

Opportunities and pitfalls for insurers on the Web

Insurance companies need to tread carefully in Internet transactions.

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THE INSURANCE INDUSTRY'S embrace of the Internet has created new opportunities for potential sales and marketing initiatives. Many insurance companies have developed creative Web sites to be more readily accessible to their clients. These Web sites, however, come with intriguing questions of state regulation and jurisdictional authority.

Insurance is regulated independently in each state, and although the use of the Internet

would be a natural extension of an industry that maintains its client base by providing information and services in an effective and efficient manner, significant problems arise when determining the origin of a transaction and the place the policy was purchased. These legal issues were largely overlooked in light of the Internet's penetration into the global community more quickly than any other technical advance.

The rapid growth proved alluring to insurance companies when traditional sales and marketing avenues were declining and online e-commerce transactions had exploded exponentially. While the legal issues took a back seat to the industry's desire to exploit quickly this new medium, the legal quagmires remained in this new world of insurance e-commerce.

The tremendous growth in consumer use of the Internet will likely translate into increased

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insurance e-commerce. In fact, one industry survey found that consumers are becoming increasingly comfortable with the idea of purchasing insurance online. See E.E. Mazier, *National Underwriter*, The National Underwriter Co., March 26, 2000.

Legal concerns for the insurance industry arise as a direct result of the way individuals are using the Web. The development of a commercial Web site may seem innocent within the context of the promotion or sale of an insured's product or services. As a Web site becomes more interactive, allowing actual transactions to take place online, legal pitfalls begin to loom.

E-commerce raises legal questions such as "What laws or regulations would govern that anonymous communication in cyberspace?" or "Where should a plaintiff file suit when his claim results from cyberspace activity?" To address these issues, cyberlaw has evolved.

Jurisdictional quagmires

Both of the issues raised above relate to the concept of cyberlaw jurisdiction. The Internet is "multijurisdictional," due to its global presence. The difficulties of applying traditional jurisdictional concepts are apparent and are not easily overcome by courts, regulatory authorities or, indeed, companies seeking to exploit this new frontier without the peril of being hauled into a jurisdiction they were not prepared to defend themselves in or become licensed in.

Legal commentators and courts are split on how and when contacts made via the Internet are sufficient to confer jurisdiction. See, e.g., George B. Delta and Jeffrey H. Matsuura, "Law of the Internet," *Aspen Law & Business* 2001 at 3-30. Traditional notions of jurisdiction are based on their requirement of minimum contacts: A defendant has to have taken actions that were purposefully directed toward the forum state, such as selling goods within the state in question. *Int'l Shoe Co. v. Washington*,

326 U.S. 310 (1945).

Jurisdiction is murky due to the wide-ranging gradations of Internet activity. Consequently, courts have been inconsistent in their analyses of minimum contacts relating to e-commerce and Internet jurisdiction. For example, in *Maritz Inc. v. CyberGold Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), the court found jurisdiction over a defendant, where the defendant's only contact with Missouri was a Web site "published" on a computer in California. In contrast, the U.S. Court of Appeals for the 2d Circuit in *Bensusan Restaurant Corp. v. King*, 1997 WL 560048 (2d Cir. Sept. 10, 1997), affirmed the district court's finding that King was not subject to personal jurisdiction in New York based on the use of his Internet site. These inconsistencies have prevented the courts from establishing common principles of jurisdiction in these areas.

Unlike the banking industry, the insurance industry is governed on the state level. Each state has an insurance department responsible for overseeing companies transacting an insurance business within its borders. Each state regulates companies by applying local standards and their own particular style. The New York Department of Insurance, for example, described in Circular Letter 33 (1999) that the department's regulatory approach would be to encourage insurers to integrate elements of electronic commerce into the marketing and sale of insurance. See www.ins.state.ny.us/c1199_33.htm.

Traditional notions of jurisdiction can be broken down into two categories: general jurisdiction and specific jurisdiction. General jurisdiction may be found by measuring the quantity and quality of the company's contacts within the forum state. This doctrine is useful when there is little or no causal connection between the defendant's wrongdoing and the forum. A court would consider the contacts within the state and determine whether these contacts are continuous and systematic. See Gene R. Shreve and Peter Raven-Hansen,

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Understanding Civil Procedure 73 (Lexis Publishing 1989).

Specific jurisdiction turns on whether the defendant could have reasonably anticipated being compelled to appear in that state's court. Specific jurisdiction exists where a corporation is found to have purposefully availed itself of the privileges of doing business in the forum state. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Additionally, specific jurisdiction can be found when the corporation or individual is involved in a claim that arose out of forum-related activities. Finally, specific jurisdiction may exist where the exercise of such jurisdiction by the court is deemed to be reasonable. *Cybersell Inc v. Cybersell Inc.*, 130 F.3d 414, 416 (9th Cir. 1997).

