January 2004
Volume 4
Issue 1

BEAN KINNEY & KORMAN PC
ATTORNEYS

Business Law Newsletter

THE INTERNET AND JURISDICTION

By James V. Irving

Not only has the Internet changed the way Americans do business, but its novel applications have challenged long-standing jurisdictional rules developed in a simpler time.

Only those courts sitting in a state in which the defendant has "minimum contacts" are legally entitled to hear and resolve a particular dispute. The Internet's easy, multi-state and multi-national reach has raised new issues to be analyzed in accordance with time-tested standards. In doing so, the courts are developing a new body of jurisdictional law.

Most recently, a Federal judge sitting in Virginia has limited the jurisdiction conferred by the use of e-mail to states where the internet user directed his email. The case of Palmer v. Valone and GRNC/FFE, Inc. was decided by Judge Leonie M. Brinkema on November 10, 2003.

Palmer involved an allegedly defamatory e-mail directed by Valone to a limited email distribution list. According to Judge Brinkema's Memorandum Opinion, the email stated that the plaintiff "who is married, was having sexual relationships with a man not her husband." The email was circulated to a private group call TAGnet. 99% of the 117 members of TAGnet lived in North Carolina and one lived just across the boarder in Virginia. Valone posted the message through America Online, which is located in Virginia, using an account provided by his employer, GRNC/FFE a non-profit organization chartered for the purpose of educating North Carolina residents about their right to bear arms.

Apparently, sometime after the original posting, someone in the TAGnet group forwarded the e-mail outside the initial circle, so that it eventually reached a number of Palmer's friends and associates in northern Virginia. Palmer argued that Virginia courts had jurisdiction because TAGnet used a Virginia internet server (AOL) and because at least one original recipient was in Virginia. Judge Brinkema ruled that these facts fail to establish Virginia jurisdiction.

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As the Wind Blows

By James V. Irving

One of the counter-intuitive aspects of our legal system is a party's right to assume legally inconsistent positions within the same lawsuit or from one litigation to another. While this practice may seem illogical or even morally corrupt, American courts typically allow a litigant to argue both sides of the same position, depending on the circumstances in which he finds himself.

Post Apartment Homes LP, et al v. RTKL Associates, Inc. was part of a complex property development dispute involving the developer, the contractor, and the architect; and it provided Judge William T. Newman, Jr., of the Arlington Circuit Court with the opportunity to comment on this peculiarity. His letter opinion was handed down November 5, 2003.

At issue in *Post Apartment* was whether a developer, who had defended an earlier multimillion dollar claim brought by the project's contractor by claiming the architect's drawings were compliant, could later sue the same architect by claiming the same architect's drawings were defective. Citing the "Inconsistent Positions Doctrine" established by Burch v. Grace ST. Bldg. Corp., Inc. in 1937, the architect argued that the developer's prior affirmative reliance on the documents barred the suit. The court disagreed. The Inconsistent Positions Doctrine only bars inconsistent testimony at trial, said Judge Newman. In any event, the case between the developer and contractor did not go to trial (the matter was settled through mediation), and the inconsistent position was only assumed in discovery in the first case.

The court acknowledged an inherit "antipathy towards taking inconsistent positions", but pointed out that the practice is well established by the Virginia Rules of Court, which expressly allows a party to plead alternative theories in litigation. Additionally, the court pointed out that the discovery responses are not treated as "immovably dispositive."

Reading between the lines, it is easy to imagine the real problem arising from a sense of mistrust as alliances formed and frayed during the heat of complex and high-risk litigation. Professional loyalty remains an important consideration for any business, but the law does not prevent a party from changing its position as the wind blows.

MEET OUR LAWYERS

James R. Schroll

Jim Schroll is admitted to the Virginia, Maryland, and District of Columbia bars and has been a Bean Kinney shareholder since 1990. Jim concentrates his practice in commercial litigation, with an emphasis on enforcement of creditors' rights. He regularly represents banks and other lending institutions as well as large and small businesses in both state and federal courts including the bankruptcy court. In addition to commercial litigation, a significant portion of Jim's practice involves the negotiation and preparation of loan documents on behalf of lenders in commercial loan transactions, including loans secured by government contracts. He advises lenders regarding secured transactions, and representing purchasers and sellers of commercial loan documents.

Jim is a member of the Board of Governors of the Bankruptcy Law Section of the Virginia State Bar, a member of the Northern Virginia Bankruptcy Bar, and a Master in the Walter P. Chandler American Inn of Court. He frequently lectures and authors articles on creditors' rights, bankruptcy and the Uniform Commercial Code.

