St. John's Law Review

Volume 53
Number 3 *Volume 53, Spring 1979, Number 3*

Article 8

CPLR 302(a)(3)(ii): Out-of-State Conversion Deemed Sufficient Predicate for Asserting In Personam Jurisdiction Over Nonresident Defendant

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ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(3)(ii): Out-of-state conversion deemed sufficient predicate for asserting in personam jurisdiction over nonresident defendant

Despite the absence of any direct contact with the State of New York, CPLR § 302(a)(3)(ii)[1] extends in personam jurisdiction over

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[1] CPLR 302 establishes the predicates for exercising in personam jurisdiction over non-domiciliaries. As originally enacted, CPLR 302(a) stated:

> (a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. owns, uses or possesses any real property situated within the state.

Ch. 308, [1962] N.Y. Laws 1315. Interpreting paragraph (2), the Court of Appeals in Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), held that an in-state injury resulting from a defendant's tortious act outside the state was not sufficient to satisfy the requirement of committing a tortious act within the state. Relying upon the statute's legislative history and the express language of CPLR 302(a)(2) that a nondomiciliary "commit a tortious act within the state," the *Feathers* Court determined that the problem of out-of-state tortious acts causing injury within the state was an issue to be addressed by the legislature. 15 N.Y.2d at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24. Professor Reese, in a report to the New York Judicial Conference, recommended that the statute be extended to reach nondomiciliaries whose acts or omissions without the state caused tortious injury within the state, and suggested that such an extension should be conditioned on the nonresident's intention that the act have consequences within the state or that the nonresident should foresee such consequences. Alternatively, the presence of other contacts with the state could make such an exercise of jurisdiction reasonable. *See* Reese, *A Study of CPLR 302 in Light of Recent Judicial Decisions,* ELEVENTH ANN. REP. N.Y. JUD. CONFERENCE 132, 135-36 (1966). Professor Reese's study prompted the Judicial Conference to propose the present CPLR 302(a)(3). FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780 (McKinney). CPLR 302 (a)(3) was adopted in 1966. Ch. 590, [1966] N.Y. Laws 1347. Thus, New York extends jurisdiction over a nondomiciliary who:

> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce
>
> . . .

Id. at 1348.

Even with the 1966 amendment, CPLR 302 apparently does not extend the reach of the state's jurisdiction to the extent permitted constitutionally. *E.g.*, American Eutectic Welding

nondomiciliaries whose out-of-state tortious acts result in foreseeable injury to person or property within the state,[2] provided that the nonresident derives "substantial revenue" from international or interstate commerce.[3] Enacted in response to the lack of statutory authority for asserting jurisdiction over parties who send defective products into the state,[4] the statute's application to commercial

Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 423, 435 (1971) (citing FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2789 (McKinney); CPLR 302, commentary at 60 (1972). Indeed, the requirement in CPLR 302(a)(3)(ii) that a defendant derive substantial revenue from interstate or international commerce renders it more restrictive than the Connecticut, CONN. GEN. STAT. § 33-411(c)(3) (West 1977), and North Carolina statutes. N.C. GEN. STAT. § 55-145(a)(3) (1975). *See* note 3 *infra*. For a general discussion of the legislative history and application of CPLR 302, see Homburger & Laufer, *Expanding Jurisdiction over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFFALO L. REV. 67 (1966); Siegel, *Conflict of Laws*, 19 SYRACUSE L. REV. 235, 235-45 (1967); Legislation, *CPLR — Personal Jurisdiction over Non-Domiciliaries Who Commit Tortious Acts Outside New York*, 33 BROOKLYN L. REV. 107 (1966); Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412 (1969).

[2] CPLR 302(a)(3)(ii) does not require a nonresident to foresee the specific injury within the state, but rather, general consequences of his activities must be foreseeable. *See* Tracy v. Paragon Contact Lens Labs., Inc., 44 App. Div. 2d 455, 458, 355 N.Y.S.2d 650, 652-53 (3d Dep't 1974); Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, 291, 315 N.Y.S.2d 51, 56 (Sup. Ct. Orange County 1968), *aff'd mem.*, 35 App. Div. 2d 720, 315 N.Y.S.2d 815 (2d Dep't 1970); FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2790 (McKinney). The foreseeability test is an objective standard of whether a reasonably prudent man would expect his tortious act to have consequences in New York. *See* Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep't 1974); Brown v. Erie-Lackawanna R.R. Co., 54 Misc. 2d 225, 227, 282 N.Y.S.2d 335, 337 (Sup. Ct. Oneida County 1967).

