

LEGAL EASE

Summer 2001

**Caught in
the Web:****Personal Jurisdiction Based
on Internet Activity***By Richard Kraus, Attorney*

Your business has finally decided to take the plunge into e-commerce. After spending vast amounts of time and money on developing your web site, you obtain a registration to use www.greatstuff.com for your URL.

You go on-line with the new web site. Shortly afterwards, you get sued in Alaska by Great Stuff for the Outdoors, Inc., an Alaskan business that claims the exclusive legal right to use "Great Stuff" to identify its products. Can you be forced to defend your business in a federal court in Anchorage?

A web site's primary benefit is the easy availability of information about your business to anyone on the Internet, anywhere in the world. This unlimited access also creates potential risks that must be considered when doing business on the Internet. The developing law in this area demonstrates the difficulty of applying traditional legal concepts to Internet activities.

"Personal jurisdiction" is the term used to describe a given court's power to exercise authority over an individual or entity. Over the years, a fairly well defined body of law has developed to determine when a person or business can be sued in a state other than their

*Continued on page 2***Keeping Informed,
Educated and Involved***By Craig Neckers, Attorney and CEO*

In our last issue, I shared some of the many ways Smith Haughey's attorneys and staff are involved in making their communities better places to live and work. I am also proud of the way Smith Haughey people seek to stay informed, educated and involved in their professions.

The professional involvement of the attorneys at Smith Haughey is as varied as the number of opportunities to participate.

Legal Organizations

We are involved in federal, state and local bar associations. These groups provide a forum for continuing education, which allows us to stay informed of rapidly changing laws that affect our clients and the areas in which we practice. Several lawyers in the firm have taken on leadership roles in these associations:

- Dale Ann Iverson began a term as President of the Grand Rapids Bar Association on July 1st.
- Randy Velzen is on the Board of Trustees of the Grand Rapids Bar Association, and is also a member of its pro bono and Membership committees.
- Angela Ross assumed the presidency of the Floyd Skinner Bar Association, an organization of primarily African American attorneys, on July 1st.
- Pat Geary recently concluded a term as President of the Michigan Defense Trial Counsel.
- Bud Roegge is a longtime member of the State Bar of Michigan's Standing Committee on Character & Fitness.

- Chip Behler is now serving his second five-year term on the State Board of Law Examiners.
- Jack Oostema and Tom Blackwell are active members of the Professional Responsibility Counselors, an organization of lawyers who regularly represent other attorneys.

In addition, nine Smith Haughey attorneys are Fellows of the Michigan State Bar Foundation. They were selected in recognition of their outstanding professional abilities and contributions to their communities.

A few of the other professional organizations in which we participate are the American Inns of Court, the Defense Research Institute, the Women Lawyers' Association of Michigan and the Young Lawyers' Sections of various local bar associations.

Industry Groups and Associations

Another focus of our professional involvement is on industry groups and trade associations which deal with issues that are important to our clients. These groups allow us to become intimately familiar with the challenges and opportunities faced by the companies and individuals we represent, and to provide a legal perspective on those issues.

Members of our Health Law and Medical Malpractice departments are involved in groups like the American Health Lawyers Association, the West Michigan Health Executive Group, the Michigan Society of Healthcare Risk Management, and the

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own. Generally, a non-resident must purposefully take some action or cause some consequence in the state where the court is located (the "forum state"). In addition, the non-resident's activity must have a substantial enough connection with the forum state so that the exercise of jurisdiction is reasonable.

The explosive and exponential growth in the accessibility and use of the Internet in recent years has generated an astounding number of judicial opinions discussing personal jurisdiction based on business conducted through web sites. Courts have struggled with the application of the traditional standards to such claims as trademark infringement, unfair trade practices and business defamation.

Early cases dealt with "cyber-squatting" – the practice of registering a domain name with no legitimate business purpose and then seeking to sell the rights to a company holding a similar trademark.

Understandably, courts took a dim view of this activity and allowed suits to proceed in the home state of the trademark owners. In other cases, courts attempted to distinguish between "passive" and "interactive" web sites. However, broad language in these cases created unintended and undesirable consequences when the defendant was not actively engaged in business transactions in the forum state or was not deliberately poaching the intellectual property rights of others.

