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## **CPLR 202: When Cause of Action Accrues in Another Jurisdiction Longer New York Statute of Limitations Will Not Apply if Plaintiff Is Only a Domiciliary and Not a Resident**

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the proposed amendment would add a new theory of liability based on previously unpleaded facts resulting in prejudice.

Finally, in *Schabe v. Hampton Bays Union Free School District*, the Appellate Division, Second Department, held that special verdict answers do not require the concurrence of the same five jurors when the special verdict contains more than one answer. Because special verdicts focus on the resolution of specific questions, the court reasoned that the "any five" rule comports with the intent of the Legislature. The members of Volume 59 hope that the discussion and analysis of the cases contained in *The Survey* will be of interest and value to our readers.

### CIVIL PRACTICE LAW AND RULES

*CPLR 202: When cause of action accrues in another jurisdiction longer New York statute of limitations will not apply if plaintiff is only a domiciliary and not a resident*

Commonly referred to as the "borrowing statute," section 202 of the CPLR provides that when a cause of action arises outside of New York, the shorter statute of limitations, that of New York or the foreign state, is applicable.<sup>1</sup> When the out of state cause of action accrues in favor of a New York resident, however, only the

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<sup>1</sup> CPLR 202 (1972). Section 202 of the CPLR provides that:

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

*Id.*; see *Evans v. Hawker-Siddeley Aviation, Ltd.*, 482 F. Supp. 547, 549 & n.2 (S.D.N.Y. 1979); *Posner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 469 F. Supp. 972, 977 (S.D.N.Y. 1979); *National Sur. Co. v. Ruffin*, 242 N.Y. 413, 415-16, 152 N.E. 246, 246 (1926); 1 WK&M ¶ 202.01, at 2-41.

Under CPLR 202, if a claim that has accrued in favor of a non-resident has expired under either the statute of limitations of the state in which the cause of action arose or the applicable New York statute, the claim is barred. SIEGEL § 57, at 58; see *Rieser v. Baltimore & O.R. Co.*, 123 F. Supp. 44, 48 (S.D.N.Y. 1954) (when cause of action accrues in another jurisdiction non-resident plaintiff must surmount hurdles of both New York statute of limitations and that of foreign jurisdiction), *aff'd*, 228 F.2d 563 (2d Cir. 1955), *cert. denied*, 350 U.S. 1006 (1956). The primary purpose of the borrowing statute is the prevention of forum shopping. *National Sur. Co.*, 242 N.Y. at 417, 152 N.E. at 247; see *Stafford v. International Harvester Co.*, 668 F.2d 142, 151 (2d Cir. 1981); *Sack v. Low*, 478 F.2d 360, 367 (2d Cir. 1973); *Martin v. Julius Dierck Equip. Co.*, 52 App. Div. 2d 463, 468, 384 N.Y.S.2d 479, 483 (2d Dep't 1976); *Daigle v. Leavitt*, 54 Misc. 2d 651, 652, 283 N.Y.S.2d 328, 330 (Sup. Ct. Rockland County 1967).

New York statute is pertinent.<sup>2</sup> Because of the ambiguity inherent in the word "resident,"<sup>3</sup> both courts and commentators have interpreted the word to be synonymous with the term "domiciliary."<sup>4</sup> Recently, however, in *Antone v. General Motors Corp.*,<sup>5</sup> the Court of Appeals determined that residence and domicile are not interchangeable for purposes of CPLR 202, and held that a non-resi-

<sup>2</sup> CPLR 202 (1972); see *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 454 (2d Cir.), cert. denied, 396 U.S. 959 (1969); *Alex v. Grande*, 29 App. Div. 2d 616, 616, 285 N.Y.S.2d 909, 911 (3d Dep't 1967); *Sinai v. Levi*, 208 Misc. 650, 653, 144 N.Y.S.2d 316, 319 (N.Y.C. Civ. Ct. N.Y. County 1955); SIEGEL § 57, at 57. Section 202 is similar to other borrowing statutes in that it "echo[es] an ever recurring theme in American law, namely, the protection of residents." A. DECKER, *THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF LAWS* 100 (1966). To benefit from the exception to the borrowing statute a plaintiff must have been a resident of New York on the day the cause of action accrued. CPLR 202, commentary at 82 (McKinney 1972); see *Cellura v. Cellura*, 24 App. Div. 2d 59, 60, 263 N.Y.S.2d 843, 844 (4th Dep't 1965); *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 126, 126 (1966).