[3] The "substantial revenue" test is designed to extend the reach of the statute only to those nondomiciliaries whose business activities are non-local and extensive in nature so that no unfair burden will be imposed on nonresidents whose contact with the state is limited or remote. *See* FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2788-89 (McKinney). Such limitation also is designed to prevent discouragement of commerce with the state. 1 WK&M ¶ 302.01. CPLR 302(a)(3)(ii), however, does not require a connection between the tortious act and the derivation of substantial revenue from interstate or international commerce. *See* Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, 291, 315 N.Y.S.2d 51, 56 (Sup. Ct. Queens County), *aff'd mem.*, 35 App. Div. 2d 720, 315 N.Y.S.2d 815 (2d Dep't 1970); Brown v. Erie-Lackawanna R.R. Co., 54 Misc. 2d 225, 227, 282 N.Y.S.2d 335, 337 (Sup. Ct. Oneida County 1967); Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 221, 282 N.Y.S.2d 127, 132 (Sup. Ct. Nassau County 1967); FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2790 (McKinney). Moreover, unlike the in-state transaction of business and tort requirements under CPLR 302(a)(1) and (2), no connection is required between New York and the location from which the nondomiciliary generates revenue, provided the revenue is derived from interstate or international trade and is substantial. *See, e.g.*, Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep't 1974).

[4] *See* Sybron Corp. v. Wetzel, 61 App. Div. 2d 697, 701, 403 N.Y.S.2d 931, 933 (4th Dep't), *aff'd*, 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978); FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2787-88 (McKinney); CPLR 302, commentary at 84-86 (1972).

torts has remained unclear.[5] Recently, in *Fantis Foods, Inc. v. Standard Importing Co.*,[6] the Appellate Division, First Department, held that where a nondomiciliary who derives substantial revenue from international commerce commits an out-of-state conversion, resulting in a foreseeable economic loss in New York, in personam jurisdiction may be obtained pursuant to CPLR § 302(a)(3)(ii).[7]

In *Fantis,* Standard Importing Co. (Standard), a New York corporation which imports various foods, entered into a written agreement in Greece with Synergal, Ltd. (Synergal) for four shipments of feta cheese, f.o.b. Piraeus, Greece.[8] Synergal, the dominant exporter of Greek feta cheese, was organized under the laws of Greece. Additionally, all of Synergal's offices were located in Greece, and it maintained no offices, agents or assets in New York, nor did it advertise or otherwise conduct business in the United States.[9] While the first shipment was in transit, Synergal allegedly substituted the plaintiff, Fantis Foods, Inc. (Fantis), a New York corporation and Standard's competitor, as the purchaser on the original bill of lading.[10] Despite the substitution, Standard obtained possession of the first shipment.[11] Fantis commenced an action against Standard for conversion of this shipment, and Standard

[5] The statute itself fails to distinguish between commercial and noncommercial torts, *see* note 1 *supra,* and previous state court cases have dealt almost exclusively with negligence and products liability. *See, e.g.,* Tracy v. Paragon Contact Lens Labs., Inc., 44 App. Div. 2d 455, 355 N.Y.S.2d 650 (3d Dep't 1974); Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 284 N.Y.S.2d 688 (Sup. Ct. Kings County 1967); Gillmore v. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967). Federal courts, however, have considered the statute's commercial application and consistently have held that a commercial loss is insufficient to invoke CPLR 302(a)(3)(ii) where such injury is incurred within the state as a fortuitous consequence of a plaintiff's domicile, incorporation, or doing business in New York. *See* Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 94 (2d Cir. 1975); American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2d Cir. 1971); Friedr. Zoellner Corp. v. Tex Metals Co., 396 F.2d 300, 303 (2d Cir. 1968); Security Nat'l Bank v. UBEX Corp., 404 F. Supp. 471, 474 (S.D.N.Y. 1975); Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1380 (S.D.N.Y. 1975). For a discusssion of these cases, see note 33 *infra.*

[6] 63 App. Div. 2d 52, 406 N.Y.S.2d 763 (1st Dep't 1978).

[7] *Id.* at 56, 406 N.Y.S.2d at 766.

