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"You've Got Mail!" Can Sending An Email Be Enough To Establish Personal Jurisdiction?

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In our e-commerce society, companies routinely exploit the ease of technology, with parties on opposite sides of the country – and even the world – conducting business without leaving the office. Agreements are sometimes executed via cyberspace that ultimately may result in litigation. Even without ever setting foot in a plaintiff's state, a defendant may find itself a party to litigation in a foreign forum based on the plaintiff's assertion that electronic communications, which previously had made their dealings that much easier, are now sufficient to confer personal jurisdiction. Recently, judges in New York, New Jersey, Maryland and Virginia have exercised jurisdiction over nonresident defendants based at least in part on the fact that their contacts with the forum included email communications. On the other hand, other recent decisions out of New York, Virginia, Missouri and Texas, have reached the opposite conclusion, holding that email communication alone – sometimes even coupled with letters, telephone calls, or facsimiles – was insufficient to establish specific jurisdiction. This article will survey this legal landscape and discuss the most recent state of the law relating to the use of email communication to establish personal jurisdiction.

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New York State

Under New York's long-arm statute, CPLR § 302(a)(1), a court may exercise jurisdiction over a non-domiciliary who transacts "any business within the state or contracts anywhere to supply goods or services in the state." Known as the "single act statute," the Court of Appeals has clarified that "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Deutsche Bank Sec., Inc. v. Montana Bd. of Inv.*, 7 N.Y.3d 65, 71 (2006).

In *Deutsche Bank*, the Court of Appeals noted that historically New York courts have "recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions." *Id.* Consistent with that observation, the court held that the defendant, "a sophisticated institutional trader that entered New York to transact business" via the Bloomberg Messaging System (an instant message service), should reasonably expect to defend its actions in New York. *Id.* at 71-72. In reaching its decision that there was jurisdiction over the defendant, the court accounted for the fact that the defendant had engaged the plaintiff in a series of trades. "Where a defendant deals directly with the broker's New York office by phone or mail or e-mail in a number of transactions instead of dealing with the broker at the broker's local office outside New York, long-arm jurisdiction may be upheld." *Id.* at 72. In the wake of *Deutsche Bank*, courts throughout New York have considered the jurisdictional effect of transmitting electronic communications.

Recently, two New York Supreme Court decisions held that email, even coupled with telephone communication, is insufficient to confer jurisdiction. For example, Judge Edward H. Lehner rejected an assertion of jurisdiction over a nonresident defendant where the parties' negotiations were conducted via telephone and email, because the defendant was not physically present in New York and its performance under the agreement took place outside of New York. *Hospitality Int'l, Inc. v. Hotels Unlimited, Inc.*, Index No. 109609/08 (Sup. Ct. N.Y. Co. Feb. 25, 2009). The court held that, under these facts, the plaintiff had failed to demonstrate "sufficient quality of contacts to sustain long-arm jurisdiction over defendant who had no physical presence in the state." Additionally, in *Shahidsaless v. Ebadi*, Index No. 115835/07 (Sup. Ct. N.Y. Co. Jan. 14, 2009), Judge Richard B. Lowe III held that one meeting in New York by two foreign parties – which the court characterized as "rarely the basis for jurisdiction" – did not establish personal jurisdiction over the defendant. The court chronicled the exchange of numerous electronic communications, but assigned them no weight because neither the Canadian-plaintiff nor the Iranian-defendant

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engaged in significant, if any, electronic correspondence in New York.

Conversely, however, Judge Lowe did find sufficient contacts to confer jurisdiction based on the exchange of electronic communications in a subsequent decision where both parties also were foreign residents, one of the Netherlands and the other of Mexico. In *CPI NA Parnassus B.V. v. Ornelas-Hernandez*, Index No. 600997/08 (Sup. Ct. N.Y. Co. Feb. 6, 2009), the court observed that the defendant communicated via telephone and email when negotiating loan documents and that there thus was "a substantial relationship between the business transaction and the cause of action sued upon." This finding of personal jurisdiction – in a seemingly similar factual situation to *Shahidsaless* (*i.e.*, neither party resided or contracted in New York) – can be reconciled by the fact that the defendant's initial negotiations, through which the electronic communications were employed and from which the litigated contract resulted, were with a New York-based third party.

Outside New York

The Fourth Circuit Court of Appeals recently affirmed a dismissal for lack of personal jurisdiction over two nonresident defendants, on the determination that a handful of emails and telephone communications alone did not satisfy minimum contacts with the state of Virginia. *Consulting Engineers Corp. v. Geometric Ltd.*, _ F.3d _, 2009 WL 738165 (4th Cir. Mar. 23, 2009). Defendant Structure Works, which is a Colorado corporation, had limited contact with the plaintiff, comprised of four telephone calls and twenty-four emails, only eight of which were sent by Structure Works. *Id.* at 4. Although the plaintiff argued that Structure Works had "intentionally directed electronic communications into Virginia with the clear intent of transacting business there," the court rejected that broad application and looked instead at "the quality and nature of the contacts" to evaluate whether they met the standards for minimum contacts. *Id.* The court held that *even had* Structure Works "reached out" to plaintiffs via email in Virginia, that fact, coupled only with the emails and telephone calls, was insufficient to establish personal jurisdiction.

