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# CPLR 302(a)(1): Cases Illustrate Elusiveness of "Transacts Business" Criteria

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ence, will conduct the entire course of litigation from initiation to judgment, including all interlocutory motions, in specially assigned cases. With the exception of those matters which are not suited for disposition in this manner, *e.g.*, proceedings under the Mental Hygiene Law requiring judicial attendance at hospitals, the cases allocated to the Individual Calendar Parts will be selected so as to represent a cross-section of all matters going before the court.

Because of the experimental nature of the project, the procedures to be followed by the attorney will not be exactly the same as in the past. For example, the First Department has instituted a method for filing of process together with a short statement regarding the nature of the cause of action. In this manner, the judges will be better equipped to control the action from its inception. Additionally, although specific rules remain to be formulated, the First Department has afforded the judges assigned to the Individual Calendar Parts wide discretion in devising new methods of calendar disposition. Thus, it is anticipated that regulations designed solely for the operation of a multi-judge court will be dispensed with, provided that a substantial right of a party is not prejudiced thereby.

The pilot project is to remain in force for at least one year, at which time an evaluation of its results, particularly in terms of speed and number of dispositions, will be made. If the project proves superior to that currently in effect, its general application in the First Department will be indicated; if not, it will be abandoned. Ultimately, the project is intended as a means of securing maximum use of judicial manpower. Simultaneously, the introduction of expeditious procedures will reduce the time and effort of the practitioner. Accordingly, the Bar is encouraged to familiarize itself with the provisions of the First Department's order so that the forthcoming year will provide a fair estimation of whether the plan should be generally adopted.

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

*CPLR 302(a)(1): Cases illustrate elusiveness of "transacts business" criteria.*

In *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*[2] the Court of Appeals stated: "In enacting section 302, the Legislature chose not to fix precise guidelines . . . ."[3] Two recent cases concerning

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2 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965).

3 *Id.* at 456, 209 N.E.2d at 75, 261 N.Y.S.2d at 18. The advisory committee took

CPLR 302(a)(1)[4] demonstrate that the courts will abide by the legislative intent to keep the guidelines flexible, if not elusive.

In *Aquascutum of London, Inc. v. S.S. American Champion*[5] the Court of Appeals for the Second Circuit was called upon to determine whether a London-based corporation, offering various types of freight service, had transacted any business in New York. The corporation, W. Wingate & Johnson (W&J), was a codefendant in three separate actions which were decided in one opinion.[6] In the *American Champion* and *Rubens* cases, goods were delivered to W&J for shipment to New York. W&J thereupon issued forwarders bills of lading, consolidated the goods in containers with goods of other shippers, sealed the containers and delivered them to a carrier. In the third case, *American Chieftain*, the goods delivered to W&J were enough to fill an entire container. W&J packed the goods and delivered them to a carrier but did not issue a bill of lading. In all three cases, shortages were discovered at the time of delivery.

Although the court could cite no authority expressly holding that a British ocean carrier delivering cargo in New York would fall within the ambit of CPLR 302(a)(1), it did find "strong" suggestions of such a result.[7] Thus, if W&J's conduct could be equated to that of a British ocean carrier, it would satisfy the transaction of business requirements since a carrier stands in a different position from that of a mere shipper.[8] The court held that W&J was transacting business in the *American Champion* and *Rubens* cases because it did not undertake "simply to arrange for transportation . . . but to effect it."[9] However, a different result was reached in *American Chieftain* inasmuch as the goods were shipped to Boston.[10]

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cognizance of sister-state provisions which do employ strict guidelines but chose instead the broad language currently in effect. *See* SECOND REP. 39-40.

4 CPLR 302(a)(1) provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state."

5 426 F.2d 205 (2d Cir. 1970), *rev'g* 300 F. Supp. 26 (S.D.N.Y. 1969).

6 The three cases were entitled *Aquascutum of London, Inc. v. S.S. American Champion (American Champion)*; *Metasco, Inc. v. S.S. American Chieftain (American Chieftain)*; and *Metasco, Inc. v. S.S. Rubens (Rubens)*.

7 426 F.2d at 209, *citing* Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965) *and* Ingravallo v. Pool Shipping Co., 247 F. Supp. 394 (E.D.N.Y. 1965).

8 *See* Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966). For a discussion of the "mere shipment rule," see 7B MCKINNEY'S CPLR 302, supp. commentary at 122 (1966).

9 426 F.2d at 210.

10 Because the goods were shipped to Boston, the court did not rule on whether W&J's conduct was equivalent to that of a carrier. However, from the tenor of the opinion it could be speculated that W&J's activities in *American Chieftain* did not venture beyond those of a mere shipper.