As the use of web sites by businesses became more pervasive and familiar, courts acknowledged the Internet's function as a widely encompassing commercial network and information resource. The courts also recognized that allowing personal jurisdiction in the plaintiff's home state whenever a domain name or web site infringed on a trademark or caused some business injury would deter legitimate business activities on the Internet.

In recent decisions, courts have held that the mere availability of advertising or the use of a protected mark on a web page is not sufficient to create jurisdiction.

Instead, courts have focused on whether the defendant engages in ongoing business with residents of the forum state, and whether the defendant has expressly targeted its business activity toward the forum state. While the case law continues to evolve, there are several approaches you can consider in trying to limit the risk of being subject to suit in a distant jurisdiction.

- Entering contracts or selling products through a web site will considerably increase the likelihood that a court will find personal jurisdiction. That risk must be considered when deciding to do business with residents of another state.
- If you decide to expand your Internet business activities into other states, consider the use of contractual provisions governing choice of law, choice of forum, and arbitration. While this may not be practical for product sales to individuals, it may be prudent in business-to-business transactions.
- Conduct a thorough trademark search before choosing a domain name and developing a web site. The issues affecting use of a trademark or business name on the Internet are much different than use in a local business or limited market area.
- As in any business, you should be cautious about making adverse comments or derogatory statements about competitors.

In today's legal environment, there is a potential risk of litigation from any business activity. Conducting business on the Internet involves special considerations that you should weigh when deciding to take advantage of these new opportunities.

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Society for Law, Medicine and Ethics.

Some of our Construction lawyers participate in groups like the Associated General Contractors, The Associated Builders & Contractors, the Construction Specifications Institute, the Home Builders Association, and the Michigan Society of Architects.

Richard Kraus is a member of the National Association of Criminal Defense Attorneys. Bob Stone is involved in the Employer's Association; T.J. Ackert is working with the Small Business Development Center; Craig Noland participates in the International Association of Accident Reconstruction Specialists and the National Association of Railroad Trial Counsel; and Tom Blackwell is a member of the national Products Liability Advisory Council. The list goes on and on!

Not Just Lawyers

As with our involvement in the community, our lawyers are not the only ones doing their part. I am continually amazed by the level of commitment I see from our paralegals, nurse consultants, secretaries and administrative staff. For example:

- Sharon Neumann from our Traverse City office is the Chairperson of the Michigan Chapter of the National Organization for Rare Disorders.
- Kathleen DeWildt, a nurse consultant in our Grand Rapids office, participates in the Michigan Nurses Association as a Board Member and member of the Congress for Nursing and Healthcare Economics. She is also a Board member and the Grand Rapids area president of the National Association of Directors of Nursing Administration.
- Wendy Passineau, our Client Services Director, is an active member of the Legal Marketing Association.
- Eight of our secretaries are involved in NALS, an association for legal professionals, including Sherri Bowden, the first Vice-President of the Michigan chapter; Cindy Root, who is President of the West Michigan chapter; and Kristi Gaskin, who serves as its Treasurer.

A Commitment to You

It is our job at Smith Haughey to provide our clients with the most efficient and most knowledgeable representation. We take that responsibility seriously, and we spend a great deal of time working to achieve that goal. We believe that involvement in professional organizations is an important and necessary part of our client service.



CUSTODIAL LAW UPI

By Randy Velzen, Attorney

For some time, Michigan has restricted the ability of a primary custodial parent to move a child out of state. This law has sometimes been misinterpreted as restricting a custodial parent's right to move. Not so. The custodial parent has always had the freedom to move out of state; it is only the child's change of residence that is at issue. A recent addition to the Child Custody Act (the "CCA") has further restricted a custodial parent's ability to move a child. Under the new Section 11 of the CCA, if the parents have joint legal custody, the custodial parent may not move a minor child more than 100 miles from the child's legal residence at the time of the divorce.

