

CPLR 302(a)(3)(ii): Injunctive Relief Available Against Nondomiciliary to Prevent Threatened Economic Harm and Loss of Trade Secrets

Sharon M. Heim

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Heim, Sharon M. (1979) "CPLR 302(a)(3)(ii): Injunctive Relief Available Against Nondomiciliary to Prevent Threatened Economic Harm and Loss of Trade Secrets," *St. John's Law Review*: Vol. 53 : No. 4 , Article 8.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol53/iss4/8>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

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

Anne A. Dillon

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-

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

(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

mining the situs of the requisite injury,²⁷ the applicability of the statute to commercial tort situations has been uncertain.²⁸ Recently, in *Sybron Corp. v. Wetzel*,²⁹ the Court of Appeals held that CPLR 302(a)(3)(ii) may be used to assert personal jurisdiction over a non-resident corporate defendant where the alleged facts, if true, show

(2d Dep't 1970). See generally Homburger & Laufer, *Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFFALO L. REV. 67, 74 (1966-1967).

The second affiliating demand of clause (ii) requires the nondomiciliary defendant to derive "substantial revenue" from interstate or international commerce, apparently because such a defendant would not be unduly burdened by being subjected to the jurisdiction of a foreign forum. TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 343 (1967). For a more extensive discussion of CPLR 302(a)(3), see *The Survey*, 53 ST. JOHN'S L. REV. 590, 603-04 nn.1-3 (1979).

²⁷ The determination of the situs of the injury seems to be a perplexing issue in commercial tort cases. To obtain jurisdiction pursuant to CPLR 302(a)(3), it must be established that the actual harm which occurred within the confines of the state directly emanated from the out-of-state tortious conduct. D. SIEGEL, *NEW YORK PRACTICE* § 88 (1978). Although this task is relatively easy where personal injury has been sustained, resolution of the issue becomes difficult where commercial harm is involved.

Generally it has been recognized that "[s]ection 302(a)(3) is not satisfied by remote or consequential injuries which occur in New York only because the plaintiff is domiciled, incorporated or doing business in the state." *Friedr. Zoellner (New York) Corp. v. Tex Metals Co.*, 396 F.2d 300, 303 (2d Cir. 1968) (citing *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga County 1967)); see *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 433 (2d Cir. 1971); *Chemical Bank v. World Hockey Ass'n*, 403 F. Supp. 1374, 1380 (S.D.N.Y. 1975); *Spectacular Promotions, Inc. v. Radio Station WING*, 272 F. Supp. 734, 737 (E.D.N.Y. 1967); CPLR 302, commentary at 88 (McKinney 1972). *But see Fantis Foods, Inc. v. Standard Importing Co.*, 63 App. Div. 2d 52, 406 N.Y.S.2d 763 (1st Dep't 1978), discussed in *The Survey*, 53 ST. JOHN'S L. REV. 590, 603 (1979).

²⁸ In commercial tort settings the injury predicate generally has been the most difficult problem in the exercise of long-arm jurisdiction pursuant to CPLR 302(a)(3). As originally proposed, the requirement of in-state consequences was limited to situations where "physical injury to person or property" was sustained. SECOND REP. at 39. Further revision, however, eliminated this qualification. FIFTH REP. at 67. Since personal injury is not a prerequisite, therefore, the availability of the statute for commercial torts apparently was not precluded. Additionally, because the statute specifically excludes only actions for defamation, it is reasonable to infer that all other tort actions may be within the purview of the statute. Judicial interpretation of CPLR 302 largely has been restricted to personal injury cases, as, for example, in *Tracy v. Paragon Contact Lens Labs, Inc.*, 44 App. Div. 2d 455, 355 N.Y.S.2d 650 (3d Dep't 1974) and *Old Westbury Golf & Country Club, Inc. v. Mitchell*, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. Nassau County 1964), *aff'd*, 24 App. Div. 2d 636, 262 N.Y.S.2d 438 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 670, 219 N.E.2d 868, 273 N.Y.S.2d 418 (1966). It has been conceded, however, "that 'commercial' tortious activity as well as [injury] of a physical nature may be covered by Section 302[(a)(3)] in an appropriate case," *Security Nat'l Bank v. UBEX Corp.*, 404 F. Supp. 471, 474 (S.D.N.Y. 1975); *accord*, *G.S.C. Assocs., Inc. v. Rogers*, 430 F. Supp. 148 (E.D.N.Y. 1977), and, in fact, CPLR 302 has been applied to commercial torts by at least one court, *Fantis Foods, Inc. v. Standard Importing Co.*, 63 App. Div. 2d 52, 406 N.Y.S.2d 763 (1st Dep't 1978).