A federal court in Missouri, under comparable facts, reached the same conclusion and granted the defendant Texas corporation's motion to dismiss where its only contacts with the forum state were by telephone, email, mail and facsimile. *NP Sterling Labs, Inc. v. Emergent Indus. Solutions, Inc.*, 2009 WL 36404 (E.D. Mo. Jan. 6, 2009). The court observed that "[i]t is well established that the mere use of e-mail, faxes, and/or the telephone is insufficient to subject a party to personal jurisdiction." *Id.* at *4.

A state court in Texas recently also declined to find personal jurisdiction over the law firm Proskauer Rose LLP based solely on the exchange of six emails and letters, in *Proskauer Rose LLP v. Pelican Trading, Inc.*, 2009 WL 242993 (Tex. Ct. App. Hous. (14th Dist) Feb. 3, 2009). Plaintiffs had sued Proskauer for breach of contract and professional malpractice, arising out of legal advice provided by the New York firm to the Texas-based plaintiffs. Proskauer's only contacts with the forum state were the emailing of several drafts and the transmission of a final tax opinion letter. *Id.* at **1, 3. The lower court denied Proskauer's motion to dismiss for lack of personal jurisdiction. The appellate court reversed, dismissing all claims against Proskauer and holding that none of the six communications – including an engagement letter and subsequent check drawn on plaintiffs' Texas bank account – qualified "as the type of 'purposeful contacts' required . . . to convey specific jurisdiction." *Id.* at *4. Furthermore, the court held that the legal advice was "created" in New York, not Texas. *Id.* at **3-4. "[N]either the mere existence of an attorney-client relationship between a resident client and an out-of-state attorney nor the routine correspondence and interactions attendant to that relationship are enough to confer personal jurisdiction." *Id.* at *4.

However, some courts have found personal jurisdiction over defendants where the contacts included the exchange of email communication, coupled with few other contacts. Earlier this year, a New Jersey District Court, in *Kiah v. Singh*, 2009 WL 47021 (D.N.J. Jan. 6, 2009), exercised jurisdiction over Florida-resident defendants, based in part on email communications directed into New Jersey. In determining whether the defendants had "purposefully directed" their activities at residents of New Jersey and whether the litigation resulted from alleged injuries arising out of or related to those activities, the court considered the following facts: (1) defendants initiated contact with plaintiffs in New Jersey via email, (2) the parties engaged in extensive contract negotiations over email, telephone, facsimile and mail, (3) defendants performed consulting services with knowledge that their services would be delivered to a New Jersey resident and business, and, (4) defendants allegedly had accessed, without authorization, plaintiff's New Jersey bank accounts. *Id.* at *4. The court stated that the emails and other communications "alone" would be insufficient to establish personal jurisdiction, but that "[t]hese mutual communications [were] relevant as they related to the circumstances giving rise to [the] action for breach of contract and other related claims." *Id.*

Similarly, in *Costar Realty Information v. Meissner*, 2009 WL 750216 (D. Md. Mar. 16, 2009), a District Court held that emails directed into Maryland, coupled with other activities, established personal jurisdiction over the Arizona-based defendant. Notably, Maryland courts have interpreted the "doing business" prong of its long-arm statute "as not requiring that a defendant ever be physically present in the state." *Id.* Thus, while this defendant had never entered Maryland, contracting to use the plaintiffs' database and services, communicating via email and telephone, and repeatedly accessing the plaintiffs' Maryland-based servers, taken together, satisfied the "doing business" prong of Maryland's long-arm statute. *Id.* at *5. The court discredited the defendant's argument that she was not aware her activities were directed into Maryland, because the plaintiffs' website indicated its Maryland address.

Applying a comparable analysis, a District Court in Virginia also considered email and telephone communications, among other contacts, in finding personal jurisdiction over nonresident defendants in *Delta-T Corp. v. Pacific Ethanol*, 2009 WL 77869 (E.D. Va. Jan. 7, 2009). Virginia's long arm statute allows for personal jurisdiction over nonresidents for any transaction of business in the state from which the cause of action arises. *Id.* at *3. The court held that the defendants had initiated contact with the plaintiff in Virginia to obtain its services in developing an ethanol plant in California, negotiated with the plaintiff by email and telephone – including a face-to-face meeting in Virginia – and bound itself to deliver "documents, drawings, and specifications" and to "wire or send payment" to the plaintiff in Virginia. *Id.* at *4. All of these facts, taken as a whole, were sufficient to establish defendants' transaction of business in Virginia, thereby satisfying Virginia's long-arm statute. The email and telephone communications were specifically listed in the court's enumeration of the facts establishing personal jurisdiction.

Conclusion

A survey of recent caselaw assessing the use of email as a means of establishing personal jurisdiction over an out-of-state defendant suggests that the plaintiff will likely have to demonstrate something more than the mere exchange of email correspondence. Nevertheless, when negotiating via email and telephone, parties should be aware that, should a dispute eventually result in litigation, those convenient emails may help to serve as the basis for jurisdiction in a foreign forum.