Early cases that discussed a state's jurisdictional authority with regard to Internet activity often reached contradictory results.

Compare *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997), with *American Network Inc. v. Access America*, 1997 WL 466507 (S.D.N.Y. Aug. 14,

1997). But a pattern appears to be emerging that indicates that jurisdictional issues in cyberspace rest on the functionality and levels of interactivity of the Web site in question. As a general rule, the more interactive the site, the more likely a court will find jurisdiction over the defendant. Courts have begun to apply a sliding-scale test with three specific levels of activity to determine whether a Web site's activities are sufficient to find that the defendant purposefully availed itself of the forum. See *Zippo Mfr. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997). The determining factors for the sliding scale are the nature of the defendant's site, the level of interactivity and whether the site is commercial in nature. Courts also take into account other non-Internet contacts (such as newspaper advertisements, *Inset Sys. Inc. v. Instruction Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996)) with the forum that, in conjunction with the operation of the Internet site, may support jurisdiction.

Sliding scale analysis

The first level of the sliding scale comprises passive Web sites, in which sites are used as a billboard. Such sites are used strictly for the posting of information about a company's services or products. Recent court decisions have found that a passive Web site that does

little more than make information available does not, from a commercial perspective, create grounds for the exercise of personal jurisdiction. *Bensusan Restaurant Corp. v. King*, 1997 WL 560048 (2d Cir. 1997). N.Y. Ins. Dep't Circular Letter 5, (Feb. 1, 2001), mirrors this line of reasoning. It advises that the operation of a Web site that contains information about specific insurance products that is accessible to New York consumers would not be considered solicitation under New York insurance law.

The circular letter further clarifies that a Web site merely containing advertisements for insurance products also does not constitute a solicitation. In California, the Producer Licensing Working Group (a group constituted by the California Department of Insurance to advise on licensing issues) in July 1998 recommended that a Web site that advertises insur-

ance, as opposed to selling insurance, should not be required to be licensed as an insurance entity, but that the owner of the Web site (an insurance company or insur-

ance agent/broker) should be licensed.

Interactive Web sites that allow a user voluntarily to exchange information with the host computer occupy the middle of the sliding scale. In these instances, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information occurring on the Web site.

Features that allow greater functionality and ease—such as the ability to obtain an insurance quote, request information via e-mail or complete an online application—may well lead a corporation into a forum in which it was not prepared to defend itself.

Recently, some courts have looked beyond interactivity and assessed the degree of commercial activity that the defendant conducted in the forum state. For instance, California has refined the interactivity scale by ruling that interactivity is irrelevant without proof that anyone from the state actually accessed the Web site. Interactivity in and of itself is important as the regulatory authorities are concerned about licensing companies based on the access to the market. See *Resolution Trust Corp. v. First American Bank*, 796 F. Supp. 1333 (C.D. Calif. 1992).

At the other end of the sliding-scale formulation are commercial Web sites, through which companies actively engage in business

transactions over the Internet. Sites such as these usually encompass a retail feature that allows consumers to purchase the product and, in the case of an insurance Web site, to prepare an online application for insurance and have it directly billed to the consumer's credit card. These business transactions may well confer personal jurisdiction on the company in the consumer's home state.

Although the definitions of interactive and commercial Web sites may overlap, a Web site that allows the consumer to obtain an insurance quote and includes customer service would bolster a court's finding that a de facto e-commerce site exists, due to its facilitation and solicitation of sales. In *Zippo Manufacturing*, the court stated, "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." 937 F. Supp. at 1123.

Watch the middle ground

Interactive Web sites, the middle ground of the sliding scale, are of the most concern to the insurance industry because, although it is readily apparent that insurers are moving at an increasing pace to embrace e-commerce, few have gone that far in terms of creating distinctive Web-enabled services.

To date, only the dot-com insurers and the most advanced of the carriers and agents/brokers do more than allow customers to access and update policy information over the Internet. Few provide online rating, quoting and policy issuance, and a mere handful use the Web for claims reporting. The same is true for most financial-services companies offering insurance. Sometimes, however, simple features such as allowing information requests via e-mail or completing an online application may be the basis for personal jurisdiction when considered in the aggregate.

At first glance, it may seem that navigating this new area of the law is relatively straightforward. The range of activity conducted on the Internet, however, is broad, from simple forms of electronic communication to complex transactions. Thus, it would be wise for any company seeking to exploit this medium to conduct a complete legal review of its cyberspace activities and to seek to understand fully the legal implications that a more interactive site poses. **NLJ**