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CPLR 302(a)(3): Guidelines Established for Applicability of Subsection

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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).

enthal showed injury in New York and that this was the injury which furnished the basis for the third-party complaint.

Having overcome one of the jurisdictional objections, the court approached the remaining jurisdictional questions relating to Christians on the assumption that the corporation had actually committed a tort in New York in person or through an agent. And, notwithstanding that assumption, the court held that jurisdiction over Christians under CPLR 302(a)(3)(i)[50] was lacking because the company derived a mere four percent of its total revenue from New York sources. In the absence of a definitive Court of Appeals ruling on the question of "substantial revenue," the 10 percent criteria suggested by Professor McLaughlin was followed.[51]

The court further held that jurisdiction could not be predicated upon subsection (a)(3)(ii) of CPLR 302, which requires that the defendant must reasonably expect that its acts will cause injury in New York[52] and further, that it derive substantial revenue from interstate or international commerce. The court believed that the statute mandated a construction calling for a greater degree of reasonable foreseeability than that existing in this case in order to protect a defendant's constitutional right to due process. For, in the court's view, how could Christians have realistically foreseen that the milk it sold to Blumenthal would eventually become an ingredient to chocolate sold in New York.[53] Similarly, the court did not believe that the "substantial revenue from interstate or international commerce" test necessarily met

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50 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 (i) regularly does or solicits business or engages in any other persistent course of conduct, or derives *substantial revenue* from goods used or consumed or services rendered in the state. . . .

(Emphasis added.)

51 7B McKINNEY'S CPLR 302, supp. commentary 121, 125 (1967). The Court of Appeals has, however, indicated that where a defendant derives less than 2 percent of its total revenue from the sale of goods in New York it is not "transacting business" in the state. Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

52 The Judicial Conference believed CPLR 302 (a)(3) should be:

> [B]road enough to protect New York residents yet not so broad as to burden unfairly non-residents whose connection with the state is so remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York. . . .
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> . . . .
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> [T]he statutory requirement of foreseeability relates to forum consequences generally and not to the specific event which produced injury within the state. . . .

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 337, 342, 344 (1967).

53 Blumenthal is a national candy manufacturer. Thus, it is difficult to imagine that Christians did not actually foresee the forum consequences of its sale.

the Supreme Court's requirement of minimum contacts[54] with the state of the forum. Judge Mansfield opined that

> [t]he standards set forth by the Supreme Court contemplate a more substantial contact with the forum state itself as opposed to a general engagement in interstate commerce.[55]

As to Grover, the sole jurisdictional issue was whether CPLR 302(a)(3)(ii) was constitutionally applicable. The court answered this question in the negative because Blumenthal failed to prove that Grover regularly introduced goods into interstate commerce. Furthermore, the jurisdictional reasoning applicable to Christians could be applied even more so to Grover because the latter had even fewer contacts with New York:

> If Grover could be brought into this action, then any supplier of raw material to a manufacturer which engages in interstate commerce could be compelled to defend an action in foreign jurisdictions with which the supplier has never had any contact.[56]

The court's discussion of due process and substantial revenue is a welcome addition to the mounting case law on our long-arm statute. Moreover, the *Chunky* rationale presents a realistic approach which curbs, at least temporarily, some of the inequities that could arise from any overly liberal application of CPLR 302(a)(3).

CPLR 302(a)(3): Jurisdiction obtained in conversion action.

The scope of CPLR 302(a)(3) has, in the past, been limited to negligence and product liability cases. However, in *General Motors Acceptance Corp. v. Richardson*,[57] the section was extended to encompass conversion actions as well.

Defendant Richardson, a New York domiciliary, was a conditional vendee of an automobile in which the plaintiff, General Motors Acceptance Corp. (hereinafter GMAC), had a secured interest. Richardson delivered the automobile to the second defendant, Manheim Auto Auction, Inc. (hereinafter Manheim) for the purpose of effecting a sale. Manheim's principal place of business was in Pennsylvania.

GMAC sued both defendants for conversion in New York, claiming that jurisdiction existed over Manheim by virtue of CPLR 302 (a)(1) and (3). The latter's operations as an auto auctioneer consisted

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54 *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).
55 299 F. Supp. at 116.
56 *Id.* at 117.
57 59 Misc. 2d 744, 300 N.Y.S.2d 757 (Sup. Ct. Monroe County 1969).