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CPLR 302(a)(1): Validity of "Agent-Independent Contractor" Distinction Questioned by Federal and State Courts

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would begin to run on a declaratory judgment action when "the controversy, which is the subject of the action, is known to exist."[28] However, this rule is susceptible to criticism because its application may lead to results which are patently unjust. This fact is well illustrated by the decision reached by the Appellate Division, Second Department, in *Sorrentino v. Mierzwa*.[29]

In *Sorrentino*, the plaintiff brought an action for a declaration of her marital status, in order to establish her eligibility for a widow's pension from the New York City Police Department. In 1951 her husband had obtained a Nevada "divorce" and had remarried on the same day the divorce decree was rendered. Plaintiff contended that the divorce was void because of her now deceased husband's failure to establish a bona fide residence in Nevada. The supreme court declared the Nevada divorce void, but the appellate division reversed, and citing *Freund*, held that the statute began to run when the plaintiff first became aware that her marital status was in dispute, *i.e.*, in 1951. The Court of Appeals,[30] in turn, reversed the appellate division, pointing out that if the *Freund* rule were to be upheld the plaintiff would lose her right to a widow's pension before that right matured. The Court opted for what it deemed to be a more reasonable rule:

> Notwithstanding the existence of a justiciable controversy which has given rise to the right to bring an action for a declaratory judgment, appellant was free to bring the instant action so long as the Statute of Limitations had not barred the enforcement of her right to the pension fund.[31]

Thus, the Court not only established a rule governing the commencement of the statute of limitations, but also held applicable to the declaratory judgment action the same statute which would have applied if the traditional remedy (enforcement of the widow's right to the pension fund) had been sought.[32]

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

CPLR 302(a)(1): Validity of "agent-independent contractor" distinction questioned by federal and state courts.

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28 208 Misc. at 662, 144 N.Y.S.2d at 611.

29 30 App. Div. 2d 549, 290 N.Y.S.2d 585 (2d Dep't 1968).

30 25 N.Y.2d 59, 250 N.E.2d 58, 302 N.Y.S.2d 565 (1969).

31 *Id.* at 63, 250 N.E.2d at 60, 302 N.Y.S.2d at 568.

32 *Accord*, Calder v. Teachers' Retirement Bd., 4 Misc. 2d 166, 156 N.Y.S.2d 494 (Sup. Ct. N.Y. County 1956); Riesner v. Young, 198 Misc. 624, 100 N.Y.S.2d 488 (Sup. Ct. N.Y. County 1950). *But cf.* Simeti v. Commissioner of Welfare, 212 N.Y.S.2d 785 (Sup. Ct. Kings County 1961) (dictum). *See generally* 1 WK&M ¶ 213.02 (1969).

Two courts, one federal[33] and one state,[34] have recently reexamined the requisite elements of the agency relationship upon which jurisdiction over a nondomiciliary defendant can be predicated under CPLR 302(a)(1). In the past, the courts have consistently distinguished between the work of an "agent" and of an "independent contractor" in order to determine whether a nondomiciliary employer was subject to the jurisdiction of the New York courts. If the employee were found to be an "agent," his principal would be subjected to in personam jurisdiction in the state for actions arising out of the agent's acts.[35] A finding that the employee was an "independent contractor," however, would preclude the court from imposing personal jurisdiction over the defendant-employer.[36] Such hair-splitting, which led to critical definitions of "agent" and "agency," has at times fostered harsh and rather absurd results.[37]

In *Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc.*, [38] Blackwood Hodge Ltd. (Blackwood), a foreign distributor for General Motors, sought to have ten dump trucks shipped to it in India. Blackwood, after numerous communications with Albert E. Bowen, Inc. (Bowen), a New York corporation, requested the latter to secure passage of this freight order. Bowen made an oral booking with Orient Mid-East Lines, Inc. (Orient),[39] a shipper of goods, but it subsequently learned that the release for the cargo would be delayed. And because of additional delays, the cargo was never shipped by Orient, which then sought to obtain jurisdiction in an action for breach of contract against Blackwood by virtue of Bowen's acts in New York as Blackwood's "agent." As Judge Tyler noted, the situation was somewhat novel since jurisdictional issues arising from an alleged agency relation-

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33 Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc., 297 F. Supp. 1149 (S.D.N.Y. 1969).

34 Elman v. Belson, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969).

35 *See, e.g.*, Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418, 279 N.Y.S.2d 97 (N.Y.C. Civ. Ct. N.Y. County 1967).

36 *See, e.g.*, Glassman v. Hyder, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 321 (1969).

37 For example, in Parke-Bernet Galleries, Inc. v. Franklyn, 31 App. Div. 2d 276, 297 N.Y.S.2d 151 (1st Dep't 1969), a California resident participated in a New York auction via telephone and, after making two successful bids, refused to tender payment. In a suit by the seller, the appellate division refuted the contention that the defendant had "transacted business" in New York, holding that the auctioneer was the "agent" of the *seller* and not the buyer. Thus, no acts of the defendant were available to support the jurisdiction in the New York action. However, the Court of Appeals recently reversed this holding in a 5 to 2 decision which recognized the inadequacies of a simple agency approach. — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1970).

