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CPLR 302(a)(3)(i): Small Percentage of Defendant's Total Income May Constitute "Substantial Revenue" to Satisfy Minimum Contacts

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ents a novel development in the law of contribution and tort liability. In *Nolechek,* the Court found that a parent owes a duty not to expose third parties to liability for a child's injuries resulting in part from the parent's negligent entrustment of a dangerous instrument to a child. Significantly, a breach of this duty was held to support a claim for contribution against the parent. In the area of criminal procedure, the Court's decision in *People v. Settles* further delineates the right to counsel. The *Settles* Court held that once an indictment is returned, an unrepresented defendant's right to counsel indelibly attaches, thus precluding a waiver of that right in the absence of an attorney.

It is hoped that these and other cases examined in *The Survey* will serve to further the goal of informing the practitioner of noteworthy trends in New York practice.

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

CPLR 302 (a)(3)(i): Small percentage of defendant's total income may constitute "substantial revenue" to satisfy minimum contacts

CPLR 302(a)(3)(i) permits a court to exercise personal jurisdiction over a nonresident defendant who commits an out-of-state tortious act that causes injury within the state.[1] Apparently designed to meet the constitutional mandate of "minimum contacts" between the nonresident and forum,[2] an additional provision of CPLR

[1] CPLR 302(a)(3)(i) (1972).

[2] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In *International Shoe,* the Supreme Court enunciated the standards by which jurisdiction over a nonresident could be obtained. The traditional jurisdictional predicate of physical presence within the state, *see* Pennoyer v. Neff, 95 U.S. 714, 722 (1877), was broadened to include nonresidents who had "certain minimum contacts with [the state] such that the maintenance of the suit [would] not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court expanded further the criteria for obtaining personal jurisdiction by permitting suit against a nonresident that had solicited one insurance contract and then mailed it into the state, based on the "substantial connection [of the contract] with that State." *Id.* at 223. Shortly thereafter, however, the Court cautioned against interpreting the holdings of *International Shoe* and *McGee* as signaling the abolition of all limitations on a state court's power to exercise personal jurisdiction over a nonresident. *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Court emphasized the necessity of purposeful activities on the part of the nonresident by which he "invok[es] the benefits and protections of [the] laws" of the state seeking to assert jurisdiction. *Id.* at 253. Although CPLR 302 does not reach as far as is permissible under the federal Constitution, it does "[represent] . . . a healthy attempt to exploit some of that potential." CPLR 302, commentary at 60 (McKinney 1972). For instance, one jurisdictional predicate under the statute is a nonresident's commis-

302(a)(3)(i) requires the defendant to "deriv[e] substantial revenue from goods used or consumed or services rendered" in New York.[3] While no uniform guidelines have been established to determine when revenue is or is not "substantial,"[4] many courts have used a proportionality test which compares the defendant's gross sales revenue from New York with its total gross sales revenue.[5]

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sion of a tortious act outside the state which causes injury in the state. If the nonresident could reasonably expect his act to have forum consequences in the state, some of CPLR 302's foreign counterparts deem that the constitutional mandates have been met. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-411(c)(3) (West 1962); N.C. GEN. STAT. § 55-145(a)(3) (1965). CPLR 302(a)(3)(ii), however, in addition to the foreseeability requirement, demands that the defendant derive substantial revenue from interstate or international commerce. This provision ensures that the nonresident's "business operations are [not solely] of a local character." Report of the Judicial Conference to the 1966 Legislature in Relation to the Civil Practice Laws and Rules, *reprinted in* [1966] N.Y. Laws 2789 (McKinney) [hereinafter cited as 1966 Conference].

[3] CPLR 302(a)(3)(i) (1972) provides in pertinent part:

> [A] court may exercise personal jurisdiction over any nondomiciliary . . . who . . . commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . 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 . . . .

The activities required by CPLR 302(a)(3)(i) were intended to ensure that the nonresident's "overall contact" with the state is of sufficient magnitude so as to avoid unfairness in compelling it to defend in New York. 1966 Conference, *supra*, note 2, at 2788; D. SIEGEL, NEW YORK PRACTICE § 88, at 103 (1978). The enumerated connections with the state are in the alternative; therefore, in addition to alleging a tortious act that occurred outside New York causing injuries inside the state, the plaintiff must establish that the defendant's conduct satisfies only one of the contacts listed in the statute. *See* Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 222, 282 N.Y.S.2d 127, 133 (Sup. Ct. Nassau County 1967). As a further measure of protection for the nonresident, however, the statute has been construed as demanding that the defendant engage in "a regular course of conduct in the state" rather than a single business transaction before being subjected to long-arm jurisdiction. 1 WK&M ¶ 302.14, at 3-120 (1978) (quoting 1966 Conference, *supra* note 2, at 2786-88); *see* CPLR 302, commentary at 90 (McKinney 1972). It should be noted that there is no requirement under CPLR 302(a)(3) that any relationship exist between the defendant's contacts with the state and the tortious act that caused the injury within the state. 1966 Conference, *supra* note 2, at 2789; CPLR 302, commentary at 89 (McKinney 1972); 1 WK&M ¶ 302.14, at 3-121 (1978).