[8] *Id.* at 53-54, 406 N.Y.S.2d at 764. The contract provided that the buyer was to assume responsibility for the cheese when it left the factory, and delivery was to be effected in the factory or the refrigerated warehouses. *Id.* at 55, 406 N.Y.S.2d at 765. Payment was guaranteed under an irrevocable credit agreement established by Standard in favor of Synergal. *Id.* at 54, 406 N.Y.S.2d at 764. After the cheese was marked with Standard's trademark and segregated in Greece, Standard surrendered an attestation to the product's weight and quality to Synergal. *Id.* at 55, 406 N.Y.S.2d at 765.

[9] *Id.* at 59, 406 N.Y.S.2d at 768 (Sullivan, J., dissenting).

[10] *Id.* at 60, 406 N.Y.S.2d at 768 (Sullivan, J., dissenting).

[11] *Id.* at 54, 406 N.Y.S.2d at 764.

impleaded Synergal, alleging breach of contract and conversion of the last three shipments.[12] Synergal moved to dismiss the third-party action, contending that there was no predicate for the exercise of in personam jurisdiction.[13] The Supreme Court, New York County, denied the motion and held that Synergal was subject to jurisdiction under New York's long-arm statute.[14]

In affirming, a divided appellate division[15] found that Synergal's diversion of the shipment to Fantis "clearly sound[ed] in tort."[16] Justice Lupiano, writing for the majority, noted that when CPLR § 302(a)(3)(ii) was enacted, it was "primarily aimed at negligence type situations involving personal injuries or property damage."[17] The court reasoned, however, that application of the statute to commercial injuries should not be foreclosed since CPLR § 302(a)(3) fails to distinguish between commercial and noncommercial injuries.[18] After deciding this threshold issue, the court found that the in-state injury requirement of CPLR § 302(a)(3)(ii) was satisfied since Synergal's "tortious act [had] consequences in New York."[19] Noting that subparagraph (ii) requires a nondomiciliary to foresee consequences of his tortious act within the state,[20] the *Fantis* court observed that Synergal should have known that its conversion would have consequences in New York because, in addition to Stan-

[12] *Id.* By virtue of the express provisions of the contract, *see* note 8 *supra,* Standard claimed it had become entitled to rightful possession of the cheese while it was in Greece and that Synergal's alleged subsequent conveyance to Fantis constituted a conversion. *Id.* at 55, 406 N.Y.S.2d at 765.

[13] *Id.* at 54, 406 N.Y.S.2d at 764. Synergal also argued that Standard's only claim was for breach of contract, to which CPLR 302(a)(3)(ii) would be inapplicable. *Id.* Furthermore, Synergal contended that, pursuant to the forum selection clause in the purchase contract, the defendant had agreed to settle disputes in Greek courts. *Id.*

[14] *Id.*

[15] In a 3-2 decision, Justices Kuperman and Lane concurred with Justice Lupiano to form the majority. Justice Sullivan dissented in an opinion in which Justice Sandler joined.

[16] *Id.* at 55, 406 N.Y.S.2d at 765; *see* note 13 *supra.*

[17] 63 App. Div. 2d at 57, 406 N.Y.S.2d at 766. *See* notes 4 & 5 and accompanying text *supra.*

[18] 63 App. Div. 2d at 57, 406 N.Y.S.2d at 766. The court rejected the reasoning of several federal cases where CPLR 302(a)(3)(ii) was applied more restrictively to torts in the commercial area. *See* note 33 *infra.*

[19] 63 App. Div. 2d at 56, 406 N.Y.S.2d at 766. The court stated that the "most essential condition" under CPLR 302(a)(3) is that injury be sustained in New York. *Id.* at 55, 406 N.Y.S.2d at 765. Although failing to elaborate on the injury requirement of CPLR 302(a)(3) in its opinion, the court stated in a footnote that "the conversion directly injured Standard in its economic relations in New York" since, in addition to damages incurred from the loss of the cheese itself, Standard lost profits generally because the conversion to Fantis, its local competitor, destroyed Standard's prospects for sales of Greek feta cheese. *Id.* at 57 n.2, 406 N.Y.S.2d at 766 n.2.

