

## ADDITIONAL DEVELOPMENTS— CYBERLAW

### *DOUGLAS V. U.S. DISTRICT COURT EX REL TALK AMERICA, INC.*

*495 F. 3d 1062 (9th Cir. 2007)*

The United States Court of Appeals for the Ninth Circuit held that a customer was not bound by the revised terms of a contract which were posted on a website.

Joe Douglas contracted for long-distance telephone service with America Online. Douglas's account was subsequently acquired by Talk America. Talk America thereafter unilaterally added provisions to the service contract, including an arbitration clause and a choice-of-law provision. Talk America posted the revised contract on its website, but did not otherwise notify customers of the revisions. Douglas used Talk America's service for four years without knowledge of the revised terms.

Douglas filed a class action suit against Talk America for, among other things, breach of contract. He petitioned for a writ of mandamus in the Ninth Circuit after the U.S. District Court for the Central District of California granted Talk America's motion to compel arbitration pursuant to the revised contract.

The Ninth Circuit granted the writ of mandamus, holding that the order to compel arbitration was clearly erroneous as a matter of law. Talk America's unilaterally revised contract did not bind Douglas because Talk America had not notified him of and he was not otherwise aware of the new terms. The Ninth Circuit held that one party to a contract has no obligation to periodically check the contract terms to learn whether they have been changed by the other party. Further, one party to a contract cannot unilaterally change the contract. "[A] revised contract is merely an offer and does not bind the parties until accepted." Moreover, since Talk America failed to give Douglas proper notice of the proposed changes, Douglas's continued use of Talk America's service after it had changed the contract terms did not give rise to an inference of acceptance. The court found that the posting of the revised contract on a website was not proper notice of the proposed changes. A party to a contract would not know when to check the website for changes to the contract without receiving a notification that the contract had been changed.

The court found that mandamus relief was warranted, concluding that Douglas lacked other adequate means of challenging the district court's arbitration order, and a forced arbitration would prejudice Douglas in a manner not correctable on appeal.

The Ninth Circuit noted that this was the first time that any federal appellate court had addressed the enforcement of a modified contract where the alleged notice given to the customer consisted of posting the contract on the provider's website. The outcome of the case could affect numerous service providers and millions of customers.

***HOWARD V. MISSOURI BONE & JOINT CENTER, INC.****869 N.E. 2d 207 (Ct. App. Ill. 2007)****CAPITOL FEDERAL SAVINGS BANK V.  
EASTERN BANK CORP.****493 F. Supp. 2d 1150 (D. Kan. 2007)*

In both *Howard v. Missouri Bone & Joint Center* and *Capitol Federal v. Eastern Bank* courts declined to find personal jurisdiction over an out-of-state corporate defendant on the basis of the defendant having a website accessible from within the state.

The Due Process Clause of the Fourteenth Amendment limits when a state may assert jurisdiction over a non-resident defendant, including a corporation, protecting a defendant's "liberty interest in not being subject to the binding judgments of a forum in which [the defendant] has established no meaningful ties, contacts or relations." To establish personal jurisdiction, a plaintiff must demonstrate that the defendant had the necessary minimum contacts with the forum state. This minimum contacts standard can be met in two ways: First, a court can exercise specific jurisdiction where a defendant has "purposefully directed" his activities at members of the forum and the litigation results from alleged injuries that "arise out of or relate to" those activities. Second, a court can exercise general jurisdiction only where the non-resident has "continuous and systematic general business contacts" with the forum.

In *Howard v. Missouri Bone & Joint Center* the Appellate Court of Illinois, Fifth District, affirmed an order of the circuit court vacating a judgment against the defendant on the grounds that the court lacked personal jurisdiction over the defendant. The defendant was a Missouri Corporation with its principal place of business and corporate headquarters in Missouri. The defendant ran a fitness center that only does business in Missouri.

The plaintiff claimed jurisdiction based on general jurisdiction, rather than injuries arising or relating to defendant's contacts with Illinois, relying on the fact that the defendant ran a website accessible to people in Illinois, and the fact that the defendant sent advertising flyers to schools and coaches in Illinois. The plaintiff had based his arguments on the "sliding scale" used by a Pennsylvania court in *Zippo Manufacturing v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). At one end of the scale is a business which regularly enters into contracts with a foreign jurisdiction where the contract involves sending computer files over the Internet. At the other end of the spectrum is a website that involves no customer interaction.

The court declined to apply the *Zippo* sliding scale, saying the interactivity of the website is irrelevant. The court found that a passive website is like an advertisement and held that an advertisement is not enough to sustain personal jurisdiction in Illinois. The court found that the defendant's distribution of flyers to coaches and schools in Illinois is a similar advertisement, and likewise is not enough for personal jurisdiction. Illinois law limits general jurisdiction over non-residents to where the non-resident is "present and doing business, requiring in-state business activity "with a fair measure of permanence and continuity," such the defendant has subjected itself to the laws and jurisdiction of the state. That standard, the court held, was not met.

In *Capitol Federal v. Eastern Bank*, the U.S. District court for the District of Kansas held that it lacked personal jurisdiction over out-of-state defendant Eastern Bank. Eastern

Bank is a mutually owned bank with headquarters in Boston doing business throughout New England. Capitol Federal is a federally chartered mutual savings association with its principal place of business in Kansas. It is the owner of the “TRUE BLUE” service mark. Capitol Federal claimed that Kansas courts had personal jurisdiction over Eastern Bank due to Eastern’s use of the “TRUE BLUE” mark to direct customers to its own commercial website.

Eastern had seventy accounts held by Kansas residents, although 96.3% of account-holders were from Massachusetts. Eastern was not licensed to do business in Kansas. It did not have any employees, agents, offices or property in Kansas, though it did have a commercial website accessible from within the state. But a person could only apply for a personal or business account online through Eastern’s website if they lived in New England. People living anywhere in the United States could apply for a credit card through Eastern’s website, but Eastern did not provide the credit cards themselves. Eastern displayed the words “TRUE BLUE” on its website. Eastern solicited and transacted business through its website, offering the same services as Capitol Federal.

Capitol Federal alleged that there was both general and specific personal jurisdiction over Eastern. The court applied the “interactivity” sliding scale test from *Zippo* and concluded that the website did not support a finding of specific personal jurisdiction. Notably, the court separately applied the test to different components of the website. The court found that to non-customers the website was passive, which did not qualify the site for personal jurisdiction. The court found that the online credit card application did qualify as being interactive, but that it wasn’t clear that Kansas residents were being targeted. The only Kansas resident who had applied for a credit card using the site had done so in preparation for the litigation. The court found that the online banking portion of the website was interactive, but that one had to sign up for a special service and Capitol Federal had failed to prove that any Kansas customers had done so.

The court concluded that Eastern’s advertising campaign was not “purposefully directed” at Kansas residents, and therefore did not support a finding of personal jurisdiction. Looking more narrowly at Eastern’s Kansas customers, the court found that while Eastern did “purposefully direct” its efforts to these customers, that there was no showing that the trademark claims “arose out of” Eastern’s relationships with these Kansas customers.

The court similarly found that there was no general personal jurisdiction over Eastern. While Eastern’s relationship with its Kansan customers was continuous, it accounted for only 0.008% of its customers. This was not substantial enough for the court to exercise jurisdiction over Eastern Bank.