[4] SIEGEL, *supra* note 3, § 88, at 104.

[5] *See, e.g.*, Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 115 (S.D.N.Y. 1969); Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep't 1974); Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 285 N.Y.S.2d 688 (Sup. Ct. Kings County 1967); Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967). The term "substantial revenue" also appears in CPLR 302(a)(3)(ii) (1972) which authorizes personal jurisdiction over a nonresident who

> commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

The courts have assumed that the meaning of "substantial revenue" is the same whether it relates to revenue derived from New York, CPLR 302(a)(3)(i), or from interstate or interna-

Recently, however, in *Allen v. Canadian General Electric Co.*,[6] the Appellate Division, Third Department, held that a "substantial" amount of money earned in New York is a sufficient contact with the state to support jurisdiction, even though the sum constitutes only a small percentage of the defendant's total income.[7]

The plaintiff in *Allen* claimed that she was injured by a tea kettle that allegedly had been manufactured defectively by the defendant Canadian General Electric Co. (CGE).[8] Since CGE was a Canadian corporation not authorized to do business in New York,[9] the plaintiff invoked CPLR 302(a)(3)(i) as the basis for New York jurisdiction.[10] Although CGE's New York sales for 1976 were about $8.79 million, this amount represented only one percent of its total income.[11] Relying on a proportionality test, the defendant moved to dismiss the complaint for lack of jurisdiction on the ground that the percentage was insufficient to satisfy the "substantial revenue" re-

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tional commerce, CPLR 302(a)(3)(ii); Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep't 1974); Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967); *see* Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 115 (S.D.N.Y. 1969); Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 285 N.Y.S.2d 688 (Sup. Ct. Kings County 1967); SIEGEL, *supra* note 3, § 88, at 104 n.7.

The statute and its legislative history provide little instruction on how to construe the phrase "substantial revenue." One authority, stating that "a specific and yet perfect statute" cannot be achieved, is of the opinion that the omission of legislative direction was purposeful. SIEGEL, *supra* note 3, § 88, at 104 n.10. Professor Siegel suggests that it was the intention of the drafters that the statutory terms be supplemented by constitutional requirements and case law. *Id.*

[6] 65 App. Div. 2d 39, 410 N.Y.S.2d 707 (3d Dep't 1978).

[7] *Id.* at 43, 410 N.Y.S.2d at 709. The court stated that "[t]he mere showing by [the] defendant . . . that the percentage of New York revenue is small in comparison to total income is insufficient evidence to support a dismissal of the complaint." *Id.*

[8] *Id.* at 40, 410 N.Y.S.2d at 707.

[9] *Id.*

[10] The complaint premised jurisdiction on the alleged tort that had been committed outside the state, resulting injury in New York and an assertion that Canadian General Electric Co. (CGE) "derive[d] substantial revenue from goods used within the State." *Id.* The complaint asserted a second basis for jurisdiction over the defendant. CGE was the subsidiary of General Electric Co., a New York corporation. *Id.* Plaintiff contended that, by virtue of this fact, defendant was doing business in New York in the traditional sense. *Id.; see* CPLR 301 (1972). Special Term, however, denied that the mere existence of a parent-subsidiary relationship could support a finding of "substantial presence" in the state. *Id.*, 410 N.Y.S.2d at 707-08; *accord,* Nursery Plastics, Inc. v. Newton & Thompson, Inc., 19 Misc. 2d 883, 884, 191 N.Y.S.2d 655, 657 (Sup. Ct. N.Y. County 1959). *See generally* Wellborn, *Subsidiary Corporations in New York: When Is Mere Ownership Enough to Establish Jurisdiction Over the Parent,* 22 BUFFALO L. REV. 681 (1973).

