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Article 13

CPLR 301: Satisfaction of Requirements of Commerce Clause Necessarily Comports with Due Process

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The Second Department disapproved of further contraction of the general rule concerning diagnostic negligence through suspension of the running of the statute until the time of discovery could have been made if plaintiff were diligent.[11] The court opined "that the preference for repose which the Statute of Limitations reflects outweighs in this case the disadvantage to the plaintiff which results from the application of the general rule."[12] In support of the rule it cited natural impairment of memory due to lapse of time and possible subjection of defendants to claims arising from medical advances subsequent to the time of the alleged malpractice under litigation.[13] That plaintiff may not discover the malpractice in time to litigate was no obstacle: ignorance of a cause of action does not of itself affect the tolling of the statute.[14]

The resolution of the *Schiffman* case — strict limitation of *Flanagan* — complies with current New York law but not with justice. The general rule requires further revision. The interests of protecting a defendant from stale claims should not outweigh the interests of a plaintiff who did not know and could not have known of the defendant's malpractice.[15] Commentators have urged that the statute of limitations should not start to run until plaintiff discovers or with due diligence should have discovered the malpractice.[16] This position has been adopted by the California courts,[17] as the Second Department noted.[18] Nevertheless, in New York, a plaintiff must institute his action within three years from the date of the malpractice or, if the "continuous treatment" rule[19] applies, within three years from termination of treatment, irrespective of when the alleged malpractice could or should have been discovered with due diligence. Legislative reconsideration of this rule is clearly warranted.

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

CPLR 301: Satisfaction of requirements of commerce clause necessarily comports with due process.

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11 *Id.* at 33, 319 N.Y.S.2d at 676.

12 *Id.*, 319 N.Y.S.2d at 677.

13 *Id.*, 319 N.Y.S.2d at 678.

14 *Id.* at 34, 319 N.Y.S.2d at 678, *citing* 509 Sixth Avenue Corp. v. New York City Transit Authority, 15 N.Y.2d 48, 51, 203 N.E.2d 486, 487, 255 N.Y.S.2d 89, 91 (1964).

15 7B McKINNEY'S CPLR 214, supp. commentary at 77 (1969).

16 *See, e.g.*, 29 U. PITT. L. REV. 341 (1967); 21 RUTGERS L. REV. 778 (1967).

17 Thompson v. County of Fresno, 59 Cal. 2d 686, 381 P.2d 924, 31 Cal. Rptr. 44 (1963); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967); Calvin v. Thayer, 150 Cal. App. 2d 610, 310 P.2d 59 (Dist. Ct. App. 1957).

18 36 App. Div. 2d at 35, 319 N.Y.S.2d at 678.

19 *See* Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

Concomitant with the increase in nationalization of commerce has been expansion of the permissible scope of jurisdiction over nondomiciliaries.[20] The requirements for obtaining personal jurisdiction over nondomiciliaries were substantially relaxed when the rigid rule of *Pennoyer v. Neff*[21] was replaced by the more flexible standard of *International Shoe Co. v. Washington.*[22] Nevertheless, as a consequence of territorial limitations on the power of the several states, some restrictions on personal jurisdiction of state courts remain in force.[23] In determining whether a foreign corporation is doing business within the state within the meaning of CPLR 301 the decisive question is "whether the corporation's contacts with the state are sufficient to justify the exercise of jurisdiction without offending 'traditional notions of fair play and substantial justice.' "[24] "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[25]

In *Scanapico v. Richmond, Fredericksburg & Potomac Railroad*[26] the federal courts were called upon to determine whether the defendant (RF&P) was doing business within New York and thus was amenable to personal jurisdiction under CPLR 301. Plaintiff, a New York resident, sued RF&P in the Eastern District Court of New York. Plaintiff had been injured by a suitcase which fell from an overhead rack in a railroad car while she was a passenger traveling from Florida to New York. The train was traveling over the tracks of RF&P between Washington and Richmond at the time of the injury. RF&P moved to quash service on the ground that its activities in New York were insufficient, under the federal due process clause and under CPLR 301, as a basis for personal jurisdiction and on the further ground that such jurisdiction would constitute an undue burden on interstate commerce.[27] RF&P's activities in New York included freight solicitation by two employees, one being a New York resident; sale and issuance by connecting railroads of coupon tickets and through bills of lading covering carriage over RF&P's tracks, for which RF&P received compensation; and daily presence within the state of RF&P's freight cars in interstate trains operated by connecting railroads.[28] The district

20 McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).
21 95 U.S. 714 (1877).
22 326 U.S. 310 (1945).
23 Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957).
24 326 U.S. at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940).
25 Hanson v. Denckla, 357 U.S. 235, 251 (1958).
26 439 F.2d 17 (2d Cir. 1970).
27 *Id.* at 18-19.
28 *Id.* at 19.

court denied the motion to dismiss for want of jurisdiction, and RF&P appealed. The Court of Appeals for the Second Circuit held that the above activities constituted sufficient "minimum contacts" to allow personal jurisdiction and affirmed the dismissal.[29] The court noted that solicitation of business in New York is alone insufficient to provide a basis for personal jurisdiction,[30] but found necessary additional acts. Both the court of appeals, Chief Judge Lumbard dissenting, and the district court found that RF&P was "doing business" in New York even though the classic indicia of corporate presence were absent.[31] Chief Judge Lumbard found no purposeful activity and concluded that the majority's affirmance practically subjected all important railroads to suit in any state in which it solicited freight business.[32]

On reconsideration in banc the Second Circuit indicated that its affirmance did not entail the broad holding feared by Chief Judge Lumbard. The court explicitly held that the requirements of the commerce clause, herein more strict than those of the due process clause, were satisfied in this case by elements additional to RF&P's New York activities, viz., plaintiff's New York residence, RF&P's regular operation of through-passenger trains to and from New York over the tracks in question, and extensive sale in New York of tickets for said trains.[33] Judge Kaufman concurred in the result without comment on the relative stringency of the commerce and due process clauses and on the necessity of through-train connections to the decision.[34] Judge Hays and Feinberg also concurred in the result but differed with the majority's view that plaintiff's New York residence is essential to jurisdiction in this case.[35] Chief Judge Lumbard again dissented, on the ground that RF&P had not engaged in purposeful activity in New York.[36]

The Second Circuit's final affirmance in *Scanapico* was a wise resolution of a difficult issue. By surprisingly reasserting the "undue burden of interstate commerce" standard, the court enabled itself to strike a fair balance between the conflicting interests of plaintiffs and nondomiciliary defendants. When the additional elements mentioned above are present, the burden on interstate commerce is not unreasonable; in their absence the burden would be unreasonable.

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29 *Id.* at 21.

30 *Id.* at 20, *citing* Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y. 2d 533, 537, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 44 (1967).

31 *Id.* at 22 (Lumbard, C.J., dissenting).

32 *Id.* at 21, 25.

33 *Id.* at 26.

34 *Id.* at 28 (Kaufman, J., concurring).

35 *Id.* at 28-29 (Hays, J., concurring in result).

36 *Id.* at 29 (Lumbard, C.J., dissenting).