[20] *Id.* at 56, 406 N.Y.S.2d at 765-66.

dard and Fantis being New York corporations, Synergal's monopolistic position in the export market enabled it to control competition between the two New York importers.[21] Thus, the court rejected Synergal's argument and upheld the lower court's assertion of jurisdiction.[22]

The dissent maintained that Standard's claim only supported a breach of contract action.[23] Authoring the dissenting opinion, Justice Sullivan argued that any loss of profits was simply the consequence of Standard's domicile.[24] Furthermore, since "the damage coalesced with the tortious act,"[25] which occurred in Greece, any injury incurred in New York was too remote to justify the court's exercise of personal jurisdiction over Synergal.[26] Viewing Synergal's monopolistic position in relation to New York importers as merely another aspect of domicile, Justice Sullivan reasoned that the "minimum contacts" standard had not been satisfied.[27] The dissent concluded, therefore, that the assertion of personal jurisdiction in this case was constitutionally impermissible.[28]

While it appears that the *Fantis* court properly held CPLR § 302(a)(3)(ii) applicable to commercial torts,[29] its application of the

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[21] *Id.* at 57, 406 N.Y.S.2d at 766.

[22] *Id.* The failure of Synergal to challenge the constitutionality of the statute at the trial level precluded treatment of this issue on appeal, *id.* at 58, 406 N.Y.S.2d at 767, since statutes are presumed constitutional, and the right to rebut such presumption must be exercised either in the pleadings or at trial. *Id.; accord,* Dodge v. Cornelius, 168 N.Y. 242, 244-45, 61 N.E. 244, 245 (1901); Jahn v. Berzon, 255 App. Div. 1023, 1024, 8 N.Y.S.2d 640, 642 (2d Dep't 1938).

[23] 63 App. Div. 2d at 60, 406 N.Y.S.2d at 768 (Sullivan, J., dissenting). Justice Sullivan contended that a tort claim could be sustained only if Standard obtained a right to title in Greece, and that this question was to be determined under Greek law. *Id.* at 61, 406 N.Y.S.2d at 769 (Sullivan, J., dissenting); *see* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 226, 186 N.E. 679, 682 (1933). Moreover, in view of Standard pleading the same facts in support of both the tort and breach of contract claims, the dissent argued that Standard's claim against Synergal for the balance of the shipment for which it bargained but failed to receive sounded solely in contract. 63 App. Div. 2d at 61, 406 N.Y.S.2d at 769 (Sullivan, J., dissenting).

[24] 63 App. Div. 2d at 64, 406 N.Y.S.2d at 770-71 (Sullivan, J., dissenting).

[25] *Id.* at 63, 406 N.Y.S.2d at 770 (Sullivan, J., dissenting).

[26] *Id.* at 63-64, 406 N.Y.S.2d at 770-71 (Sullivan, J., dissenting).

[27] *Id.* at 64, 406 N.Y.S.2d at 771 (Sullivan, J., dissenting).

[28] *Id.* (Sullivan, J., dissenting). The dissent expressed the fear that the majority's holding would extend jurisdiction beyond the constitutional limits of International Shoe Co. v. Washington, 326 U.S. 310 (1945), by allowing a nondomiciliary to be sued in New York merely because a loss of profits appears on the corporation's records solely by reason of the plaintiff's New York domicile. 63 App. Div. 2d at 64, 406 N.Y.S.2d at 771 (Sullivan, J., dissenting).

[29] In a case decided after *Fantis,* the Court of Appeals, in Sybron v. Wetzel, 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978), applied CPLR 302(a)(3)(ii) to a commercial tort. Noting that since the preliminary studies and the expert draftsmen of the statute did not exclude commercial torts, the Court concluded that the statute should be construed

statute's jurisdictional requirements seems questionable. Before long-arm jurisdiction may be obtained, the defendant must cause an "injury to person or property within the state"[30] *and* "reasonably expect [his tortious] act to have consequences in the state."[31] The *Fantis* court, while acknowledging the requirements of the statute, apparently merged the foreseeable consequences and injury requirements. After finding loss of profits in New York to be a foreseeable consequence of Synergal's tortious conduct, the court merely added that the loss was sufficient to satisfy the requirement of injury within the state. Since the injury requirement provides an important nexus with the forum state,[32] the *Fantis* court should have further explained its reasons for accepting loss of profits as an injury within the meaning of the statute.[33] The majority's conclusion, if

broadly. *Id.* at 205, 385 N.E.2d at 1085, 413 N.Y.S.2d at 131. The *Sybron* Court held that a New York court could issue an injunction against a nondomiciliary where it was deemed probable that the nondomiciliary's continued out-of-state conduct would eventually result in the commission of a commercial tort causing injury within New York, provided such injury was foreseeable and the nonresident was engaged in interstate or international commerce. *Id.* at 204-06, 385 N.E.2d at 1059-60, 413 N.Y.S.2d at 132-33.

