

# How to deal with Texas businesses without getting sued

David Coale explores when a Texas-based court can exercise jurisdiction over an out-of-state defendant



David Coale

David Coale is a partner with Lynn Pinker Hurst & Schwegmann LLP in Dallas, Texas  
[lynllp.com](http://lynllp.com)

“I’ve talked to a business in Texas about a potential deal. But now it’s falling apart. Can I be sued there, even though I live in Europe?”

Two recent cases explain when a Texas-based court can reach beyond state lines and exercise jurisdiction over an out-of-state defendant. The cases address those principles in three common business situations: contract negotiation, contract performance and online commerce conducted through a website. In addition to stating the relevant law for an important US jurisdiction, these opinions fairly describe the law that applies generally throughout the US. This article summarizes what those cases say about those principles.

## CONTRACT NEGOTIATION

In *Danziger & De Llano, LLP v Morgan Verkamp, LLC*, 24 F 4th 491 (5th Cir 2022), a Texas law firm sued an Ohio law firm about an agreement between them as to a shared fee. The federal appellate court that covers Texas (the US Court of Appeals for the Fifth Circuit) affirmed dismissal for lack of personal jurisdiction over the Ohio firm.

One of the Texas firm’s claims was for fraud, alleging that the Ohio firm failed to disclose its representation of a key party. The Fifth Circuit held that even if the Ohio firm’s conduct “may have affected [the Texas Firm] in Texas, none of this conduct occurred in Texas.” It relied on a US Supreme Court case, *Walden v Fiore*, 571 US 277 (2014), which found no jurisdiction over an out-of-state defendant in Nevada when “no part of [the defendant’s] course of conduct occurred in Nevada because it never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada”.

The Texas firm relied on an earlier Fifth Circuit case, *Wien Air Alaska, Inc v Brandt*, 195 F 3d 208 (5th Cir 1999), in which a Texas-based airline sued a German resident for fraud. The defendant in that case, however, had “performed several tortious actions outside of Texas” with “foreseeable effects in the forum ... directed at the forum” by directing allegedly misleading letters, faxes, and phone calls to Texas. The Fifth Circuit distinguished that earlier case both quantitatively – characterizing it as involving “numerous” communications – and qualitatively, noting

that those communications “contained the promises, assurances, and representations that are at the heart of the lawsuit”.

## CONTRACT PERFORMANCE

In the *Danziger* case, the Texas firm also sued for breach of contract, contending that it had reached an oral agreement with the Ohio firm to split any fees they received from their work on a new case. The Fifth Circuit identified two main reasons why that alleged agreement could not support Texas jurisdiction.

First, the contemplated relationship did not involve “wide reaching contacts and contemplated future consequences within the forum state”, and “[t]he plaintiff’s Texas location was not strategically advantageous to the defendant”. In other words, this case was not analogous to a dispute about constructing a business facility in Texas, or developing a strategy for making sales statewide – situations that would present a stronger case for jurisdiction.

Second, the court noted that “[t]he only alleged Texas contacts related to contract formation or breach are [the defendant’s] conference calls negotiating the agreement while [the plaintiff] was in Texas”. That fact brought the case within a line of authority that declines to find jurisdiction when “the defendant’s communications to Texas rested on nothing but the mere fortuity that [the plaintiff] happens to be a resident of the forum”. If a contracting party is in Texas, but its Texas location was not relevant to the plaintiff’s decision to enter a contract, the mere fact that the party is located in Texas is unlikely to establish jurisdiction.

## ONLINE COMMERCE

A 2020 opinion from the intermediate Texas state court of appeals in Dallas, *Shopstyle, Inc & Popsugar, Inc v rewardStyle, Inc*, 2020 WL 4187937 (Tex App – Dallas July 21, 2020, no pet), found that a Texas court could not exercise personal jurisdiction over the out-of-state operators of a popular website. The court focused on three points: (1) the continued viability of *Zippo*, a widely cited 1997 case about jurisdiction based on online activity, (2) the relevance of the claimed jurisdictional contacts to the substantive theories in the case,

and (3) the proper weight to give, in a jurisdictional analysis, to business activity by third parties.

The first issue involved an opinion written by a federal district court in 1997 – a time when ‘internet’ in the US meant free CDs from America Online. That court developed a ‘sliding scale’ test for personal jurisdiction, based on the interactivity of the defendant’s website. It described a “spectrum”, where “[a]t one end are situations where a defendant clearly does business over the Internet... involving the knowing and repeated transmission of computer files over the Internet”, while “[a]t the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions”. *Zippo Manufacturing Co v Zippo Dot Com, Inc*, 952 F Supp 1119, 1124 (WD Pa 1997).

The once-influential *Zippo* test has fallen into disfavor. The Dallas court noted a growing line of authority that “there needs to be more than the existence of a website (whether interactive or not) to support an inference that the forum was targeted by the website owner”. It cited another Texas appellate court that recently observed how “evidence of a website, regardless of whether it is interactive, just illustrates ‘the potential for activity from the forum in question and the website owner’s knowledge of that potentiality’” rather than the actual use of the website.

The court then examined the Texas contacts that the plaintiff cited to support Texas jurisdiction, and found them insufficiently related to the “operative facts” of the substantive claims in the case. On the merits, “[t]he focus would be on issues such as whether PopSugar obtained content from rewardStyle without consent; whether PopSugar used that content; whether PopSugar profited from such use; and whether rewardStyle suffered an injury.” The court did not see those issues as related to the operational details cited to support jurisdiction – namely, “[w]hether PopSugar’s website is available in Texas or whether links to Texas-based retailers are available on PopSugar’s website is unrelated to the operative facts as alleged by rewardStyle”.

Finally, the court considered how much weight to give evidence showing that the defendants’ sites use “hyperlinks that take



viewers to the websites of third-party affiliated retailers where a consumer can purchase the linked products”. The court noted “the user cannot purchase products on the PopSugar website but instead follows links to the websites of affiliated third-party retailers” and that a user “cannot consummate a commercial transaction online without accessing and logging-into a third-party website”.

From there, the court observed that while it did not have clear evidence before it about the amount and extent of such activity, the entire topic would not carry much weight in the analysis of jurisdiction. It applied the principle, discussed earlier, that “only the defendant’s contacts with the forum are relevant, not the unilateral activity of another party or third persons”, and thus held that “permitting hyperlinks to the websites of third-party Texas-based retailers where products can be purchased” did not show the defendants’ control of those sales and would not support Texas jurisdiction.

#### FUTURE APPLICATION

Two recent Texas cases about the exercise of jurisdiction over out-of-state defendants show that Texas courts are well aware of the fast-moving, complex realities of the modern business world. Jurisdiction must be based on the acts of the defendant itself, not unrelated parties who may have business dealings with the defendant. And even then, having a limited number of communications, unrelated to business conducted in Texas, is unlikely to create Texas jurisdiction in a business dispute. <sup>51</sup>



**Jurisdiction must be based on the acts of the defendant itself, not unrelated parties who may have business dealings with the defendant**