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CPLR 327: Enforceability of the Judgment Deemed a Factor in Application of the Doctrine of Forum Non Conveniens

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he was sued, a similar claim based upon "strict liability in tort" could be asserted within three years of the plaintiff's injury.[31] Under this rule, a retailer or wholesaler held liable to an injured consumer would be assured at least a minimum of time to assert a claim over. An alternative means of securing indemnification from a manufacturer which the court in *Victorson* appears to have rejected[32] might be a claim under *Dole v. Dow Chemical Co.*[33] The *Dole* rule of equitable apportionment of damages among joint tortfeasors based upon relative responsibility has been held to apply to actions in "breach of warranty."[34] A claim for *Dole* indemnification accrues when the tortfeasor indemnitee suffers judgment and is timely if asserted within six years.[35]

Undoubtedly the Court of Appeals will soon have an opportunity to rule on the effect of the *Codling* case on statute of limitations problems in products liability cases. It is hoped that the Court will adopt the approach suggested in *Victorson,* thus giving the law in this area a rationality and fairness which was lacking under *Mendel.*

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

CPLR 327: Enforceability of the judgment deemed a factor in the application of the doctrine of forum non conveniens.

Under *Silver v. Great American Insurance Co.*[36] and its codification in CPLR 327,[37] a New York court is not required to accept jurisdiction where a lawsuit's only nexus to the state is the residence of one of the parties.[38] The present standard is based upon "considerations

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31 This is a reasonable extrapolation from the *Codling* language. The Court in *Codling* held that a cause of action in strict liability in tort accrues to any person "injured or damaged." *Id.* This would appear to be broad enough to encompass damage resulting from liability to an injured consumer.

32 Kaplan's claim over based upon "relative responsibility" was dismissed. 75 Misc. 2d at 43, 347 N.Y.S.2d at 668.

33 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

34 *See* Noble v. Desco Shoe Corp., 41 App. Div. 2d 908, 343 N.Y.S.2d 134 (1st Dep't 1973); Walsh v. Ford Motor Co., 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (mem.).

35 *Cf.* Musco v. Conte, 22 App. Div. 2d 121, 125-26, 254 N.Y.S.2d 589, 595 (2d Dep't 1964).

36 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

37 CPLR 327 provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

38 The former rule compelled the court to accept jurisdiction where either party was a resident. De la Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949), *reargument denied,* 300 N.Y. 644, 90 N.E.2d 496 (1950) (defendant was a resident); Gregonis v. Phila-

of justice, fairness and convenience,"[39] and no one circumstance conclusively precludes the application of the doctrine of *forum non conveniens*. While a litigant's New York residence is a strong element to be considered, the court is vested with wide discretion in determining the weight it merits.[40]

The courts have relied on numerous factors in holding that "New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties."[41] Complaints have been dismissed where the only contact with the state was that the defendant was incorporated in New York[42] or that the plaintiff-assignee resided here.[43] Other circumstances which have been stressed are the convenience of witnesses,[44] the unavailability of another forum,[45] and the degree of difficulty in applying the law of another jurisdiction.[46]

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delphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923) (plaintiff was a resident). For a comprehensive treatment of the origin and development of the doctrine of *forum non conveniens*, see *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 588 (1972).

39 Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972).

40 *Id.*; *see* Varkonyi v. Varig, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

41 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

42 Silver v. Great Am. Ins. Co., 29 N.Y.2d at 362 n.5, 278 N.E.2d at 622 n.5, 328 N.Y.S.2d at 403 n.5 (1972). *Silver* involved an action by a physician, a resident of Hawaii, against a New York corporation, authorized to do business in Hawaii, for an injunction and damages based on defamation and conspiracy to injure him in his practice in Hawaii. The plaintiff had instituted other actions in Hawaii related to the same subject matter. All the witnesses resided in Hawaii and the defendant consented to jurisdiction there. But the controlling factor in the Court's view was the absence of any New York contacts with the case other than the fact of the defendant's incorporation here.

43 In Taurus v. Boeck Fuel Co., Inc., 39 App. Div. 2d 519, 330 N.Y.S.2d 451 (1st Dep't 1972) (mem.), the plaintiff-assignee was a New York corporation, but its assignor and the defendants were domiciliaries of Wisconsin, where the accident took place.

44 In Barry v. American Home Assurance Co., 38 App. Div. 2d 928, 329 N.Y.S.2d 911 (1st Dep't 1972) (mem.), *aff'd mem.*, 31 N.Y.2d 684, 289 N.E.2d 180, 337 N.Y.S.2d 259 (1972), the plaintiff brought an action to compel payment of the proceeds of a life insurance policy procured by decedent in Delaware, which was the site of the airplane crash and the residence of the witnesses, the investigators, the owner of the plane and the maintenance men. The defendant had stipulated that it would accept process in the more convenient forum and would waive any defenses based upon the statute of limitations. The validity of attaching such conditions to a dismissal under the *forum non conveniens* doctrine has long been recognized. *See The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 603 (1972). *See also* 7B MCKINNEY'S CPLR 301, commentary at 15 (1972), *citing* Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1st Dep't 1966).

45 Varkonyi v. Varig, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968). *See* 7B MCKINNEY'S CPLR 327, supp. commentary at 40 (1972).

