PERSONAL JURISDICTION AND INTERNET DEFAMATION: AN ANALYSIS OF POST-*ZIPPO* JURISDICTION DECISIONS IN INTERNET LIBEL CASES

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ABSTRACT

JONATHAN D. JONES: Personal Jurisdiction and Internet Defamation: An Analysis of Post-*Zippo* Jurisdiction Decisions in Internet Libel Cases
(Under the direction of Ruth Walden)

Obtaining personal jurisdiction over Internet speakers in libel cases has become a source of confusion for many appellate courts. The only United States Supreme Court jurisdiction decisions involving defamation cases came long before the Internet was a household communication tool. This thesis analyzes the various tests state and federal appellate courts applied from 1997-2010 in determining when an out-of-state defendant is subject to jurisdiction in a defamation claim based on Internet comments.

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Chapter 1

Personal Jurisdiction and Internet Libel

A couple of years ago Scott Roberts, a Virginia resident, purchased an engine block from a specialty racing shop in Ohio.[1] The engine was delivered by Kauffman Racing Equipment Company to Roberts.[2] Eight months passed and Roberts became upset over what he perceived to be manufacturing defects with the engine.[3] He contacted Kauffman Racing, and the company agreed to take the engine back for testing.[4] At that point they couldn't agree over who was at fault for the performance problems.[5] Roberts still believed the problem was a manufacturing defect.[6] Kauffman Racing claimed the problem was caused by modifications Roberts made to the engine, and the company refused to offer a refund.[7]

Unhappy over the refusal to give him a refund, Roberts did what many disgruntled customers have taken to doing. He went to the Internet. Roberts posted about his experiences with Kauffman Racing on eBay and several message boards for auto

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[1] Kauffman Racing Equip., L.L.C. v. Roberts, 930 N.E.2d 784 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011).

[2] *Id.* at 787

[3] *Id.*

[4] *Id.*

[5] *Id.* at 787-88.

[6] *Id.* at 788.

[7] *Id.*

racing enthusiasts.[8] The owner of Kauffman Racing heard about the postings from at least five fellow Ohioans.[9] So Kauffman Racing sued Roberts, claiming defamation, in an Ohio court.[10] The first issue the courts had to decide was whether Roberts, who had never been set foot in the state, should be subject to jurisdiction in an Ohio court based solely on his Internet postings about an Ohio business.[11] In a surprisingly broad opinion, the Ohio Supreme Court applied an expansive version of the "effects test" from *Calder v. Jones*[12] to assert that an Ohio trial court had jurisdiction over Roberts.[13] He had written about an Ohio company, his postings had been read in Ohio by at least five Ohioans, and the brunt of the harm was felt in Ohio.[14]

The Ohio Court's decision was the first of four from 2010 that seemed to mark a distinct shift in how expansively courts were willing to view jurisdiction in Internet defamation cases. The Seventh Circuit and the Missouri Court of Appeals both issued opinions allowing an assertion of jurisdiction over defendants whose primary contact with the forum state was writing about a resident of that state.[15] And the Florida Supreme Court issued a ruling based solely on the state's long-arm statute that would allow

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] 465 U.S. 783 (1984). In *Calder* the Supreme Court created a separate jurisdictional analysis that is applied, at a minimum, in defamation cases and perhaps in any intentional tort case. The test focuses on where the locus of the harm to the plaintiff is and whether defendant knew that the harm would occur there. *Id.*

[13] *Kauffman Racing*, 930 N.E.2d at 788

[14] *Id.*

[15] Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); Baldwin v. Fischer-Smith, 315 S.W. 3d 389 (Mo. Ct. App. 2010).

jurisdiction over Internet speakers who discuss Florida residents and whose speech is received in Florida.[16]

These cases – on their surface – appear to indicate a new willingness by courts to take a broad interpretation of *Calder*'s effects test and assert jurisdiction in Internet defamation cases in which the speaker's only contact with the forum is the speech. In contrast, the Fourth Circuit took up the jurisdiction question in 2002 in *Young v. New Haven Advocate*[17] and developed a derivative test from *Calder* that gave significant weight to *Calder*'s discussion of express aiming and found a requirement that the Internet posts show an "intent to target and focus on" readers in the forum.[18] And the Fifth Circuit, in 2002 in *Revell v. Lidov,*[19] also took a slightly broader view of *Calder*'s effects test but still found reason to deny jurisdiction in an Internet defamation case. "[T]he 'effects' test is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant's contacts with the forum," the *Revell* court wrote.[20] The purpose of this thesis is to determine how courts are applying the *Calder*

[16] Internet Solutions Corp. v. Marshall, 39 So. 3d 1201 (Fla. 2010). The case was in an odd procedural posture because the Florida Supreme Court was answering a certified question from the Eleventh Circuit in Atlanta about how to interpret the state's long-arm statute, and it was not faced with the due process question. *Id.* The companion due process question was subsequently answered by the U.S. District Court for the Middle District of Florida, which found that jurisdiction could not be asserted because travelling to Florida to defend the case would place an undue burden on the defendant. Internet Solutions Corporation v. Marshall, Order, Case No. 6:07-cv-1740 (M.D. Fla. Sept. 30, 2010) *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2010-09-30-Marshall%20second%20dismissal.pdf.

[17] 315 F.3d 256 (4th Cir. 2002).

[18] *Id.* at 263.

[19] 317 F.3d 467 (5th Cir. 2002).

[20] *Id.* at 473 (citing Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 869 (5th Cir. 2001)).

effects test and what factors they consider relevant in determining jurisdiction in Internet defamation cases.

Brief Overview of Personal Jurisdiction

The Supreme Court first turned state exercise of personal jurisdiction into a constitutional issue in 1877 with *Pennoyer v. Neff*,[21] a case involving the validity of an Oregon default judgment against a non-resident.[22] The non-resident, Neff, had not been served in Oregon and had not appeared in the case, but he owned land in Oregon. The Court explained the limits of personal jurisdiction in the context of physical territory. But this limitation did not preclude the exercise of authority over non-residents who are not present in the forum. In fact, it recognized that a state court has the ability to protect the rights and property of state residents by exerting control over non-residents and their property.[23]

This view of personal jurisdiction as solely a function of territorial presence did not last. In *International Shoe v. Washington*,[24] decided in 1945, the Court began a long process of reframing personal jurisdiction by focusing on the contacts a defendant has with a forum.[25] *International Shoe* called for an inquiry into whether the defendant "has certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and

[21] 95 U.S. 714 (1877).

[22] *Id.* A more detailed explanation of the principles behind *Pennoyer*, as well as the jurisdiction cases that pre-dated the Court turning it into a constitutional question, is contained in Chapter 2.

[23] *Id.* at 735.

[24] 326 U.S. 310 (1945).

[25] *Id.*

substantial justice.'"[26] The Court began its refinement of the minimum contacts test in 1958 in *Hanson v. Denckla*.[27] In *Hanson*, the defendant was a Delaware trust company that was trying to avoid jurisdiction in Florida. It had never solicited any clients there, and its only contacts were with a trust settlor who had moved from Pennsylvania to Florida after the trust had been established.[28] Because the trust company's only contacts with Florida were the result of the settlor's unilateral decision to move there, the Court found that company had not purposefully availed itself of the laws of Florida and should not have to go to court there:[29] "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[30]

That refinement continued with *World-Wide Volkswagen v. Woodson* in 1980.[31] In that case, the Supreme Court explained that *International Shoe*'s minimum contacts requirement has two functions.[32] The first is protecting a defendant from having to go to court in a "distant or inconvenient forum."[33] The second is protecting

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[26] *Id.* at 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[27] 357 U.S. 235 (1958).

[28] *Id.* at 253.

[29] *Id.*

[30] *Id.*

[31] 444 U.S. 286 (1980) *World-Wide Volkswagen* involved claims against a German car manufacturer's American subsidiary and a dealership, both based in New York. The plaintiff filed suit in Oklahoma, where the car had malfunctioned causing an accident. Neither the dealership nor the manufacturer had any contacts with Oklahoma. *Id.*

[32] *Id.* at 292.

[33] *Id.*

federalism by preventing states from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[34] Citing *Hanson*,[35] the *World-Wide Volkswagen* Court explained that the question wasn't whether the defendant could foresee *any contact* with a particular forum but whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[36] It also stated that the foreseeability test is met when a corporation "purposefully avails itself of the privilege of conducting activities within the forum State."[37]

The Court took an unexplained turn in its jurisdiction analysis in a defamation case over an article published in the *National Enquirer*. In *Calder v. Jones*[38] the question of "purposeful availment" was never broached.[39] Instead the Court focused on the defendants' — both Florida residents — knowledge that the article would cause the "brunt of the harm" to the plaintiff in California.[40] Rather than apply the purposeful availment standard the Court that had developed in its previous jurisdiction cases, the *Calder* Court crafted a new standard under which jurisdiction

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[34] *Id.* at 291-92.

[35] 357 U.S. 235 (1958).

[36] *World-Wide Volkswagen*, 444 U.S. at 297.

[37] *Id.*

[38] 465 U.S. 783 (1984).

[39] Redish describes this as "depart[ing] dramatically from the logic of the purposeful availment standard." Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 584 (1998).

[40] *Calder*, 465 U.S. at 789. The defendants in *Calder* included a reporter and editor, being sued as individuals, who had participated in the publication of an article about a California actress. The reporter had made some phone calls and at least one trip to California to report the story. The editor had no contacts with California that were directly related to publication of the article.

can be asserted if the plaintiff can show that the forum state was both the focal point of the act and the place where the harm was suffered.[41] The court also introduced "express aiming" into the analysis of whether the defendants' conduct was targeting the forum state:

> [P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the state in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.[42]

The Court however did conduct a minimum contacts analysis in *Keeton v. Hustler Magazine*, a companion case to *Calder* that also involved a defamation claim.[43] In *Keeton*, the Court found the magazine's monthly circulation of 10,000 to 15,000 copies in the forum state, New Hampshire, was adequate to meet the Due Process Clause's minimum contacts requirements. "Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous."[44] The Court's ruling in *Keeton* is more in tune with the *World-Wide Volkswagen* line of cases than *Calder* because it focuses on whether

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[41] *Id.* at 788-89.

[42] *Id.* at 789-90 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 (1980)).

[43] 465 U.S. 770 (1984).

[44] *Id.* at 774.

Hustler magazine purposefully availed itself of the laws of New Hampshire by circulating more than 10,000 copies there.[45]

The Court returned to the purposeful availment framework in *Burger King Corp. v. Rudzewicz*, a contract dispute case between Burger King and its franchisees.[46] The Court applied *World-Wide Volkswagen* but added a new wrinkle — directed conduct.[47] The Court held that specific jurisdiction could be asserted over an out-of-state defendant when the subject had "fair warning" because "the defendant has 'purposefully directed' his activities at residents of the forum."[48]

The Court's personal jurisdiction cases after *Burger King* focus largely on a question dealing with manufacturers placing products into the "stream of commerce" and how far down that stream jurisdiction should extend.[49] That issue returned to the Court in two cases decided in 2011,[50] which marked the first time in 20 years the Supreme Court has revisited personal jurisdiction.

Courts have struggled with how to apply these two lines of jurisdictional analyses – purposeful availment and effects – in Internet-based cases generally and

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[45] *Id.*

[46] 471 U.S. 462 (1985)

[47] *Id.* at 471-72.

[48] *Id.* at 472 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

[49] *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); J. McIntyre Machinery, Ltd. v. Nicastro, No. 09-1343, slip op. (U.S. Jun. 27, 2011); Goodyear Luxembourg Tires SA v. Brown, No. 10-76, slip op. (U.S. Jun. 27, 2011).

[50] J. McIntyre Machinery, Ltd. v. Nicastro, No. 09-1343, slip op. (U.S. Jun. 27, 2011); Goodyear Luxembourg Tires SA v. Brown, No. 10-76, slip op. (U.S. Jun. 27, 2011).

particularly in Internet defamation cases.[51] In defamation cases there appears to be particular confusion about the role of the *Calder* effects test and what it takes to establish that a defendant knew that the brunt of the harm he or she was causing would be felt in the forum state.[52] Further complicating the Internet jurisdiction picture is a 1997 federal district court opinion, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[53] which introduced a new element to the analysis: a sliding scale of how interactive the Internet site is.[54] This "sliding scale" test has been adopted by some courts, rejected outright by others, and incorporated as an additional analysis overlaying other jurisdictional frameworks by others.

Literature Review

The application of personal jurisdiction doctrine to Internet-based claims has generated a tremendous amount of scholarship[55] from which a few central themes

[51] *See* Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002).

[52] *See Kauffman Racing*, 930 N.E.2d 788 (Ohio 2010); Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); Baldwin v. Fischer-Smith, 315 S.W. 3d 389 (Mo. Ct. App. 2010); Internet Solutions Corp. v. Marshall, 39 So. 3d 1201 (Fla. 2010).

[53] 952 F.Supp. 1119 (W.D. Pa. 1997)

[54] *Id.* at 1121.

[55] *See, e.g.*, Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 Nw. U. L. Rev. 473 (2004); Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53 (2005); Developments, *Internet Jurisdiction: A Comparative Analysis*, 120 Harv. L. Rev. 1031 (2007); Catherine Ross Dunham, *Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. REV. 559 (2009); C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L. J. 601 (2006); Michael A. Geist, *Is There a There? Toward Greater Certainty For Internet Jurisdiction*, 16 BERKELEY TECH. L. J. 1345 (2001); Andrew F. Halaby, *You Won't Be Back: Making Sense of "Express Aiming" After* Schwarzenegger v. Fred Martin Motor Co., 37 ARIZ. ST. L.J. 625 (2005); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants*, 64 U. MIAMI L.

emerge. What appears to be a nearly universal theme in the literature is the need for the Supreme Court to revisit and clarify personal jurisdiction doctrine. "The Court's inadequate guidance has led to lower court decisions that are weakly reasoned and that search for meaning where none can be found," Peterson writes.[56] Authors also question how jurisdiction should apply in intentional tort cases and whether the Internet deserves its own standard.

The need to clarify personal jurisdiction

There are two primary lines of argument about what the Supreme Court should do with personal jurisdiction. One calls for refinement of personal jurisdiction doctrine, irrespective of the Internet, in an effort to craft a set of universal rules equally applicable in the online and offline worlds for any civil claim.[57] The second calls for a set of situation-specific jurisdiction rules that would keep the purposeful availment analysis intact in some scenarios and use the effects test in others. Proponents argue that this scheme would make it easier for courts to determine over whom they have authority.[58]

REV. 133 (2009); Scott T. Jansen, Comment, *Oh, What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 MO. L. REV. 177 (2006); Rachael T. Krueger, Comment, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements*, 51 CATH. U. L. REV. 301 (2001); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010); Alexander B. Punger, Recent Development, *Mapping the World Wide Web: Using* Calder v. Jones *to Create a Framework for Analyzing when Statements Written on the Internet Give Rise to Personal Jurisdiction*, 87 N.C. L. REV. 1952 (2009); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet and the Nature of Constitutional Evolution*, 38 JURIMETRICS 575 (1998); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411 (2004); David Wille, *Personal Jurisdiction and the Internet – Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95 (1998); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005).

[56] Peterson, *supra* note 55, at 159.

[57] *See, e.g.*, Stein, *supra* note 55.

[58] *See, e.g.*, Redish, *supra* not 55.

In the group of authors seeking further development of personal jurisdiction irrespective of the Internet, Stein argues that both the purposeful availment and effects tests can be reconciled if the courts view them through a regulatory lens.[59] In this view the need is not for wholesale abandonment of one, or either, but rather a refinement of a unifying theory behind each.[60] The question, according to Stein, is "not whether a defendant has surrendered his or her liberty, but whether the state's assertion of judicial authority sufficiently advances its regulatory interests to justify the attendant burden that such a proceeding would impose upon conduct outside of its territory."[61] Stein's argument is rooted in the idea that the state's regulatory interest is not in providing a forum for its resident after the fact, but in regulating a type of behavior before the controversy arises. Stein acknowledges that courts have struggled with how to apply jurisdictional standards in Internet cases, particularly intentional torts. "It's not surprising . . . that courts have had a devilish time applying *Calder* in other defamation cases" Stein concludes.[62]

Borchers, while arguing for refinement irrespective of the Internet, suggests that the *Zippo* test should be scrapped altogether, or, at a minimum, it should not be applicable in libel cases.[63] He argues that *Zippo* makes no sense in the context of defamation because the level of activity that a website has is not particularly relevant to the reputational harm being asserted.[64] A static website can host a statement equally

[59] Stein, *supra* note 55, at 412.

[60] *Id.*

[61] *Id.* at 413.

[62] *Id.* at 423.

[63] Borchers, *supra* note 55, at 489.

[64] *Id.*

damning as a dynamic website, and the recipient will feel the same harm, he suggests[65] Geist agrees that the *Zippo* test is inadequate and calls for a technology-neutral, targeting-based analysis.[66] Geist argues that technology-neutrality allows a test to remain relevant even as web technologies change without discouraging online activity, and it provides sufficient certainty of legal risk for Internet users.[67] A targeting-based approach would lessen reliance on the effects analyses rooted in *Calder*, Geist argues.[68] Geist's targeting approach would consider as factors whether there was foreseeability of jurisdiction on the part of the actor based on contracts, technology, and actual or implied knowledge.[69] He criticizes the effects test as causing uncertainty because "Internet-based activity can ordinarily be said to cause effects in most jurisdictions."[70]

Among the authors making the case for rules specific to Internet cases, Redish argues that the purposeful availment test "cannot effectively deal with the dramatic socio-economic implications of the Internet's development. Pursuant to that standard, an out-of-state defendant will not be subject to a forum's jurisdictional reach unless that defendant has purposefully availed itself of the forum's benefits and privileges."[71] This argument recognizes the difficulty in determining how an Internet user might purposefully avail herself of a state's jurisdiction if her only connection with the forum is

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[65] *Id.*

[66] Geist, *supra* note 55, at 1380.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 1385-97.

[70] *Id.* at 1381.

[71] Redish, *supra* not 55, at 578.

interaction over the Internet with another person or entity based in that state. Therefore, Redish calls for the Court to reconsider the theoretical foundation for personal jurisdiction. If it is rooted in federalism, as Redish contends, then application of the purposeful availment test to Internet-based claims "subverts a state's ability to assert its sovereign power in order to protect its citizens."[72] Redish argues that purposeful availment as a prerequisite for jurisdiction should be eliminated, and instead the focus should be on a balance of the state's interest and procedural fairness.[73]

The Court's apparent split on jurisdictional analyses – using effects for intentional torts in *Calder* and the purposeful availment line of cases in other actions — provides justification for Yokoyama to argue that a single standard isn't necessary.[74] "[T]he traditional model of personal jurisdiction itself fails to support the notion that one test for specific jurisdiction should be applied to all claims."[75] While criticizing the *Zippo* sliding scale as inadequate, Yokoyama argues that traditional personal jurisdiction principles in the purposeful availment" and effects cases can be adequately applied to Internet cases:[76] "Because the Internet hosts a multitudinous array of activities and communities that now mirrors all aspects of society, the resolution of Internet jurisdiction must be sensitive to the defendant's specific Internet activities."[77]

Personal Jurisdiction and Intentional Torts

[72] *Id.* at 580.

[73] *Id.* at 609.

[74] Yokoyama, *supra* note 55, at 1174.

[75] *Id.*

[76] *Id.* at 1149.

[77] *Id.* at 1150.

Many commentators consider the *Calder* effects test as a separate framework, distinct from purposeful availment analysis, for dealing with intentional torts. Confusion over which of the personal jurisdiction standards – purposeful availment, the *Calder* effects test, or the *Zippo* sliding scale — to apply has been widespread in intentional tort cases, particularly defamation cases, according to Floyd and Baradaran-Robison.[78] Their research found courts that applied either the *Calder* effects test, the *Zippo* test, or some variation of both.[79] Floyd and Baradaran-Robison argue that this widespread confusion among lower courts is a result of *Calder*'s poor guidance on the meaning of "express aiming" or "intentional targeting."[80] They contend that the question for courts becomes one of whether the defendant knew that the brunt of the harm would be felt in the forum state.[81] Parsing out what standard of knowledge – actual or constructive – should be applied, and which the defendant actually held, is a process fraught with uncertainty.[82]

According to Redish, the purposeful availment test cannot be satisfied solely by a defamation transmitted over the Internet. "A defendant has not 'purposefully availed' itself of the benefits and privileges of the forum merely because it has sent a defamatory communication over the Internet about a resident of the forum state," he writes.[83] Calling the *Calder* decision "aberrational," "illogical" and unprincipled,[84] Redish argues that an

[78] Floyd and Baradaran-Robison, *supra* note 55, at 614-15.

[79] *Id.* at 617.

[80] *Id.* at 618.

[81] *Id.*

[82] *Id.*

[83] Redish, *supra* note 55, at 599.

[84] *Id.* at 603.

expansive use of *Calder* specifically for intentional tort cases over the Internet is inappropriate. A central element of *Calder* was California's role as the focal point of the case, and that element is missing from many of the Internet-based intentional tort cases.[85]

Yet Krueger argues that *Calder*'s effects test not only can satisfy purposeful availment in Internet defamation cases, but that it is the appropriate standard to apply in such cases.[86] "The danger of rejecting defamation actions without analyzing the extent of the effects in the forum state becomes evident if non-resident defendants target a forum with defamation and escape punishment."[87] In Krueger's view, the defendant's intent to reach a particular forum and commit a harm against a particular plaintiff in that forum is where the focus of the jurisdiction decision should be.

One interesting approach, mentioned by Borchers[88] and explored in depth by Haynes, is for states to voluntarily limit personal jurisdiction by statute.[89] While much of the literature has focused on the development of constitutional standards for jurisdiction under the Due Process Clause of the Fourteenth Amendment, there is also the matter of statutory authority. Jurisdictional analysis is a two-prong analysis. The first prong is whether the forum's so-called "long-arm statute" authorizes jurisdiction; the second prong is whether assertion of that jurisdiction meets constitutional requirements. Most states, either explicitly in their long-arm statutes or through court interpretation, allow

[85] *Id.* at 604.

[86] Krueger, *supra* note 55, at 328.

[87] *Id.* at 330.

[88] Borchers, *supra* note 55, at 490.

[89] Haynes, *supra* note 55.

jurisdiction to the full extent allowed by due process.[90] Yet some states' long-arm statutes exclude defamation cases from jurisdiction over non-residents.[91] Haynes argues for states to voluntarily pull back on jurisdiction by limiting the extent granted under their long-arm statutes.[92] Under Haynes' model "short-arm" statute, states would define the type of targeted activity that would give rise to liability:[93]

> This could take the form of a *mens rea* requirement—that the defendant knew the target of the defamation was located in or would feel the effects in the forum state, for example—or a quantity calculation where a single such targeted statement would be insufficient, but numerous efforts to target forum residents would suffice.[94]

While this approach is interesting, it suffers from two problems. First, states are unlikely to voluntarily relinquish jurisdiction over intentional tort cases involving their residents. There is little incentive for a state to follow that path. Second, the initial formulation – "that the defendant knew the target of the defamation was located in or would feel the effects in the forum state" — bears a close

[90] Haynes, *supra* note 55, at 162-63. Haynes' research indicates that 32 states have either this explicit extension to the full authority allowed under due process or have court interpretations that allow jurisdiction to extend that far.