The Michigan Court Rules have historically required that any judgment awarding custody

of a minor must provide that the residence of the minor may not be moved from Michigan without proper court approval. The custodial parent was free to move the child anywhere in the State of Michigan without court approval, resulting in the peculiar situation that a child could be moved 400 miles to the upper peninsula without court permission, but not 50 miles to another state. Change of address merely had to be reported to the Friend of the Court.

New rule further restricts a custodial parent's ability to change a child's residence.

Before granting a custodial parent's request to move a child, the court must consider:

- Whether the prospective move has the capacity to improve the quality of life for both the custodial parent and child.
- Whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the non-custodial

Planning Curtails Building Disputes

By Charles F. Behler, Attorney
and Charles B. Judson, Attorney

MOST DISPUTES CAN BE AVOIDED THROUGH CAREFUL PLANNING AND DEVELOPMENT OF A COMPREHENSIVE CONTRACT BEFORE CONSTRUCTION BEGINS.

Disputes are common between owners and developers and their architects and contractors following the renovation or construction of a building. These disputes can involve enormously complex issues related to the specification, construction, and installation of materials in a multimillion dollar office complex to an argument between homeowner and builder over the type of plumbing installed in a new house.

Owners may seek reimbursement or remediation from contractors if a building is alleged to have

been constructed with substandard or inappropriate materials or construction methods, thereby causing a failure of the building to conform with the specifications for construction. Contractors and architects may seek reimbursement for extra work or changes to or interference with the work as originally planned and specified.

However, under the applicable statute of limitations, suit must be filed within six (6) years after the time of the occupancy, use, or substantial completion of the improvement or construction. If the claim is based on gross negligence, suit may be filed after six (6) years but within one (1) year after the discovery of the defect, and not more than ten (10) years after the occupancy, use, or acceptance of the improvement.

An Owner's Rights

In general, an owner is entitled to receive what was bargained for under a contract. In building contracts, this means the structure must conform to the plans and specifications agreed upon by the parties prior to construction. If a building or

DATE: THE 100 MILE RULE

parent and whether the custodial parent is likely to comply with visitation orders once he or she is no longer subject to the jurisdiction of the courts of Michigan.

- The extent to which the non-custodial parent, in resisting the move, is motivated by the desire to secure a financial advantage in respect of a continuing support obligation.
- The degree to which the court is satisfied that modified visitation can provide an adequate basis for preserving and fostering the parental relationship with the non-custodial parent.

The party seeking to move the custodial child out of state has the burden of satisfying the Court with regard to these considerations by a preponderance of the evidence.

EXCEPTIONS TO THE NEW RULE

There are five exceptions to the "100 Mile Rule":

1. A custodial parent's change of a child's legal address is not restricted if the other parent consents.
2. There will be no restriction if the order governing the child's custody grants sole legal custody to only one of the child's parents.
3. If, at the time of the commencement of the action in which the custody order is issued, the child's two residences were more than 100 miles apart, there will be no restriction if the legal residence change results in the child's two legal residences being closer to each other than before.
4. If a parent is seeking a location that is safe from the threat of domestic violence, the parent may move to such a location with the child until the court makes its determination.
5. Finally, a custodial parent may petition a court, under the same criteria, to move a child out of state.

Because Section 11 of the CCA is so new, there are many unanswered questions. For example, it is not clear whether the measurement of 100 miles is "as the crow flies" or 100 driving miles. Given the unique geography of Michigan's upper peninsula, this question could be of some importance. Also, how does joint physical custody affect this rule (if at all)? What affect, if any, does the procurement of loss of joint legal custody after the entry of the judgment have on this rule?

Child custody, prohibitions against taking custodial children out of state, and the addition of the "100 Mile Rule" are very important considerations for a parent contemplating divorce or seeking to relocate a child. Members of the Family Law Department at Smith Haughey Rice & Roegge can assist you in dealing with these sensitive and emotional issues.

Gabriel Hawkins, a Smith Haughey Rice & Roegge summer associate, assisted in researching and drafting this article. Thank you.

improvement to a building fails to conform to plans and specifications, the owner is entitled to appropriate repairs from the party at fault.

If the building cannot be repaired at a reasonable expense, a contractor or architect may argue the repair involves unreasonable and unrecoverable economic waste. In that situation, the owner is entitled to collect the difference between the value of the structure as built and the anticipated value of the structure had it been built in accordance with original plans and specifications.