[11] 65 App. Div. 2d at 41, 410 N.Y.S.2d at 708. The defendant claimed that only 1% of its total sales were to customers in New York. The plaintiff, however, alleged that the defendant's total sales were $879 million; from this the court calculated the figure of $8.79 million, which was not disputed by the defendant.

quirement of CPLR 302.[12] The Supreme Court, Special Term, denied the motion, finding that, on its face, the large sum of $8.79 million constituted "substantial revenue."[13]

On appeal, the Appellate Division, Third Department, affirmed, finding that "the sum of $8.79 million . . . is prima facie 'substantial.' "[14] The court acknowledged that the proportionality test generally was an effective method of determining the importance of income derived from New York,[15] but noted that, in most cases, small percentages would not represent large amounts of money.[16] In the present case, however, the court concluded that it would be difficult to consider the amount involved as not "substantial revenue."[17] The court reasoned that use of the proportionality test only would often allow a large corporation to avoid liability to residents of this state on the strength of its high total income.[18] According to the court, not only was this result unacceptable, but asserting jurisdiction over a defendant with $8.79 million in New York sales "does not offend 'traditional notions of fair play and substantial justice.' "[19]

It is suggested that the *Allen* court's concentration on the amount of the revenue derived from New York rather than the revenue's relationship to the total income of the nonresident defendant was necessary in order to effectuate the legislative intent behind

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[12] *Id.* The defendant cited Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 357 N.Y.S.2d 547 (3d Dep't 1974), wherein the court utilized the comparison test in defining substantial revenue. *See* note 4 and accompanying text *supra* note 22 *infra*.

[13] 65 App. Div. 2d at 41, 410 N.Y.S.2d at 708.

[14] *Id.* at 43, 410 N.Y.S.2d at 709.

[15] *Id.* at 41-42, 410 N.Y.S.2d at 708-09; *see* note 4 and accompanying text *supra*.

[16] 65 App. Div. 2d at 42, 410 N.Y.S.2d at 708. *But see* Nichols v. Surgitool, Inc., 419 F. Supp. 58, 62 (W.D.N.Y. 1976). In support of its motion to dismiss for lack of jurisdiction, the *Allen* defendant relied on Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 357 N.Y.S.2d 547 (3d Dep't 1974), wherein the court stated that the term "substantial revenue" "should be construed to require comparison between a defendant's gross sales revenue from interstate or international business with total gross sales revenue . . . ." *Id.* at 333, 357 N.Y.S.2d at 550. The *Auto Specialties* court, however, in addition to comparing the income generated by activities in New York with gross revenue, required a calculation of the percentage of profits those figures represented. *Id.* The *Allen* court found it significant that the defendant had not "offer[ed] . . . any comparison of its profits and the New York sales . . . [when the *Auto Specialties* court] specifically noted that profits were relevant to the issue of 'substantial revenue.'" 65 App. Div. 2d at 42, 410 N.Y.S.2d at 708.

[17] 65 App. Div. 2d at 42-43, 410 N.Y.S.2d at 709. The court assumed that the defendant's parent corporation would deem $8.79 million "substantial" were the amount representative of a loss. *Id.* at 42, 410 N.Y.S.2d at 709. The court also noted that an economist most likely would regard sales of $8.79 million as substantial "regardless of their ratio to total sales." *Id.* at 43, 410 N.Y.S.2d at 709.

[18] *Id.*

[19] *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1948)).

CPLR 302(a)(3)(i).[20] While the comparison test had proven to be an adequate method of determining when revenue is "substantial" in the majority of cases,[21] it did not deal effectively with large business concerns whose high New York incomes constitute only a small percentage of their total earnings.[22] The purpose of CPLR 302(a)(3)(i) was to subject to in personam jurisdiction nonresidents whose contacts with the state were of a nature and quality so that it would not be unfair to compel them to defend an action in a New York court.[23] It therefore would appear to be fair to require a nonresident defendant who has earned $8.79 million from sales in New York to come to the state to litigate a lawsuit, since an organization of this size is protected by the laws of the forum and should be equipped to handle the expense.[24]

The *Allen* court's decision not to confine its "substantial revenue" inquiry to a mere comparison properly will prevent a large corporation carrying on a small percentage of its business in New York from escaping jurisdiction when it derives significant benefits

[20] *See* note 3 *supra*. The *Allen* decision would appear to bring the third department in line with the first department. In Tonelli v. Chase Manhattan Bank, 49 App. Div. 2d 731, 372 N.Y.S.2d 662 (1st Dep't 1975) (per curiam), a conversion action in which a New York plaintiff sought jurisdiction over a New Jersey bank, the court denied the defendant's motion to dismiss for lack of personal jurisdiction. The court stated, "the fact that the instant transaction involves $200,000 of a New York depositor suffices to show at this time that [the bank] may derive substantial revenue from interstate commerce." *Id.*, 372 N.Y.S.2d at 663; *accord*, Nichols v. Surgitool, Inc., 419 F. Supp. 58 (S.D.N.Y. 1976); Path Instruments Int'l Corp. v. Asahi Optical Co., 312 F. Supp. 805 (S.D.N.Y. 1970).