[91] *Id*. at 165 (citing, CONN. GEN. STAT. ANN. § 52-59b(a)(2) (West 2009); N.Y. C.P.L.R. 302(a)(2) (McKinney 2009)). The Connecticut statute says: "a court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent: . . . (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act" CONN. GEN. STAT. ANN. § 52-59b(a)(2) (West 2009). The New York statute says: "a court may exercise personal jurisdiction over any non-domiciliary . . ., who in person or through an agent: 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act." N.Y. C.P.L.R. 302(a)(2) (McKinney 2009).

[92] Haynes, *supra* note 55, at 166-74.

[93] *Id.* at 168.

[94] *Id.*

resemblance to the practical application courts have been giving the *Calder* effects test in Internet defamation cases.[95]

Halaby focuses on the need for the Court to clarify the express aiming element of the *Calder* effects test if it is to be used for intentional tort cases.[96] Halaby calls for two tiers of express aiming.[97] The first is established when a defendant acts with purpose to cause an effect on the plaintiff, whether that's in a specific forum or not.[98] If A sets out to harm B, regardless of where B is, then B should be able to make a claim in whatever forum B is in. Jurisdiction would be appropriate when the defendant intends to harm the plaintiff in the forum. The second type of express aiming is when a defendant knew or should have known that his actions would cause harm to the plaintiff, either in the forum or knowing the plaintiff lives in the forum.[99] In this approach, in order to assert jurisdiction under the second tier, one would need to couple knowledge that the resident could be harmed in the forum with a related forum contact.[100] This second formulation tracks closely to the facts in *Calder*. Even if the *Calder* defendants didn't intend to harm the plaintiff, they arguably knew or should have known that she lived in

[95] *See* Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); Kauffman Racing Equip. v. Roberts, 930 N.E.2d 788, (Ohio 2010); Baldwin v. Fischer-Smith, 315 S.W. 3d 389 (Mo. Ct. App. 2010).

[96] Halaby, *supra* note 55, at 625.

[97] *Id.* at 626

[98] *Id.*

[99] *Id.*

[100] *Id.* at 655.

California and could suffer harm in California based on their story. Halaby argues that this tiered system would lead to greater predictability.[101]

Stein's regulatory approach considers the state's "legitimate claim to generating the legal order that governs the targeter's extraterritorial behavior."[102] In other words, the focus is returned to whether the conduct was targeted at a forum. Yet Stein acknowledges that this approach to personal jurisdiction analysis poses particular problems in defamation cases.[103] States where intentional torts are targeted have "a legitimate claim to generating the legal order that governs the targeter's extraterritorial jurisdiction."[104] He uses *New York Times Co. v. Sullivan*[105] to illustrate the point that one state's regulatory interest in speech — in this case Alabama's interest in protecting the reputation of its resident — can be in conflict with the interests of other forums.[106] Society generally wants to encourage the kind of political discussion that formed the basis of the tort claim in *New York Times*, and that interest may outweigh a particular jurisdiction's interest in regulating it.[107]

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[101] *Id.* at 657.

[102] Stein, *supra* note 55, at 421.

[103] *Id.* at 422.

[104] *Id.*

[105] 376 U.S. 254 (1964). The Court introduced First Amendment considerations to libel cases in *New York Times Co. v. Sullivan*, by raising the standard of fault required to "actual malice" when the subject of the defamatory statement is a public figure. *Id.* The plaintiff in Sullivan was the Montgomery Alabama Public Safety Commissioner. *Id.* He claimed an advertisement taken out by civil rights activists that described actions taken against civil rights workers by police defamed him, even though he was not individually named in the advertisement. *Id.*

[106] Stein, *supra* note 55, at 422.

[107] *Id.*

Wille also finds a regulatory basis for states asserting jurisdiction to be proper and argues for a framework in which a state's regulatory interest in particular conduct would be determinative.[108] "A defendant who engages in conduct that may be regulated by a sovereign has tacitly consented to the jurisdiction of that sovereign."[109] Because states have a regulatory interest in the function of the World Wide Web and because of the way in which computers accessing the web function – sending data back and forth – this scheme would find that posting something defamatory about another on the Internet is adequate contact for exercise of jurisdiction.[110] "A state where the contents of a Web page proximately cause damage may exercise personal jurisdiction over the owner of the Web page no matter whether the recipient or a third party is injured by the communication."[111]

Creating a separate jurisdictional analysis for intentional torts should be avoided, according to Floyd and Baradaran-Robison, because that approach creates difficulty determining which standard to use when a case involves multiple different types of claims.[112] They find common ground in *Burger King*'s purposeful availment test and *Calder*'s effects test in that both focus on the defendant's conduct.[113] That common element – focus on the defendant's conduct

[108] Wille, *supra* note 55, at 120.

[109] *Id.*

[110] *Id.* at 176.

[111] *Id.*

[112] Floyd and Baradaran-Robison, *supra* note 55, at 626.

[113] *Id*. at 627

– forms the basis for their suggestion that the personal jurisdiction standard should consider the defendant's specific conduct and whether there is a specific notice based on geography that should make the defendant aware he or she is subjecting himself or herself to jurisdiction in a particular forum.[114]

Geist's targeting approach also focuses on the defendant's conduct by making "actual or implied knowledge" of the plaintiff's residence one of three factors a court should consider in determining whether conduct is aimed at a specific jurisdiction.[115] Relying on *Calder* for the foundation of the knowledge factor, Geist argues that when a defendant knows her conduct will cause some action or reaction in a particular forum, then the balance should weigh in favor of jurisdiction there.[116]

Punger similarly places a great deal of weight on the defendant's knowledge of locale as a guiding factor in finding jurisdiction.[117] Instead of focusing on the effects test from *Calder*, Punger argues that the case provides a set of three "factors" that should be determinative of jurisdiction: 1) publication medium; 2) knowledge of the plaintiff's state of residence and work; and 3) intentional nature of the defendant's actions.[118] This approach grossly extends *Calder*'s reach. The nature of the medium in *Calder* – a newspaper – was far less

[114] *Id.* at 628.

[115] Geist, *supra* note 55, at 1402. The other two factors are the presence or absence of a contract and the type of technology being utilized.

[116] *Id.* at 1403.

[117] Punger, *supra* note 55, at 1965-66.

[118] Id. at 1966

important to the court than the size of its circulation in the forum – 600,000 copies – and the defendants' knowledge that it would reach a large audience there. The *Calder* Court discussed those factors because they were directly relevant to understanding where the "brunt of the harm" would be felt.

Special Rules for Jurisdiction and the Internet?

A number of commentators have questioned whether the Internet, because of its unique nature as a communication tool, calls for a separate set of jurisdictional rules. Redish suggests that an exception to "purposeful" availment analysis would be appropriate for Internet cases and urges the Court to develop a system focused on procedural fairness instead.[119] Redish's test would have two factors, inversely correlated: "The stronger the state interest in asserting jurisdiction, the greater the procedural burdens on the out-of-state defendant the court should be willing to tolerate."[120] Redish does not expound on how this formula would apply in Internet defamation cases, but the question would essentially involve weighing the state's interest in granting a forum for its residents. The only burdens on the defendant the test considers are procedural. Thus in the case of Internet defamation, it may not leave room for consideration of the defendant's constitutional speech rights.

Jansen argues for the creation of an "Interactive Web site Test" that would combine the effects test, the concept of targeting and *Zippo*'s sliding scale into a single framework.[121] This test would first apply the sliding scale to the website's level of

[119] Redish, *supra* note 55, at 607.

[120] *Id.* at 609.

[121] Jansen, *supra* note 55, at 201.

interactivity and the relationship between those interactive features and the claim alleged.[122] If there is no interactivity, then a "traditional effects analysis" would be conducted "requiring the plaintiff to clearly show both express aiming and a focal point for the injury."[123] If the website is interactive, the court should then analyze whether the contacts that derive from that interactivity are also related to the basis for the claim.[124] If they're connected, there is jurisdiction, but if there's no relation between the interactivity and the claim, then the court should revert to an effects analysis. In Jansen's test, interactivity functions to lower the threshold if the claim is related to the interactivity. In all other situations, courts would rely on an effects and express aiming analysis.[125]

Similarly, Geist calls for an Internet-specific jurisdictional analysis.[126] He stresses the importance of the standard being "technology neutral" – within Internet uses – so that it can withstand expansion and changes in Internet use and access, but the application of his targeting analysis calls for its use when claims arise out of Internet-based communications.[127]

In contrast, Floyd and Baradaran-Robison suggest a "unified and objective test for personal jurisdiction based on the geographically specific scope that the defendant should ascribe to the impact" of his activities that would apply equally to online and offline

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Geist, *supra* note 55, at 1404.

[127] *Id.*

activity.[128] Floyd and Baradaran-Robison argue that the Court should turn from a focus on the defendant's intent to his objective awareness.[129] Is the defendant aware of the types of claims to which he might be subjected, of the jurisdictions he might be haled into and of who might be a plaintiff against him?[130] Creating a special jurisdictional standard for the Internet would strain the meaning of the existing tests and would further muddy the already cloudy waters of jurisdictional analysis, Floyd and Baradaran-Robison argue.[131]

Lastly, Yokoyama contends that a single test for Internet jurisdiction is inappropriate because of the wide variety of conduct that can occur on the Internet and the Court's apparent acceptance already of a special standard for intentional torts.[132] He argues that the existing framework from *Calder* and *Keeton* for defamation cases can be used adequately on the Internet.[133] "The website, for defamation purposes, can legitimately be analogized with traditional means of communication, such as the print media, radio and television."[134] This argument struggles to gain traction, though, when one starts comparing the structure and use of those traditional media against the Internet. A newspaper publisher knows how many copies of his or her paper are mailed to another state. A radio or television broadcaster has a reliable estimate of how many people in

[128] Floyd and Baradaran-Robison, *supra* note 55, at 626.

[129] *Id.* at 633.

[130] *Id.*

[131] *Id.* at 657

[132] Yokoyama, *supra* note 55, at 1176.

[133] *Id.*

[134] *Id.*

another state are tuning in. But an Internet speaker generally has little idea how many people in a given jurisdiction are going to see his or her content. The number of subscribers that the *National Enquirer* and *Hustler* magazine had in California and New Hampshire, respectively, were important factors in the Court finding jurisdiction in both *Calder* and *Keeton*.

The literature shows a need for the Supreme Court to review its personal jurisdiction jurisprudence, particularly as it relates to the Internet and intentional torts, in order to provide Internet users adequate warning of when they are subjecting themselves to jurisdiction in another forum. The literature indicates a great deal of research into the intersection of jurisdiction and technology – particularly the Internet – and to a lesser extent the intersection of the Internet and jurisdiction in defamation cases. There has been no exhaustive review of jurisdiction decisions in Internet defamation cases.

Research Questions

The goal of this thesis is to determine how state and federal appellate courts have approached jurisdiction issues in Internet defamation cases. To accomplish this, the following research questions are addressed:

> 1) Did courts utilize the *Calder* effects test? If so, how did they apply it? Was it the sole standard used to determine jurisdiction? If they did not use the *Calder* effects test, did they acknowledge it and/or explain their decisions to use a different standard?
>
> 2) Did courts utilize the *Zippo* sliding scale test? If so, how did they apply it? Was it the sole standard used to determine jurisdiction? If they did not use the *Zippo* test, did they acknowledge it and/or explain their decisions to use a different standard?
>
> 3) Did courts give any consideration to First Amendment speech protections in deciding jurisdiction issues?

Methodology

Cases from state and federal appellate courts involving defamation claims arising out of Internet content were reviewed. To identify the relevant cases, searches were conducted in the LexisNexis "Federal & State Cases, Combined" database, which includes all state and federal appellate courts in the United States. The following search terms were used to identify relevant cases "'personal jurisdiction' & Internet & defam! OR libel OR slander" Additionally, the search was limited to the years 1997-2010. The search began with 1997 because that is the year the *Zippo* decision was issued, introducing the sliding scale of interactivity and influencing a number of courts' jurisdiction analyses. A search of those terms identified a universe of 721 cases. Once trial court decisions and non-relevant cases were eliminated, the result was 35 cases involving jurisdiction issues in Internet defamation claims. Non-relevant cases were those in which the jurisdiction question was not decided on due process grounds by the appellate court or those that did not contain a defamation claim based on Internet communication. Additionally, while reading the 35 identified cases, citations were checked against the identified case list to double-check the list for any missing cases. The cases were also Shepardized to make sure they are still good case law as well as identify any potentially missing cases.

Outline

The first chapter of this thesis consists of a review of relevant literature, research questions and method. The second chapter outlines the development of Supreme Court

personal jurisdiction doctrine prior to the creation of the *Zippo* test. The third chapter reviews and analyzes how appellate courts between 1997 and 2010 utilized the *Calder* effects test. The fourth chapter reviews and analyzes how appellate courts used, rejected or ignored the *Zippo* sliding scale between 1997 and 2010. The fifth chapter analyzes cases decided on grounds other than *Zippo* or *Calder*, analyzes how courts treated First Amendment protection arguments, if at all, in the jurisdictional analysis and argues for consideration of free speech principles in Internet defamation cases.

Chapter 2

The Supreme Court's Development of Personal Jurisdiction

At the start of every court case there is a basic question to be asked: Does this court have the authority to hear this case? Or to put it the way a lawyer might: Does this court have jurisdiction? The answer could be based on subject matter; it could be based on a statute; or it could flow from the type of court. It could be determined based on who the parties are, where they live and what activities they've participated in. The latter criteria are the basis for "personal jurisdiction," a body of law that is both convoluted and complex, with roots in the common law and modern day moorings in the Constitution. Black's Law Dictionary defines personal jurisdiction as: "A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests."[1] It is the authority a court holds, or in some cases lacks, to exert power over an individual. And at the start of every case, the court should consider whether it has personal jurisdiction over the parties in front of it.

This chapter will address the development of personal jurisdiction in three parts. The first part will be a brief overview of the Supreme Court's early jurisdiction cases. The second part will discuss *Pennoyer v. Neff*,[2] in which the Court incorporated common law territorial principles into the Due Process Clause of the Fourteenth Amendment. It

[1] BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

[2] 95 U.S. 714 (1877)

will also provide a brief overview of some of the cases that followed. The third part will discuss modern jurisdictional rules following the Court's re-structuring of the law in *International Shoe v. Washington*[3] into a "minimum contacts" analysis.[4] This final section will pay particular attention to *Calder v. Jones*,[5] which created the "effects" test that is central in many defamation cases. This historical overview provides the context and background needed to understand the current state of confusion involving personal jurisdiction doctrine in Internet defamation cases.

Pre-Due Process: When Jurisdiction Rules Were Rooted in Common Law

In American legal education, civil procedure courses often begin the jurisdiction discussion with *Pennoyer v. Neff*,[6] an 1877 case that constitutionalized jurisdiction law. But the Supreme Court handled a number of cases prior to *Pennoyer* that dealt with jurisdiction-related issues.[7] This section briefly discusses some of the most illustrative of

[3] 326 U.S. 310 (1945).

[4] *Id.* at 316.

[5] 465 U.S. 783, 790-91(1984).

[6] 95 U.S. 714 (1877).

[7] *See, e.g.*, Creighton v. Kerr, 87 U.S. (20 Wall.) 8 (1873); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873); Crapo v. Kelly, 83 U.S. (16 Wall.) 610 (1872); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1870); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Harvey v. Tyler, 69 U.S. (2 Wall.) 328 (1864); Miller v. Sherry, 69 U.S. (2 Wall.) 237 (1864); Nations v. Johnson, 65 U.S. (24 How.) 195 (1860); Jeter v. Hewitt, 63 U.S. (22 How.) 352 (1859); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); Harris v. Hardeman, 55 U.S. (14 How.) 334 (1852); Sargeant v. State Bank of Ind., 53 U.S. (12 How.) 371 (1851); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Lessee of Grignon v. Astor, 43 U.S. (2 How.) 319 (1844); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839); Voorhees v. Jackson, 35 U.S. (10 Pet.) 449 (1836); Elliott v. Lessee Perisol, 26 U.S. (1 Pet.) 328 (1828); Mayhew v. Thatcher, 19 U.S. (6 Wheat.) 129 (1821); Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813).

those cases, as identified by Dean Borchers,[8] and their significance in the development of jurisdiction rules in the United States Supreme Court. The Court's first foray into jurisdiction came in *Mills v. Duryee*,[9] a case requiring interpretation of the Full Faith and Credit Act of 1790,[10] in which the Court found that a judgment in one state should have a "conclusive effect" on the judgments of other states.[11] The plaintiff in *Mills* won a judgment in New York state court and attempted to enforce the judgment in the United States District Court for the District of Columbia.[12] The defendant contested the New York judgment in the district court by pleading *nil debet*,[13] which is a general denial in a debt action on a simple contract.[14] By upholding the judgment in *Mills*, the Court implicitly found that the New York court had jurisdiction over the defendant and he could not plead *nil debet* on a collateral attack when the judgment was being enforced in another forum. *Mills* is perhaps most notable for Justice Johnson's dissent, in which he argued that Congress had not intended to undercut collateral attack when a judgment was

[8] Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 25-43 (1990).

[9] 11 U.S. (7 Cranch) 481 (1813).

[10] Act of May 26, 1790, ch. 11, 1 Stat. 122, as amended by Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1738 (2010)).

[11] *Mills*, 11 U.S. (7 Cranch) at 485.

[12] *Id.*

[13] *Id.*

[14] BLACK'S LAW DICTIONARY 1071 (8th ed. 2004).

entered by a court that had no jurisdiction over a party.[15] Johnson's dissent would begin to gain traction in an intrastate collateral attack case, *Elliott v. Lessee of Peirsol*,[16] a few years later when the Court allowed such a defense on jurisdictional grounds. It then became the clear majority view in *D'Arcy v. Ketchum*,[17] an 1850 case in which defendants were multiple out-of-state debtors and plaintiffs were the holders of their notes who lived in New York.[18] One of the defendants appeared in New York court, but then he subsequently defaulted.[19] The plaintiffs attempted to enforce the judgment against another of the defendants in Louisiana.[20] The Court adopted the notion that Justice Johnson had argued in *Mills*: neither the Full Faith and Credit Clause of the Constitution nor the Full Faith and Credit Act of 1790 precluded a collateral attack for lack of jurisdiction.[21]

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[15] *Mills*, 11 U.S. (7 Cranch) at 485-86 (Johnson, J., dissenting). Justice Johnson wrote:

> There are certain eternal principles of justice which never ought to be dispensed with, and which Courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits. But if the states are at liberty to pass the most absurd laws on this subject, and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the constitution in direct hostility with the object of it.

Id. at 486-87.

[16] 26 U.S. (1 Pet.) 328, 341 (1828).

[17] 52 U.S. (11 How.) 165 (1850).

[18] *Id.*

[19] *Id.* at 173.

[20] *Id.*

[21] *Id.* at 174.

In *Lafayette Insurance Co. v. French*,[22] the Court adopted the principle that a company could consent to jurisdiction in another state by its actions there.[23] An Indiana corporation was doing business in Ohio, and Ohio had a statute that declared any agent of an out-of-state corporation to be the company's agent for service of process.[24] The Court upheld the Ohio statute and found that the Indiana company had "consented" to jurisdiction in Ohio as a condition of doing business there,[25] which appears to be a precursor to the Court's later understanding of purposeful availment.

The last pre-*Pennoyer* case that Borchers identified as significant is *Galpin v. Page*,[26] which involved an intrastate collateral attack on a judgment.[27] In the underlying case, the plaintiff served constructive notice on an out-of-state infant defendant by publication in a California newspaper.[28] When the defendant defaulted without making an appearance, the plaintiff took possession of property in California.[29] When the defendant's representatives discovered what happened, a suit was filed in California to attack the judgment and eject the plaintiff.[30] The Court held that to properly assert

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[22] 59 U.S. (18 How.) 404 (1855).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 407.

[26] 85 U.S. (18 Wall.) 350 (1873).

[27] *Id.* at 365. Although the defendant was an out-of-state infant, because the property attached to enforce the judgment was in the forum, the collateral attack became intrastate. The infant had to come to California to attack the judgment.

[28] *Id.* at 355.

[29] *Id.*

[30] *Id.* at 356.

jurisdiction over a person, the person had to be served within the state or appear voluntarily.[31] These early jurisdiction rules were not based on the Constitution but on a mix of common law views of territorial principles, as well as state and federal statutes.[32]

***Pennoyer*: Reframing Jurisdiction with Due Process**

The Supreme Court turned personal jurisdiction into a constitutional issue with *Pennoyer v. Neff*[33] in 1878 by finding the basis for jurisdiction in the Due Process Clause of the Fourteenth Amendment.[34] *Pennoyer* involved the validity of a default judgment in an Oregon state court against a non-resident,[35] and it had some striking resemblances to *Galpin*. The non-resident, Neff, had not been served in Oregon and had not appeared in the case, but he owned land in Oregon. The plaintiff – an attorney who claimed Neff owed him for services – gave constructive notice via publication in an Oregon newspaper.[36] After winning a judgment, the attorney attached Neff's Oregon land, which was sold in a sheriff's sale.[37] When Neff returned to Oregon, he filed a suit in federal district court against Pennoyer, who had purchased the land, to eject him from the property and also attack the earlier judgment for lack of personal jurisdiction.[38]

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[31] *Id.* at 365-66.

[32] *See* Borchers, *supra* note 9, at 25-43.

[33] 95 U.S. 714 (1878).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

The district court found in favor of Neff, and Pennoyer appealed to the Supreme Court, where the question became whether Oregon had properly exerted jurisdiction over Neff when he had not had practical notice of the action against him. The Court explained the limits of personal jurisdiction in the context of physical territory:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.[39]

This limitation did not preclude the exercise of authority over non-residents who are not present in the forum. In fact, it recognized for the first time that a state court has the ability to protect the rights and property of state residents by exerting control over non-residents and their property.[40] It also found, for the first time, a home for personal jurisdiction in the Constitution.

The *Pennoyer* Court did not explain how the Due Process Clause formed the foundation for personal jurisdiction.[41] Rather, Justice Field gave a dissertation on the common law concepts of *in rem* and *in personam* jurisdiction.[42] *In rem* jurisdiction is

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[39] *Id.* at 720.

[40] *Id.* at 735.

[41] *Id.*

[42] *Id.* at 722-35. Justice Field favorably quoted Justice McLean's majority opinion in *Boswell's Lessee v. Otis* in explaining the two:

> "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem.*"

Id. at 724 (quoting Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850)).

appropriate when a court has jurisdiction over property in the forum, and it can only be exerted to the value of the property.[43] To put it simply, if a defendant owns a piece of land in the forum, a court can exert *in rem* jurisdiction but cannot award a judgment in excess of the value of the land. In *Pennoyer,* the Court announced a limitation on *in rem* jurisdiction that the property must be attached at the start of the proceeding.[44] This rule was meant to avoid the situation of having a judgment become valid because of discovery of property after the proceedings began.[45]

In personam jurisdiction is derived from the court's authority over the person.[46] A court has jurisdiction over a person who is present in the forum.[47] In *Pennoyer*, the Court held that *in personam* jurisdiction could only be exerted if the person was served in the forum or if he voluntarily appeared.[48] These were the same territorial principles on which the earlier cases dealing with collateral attacks in subsequent forums had been decided,

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[43] *Id.* at 722

[44] *Id.* at 728. (The court's "jurisdiction . . . cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none.")