²⁹ 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127, *rev'g in part and aff'g in part*, 61 App. Div. 2d 697, 403 N.Y.S.2d 931 (4th Dep't 1978).

that the defendant committed a tortious act, even though injury in New York was only expected.³⁰

In *Sybron*, defendant Wetzel was employed as general ceramics foreman at a subsidiary of the New York plaintiff, Sybron Corp. (Sybron), a manufacturer of specialized glass-lined vessels, for 13 years before his retirement.³¹ The other defendant, De Dietrich (U.S.A.), Inc. (De Dietrich), a Delaware corporation neither licensed to do business in New York nor having any offices within the state,³² solicited Wetzel at his Florida residence and proposed that he supervise its processing plant in New Jersey.³³ Upon learning of this offer, Sybron sought to enjoin the employment of Wetzel by De Dietrich and the divulgence of trade secrets by Wetzel.³⁴ The Supreme Court, Monroe County, granted a preliminary injunction.³⁵ Unanimously reversing, the Appellate Division, Fourth Depart-

³⁰ 46 N.Y.2d at 206, 385 N.E.2d at 1059, 413 N.Y.S.2d at 132.

³¹ *Id.* at 201, 385 N.E.2d at 1056, 413 N.Y.S.2d at 128-29. Wetzel was employed by the plaintiff for 34 years, originally in lower positions in the glass-coating department, and rose to the position of foreman in 1961. *Id.* In 1974, Wetzel retired and changed his domicile to Florida, but continued to draw his pension in New York. Even after his retirement, he was sent as a technical consultant to Sybron's Mexican factory. 61 App. Div. 2d 697, 700, 403 N.Y.S.2d 931, 932 (4th Dep't 1978). It should be noted that Sybron is one of only three American competitors involved in the design, manufacture and sale of glass-lined containers used in chemical processing. 46 N.Y.2d at 201, 385 N.E.2d at 1056, 413 N.Y.S.2d at 129.

³² *Id.* De Dietrich is the American division of De Dietrich & Cie, a French corporation. *Id.* The subsidiary is incorporated in Delaware with its principal place of business in New Jersey. Having no New York office or employees, the corporation's only contacts with the state consisted of approximately 20 to 40 business accounts in New York. One of the accounts, Eastman Kodak, is substantial and of particular significance since it represents a major client of Sybron. *Id.* at 203, 385 N.E.2d at 1057, 413 N.Y.S.2d at 129-30.

³³ *Id.* at 201, 385 N.E.2d at 1056, 413 N.Y.S.2d at 129. Wetzel was approached in Florida by a former co-employee who was working for De Dietrich at the time. According to the evidence, "only one other person, also a former [employee of the plaintiff], was interviewed for the [supervisory] position." *Id.* at 201-02, 385 N.E.2d at 1056, 413 N.Y.S.2d at 129.

³⁴ *Id.* at 202, 385 N.E.2d at 1056, 413 N.Y.S.2d at 129. The Court relied in part upon an agreement between the plaintiff and Wetzel which required the employee to preserve the confidentiality of trade secrets. Apparently, all employees "with access to proprietary secrets," *id.*, were required to sign an agreement with Sybron, which stated:

I will preserve in confidence, and in accordance with established Company policy, all secret and confidential matters of the Company and others with whom the Company may have confidential relations both during my employment and thereafter.

61 App. Div. 2d at 702, 403 N.Y.S.2d at 934. This agreement supported Sybron's contention that Wetzel possessed trade secrets and not mere skills as argued by the defendants. For a detailed discussion of the law of trade secrets, see generally Berryhill, *Trade Secret Litigation: Injunctions and Other Equitable Remedies*, 48 U. COLO. L. REV. 189 (1977); Johnson, *Remedies in Trade Secret Litigation*, 72 NW. U.L. REV. 1004 (1978); Marcuse, *The Protection of Trade Secrets: Theory and Practice*, 36 CONN. B.J. 348 (1962); Comment, *Theft of Trade Secrets: The Need for a Statutory Solution*, 120 U. PA. L. REV. 378 (1971).

