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ISSUE: Can TX assert personal jurisdiction over a financial institution that does not have a physical presence in TX but does have numerous depositors residing in TX who owe support?

In determining the ability to assert personal jurisdiction over a financial institution that does not have a physical presence in TX, two types of personal jurisdiction can be considered: (1) general jurisdiction or (2) specific jurisdiction. The existence of either is a recognized basis for personal jurisdiction.

The most widely recognized and applied basis for analyzing personal jurisdiction over an entity that conducts business across state lines, including use of the Internet, without having a physical presence in the state is found in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* 952 F.Supp. 1119 (W.D.Pa.1997). While ultimately focusing on the Internet aspect, the decision starts with the fundamental analysis of personal jurisdiction.

The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. (*cite omitted*). General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984). In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. *Zippo* at 1122.

Texas has clearly adopted the Zippo approach, especially when it comes to businesses that use the Internet.

Internet usage is divided into three categories, using a sliding scale, for the purposes of establishing personal jurisdiction. *Reiff v. Roy*, 115 S.W.3d 700, 705 (Tex.App.–Dallas 2003, pet. denied).^{FN2} "At one end of the scale are websites clearly used for transacting business over the Internet, such as entering into contracts and knowing and repeated transmission of files of information, which may be sufficient to establish minimum contacts with a state." *Id.* "On the other end of the spectrum are *178 'passive' websites that are used only for advertising over the Internet and are not sufficient to establish minimum contacts even though they are accessible to residents of a particular state." *Id.* at 705–06. "In the middle are 'interactive' websites that allow the 'exchange' of information between a potential customer and a host computer." *Id.* at 706. Jurisdiction in cases involving interactive websites is determined by the degree of interaction. *Id.*

FN2. This test was first created in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* 952 F.Supp. 1119, 1124 (W.D.Pa.1997), and it has been adopted in the Fifth Circuit, *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir.1999), and applied

by many Texas courts of appeals. See *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 876 n. 21 (Tex.App.–Austin 2008, no pet.); *Karstetter v. Voss*, 184 S.W.3d 396, 404 (Tex.App.–Dallas 2006, no pet.); *Exito Elec. Co., Ltd. v. Trejo*, 166 S.W.3d 839, 858 (Tex.App.–Corpus Christi 2005, no pet.); *Townsend v. Univ. Hosp.-Univ. Of Colo.*, 83 S.W.3d 913, 922 (Tex.App.–Texarkana 2002, pet. denied); *Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496, 507 (Tex.App.–Houston [14th Dist.] 2002, no pet.); *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 677 (Tex.App.–Fort Worth 2001, no pet.); *Gessmann v. Stephens*, 51 S.W.3d 329, 338 (Tex.App.–Tyler 2001, no pet.); *Riviera Operating Corp. v. Dawson*, 29 S.W.3d 905, 911 (Tex.App.–Beaumont 2000, pet. denied); *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767, 772 (Tex.App.–San Antonio 1999, pet. dismissed w.o.j.).

Choice Auto Brokers, Inc. V. Dawson, 274 S. W.3d 172, 177-178 (Tex App - Houston [1st Dist.]2008).

With respect to the ability to assert both general and specific personal jurisdiction over a financial institution with an Internet presence but no physical presence in Texas, the most analogous case is probably *Gorman v. Ameritrade Holding Corporation*, 293 F. 3d 506, DC Cir.2002). Although it affirmed the holding that the defendant had not been properly served, the Court did clearly find that the activities Ameritrade engaged in within the District of Columbia were sufficient to obtain general jurisdiction over it. Among the court's observations:

Ameritrade is quite wrong in treating "cyberspace" as if it were a kingdom floating in the mysterious ether, immune from the jurisdiction of earthly courts. At 516

"Cyberspace," however, is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet. In the last century, for example, courts held that, depending upon the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites. At 510-511

Ameritrade's contact with the District is not limited to an "essentially passive" website through which customers merely access information about the financial markets. *GTE*, 199 F.3d at 1348; see *supra* note 5. To the contrary, Ameritrade concedes that District residents use its website to engage in electronic transactions with the firm. See Reply Mem. in Supp. of Defs.' Mot. to Dismiss at 6. The firm's customers can open Ameritrade brokerage accounts online; transmit funds to their accounts electronically; and use those accounts to buy and sell securities, to borrow from Ameritrade on margin, and to pay Ameritrade brokerage commissions and interest. Using e-mail and web-posting, Ameritrade transmits electronic confirmations, monthly account statements, and both financial and product information back to its customers. As a result of their electronic interactions, Ameritrade*513 **236 and its District of Columbia customers enter into binding contracts, the customers become the owners of valuable securities, and Ameritrade obtains valuable revenue. At 512-513

Included in the "other acts" bases for asserting personal jurisdiction that must pass Constitutional

scrutiny, the Texas Practice and Remedies Code specifically mentions the type of contractual obligations mentioned in *Ameritrade* that also apply to virtually all financial institutions who have depositors in Texas.

Sec. 17.042. ACTS CONSTITUTING BUSINESS IN THIS STATE. In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

CONCLUSION

With respect to the financial institutions the SCU would be pursuing, there can be little doubt that Texas has BOTH general and specific personal jurisdiction. Institutions such as T Rowe Price, US Bank, and Service Credit Union (on base credit union for military personnel) are purposefully and systematically doing business in Texas. Moreover, each entity is providing specific services as an asset holder to obligors residing in Texas.