[45] *Id.*

[46] *Id.* at 725.

[47] *Id.*

[48] *Id*. at 726-27. Justice Field wrote:

> If, without personal service, judgments *in personam,* obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Id.

but now they were being applied to a collateral attack within the same forum where the original judgment had been issued.[49]

Pennoyer also declared that substituted service – such as by publication – could only be effective on non-residents for *in rem* jurisdiction cases when the property was attached at the outset.[50] The idea was that attachment of the property would be sufficient to serve notice since property is presumed to be "in the possession of its owner."[51] Because the plaintiff in the underlying action had not attached Neff's property at the outset of the case, under the Supreme Court's newly announced jurisdiction regime, jurisdiction was improper.[52] Substituted service would never be proper in an *in personam* case over an out-of-state defendant.[53]

A particular oddity of *Pennoyer* is its timing problem.[54] The underlying action in *Pennoyer* — the default judgment against Neff — occurred in 1866, two years before the Fourteenth Amendment was ratified.[55] Borchers asks, "If the [F]ourteenth [A]mendment was a crucial element in invalidating the underlying judgment, and the opinion certainly suggested that this was so, how could it have acted retroactively?"[56] Yet the Court never

[49] *See* Borchers, *supra* note 9, at 31.

[50] *Pennoyer*, 95 U.S. at 727.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See* Borchers, *supra* note 9, at 37.

[55] *Id.*

[56] *Id.*

explained this apparent anomaly, and many commenters have referred to it as "dictum" even though the Due Process Clause is treated in the opinion as an essential element.[57]

For nearly 70 years the Court continued to apply these territorial principles in jurisdiction cases, making refinements while failing to offer clear guidance. "*Pennoyer* left the matter of whether there was a general constitutional limitation on the reach of state courts in splendid ambiguity," according to Borchers.[58] The early cases took a limited view of *Pennoyer* as only providing an avenue for challenge of a state's jurisdiction instead of dictating the rules of jurisdiction.[59]

Between 1906 and 1915, the Court shifted to a more expansive view of *Pennoyer* as "mean[ing] to render unconstitutional any state court assertion of personal jurisdiction beyond the territorial principles and allow a defendant to attack the judgment either intrastate or interstate."[60] By the time the Court heard *Riverside & Dan River Cotton Mills v. Menefee*[61] in 1915, this view had gained considerable ground. In *Menefee* a member of the board of directors of a Virginia company was served at his home in North Carolina.[62] North Carolina's jurisdictional rules allowed service of process on a director to confer jurisdiction on an out-of-state corporation, and the state courts upheld

[57] *Id.* at 38.

[58] *Id.* at 43.

[59] *See, e.g.*, Hart v. Sansom, 110 U.S. 151 (1884) (holding that constructive service on an out-of-state defendant was not adequate); Insurance Co. v. Bangs, 103 U.S. 435 (1880) (holding that state courts could formulate jurisdictional rules, including substituted service in *in personam* cases).

[60] *See* Borchers, *supra* note 9, at 39.

[61] 237 U.S. 189 (1915).

[62] *Id.* at 190.

jurisdiction.[63] The Supreme Court made clear that an expansive view of *Pennoyer* was now the rule when it struck down jurisdiction, despite the North Carolina courts having complied with North Carolina rules regarding out-of-state defendants.[64]

The notion of consent, which had been seen first in *Lafayette Insurance Co.*,[65] re-emerged in *Kane v. New Jersey*,[66] as "implied consent." New Jersey was in the practice of requiring out-of-state drivers to sign forms consenting to jurisdiction at the state line before being permitted to drive in the state, which the Supreme Court upheld.[67] In *Hess v. Pawkloski*,[68] the Court extended the consent doctrine to include driving in Massachusetts – without signing a form – which was sufficient under that state's law.[69] These consent cases, rooted in the territorial principles of *Pennoyer*, set the stage for a dramatic remaking of jurisdiction doctrine.

Minimum Contacts: *International Shoe* and Beyond

In *International Shoe v. Washington*,[70] the Court began a long process of reframing personal jurisdiction by focusing on the contacts a defendant has with a forum and the degree of "presence."[71] The case arose out of a dispute between a

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[63] *Id.*

[64] *Id.* at 191-92

[65] Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404 (1855).

[66] 242 U.S. 160 (1919).

[67] *Id.*

[68] 274 U.S. 352 (1927).

[69] *Id.*

[70] 326 U.S. 310 (1945).

[71] *Id.* at 315.

Delaware corporation, with its principal place of business in St. Louis, Mo., and the state of Washington.[72] Washington had a law requiring companies that operated in the state to contribute to an unemployment compensation fund.[73] The state was attempting to collect from International Shoe Company and filed suit in state court.[74] It then served one of International Shoe's salesmen who worked in Washington and mailed a copy to the company's registered agent in Missouri.[75] The company appeared in the Washington proceedings, challenged the service as improper and argued that it was not a Washington company doing business within the state.[76]

The company had no offices or manufacturing facilities in the state.[77] For a limited period of time it had employed about one dozen traveling salesmen who lived in Washington and had little authority to do more than transmit orders back to St. Louis.[78] The salesmen only carried samples with them and did not have inventory to sell,[79] and they had no authority to enter into any contracts on behalf of the company.[80]

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[72] *Id.* at 311-12.

[73] *Id.* at 311.

[74] *Id.* at 312.

[75] *Id.* at 313.

[76] *Id.* at 313.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 314.

The question before the Court was whether service of a salesman in such circumstances was adequate under *in personam* principles to assert jurisdiction over the corporation. Since corporations are a legal fiction, the Court began to focus on what corporate "presence" means.[81] The *International Shoe* Court called for an inquiry into whether the defendant "has certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[82] The court weighed such factors as whether the corporation had "systematic and continuous" activities within the state and whether it conducted activities to such an extent that it "enjoys the benefits and protection of the laws of that state" in determining that Washington did have jurisdiction over International Shoe.[83]

The Court's next foray into jurisdiction did not deal with minimum contacts but is notable for its treatment of *in personam* and *in rem* jurisdiction. In *Mullane v. Central Hanover Bank & Trust*,[84] the Court called them "elusive and confused" and signaled the end for both as the basis of jurisdiction. Instead two new concepts rooted in *International Shoe* began to emerge: specific personal jurisdiction and general jurisdiction. The concept that would later be known as "specific personal jurisdiction" was first described in *Travelers Health Association v. Virginia*,[85] a case in which the Court held that the connection between the insurance company's

[81] *Id.* at 317.

[82] *Id.* at 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[83] *Id.* at 319-20.

[84] 339 U.S. 306 (1950).

[85] 339 U.S. 643 (1950).

contacts with Virginia and the state's interest in regulating insurance were adequate to create jurisdiction.[86]

General jurisdiction emerged in *Perkins v. Benguet Consolidated Mining Co.*[87] where the Court found that Ohio had jurisdiction over a foreign corporation with a base in Ohio for all intents and purposes.[88] The company's operations were primarily in the Philippines, but its headquarters had moved to Ohio during World War II because of the Japanese invasion of the islands.[89] The Court evaluated the company's "continuous and systematic corporate activities" in Ohio and found them sufficient to make it fair and reasonable to subject the company to jurisdiction there.[90]

The Introduction of Purposeful Availment

The Court began, in earnest, its refinement of the minimum contacts test in *Hanson v. Denckla*.[91] In *Hanson* the defendant was a Delaware trust company that was trying to avoid jurisdiction in Florida. It had never solicited any clients there, and its only contacts were with a trust settlor who had moved from Pennsylvania to Florida after the trust had been established.[92] Because the trust company's only contacts with Florida were the result of the settlor's unilateral decision to move there, the Court found that company had not "purposefully avail[ed]" itself of the laws of

[86] *Id.* at 648.

[87] 342 U.S. 437 (1952).

[88] *Id*. at 445.

[89] *Id*. at 445-48.

[90] *Id.* at 445.

[91] 357 U.S. 235 (1958).

[92] *Id.* at 253.

Florida and should not have to go to court there: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[93] *Hanson* thereby introduced "purposeful availment" into the minimum contacts equation.

Personal jurisdiction stayed out of the Court's crosshairs for nearly 20 years before it stepped back into the line of fire with *Shaffer v. Heitner*.[94] *Shaffer* focused on a holdover from *Pennoyer* called *quasi-in-rem* jurisdiction. With *in rem* jurisdiction the property creating jurisdiction is also the object of the action. With *quasi-in-rem* jurisdiction the property is somehow related but not the focus of the action. *Shaffer* was a *quasi-in-rem* case that started as a shareholder derivative lawsuit in Delaware against a Delaware corporation and 28 members of the company's board of directors.[95] The plaintiff sought an order barring the sale of stock held by the directors, most of whom were not Delaware residents, since under state law the stock of Delaware corporations is "located" in the state.[96] The *Shaffer* Court found that Delaware's exertion of *quasi-in-rem* jurisdiction could not be justified unless the defendants met the same minimum contacts test required for other forms of jurisdiction,[97] essentially merging the concept of *quasi-in-rem* jurisdiction with personal jurisdiction in practice.

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[93] *Id.*

[94] 433 U.S. 186 (1977).

[95] *Id.* at 189.

[96] *Id.*

[97] *Id.* at 207.

That refinement of the minimum contacts test continued with *World-Wide Volkswagen v. Woodson* in 1980.[98] The Supreme Court explained that *International Shoe*'s minimum contacts requirement has two functions.[99] The first is protecting a defendant from having to go to court in a "distant or inconvenient forum."[100] The second is protecting federalism by preventing states from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[101] Citing *Hanson*,[102] the Court explained that the question wasn't whether the defendant could foresee *any contact* with a particular forum but whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[103] It also stated that the foreseeability test is met when a corporation "purposefully avails itself of the privilege of conducting activities within the forum State."[104]

Calder v. Jones: *Creation of the "Effects" Test*

The Court then took an unexplained turn in its jurisdiction analysis in a defamation case over an article published in the *National Enquirer*. In *Calder v.*

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[98] 444 U.S. 286 (1980) *World-Wide Volkswagen* involved claims against a German car manufacturer's American subsidiary and a dealership, both based in New York. The plaintiff filed suit in Oklahoma, where the car had malfunctioned causing an accident. Neither the dealership nor the manufacturer had any contacts with Oklahoma. *Id.*

[99] *Id.* at 292.

[100] *Id.*

[101] *Id.* at 291-92.

[102] 357 U.S. 235 (1958).

[103] *World-Wide Volkswagen*, 444 U.S. at 297.

[104] *Id.*

Jones,[105] which followed *World-Wide Volkswagen* by only four years, the question of purposeful availment was never broached.[106] Instead the Court focused on the defendants' — both Florida residents — knowledge that the article would cause the "brunt of the harm" to the plaintiff in California.[107] Rather than apply the purposeful availment standard the Court had developed in its previous jurisdiction cases, it crafted a new standard under which jurisdiction can be asserted if the plaintiff can show that the forum state was both the focal point of the act and the place where the harm was suffered.[108] The court also introduced "express aiming" into the analysis of whether the defendants' conduct was targeting the forum state:

> [P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the state in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.[109]

The Court did conduct a minimum contacts analysis in *Keeton v. Hustler Magazine*, a companion case to *Calder* that also involved a defamation claim.[110] In

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[105] 465 U.S. 783 (1984).

[106] Redish describes this as "depart[ing] dramatically from the logic of the purposeful availment standard." Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 584 (1998).

[107] *Calder*, 465 U.S. at 789. The defendants in *Calder* included a reporter and editor, being sued as individuals, who had participated in the publication of an article about a California actress. The reporter had made some phone calls and at least one trip to California to report the story. The editor had no contacts with California that were directly related to publication of the article.

[108] *Id.* at 788-89.

[109] *Id.* at 789-90 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 (1980)).

[110] 465 U.S. 770 (1984).

Keeton, the Court found the magazine's monthly circulation of 10,000 to 15,000 copies in the forum state, New Hampshire, was adequate to meet the Due Process Clause of the Fourteenth Amendment's minimum contacts requirements. "Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous."[111]

The primary factual difference between *Keeton* and *Calder* was the identity of the defendants seeking to escape another state's jurisdiction. In *Keeton* the defendant was the corporation that published the magazine while in *Calder* the defendants were the reporter and editor who prepared the allegedly defamatory story for publication. Yet the Court's ruling in *Keeton* is more in tune with the *World-Wide Volkswagen* line of cases than *Calder* because it focuses on whether *Hustler* magazine purposefully availed itself of the laws of New Hampshire by circulating more than 10,000 copies there.[112] The *Calder* defendants likened themselves to the welders on a boiler in Florida that later exploded in California and argued that they shouldn't individually be subject to jurisdiction since they did not control where the article would end up.[113] The Court flatly rejected this foreseeability argument on the grounds that the defendants knew the actress-plaintiff lived and worked in California and that the newspaper had a large circulation there.[114]

Another important element of *Calder* is how the Court treated the argument that granting jurisdiction in defamation cases before conducting a First Amendment

[111] *Id.* at 774.

[112] *Id*.

[113] *Calder*, 465 U.S. at 789.

[114] *Id.* at 790.

analysis has a potentially chilling effect on speech. In dictum, the Court flatly rejected a call for First Amendment analysis at the jurisdiction stage:[115]

> The infusion of such considerations would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected *First Amendment* activity stemming from libel and defamation cases is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting.[116]

Because *Calder* involved a defamation case in which the authors of an allegedly defamatory article had few physical or business contacts with the forum, it will become particularly important in Internet defamation cases.[117] While some commenters have looked approvingly on the use of *Calder*'s effects test in intentional tort cases,[118] others have considered it to be too limiting,[119] and it has resulted in a

[115] *Id.* at 790-91.

[116] *Id.* at 790 (citations omitted, emphasis in original).

[117] *See generally* Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010) (relying on *Calder* to find jurisdiction in an Internet defamation case); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (reformulating *Calder* into a targeting test); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) (relying partially on *Calder*).

[118] *See* Rachael T. Krueger, Comment, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements*, 51 CATH. U. L. REV. 301, 309 (2001) ("*Calder* stands as a useful, analytical method for courts navigating through on-line defamation cases").

[119] *See* Scott Fruehwald, *The Boundary of Personal Jurisdiction: The "Effects Test" and the Protection of Crazy Horse's Name,* 38 J. MARSHALL L. REV. 381 (2004). Prof. Fruehwald argues that the "effects test" in its present form is too limiting in libel cases, making the case that a "significant harm" standard should replace the "brunt of the harm" standard that *Calder* calls for: "Jurisdiction over the defendant in a libel case should be proper in plaintiff's home state when significant harm is felt by the plaintiff in his or her home state. In such a case, the defendant has purposefully made a connection with the state, thereby satisfying due process requirements." *Id.* at 430. Fruehwald also argues that "the forum should not have to be the focal point of the intentional conduct" because it could be targeted at more than one state. *Id.* at 431. *See also* David Wille, *Personal Jurisdiction and the Internet – Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95 (1998). Prof. Wille similarly argues for a much more lenient "significant effects" test than the current *Calder* standard. *Id.* at 114.

great deal of confusion about when it should be applied.[120] Floyd and Baradaran-Robison in their research found that courts struggle with understanding the relationship between *Calder* and the purposeful availment cases.[121]

Return to Purposeful Availment

The Court returned to the purposeful availment framework in *Burger King Corp. v. Rudzewicz*,[122] a contract dispute case between Burger King and its franchisees. The Court applied the *World-Wide Volkswagen* framework but added a new wrinkle — directed conduct.[123] The Court held that specific jurisdiction could be asserted over an out-of-state defendant when the subject had "fair warning" because "the defendant has 'purposefully directed' his activities at residents of the forum."[124] It did not make jurisdiction automatic even when a plaintiff could show that a defendant engaged in targeted conduct toward a jurisdiction:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. . . . Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.[125]

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[120] C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L. J. 601, 612 (2006).

[121] *Id.* at 612.

[122] 471 U.S. 462 (1985).

[123] *Id.* at 471-72.

[124] *Id.* at 472 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

[125] *Id.* at 477-78 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980)).

The Court's only acknowledgement of *Calder* was not for the effects test but as support for propositions more directly rooted in *Keeton*.[126]

There is another important piece to the Court's personal jurisdiction cases that should be noted. In one of its most recent jurisdiction decisions, *Asahi Metal Industry Co. v. Superior Court*,[127] the Court divided on the question of whether awareness that an item placed into the "stream of commerce" could end up in a specific forum farther down the line is adequate to establish jurisdiction even if there are no other contacts with the forum. Asahi Metal Industry, a Japanese manufacturer of tire valve stems, challenged jurisdiction because the company had no California business. It sold its parts to a Taiwanese company.[128] The Taiwanese company claimed that Asahi knew the valve stems would end up in California.[129] The justices agreed that jurisdiction would be improper because of the burden litigation in California would place on the Japanese defendant.[130]

Yet, the Court split on the stream of commerce question. In a plurality opinion written by Justice O'Connor, four justices found that "mere awareness" a product

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[126] *Id.* at 473. For example, the Court cited *Calder* as a second authority supporting *Keeton*'s proposition that "a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting from an allegedly defamatory story." *Id.* at 473. It also cited *Calder* to support *Keeton*'s notion that an absence of physical contacts does not defeat personal jurisdiction if a "commercial actor's efforts are 'purposefully directed'" toward residents of another state. *Id.* at 476. And the Court cited *Calder* as supporting the argument that in some circumstances a lesser amount of minimum contacts can satisfy reasonableness when factors such as the burden on the defendant being in the forum, the interest of the plaintiff in having a convenient forum, judicial efficiency and the interests of shared social policies among states are taken into account. *Id.* at 477.

[127] 480 U.S. 102 (1987).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 116.

could end up in a particular forum once it was placed into the stream of commerce was inadequate to find purposeful availment.[131] "Something more" is required.[132] Four justices found that Asahi's contacts with California were sufficient to meet the purposeful availment standard based on its placing the tire valve stem into the stream of commerce and its awareness that the valve stem eventually would end up in California.[133] Justice Stevens concurred in the judgment but wrote that the purposeful availment question did not need to be reached since the justices agreed that exercising jurisdiction over a foreign corporation under the *Asahi* facts would be unreasonable.[134] It was perhaps significant that the American parties had all settled by the time the jurisdictional dispute reached the Supreme Court and all that was left was a dispute between two foreign corporations with few ties to California.

The Court's next personal jurisdiction case, *Burnham v. Superior Court*,[135] involved a long-accepted practice known as "tagging" or "transient jurisdiction," which is service of process while a defendant is temporarily in the jurisdiction on an unrelated matter, such as on a vacation or even a layover at the airport.[136] While the

[131] *Id.* at 105.

[132] *Id.* at 111. The plurality offered no definition of what the "something more" might be.

[133] *Id.* at 121 (1987) (Brennan, J., concurring in part and in the judgment).

[134] *Id.* at 122 (1987) (Stevens, J., concurring in the judgment). Stevens also argued that the purposeful availment question should not turn on "mere awareness" that a product would end up in a particular forum. Rather, additional factors should be taken into account, including the volume of a particular product that eventually made its way into the forum. *Id.*

[135] 495 U.S. 604 (1990).

[136] *Id.* at 607.

Court unanimously upheld the California court's assertion of authority[137] the reasoning was splintered, resulting in a plurality opinion and three concurrences.

The defendant in *Burnham* and his wife were in the process of divorcing.[138] At the time of their separation the couple lived in New Jersey and agreed that the wife could take custody of the children and move to California.[139] The husband was to file for divorce in New Jersey citing "irreconcilable differences," but after his wife moved to California he filed for divorce citing "desertion."[140] At the end of a brief trip to California that included a visit with his children, the husband was served with a divorce petition filed there by the wife.[141]

Justice Scalia announced the Court's decision and argued that jurisdiction over those present in a state is "[a]mong the most firmly rooted principles of personal jurisdiction in American tradition."[142] Once such jurisdiction is obtained, it is retained even if the person leaves the state.[143] Justice Brennan argued the position that while the historical acceptance of "transient jurisdiction" is an important factor, an "independent inquiry into the . . . fairness of the prevailing in-state service rule"

[137] *Id.* at 606.

[138] *Id.* at 607.

[139] *Id.*

[140] *Id.* at 607-08.

[141] *Id.* at 608.

[142] *Id.* at 610. (Justice Scalia's position was joined entirely by Chief Justice Rehnquist and Justice Kennedy. Justice White joined in part).

[143] *Id.*

should be undertaken.[144] Justices White[145] and Stevens[146] each wrote brief concurrences, as well.

Lastly, two personal jurisdiction cases were decided by the Court in 2011, marking the first time since *Burnham* that the justices took up a personal jurisdiction case. Neither arose out of an Internet dispute, and both dealt with "stream of commerce" questions left open by *Asahi*. In *J. McIntyre Machinery Ltd. v. Nicastro*[147] the Court wrestled with the question of whether a foreign corporation targeting the United States as a whole with a product is sufficient, consistent with due process limits, to create personal jurisdiction in a forum state where the product was sold.[148] The Court majority adopted Justice O'Connor's interpretation of Asahi that something more than merely placing a product in the stream of commerce was required.[149] In *Goodyear Luxembourg Tires SA v. Brown*[150] the Court considered whether placement of a product into the stream of commerce by other actors, with the knowledge of a foreign corporation, should confer general jurisdiction when that

[144] *Id.* at 628-29. (Brennan, J., concurring in the judgment) (Justices Blackmun, O'Connor and Marshall joined Brennan's opinion.)

[145] *Id.* at 628 (White, J., concurring in the judgment) ("The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment.")

[146] *Id.* at 640 (Stevens, J., concurring in the judgment) ("For me, it is sufficient to note that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case.")

[147] No. 09-1343, slip op. (U.S. Jun. 27, 2011).

[148] *Id.*

[149] *Id.*

[150] No. 10-76 (argued Jan. 11, 2011).

product ends up in a particular forum.[151] In *Brown*, the plaintiff's son had died in a bus accident in Paris, France that was caused by a tire failure.[152] The plaintiffs sought jurisdiction in North Carolina, where the defendants tires were sold with the company's knowledge by third-party distributors.[153] The court found the stream of commerce doctrine inadequate to confer general jurisdiction.[154] Both cases served to answer fairly narrow jurisdiction questions that had been left open by Asahi and neither is likely to have an effect on defamation claims arising from Internet speech.

Conclusion

The Supreme Court's early jurisdiction cases provide a context for the principles that continue to be applied in disputes involving out-of-state defendants. The basic territorial principle, while no longer the rule, still informs the decisions of courts that choose not to exercise jurisdiction over out-of-state defendants. Yet it's also easy to see why strict adherence to the rule would not make sense in our modern society. With the ease of travel and technological advances that make doing business and communicating across territorial boundaries easy, avoiding jurisdiction for actual harms committed elsewhere would be simple. In the Internet defamation context, the only available forum to a victim would be wherever the defamer lives.

The cases developed in the minimum contacts era provide the necessary framework for understanding lower courts' decisions in Internet defamation cases. They also help highlight why lower courts struggle to choose which standard is most

[151] Goodyear Luxemburg Tires, SA v. Brown, No. 10-76, slip op. (U.S. Jun. 27, 2011).