46 Varkonyi v. Varig, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968). Here, the Court was faced with the task of applying the law of a foreign country, and retained jurisdiction after balancing the burden on itself and on the defendant against the fact that there was no other forum available in which the plaintiff could obtain relief. *See also* Heller v. National Gen. Corp., 39 App. Div. 2d 688, 332 N.Y.S.2d 511 (1st Dep't 1972), where a strong circumstance behind the dismissal of the suit was the fact that the parties had agreed that California law would apply to any controversy arising out of the contract.

In the recent case of *Neumeier v. Keuhner*,[47] the Appellate Division, Fourth Department, was confronted with yet another element to be considered in the application of the *forum non conveniens* doctrine. A wrongful death action was brought in the Supreme Court, Erie County, against a Canadian railroad and the estate of the driver of the car in which the plaintiff's husband was a passenger when it crashed at an Ontario railroad crossing. The plaintiff and her husband were residents of Ontario. The defendant estate moved to dismiss on the grounds of *forum non conveniens*, alleging as "inconvenience" the necessity of applying the Ontario motorist guest statute.[48] The motion was denied, and the Appellate Division unanimously affirmed, holding that the lower court had not exceeded the wide discretion vested in it by *Silver*. The enforceability of a judgment which the plaintiff might obtain was accorded substantial weight by the court:

> [U]ndoubtedly a factor in plaintiff's choice of forum [was the fact that] a judgment obtained in the present action against the defendant Kuehner, the New York resident, will be far more easily satisfied against the driver's estate than would be a judgment obtained in an Ontario court, to which no full faith and credit would attach . . . .[49]

Other reasons cited by the court for retaining jurisdiction included the delay that would be imposed upon the plaintiff if it became necessary

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47 43 App. Div. 2d 109, 349 N.Y.S.2d 866 (4th Dep't 1973).

48 The case had already gone to the Court of Appeals on a choice of law issue. Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), *noted in* 37 ALBANY L. REV. 173 (1972). Chief Judge Fuld, writing for the majority, clarified the choice of law rules expounded by him in Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), but there not accepted by a majority of the court. The rule applicable here is that where passenger and driver are domiciled in different states, the law to be applied is that of the place of the accident (*lex loci delictus*), "but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532 (citations omitted).

> In holding the applicable law to be that of Ontario, the Court of Appeals reasoned: Certainly, ignoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York. In point of fact, application of New York law would result in the exposure of this State's domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways. Conversely, the failure to apply Ontario's law would "impair"—to cull from the rule set out above—"the smooth working of the multi-state system [and] produce great uncertainty for litigants" by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile. In short, the plaintiff has failed to show that this State's connection with the controversy was sufficient to justify displacing the rule of *lex loci delictus*.

31 N.Y.2d at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 70-71.

49 43 App. Div. 2d at 111, 349 N.Y.S.2d at 868.

to recommence the action, pending in the New York courts since 1969 and now ready for trial, in the Province of Ontario, and the fact that the site of the accident and the plaintiff's residence, although in Canada, were only a few miles from the courthouse.

As courts continue to exert their expanded discretion with respect to the exercise of jurisdiction, further refinements will be engrafted upon the doctrine of *forum non conveniens*. The decision in *Neumeier* is consistent with the Court of Appeals' view that a pertinent factor to be weighed is "the unavailability elsewhere of a forum in which the plaintiff may obtain *effective* redress. . . ."[50] A court should properly be reluctant to invoke the doctrine at the insistence of a resident defendant where the plaintiff would otherwise be faced with the prospect of bringing suit on a foreign judgment.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1025: Obstacles to an action against an unincorporated association.

Section 13 of the General Associations Law, incorporated by reference into the CPLR by section 1025,[51] provides that a party with a claim against all the members of an unincorporated association may seek recovery from the association itself by maintaining an action against its president or treasurer.[52] The association is considered a natural person for purposes of service of process.[53]

It has generally been held that these sections are purely procedural, and that the traditional rule remains that the association's treasury cannot be reached unless the act or agreement giving rise to the claim has been ratified by all the members of the organization.[54] A recent case in the District Court of Nassau County provides an illustration. In *Fairfield Lease Corp. v. Empire Employees Sunshine Club*,[55] the lessor of a coffee-making machine attempted to recover the balance due on a

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50 Varkonyi v. Varig, 22 N.Y.2d 333, 338, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 673 (1968) (emphasis added).

51 CPLR 1025 states in part: ". . . actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law."

52 N.Y. GEN. ASS'NS LAW § 13 (McKinney 1973). *See* Stefania v. McNiff, 49 Misc. 2d 480, 482, 267 N.Y.S.2d 854, 857 (Sup. Ct. Queens County 1966).

53 The "person" of the association is the president or treasurer and therefore personal jurisdiction can be obtained by personal service on one of these officers within New York. Since the association is deemed a natural person, this is a sufficient jurisdictional basis, and the "doing business" concept is inapplicable. *See* Gross v. Cross, 28 Misc. 2d 375, 211 N.Y.S.2d 279 (Sup. Ct. N.Y. County 1961).

54 Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683 (1951).

55 74 Misc. 2d 328, 345 N.Y.S.2d 305 (Dist. Ct. Nassau County 1973).