), which held that specific jurisdiction for a suit alleging the intentional tort of libel exists for (1) a publication with adequate circulation in the state, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 773–74 (1984), or (2) an author or publisher who "aims" a story at the state knowing that the "effects" of the story will be felt there. *Calder* v. *Jones*, 465 U.S. 783, 789–90 (1984).

The dissent took the majority to task for not examining the differences between *Keeton* and *Calder*. In *Keeton*, the Supreme Court found personal jurisdiction over an out-of-state magazine because the magazine had substantial circulation in the forum that was not "random, isolated, or fortuitous." However, in *Calder*, decided the

same day as *Keeton*, the Supreme Court found personal jurisdiction over two out-of-state authors of a publication because the "effects" of their conduct were felt in the forum. Thus, the dissent argued that the characterization of the defendant is critical: if the defendant alleging lack of personal jurisdiction is a publication like the magazine in *Keeton*, then the *Keeton* circulation test applies, but if the defendant alleging lack of personal jurisdiction is an individual, then the *Calder* effects test applies. The dissent argued that this is the key holding of *Fielding*.

Applying *Fielding*, the dissent argued that because Johnson sued HuffPost, *Keeton* applies. Due to the "fulsome circulation" of HuffPost in Texas, the dissent concluded that personal jurisdiction exists, despite the article not mentioning Texas.

III. Conclusion

The *HuffingtonPost* decision illustrates the challenges of determining where website operators and other participants on the Internet can be subject to jurisdiction, particularly for engaging in speech on the Internet. Joining the Ninth Circuit, the Fifth Circuit rejected the argument that widespread use of a website in a forum can establish jurisdiction and instead found there must be more to tie the defendant to the forum. However, as courts will certainly continue to confront this issue, it remains to be seen whether other courts will continue this trend.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz (counsel) at 212.701.3981 or amintz@cahill.com; or Kevin Judy (associate) at 212.701.3499 or kjudy@cahill.com; or email publications@cahill.com.

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