[152] *Id.*

[153] *Id.*

[154] *Id.*

appropriate. The Court has outlined two seemingly irreconcilable standards for determining jurisdiction: the purposeful availment line of cases that focuses on the defendant's actual contacts with the forum and the *Calder* effects test that focuses on the defendant's knowledge of where the plaintiff would feel the brunt of the harm. In announcing the latter standard, the Court was not clear on when it should apply, leaving open the question of whether it is a defamation-only standard, an intentional tort standard, or something else. Because none of these decisions were reached after the Internet became an ever-present tool in society, their principles aren't informed by the ways in which modern interactions occur. Thus, determining how to apply those principles to Internet interactions has become the task of lower courts and is the focus of the following chapters.

Chapter 3

The Application of *Calder*'s Effects Test to Internet Defamation Cases

In *Calder v. Jones*,[1] the U.S. Supreme Court introduced a new formulation for minimum contacts in a defamation case.[2] Instead of focusing on the physical contacts the two defendants had with the forum, the court turned to the defendants' knowledge that their actions would harm the plaintiff – an actress – in California and that she was a resident of California:

> [T]hey knew that the brunt of that injury would be felt by respondent in the state in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article."[3]

The Court did not ignore traditional contacts outright. It noted that the publication, the *National Enquirer*, circulated more copies in California than in any other state and that the circulation there was quite large: 600,000.[4]

The defendants who were challenging jurisdiction in *Calder* were the individual editor and reporter who had worked on the story.[5] Using the pre-*Calder* jurisdiction framework might not have resulted in those two defendants facing

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[1] 465 U.S. 783 (1984).

[2] *See supra* Chapter 2, Part III.

[3] *Calder*, 465 U.S. at 789-90 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 (1980)).

[4] *Id.*

[5] *Id.* at 785.

jurisdiction in California, though, because they each had limited contacts with the state and the defamation claim did not arise out of those contacts.[6] So the Court announced this new "effects" test that conferred jurisdiction when an intentional, tortious act is directed into the forum state and the actors know that the "brunt of th[e] injury" will be felt by the victim in the forum.[7]

This framework has proved attractive to courts wrestling with jurisdiction in Internet defamation cases. Many have considered *Calder* the appropriate guideline because it is a defamation case. Others find it useful in any intentional tort situation where an out-of-state act results in harm to a state resident. But *Calder* does not provide clear guidelines for how its express aiming element is to be applied. It also does not clarify whether the defendant must only know that the plaintiff is a resident of a particular forum and will suffer harm there or whether there must also be an intent to target the forum in addition to an intent to target the individual who lives there. With that confusion, lower courts have come to varying conclusions about how to apply *Calder* in Internet defamation cases.

Calder was discussed in 27 state and federal appellate cases decided between 1997 and 2010 where jurisdiction in Internet defamation was at issue. Those cases can be placed into four broad categories, each of which will be addressed in a different part of this chapter. The first part discusses cases in which neither the plaintiff nor the defendant is a resident of the forum and the court must consider whether, under the effects test, a plaintiff could experience the "brunt of the harm" in that jurisdiction. The second part

[6] *Id.*

[7] *Id*. at 790.

deals with the cases in which courts adopted a narrow view of the "express aiming" and knowledge requirements of the effects test, thereby created a relatively high barrier for jurisdiction in Internet defamation cases. The cases in the third part are those in which courts took a broad view of the express aiming and knowledge requirements, making it easier for courts to assert jurisdiction in Internet defamation cases. The fourth part covers cases in which courts discussed *Calder* but declined to apply the effects test. The chapter concludes that the narrow view is more appropriate than a broad view because it hews more closely to the U.S. Supreme Court's intent in *Calder*.

Out-of-state Plaintiffs and Out-of-state Defendants

When both the plaintiff and the defendant are non-residents of the forum, courts appear reluctant to confer jurisdiction based on an application of the *Calder* effects test. But there is room for an out-of-state plaintiff to show that the brunt of the injury was felt in the forum and that the defendant intended to target the forum. The cases involving non-resident plaintiffs and defendants include both broad and narrow views of the "express aiming" element, but because the plaintiff's burden of showing the brunt of the injury was felt in a state in which he does not reside is considerably heavier, these cases have been grouped together.

In *Jewish Defense Organization, Inc. v. Superior Court*[8] the California Court of Appeal relied heavily on the *Calder* effects test in its determination that it did not have jurisdiction over a New York-based defendant. The case was the first of a series brought in California courts by New York private investigator Steve Rambam against various website owners from places outside California. In *Jewish Defense Organization*, the

[8] 72 Cal. App. 4th 1045 (1999).

defendants were a New York activist group and its primary leader, Mordechai Levy, who had a long history with the investigator.[9] Rambam had been hired in 1989 to serve process on Levy in New York for a different lawsuit.[10] Levy shot at Rambam but missed and injured a bystander.[11] Levy later created a website that included allegations Rambam was a "snitch" and government informant, admired Nazis and was anti-Semitic.[12] Rambam sued in California, arguing that courts there had jurisdiction over Levy because a "mirror" of Levy's website was housed on servers in California.[13] A "mirror" site on the Internet is one that contains identical content as the main website although it is housed in a different location.

The court quickly rejected any theories of jurisdiction based on the mirror website, which was maintained by a third party who was not a defendant in the case.[14] It then engaged in a two-part jurisdictional analysis to determine if specific jurisdiction existed. First it applied what it called "the case law which has developed in defamation cases"[15] rooted in *Calder v. Jones*.[16] Then it turned to Internet jurisdiction cases and

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[9] *Id.* at 1051-54.

[10] *Id.* at 1051.

[11] *Id.*

[12] *Id.* at 1050.

[13] *Id.* at 1053. Rambam also claimed that Levy owned property and a business in California. He presented public records connected to land and a service station owned by a Mordechai Levy, but the trial court was not satisfied these were owned by the same Mordechai Levy as the defendant in this case in part because they had different Social Security numbers. *Id.*

[14] *Id.*

[15] *Id.*at 1056.

[16] 465 U.S. 783, 790-91(1984); *Id.* at 1057.

applied *Zippo Manufacturing Inc. v. Zippo Dot Com*.[17] How the *Jewish Defense Organization* court applied *Zippo* will be discussed more thoroughly in Chapter 4.

The California Court of Appeal found that *Calder*'s effects test could be used to satisfy the purposeful availment requirements of due process and then relied on the Ninth Circuit's reformulation of the test in *Panavision International, L.P. v. Toeppen*[18] as its guide.[19] "Under *Calder*, personal jurisdiction can be based upon: (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state."[20] Under this formulation of the effects test, which takes a narrow view of the express aiming element, the court found it fairly easy to conclude that California did not have jurisdiction because Rambam had not shown that he would feel the brunt of the harm there.[21]

Rambam, who was not a California resident, had provided evidence that he "spent considerable professional time" there but had not shown that he had clients there or established that his reputation would be harmed there.[22] The court noted that it did not need to wade into the discussion among the federal circuit courts about the meaning of

[17] 952 F. Supp. 1119 (W.D. Pa. 1997).

[18] 141 F.3d 1316 (9th Cir. 1998).

[19] *Jewish Defense Org.*, 72 Cal. App. 4th at 1057.

[20] *Id.*

[21] *Id.* at 1059.

[22] *Id.* The court also found jurisdiction lacking under the *Zippo* standard, which will be discussed in Chapter 4, because the website was "passive." *Id.* at 1057.

the "express aiming" element of *Calder* because Rambam had not been able to show the harm would be felt in California.[23]

The Appellate Division of the Superior Court of New Jersey in *Blakey v. Continental Airlines*[24] considered *Calder* but also relied heavily on its companion case, *Keeton v. Hustler Magazine*.[25] In *Keeton*, the U.S. Supreme Court found personal jurisdiction was appropriately exerted in New Hampshire over a magazine with a circulation of more than 10,000 copies in the state that had employees whose job was to oversee distribution there.[26] The *Keeton* Court performed a purposeful availment analysis based on forum contacts, instead of using the just-announced effects test, to find the magazine was subject to jurisdiction there.[27] The *Blakey* appellate court noted that in both *Keeton* and *Calder* there were "continuously and deliberately directed" comments into the forum.[28] Ultimately, though, the effects test played a greater role in the court's decision. It adopted the trial court's interpretation of appropriate jurisdiction in Internet defamation cases, which was heavily influenced by *Calder* and contained a narrow view of the express aiming element:

> We concur with Judge Fuentes' synthesis of the current state of the law: "The common thread that runs through each of the reported decisions is that non-resident defendants may be subject to personal jurisdiction solely on the basis of their electronic contacts when they specifically direct their

[23] *Id.* "In the instant case, we need not resolve any conflict among the federal circuits; Rambam has not even established that his residence or principal place of business is in California, so the purposeful availment prong of the special jurisdiction issue is not satisfied on that ground." *Id.*

[24] 730 A.2d 854 (N.J. Super. Ct. App. Div. 1999), *rev'd*, 751 A.2d 538 (N.J. 2000).

[25] 465 U.S. 770 (1984).

[26] *Id.* at 774.

[27] *Id.*

[28] *Blakey*, 730 A.2d at 867.

> activities at the forum, the plaintiff is a resident of the forum, and the brunt of the injury is felt in the forum state."[29]

The court found jurisdiction inappropriate because *Blakey* arose out of comments on a limited-access bulletin board operated by Continental Airlines for its employees, neither the individual defendants nor the plaintiff — all employees of the airline — were New Jersey residents, and there were no systematic or continuous contacts with New Jersey on the part of the individuals who made the allegedly defamatory comments.[30] The plaintiff's own contacts with New Jersey made assertion of jurisdiction in New Jersey over other out-of-state actors too attenuated.

The New Jersey Supreme Court reversed by focusing on the facts of the case and *Calder*'s indication that the forum where a plaintiff feels the "brunt of the harm" will have jurisdiction if there is targeting of that locale.[31] That the plaintiff was a resident of Washington state was relevant to whether the "brunt of the harm" would be felt in New Jersey, but it was not determinative, the New Jersey Supreme Court wrote.[32] The plaintiff had filed a sexual harassment case against the airline, and the case was pending in a New Jersey federal court when other pilots began commenting about her in the employee forum.[33] She then filed the subsequent defamation lawsuit against those employees in state court.[34]

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[29] *Id*. at 864.

[30] *Id.* at 867.

[31] Blakely v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000).

[32] *Id.* at 556.

[33] *Id.* at 555.

[34] *Id.*

Because her sexual harassment case was pending in New Jersey when the allegedly tortious conduct of the individual defendants began, the court found that jurisdiction might be appropriate when applying the effects test.[35] "Because defamation was alleged to be part of the harassing conduct that took place on the Crew Members Forum, it would be fair to posit jurisdiction where the effects of the harassment were intended to be felt. The center of gravity of this employment dispute was in Newark, New Jersey."[36] The court remanded the case for additional discovery to determine whether the individual defendants knew that the plaintiff had a sexual harassment case pending in New Jersey.[37] By finding it necessary for the trial court to determine whether the defendants knew that the harassment case was pending, the court asked the trial court implicitly to determine whether the defendants knew that the brunt of the harm caused by their online taunts was to be felt in New Jersey.

The California Court of Appeal revisited jurisdiction in Internet defamation cases in *Nam Tai Electronics v. Titzer*.[38] Neither the plaintiff, Nam Tai Electronics, nor the defendant was a California resident.[39] The company was incorporated in the British Virgin Islands and based in Hong Kong.[40] Titzer was a Colorado resident who had posted

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[35] *Id.* at 556.

[36] *Id.*

[37] *Id.* at 558.

[38] 93 Cal. App. 4th 1301 (2001), *overruled in part by* Pavlovich v. Superior Court, 29 Cal. 4th 262 (2002). *Pavlovich* was a trade secrets case in which the court applied the *Calder* effects test to determine whether the state had jurisdiction over a Texas defendant. *Pavlovich*, 29 Cal. 4th at 266-67.

[39] *Nam Tai Elec*., 93 Cal. App. 4th at 1305.

[40] *Id.*

numerous messages about Nam Tai on a Yahoo! message board.[41] Nam Tai sued in California on the theory that jurisdiction was appropriate there because Yahoo! was based there and its terms of service with users stated that California law would govern disputes.[42] The court quickly dispensed with the terms of service argument since the agreement is between the user and Yahoo!, not a third-party.[43] It then focused on the messages to determine whether they provided sufficient minimum contacts to warrant jurisdiction.

Following the same logic it used in *Jewish Defense Organization*, the court found no evidence that the messages were directed at California or that the plaintiff suffered any reputational damage there.[44] "The determinative question is whether the Web sites themselves are of particular significance to California or Californians such that the user has reason to know the posting of a message will have significant impact in this state."[45] The court found the answer to that question was no. [46]

In another case involving Steve Rambam – the plaintiff in *Jewish Defense Organization* – the California Court of Appeal again analyzed jurisdiction in a claim of Internet defamation.[47] The case, *Rambam (Rambam I) v. Luhta*,[48] really was based on

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 1312.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Rambam v. Luhta, 2001 Cal. App. Unpub. LEXIS 1143 (2001).

[48] *Id.*

email rather than a publicly accessible website although the court described it as though it were a website case and applied the same standards as it had in *Jewish Defense Organization* and *Nam Tai Electronics*.[49] For similar reasons, the *Rambam I* court, in an unpublished decision, found jurisdiction lacking. Neither Rambam nor the defendant, a Canadian, was a California resident, and the plaintiff had not shown that the harm would be felt there.[50] In a third case, *Rambam (Rambam II) v. Prytulak*,[51] another unpublished decision involving the same plaintiff and nearly identical facts, the court followed its earlier decisions in *Rambam I* and *Jewish Defense Organization*. The only significant difference between *Rambam I* and *Rambam II* was that the latter came up as a collateral attack on a default judgment.[52]

The California Court of Appeal again dealt with an Internet defamation claim involving a foreign defendant in *Nygard v. Aller Jukaisut Oy*,[53] also an unpublished decision. The plaintiff in *Nygard* was a Finnish national who was the chairman of a Canada-based fashion company and occasionally spent time at a corporate guest house in the Los Angeles area.[54] The defendant was a Finnish magazine publisher that also puts articles on its website.[55] After determining that the publisher did not have enough contacts with California for general jurisdiction, the court turned to the specific personal

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[49] *Id.* at 1143, *12-19

[50] *Id.*

[51] 2004 Cal. App. Unpub. LEXIS 12 (2004).

[52] *Id.*

[53] 2005 Cal. App. Unpub. LEXIS 1375 (2005).

[54] *Id.* at 1375, *2

[55] *Id.*

jurisdiction question using the *Calder* effects test.[56] Following the same logic it did in *Nam Tai Electronics*, as well as the three cases involving Steve Rambam, the court found that jurisdiction in California could not be sustained.[57] There was no evidence that posting of the allegedly defamatory story – in the Finnish language – was intentionally targeted at California or that the plaintiff felt the brunt of the harm there.[58]

These cases seem to stand for the principle that an out-of-state plaintiff faces a high barrier to gaining jurisdiction over an out-of-state defendant by relying on the effects test, but that jurisdiction is not closed off entirely. The California cases involving Steve Rambam indicate that a plaintiff must establish that his reputation will suffer its greatest harm in that jurisdiction. That can be done by showing that the plaintiff conducts most of his business in that state and is regularly present in the state as a non-resident. And the *Blakely* case shows that in specific circumstances, such as having a pending sexual harassment case against a national corporation in the forum, an out-of-state plaintiff may be able to show that the brunt of the injury will be felt there.

The Narrow View of Express Aiming and Knowledge

Courts appear to take two divergent views on how the *Calder* effects test applies. The first is a narrow application of the express aiming and knowledge requirements. In this interpretation a plaintiff typically must show that the defendant: 1) expressly aimed his conduct at the forum; and 2) had knowledge that the plaintiff was both a resident of the state and would likely feel the brunt of the harm in that state. The second, broad view

[56] *Id.*

[57] *Id.* at 1375 *27.

[58] *Id.*

will be discussed in part three, but it seems to require only that the defendant knew the defendant was a resident of the forum because knowledge of residency will likely fulfill the targeting requirement. The key difference appears to be that courts applying the narrow approach require some showing that defendant targeted an audience in the forum, not just the plaintiff who happens to live in the forum, while courts applying the broad approach will frequently be satisfied that targeting has occurred when there is evidence that the defendant knew where the plaintiff lived.

Rejecting jurisdiction under the narrow view

In the first Internet defamation jurisdiction case to make its way through the Minnesota courts, *Griffis v. Luban,*[59] the Minnesota Supreme Court took a narrow view of the effects test after reversing a court of appeals decision that approached it broadly. The appeals court decision will be discussed briefly before the state supreme court's pronouncement. *Griffis v. Luban*[60] came to the Minnesota Court of Appeals as a collateral attack on an Alabama libel judgment.[61] The plaintiff in *Griffis* was an adjunct instructor at the University of Alabama at Birmingham who taught non-credit courses in ancient Egyptian history and culture.[62] She and the defendant were both members of an Internet newsgroup devoted to archeology.[63] The defendant, a Minnesota resident, posted a series of messages questioning the plaintiff's credentials and truthfulness.[64] The plaintiff sued

[59] 646 N.W.2d 527 (Minn. 2002).

[60] 633 N.W.2d 548 (Minn. Ct. App. 2001), *rev'd*, 646 N.W.2d 527 (Minn. 2002).

[61] *Id.* at 549.

[62] *Id.*

[63] *Id*. at 550.

[64] *Id.*

for defamation in Alabama and won a $25,000 default judgment.[65] When she tried to enforce the judgment in Minnesota, the defendant attacked the Alabama court's exertion of jurisdiction.[66] The Minnesota trial court found that Alabama had jurisdiction, and the defendant appealed.[67]

The Minnesota appellate court first found that Alabama's long-arm rule allowed jurisdiction to the full extent of due process and then said it would apply the *Calder* effects test to determine whether sufficient minimum contacts existed to exert jurisdiction.[68] The court did not clearly define the effects test, instead it paraphrased the test in a way that required reasonable anticipation that the state could exert jurisdiction over the defendant and that the "brunt of the injury" would be felt there.[69] In applying the effects test this way the court focused on two factors: 1) the defendant's knowledge that Alabama was where the plaintiff lived and 2) the defendant's repeated postings about the plaintiff even after being threatened with legal action.[70] The court considered the repeated postings after receiving a warning letter from an Alabama attorney as knowledge that the messages were causing harm in Alabama and adequate to satisfy due process.[71]

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 551-52.

[69] *Id.* at 552.

[70] *Id.* at 553-53.

[71] *Id.*

The Minnesota Supreme Court reversed.[72] After an extensive discussion of the *Calder* facts, the court adopted a version of the effects test previously announced by the Third Circuit Court of Appeals in *Imo Industries, Inc. v. Kiekert*,[73] a tortious interference case. As the Minnesota court explained the *Imo Industries* version of the effects test, it has three prongs that the plaintiff must meet:

> (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff's injury; and (3) the defendant expressly aimed the tortious conduct at the forum such that forum state was the focal point of the tortious activity.[74]

This casting of the effects test requires the forum state to be the focal point of both the harm suffered and the tortious activity. It is not enough that the activity entered into the state. It must be targeted there, and that targeting implicitly includes the knowledge requirement described as a characteristic of the narrow view.

In applying this construction of the effects test, the *Griffis* court found that Alabama could not exert jurisdiction because it failed both the second and third prongs.[75] The plaintiff had not presented any evidence that any other Alabama residents, besides herself, had read the statements; thus she had not shown that Alabama was the focal point of her injury.[76] Similarly, there was no evidence that the messages had been targeted at Alabama.[77] While the defendant knew that the plaintiff was an Alabama resident, the

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[72] Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002).

[73] 155 F.3d 254 (3d Cir. 1998)

[74] *Griffis*, 646 N.W.2d at 534.

[75] *Id.* at 535.

[76] *Id.* at 536.

[77] *Id.*

messages made no mention of Alabama and were posted to an archeology newsgroup that had no specific connection to the state.[78]

The Fourth Circuit, in what may be a model approach for Internet defamation, took a somewhat different tack in *Young v. New Haven Advocate*.[79] *Young* involved claims of defamation on websites of out-of-state newspapers.[80] The plaintiff was a Virginia prison warden.[81] Two Connecticut newspapers – the *New Haven Advocate* and *The Hartford Courant* – published stories and columns about state prisoners who had been moved to prisons in Virginia in order to relieve prison overcrowding in Connecticut.[82] The *Advocate* article included claims that inmates at the prison warden Young ran, Wallens Ridge, were not given adequate medical care, lacked proper hygiene and were denied religious privileges.[83] The article also included a claim by a state senator that Young had Confederate memorabilia in his office.[84] The *Courant* columns did not mention Young by name but included allegations by Connecticut prisoners housed at Wallens Ridge that they had suffered cruelty at the hands of the prison guards.[85] The prison was described as a "cut-rate gulag."[86]

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[78] *Id.*

[79] 313 F.3d 256 (4th Cir. 2002)

[80] *Id.* at 258.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

Young brought libel claims against the newspapers, their reporters and editors in the U.S. District Court for the Western District of Virginia.[87] The district court found jurisdiction based on the Internet postings as contacts, and the Fourth Circuit allowed an interlocutory appeal.[88] The newspapers had some limited contacts with Virginia: the *Courant* had a small number of subscribers there, and journalists for both papers had made some phone calls to the state during their reporting.[89] The warden did not argue jurisdiction based on those contacts, so the Fourth Circuit's jurisdiction analysis was focused on whether the stories being posted on the Internet, and thus accessible in Virginia, were sufficient contacts to satisfy due process.[90]

The court relied on its own recent decision in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,[91] an Internet jurisdiction case involving a copyright claim, and *Calder*. The court noted, "*Calder*, though not an Internet case, has particular relevance here because it deals with personal jurisdiction in the context of a libel suit."[92] In *ALS Scan* the court had applied *Calder* and held that "specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [the forum] and causing injury that gives rise to a potential cognizable claim [there]."[93] The *ALS Scan*

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[87] *Id.*

[88] *Id.* at 260.

[89] *Id.* at 259-60. The Courant had eight subscribers in Virginia when the stories were printed. *Id.* at 260.

[90] *Id.* at 261-63.

[91] 293 F.3d 707 (4th Cir. 2002).

[92] *Young*, 313 F.3d at 262.

[93] *Id.* at 714.

court stated its interpretation of appropriate jurisdiction arising out of Internet contacts based on *Calder*'s effects test as follows:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.[94]

The *Young* court said that the plaintiff feeling the effects of libel in Virginia was insufficient to sustain jurisdiction on its own.[95] The plaintiff also needed to show that the defendants had directed their conduct at Virginia.[96] It further refined the *ALS Scan* test by requiring "[t]he newspaper must, through the Internet postings, manifest an intent to target and focus on Virginia readers."[97] Because Connecticut, not Virginia, was the focal point of the articles, the Fourth Circuit found that jurisdiction could not be sustained.[98] The *Young* court effectively required a showing of targeted or directed conduct at both the plaintiff and the forum in order to uphold jurisdiction.

Both the *Young* and the *Griffis* opinions would influence other courts. The first to consider either was Alabama, which followed *Griffis* closely in a quite similar case, *Novak v. Benn*.[99] *Novak* gave the Alabama Court of Civil Appeals its first chance to decide an Internet jurisdiction case. Like *Griffis*, *Novak* came to the court as a collateral

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[94] *Id*.

[95] *Young*, 313 F.3d at 262.

[96] *Id.*

[97] *Id.* at 263.

[98] *Id*. at 264.

