

**CPLR 302(a)(3)(ii): Case Illustrates Factors To Be Considered  
When Determining Whether a Defendant Has Derived "Substantial  
Revenue from Interstate or International Commerce"**

St. John's Law Review

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suitors in negligent treatment and negligent medication cases because of the greater danger of specious claims.<sup>40</sup>

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

*CPLR 302(a)(3)(ii): Case illustrates factors to be considered when determining whether a defendant has derived "substantial revenue from interstate or international commerce."*

CPLR 302(a)(3)(ii) extends jurisdiction of New York courts to encompass a nondomiciliary who commits a tortious act without the state causing injury within the state and who "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Since foreseeability of New York consequences is undeniable in many instances, the operation of this subsection might expose a nondomiciliary to an unfair burden of defending an action here were it not for the additional caveat that the tortfeasor derive substantial revenue from interstate or international commerce.<sup>41</sup>

To date, the phrase "substantial revenue" has escaped precise definition. Given the rationale underlying CPLR 302(a)(3)(ii),<sup>42</sup> it would seem that this state of uncertainty is preferable to a condition of certitude resulting from the establishment of arbitrary dollar volume or percentage of interstate income criteria.<sup>43</sup> Indeed, in *Path Instruments International Corp. v. Asahi Optical Co.*<sup>44</sup> a federal district court demonstrated the necessity of looking beyond the unadorned income quotas to discern the existence of substantial revenue.

<sup>40</sup> Cf. *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); see also Rapson, "To Guard Against The Unfounded Actions . . ." — *The Issue Behind The Mendel Labels*, 45 ST. JOHN'S L. REV. 96 (1970).

<sup>41</sup> To illustrate the hardship that would be visited upon a nondomiciliary absent the "substantial revenue" requirement, consider the following question posed by Professor McLaughlin:

Suppose a California tire dealer sold and installed a set of tires on an automobile belonging to a tourist with New York license plates. Presumably, the plates would make it foreseeable that the automobile would eventually return to New York, and that if the tires should fail, an injury would occur in New York. Would it be reasonable to require the tire dealer to defend the action in New York?

7B MCKINNEY'S CPLR 302, supp. commentary at 132 (1966); see also *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956).

<sup>42</sup> CPLR 302(a)(3)(ii) is premised on the relationship between income derived in interstate and international commerce and the ability to handle litigation away from the primary business location. 1 WK&M ¶ 302.10a.

<sup>43</sup> See, e.g., *Gluck v. Fasig Tipton Co.*, 63 Misc. 2d 82, 310 N.Y.S.2d 809 (Sup. Ct. N.Y. County 1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 348 (1970); cf. *Gillmore v. J.S. Inskip, Inc.*, 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967).

<sup>44</sup> 312 F. Supp. 805 (S.D.N.Y. 1970).

Plaintiff, a New York corporation, brought suit against Asahi Optical Co., Hughes-Owens Co. (Canada), and Hughes-Owens Co. (Illinois) alleging a conspiracy to injure its business.<sup>45</sup> The court experienced little difficulty in justifying the assumption of jurisdiction over Asahi Optical Co. and Hughes-Owens Co. (Canada),<sup>46</sup> but with respect to Hughes-Owens Co. (Illinois) the jurisdictional nexus was not so readily perceivable. First of all, the court regarded the company's interstate income of \$85,000 as insufficient in absolute terms to meet the requirements of CPLR 302(a)(3)(ii). Secondly, even the fact that the company's business was almost exclusively interstate in character was viewed guardedly by the court. Nevertheless, the company's interstate activities were deemed to evidence substantial revenue when coupled with the recognition that the company had functioned as the sales and distributional arm of a much larger organization, Hughes-Owens Co. (Canada).<sup>47</sup>

Perhaps, no one case can ever completely define "substantial revenue" inasmuch as most of the cases arising under CPLR 302(a)(3)(ii) are sui generis. Nonetheless, *Path Instruments* offers a reasonable approach to jurisdictional questions in this area. It seems clear that the "dollar volume" and "percentage of income" tests should not be employed either alternatively or in the abstract. For, a defendant whose 80 percent interstate income amounts to \$10,000 should not be subjected to suit in New York. Conversely, the defendant whose 10 percent interstate income totals \$100,000 can certainly bear the expense of out-of-state litigation. Where, as in *Path Instruments*, neither test yields a satisfactory result, an examination of the circumstances surrounding the operation of defendant's business can facilitate a just outcome.

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<sup>45</sup> The court ruled initially that the alleged conspiracy constituted a tortious act even though the means alleged was a breach of contract. *Id.* at 808, citing *Avon Prods., Inc. v. Berson*, 206 Misc. 900, 135 N.Y.S.2d 867 (Sup. Ct. N.Y. County 1954).

<sup>46</sup> Asahi is a large manufacturer of optical devices and instruments and as an example of the magnitude of its international business, the court pointed to a contract with Path providing that Path would purchase a minimum of \$300,000 in surveying equipment from a wholly-owned subsidiary of Asahi in 1967. As to Hughes-Owens (Canada) its 1968 gross sales revenue of \$7,686,817 was derived from the distribution and sale of inventory purchased from about 1,200 manufacturers and suppliers throughout the world. The court was therefore prompted to hold "both Asahi and Hughes-Owens (Canada) are sizeable corporations already engaged in transaction of substantial international business, for whom the expense and complexity of defending a lawsuit in the courts of New York will not be an unreasonable inconvenience." 312 F. Supp. at 809.

<sup>47</sup> Perhaps, many courts would not have been compelled to look behind the defendant's gross sales figure and the percentage of interstate income in relation to total income. Judge Mansfield, however, the author of *Path Instruments*, has previously questioned the constitutionality of CPLR 302(a)(3)(ii). See *Chunky v. Blumenthal Bros. Chocolate Co.*, 299 F. Supp. 110, 117 (S.D.N.Y. 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 543 (1970).