38 297 F. Supp. 1149 (S.D.N.Y. 1969).

39 Whether or not a valid contract was made by Bowen with Orient was unclear and immaterial for a ruling by the court on the jurisdictional basis for suit.

ship ordinarily appear in suits by the agent against the nondomiciliary defendant.[40]

The court dispensed with the requirement of an exclusive agency[41] in finding that Blackwood's acts had subjected the company to jurisdiction in New York. Judge Tyler stated that the important consideration was actually whether or not "the principal [requested] purposeful acts by a person in New York for the benefit of the foreign corporate defendant."[42] Blackwood intended to obtain possession of the trucks for the corporate purpose of selling them to the Indian Government. And the acts performed in New York by Bowen with a view to accomplishing this purpose[43] were sufficient to support jurisdiction over Blackwood under CPLR 302(a)(1).

In *Elman v. Belson*,[44] the Appellate Division, Second Department, reversed a decision of the supreme court[45] which held that jurisdiction had been obtained over an Illinois defendant *only* if his Chicago attorneys had acted pursuant to his instructions when they employed a New York law firm to represent him in another action. The New York attorneys had sued the defendant for the value of the services rendered. Jurisdiction was predicated upon CPLR 302(a)(1). The second department, in reversing, adopted Professor McLaughlin's position that the court should not become "ensnarled in the technical rules of agency."[46] Having decided that "all of [the] activities were

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40 It is interesting to note that Judge Tyler expressed his displeasure with the manner in which jurisdictional questions are answered by the courts. 297 F. Supp. at 1150 n.1:

> Typically the jurisdictional problem has helped to delay the progress of this case, filed in 1965. A powerful argument can be made for the proposition that delays in resolving these jurisdictional questions are caused by two judicially created phenomena: adherence to a factual case-by-case approach to "find" contacts of the defendant in the forum state and insistence that such factual issues be heard and resolved at a stage earlier than that when such issues are normally resolved in the litigation process. . . . Conceding that hardship in occasional, extreme cases might result if jurisdictional disputes were deferred until trial, this disability would be more than offset by the savings in court time and litigants' money.

41 *See generally* United States v. Montreal Trust Co., 358 F.2d 239, 250-59 (2d Cir.) (dissenting opinion), *cert. denied*, 384 U.S. 919, *rehearing denied*, 384 U.S. 982 (1966) for more detailed analysis of "exclusive agencies" and jurisdiction.

42 297 F. Supp. at 1152. The "purposeful acts" doctrine was born in Hanson v. Denckla, 357 U.S. 235 (1958), wherein the court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

43 *See* 297 F. Supp. at 1151.

44 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969).

45 Elman v. Belson, 58 Misc.2d 271, 298 N.Y.S.2d 234 (Sup. Ct. Nassau County 1968), *rev'd*, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969). *See The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 321 (1969).

46 7B MCKINNEY'S CPLR 301, supp. commentary 89, 92 (1968).

conducted for [the defendant] even though he now chooses not to recognize them,"[47] the court sustained jurisdiction on the basis that the defendant had engaged in purposeful activities in New York.

While both a federal district court and the second department have apparently discarded the distinction between "agents" and "independent contractors" for some jurisdictional purposes, the distinction may nevertheless have continued vitality in certain situations. For each of the cases noted dealt with an action by a third party rather than the case involving a suit brought by an agent against his principal. Significantly, each court has recognized that different criteria may apply in the latter instance.[48] Thus, whether or not this capricious distinction will linger even in that situation is yet to be determined. And harsh inequities may continue to be wrought until this last vestige of the agent-independent contractor distinction is discarded for jurisdictional purposes.

CPLR 302(a)(3): Guidelines established for applicability of subsection.

The United States District Court for the Southern District of New York has refused to interpret CPLR 302(a)(3) in a manner that might have subjected many local nonresident suppliers to increased litigation in New York. In *Chunky v. Blumenthal Brothers Chocolate Co.*,[49] a New York candy manufacturer (Chunky) sued Blumenthal Brothers Chocolate Co. (hereinafter Blumenthal), a Pennsylvania chocolate manufacturer, for damages arising from the sale of allegedly contaminated chocolate. Blumenthal, in turn, brought third-party actions against a Chicago-based milk wholesaler, H.C. Christians Co. (hereinafter Christians), and a Pennsylvania dairy, Grover Farms, Inc. (hereinafter Grover), contending that the milk produced by Grover and sold by Christians had caused the alleged contamination. It should be noted that Christians acted only as a middleman for Grover and Blumenthal; it had neither produced nor delivered any of the milk in question.

Blumenthal predicated jurisdiction over Grover and Christians upon CPLR 302(a)(3). The latter two corporations, however, contended that jurisdiction could not be acquired in such manner since the injury to Blumenthal, if any, had been caused entirely without the state, *i.e.*, in Pennsylvania. The court quickly disposed of this contention, declaring that the primary action between Chunky and Blum-

47 32 App. Div. 2d at 425, 302 N.Y.S.2d at 964.
48 *Compare* 297 F. Supp. at 1152 *with* 32 App. Div. 2d at 425, 302 N.Y.S.2d at 964.
49 299 F. Supp. 110 (S.D.N.Y. 1969).