[99] 896 So.2d 513 (Ala. Civ. App. 2004).

attack on a default judgment. The defamation suit, filed in Alabama, arose out of messages posted in a Compuserve forum for people who keep aquariums.[100] The plaintiff, John Benn, an attorney, accused the defendant of posting messages under a pseudonym that falsely claimed a complaint was pending against Benn at the Alabama state bar.[101] Novak initially contested the suit, having it removed to federal court and filing a counterclaim.[102] He apparently abandoned his claims and defense when the federal court remanded the case back to the state court, and Benn won a default judgment.[103]

On appeal, Novak attacked jurisdiction, arguing that he had insufficient contacts with Alabama to reasonably anticipate being haled into court there.[104] The court quoted extensively and favorably from *Griffis*, the Minnesota Supreme Court case with similar facts in which the court interpreted Alabama law, in its application of the effects test.[105] Like the Minnesota Supreme Court, the Alabama court relied on the three-pronged approach to the effects test outlined in *Imo Industries*.[106] The Alabama court found that nothing in the text of the allegedly libelous statements indicated an intent to target Alabama and nothing in the record indicated that the defendant knew the brunt of the harm would be felt there.[107]

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[100] *Id.* at 514.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 515.

[105] *Id.* at 518.

[106] *Id.* at 520.

[107] *Id.*

The Sixth Circuit in *The Cadle Company v. Schlichtmann*,[108] an unpublished opinion, applied a *Zippo-Calder* two-step analysis, first using the sliding scale of interactivity and then the effects test. The defendant, a Massachusetts resident, had launched a website accusing The Cadle Company, an Ohio debt collection company, of violating various debt collection laws in Massachusetts and seeking other potential plaintiffs in a class-action lawsuit against the company.[109] Statements on the website formed the basis for a defamation claim against the defendant, and he contested jurisdiction.[110] How the court dealt with *Zippo* will be discussed in Chapter 4. After determining that jurisdiction could not be asserted on a *Zippo* theory, the court turned to the *Calder* effects test.[111] In its explanation of *Calder*, the court found a requirement that Ohio be the focal point of both the writings and the harm suffered, and that the defendant knew the plaintiff would suffer the "brunt of the injury" there.[112] In applying the test, the court found no jurisdiction because the content of the writings was focused on the plaintiff's activities in Massachusetts and the audience targeted was in Massachusetts, not Ohio.

The Third Circuit used its own application of the effects test in *Imo Industries, Inc. v. Kiekert*[113] as its guide when jurisdiction came up in an Internet defamation case,

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[108] 123 Fed. App'x 675 (6th Cir. 2005).

[109] *Id.* at 676.

[110] *Id.*

[111] *Id.* at 678-80.

[112] *Id.* at 679.

[113] 155 F.3d 254 (3d Cir. 1998).

Marten v. Godwin.[114] The record in *Marten* was sparse, and it's unclear from the court's opinion where exactly the allegedly defamatory statements were made, i.e., email, an Internet forum, or a letter, although several possibilities are discussed. One of the problems with the record was the plaintiff, a Pennsylvania resident who had enrolled in an online graduate program of the University of Kansas School of Pharmacy,[115] never set out what the allegedly defamatory statements were.[116] After an accusation of plagiarism, the plaintiff was expelled from the program.[117] He then sued, alleging defamation and retaliation in violation of the First Amendment.[118] The district court dismissed for lack of personal jurisdiction after discovery.[119]

The *Marten* court began its analysis with the third prong in the *Imo Industries* test – express aiming – stating that the other two elements should only be considered if the express aiming element was met.[120] "To establish that the defendant 'expressly aimed' his conduct, the plaintiff has to demonstrate that 'the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at

[114] 499 F.3d 290 (3d Cir. 2007).

[115] *Id.* at 293.

[116] *Id.* at 297.

[117] *Id.* at 294.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 297.

the forum."[121] In applying this standard, the court found that the defendant had failed to allege facts that could be construed as "deliberate targeting of Pennsylvania."[122]

The North Carolina Court of Appeals adopted the *Young* analysis in *Dailey v. Popma*.[123] *Dailey* involved posts on a message board for firearms enthusiasts.[124] The plaintiff, Jack Dailey, was a North Carolina resident who owned a shooting range.[125] The defendant was a Georgia resident at the time the allegedly defamatory posts were made on the Internet, though he had been a North Carolina resident a little more than a year prior.[126] The court framed the issue this way: "The dispositive question before this Court is whether posting messages on an internet bulletin board about a North Carolina resident and businessman constitutes sufficient minimum contacts to support a finding of personal jurisdiction over an out-of-state defendant."[127] The court then provided a brief discussion of *Young* before calling the reasoning "persuasive" and adopting the analysis.[128]

That changed the focus of the question to whether the defendant intended to target North Carolina readers with his posts.[129] Because the plaintiff had not provided the allegedly defamatory statements, the court found there was no evidence of intent to target

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[121] *Id.* at 297-98. (quoting Imo Industries Inc. v. Keikert, 155 F.3d 254, 266 (3d Cir. 1998)).

[122] *Id.* at 298.

[123] 662 S.E. 2d 12 (N.C. App. 2008).

[124] *Id.* at 12.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 16

[128] *Id.* at 18.

[129] *Id.*

North Carolina, and therefore jurisdiction could not be sustained.[130] The court rejected the plaintiff's argument that the effects the postings had on him in North Carolina were sufficient to sustain jurisdiction.[131] "A holding otherwise would confer jurisdiction in each state in which a plaintiff was affected by internet postings. The defense of lack of personal jurisdiction would, in effect, be eliminated from all cases involving defamation."[132]

In *Johnson v. Arden*,[133] the Eighth Circuit adopted a narrow view of the effects test's express aiming requirement and found no jurisdiction in an Internet defamation case involving cat breeders.[134] The plaintiffs were Missouri residents who ran the Cozy Kitten Cattery.[135] The defendants were the proprietors of the website ComplaintsBoard.com, the website's hosting service, a former Cozy Kitten employee who lived in Colorado, and a woman who lived in California. The plaintiffs alleged defamation based on posts made to the ComplaintsBoard website accusing them of stealing money from clients, treating animals cruelly and killing them unnecessarily.[136] The trial court dismissed the case against all the defendants for lack of jurisdiction, and the plaintiffs appealed regarding the hosting service, the former employee and the

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[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] 614 F.3d 785 (8th Cir. 2010).

[134] *Id.* at 796.

[135] *Id.* at 787.

[136] *Id.*

California resident, but not the website operators.[137] The Eighth Circuit quickly dismissed the hosting service under Section 230 immunity,[138] so it was left with the former employee from Colorado and the California defendant.

After first applying *Zippo* and finding that jurisdiction could not be asserted under that theory, the court turned to the *Calder* effects test.[139] It adopted the following construction of the effects test:

> "[A] defendant's tortious acts can serve as a source of personal jurisdiction only where the plaintiff makes a prima facie showing that the defendant's acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered – and the defendant knew was likely to be suffered – in the forum state."[140]

This is a narrow construction of express aiming requiring evidence that the action was targeting the forum state in addition to knowledge that the defendant would suffer the brunt of the harm there.[141] In applying this to the defendants, the court found evidence of the targeting of Missouri to be lacking. The state name was mentioned in some of the posts, but the court called that "incidental."[142]

Finding jurisdiction under the narrow view

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[137] *Id.*

[138] *Id.* Section 230 immunity refers to the Communications Decency Act of 1996, 47 U.S.C.A. § 230 (West 2008), which grants immunity to internet service providers for tortious conduct of their users. It has been interpreted to protect website administrators from liability for comments left by their users.

[139] *Johnson*, 614 F.3d at 796.

[140] *Id.* (quoting Lindgregn v. GDT, LLC 312 F. Supp. 2d 1125 (S.D. Iowa 2004)).

[141] *Id.*

[142] *Id.*

In a short, unpublished opinion, *Northwest Healthcare Alliance v. Healthgrades.com*,[143] the Ninth Circuit said it had adopted two separate frameworks for Internet jurisdiction cases: one based on the *Zippo* sliding scale and one based on *Calder*'s effects test.[144] It then said the effects test is the appropriate framework when the "harm allegedly suffered by plaintiff sounds in tort."[145] Because *Northwest Healthcare Alliance* was a defamation case, the court then applied the effects test to find jurisdiction existed.[146]

The plaintiff was a Washington state home health care provider, and the defendant was a company incorporated in Delaware and based in Colorado.[147] The defendant maintained a website, Healthgrades.com, on which it rated health care providers, and it had rated the plaintiff.[148] That rating was the basis for the defamation lawsuit.[149] The *Northwest Healthcare* court adopted a narrow view of the effects test, saying the test has three elements and jurisdiction is proper if the defendant: "1) engaged in intentional actions; 2) expressly aimed at the forum state; 3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state."[150] Applying this construction, it was easy for the court to find jurisdiction proper

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[143] 50 Fed. App'x 339 (9th Cir. 2002).

[144] *Id.* at 340.

[145] *Id.*

[146] *Id.* at 341.

[147] *Id.* at 339.

[148] *Id.*

[149] *Id.* at 340.

[150] *Id.* at 341.

because the defendant had gathered information from Washington state to create the review, indicating knowledge that the health care provider was based there and would feel harm there, and had expressly aimed its actions at the forum since its purpose was to reach health care customers in Washington who might use the plaintiff's services.[151]

The Appellate Division of the Superior Court of New Jersey considered the *Blakely* analysis in its next jurisdiction case involving Internet defamation, *Goldhaber v. Kohlenberg*.[152] The court did not find *Blakely* to be determinative because the plaintiff in *Goldhaber* was a New Jersey resident, the defendant's discussion of the state in his offending comments was extensive, and several courts outside New Jersey had subsequently issued opinions on similar cases.[153] The *Goldhaber* defendant was a resident of California with no New Jersey contacts.[154] He posted messages on an Internet newsgroup accusing the plaintiffs, New Jersey residents, of incest and bestiality, among other things.[155] They sued for defamation in New Jersey and won a default judgment in excess of $1 million.[156] The defendant contested jurisdiction on appeal.[157]

The New Jersey court distinguished *Blakely* by looking at how courts in other jurisdictions had dealt with the due process analysis in intervening years. It looked favorably on *Griffis* for the principle that "mere posting of messages upon . . . an open

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[151] *Id.*

[152] 928 A.2d 948 (N.J. Super. Ct. App. Div. 2007).

[153] *Id.* at 951.

[154] *Id.* at 949.

[155] *Id.*

[156] *Id.*

[157] *Id.*

forum by a resident of one state that could be read in a second state was not sufficient to confer jurisdiction upon the latter."[158] The appellate court considered *Blakely* as the New Jersey Supreme Court adopting *Calder*'s effects test, and then it returned to *Calder* for guidance.[159] In applying the effects test, the court found that the defendant's detailed knowledge of where plaintiffs lived and references to that knowledge in his posts were adequate to indicate a targeting of the state.[160] The defendant posted repeated, "disparaging" references to the town the plaintiff's lived in, to the police in that town, and "he referred to plaintiffs' neighbors in the apartment complex in which they resided and at one point even posted their address."[161] While the opinion does not state exactly what the allegedly defamatory statements were, it does note that the plaintiff felt so threatened by them that she "sought protection from her local police department."[162] Thus, the court upheld jurisdiction based solely on the defendants' Internet posts.[163] It is not clear that this case is applying the narrow view of *Calder* since the court did not set out the defendant's statements or its rationale for announcing that the contacts were adequate to indicate targeting of New Jersey. But based on its reliance on *Griffis* and its description of comments that revealed the plaintiff's address, described her neighbors and caused her to file a police report out of fear, it appears the court found intentional targeting of New Jersey above mere knowledge that the plaintiff lived there.

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[158] *Id.* at 952.

[159] *Id.* at 953.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 955.

[163] *Id.* at 953

The Tenth Circuit, in an unpublished opinion, *Silver v. Brown*,[164] found jurisdiction appropriate in a case arising out of a defamatory blog.[165] The plaintiff and the defendant had been involved in a contractual business relationship that turned sour.[166] The defendant, a Florida resident unhappy with the way the situation was being handled, registered a domain name with the plaintiff's name, his hometown, and the name of his business in it – www.davidsilversantafe.com – and then started posting claims that the plaintiff was a "thief."[167] The plaintiff, a New Mexico resident, sued in New Mexico for defamation.[168]

The court turned to the *Calder* effects test to assist in its jurisdictional analysis.[169] Its understanding of the effects test was that it there must be a showing of:

> "(a) an intentional action (writing, editing, and publishing the article), that was (b) expressly aimed at the forum state (the article was about a California resident and her activities in California; likewise it was drawn from California sources and widely distributed in that state), with (c) knowledge that the brunt of the injury would be felt in the forum state (defendants knew Ms. Jones was in California and her career revolved around the entertainment industry there)."[170]

In applying this test to the case in *Silver*, the court found that the express aiming element was satisfied because the blog complained about the plaintiff's activities in New Mexico, the blog was widely accessible in New Mexico, and the defendant had included "Santa

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[164] 382 Fed. App'x 723 (10th Cir. 2010).

[165] *Id.* at 724.

[166] *Id.*

[167] *Id.* at 725.

[168] *Id.*

[169] *Id.* at 729.

[170] *Id.* (quoting Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1072 (10th Cir. 2008)).

Fe" in the blog's domain name as part of an effort to increase its visibility there.[171] The knowledge requirement was also met because the parties had been involved in a New Mexico-based business transaction prior to the blog posts and the defendant knew that was where the plaintiff lived and did most of his work.[172]

These narrow view cases are not identical. There is a strain rooted in the *Young* case in which jurisdiction is more difficult to obtain because the plaintiff has to show not only intentional, targeted contacts with the forum state, but also that the publisher was intending to focus on readers in that forum as its audience. Thus, publishing in a way that indicates a desire to reach a national audience or a specific audience in another forum is going to preclude jurisdiction in the plaintiff's home state under *Young*. The content of the allegedly libelous publication – and not just the libelous statement – becomes paramount in *Young*. On the other hand, cases such as *Goldhaber* and *Silver* indicate that when there are discussions of a particular forum in the offending publication that may very well be adequate to confer jurisdiction over an out-of-state defendant.

The Broad View of Express Aiming and Knowledge

The other way to approach the *Calder* effects test is to take a more permissive view of what constitutes the express aiming and knowledge requirements. In this framework, it is generally adequate to show that a defendant 1) knew the plaintiff was a resident of the forum and 2) took action that would harm the plaintiff in the forum. In this view, knowledge that the plaintiff lives in a particular forum coupled with a tortious act against the plaintiff is enough to subsume the targeting analysis. The court does not need

[171] *Id.*

[172] *Id.*

to determine that comments were intended to be read in a particular forum, only that they were intended to harm the plaintiff and there was knowledge of where the plaintiff lives. It seems to equate knowing the plaintiff lives in a particular forum with targeting that forum. It also seems to minimize the requirement that the defendant knew the "brunt of the injury" would be felt in the forum.

Rejecting jurisdiction under the broad view

Just a few weeks after the Fourth Circuit's decision in *Young*, the Fifth Circuit issued an opinion in a similar case using different reasoning. *Revell v. Lidov*[173] arose out of an article posted on Columbia University's journalism school website in New York.[174] The article was written by a Massachusetts resident, Hart Lidov.[175] The focus of the article was the Pan Am Flight 103 bombing in Lockerbie, Scotland.[176] Lidov accused the Reagan Administration of a broad conspiracy to cover up advance warning it had received of the attack.[177] The plaintiff, Oliver "Buck" Revell, had been an associate deputy director of the FBI working in the Washington, D.C.-area at the time of the bombing.[178] The article alleged that Revell knew of the attack in advance and made sure his son took a different flight since the son was scheduled to be on Pan Am 103.[179] Revell, a Texas resident at the time the article was published, sued Lidov and Columbia

[173] 317 F.3d 467 (5th Cir. 2002).

[174] *Id.* at 469.

[175] *Id.* at 469.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 469.

[179] *Id.*

for libel in the U.S. District Court for the Northern District of Texas.[180] Lidov filed an affidavit that he did not know Revell was a Texas resident prior to the lawsuit.[181] The district court granted the defendants' motions to dismiss for lack of personal jurisdiction.[182]

On appeal, the Fifth Circuit turned first to the sliding scale of interactivity in *Zippo*, which it had previously treated favorably in non-tort contexts.[183] Its reasoning for declining to assert jurisdiction under *Zippo* is discussed thoroughly in Chapter 4.[184] After considering interactivity, the court turned to *Calder*'s effects test to determine whether jurisdiction would be appropriate.[185] The court found that *Calder* stands for the proposition that "[t]he defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum."[186] The court also stated that the "'effects' test is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant's contacts with the forum."[187]

In applying the effects test, the court noted that the allegedly libelous article contained no references to Texas and wasn't describing any activities that took place in

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[180] *Id.*

[181] *Id.* at 475

[182] *Id.* at 469

[183] *Id.* at 470-72.

[184] *See infra*, Chapter 4, notes 7-16 and accompanying text.

[185] *Revell*, 317 F.3d at 472-73.

[186] *Id.* at 475.

[187] *Id*. at 473.

Texas.[188] "These facts weigh heavily against finding the requisite minimum contacts in this case."[189] The court also found that nothing in the article indicated it was targeted at Texas readers over readers from other places.[190] Thus, the absence of a specific reference to the forum, description of activities in the forum or indication that readers in the forum were being targeted over others was determinative in finding that Texas was not the "focal point of the article or the harm suffered."[191] In the Fifth Circuit's view, the plaintiff's residency in the forum and suffering harm there were not adequate to sustain jurisdiction.[192] If the court stopped there, this analysis would appear to fit in the narrow view of cases describe in part two above. But the court instead continued and in doing so announced a fairly broad view that mere knowledge of a plaintiff's residence coupled with a defamatory statement is likely adequate to establish targeting of the forum:[193]

> Demanding knowledge of a particular forum to which conduct is directed, in defamation cases, is not altogether distinct from the requirement that the forum be the focal point of the tortious activity because satisfaction of the latter will ofttimes provide sufficient evidence of the former. Lidov must have known that the harm of the article would hit home where Revell resided. But that is the case with virtually any defamation.[194]

Lidov's not knowing that Revell lived in Texas appears to be all that saved him from facing jurisdiction there.

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[188] *Id.*

[189] *Id.* at 474

[190] *Id.* at 473

[191] *Id.*

[192] *Id.*

[193] *Id.* at 475-76.

[194] *Id.*

The Fifth Circuit briefly revisited personal jurisdiction in Internet defamation in an unpublished opinion, *Ouazzani-Chahdi v. Greensboro News & Record, Inc.*[195] The plaintiff was a Texas attorney who had been mentioned in a story in a North Carolina newspaper article on "sham marriages" designed to obtain United States citizenship illegally.[196] Several years after the newspaper article was published, the plaintiff discovered a copy of it on the Internet and sued for defamation in Texas state court.[197] After the case was removed to federal district court, it was dismissed for lack of personal jurisdiction.[198] The plaintiff asserted jurisdiction based on the newspaper's Internet contacts with Texas, but the Fifth Circuit focused instead on its non-Internet contacts with the state.[199] The court relied on its previous decision in *Revell* for the principle that aiming is satisfied when "(1) the subject matter of and (2) the sources relied upon for the article were in the forum state."[200] The newspaper circulated only three copies in Texas, had not relied on any Texas sources in the reporting of its story, and had not described any activities that took place in Texas.[201] Thus, the plaintiff couldn't show that he felt the brunt of the harm in Texas or that the newspaper had expressly aimed its conduct there.[202] The key became the newspaper's lack of knowledge of the plaintiff's residence, just as it

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[195] 200 Fed. App'x 289 (5th Cir. 2006).

[196] *Id.* at 290.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 292.

[200] *Id.* at 292.

[201] *Id*. at 293.

[202] *Id.*

was in *Revell*. There was no evidence that the *News & Record* knew the plaintiff had moved to Texas.

Finding jurisdiction under the broad view

In *Kauffman Racing Equipment v. Roberts*,[203] the Ohio Court of Appeals considered whether posts on an Internet auction site and a message board were adequate contacts to assert jurisdiction over a Virginia resident.[204] The plaintiff, Kauffman Racing, was an Ohio business that sold high performance auto parts.[205] The defendant, Scott Roberts, ordered an engine from Kauffman racing in early 2006.[206] Several months after receiving the engine, Roberts complained to Kauffman racing that the engine was faulty and asked for a refund.[207] Kauffman Racing agreed to examine the engine and had it shipped back to Ohio, where it determined that the performance problems were the result of modifications Roberts had made.[208] Unhappy with the Ohio company's decision not to refund the purchase price, Roberts took to the Internet to express his dissatisfaction.[209]

He posted messages on websites dedicated to racing as well as on the auction site eBay in which he called the engine a "useless block" and "worthless" and said he was "[j]ust trying to help other potential victims."[210] The court briefly discussed the *Zippo*

[203] 2008 Ohio 1922 (Ohio Ct. App. 2008).

[204] *Id.* at ¶ 16-23.

[205] *Id.* at ¶ 2.

[206] *Id.* at ¶ 3.

[207] *Id.* at ¶ 3-4.

[208] *Id.* at ¶ 5.

[209] *Id.* at ¶ 5-6.

[210] *Id.* at ¶ 16-21.

sliding scale before finding jurisdiction based on *Calder*.[211] "A non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state."[212] In applying *Calder*, the court did not announce any particular interpretation of the effects test, rather it simply declared:

> The alleged defamation concerned a business located in Ohio and the business practices of an Ohio resident. Roberts was aware of these facts when he posted his messages. Although Kauffman Racing conducted business over the Internet, which is accessible worldwide, the defamation impugned the propriety of Kauffman Racing's business dealings, which are centered in Ohio. The brunt of the harm, in terms of the injury to Kauffman Racing's professional reputation and business, was suffered in Ohio. In sum, Ohio is the focal point both of the defamation and of the harm suffered. Jurisdiction over Roberts is, therefore, proper in Ohio based upon the "effects" of his Virginia conduct in Ohio.[213]

The court clearly found Ohio to be the focal point of the injury, but it never addressed the other major prong of *Calder* – the express aiming analysis, that is, whether Roberts specifically targeted an audience in Ohio.

On review the Ohio Supreme Court upheld jurisdiction in *Kauffman Racing v. Roberts*[214] but used a different application of the *Calder* effects test. The state supreme court focused on two aspects of Roberts' allegedly defamatory statements. The first was an expression of direct intent to harm Kauffman Racing: "I guess it doesn't matter that the day I got it all of the defects exsisted [sic] and nothing that I have done caused them. But don't worry about that. What I loose [sic] in dollars I will make up in entertainment

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[211] *Id.* at ¶ 27-33.

[212] *Id.* at ¶ 32.

[213] *Id.* at ¶ 33.