A *magna cum laude* graduate (Phi Beta Kappa) of Duke University, Mr. Schroll received his law degree with honors from the George Washington University Law School in 1978.

Jim lives in Falls Church, Virginia with Nancy, his wife of 27 years, their daughter Julie. Their son, Ben, attends college in North Carolina.

Imprecise Contracts May Be Unenforceable

By James V. Irving

When asked to enforce the terms of a contract, courts first seek to ascertain the intention of the parties. This often-repeated statement remains a cardinal rule of contract interpretation. However, a recent ruling from the Circuit Court of the City of Roanoke reminds us that this maxim is modified by the limitation "within the language of the agreement as written."

In Berglund Chevrolet Inc. v. Thor Incorporated, an officer of the plaintiff corporation casually signed the contract at issue in his own name, intending to bind his employer. Because his signature failed to identify the representative capacity in which he intended to sign, the Court granted the defendant's request to dismiss the case. Berglund Chevrolet Inc. was not named in the contract.

Berglund arose from a preprinted three-party construction contract identifying the "Owner," "Architect," and "Contractor" as the parties. The Contractor's representative signed as "Thor Inc. by James B. Bradshaw, President." The owner was ambiguously identified as "Bruce M. Farrell" of "Bergland Automotive Group" on the face of the document by the employee of the Architect who filled out the form. In fact Farrell was an officer of Berglund, but he failed to correct the misnomer or follow the normal formalities for corporate endorsement.

"within the language of the agreement as written."

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A non-resident subjects himself to "general jurisdiction" in Virginia when they have persistent contacts within the state. No one claimed Valone's contacts rose to this level. A second type of jurisdiction, called "specific jurisdiction" can arise when there are only limited contacts between the Defendant and the forum state, if those contacts are the basis of the suit and if the defendant has "purposefully availed" himself of the privilege of conducting business in the Commonwealth.

Citing *ALS Scan v. Digital Service Consultants, Inc.* (4th Circuit, 2002), Judge Brinkema ruled, in essence, that even assuming that Valone should have been aware of the single Virginia's resident on the TAGnet list, sending a single, incidental Virginia email was insufficient to establish specific jurisdiction because there was no apparent intent on the part of the defendant to direct his conduct toward Virginia. Additionally, and relying on the precedent established by *ALS,* the use of the AOL account alone was insufficient to establish jurisdiction in Virginia, even though AOL is headquartered in Virginia.

As jurisdiction is ultimately measured by fairness, Judge Brinkema's ruling is logical. If the use of an internet server was sufficient, then Virginia might be an available forum in the case of anyone with an AOL account; even users who had no idea where AOL was based.

The issue arising from the email's delivery is more difficult until one remembers that it doesn't matter where the email ended up; it matters where Valone intended to send it. Since his activities were directed within North Carolina, it would be unreasonable to drag him into Virginia courts. While on the surface the result may seem unfair to Palmer, she retains the right to sue Valone in North Carolina.

Judge Brinkema's *Palmer* decision may not be completely consistent with other emerging law on interest-based jurisdiction. Appellant Courts are likely to review competing and inconsistent lower court decisions before the law becomes settled.

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Imprecise Contracts May Be Unenforceable

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He simply signed in his own name. Later, when Berglund claimed that the defendant was installing sub-standard tile, they brought suit to enforce the contract. Thor responded with a Motion to Dismiss claiming that Berglund Chevrolet Inc. was not a party to the contract.

Plaintiff argued that the intention of the parties was clearly understood and apparent from the details of performance: it was, for example, Berglund Chevrolet, Inc., and not Farrell, that paid the Contractor's invoices. Other evidence, however, was ambiguous. Even the references in the contract suggesting a corporate owner used the phrase "Berglund Automotive Group", rather than Berglund Chevrolet Inc. Judge William D. Broadhurst noted that the "equivocal behavior of the parities" made it impossible for the court to conclude that Berglund Chevrolet Inc. was intended to be one of the parties to the contract. Judge Broadhurst wrote "where conduct is used to show the intent of the parties, the acts relied on must clearly demonstrate the intent and not be doubtful or of arguable quality."

It is not unusual for even sophisticated business people to be occasionally careless about certain niceties of contract draftsmanship. *Berglund Chevrolet* reminds us that a party may be fatally limited by the shortcomings in the document it signs.

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