[30] CPLR § 302(a)(3) (1972).

[31] *Id.* § 302(a)(3)(ii). Before a court may exercise jurisdiction under CPLR 302(a)(3)(ii), four prerequisites must be satisfied. In addition to the two injury requirements, injurious consequences within the state must have been foreseen or reasonably should have been foreseen by the tortfeasor. Finally, the tortfeasor must be engaged in interstate or international commerce and derive substantial revenue therefrom. D. SIEGEL, NEW YORK PRACTICE § 88, at 103-04 (1978). Regarding the second requirement of injury within the state, the courts, in noncommercial cases, have "look[ed] to the imparting of the original injury within the State of New York and not resultant damage." Black v. Oberle Rentals, Inc., 55 Misc. 2d 398, 400, 285 N.Y.S.2d 226, 229 (Sup. Ct. Onondaga County 1967). Thus, a physical injury incurred outside the state has been held insufficient to satisfy CPLR 302(a)(3)(ii)'s injury requirement, even though the manifestations of the injury remain or develop when an injured resident returns to New York. *See, e.g.*, Kramer v. Hotel Los Monteros S.A., 57 App. Div. 2d 756, 394 N.Y.S.2d 415 (1st Dep't 1977). It is submitted that in commercial tort cases a similar standard should be employed. *See* note 38 and accompanying text *infra*.

[32] FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2788 (McKinney); *see* note 34 *infra*.

[33] *See* note 19 *supra*. The federal cases require that the injury within the state be direct, and have deemed "the place where the plaintiff lost business" to be the situs of the injury, American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2d Cir. 1971) (quoting Spectacular Promotions, Inc. v. Radio Station WING, 272 F. Supp. 734, 737 (E.D.N.Y. 1967)), since the place where business is lost usually will be a forum reasonably foreseeable to the tortfeasor and ordinarily the location of crucial events connected with the disagreement. 439 F.2d at 433. Thus, where loss of profits results from a domiciliary's loss of business outside the state, as, for example, where a foreign corporation induced salesmen to leave the employ of a New York corporation and used confidential customer lists, federal courts have viewed the injury within New York as merely the fortuitous result of the plaintiff's domicile and too indirect to satisfy CPLR 302(a)(3)(ii)'s injury requirement. *See, e.g., id.* at 435. A virtual destruction of the plaintiff's New York business through a depletion of nonresident customers, however, might yield a different result. *See id.* In Friedr. Zoellner Corp. v. Tex Metals Co., 278 F. Supp. 52 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 300 (2d Cir. 1968), the

logically extended, would subject to the state's jurisdiction any nonresident who enters into a contract with a New York domiciliary, if it was foreseeable that a conversion would cause a loss of profits and the nonresident derived substantial revenue from interstate or international commerce.[34]

The difficulties presented by the *Fantis* opinion may stem from the fact that the tort of conversion does not lend itself to the jurisdictional analysis traditionally employed in personal injury actions.[35] When a defective product is sent into the state, the tort is

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district court held that where the defendant had absolutely no contacts with New York and did not enjoy the benefits and privileges of the laws of the state, the "minimum contacts" standard was not satisfied and the defendant was not subject to jurisdiction under CPLR 302(a)(3)(ii). 278 F. Supp. at 56; *see* Security Nat'l Bank v. UBEX Corp., 404 F. Supp. 471 (S.D.N.Y. 1975); Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374 (S.D.N.Y. 1975); Lehigh Valley Indus., Inc. v. Birenbaum, 389 F. Supp. 798 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975). In each of these federal cases, the "balance sheet" loss of profits was not attributable to a corresponding reduction in the volume of business within New York.

[34] *See* 63 App. Div. 2d at 64, 406 N.Y.S.2d at 771 (Sullivan, J., dissenting). Although the *Fantis* court did not reach the constitutional issue, *see* note 22 *supra*, CPLR 302(a)(3) appears to be well within constitutional bounds. *See* note 1 *supra*. It is submitted, however, that the *Fantis* court's application of the statute fails to satisfy the "minimum contacts" standard set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). Under CPLR 302(a)(3)(ii), the only contacts with the state are the injury and a contract with a New York corporation. While the foreseeability and revenue requirements are important limitations on the state's exercise of jurisdiction, *see* FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2789 (McKinney), neither necessarily provides any tangible contact with New York. *See* notes 2 & 3 *supra*. Thus, the satisfaction of the injury requirement is critical, especially since the tortious act is not committed within the state.