<sup>3</sup> See *Perkins v. Guaranty Trust Co.*, 274 N.Y. 250, 259, 8 N.E.2d 849, 852 (1937); *Rawstone v. Maguire*, 265 N.Y. 204, 207-08, 192 N.E. 294, 295 (1934); K. KENNAN, *RESIDENCE AND DOMICILE* §§ 10-13, at 22-35 (1934); RESTATEMENT (SECOND) CONFLICTS OF LAWS § 11, comment K (1971). "The words 'residence' and 'domicile' when used in a statute may have an identical or a variable meaning depending 'upon the nature of the subject-matter of the statute as well as the context in which the words are used.'" *Perkins*, 274 N.Y. at 259, 8 N.E.2d at 852 (quoting *Rawstone v. Maguire*, 265 N.Y. at 208, 192 N.E. at 295); see *Kemp v. Kemp*, 172 Misc. 738, 743, 16 N.Y.S.2d 26, 34 (N.Y.C. Dom. Rel. Ct. N.Y. County 1939); see also K. KENNAN, *supra*, § 10, at 22-26 (courts frequently have deemed terms to have both same and distinct meanings, and the latter even when considering same area of law). Compare *McCarthy v. Bristol Laboratories*, 86 App. Div. 2d 279, 283, 449 N.Y.S.2d 280, 283 (2d Dep't 1982) (resident benefits from New York statutory period when action accrued out of state) and *Alex v. Grande*, 29 App. Div. 2d 616, 616, 285 N.Y.S.2d 909, 911 (3d Dep't 1967) (New York resident benefits from exception to borrowing statute) with *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 243 n.5 (2d Cir. 1984) (residence equated with domicile under § 202) and *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 694 (S.D.N.Y. 1978) (under § 202 plaintiff's residence is his domicile).

However, in *The Venus*, 12 U.S. (8 Cranch) 253, 278 (1814), the United States Supreme Court noted that residence is temporary in nature, while domicile is "residence accompanied with an intention to make it a permanent place of abode." *Id.*; see *Texas v. Florida*, 306 U.S. 398, 424 (1938).

<sup>4</sup> See, e.g., *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 243 n.5 (2d Cir. 1984); *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 694 (S.D.N.Y. 1978); *Banasik v. Reed Prentice Div., Package Mach. Co.*, 34 App. Div. 2d 746, 746-47, 310 N.Y.S.2d 127, 129 (1st Dep't 1970), *aff'd mem.*, 28 N.Y.2d 770, 269 N.E.2d 918, 321 N.Y.S.2d 376 (1971); SIEGEL § 57, at 57; CPLR 202, commentary at 81 (McKinney 1972); *The Quarterly Survey*, *supra* note 2, at 126.

"For purposes of the borrowing statute, the term 'resident' as used in section 202 is equated with domiciliary." *Katz*, 737 F.2d at 243 n.5. While it is true that a person may have multiple residences but only one domicile, with regard to the borrowing statute a person can have only one state of residence, "and that is *the state of his domicile.*" *Bache*, 446 F. Supp. at 694 (emphasis in original).

<sup>5</sup> 64 N.Y.2d 20, 473 N.E.2d 742, 484 N.Y.S.2d 514 (1984).

dent of New York domiciled within the state may not avail himself of the longer New York statute of limitations with respect to a cause of action accruing in Pennsylvania.<sup>6</sup>

In connection with a Pennsylvania automobile accident, the plaintiff in *Antone* commenced a negligence and strict liability action against General Motors, the manufacturer of the automobile in which plaintiff was injured.<sup>7</sup> The plaintiff was a Pennsylvania resident who formerly resided in New York, and, at the time of the action, claimed to have remained a New York domiciliary.<sup>8</sup> The action was brought in the Supreme Court of New York nearly three years after the accident.<sup>9</sup> Determining that the plaintiff was unable to prove New York residency at the time of the accident, Special Term granted the motion of the defendant for summary judgment on the ground that the plaintiff failed to satisfy the dual periods of limitation prescribed by CPLR 202.<sup>10</sup> The Appellate Division affirmed unanimously, without opinion.<sup>11</sup>

The Court of Appeals affirmed the decisions below, holding that "resident" and "domiciliary" are not synonymous for purposes of CPLR 202.<sup>12</sup> Writing for a unanimous court, Judge Wachtler reasoned that the "extremely thorough drafting" of the CPLR made "apparent" the legislature's awareness of the distinction between the words "residence" and "domicile."<sup>13</sup> In interpreting the

<sup>6</sup> *Id.* at 30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518.