[214] 930 N.E. 2d 784 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011).

at their expence [sic]."[215] The second was the receipt of his comments by at least five Ohio residents.[216] Thus when the Ohio court adopted a very broad interpretation of the express aiming element of Calder — focusing not on whether the defendant targeted the state but whether any Ohio resident read his comments — it was easy to find jurisdiction:

> Like the defendants in *Calder*, Roberts is not alleged to have engaged in untargeted negligence. Robert's Internet commentary reveals a blatant intent to harm KRE's reputation. Roberts knew that KRE was an Ohio company. Roberts impugned the activities that KRE undertakes in Ohio. Roberts hoped that this commentary would have a devastating effect on KRE and that if there were fallout from his comments, the brunt of the harm would be suffered in Ohio.[217]

In a brief dissent Justice Terrence O'Donnell criticized the majority opinion for the breadth with which it interpreted the express aiming element and for failure to consider the pervasiveness of the speech's contact with the forum. He noted that the U.S. Supreme Court pointed to the *National Enquirer*'s extensive circulation in California – more than 600,000 copies – when it conferred jurisdiction using the effects test.[218] O'Donnell also argued in favor of a narrower view of express aiming that requires something more to show that the defendant had an intent to target the forum and not just harm the plaintiff.[219] "By merely posting to general websites, Roberts neither *deliberately* engaged in significant activities within Ohio nor *purposefully directed* his activities at an

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[215] *Id.* at 787.

[216] *Id.* at 795.

[217] *Id.* at 794

[218] *Id.* at 798. (O'Donnell, J. dissenting).

[219] *Id.*

Ohio resident sufficient to establish minimum contacts and satisfy due process – regardless of his intent."[220]

The Seventh Circuit adopted an interpretation of *Calder* based, in part, on the *Imo Industries* case in *Tamburo v. Dworkin*.[221] The facts in *Tamburo* were similar to many of the earlier cases. The plaintiff, an Illinois man, was involved in the dog-breeding business and had compiled a searchable pedigree database.[222] The data for his database were compiled from other publicly available websites that contained pedigree information.[223] The defendants were dog breeders from Colorado, Michigan, Ohio and Canada, and a software company from Australia.[224] Some of the defendants began posting accusations on various dog breeding message boards and email listservs that the plaintiff had stolen the information in his database from their websites.[225] The plaintiff sued for defamation. All of the defendants had limited contacts with Illinois other than the messages posted to the Internet and email listserves.[226] They all moved to dismiss the lawsuit for lack of personal jurisdiction.[227]

The *Tamburo* court characterized the *Calder* effects test as requiring: "(1) intentional conduct (or intentional and allegedly tortious conduct); (2) expressly aimed at

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[220] *Id.* (emphasis in original).

[221] 601 F.3d 693 (7th Cir. 2010).

[222] *Id.* at 697.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* at 697-98.

the forum state; (3) with the defendant's knowledge that the effects would be felt – that is, the plaintiff would be injured – in the forum state."[228] While this construction is based in part on *Imo*, where it differs significantly is that the court did not require either that the forum state be the focal point of the injury or evidence that the defendants targeted their communications at an Illinois audience.[229]

Using this formulation, the court upheld jurisdiction against the American and Canadian defendants because the messages specifically referenced the plaintiff's Illinois address, encouraged other dog breeders to contact him, and asked people to boycott his products.[230] These acts showed that the defendants "engaged in this conduct with knowledge that Tamburo lived in Illinois and operated his business there."[231] Thus the court equated mere knowledge of Tamburo's residence and place of business with express aiming at the forum state.[232]

The Missouri Court of Appeals adopted the *Tamburo* court's *Calder* framework just a few months later in *Baldwin v. Fischer-Smith*.[233] After an extensive review of the case law – and many of the existing disputes between jurisdictions – on the application of the effects test to Internet jurisdiction issues, the Missouri court said it was following the *Tamburo* court for two reasons.[234] First, it believed *Tamburo* struck the proper balance

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[228] *Id.* at 703.

[229] *See supra* notes 73-87 and accompanying text.

[230] *Tamburo*, 601 F.3d at 706.

[231] *Id.*

[232] *Id.*

[233] 315 S.W. 389 (Mo. Ct. App. 2010).

[234] *Id*. at 394.

between broad and narrow interpretations of the express aiming element.[235] Second, the facts of the two cases were nearly identical.[236] Like *Tamburo*, *Baldwin* also involved a dispute between people involved in dog breeding suing for libel over Internet comments.[237] In *Baldwin*, the plaintiff was a Missouri breeder of Chinese crested dogs.[238] The defendants – also breeders of Chinese crested dogs – created a website, www.stop-whisperinglane.com, attacking the plaintiff's practices.[239] In applying the *Tamburo* framework, the *Baldwin* court found that even if *Calder* does require a specific targeting of Missouri or a Missouri audience – and not just the plaintiffs there – that element was satisfied because the defendants had discussed Missouri animal care laws extensively in the posts they made.[240]

These broad view cases seem to make it easy to confer jurisdiction, such as in *Kauffman Racing* in which the defendant didn't even mention Ohio in his posts and had never been to Ohio. Because the defendant knew the plaintiff lived there and indicated intent to exact revenge, that was adequate for jurisdiction. Had a *Young*-like framework been applied to that case, jurisdiction would not have been sustained because Roberts' audience wasn't Ohio-specific but rather subject-specific – car enthusiasts. Yet even under these broad view cases, jurisdiction will be denied, such as in *Revell*, when there is no connection with the forum in the defendant's writings. If the defendant gathers no

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* at 392.

[239] *Id.*

[240] *Id.*

information from the state, doesn't mention the state and has no other connections with the state, then jurisdiction will not be appropriate.

Declining to apply *Calder*

In a handful of cases, the courts considered the effects test but did not apply it. In some cases, that was a result of finding that a different framework was more appropriate, and in others it was because the court felt it simply did not apply to the facts in front of it.

The Indiana Court of Appeals was the first appellate court post-*Zippo* to consider jurisdiction in an Internet libel case. In *Conseco, Inc. v. Hickerson*[241] an Indiana insurance company alleged trademark dilution and infringement, commercial disparagement, tortious interference as well as libel.[242] The defendant was a Texas resident who had published a website accusing Philadelphia Life Insurance, a Conseco subsidiary, of fraud.[243] The trial court dismissed the claims for lack of personal jurisdiction.[244] On appeal, Conseco argued that jurisdiction was appropriate under the *Calder* effects test because Indiana was where the corporation was based and where its reputation would be most heavily damaged.[245]

The appellate court rejected that argument and specifically declined to apply the *Calder* effects test because Conseco was a major, national corporation. "In this case, Conseco is a national corporation with insurance subsidiaries and policyholders throughout the United States. The potential harm to be suffered by Hickerson's alleged

[241] 698 N.E.2d 816 (Ind. Ct. App. 1998).

[242] *Id.* at 817.

[243] *Id.*

[244] *Id.*

[245] *Id*. at 818.

defamation would not only be suffered in Indiana, but throughout the nation."[246] The court then turned to a *Zippo*-framework for its personal jurisdiction decision,[247] which will be discussed in Chapter 4.

The North Dakota Supreme Court briefly discussed the *Calder* effects test in *Wagner v. Mishkin*[248] before deciding the jurisdiction issue on a more general approach to contacts than effects alone.[249] The plaintiff in *Wagner* was a professor at the University of North Dakota, and the defendant was a former student in one of his physics classes.[250] The student was suspended from the university for "stalking and harassing" the professor.[251] She subsequently moved back to Minnesota and launched the website www.undnews.com.[252] She used this website to level all sorts of accusations of inappropriate behavior against the professor.[253] The professor sued, and a jury awarded $3 million in damages for libel, slander and intentional interference with business relationships.[254] The defendant represented herself at trial and on appeal, and the plaintiff

[246] *Id.* at 819.

[247] Id. at 820-21.

[248] 660 N.W.2d 593 (N.D. 2003).

[249] *Id.* at 598.

[250] *Id.* at 595.

[251] *Id.*

[252] *Id.* at 595-98.

[253] *Id.* at 595.

[254] *Id.*

represented himself on appeal, which created some difficulties for the appellate court in evaluating both of their claims because the record was incomplete.[255]

That incompleteness hampered the court's analysis of jurisdiction based on Internet contacts.[256] The court discussed the *Calder* effects test but didn't apply it because there wasn't enough in the record to make that determination.[257] The record did provide enough for the court to find specific targeting of North Dakota with the Internet communications; in particular the website's Internet address had an abbreviation of the University of North Dakota (UND) in it, and the articles on the site related to the university.[258] That targeting coupled with the defendant's other forum contacts – having been a student at the University of North Dakota, use of the university's email system, having lived on campus there and phone calls into the jurisdiction – were adequate to sustain personal jurisdiction.[259]

The Florida Court of Appeals also briefly mentioned *Calder* in *Renaissance Health Publishing v. Resveratrol Partners*,[260] but not for the effects test. Instead it cited *Calder* for the proposition that a defendant must be able to "reasonably anticipate being

[255] *Id.* at 596-97.

[256] *Id.* at 598 ("This Court has not previously had occasion to consider an Internet jurisdiction case. The present case lacking a complete transcript of the district court proceedings, does not provide us with a sufficient record to undertake such an analysis.")

[257] *Id.*

[258] *Id.* at 599.

[259] *Id.*

[260] 982 So.2d 739 (Fla. Ct. App. 2008).

haled into court there."[261] The court then relied on *Zippo*, as discussed in Chapter 4, to make its decision on minimum contacts for due process.[262]

Conclusion

Appellate courts are all over the map in their application of *Calder*. Some find it inappropriate to apply in particular Internet defamation cases based on the facts presented.[263] Some find it to be the most useful guide in understanding contacts in Internet defamation cases.[264] Others find it to be a useful piece of the personal jurisdiction puzzle, but not the only piece.[265] There doesn't seem to be a discernable trend in the direction courts are going with the effects test, as in the last two years alone there were examples of courts relying primarily on *Zippo*,[266] courts taking a very broad view of *Calder*'s effects test and finding jurisdiction in the flimsiest of circumstances,[267] and courts taking very narrow views and rejecting jurisdiction.[268] This lack of clarity is problematic. It leaves Internet users with little predictability about where they potentially can be dragged into court – the state next door or some far-flung jurisdiction – if someone chooses to sue over the content they have placed on the Internet.

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[261] *Id*. at 742.

[262] *Id.* at 741-43.

[263] Conseco v. Hickerson, 698 N.E.2d 816 (Ind. Ct. App. 1998).

[264] Young v. New Haven Advocate, 313 F.3d 256 (4th Cir. 2002).

[265] Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002).

[266] Renaissance Health Publ'g v. Resveratrol Partners, 982 So.2d 739 (Fla. Ct. App. 2008).

[267] Kauffman Racing Equip. v. Roberts, 930 N.E. 2d 784 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011). .

[268] Dailey v. Popma, 662 S.E. 2d 12 (N.C. App. 2008).

Among these different frameworks, the narrow view – particularly that articulated by the *Young* court and followed in *Dailey* – is the preferable one because it allows for the most robust speech on the Internet. It requires a showing that the communication was actually targeted at an audience in the forum and wasn't simply a general message aimed at anyone anywhere who chose to access it. An Internet user should not be potentially subjected to jurisdiction in any state simply because he wrote about someone and knew where that person lived, as occurred in *Kauffman Racing*. That kind of widespread potential for jurisdiction is a threat to discourse on the Internet. At the same time, while that narrow framework sets a high bar for pulling an out-of-state defendant into court, it is not impossible to meet, as the Tenth Circuit's application of a narrow view in *Silver* showed.

Chapter 4

The Application of *Zippo*'s Sliding Scale to Internet Defamation Cases

In 1997 the Western District of Pennsylvania faced its first Internet jurisdiction case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[1] involving a trademark dispute. The plaintiff was Zippo Manufacturing, the well-known manufacturer of cigarette lighters based in Pennsylvania.[2] The defendant was the owner of a subscription service website based in California that was using the Internet address www.zippo.com.[3] The manufacturer sued the website for trademark infringement in Pennsylvania and the website operator contested jurisdiction.

The district court surveyed what little Internet jurisdiction law existed at the time and then introduced a brand new element to the analysis: a sliding scale of interactivity.[4] The *Zippo* court described the ends of the scale in terms of how "passive" or active" the website is:

> If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the

[1] 952 F. Supp. 1119 (W.D. Pa. 1997)

[2] *Id.* at 1121.

[3] *Id.*

[4] *Id.*

> opposite end [of the scale] are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[5]

This sliding scale test has subsequently been adopted by some courts, rejected outright by some, and incorporated as an additional analysis overlaying other jurisdictional frameworks by others. The influence of the *Zippo* sliding scale has been surprisingly strong for a district court opinion, but courts and commentators generally have noted it is not well suited to defamation cases.[6] Despite that criticism, the case continues to have influence in Internet jurisdiction decisions, including those involving libel.

In 16 of the cases studied for this thesis — Internet defamation cases decided by federal and state appellate courts between 1997 and 2010 — courts considered whether to apply *Zippo* or a variation of its sliding scale test to jurisdiction questions. Three basic approaches emerge from the 16 cases. Many courts view *Zippo* and *Calder* in conjunction with each other as two separate steps that each could confer jurisdiction on its own. This approach will be discussed in part one. Some courts rejected *Zippo* outright as either inappropriate in an Internet defamation context or as an inappropriate special standard for

[5] *Id.* at 1121.

[6] A LexisNexis Shepard's search of the case in May 2011 indicated it had been followed 261 times, distinguished 47 times, and cited in 536 law review articles. Lexis Shepard's Report for *Zippo* (May 16, 2011) (on file with author).

Internet jurisdiction. This approach is covered in part two. Part three discusses the cases in which courts relied solely on *Zippo*'s sliding scale to determine jurisdiction.

The *Zippo-Calder* Two Step

One approach that appeared quite frequently was to view *Zippo* and *Calder* as separate frameworks that should be applied sequentially. If jurisdiction was not appropriate when the sliding scale of interactivity is applied, then those courts turn next to the effects test. This two-step analysis is interesting in that it could confer jurisdiction based solely on *Zippo* if a website is interactive and the proprietor has related, commercial contacts with the forum, regardless of content. But if the same message were posted on a passive website, jurisdiction may never be achieved under *Zippo*.

The Fifth Circuit favorably drew on *Zippo* in *Revell v. Lidov*,[7] a libel case arising out of an article posted on a New York university's journalism school website.[8] The plaintiff in *Revell* was a Texas resident who had been discussed in the article.[9] The Fifth Circuit saw *Zippo* as fitting in as part of a multi-step analysis in which any of the steps might confer jurisdiction.[10] First, it looked to the level of website interactivity under the *Zippo* sliding scale to determine if personal jurisdiction could be based on that theory.[11] The second step, after applying the sliding scale of interactivity, was to perform a

[7] 317 F.3d 467 (5th Cir. 2002).

[8] For a more thorough discussion of the case facts see Chapter 3, notes 173-190 and accompanying text.

[9] *Revell*, 317 F.3d at 469.

[10] *Id.* at 469-70.

[11] *Id.*

minimum contacts analysis based on the content of the article and the defendants' other contacts with the forums.[12]

In applying the *Zippo* scale the court slightly recast the test:

> *Zippo* used a "sliding scale" to measure an internet site's connections to a forum state. A "passive" website, one that merely allows the owner to post information on the internet, is at one end of the scale. It will not be sufficient to establish personal jurisdiction. At the other end are sites whose owners engage in repeated online contacts with forum residents over the internet, and in these cases personal jurisdiction may be proper. In between are those sites with some interactive elements, through which a site allows for bilateral information exchange with its visitors. Here we find more familiar terrain, requiring that we examine the extent of the interactivity and the extent of the forum contacts.[13]

The website that the university was hosting functioned as a bulletin board, where users could post their own stories and read stories written by others.[14] As the court described it, "[T]he visitor may participate in an open forum."[15] Thus the forum was "interactive" on the sliding scale, and the court had to then perform the second step of the analysis: examining the defendants' other contacts with Texas to determine if jurisdiction existed. As discussed in Chapter 3, the court rejected jurisdiction based on these additional contacts because they were minimal and did not show an intent to target Texas.[16]

In *Jewish Defense Organization, Inc. v. Superior Court*[17] the California Court of Appeal quoted the entire *Zippo* "sliding scale" passage before finding that the defendant's

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[12] *Id*.

[13] *Id.* at 470.

[14] *Id*. at 472.

[15] *Id.*

[16] *Id.* at 473.

[17] 72 Cal. App. 4th 1045 (1999).

"conduct in registering [plaintiff]'s name as a domain name and posting passive Web sites on the Internet is not sufficient to subject them to jurisdiction in California."[18] That was the extent of the court's use of the sliding scale – quoting it extensively and then describing the websites at issue as "passive."[19] The only exploration of the websites' character is in a brief footnote in which the court said the defendant's "declarations explain in detail the nature of the Web sites, which meet the definition of passive Web sites set out in the *Zippo* . . . case."[20] The court then conducted a separate Internet-based jurisdictional analysis of entering into third-party contracts and applied it to the registration of the plaintiff's name as a domain name[21] even though the defamation claims in the case did not arise out of the domain name's registration.[22]

Similarly, in *Nam Tai Electronics v. Titzer*[23] the California Court of Appeal again considered the sliding scale of interactivity in its discussion of jurisdiction involving Internet defamation.[24] Like *Jewish Defense Organization*, *Nam Tai Electronics* involved a non-resident plaintiff and a non-resident defendant.[25] The allegedly defamatory

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[18] *Id*. at 1060.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 1060-61.

[22] *Id.* at 1051. The defendant had registered www.rambam-steve.com, and the plaintiff's name was Steve Rambam. *Id.*

[23] 93 Cal. App. 4th 1301 (2001), *overruled in part by* Pavlovich v. Superior Court, 29 Cal. 4th 262 (2002). *Pavlovich* was a trade secrets case in which the court applied the *Calder* effects test to determine whether the state had jurisdiction over a Texas defendant. *Pavlovich*, 29 Cal. 4th at 266-67.

[24] *Nam Tai Elec*., 93 Cal. App. 4th at 1311.

[25] *Id.* at 1305.

messages had been posted on a Yahoo! message board.[26] The theory of jurisdiction in California was based on Yahoo!'s corporate headquarters being there and its terms of service requiring users to agree that disputes would be governed by California law.[27] The company tried to distinguish the case from *Jewish Defense Organization* by arguing that the defendant had affirmatively posted "almost 250 messages" on the Yahoo! message board.[28] The court described this as "miss[ing] the point" and determined that jurisdiction shouldn't be based on the sliding scale but on whether the effect of the harm would be felt in California.[29] The same court, again, favorably quoted the *Zippo* sliding scale in *Rambam v. Luhta*[30] but did not apply it in order to determine jurisdiction.[31]

The Sixth Circuit in *The Cadle Company v. Schlictmann*,[32] an unpublished opinion, began its jurisdiction analysis by applying the *Zippo* sliding scale.[33] The court explained its understanding of the interactivity rationale: "The operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state if the website is interactive to a degree that reveals specifically intended interaction with residents of the state."[34] In applying the test in this case, the court found that the website

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 1312

[29] *Id.*

[30] 2001 Cal. App. Unpub. LEXIS 1143 (2001).

[31] *Id.* at 1143, *18-19.

[32] 123 Fed. App'x 675 (6th Cir. 2005).

[33] *Id.* at 678.

[34] *Id.*

in question was somewhere in the middle of the scale.[35] The website was largely static in its description of alleged violations of Massachusetts debt collection laws,[36] but it had a function allowing those interested in joining a class action lawsuit against the plaintiff to send a message to the website owner.[37] When websites fall in the middle of the scale, the court said it turns to the commercial nature of the exchange of information that occurs to complete the analysis. Because there was no evidence that anyone from Ohio had sent any information to the defendant through the website, the court found that jurisdiction could not be upheld based on the nature of the website. The court then turned to a *Calder* effects analysis to determine if a basis for personal jurisdiction lay there.[38]

The Eighth Circuit endorsed the *Zippo-Calder* two-step analysis in *Johnson v. Arden*,[39] first applying *Zippo*'s sliding scale to determine if jurisdiction could appropriately be asserted.[40] The court applied it to the ComplaintsBoard.com website and declared that the site was on the passive end of the scale, which meant that jurisdiction could not be exerted under that theory.[41] The court's explanation for finding the site passive is a bit odd given that its content is largely driven by user contributions. But the court said, "[U]sers may actually only post information. There is no interaction between

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] 614 F.3d 785 (8th Cir. 2010).

[40] *Id.* at 795.

[41] *Id.*

users and a host computer; the site merely makes information available to people."[42] The court then turned to *Calder*, as discussed in Chapter 3, to finish its jurisdiction decision.[43]

In each of the cases in which a court discussed *Zippo* and *Calder* as two parts of the same overall inquiry, the court declined to find jurisdiction based on the sliding scale of interactivity. That fact raises the question of whether *Zippo* is useful at all in such a two-step approach for Internet defamation cases. None of the courts dealt with the key criticism of applying *Zippo* to Internet defamation: it leads to perverse results whereby the same, equally damning statement on two separate websites could lead to opposite jurisdiction decisions depending entirely on the character of the website and not the content of the message or the size or location of audience reached.

Declining to Apply *Zippo*

Several courts found the *Zippo* sliding scale inappropriate for use in Internet defamation cases, either because *Calder* provides the appropriate framework in libel or because they rejected the notion that a special standard should be created for Internet jurisdiction. In a short, unpublished opinion, *Northwest Healthcare Alliance v. Healthgrades.com*,[44] the Ninth Circuit said it had adopted two separate frameworks for Internet jurisdiction cases: one based on the *Zippo* sliding scale and one based on *Calder*'s effects test.[45] It then said the effects test is the appropriate framework for intentional torts and did not apply *Zippo* to that case because it was a defamation claim.[46]

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[42] *Id.*

[43] The court did not allow jurisdiction under an effects test theory either. *Id.* at 797.

[44] 50 Fed. App'x 339 (9th Cir. 2002).

[45] *Id.* at 340.

[46] *Id.* at 341.

The Ohio Court of Appeals considered *Zippo* favorably in *Kauffman Racing Equipment v. Roberts*,[47] a case involving an Ohio plaintiff and a Virginia defendant involved in a dispute over a car engine.[48] The Ohio court significantly re-cast the "sliding scale" in terms of online commercial activity instead of website interactivity:

> The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming in the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals 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. This sliding scale is consistent with well-developed personal jurisdiction principles.[49]

But the court did not apply this commercial activity scale to the case beyond acknowledging that the plaintiff operated a website to advertise his business.[50] Instead, it turned to a version of the *Calder* effects test, as discussed in Chapter 3.

On appeal, the Ohio Supreme Court declined a *Zippo* analysis for jurisdiction in *Kauffman Racing Equipment v. Roberts.*[51] The state supreme court found that the "*Zippo* model was developed in a commercial or business context and is factually distinct from this case. When the Internet activity in question 'is non-commercial in nature, the *Zippo* analysis offers little to supplement the traditional framework for considering questions of

[47] 2008 Ohio 1922 (Ohio Ct. App. 2008).

[48] *Id.* at ¶ 2-3.

[49] *Id.* at ¶ 30.

[50] *Id*. at ¶ 32-33.

[51] 930 N.E. 2d 784 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011).

personal jurisdiction.'"[52] So, even though the Ohio Court of Appeals viewed *Zippo* favorably, the rule in that jurisdiction is that it does not apply to disputes that are non-commercial in nature, such as defamation.[53]

The North Dakota Supreme Court discussed the *Zippo* test in *Wagner v. Miskin*[54] but did not apply it because the record was too incomplete to make a determination of Internet-based jurisdiction.[55] Both the plaintiff and defendant represented themselves at the supreme court, and neither was an attorney.[56] Even though the court did not apply *Zippo,* it provided some insight into how it might view the relationship between *Zippo* and *Calder*.[57] Instead of considering the two as compatible with each other, and perhaps part of the same two-step analysis, as the Fifth Circuit did in *Revell*, the North Dakota Supreme Court described their application as an either/or proposition.[58] Then again, the discussion of each test was brief, less than a paragraph each.[59]

The Seventh Circuit expressly declined to apply *Zippo* in an Internet defamation case, *Tamburo v. Dworkin*.[60] In an extensive footnote, the court considered the sliding

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[52] *Id.* at 785 (quoting Oasis Corp. v. Judd, 132 F. Supp.2d 612, 622, fn.9 (S.D. Ohio 2001)).