The "minimum contacts" standard requires that "the defendant purposefully [avail] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). In Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the Illinois Supreme Court interpreted § 17 of the Illinois Civil Practice Act, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd Supp. 1978), upon which CPLR 302 is based. *See* WK&M ¶ 302.01. The *Gray* court found that the defendant should have reasonably foreseen that its defective product manufactured in Ohio would find its way into Illinois and produce consequences therein. Reasoning that the presence of defendant's product in the state was not an isolated instance and that the product was sold with the knowledge that it might be used in Illinois, the court held that the defendant had invoked the benefits and protections of the laws of Illinois. Consequently, the defendant's contacts with the state did not make it unfair to require the defendant to defend an action brought therein. 22 Ill. 2d at 437, 176 N.E.2d at 766. It is submitted that, unlike the *Gray* defendant, Synergal did not invoke the benefits and protections of the laws of New York. Assuming arguendo that injury was incurred in the United States despite the conversion in Greece, *see* notes 35 & 37 and accompanying text *infra*, it appears that Standard would lose customers in the Chicago area, since the shipments were destined for Chicago. Thus, if Synergal invoked the benefits and protections of the laws of any state, it received the benefits of the laws of Illinois, not New York.

[35] In negligence and strict liability cases, the tortious act occurs when the product is manufactured outside the state. When it is later shipped into the state where it causes

not complete until the product causes an injury to person or property.[36] In conversion, on the other hand, the tortious act and injury occur simultaneously, and the tort is complete when the goods are converted.[37] Thus, the injury occurs wherever the tortious act takes place. In *Fantis,* since the conversion took place in Greece, no injury was incurred in New York.[38] The loss of profits, which the *Fantis* court treated as an in-state injury for purposes of CPLR § 302(a)(3)(ii), appears to be more appropriately termed a consequence of the injury suffered in Greece.

It is submitted that the failure of the *Fantis* court to evaluate the distinctions peculiar to the tort of conversion resulted in an exercise of jurisdiction which is predicated primarily upon the plaintiff's domicile.[39] When applied to commercial torts, CPLR § 302(a)(3)(ii) should be examined in light of the nature of the tort committed, since this may be relevant to whether the injury requirement is satisfied. Without such consideration, the courts may extend the state's jurisdiction beyond the limits permitted by due process.

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personal injury or property damage, the tort is completed in New York. If the manufacturer can foresee ramifications within the state and is substantially engaged in interstate or international commerce, jurisdiction may be exercised pursuant to CPLR 302(a)(3)(ii). *See, e.g.,* Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 370, 285 N.Y.S.2d 688, 690 (Sup. Ct. Kings County 1967). This is the classic application of CPLR 302(a)(3)(ii) contemplated by the drafters. *See* FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), *reprinted in* [1966] N.Y. Laws 2780, 2788 (McKinney). It has been held, however, that jurisdiction is not obtained under CPLR 302(a)(3)(ii) where a defective product manufactured outside the state causes injury to New York domiciliaries while they are outside the state. *See, e.g.,* Black v. Oberle Rentals, Inc., 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga County 1967). In such a situation the tort is completed outside the state. Accordingly, any loss of earnings or other damages incurred are deemed consequential since they stem from the original personal injury and occur in New York solely because the injured party is domiciled here. *Id.* at 400, 285 N.Y.S.2d 226, 229. This situation is analogous to cases involving the tort of conversion where the tort is complete when the goods are converted. *See* note 37 and accompanying text *infra.* Thus, any loss of profits is similar to loss of earnings in a personal injury case.

[36] *See* W. PROSSER, LAW OF TORTS 2 (4th ed. 1971). Indeed, the Court of Appeals, in Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), distinguished between "tortious act" and "tort," noting that they do not always occur at the same time and place. *Id.* at 463, 209 N.E.2d at 79, 261 N.Y.S.2d at 23.

[37] *See* PROSSER, *supra* note 36, at 84, 97 (4th ed. 1971).

[38] If the theoretical argument can be circumvented it may be argued that the injury occurred where Standard lost sales or customers, *see* note 34 *supra,* since actual loss of customers or sales is more likely to be considered a direct "injury" than a mere balance sheet loss of profits. Even if this line of reasoning is pursued, however, it appears as though Standard would have lost customers or sales in Chicago, where the shipments were to be delivered.

[39] *See* note 35 *supra.*