<sup>7</sup> *Id.* at 27, 473 N.E.2d at 744, 484 N.Y.S.2d at 516.

<sup>8</sup> *Id.* at 26, 473 N.E.2d at 744, 484 N.Y.S.2d at 516. On the date of the accident the plaintiff was living at a Pennsylvania nursing home where he was employed. *Id.* Before moving to Pennsylvania approximately four months before the accident, the plaintiff lived in New York, where he still maintained a post office box. *Id.* Despite this fact, the Court determined that the plaintiff "did not maintain any place of residence in New York State." *Id.*

<sup>9</sup> *Id.* at 27, 473 N.E.2d at 744, 484 N.Y.S.2d at 516.

<sup>10</sup> *See id.*, 473 N.E.2d at 745, 484 N.Y.S.2d at 517. The Pennsylvania statute of limitations for personal injury actions is two years. *Id.* at 30, 473 N.E.2d at 747, 484 N.Y.S.2d at 519. The plaintiff commenced his action on August 27, 1980, nearly three years after the September 12, 1977, accident. *Id.* at 30-31, 473 N.E.2d at 744, 484 N.Y.S.2d at 516. Thus, the plaintiff failed to satisfy the Pennsylvania period of limitation as required under CPLR 202, and the defendant's motion for summary judgment was granted. *Id.*

<sup>11</sup> *Antone v. General Motors Corp.*, 93 App. Div. 2d 1007, 462 N.Y.S.2d 734 (4th Dep't 1983), *aff'd*, 64 N.Y.2d 20, 473 N.E.2d 742, 484 N.Y.S.2d 514 (1984).

<sup>12</sup> 64 N.Y.2d at 28-29, 473 N.E.2d at 745-46, 484 N.Y.S.2d at 517-18.

<sup>13</sup> *Id.* at 29, 473 N.E.2d at 746, 484 N.Y.S.2d at 518. The court recognized the ambiguities involved when the word "residence" appears in a statute, *id.* at 28, 473 N.E.2d at 745, 484 N.Y.S.2d at 517, but held that both the courts and legislature of New York have recognized the terms as distinct since 1908, *id.* at 29, 473 N.E.2d at 746, 484 N.Y.S.2d at 518. Both terms appear in different sections of the CPLR, and are separated by the disjunctive "or" when employed in the same section. *Id.*

term "residence" for purposes of section 202, the Court referred to the law of venue, in which the term has been treated as distinct from the term "domicile" since before 1925.<sup>14</sup> Moreover, to ensure the prevention of forum shopping,<sup>15</sup> the Court determined that an individual who is a resident for venue purposes is a resident for purposes of section 202.<sup>16</sup> The legislative purpose, the Court concluded, would not be served by interpreting "resident" as the equivalent of "domiciliary," because under such an approach a non-domiciliary resident would be treated as the equivalent of a party who lacks contacts with New York.<sup>17</sup>

By concluding that the terms "resident" and "domiciliary" are not synonymous for purposes of CPLR 202,<sup>18</sup> the *Antone* Court, it is suggested, has clarified an area of law plagued with uncertainty and inconsistency.<sup>19</sup> If the term "residence" was to assume the meaning of the term "domicile," the application of the statute, it is submitted, would be severely limited.<sup>20</sup> A non-domiciliary resident would be required to commence an action within the limitations

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<sup>14</sup> *Id.* at 30, 473 N.E.2d at 746-47, 484 N.Y.S.2d at 518-19; see Ch. 493, [1925] N.Y. Laws. In 1925, the New York legislature amended § 182 of the Code of Civil Procedure to provide that an individual who resides in more than one county shall be a resident of either county for purposes of venue. Ch. 493, [1925] N.Y. Laws; see 2 N.Y. STANDARD CIVIL PRACTICE SERVICE § 503 (1963). This change was made in response to many cases which held that residence, for venue purposes, does not mean domicile. See 2 WK&M ¶ 503.02, at 5-30 to 5-31 & n.10. CPLR 503, adopted from CPA § 182, continues to discern the terms. See SIEGEL § 118, at 147-48.

