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Insurance Law § 59-a: Jurisdiction Over Foreign Insurer May Not Be Predicated upon the Unauthorized Acts of Its Limited Agent

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would indicate a preference for the result reached by the court, it cannot be assumed that it is a result which the Legislature intended.[192] Without lucid legislative commentary to guide us, it should not be presumed that limiting motions to compel arbitration to the forum of the pending action, while omitting a parallel provision for applications to stay, was an act of legislative oversight rather than of conscious intent. The *Allstate* decision does point up the need for a definitive interpretation of the scope and limitations of the venue provisions of CPLR 7502(a), or article 75 in general.

Although the court's sua sponte discussion of venue is technically dicta,[193] its order that "[h]ereinafter the Court shall strike matters such as the instant one from the calendar and deny the application. . ."[194] will undoubtedly affect future controversies of this nature. To require that an application to stay, which is the first application to the court relating to an arbitrable controversy, be made in the pending action is to engraft onto CPLR 7502 and 7503 limitations not placed there by the Legislature.

INSURANCE LAW

Insurance Law § 59-a: Jurisdiction over foreign insurer may not be predicated upon the unauthorized acts of its limited agent.

Section 59-a of the Insurance Law was enacted to facilitate suits against unauthorized foreign insurers whose activities affect New York residents.[195] It subjects such insurers to jurisdiction when they engage in certain activities, including the mailing of policies into the state. While the statute's jurisdictional reach is longer than that of CPLR 302,[196] it may not be interpreted so as to confer jurisdiction over a

N.Y.S.2d at 687. Apparently, applications to stay arbitration are brought automatically by insurance companies under uninsured motorist provisions whether meritorious or not, adding to calendar congestion.

192 If, as the court asserts, it was the Legislature's aim to limit motions relating to pending actions to the forum already introduced to the issues, a more efficacious argument might have been found in reliance on CPLR 7502(a) itself, rather than CPLR 7503.

193 *See* notes 184 and 185 *supra.*

194 75 Misc. 2d at 800, 348 N.Y.S.2d at 688 (without prejudice to renewal of the application in the "proper" county).

195 The statute states in pertinent part:

> The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies.

N.Y. INS. LAW § 59-a(1) (McKinney 1966).

196 *See* A. Millner Co. v. Noudar, Lda., 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

defendant who has not "purposefully [availed] itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws."[197] In light of this restriction, the Court of Appeals recently refused to sustain jurisdiction under section 59-a over a foreign insurer whose limited agent had issued a policy to a New York resident without authority from the insurer.

In *Ford v. Unity Hospital*,[198] a medical partnership seeking to procure malpractice insurance indirectly retained National Reinsurance Corporation, Inc. (National), an Illinois corporation with no New York contacts. National and "America," Compagnia General De Seguros, S.A. (Seguros), a Mexican insurer also without New York contacts, had entered into a limited agency agreement which did not authorize National to sell malpractice insurance in New York. Despite its lack of authority, National attempted to obtain the requested coverage from Seguros' Louisiana-based general agent. Although the general agent expressly refused to authorize the issuance of the policy, National mailed a cover letter to the New York medical partnership purporting to bind Seguros. Upon learning of National's actions, the general agent mailed a cancellation notice to the partnership, but not before the latter had committed an act of alleged malpractice. When a malpractice action was brought against the medical partnership, it sought to implead Seguros. Affirming an order of the Supreme Court, Kings County, the Appellate Division, Second Department, held that National's act of mailing the cover letter into New York was within its apparent authority and was, therefore, sufficient to sustain in personam jurisdiction over Seguros under section 59-a.[199] The Court of Appeals unanimously reversed, dismissing the third party complaint for lack of jurisdiction. The pivotal question, the Court reasoned, was whether the insurer had "purposefully" sought the privileges of carrying on activities in New York.[200] By limiting the authority of its agent and by expressly refusing to authorize the issuance of the policy in question, the insurer, the Court noted, had done all it could to avoid New York contacts. Additionally, the Court placed reliance on the fact that, under the technical rules of agency, the limited agent had been acting in behalf of the insured.[201] The Court rejected the Appellate Division's apparent

197 Hanson v. Denckla, 357 U.S. 235, 253 (1958).

198 32 N.Y.2d 464, 299 N.E.2d 659, 346 N.Y.S.2d 238 (1973).

199 39 App. Div. 2d 569, 331 N.Y.S.2d 865 (2d Dep't 1972) (mem.), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 530, 578 (1973).

200 32 N.Y.2d at 471, 299 N.E.2d at 663, 346 N.Y.S.2d at 243.

201 *Id.* at 472, 299 N.E.2d at 663, 346 N.Y.S.2d at 243.

authority theory, finding that the insurer had done nothing to mislead the partnership into believing that the limited agent's actions were authorized.[202]

Admittedly, the *Ford* case "test[s] the very outer limits of due process."[203] In view of the desirability of protecting New York insureds, however, the Court might have searched further for the "minimum contacts"[204] necessary to sustain jurisdiction. The fact that an agent is not acting within the scope of his authority does not necessitate a holding that his acts may not be attributed to his principal for jurisdictional purposes.[205] Where an insurer does business through an agent of its own choosing, the New York activities of the latter, although they may not ultimately be held legally binding, should provide the jurisdictionally required forum contacts.

DOLE V. DOW CHEMICAL CO.

Intrafamily torts

The rule of *Dole v. Dow Chemical Co.*[206] is forcing the New York courts to re-examine intrafamily tort law. One of the most controversial topics appears to be the negligent supervision *Dole* claim.[207] This claim

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202 *Id.* at 473, 299 N.E.2d at 664, 346 N.Y.S.2d at 245.

203 39 App. Div. 2d at 571, 331 N.Y.S.2d at 868, *citing* Hanson v. Denckla, 357 U.S. 235 (1958); 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), *discussed in The Quarterly Survey*, 40 ST. JOHN'S L. REV. 122, 133 (1965).

204 The requirement of "minimum contacts" was first enunciated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Court therein applied a flexible test of fairness and reasonableness in determining jurisdiction.

205 In *Ford*, the Court seemingly made no distinction between the threshold question of jurisdiction and the merits of the claim. *Compare* Elman v. Belson, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 540 (1970), where the question presented was whether the activities of an attorney could be attributed to an Illinois domiciliary defendant, the court stated

> [t]here is . . . a genuine and fundamental difference between the court's power to entertain an action and the determination of the action itself. Whether the defendant became obligated to the plaintiffs as a result of his attorney's proceedings conceivably could be decided in any forum having jurisdiction over the parties but the preliminary question which must be resolved is whether the forum invoked by the plaintiffs to make that decision has jurisdiction over the parties.

Id. at 424, 302 N.Y.S.2d at 963. While the court found that the acts upon which jurisdiction was predicated were within the attorney's implied authority, it based its decision on more flexible considerations of fairness. "The final standard for jurisdiction is reasonableness — whether the defendant is unfairly burdened by the compulsion to contest a suit in a forum outside his domicile." *Id.* at 426, 302 N.Y.S.2d at 965, *citing* International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

206 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *noted in* 37 ALBANY L. REV. 154 (1972); 47 N.Y.U.L. REV. 815 (1972); 47 ST. JOHN'S L. REV. 185 (1972). For an extended discussion of *Dole* by Professor David D. Siegel see 7B MCKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

207 The question of the permissibility of such claims has been the subject of a great deal of litigation. *See* Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972) (claim