Whatever measure of damages is used, the owner is not entitled to "betterment" or to profit from a contractor's error. He is only entitled to receive what was contemplated in his agreement or contract.

Additional remedies are available to an owner for design-related problems. For instance, if an architect fails to perform in conformance with the contract or exercise reasonable care, the owner will be subject to a claim by an owner who has

suffered damages as a result of that contract violator's negligence. In Michigan, an architect also may be subject to claims by contractors or subcontractors for architectural negligence.

An Owner's Responsibilities

While a contractor is usually liable for construction defects, this liability may not occur if the contractor is required to build according to plans and specifications prepared or furnished by the owner.

Likewise, the contractor will not generally be liable for construction defects if they resulted from performance of the work in the manner specified by the owner.

The owner retains responsibility for his selection of materials and methods if the contractor's discretion has been removed.

However, the owner may require the contractor to rely on his skill and judgment to select and purchase materials for construction and select methods of construction and installation.

Likewise, the owner may require extensive warranties from the contractor, its suppliers and the architect, as well as exhaustive inspections or other involvement in the construction process by the architect.

The contractor may limit its liability by requiring the owner to contract directly with certain suppliers or through warranty disclaimers. One party to a construction contract may be required to indemnify another party for claims of financial loss or personal injury resulting from defective construction, specifications, or unsafe construction methods. Construction contracts typically require the contractor to indemnify the owner for property damage or personal injury arising from the contractor's work on the project. Contractors may require similar protection from their subcontractors.

While properly drafted indemnification contracts are generally valid, Michigan law prohibits indemnification for liability arising from the "sole" negligence of the person indemnified.

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Have You Heard The News?



On July 1st, **Dale Ann Iverson** began a one-year term as President of the Grand Rapids Bar

Association. Dale will be a presenter at the Nonprofit Risk Management Institute's annual event in Washington D.C. This year's event is titled "2001: A Risk Odyssey" and will be held on Capitol Hill October 7-9, 2001. Dale will be speaking on the topic of "Partnership/Collaboration Risk."



On July 1st, **Angela Ross** began a one-year term as President of the Floyd Skinner Bar Association.



Chip Behler, Dave DeGraw and Aileen Leipprandt will be presenting at a Lorman Education Services seminar entitled, "Construction Site Safety: Assessing and Managing Risk." The seminar will be held in Grand Rapids on July 18, 2001. For information on attending, please contact Lorman directly at 715.833.3959.



Aileen Leipprandt has also been selected to serve as Co-Chair of Children Ready to Succeed Investment Council of the Heart of Michigan United Way. Additionally, she has been elected to the Board of Directors for the National Association of Women in Construction #194.

Introductions Are in Order



Bill Henn has joined our firm after completing a one-year clerkship for the Honorable Richard F.

Suhrheinrich of the United States Court of Appeals, Sixth Circuit. Mr. Henn graduated from the University of Michigan School of Law and Central Michigan University. His focus is General Civil litigation with emphases in Professional Liability and Governmental Law. You can reach him in the Grand Rapids office at 616.458.5456.

Have You Heard
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News?

Delay of the completion of a construction project may also give rise to a claim for damages. Thus, it is advisable to negotiate – prior to construction – whether the owner will be entitled to liquidated damages (in a predetermined amount) for delayed completion or whether the contractor has a right to recover damages for delays and, if so, under what conditions.

The construction contract can also effectively allocate the project risks inherent in most construction projects. Risks such as adverse weather, labor and material shortages, unanticipated subsurface conditions, environmental conditions, price increases, and the like are typical risks of construction projects. Allocating these risks prior to construction can eliminate later disputes if one of the risks becomes a reality.

The construction contract should also detail the methods by which it can be amended,

the contract amount, the payment process, and the timing of payments.

Proper planning and the appropriate documentation of the rights and obligations of the parties to a construction contract will foster positive business relationships and can minimize time-consuming and expensive disputes during or following a construction project.

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This newsletter is provided for information purposes and should not be acted upon without professional advice.

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