<sup>15</sup> See 64 N.Y.2d at 29, 473 N.E.2d at 746, 484 N.Y.S.2d at 518; *supra* note 1.

<sup>16</sup> 64 N.Y.2d at 30, 473 N.E.2d at 476-77, 484 N.Y.S.2d at 518-19; see *supra* note 14 and accompanying text.

Judge Wachtler determined that the appearance of the word "resident" in the CPLR gives rise to a rebuttable presumption that it is not synonymous with the word "domicile." 64 N.Y.2d at 29, 473 N.E.2d at 746, 484 N.Y.S.2d at 518. The Court noted, however, that if a meaning other than domicile would be inimical to the purpose of the statute, the presumption could be rebutted. *Id.*

<sup>17</sup> 64 N.Y.2d at 29-30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518; cf. K. KENNAN, *supra* note 3, § 13, at 32 (individual can be a "nonresident of the state of his domicile").

<sup>18</sup> See 64 N.Y.2d at 30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518.

<sup>19</sup> See *supra* notes 3 & 4 and accompanying text; see also Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 561-65 (1953) (residence is "one of the most variable words in the legal dictionary"). Since there is no uniform definition of the word residence in the statutes, the courts bear the burden of assigning a meaning to it. See, e.g., *Contento v. Kohinke*, 42 App. Div. 2d 1025, 1025, 348 N.Y.S.2d 392, 393 (3d Dep't 1973) (residence cannot be uniformly defined, thus courts must construe its meaning in relation to particular statute involved); *Kemp v. Kemp*, 172 Misc. 738, 743, 16 N.Y.S.2d 26, 34 (N.Y.C. Dom. Rel. Ct. N.Y. County 1939) (if residence used in statute, courts must determine whether or not legislature intended it to mean domicile).

<sup>20</sup> See 64 N.Y.2d at 29-30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518; *infra* notes 21 & 22 and accompanying text.

periods of both New York and the foreign jurisdiction.<sup>21</sup> Thus, an individual with significant contacts with New York—a non-domiciliary resident—would be denied the benefit of New York laws.<sup>22</sup> Not only would this be contrary to the legislative intent,<sup>23</sup> but since the discriminatory treatment would be between citizen and non-citizen—not between resident and non-resident—the Privileges and Immunities Clause of the United States Constitution would be violated.<sup>24</sup>

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<sup>21</sup> See CPLR 202 (1972). A requirement that a plaintiff be a domiciliary of New York in order to take advantage of the favored status allowed by § 202 would add an additional stricture to the statute. See *The Survey*, 48 ST. JOHN'S L. REV. 161, 161-62 (1973); *infra* notes 22-24 and accompanying text.

<sup>22</sup> See *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 242-43 & n.5 (2d Cir. 1984); *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 694 (S.D.N.Y. 1978); *Banasik v. Reed Prentice Div., Package Mach. Co.*, 34 App. Div. 2d 746, 746-47, 310 N.Y.S.2d 127, 129 (1st Dep't 1970), *aff'd mem.*, 28 N.Y.2d 770, 269 N.E.2d 918, 321 N.Y.S.2d 376 (1971).

In *Katz*, although the plaintiff and his family moved frequently, their belongings were in New York at the home of the plaintiff's sister, where the family was staying. *Katz*, 737 F.2d at 242. The plaintiff was injured in another jurisdiction while returning to New York from a vacation. *Id.* Relying on *Banasik* and *Bache*, the Court of Appeals for the Second Circuit held that to benefit from the § 202 exception, the plaintiff had to prove that he was a domiciliary of New York. *Id.* at 243 & n.6. It is submitted that by holding the word "residence" to mean "domicile," the court denied the plaintiff favored treatment under the borrowing statute despite the presence of facts supporting New York residency.