Where the district court had erred, in the opinion of Judge Friendly, was in failing to distinguish between two different types of forwarders: the first merely arranges for the transportation of the goods, while the second not only arranges the transportation, but also agrees to deliver the goods safely to the consignee.[11] In the first two cases, W&J's activities went so far as to approximate those of a carrier.

In contrast to the Second Circuit's opinion in *Aquascutum* is the rather conservative stance taken by the Court of Appeals in *Ferrante Equipment Co. v. Lasker-Goldman Corp.*[12] There, the defendant's surety sought indemnification on its performance bond from the fourth-party defendant (Ferrante) after the defendant had defaulted in its performance. The indemnification agreement was executed in New Jersey and Ferrante had not entered New York for any purposes related to the agreement. Nevertheless, the agreement did cover work to be performed in New York and Ferrante derived commercial benefits from the contract. Additionally, it was apparent that defendant would not have been able to obtain the performance bond without assurances on Ferrante's part.

Since it was conceded that all of Ferrante's activities occurred in New Jersey, the Court narrowed the issue to "whether the language of CPLR 302(a)(1) covers the case of a nonresident who never comes to our State, but whose actions in his home State affect the performance of work by others in New York."[13] The Court was unwilling to answer this question in the affirmative.

The opinions in *Aquascutum* and *Ferrante*, perhaps, add little by way of defining "transacts any business," but they do emphasize that courts will continue to take a case-by-case approach. Unfortunately, this mode of disposition will often manifest itself in seemingly inconsistent policy determinations. Indeed, in *Aquascutum* the court labored to channel the conduct of W&J into a category somewhere beyond that of a mere shipper in order to justify the assumption of jurisdiction over the English corporation. Yet, the *Ferrante* court adopted a conservative stance by clinging to the jurisdictional nexuses of physical presence and domestic execution of a contract despite the fourth-party defendant's affect upon work to be performed in New York. Ironically, impleader actions would appear to present more compelling reasons for

[11] The categorization of forwarders is derived from Chicago, Milwaukee, St. P. & P.R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 484 (1949).

[12] 26 N.Y.2d 280, 258 N.E.2d 202, 309 N.Y.S.2d 913 (1970), *aff'g* 31 App. Div. 2d 355, 297 N.Y.S.2d 985 (1st Dep't 1969). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 320 (1969).

[13] 26 N.Y.2d at 283-84, 258 N.E.2d at 204, 309 N.Y.S.2d at 916.

sustaining jurisdiction in problematical cases: the agreement to indemnify could be deemed implicitly to include the burden of defending in any forum where the indemnitee is forced to litigate. Although *Ferrante* displays something of a jurisdictional paralysis, *Aquascutum* suggests that the outer limits of CPLR 302(a)(1) are yet to be reached.

*CPLR 302(a)(3)(ii): 1 percent of gross income does not constitute "substantial revenue from interstate commerce."*

Responding to the Court of Appeals decision in *Feathers v. McLucas*,[14] the Judicial Conference recommended passage[15] of what is now CPLR 302(a)(3).[16] Although designed to afford protection to New York residents injured within the state by foreign tortfeasors who could not otherwise be reached under the long-arm statute,[17] the restrictions contained in this subsection are such that the courts have ample latitude within which to safeguard the rights of nonresident defendants.[18] *Gluck v. Fasig Tipton Co.*[19] provides a recent example of judicial unwillingness to extend CPLR 302(a)(3) to the point where the burden of defending an action in New York would be oppressive.

In *Gluck* the plaintiff alleged fraud and breach of warranty arising out of the sale of a mare at an auction in Saratoga, New York. In addition to the seller and the auctioneer, a Kentucky-based veterinarian, who, allegedly, falsely certified the mare to be pregnant, was named as a defendant. The latter's motion to dismiss for lack of jurisdiction was granted despite plaintiff's contention that both CPLR 302(a)(2) and (a)(3) provided the court with personal jurisdiction.

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14 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

15 *Report to the 1966 Legislature in Relation to the Civil Practice Law and Rules*, TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 12, 15, 17 (1967) [hereinafter TWELFTH REP.].

16 CPLR 302(a)(3) states that a nondomiciliary will be subject to in personam jurisdiction in New York when he

> commits a tortious act without the state causing injury to person or property within the state, . . . 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. . . .

17 For example, under CPLR 302(a)(2) the tortious act must be committed within the state. Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). *See generally* 7B MCKINNEY'S CPLR 302, supp. commentary at 139-41 (1965).

18 In safeguarding the nonresident's rights, the New York courts are also protecting a New York domiciliary since the "[e]nthusiasm for extending jurisdiction over foreign persons . . . in limited contact cases, . . . may well be tempered by the expectation that the same rule will be reciprocally applied in remote countries against our citizens here." A. Millner Co. v. Noudar LDA, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

19 63 Misc. 2d 82, 310 N.Y.S.2d 809 (Sup. Ct. N.Y. County 1970).