[53] *Id.*

[54] 660 N.W.2d 593 (N.D. 2003).

[55] *Id.* at 598 ("This Court has not previously had occasion to consider an Internet jurisdiction case. The present case lacking a complete transcript of the district court proceedings, does not provide us with a sufficient record to undertake such an analysis.")

[56] *Id.* at 595.

[57] *Id.* at 598.

[58] *Id.*

[59] *Id.*

[60] 601 F.3d 693 (7th Cir. 2010).

scale of interactivity and noted that several other courts have found its use appropriate when dealing with cases where jurisdiction was based on "electronic contacts."[61] The court, however, declined to apply *Zippo* saying, "As a more general matter, we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet."[62] Essentially, the court said that *Calder*'s effects test works fine for defamation cases, and it was not ready to create a special jurisdiction standard for the Internet.[63]

The Appellate Division of the Superior Court of New Jersey looked disapprovingly on the *Zippo* scale in *Goldhaber v. Kohlenberg*.[64] That case involved New Jersey plaintiffs and a California defendant in a defamation suit over posts on an Internet newsgroup.[65] The court did not reference *Zippo* directly but rather briefly discussed the passive-interactive sliding scale in a parenthetical note in which it favorably quoted Michael Geist's argument that the test is inappropriate for defamation cases.[66] "'If the target is unable to sue locally due to a strict adherence to the passive versus active test, the law might be seen as encouraging online defamatory speech by creating a jurisdictional hurdle to launching a legal claim.'"[67]

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[61] *Id.* at 703, n.7.

[62] *Id.*

[63] *Id.*

[64] 928 A.2d 948 (N.J. Super. Ct. App. Div. 2007).

[65] *Id.* at 952.

[66] *Id.*

[67] *Id.* (quoting Michael A. Geist, *Is There a There? Toward Greater Certainty For Internet Jurisdiction*, 16 BERKELEY TECH. L. J. 1345, 1377 (2001)).

These cases show confusion about when *Zippo* should apply. Although each rejected the sliding scale's application in the case before it, the reasons varied. Some, such as the Ohio Supreme Court, said that *Zippo*'s development in the commercial context precludes its use in a defamation case. Others, such as the Seventh Circuit, viewed *Zippo* as a special Internet jurisdiction test and were not prepared to adopt such a test. And then there's the Ninth Circuit view that *Calder* should govern in Internet defamation cases because *Calder* was a defamation case while *Zippo* is appropriate for other types of Internet actions.

Relying Primarily On *Zippo*

A small number of courts found the sliding scale was not only appropriate but the only test necessary for determining jurisdiction in Internet defamation cases. The Indiana Court of Appeals used a *Zippo*-influenced framework in its first decision determining jurisdiction in an Internet libel case. The plaintiff in *Conseco, Inc. v. Hickerson*[68] was an Indiana corporation that had subsidiary insurance companies and customers across the country.[69] Conseco sued a Texas resident for libel, trademark infringement and tortious interference based on a website he maintained that accused one of the company's subsidiaries of committing fraud.[70]

After explicitly declining to follow the effects test from *Calder v. Jones*,[71] the court adopted the Ninth Circuit's analysis from *Cybersell, Inc. v. Cybersell, Inc.*,[72] a

[68] 698 N.E.2d 816 (Ind. Ct. App. 1998).

[69] *Id.* at 819.

[70] *Id.* at 817.

[71] *Id.* at 820.

[72] 130 F.3d 414 (9th Cir. 1997).

trademark infringement case that relied on *Zippo* for the principle that the degree of website "interactivity" can be a factor in determining jurisdiction.[73] The *Cybersell* application does not refer to the "sliding scale" that other courts have considered when utilizing *Zippo*. But it approvingly supports the end of the scale in which the jurisdiction analysis requires measuring the degree of website interactivity, the commercial nature of information being exchanged and additional forum contacts.[74] The Indiana court, in applying this analysis, presumed the website was interactive based on an email link and then found that jurisdiction could not be conferred because there were no other forum contacts. "We hold that Hickerson's discussion of Conseco in his web site, without any other contacts, was not a minimum contact sufficient to allow Indiana to exercise personal jurisdiction over him."[75]

The Illinois Appellate Court relied primarily on *Zippo* to determine jurisdiction in an Internet defamation case arising out of a dispute between dog breeders.[76] In *Bombliss v. Cornelsen*,[77] the plaintiff was an Illinois-based breeder of Tibetan-mastiffs.[78] The defendants were residents of Oklahoma.[79] The plaintiffs, Ronald and Catherine Bombliss, purchased a dog from the defendants for breeding.[80] A few months later one of the

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[73] *Id.* at 418, 420.

[74] *Id.*

[75] *Conseco, Inc*, 698 N.E.2d at 820.

[76] Bombliss v. Cornelsen, 824 N.E.2d 1175 (Ill. App. Ct. 2005).

[77] *Id.*

[78] *Id.* at 1177.

[79] *Id.* There was also a Washington state defendant in the initial complaint, but the plaintiffs did not appeal the trial court's dismissal of jurisdiction against that defendant. *Id.*

[80] *Id.*

defendants, Anne Cornelson, began posting on a forum for dog breeders that she believed the litter suffered from genetic defects, and that none of the dogs – including the one purchased by the plaintiffs – should be used for breeding.[81] The plaintiffs had their dog tested for genetic defects and none were revealed.[82] The Bomblisses then filed a suit alleging defamation, false light invasion of privacy, and intentional infliction of emotional distress.[83] Their theory was that the defendants were knowingly posting false information about dogs in the litter as a way of retaliating against the owner of the sire for the litter and, in the process, impaired the good reputations of the Illinois plaintiffs.[84] The trial court dismissed the complaint for lack of jurisdiction, and the plaintiffs appealed on a theory that the Illinois courts had jurisdiction based on the defendant's postings on Yahoo! message boards.[85]

The appellate court gave a brief recitation of minimum contacts based on *World-Wide Volkswagen v. Woodson*[86] and *Burger King Corporation v. Rudzewicz*.[87] It then looked favorably at *Zippo* for making minimum contacts determinations in Internet cases. "For ease of analysis, a 'sliding scale' approach has been adopted."[88] The court then

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[81] *Id.* at 1178.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 444 U.S. 286 (1980).

[87] 471 U.S. 462 (1985); *Bombliss*, 824 N.E.2d at 1179-80.

[88] *Bombliss*, 824 N.E.2d at 1180 (quoting Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).

applied the sliding scale to two websites relevant to the case.[89] The first was the defendants' own website through which they advertised their puppies for sale and had information, including email addresses, for contacting the owners.[90] The court found this website fell in the middle of the sliding scale in that it had some interactivity with the email address and it was commercial in nature.[91] But it was not interactive enough to constitute "purposeful contacts" with Illinois on its own.[92] The second website the court considered was the Yahoo! message board on which the allegedly defamatory posts were made.[93] While the court never announced where it saw the message board falling on the scale, it found that the sale of a dog to an Illinois resident, the maintenance of a commercial, interactive website, and the use of the Yahoo! message board to reach potential customers were "of sufficient quantity and quality to constitute minimum contacts in Illinois."[94] After finding that the allegations arose out of those contacts, the court remanded the case for additional proceedings since jurisdiction was proper.[95]

In *Best Van Lines, Inc. v. Walker*[96] the Second Circuit utilized *Zippo* to inform its understanding of the New York long arm statute.[97] The statute presents a higher bar than

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[89] *Id.* at 1180-81.

[90] *Id.* at 1180.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 1181.

[95] *Id.* at 1181-82.

[96] 490 F.3d 239 (2d Cir. 2007).

[97] N.Y. C.P.L.R. 302(a)(2) (McKinney 2009)

most for defamation claims. It appears on its face to bar jurisdiction in a defamation case over an out-of-state defendant who was speaking outside the state.[98] But the New York courts have not interpreted the statute so rigidly.[99] Under certain circumstances, the courts will consider defamatory remarks as "transacting business" within the state and allow a defamation case based on out-of-state speech by a non-resident to go forward.[100] But defamatory speech alone is not adequate to satisfy the "transacting business" requirement in the statute.[101]

Thus, the courts use the forum contacts analysis in due process law to determine how far "transacting business" extends.[102] The Second Circuit did precisely that in *Best Van Lines*:

> We think that a website's interactivity may be useful for analyzing personal jurisdiction under [the New York long arm statute], but only insofar as it helps to decide whether the defendant "transacts any business" in New York – that is, whether the defendant, through the website, "purposefully avail[ed] himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws."[103]

The court was careful to point out that it did not view *Zippo* as providing a "separate framework" for Internet-based jurisdiction, but rather an informative tool for traditional

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[98] The statute states: "a court may exercise personal jurisdiction over any non-domiciliary . . ., who in person or through an agent: 2. commits a tortious act within the state, expect as to a cause of action for defamation of character arising from the act." Id.

[99] *Best Van Lines*, 490 F.3d at 245.

[100] *Id.* at 247

[101] *Id.*

[102] *Id.*

[103] *Id.* at 252 (quoting Cutco Indus. v. Naughton, 806 F.2d 361, 365 (2d Cr. 1986)).

analyses.[104] In this case, the court found the website to be interactive, because the defendant had a section on it through which people could send him donations.[105] But the defamation claims did not arise out of those donations, so there was no nexus between the forum contacts and the claims and, therefore, jurisdiction could not be sustained under the "transacting business" prong of the long arm statute.[106] The court also took notice of *Calder*, but specifically noted that it would not be useful in informing the long-arm statute since the particular section of the long-arm to which it might be analogous specifically barred defamation claims.[107]

The Florida Court of Appeals relied heavily on *Zippo*'s sliding scale to determine jurisdiction in a trade libel case, *Renaissance Health Publishing v. Resveratrol Partners*,[108] arising out of Internet activity. The plaintiff, Renaissance Health, sued Resveratrol Partners and one of its executives as an individual for trade libel based on statements from the defendants' website.[109] The plaintiff, a Florida company, and the defendants manufactured competing red wine extracts.[110] The defendants made some disparaging remarks on their website about the plaintiff's product, and a lawsuit was soon filed.[111] The defendants were not Florida residents.[112] The company was incorporated in

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[104] *Id.*

[105] *Id.* at 254.

[106] *Id.*

[107] *Id.* at 254, n.14.

[108] 982 So. 2d 739 (Fla. Ct. App. 2008).

[109] *Id.* at 740.

[110] *Id.*

[111] *Id.* at 739.

Nevada with its principal place of business in California,[113] but it actively sold products in Florida, which accounted for 2.4 percent of its overall business.[114]

The Florida court found the combination of an interactive website and having a significant portion of the company's sales in that state were adequate to sustain jurisdiction.[115] "An interactive website which allows a defendant to enter into contracts to sell products to Florida residents, and which 'involve[s] the knowing and repeated transmission of computer files over the internet' may support a finding of personal jurisdiction."[116]

In *Pearl v. Abshire*,[117] the Texas Court of Appeals issued a memorandum opinion in which it relied on the sliding scale of interactivity without directly referencing *Zippo*.[118] The Texas-based plaintiff brought a libel claim against a New York resident who had been posting allegations of sexual harassment on a Yahoo! Finance message board.[119] The court applied the sliding scale to determine purposeful availment, first deciding where on the scale the website fell.[120] Because it was a message board, the court

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[112] *Id.*

[113] *Id.*

[114] *Id.* at 740.

[115] *Id.* at 742.

[116] *Id.* (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

[117] 2009 Tex. App. LEXIS 5351 (Tex. Ct. App. 2009).

[118] *Id.*

[119] *Id.*

[120] *Id.* at *9.

found it was an interactive website and in the middle of the scale.[121] That meant the court then had to determine the nature and degree of interaction between the defendant and the website.[122] Jurisdiction could not be sustained because all of the defendant's posts were in response to posts made by the plaintiff, who admitted he posted on the site for the purpose of getting a response.[123] Therefore, the court said, it was "merely fortuitous" that the plaintiff was a Texas resident and the defendant did not purposefully avail himself of Texas law.[124]

The cases in which courts primarily relied on *Zippo* again indicate confusion, but this time about how the test should apply. In *Renaissance Health Publishing*, the Florida court applied the sliding scale to a clearly commercial context in a dispute between two rival wine extract sellers. The sales in Florida by the out-of-state defendants created additional contacts. But in a similar case, the Second Circuit said the tortious conduct – defamation – had to arise out of those contacts and wouldn't sustain jurisdiction when the additional contacts had to do with solicitations for donations. These cases do little to help resolve the muddy state of personal jurisdiction law in Internet libel cases.

Conclusion

The *Zippo* framework is only moderately helpful, at best, in determining jurisdiction in Internet libel cases and, at worst, is prone to produce strange results. The cases discussed in this chapter show how odd its application can be. In *Bombliss*, the Illinois court used the sliding scale to uphold jurisdiction based on three factors: 1) the

[121] *Id.*

[122] *Id.* at *12

[123] *Id.*

[124] *Id.*

defendant had sold a dog to a resident of the state, indicating an additional contact; 2) the defendant maintained an interactive website for her business – even though the tort claims had nothing to do with that website; and 3) the defendant had posted on an interactive message board.[125] The interactivity scale here was used to draw in a largely irrelevant, additional website that was not connected to the basis for the claims. At the other end is *Pearl* in which the court found posting on an interactive website was adequate to then look at additional contacts.[126] The defendant had none, so his sustained pattern of posting claims of sexual harassment against the plaintiff were not adequate to uphold jurisdiction on the sliding scale.[127]

The cases in which the courts do a two-step analysis, applying the sliding scale and then the effects test raise a serious question: What's the purpose of applying the sliding scale in the first place? In every one of the cases in which the courts said the two should be applied in that order, the courts did not find enough interactivity or additional contacts to sustain jurisdiction. Since very few courts even reach the conclusion that *Zippo* is applicable, let alone to sustain jurisdiction, in Internet defamation cases, it should be abandoned in this context.

[125] Bombliss v. Cornelsen, 824 N.E.2d 1175, 1181-82 (Ill. App. Ct. 2005).

[126] Pearl v. Abshire, 2009 Tex. App. LEXIS 5351 (2009).

[127] *Id.*

Chapter 5

Discussion and Conclusion

The effects test from *Calder v. Jones*[1] and the sliding scale from *Zippo Manufacturing, Inc. v. Zippo Dot Com, Inc.*[2] are the two predominant tests that courts relied on when deciding jurisdiction in Internet defamation claims, but they are not the only considerations. A few courts chose not to apply either *Calder* or *Zippo* and went with other personal jurisdiction standards, and a few courts at least gave mention to First Amendment concerns in Internet defamation cases.

The first part of this chapter will briefly discuss the small number of cases that relied on neither *Calder*'s effects test nor *Zippo*'s sliding scale of interactivity to determine jurisdiction in Internet libel cases. Part two will consider the lack of First Amendment discussion in the jurisdiction decisions. Part three briefly discusses the results of the research questions asked in this thesis. Part four argues for the inclusion of First Amendment consideration at the jurisdiction stage.

Cases That Used Neither Effects Nor Interactivity

In a small number of cases – five of the 35 studied – the court turned to some rationale other than *Calder*'s effects test or *Zippo*'s sliding scale of interactivity in order to decide jurisdiction in Internet defamation cases. The frameworks applied varied from

[1] 465 U.S. 783 (1984).

[2] 952 F. Supp. 1119 (W.D. Pa. 1997).

an analysis based on *World-Wide Volkswagen Inc. v. Woodson*[3] and *Burger King Corp. v. Rudzecwiz*'s[4] purposeful availment construction to one relying on *Asahi Metal Industry Co. v. Superior Court*'s fairness principle.[5]

In *Johnson v. Schlotzky's, Inc.*[6] the Texas Court of Appeals did not conduct an Internet contacts analysis, even though the allegedly defamatory statements were published on the Internet. The out-of-state defendant, Johnson, had been in a contractual relationship with the plaintiff, Schlotzky's Inc., for 15 years.[7] He held several franchising agreements to operate three Schlotzky's restaurants in Nebraska for 15 years from 1984 to 2001.[8] Schlotzky's was a Texas corporation.[9] In the late 1990s the two sides began to differ about one of the agreements and ended up in court. While the matter was pending, a series of messages were posted in a Yahoo! Finance message board that were highly critical of Schlotzky's and warned potential franchisees of doing business with the company.[10] Schlotzky's accused Johnson of posting the messages and sued in Texas for defamation, business disparagement, conspiracy and breach of confidentiality.[11] Johnson consented to jurisdiction in Texas on breach of confidentiality because there was a forum

[3] 444 U.S. 286 (1980).

[4] 471 U.S. 462 (1985).

[5] 480 U.S. 102 (1987)

[6] 2003 Tex. App. LEXIS 10566 (Tex. Ct. App. 2006).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 10566, *2.

[11] *Id.*

selection clause in the agreements he signed with the company, but he contested jurisdiction on the tort claims.[12]

The appellate court found that the contract and the tort claims were so interwoven that jurisdiction was appropriate based on the forum selection clause.[13] However, it also conducted a separate minimum contacts analysis and found that jurisdiction would be appropriate independent of the contract.[14] The court did not conduct an effects test or apply the interactivity sliding scale, though, because it found Johnson had adequate contacts under the *World-Wide Volkswagen* and *Burger King* line of cases.[15] Johnson had entered into contracts with a Texas company; he visited Texas as part of the business relationship; and he regularly sent payments to the company in Texas.[16]

The Wyoming Supreme Court considered jurisdiction in a defamation case arising primarily out of email in *Cheyenne Publishing, LLC v. Starostka*.[17] The plaintiff was a Wyoming publisher, and the defendant was a Nebraska artist who had entered into an agreement to have her work featured in a catalogue published by the company.[18] The relationship soured. The company claimed Starostka defamed it when she contacted other artists "via e-mail, internet, telephone and written correspondence," but it never laid out

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[12] *Id.*

[13] *Id.* at 10566, *9.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 10566, *13.

[17] 94 P.3d 463 (Wy. 2004).

[18] *Id.* at 465-66.

what the allegedly defamatory statements were.[19] Starostka claimed that the only contacts she made to anyone in Wyoming were with the plaintiff and with the state attorney general's office to complain about the company.[20] All of the artists she contacted lived in other states.[21] The court conducted a traditional forum contacts analysis focusing on the contract between the two, which was formed in Nebraska, and said that jurisdiction was improper based on the lack of any other contracts with Wyoming.[22]

The Tennessee Court of Appeals forged its own framework for jurisdiction in Internet defamation cases in *Hibdon v. Grabowski*.[23] The plaintiff, Kerry Hibdon, was a Tennessee jet-ski watercraft mechanic who had been featured in several jet-ski enthusiast magazine articles for the speeds he was able to get the machines to reach.[24] The defendants posted critical messages about Hibdon on a jet-ski enthusiast newsgroup.[25] Two of the defendants were Ohio residents, and they contested jurisdiction in Tennessee.[26]

The court conducted a brief jurisdiction analysis relying on the *World-Wide Volkswagen* and *Burger King* line of cases.[27] The court then found that the defendants

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[19] *Id.* at 466.

[20] *Id.* at 467.

[21] *Id.*

[22] *Id.* at 473.

[23] 195 S.W.3d 48 (2005).

[24] *Id.* at 52-54.

[25] *Id.* at 54.

[26] *Id.*

[27] *Id.* at 69-71.

had purposefully availed themselves of Tennessee laws by virtue of having sent messages to a forum read by Tennessee residents. "In the present case, Grabowski and Pace personally directed many of their Internet messages to residents of Tennessee, specifically fellow defendants."[28] Without explaining what characteristics of the messages indicated they were directed at Tennessee, the court sustained jurisdiction.[29]

The Arizona Court of Appeals relied on *Asahi* to reject jurisdiction in *Austin v. Crystaltech Web Hosting*.[30] The plaintiff in *Austin* was a resident of Bali. There were three defendants: an Arizona-based Internet hosting service, a Bali resident and a Bali corporation.[31] The Bali defendants competed with the plaintiff in selling travel tours to Indonesia.[32] The Arizona-based company, which hosted the Bali defendants' website on which the allegedly defamatory statements appeared, was dismissed as immune under Section 230 of the Communications Decency Act of 1996.[33]

Once the hosting service was removed, the court was left with a Bali plaintiff suing two Bali defendants. It applied *Asahi*'s principle that the "exercise of jurisdiction would be unreasonable and unfair in light of the 'serious burdens on [the] alien defendant [which were] outweighed by the minimal interests on the part of the plaintiff or the forum

[28] *Id.* at 71.

[29] *Id.*

[30] 125 P.3d 389 (Ariz. Ct. App. 2005).

[31] *Id.* at 391.

[32] *Id.*

[33] *Id.* at 573-74. 47 U.S.C. § 230 (2010).

State.'"[34] Arizona had "no real interest" in resolving the case between two Bali competitors.[35]

The Florida Court of Appeal gave little explanation for its assertion of jurisdiction in *Price v. Kronenberger*,[36] a very brief opinion. Both the defendant and the plaintiff had been members of the Korean War Veteran's Association.[37] After being expelled from the group, the defendant, an Illinois resident, sent an email to other members of the group throughout the country disparaging the plaintiff.[38] The plaintiff sued for defamation in Florida. After a short discussion of the state's long-arm statute, the court held that "[b]y publishing the e-mail in Florida and directing the defamatory comments at a Florida resident, Kronenberger established minimum contacts with this state."[39] The court cited two of its own precedents dealing with a television interview taped in Washington, D.C., that was aired in Florida[40] and with letters that were sent to Florida[41] without explaining the principle behind its decision to find jurisdiction.[42]

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[34] *Id.* at 575 (quoting *Asahi*, 480 U.S. at 115-16).

[35] *Id.* at 575.

[36] 24 So. 3d 775 (Fla. Ct. App. 2009).

[37] *Id.* at 776.

[38] *Id.*

[39] *Id*.

[40] Smith v. Cuban Am. Nat'l Found., 657 So. 2d 86 (Fla. Ct. App. 1995).

[41] Silver v. Levinson, 648 So. 2d 240, 243-44 (Fla. Ct. App. 1994).

[42] *Price*, 24 So. 3d at 776.

First Amendment Considered in Jurisdiction Cases

That very few courts took First Amendment considerations into account during the jurisdiction analysis is not surprising. After all, the Supreme Court looked unfavorably on adding a First Amendment analysis to jurisdiction in *Calder*.[43]

> The infusion of such considerations would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected *First Amendment* activity stemming from libel and defamation cases is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting.[44]

Yet, the Supreme Court's announcement was made in dictum and not in the substantive analysis of *Calder*, meaning a court that chose to tackle First Amendment principles would not be bound by that decision.