<sup>23</sup> See 64 N.Y.2d at 30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518; CPLR 202, commentary at 81 (McKinney 1972); *supra* note 1. Since the primary purpose of the statute is to prevent individuals who have no contacts with the forum from taking advantage of the longer statutes of limitation in New York, see *supra* note 1, Judge Wachtler reasoned that it would be inconsistent with the legislative intent to deny individuals who have contacts with the forum the benefit of the statute, 64 N.Y.2d at 29-30, 473 N.E.2d at 746, 484 N.Y.S.2d at 518.

<sup>24</sup> U.S. CONST. art. 4, § 2, cl. 1. The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* The clause has been held to protect the fundamental right of citizens of one state to institute and maintain actions in the courts of another state. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230); W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICTS OF LAWS* 434 (8th ed. 1984). The constitutional validity of the resident plaintiff exception to the New York borrowing statute has long been established. See *Klotz v. Angle*, 220 N.Y. 347, 358, 116 N.E. 24, 27 (1917); Note, *Foreign Statutes of Limitation in New York*, 4 BROOKLYN L. REV. 76, 78 (1934); see also Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 70 (1962) (*Klotz* cited as example of case upholding constitutional validity of resident plaintiff exception to borrowing statute).

The constitutional validity of borrowing statutes that discriminate between residents and non-residents has been upheld under the Privileges and Immunities Clause, on the grounds that difference in treatment does not rest on the citizenship of the parties. *Klotz*, 220 N.Y. at 358, 116 N.E. at 26 (citing *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 324, 19 N.E. 625, 627 (1889)); see *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 562-63 (1920). If the exception to § 202 was held applicable to domiciliaries only, it is submitted that the favoritism afforded individuals domiciled within the state would result in imper-

The Court's holding that the beneficial treatment afforded by section 202 applies to residents of New York does not adversely affect true domiciliaries of the state.<sup>25</sup> Residence, a subcategory of domicile,<sup>26</sup> is established by physical presence in a location,<sup>27</sup> whereas domicile is established by residence coupled with intent to make such residency one's permanent home.<sup>28</sup> By definition, therefore, a domicile cannot exist prior to the establishment of a residence.<sup>29</sup> In addition, a "person continues [to be] a 'resident' of a State where he is domiciled even though temporarily absent from the state."<sup>30</sup> Thus, the Court's decision, it is submitted, allows all individuals with significant contacts with New York to enjoy the benefits of CPLR 202.

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missible discrimination between citizens and non-citizens, see *Canadian N. Ry.*, 252 U.S. at 562-63; *Klotz*, 220 N.Y. at 358, 116 N.E. at 27; W. REESE & M. ROSENBERG, *supra*, at 434-35, as citizenship is based on domicile, see *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 163 (2d Cir. 1966).

<sup>25</sup> See *infra* note 29 and accompanying text. Concluding that the plaintiff was not a New York resident and therefore not in a position to avail himself of the exception to CPLR 202, the Court, it is suggested, impliedly held that the plaintiff had abandoned New York as the state of his domicile. See 64 N.Y.2d at 26, 473 N.E.2d at 774, 484 N.Y.S.2d at 516.

<sup>26</sup> See *Catalanotto v. Palazzolo*, 46 Misc. 2d 381, 383, 259 N.Y.S.2d 473, 476 (Sup. Ct. N.Y. County 1965) ("in the term 'domicile' is implied a legal place of residence"); *infra* notes 28 & 29 and accompanying text.

<sup>27</sup> See, e.g., *In re Newcomb*, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908) (residence means living in particular locality); *In re Yap*, 39 Misc. 2d 835, 836, 241 N.Y.S.2d 976, 978 (Sup. Ct. Queens County 1963) (residence is established when an individual lives "in a place for a time irrespective of domicile"); *Foote v. Footo*, 192 Misc. 2d 270, 274-75, 77 N.Y.S.2d 60, 65 (Sup. Ct. Oneida County 1948) (residence established by living in particular locality).

<sup>28</sup> See *Texas v. Florida*, 306 U.S. 398, 424 (1938); *The Venus*, 12 U.S. (8 Cranch) 253, 278 (1814); *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 694 (S.D.N.Y. 1978); *Newcomb*, 192 N.Y. at 250, 84 N.E. at 954; *Reese v. Reese*, 179 Misc. 665, 668, 40 N.Y.S.2d 468, 472 (Sup. Ct. Queens County 1943).