³⁵ 61 App. Div. 2d at 700, 403 N.Y.S.2d at 932.

ment, dismissed the plaintiff's complaint, finding that no jurisdictional predicate existed for the action against De Dietrich and that Wetzel, although subject to New York jurisdiction, did not possess trade secrets.³⁶

In an opinion written by Chief Judge Breitel,³⁷ the Court of Appeals reversed, concluding that personal jurisdiction may be exercised over De Dietrich pursuant to CPLR 302(a)(3)(ii). The Court initially determined that CPLR 302(a)(3) should apply to commercial torts, since the statute on its face was not limited to noncommercial torts and the legislative history did not address the question.³⁸ The majority also found the statute applicable even when there is no injury in New York at the time the suit was instituted.³⁹ Reasoning that if it could be established that Wetzel was actually in possession of trade secrets and that De Dietrich intended to misappropriate the same, jurisdiction could be asserted because, according to the Court, "a tortious act [would] have been committed . . . although the consequential economic injury in [the] state [was] still only anticipated."⁴⁰ Furthermore, if injury did occur, it would take place in New York, where the plaintiff manufactured its equipment, where the alleged trade secrets were obtained, and where a substantial amount of business would be lost.⁴¹ A second

³⁵ *Id.* at 704, 403 N.Y.S.2d at 935. The appellate division held that the threshold jurisdictional predicate was lacking with respect to De Dietrich, finding that "[t]he alleged tortious act . . . , malicious interference with contract rights, is both speculative and anticipatory." *Id.* at 702, 403 N.Y.S.2d at 933. With respect to Wetzel, however, jurisdiction was properly asserted pursuant to CPLR 302(a)(1) based on the employment contract between the plaintiff and the defendant-employee, since the cause of action arose from the same transaction. *Id.* at 700, 403 N.Y.S.2d at 932; *see note 26 supra*. The court dismissed the claim, not on jurisdictional grounds, but on a determination of the merits. It was concluded that the skill and experience Wetzel had acquired while in the employ of the plaintiff did not constitute trade secrets warranting protection by the court. 61 App. Div. 2d at 704, 403 N.Y.S.2d at 935.

³⁷ Judges Jasen, Jones and Fuchsberg joined Chief Judge Breitel in the majority opinion. Judge Wachtler filed a dissenting opinion in which Judge Cooke concurred. Judge Gabrielli took no part in the decision.

³⁸ 46 N.Y.2d at 205, 385 N.E.2d at 1058, 413 N.Y.S.2d at 131. Since the appellate division had vacated the injunction on the merits of the case, the Court of Appeals was without authority to review this disposition, *id.* at 201, 385 N.E.2d at 1056, 413 N.Y.S.2d at 128, because a question of fact was involved. Generally, the Court of Appeals has jurisdiction to review only questions of law. N.Y. CONST. art. VI, § 3; *see D. SIEGEL, NEW YORK PRACTICE* §§ 10, 527-30 (1978).

³⁹ 46 N.Y.2d at 204, 385 N.E.2d at 1058, 413 N.Y.S.2d at 130.

⁴⁰ *Id.* at 203-04, 385 N.E.2d at 1057-58, 413 N.Y.S.2d at 130; *see note 26 supra*.

⁴¹ 46 N.Y.2d at 205, 385 N.E.2d at 1058-59, 413 N.Y.S.2d at 131. The Court also gave the foreseeability requirement only cursory treatment in its decision, finding that the defendant should have reasonably expected New York effects from its conduct. *Id.* at 206, 385 N.E.2d at 1059, 413 N.Y.S.2d at 132. Since this criterion appears to be the legislative linchpin

ground for satisfying the jurisdictional requirements of CPLR 302 was the "probable inference" that De Dietrich had executed a "conscious plan to engage in unfair competition by misappropriation of Sybron's trade secrets."⁴²

Judge Wachtler, dissenting, maintained that in personam jurisdiction could not be validly asserted over the nonresident defendant-corporation prior to the actual occurrence of the tortious act.⁴³ Thus, the dissent opined that "inferred intent to misappropriate trade secrets" was insufficient to satisfy this primary jurisdictional requirement embodied in the statute.⁴⁴ The dissent also noted that the additional prerequisite of showing actual injury was not met.⁴⁵ Moreover, Judge Wachtler stated that policy considerations militated against the majority's extension of long-arm jurisdiction, arguing that employee mobility in the labor market would be unjustifiably impeded by the Court's decision.⁴⁶

Although construed narrowly in earlier court decisions, both legislative amendment and judicial interpretation have expanded the scope of CPLR 302.⁴⁷ It would appear that the *Sybron* Court has

for assuring the constitutionality of the statute, *see* note 26 *supra*, it may have warranted more extensive discussion by the majority.