Of the 35 cases studied in this thesis, First Amendment issues were raised in only four decisions.[45] In two of those cases, the First Amendment consideration was related to a companion issue on appeal and not jurisdiction in the Internet defamation claim.[46] In the two remaining cases, one court cited the *Calder* dictum while dismissing First

[43] Calder v. Jones, 465 U.S. 783, 790-91 (1984).

[44] *Id.* at 790 (citations omitted, emphasis in original).

[45] *See* Marten v. Godwin, 499 F.3d 290, 298-99 (3d Cir. 2007); Kauffman Racing Equip., L.L.C. v. Roberts, 930 N.E.2d 784, 800 (Ohio 2010) (O'Donnell, J., dissenting); Hibdon v. Grabowski, 195 S.W.3d 48, 56-69 (Tenn. Ct. App. 2005); Griffis v. Luban, 633 N.W.2d 548, 553 (Minn. Ct. App. 2001), *rev'd*, 646 N.W.2d 527 (Minn. 2002).

[46] *See Marten*, 499 F.3d at 298-99 (finding that the plaintiff had failed to show targeted conduct sufficient for jurisdiction over a First Amendment retaliation claim); *Hibdon*, 195 S.W.3d at 56-69 (discussing substantive libel law and First Amendment principles in review of a summary judgment dismissal of defamation claims).

Amendment consideration,[47] and in the last case it was discussed only by the dissent and briefly.[48]

The Minnesota Court of Appeals First Amendment discussion in *Griffis v. Luban* was quite brief.[49] Griffis involved a defamation claim brought by an Alabama resident against a Minnesota resident in Alabama court.[50] The defendant had disparaged the plaintiff's credentials to teach a college course in an Internet newsgroup.[51] After winning in Alabama state court a default judgment of $25,000 and an injunction prohibiting the defendant from disparaging her credentials, the plaintiff went to Minnesota to enforce the judgment.[52] The defendant contested the Alabama court's jurisdiction in a collateral attack in Minnesota.[53]

The court briefly discussed the injunction: "Appellant also argues that the injunction violates the First Amendment. Because of this alleged illegality, appellant argues that the district court erred when it found in favor of respondent. The First Amendment plays no role in jurisdictional analysis."[54] It went on to say that because the Minnesota trial court had not made a decision on the First Amendment issue, it wasn't

[47] *Griffis*, 633 N.W.2d at 553.

[48] *Kauffman Racing Equip.*, 930 N.E.2d at 800 (O'Donnell, J., dissenting).

[49] *Griffis*, 633 N.W.2d at 553.

[50] *Id.* at 549.

[51] *Id.* at 550

[52] *Id.*

[53] *Id.*

[54] *Id.* at 553.

properly before the appellate court.[55] The Minnesota Supreme Court later reversed the appellate court's jurisdiction decision without discussing the First Amendment issues.[56]

Ohio Supreme Court Justice Terrence O'Donnell also gave the First Amendment a brief discussion in his *Kauffman Racing Equipment v. Roberts* dissent.[57] O'Donnell noted that the parties had not briefed and the court did not address First Amendment concerns because it was at the jurisdiction stage. "The Supreme Court of the United States in Calder 'rejected the suggested that First Amendment concerns enter into the jurisdictional analysis [and] declined . . . to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.'"[58] *Kauffman Racing* grew out of a dispute between an Ohio engine manufacturer and a customer in Virginia.[59] The customer had never been to Ohio and his only contacts with the state were the business transaction he entered into with Kauffman Racing and some comments he posted about the company on the website.[60] Applying the *Calder* effects test, the Ohio Supreme Court majority said his posts to several auto enthusiast forums and the online auction site eBay were adequate to satisfy due process.[61]

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[55] *Id.*

[56] Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002). *See supra* Chapter 3 notes 63-84 and accompanying text.

[57] 930 N.E.2d 784, 800 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011) (O'Donnell, J., dissenting).

[58] *Id.* (quoting Calder v. Jones, 465 U.S. 783, 790 (1984)).

[59] *Id.* at 787.

[60] *Id.*

[61] *Id.* at 798.

Justice O'Donnell, in dissent, expressed concern about the effect the majority's broad jurisdiction interpretation would have on speech. "[T]he practical impact of the majority's holding in this case is to unnecessarily chill the exercise of free speech."[62]

Finally, in a related case the Florida Supreme Court rejected First Amendment considerations when they were raised as a challenge to the state's long-arm statute.[63] In *Internet Solutions Corp. v. Marshall*,[64] the court did not have a constitutional due process decision in front of it.[65] The case arrived in the Florida Supreme Court in an unusual procedural posture. The federal Eleventh Circuit Court of Appeals certified a question about how to interpret the state's long-arm statute to aid its review of a federal district court opinion.[66] The case involved a Florida corporation suing a Washington state blogger for defamation based on a review she had posted calling one of its products a "fraud."[67]

At the Florida Supreme Court the defendant attacked the application of the long-arm statute as a violation of First Amendment speech protections.[68] The Florida court disagreed, citing *Calder*'s dictum. "As explained by the U.S. Supreme Court, 'the

[62] *Id.* at 800 (O'Donnell, J., dissenting).

[63] Internet Solutions Corp. v. Marshall, 39 So. 3d 1201 (Fla. 2010). This case falls outside the research methodology for this thesis because it is a long-arm statute decision and not a due process decision. It's discussed here because of the dearth of due process personal jurisdiction cases addressing the First Amendment and its usefulness in explaining one court's reluctance to apply First Amendment principles to an analysis that is closely connected to personal jurisdiction under due process. The case also relies on due process decisions for the rule that First Amendment considerations should not be undertaken at the jurisdiction stage.

[64] *Id.* at 1202

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1215.

potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.'"[69]

These cases clearly state one rule: Courts will not apply First Amendment protections to jurisdiction questions. They find the basis for that rule in *Calder* and adhere closely to it. This may be for reasons of judicial economy – as the Supreme Court seems to believe taking speech principles into account at the jurisdiction stage and in the substantive law of defamation would be a form of double counting. It could also be a desire to allow defamation cases to move past the jurisdiction stage and into discovery without cutting off a forum for an aggrieved party. Whatever the reason, courts are clearly reluctant to head down that path.

Results: *Calder, Zippo* and the First Amendment

This thesis sought to answer three basic questions about how courts deciding Internet defamation determined personal jurisdiction when the defendant was not a state resident. The research identified 35 cases where appellate courts made jurisdiction decisions based on due process considerations.

> 1) Did courts utilize the *Calder* effects test? If so, how did they apply it? Was it the sole standard used to determine jurisdiction? If they did not use the *Calder* effects test, did they acknowledge it and/or explain their decisions to use a different standard?

Thirteen of the cases relied solely on *Calder* or another case restating the effects test,[70] three considered *Calder* but declined to apply the effects test[71] and twelve applied

[69] *Id.*

[70] Silver v. Brown, 382 Fed. App'x 723 (10th Cir. 2010); Marten v. Godwin, 499 F.3d 290 (3d Cir. 2007); Ouazzani-Chadi v. Greensboro News & Record, Inc., 200 Fed. App'x 289 (5th Cir. 2006); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002); Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002); Blakey v. Continental Airlines, 751 A.2d 538 (N.J. 2000); Baldwin v. Fischer-Smith, 315 S.W. 3d 389 (Mo. Ct. App.

Calder while considering other tests.[72] The courts that applied *Calder* generally fell into one of two general categories: those taking a broad view of the effects test that allows for a wide application of jurisdiction and those taking a narrow view that restricts jurisdiction in many Internet defamation cases.

> 2) Did courts utilize the *Zippo* sliding scale test? If so, how did they apply it? Was it the sole standard used to determine jurisdiction? If they did not use the *Zippo* test, did they acknowledge it and/or explain their decisions to use a different standard?

Zippo's sliding scale was rejected outright by five courts deciding jurisdiction in Internet defamation cases,[73] applied as the primary test by five courts[74] and used in conjunction with the *Calder* effects test by six more.[75] The courts rejecting *Zippo* did so

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2010); Dailey v. Popma, 662 S.E. 2d 12 (N.C. App. 2008); Nygard v. Aller Jukaisat Oy, 2005 Cal. App. Unpub. LEXIS 1375 (2005); Rambam v. Prytulak, 2004 Cal. App. Unpub. LEXIS 12 (2004); Novak v. Benn, 896 So.2d 513 (Ala. Civ. App. 2004); Griffis v. Luban, 633 N.W.2d 548 (Minn. Ct. App. 2001), *rev'd*, 646 N.W.2d 527 (Minn. 2002); Blakey v. Continental Airlines, 730 A.2d 854 (N.J. Super. Ct. App. Div. 1999) *rev'd*, 751 A.2d 538 (N.J. 2000).

[71] Wagner v. Mishkin, 660 N.W.2d 593 (N.D. 2003); Renaissance Health Publishing v. Resveratrol Partners, 982 So.2d 739 (Fla. Ct. App. 2008); Conseco, Inc. v. Hickerson, 698 N.E.2d 816 (Ind. Ct. App. 1998).

[72] Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010); Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); The Cadle Company v. Schlictmann, 123 Fed. App'x 675 (6th Cir. 2005); Northwest Healthcare Alliance v. Healthgrades.com, 50 Fed. App'x 339 (9th Cir. 2002); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Kauffman Racing Equip., L.L.C. v. Roberts, 930 N.E.2d 784 (Ohio 2010); Kauffman Racing Equip., L.L.C. v. Roberts, 2008 Ohio 1922 (Ohio Ct. App. 2008); Goldhaber v. Kohlenberg, 928 A.2d 954 (N.J. Super. Ct. App. Div. 2007); Nam Tai Electronices v. Titzer, 93 Cal. App. 4th 1301 (2001); Rambam v. Luhta, 2001 Cal. App. Unpub. LEXIS 1143 (2001); Jewish Defense Org., Inc. v. Superior Court of L.A. County, 72 Cal. App. 4th 1045 (1999).

[73] Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); Northwest Healthcare Alliance v. Healthgrades.com, 50 Fed. App'x 339 (9th Cir. 2002); Kauffman Racing Equip., L.L.C. v. Roberts, 930 N.E.2d 784 (Ohio 2010);Wagner v. Mishkin, 660 N.W.2d 593 (N.D. 2003); Goldhaber v. Kohlenberg, 928 A.2d 954 (N.J. Super. Ct. App. Div. 2007).

[74] Best Van Lines, Inc. v. Walker, 490 F.3d 239 (2d Cir. 2007); Pearl v. Abshire, 2009 Tex. App. LEXIS 5351 (2009); Renaissance Health Publishing v. Resveratrol Partners, 982 So.2d 739 (Fla. Ct. App. 2008); Bombliss v. Cornelsen, 824 N.E.2d 1175 (Ill. App. Ct. 2005); Conseco, Inc. v. Hickerson, 698 N.E.2d 816 (Ind. Ct. App. 1998).

[75] Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010); The Cadle Company v. Schlictmann, 123 Fed. App'x 675 (6th Cir. 2005); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Nam Tai Electronices v. Titzer, 93 Cal.

either because they did not think it was appropriate to create a special Internet jurisdiction test or because they considered *Calder* to be more appropriate in defamation cases.

3) Did courts give any consideration to First Amendment speech protections in deciding jurisdiction issues?

Few courts considered First Amendment principles while discussing jurisdiction in Internet defamation cases. Only two courts mentioned the First Amendment during a due process discussion,[76] and in both instances the court relied on *Calder*'s dictum for the principle that the First Amendment should not be applied at that stage.

The Case for First Amendment Inclusion

Kauffman Racing provides a good example of why excluding First Amendment concerns at the jurisdiction stage is potentially dangerous to speech.[77] At its root, *Kauffman Racing* is a dispute between a merchant and an upset customer. The customer chooses to voice his concern about what he perceives to be a poor quality product on the Internet. This kind of complaint has become common in the Internet Age. The harm to the plaintiff is apparently minimal. Less than a half-dozen Ohioans read the posts, the worst of which claimed that the plaintiff was "less than honorable."[78] And the defendant had few connections to Ohio and showed little intent to reach an Ohio audience.

He may very well have had a good defense had the case gone to trial, but the cost of litigation was mounting after fighting the jurisdiction question through three

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App. 4th 1301 (2001); Rambam v. Luhta, 2001 Cal. App. Unpub. LEXIS 1143 (2001); Jewish Defense Org., Inc. v. Superior Court of L.A. County, 72 Cal. App. 4th 1045 (1999).

[76] 930 N.E.2d 784, 800 (Ohio 2010) (O'Donnell, J., dissenting); Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002).

[77] Kauffman Racing Equip., L.L.C. v. Roberts, 930 N.E.2d 784 (Ohio 2010), *cert denied* Roberts v. Kauffman Racing Equip., No. 10-617, order (U.S. Jun. 28, 2011). .

[78] *Id.* at 789.

courts. By leaving the First Amendment analysis to later in the litigation, the Ohio court left Roberts with a difficult choice: continue racking up legal bills until reaching the free speech vindication or settle.

Contrary to the dicta in *Calder*, a First Amendment analysis at the jurisdictional stage should be appropriate. At the early stages of litigation, before any evidence has been presented or any discovery conducted, courts consider a plaintiff's pleadings as factual in determining questions of law. Making sure that a defamation claim, as pleaded, can pass First Amendment muster at the jurisdictional stage doesn't serve to complicate an inquiry; rather it serves as a safety valve to ensure that protected speech is not being needlessly infringed. As Stein argued, "[C]ourts need to be cautious in assuming the validity of a plaintiff's assertion of malicious conduct. Defamation is a particularly bad candidate for such an assumption, given its potential chilling effects on protected speech outside of the forum."[79]

The two crucial elements that tend to determine libel cases are falsity and fault. The requisite level of fault is determined by the status of the plaintiff as a public official, public figure or private figure.[80] Falsity comes into play whenever the statements at issue involve public concerns.[81] Introducing a First Amendment analysis into the jurisdiction question would provide protection on both elements by

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[79] Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 447 (2004).

[80] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). In *Sullivan* the Court raised the fault standard in libel cases where the plaintiff is a "public figure" to "actual malice," which it defined as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 80. *Gertz* extended the actual malice standard to anyone qualifying as a public figure and to determine that the court looks to the plaintiff's "pervasive fame or notoriety" or whether "an individual voluntarily injects himself . . . into a particular public controversy." *Gertz*, 418 U.S. at 351.

[81] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

ensuring that the plaintiff, at a bare minimum, was able to plead a case that was likely to survive summary judgment.

For example, a public official wishing to sue an out-of-state newspaper for libel would have to include in his pleadings an allegation of a false statement of fact made with actual malice. If he could not, or failed to, plead the necessary elements of an actual malice showing, then the defendant newspaper would not have to be subject to the expense of litigating through pre-trial motions before ultimately winning on summary judgment. The only purpose of allowing the entire exercise to proceed without a prima facie showing of potential success is to subject the newspaper to harassing litigation in a distant forum. On the other hand, a private figure plaintiff most likely would not have a difficult time getting his case through the First Amendment portion of a jurisdictional analysis because he merely must plead that a falsehood has been published about him negligently. Thus, a requirement at the jurisdictional analysis stage that the plaintiff be able to make a prima facie case that would withstand First Amendment scrutiny would serve to protect only those who choose to comment on public officials and figures from being needlessly harassed in another jurisdiction by a plaintiff who ultimately has little chance of success.

Philadelphia Newspapers v. Hepps[82] helps illuminate how a First Amendment protection would help with the falsity element. In *Hepps*, the Supreme Court held that when an allegedly libelous statement involves a matter of public concern, libel plaintiffs, both public and private, must prove the falsity of the

[82] 475 U.S. 767 (1986).

statements in order to prevail.[83] "To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[84] The essential point was that giving the burden to the defendant to prove the truth of his statements would harm the flow of speech. Thus, requiring a plaintiff to make a prima facie showing of his libel case at the jurisdictional stage would also include some pleadings about the falsity of the statements he is claiming are defamatory if the subject of the statements was a matter of public concern. That necessarily would require the plaintiff to plead the allegedly defamatory statements with specificity if the jurisdiction he was in did not already require it under the rules of civil procedure.

Applying that framework to *Tamburo v. Dworkin*[85] shows how that standard would work. In *Tamburo* the plaintiff was a dog breeder accused of stealing data from other dog breeders' publicly available websites.[86] In order to survive jurisdiction, Tamburo would simply have to plead facts about the falsity of the statements, i.e., where he got the data from. The burden on the plaintiff is relative low at pleading, but raising the bar even slightly could help prevent harassing litigation. A requirement at

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[83] *Id.*

[84] *Id.* at 776-77.While the Hepps court did not decide whether the same standard applied to cases involving nonmedia defendants, many lower courts have found that in cases of private plaintiffs-public concern the falsity standard is applicable. *See* Flamm v. American Ass'n of Univ. Women, 210 F.3d 144, 149 (2nd Cir. 2000); Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 549 (5th Cir. 1994); *In re* IBP Confidential Business Documents Litig., 797 F.2d 632, 644 (8th Cir. 1986); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1511 (D.D.C. 1987);Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781, 786 (Cal. Ct. App. 1996); Kahn v. Bower, 284 Cal. Rptr. 244, 249 (Cal. Ct. App. 1991); Ayala v. Washington, 679 A.2d 1057, 1062-63 (D.C. Ct. App. 1996).

[85] 601 F.3d 693 (7th Cir. 2010).

[86] *Id.* at 697.

the jurisdictional analysis stage that the plaintiff be able to make a prima facie case that would withstand First Amendment scrutiny could provide some degree of protection to those who choose to comment on public officials, public figures and matters of public concern from being harassed in another state by a plaintiff who has no chance of success.

The Danger of Bringing Back Common Law Malice

When the question of jurisdiction turns on the intent of the defendant to cause harm in a specific forum, the analysis allows the reintroduction of common law malice. In the *New York Times v. Sullivan*,[87] the Court set out a new standard of fault in libel cases brought by public officials: actual malice. The Court defined actual malice as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[88] Without this heightened standard to protect speech,

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." . . . The rule [strict liability] thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[89]

In *Gertz v. Robert Welch, Inc*. the Court extended the actual malice standard to anyone who qualifies as a public figure.[90] To determine public figure status, the Court

[87] 376 U.S. 254 (1964).

[88] i at 280.

[89] *Id.* at 279.

[90] 418 U.S. 323 (1974).

said judges should look to the plaintiff's "pervasive fame or notoriety" or whether "an individual voluntarily injects himself . . . into a particular public controversy."[91]

At common law, malice is "1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights."[92] The difference between actual malice, as defined by *Sullivan* and common-law malice is the nature of intent. Actual malice requires an intent to knowingly or recklessly publish a falsehood. That's a higher standard than what is created by common law malice, which, in essence, involves an intent to harm. In looking at the relationship between the two, the D.C. Circuit said, "It is clear . . . that common law malice is not the equivalent of actual malice in the defamation context, and that common law malice alone will not support a finding of actual malice."[93]

While the *Calder* test is essentially an "effects" test,[94] it calls for an inquiry into the intent of the defendant. In *Calder*, the Court included the intent of the defendants to cause harm in the forum state as part of its determination: "[T]heir intentional, and allegedly tortious, actions were expressly aimed at California. . . . And they knew that the brunt of that injury would be felt be respondent in the State in which she lives and works."[95] Yet when the Court rejected the First Amendment analysis at the jurisdictional stage, while citing the speech protections afforded libel

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[91] *Id.* at 351.

[92] BLACK'S LAW DICTIONARY 976 (8th ed. 2004).

[93] Tavoulareas v. Piro, 759 F.2d 90, 117 (D.C. Cir. 1985) (citing Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82, 88 S. Ct. 197 (1967) (per curiam); Henry v. Collins, 380 U.S. 356, 357, 85 S. Ct. 992 (1965) (per curiam)).

[94] *See supra* Chapter 3.

[95] Calder v. Jones, 465 U.S. 783, 789-90 (1984).

defendants in *Sullivan* and *Gertz*, it did not acknowledge that it was potentially creating two different intent inquiries in some libel cases.

The result is that in defamation cases in which the actual malice standard will be involved, courts must look at intent twice and use two different standards. For jurisdictional analysis, under *Calder*, the court analyzes whether the defendant knew that the allegedly defamatory statement would cause the brunt of its harm in the forum state.[96] Then using the First Amendment — much later in the litigation — either the court or jury returns to the defendant's intent to determine whether he knew the statement was false or was reckless in his disregard for whether it was true or false.[97] This scheme is an inefficient use of judicial resources. A case that is clearly destined for dismissal at the summary judgment stage because the plaintiff is a public figure and has not pleaded sufficient facts to prove actual malice may still proceed past jurisdictional analysis and into discovery. A single inquiry into intent is both more efficient and provides appropriate protection for speech that fulfills First Amendment values. Stein rightfully argues:

> To the extent that jurisdiction is dependent upon the malicious intent of defendant to cause injury in the forum, courts ought to test the factual sufficiency of the plaintiff's claim on the merits at this stage, including proof that defendant acted with "actual malice" and the underlying statement is, in fact, false. Courts that have sustained jurisdiction in libel cases have not taken this burden seriously.[98]

[96] *Id.* at 789.

[97] New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

[98] Stein, *supra* note 74, at 448.

Conclusion

The U.S. Supreme Court should clarify how the *Calder* effects test is to be applied in defamation cases and should reject application of the *Zippo* sliding scale. When applied to Internet defamation, the *Zippo* sliding scale of interactivity irrationally focuses on the nature and character of the website. Neither of those considerations has any bearing on how damaging a defamatory statement may be to an individual's reputation nor whether the defendant intended to avail himself or herself of a particular forum. On the other hand, lower courts have applied the *Calder* effects test to Internet defamation in confusing and contradictory ways. Some courts have read it to require the defendant intentionally targeted of the forum itself as well as had knowledge the plaintiff would feel the harm there.[99] Others have read it in a much broader sense so that it allows jurisdiction if a defendant knows the plaintiff lives in the forum and targets the plaintiff and someone in the forum other than the plaintiff reads it.[100]

When the Court revisits personal jurisdiction in the defamation context it should be in an Internet case. Because the Internet functions differently than traditional media, the balancing of factors the Court did in *Calder* becomes more difficult. The *Calder* Court specifically noted that the *National Enquirer* circulated a large number of copies in California – 600,000 – and that it was the state in which the publication had its highest circulation. That the reporter and editor working on the story knew the newspaper would have an extended reach in California was an important element of conferring jurisdiction there. Determining the geographic location of readers on the Internet is much more

[99] *See* Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

[100] *See* Kauffman Racing Equip. L.L.C. v. Roberts, 930 N.E.2d 784 (Ohio 2010).

difficult. Predicting where a particular article will have its highest readership is also difficult in the Internet age. For example, a small North Carolina community newspaper that posts its stories on the Internet might expect its highest readership in the state. Its news is local. But if it posts a story that has a particularly captivating, compelling or humorous narrative, the story could easily go viral through social media links and end up having its highest readership in New York or California. How does one apply the readership factors in *Calder* to a story published on the Internet? An editor or reporter has no reasonable expectation that the audience will be in one particular state or reach a certain number of readers.

When the Court revisits *Calder*, it should also repudiate its dictum that First Amendment principles are not applicable to the jurisdiction decision. Asking a plaintiff to at least plead adequate facts to pass First Amendment scrutiny in a jurisdiction decision is not a form of double counting, as the *Calder* Court asserted. Rather it serves as a prophylactic measure to prevent courts from exercising broad jurisdiction that ultimately inhibits robust public debate, as the Ohio court did in *Kauffman Racing*.

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