[21] *See* note 5 and accompanying text *supra*.

[22] *See generally* 65 App. Div. 2d at 43, 410 N.Y.S.2d at 709. The practice commentary to CPLR 302 suggests that the derivation of 10% of total income from New York would be considered "substantial revenue." CPLR 302, commentary at 90 (McKinney 1972); *see* Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 115 (S.D.N.Y. 1969); New England Laminates Co. v. Murphy, 79 Misc. 2d 1025, 1028, 362 N.Y.S.2d 730, 734 (Sup. Ct. Nassau County 1974). *But see* Nichols v. Surgitool, Inc., 419 F. Supp. 58 (W.D.N.Y. 1976).

[23] *See* 1966 Conference, *supra* note 2, at 2789; *see* note 3 *supra*.

[24] *See* 65 App. Div. 2d at 43, 410 N.Y.S.2d at 709 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). According to the court in Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 224, 282 N.Y.S.2d 127, 135 (Sup. Ct. Nassau County 1967), the rationale sustaining the inherent equity in CPLR 302(a)(3)(i) and (ii) may be found in Gray v. American Radiator & Standard Sanitary Supply Corp., 22 Ill. 2d 432, 442-43, 176 N.E.2d 761, 766 (1961).

For an example of a case where the nonresident defendant clearly did not meet the contacts required by CPLR 302, see Markham v. Anderson, 531 F.2d 634, 636 (2d Cir. 1976). *See generally* CPLR 302, commentary at 87-93 (McKinney 1972); 1 WK&M ¶ 302.14, at 3-119 to 3-129 (1978).

from the state.[25] Such continued flexibility in interpreting the provisions of CPLR 302 will preserve the intent of the draftsmen.

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CPLR 302(a)(3)(ii): Injunctive relief available against nondomiciliary to prevent threatened economic harm and loss of trade secrets

CPLR 302(a)(3) permits New York to exercise long-arm jurisdiction over nondomiciliaries whose tortious acts outside the state cause injury in the state.[26] Principally due to the difficulty in deter-

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[25] *See* note 18 and accompanying text *supra.*

[26] CPLR 302(a)(3)(ii) (1972) extends jurisdiction over a nondomiciliary if he

> 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
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> . . .
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR 302(a)(3) was enacted in direct response to the New York Court of Appeals decision in Feathers v. McLucas, *reported sub nom.* Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), which held CPLR 302(a)(2) inapplicable to out-of-state tortious acts which cause injury within the state. *Id.* at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24; Memorandum of Judicial Conference on Approval of Ch. 590, N.Y. Laws (N.Y.S. 2681, N.Y.A. 3086, 189th Sess.), in TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 21, 21 (1967); *see* Reese, *A Study of CPLR 302 in Light of Recent Judicial Decisions,* ELEVENTH ANN. REP. N.Y. JUD. CONFERENCE 132, 132 (1966). *Feathers* involved a personal injury action precipitated by the explosion of a defective propane gas tank while it was being transported through New York to Vermont. The Court held that jurisdiction could not be exercised over the nondomiciliary corporate defendant since the negligent manufacture, and therefore the tort, occurred without the state.

In recommending that the legislature amend the long-arm statute to encompass such tortious conduct, a study commissioned to examine CPLR 302 noted that, "as a matter of policy, jurisdiction should not be exercised over a [defendant] who causes tortious injury in the state by an act or omission outside the state unless he had other contacts with the state." Reese, *supra,* at 136. This is accomplished by the affiliating requirements found in clauses (i) and (ii) of CPLR 302, which mandate sufficient contacts to ensure constitutionality. 1 WK&M ¶ 302.14, at 3-120; *see* note 48 *infra. But cf.* Note, *Jurisdiction in New York: A Proposed Reform,* 69 COLUM. L. REV. 1412, 1432-33 (1969) (additional requirements unnecessary to satisfy due process).

CPLR 302(a)(3)(ii) adds two conditions to the tortious-act and resultant-injury requirements. TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 343 (1967). The injury caused in New York must have been foreseeable, although it is not necessary that the defendant expected, or reasonably should have expected, that the specific injury would occur. It is only required that some forum consequences would foreseeably result from the nonresident's tortious act. TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 343-44 (1967); CPLR 302, commentary at 92 (McKinney 1972); *see* Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep't 1974); Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, 291, 315 N.Y.S.2d 51, 56 (Sup. Ct. Queens County), *aff'd,* 35 App. Div. 2d 720, 315 N.Y.S.2d 815