⁴² 46 N.Y.2d at 203-04, 385 N.E.2d at 1057-58, 413 N.Y.S.2d at 130. The Court also noted that it would be unacceptable "[i]f a tort must already have been committed for jurisdiction to be available under the statute, [since CPLR 302 then] would never be usable by a plaintiff seeking anticipatory injunctive relief." *Id.* at 204, 385 N.E.2d at 1058, 413 N.Y.S.2d at 131. It is suggested that this reasoning represents a policy consideration rather than an alternative basis for the exercise of in personam jurisdiction.

⁴³ *Id.* at 208, 385 N.E.2d at 1060, 413 N.Y.S.2d at 133 (Wachtler, J., dissenting). It can be argued that Judge Wachtler's interpretation of the CPLR runs contrary to the legislative intent, which mandates that the law "shall be liberally construed." CPLR 104 (McKinney 1972). For example, if the wording of section 302 were read literally, it would be inapplicable to corporate defendants. *See Biannual Survey*, 38 ST. JOHN'S L. REV. 190, 195 (1963); note 1 *supra*.

⁴⁴ 46 N.Y.2d at 209, 385 N.E.2d at 1061, 413 N.Y.S.2d at 133-34 (Wachtler, J., dissenting).

⁴⁵ *Id.* at 210, 385 N.E.2d at 1061, 413 N.Y.S.2d at 134 (Wachtler, J., dissenting).

⁴⁶ *Id.* at 209-10, 385 N.E.2d at 1061-62, 413 N.Y.2d at 134 (Wachtler, J., dissenting). Although Wetzel only agreed to refrain from divulging trade secrets gained by virtue of his employment with Sybron, the agreement raises problems similar to those encountered in restrictive covenants not to compete. Where restrictive covenants are involved, advantageous contract expectations of the employer must be weighed against the employee's interest in freedom from restraint in his choice of employment. *See generally* Blaustein, *General and Limited Covenants Not to Compete for the Multi-State Corporation*, 49 N.Y. ST. B.J. 292 (1977); Kniffin, *Employee Noncompetition Covenants: The Perils of Performing Unique Services*, 10 RUT.-CAM. L.J. 25 (1978); Richards, *Drafting and Enforcing Restrictive Covenants Not to Compete*, 55 MARQ. L. REV. 241 (1972).

⁴⁷ *See* note 26 *supra*. For example, the Court recently has been more liberal in recognizing jurisdiction pursuant to CPLR 302(a)(1). The single act of a nondomiciliary defendant has been deemed adequate to satisfy the "transacting business" standard without any require-

further extended the reach of the long-arm statute, possibly toward constitutional limits,⁴⁸ by its liberal interpretation of the statute. Questionable is whether the existing constitutional standard requiring some kind of minimal contact with the forum state is met by the Court's extension of long-arm jurisdiction.⁴⁹ Absent an actual injury,⁵⁰ the only minimum contact with the forum in *Sybron* was the foreseeability that an injury might flow from a nondomiciliary's tortious conduct. Such contacts do not comport with those tradi-

ment that the subject matter of the transaction be of special interest to the state. *See, e.g.,* *George Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 363 N.E.2d 551, 394 N.Y.S.2d 844 (1977), *discussed in The Survey*, 51 ST. JOHN'S L. REV. 786, 794 (1977); *Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*, 32 N.Y.2d 583, 300 N.E.2d 421, 347 N.Y.S.2d 47 (1973); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

⁴⁸ *See* SECOND REP. at 39. New York's long-arm statute, however, was not enacted with the intent to capitalize on the full constitutional limits permissible under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *see* *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 435 (2d Cir. 1971); *A. Millner Co. v. Noudar, Lda.*, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 293 (1st Dep't 1966); 1 WK&M ¶ 302.14, at 3-120, as have other states' laws, *e.g.,* CAL. CIV. PROC. CODE § 410.10 (Deering 1972); R.I. GEN. LAWS § 9-5-33 (1972). The constitutionality of long-arm statutes which predicate jurisdiction on tortious activity as yet have not been ruled upon by the Supreme Court. D. SIEGEL, *NEW YORK PRACTICE* § 88, at 105 (1978). Commenting on CPLR 302(a)(2), Justice Goldberg acknowledged that "the clear trend of the decisions" supports the validity of such statutes. *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1, 4 (1965) (opinion in chambers) (quoting Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 540); *accord, Singer v. Walker*, 21 App. Div. 2d 285, 292, 250 N.Y.S.2d 216, 223 (1st Dep't 1964), *aff'd 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, *cert. denied*, 382 U.S. 905 (1965); *Totero v. World Telegram Corp.*, 41 Misc. 2d 594, 597, 245 N.Y.S.2d 870, 874 (Sup. Ct. N.Y. County 1963); *Homburger & Laufer, Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFFALO L. REV. 67, 71, 76 (1966-1967); 66 COLUM. L. REV. 199, 206 (1966). *Contra, Franklin Nat'l Bank v. Krakow*, 295 F. Supp. 910, 920 (D.D.C. 1969); CPLR 302, commentary at 92 (McKinney 1972); 33 BROOKLYN L. REV. 107, 110, 118 (1966).