<sup>29</sup> See *Newcomb*, 192 N.Y. at 250, 84 N.E. at 954; *Footo v. Footo*, 192 Misc. 2d 270, 274-75, 77 N.Y.S.2d 60, 65 (Sup. Ct. Oneida County 1948); *In re McCarthy*, 39 Misc. 2d 915, 916, 242 N.Y.S.2d 82, 83 (Sup. Ct. N.Y. County 1963). "Residence is necessary, for there can be no domicile without it . . ." *Newcomb*, 192 N.Y. at 250, 84 N.E. at 954.

The laws applicable to changing domicile illustrate the necessity of residence in establishing a domicile. See *Dupuy v. Wurtz*, 53 N.Y. 556, 561 (1873); *In re Minsky*, 78 App. Div. 2d 955, 955, 433 N.Y.S.2d 276, 277 (3d Dep't 1980). "It is well established that to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location, *animus et factus*, must be present." *Minsky*, 78 App. Div. 2d at 955, 433 N.Y.S.2d at 277.

<sup>30</sup> *Rawstorne v. Maguire*, 265 N.Y. 204, 209, 192 N.E. 294, 296 (1934); see *McCandless v. Reuter*, 248 App. Div. 93, 96, 288 N.Y.S. 952, 955-56 (1st Dep't 1936); *Alvord v. Patenotre*, 196 Misc. 524, 526, 92 N.Y.S.2d 514, 516 (Sup. Ct. N.Y. County 1949).

By ensuring that those who have abandoned, or otherwise lack, significant contacts with New York are prohibited from making use of its limitations periods, the Court of Appeals in *Antone* has bolstered significantly the efficacy of the borrowing statute as a tool for limiting forum shopping without destroying the protection it provides for New York residents.

Anthony J. Cornicello

*CPLR 208: Temporary effect of medication administered in treatment of physical injuries is not "insanity" and will not cause tolling of statutes of limitation*

Section 208 of the CPLR suspends the running of a statute of limitations when one entitled to commence an action is under a disability of infancy or insanity.<sup>1</sup> While "insanity" is not expressly defined by the statute, the courts have construed the term broadly to mean a mere inability to understand and protect one's legal rights.<sup>2</sup> Recognizing the function of statutes of limitation as stat-

<sup>1</sup> CPLR 208 (Supp. 1984-1985). CPLR 208 provides in pertinent part:

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues . . . the time within which the action must be commenced shall be extended . . . .

*Id.* The statute also provides guidelines to determine the length of the tolling period. *See id.* When a statute of limitations of three years or more applies, and the time allowed for filing suit would otherwise expire before or within three years after the disability ends or the disabled party dies, the claimant receives an extension of three years after the disability has ceased. *Id.* When a statute of limitations of less than three years applies, the time for commencing an action is extended by the duration of the disability. *Id.* In cases of insanity, the time for commencing an action can not extend more than ten years beyond accrual of the cause of action. *Id.*

For the tolling provision to apply the plaintiff must be burdened by the insanity disability at the time the cause of action accrues. *See* SIEGEL § 54, at 55. However, some authority suggests that if the plaintiff's insanity results from the defendant's negligence the tolling provision will apply notwithstanding a lack of contemporaneity. *See* H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 178 (1978); 1 *WK&M* ¶ 208.04 (Supp. 1983).

<sup>2</sup> *See, e.g.,* *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y.2d 543, 547, 435 N.E.2d 1072, 1074, 450 N.Y.S.2d 457, 459 (1980) (statute does not define insanity); *see also* SECOND REP. at 58 (CPA revision committee supported tolling provisions but attempted to correct inequities that it believed were "unreasonably generous in favor of the disabled plaintiff").

Influenced by other jurisdictions, one New York appellate court construed insanity generically to embrace a mere inability to understand and protect one's legal rights. *See Hurd v. County of Allegany*, 39 App. Div. 2d 499, 503, 336 N.Y.S.2d 952, 957 (4th Dep't 1972); *see also* SIEGEL § 54, at 55 (insanity means inability to protect one's affairs). Historically, in-