⁴⁹ The "minimum contacts" test was developed in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Under *International Shoe*, a state may exercise jurisdiction over a nondomiciliary if there have been sufficient contacts between the nonresident and the forum and "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The test of "minimum contacts" is not merely quantitative, but depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws." *Id.* at 319; *see* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts — From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 586-93 (1958). Since the Supreme Court generally has held a liberal attitude with respect to the fulfillment of this criterion, Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U.L. REV. 126, 133 & n.52 (1978), a single transaction may suffice, particularly where the state has a special interest in the subject matter of the activity. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (single insurance contract). *See generally* Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

⁵⁰ In *Sybron*, it is clear that the plaintiff would suffer direct economic harm within the state, since it stood to lose substantial New York clients if the defendant's tortious conduct was not prevented, as opposed to incurring injury as a result of fortuitous domicile.

tionally relied upon and, under other circumstances, may represent a tenuous premise for asserting that existing constitutional standards have been met.⁵¹ Since CPLR 302 was designed as a limited jurisdictional statute,⁵² it seems that the Court may have promulgated judicial legislation rather than judicial interpretation.

It is submitted that legislative amendment should precede the broad application of CPLR 302(a)(3)(ii) to the commercial tort setting where the "injury" is merely perceived and not realized. Nevertheless, in light of the careful examination of the facts made by the *Sybron* Court,⁵³ it appears that the application of CPLR 302(a)(3)(ii) jurisdiction to commercial cases will be restricted to those situations where there is substantial evidence that an intentional tort committed without the state may result in considerable direct economic injury within.

Sharon M. Heim

CPLR 314(1): Absent minimum contacts, jurisdiction lacking over nonresident second wife of deceased husband in action by domiciliary first wife to adjudicate validity of first marriage

CPLR 314(1) permits the exercise of in rem jurisdiction in a matrimonial action for the limited purpose of affecting the marital status.⁵⁴ The jurisdictional basis is the presence of a fictional mari-

⁵¹ See note 49 *supra*. The *Sybron* opinion is devoid of any reference to whether the defendant had "minimum contacts" with the forum state, apparently assuming that satisfaction of the requirements of the long-arm statute would be sufficient to insure that assertion of jurisdiction was constitutional.

⁵² See note 48 *supra*.

⁵³ In addition to the extensive consideration given by the Court of Appeals, Special Term conducted a two-day hearing to examine the issues of fact in that case. 46 N.Y.2d at 202, 385 N.E.2d at 1057, 413 N.Y.S.2d at 129. Since the ultimate liability of the defendant need not be determined, *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 460, 209 N.E. 2d 68, 77, 261 N.Y.S.2d 8, 21 (1966), it is only necessary to establish that "the defendant was the author of acts without the State and that the complaint adequately frames a cause of action in tort arising from those acts." *Evans v. Planned Parenthood, Inc.*, 43 App. Div. 2d 996, 997, 352 N.Y.S.2d 257, 259 (3d Dep't 1974). Such allegations, of course, are viewed "in a light most favorable to [the] plaintiff." *Johnson v. City of Newburgh*, 46 App. Div. 2d 663, 663, 359 N.Y.S.2d 840, 842 (2d Dep't 1974); see 66 COLUM. L. REV. 199, 204-05 (1966). See generally D. SEGEL, *NEW YORK PRACTICE* § 92 (1978).

⁵⁴ *Reschofsky v. Reschofsky*, 272 App. Div. 694, 74 N.Y.S.2d 636 (1st Dep't 1947) (construing predecessor to CPLR 314). CPLR 314(1) (1972) authorizes the service of process outside New York in the same manner as it is served inside the state "in a matrimonial action." Such extraterritorial service vests the court with in rem jurisdiction. CPLR 314, commentary at 307 (McKinney 1972). In rem jurisdiction empowers the court to adjudicate the parties' marital status. 1 WK&M ¶ 313.02, at 3-275 to 3-276 (citing *Usher v. Usher*, 41