

# CPLR 302(a)(1): Constitutional Limit Not Reached

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include an inquiry into the merits,<sup>57</sup> this inquiry is limited to whether the alleged acts, out of which the cause of action has arisen, have been committed, and may not include a determination of whether those acts were wrongful.

*CPLR 302(a)(1): Constitutional limit not reached.*

While New York's long-arm statute, CPLR 302, has greatly increased the power of New York courts to exercise in personam jurisdiction over non-domiciliaries, a question has arisen as to whether CPLR 302 has gone as far as is constitutionally permissible.

CPLR 302(a)(1) gives personal jurisdiction over non-domiciliaries who have "transacted business" in New York, out of which transaction a cause of action has arisen. The courts have been liberal in applying this section in commercial cases.<sup>58</sup> This is contrasted with the restricted application of CPLR 302(a)(2) in tort cases.<sup>59</sup> A recent case, however, gives some indication that CPLR 302(a)(1) does *not* reach the permissible limit of in personam jurisdiction.

In *Kramer v. Vogl*,<sup>60</sup> plaintiff sought fraud damages. The defendants, Austrian firms, had contracted to give the plaintiff the exclusive right<sup>61</sup> to sell the defendants' product in the United States. The contract was consummated in Paris and a letter confirming the exclusive sales agreement was sent to the plaintiff's office in New York. The defendants did not engage in sales, pro-

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<sup>57</sup> Since jurisdiction under CPLR 302 depends upon the commission of certain acts within New York by the non-domiciliary defendant, a court deciding the issue of jurisdiction must make determinations on the merits, *i.e.*, whether the defendant transacted business in New York (CPLR 302(a)(1)), or committed a tortious act within the state (CPLR 302(a)(2)), or owned or possessed property in New York out of which the action arose (CPLR 302(a)(3)). Any determination on the merits made by a court concerned solely with jurisdiction, however, is not binding on the court trying the merits. *E.g.*, *Vernon v. Rock-Ledge House, Inc.*, 49 Misc. 2d 98, 266 N.Y.S.2d 556 (Sup. Ct. N.Y. County 1966); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

<sup>58</sup> *E.g.*, *Lewin v. Boch Laundry Mach. Co.*, 16 N.Y.2d 1070, 213 N.E.2d 686, 266 N.Y.S.2d 391 (1966); *Johnson v. Equitable Life Assur. Soc'y*, 16 N.Y.2d 1067, 213 N.E.2d 466, 266 N.Y.S.2d 138 (1966); *Singer v. Walker*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965).

<sup>59</sup> Since the decision of *Feathers v. McLucas*, there has been no doubt that CPLR 302(a)(2), dealing with the commission of a "tortious act," does not approach the constitutional limit. In that case, the Court of Appeals held that the language of that subsection clearly precluded its applicability to any case wherein the act which produced the injury in New York was committed outside the state. *Feathers v. McLucas*, 15 N.Y.2d 443, 460, 209 N.E.2d 68, 77, 261 N.Y.S.2d 8, 21 (1965).

<sup>60</sup> 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

<sup>61</sup> An exception was made in the contract for one named customer. *Id.* at 29-30, 215 N.E.2d at 160, 267 N.Y.S.2d at 902.

motional or advertising activities in New York, nor did they employ any local salesmen in the state. The defendants merely shipped goods to dealers in the state who had placed orders with them. The court held that CPLR 302(a)(1) does not apply to a non-resident who never comes into New York and only sends goods into New York pursuant to orders from within the state. The court, however, reserved judgment as to whether it would be constitutional for a state to exercise jurisdiction in such a case by means of a statutory enactment.<sup>62</sup>

*CPLR 302(a)(1): Neither contracting by mail nor the acts of an independent broker are a sufficient basis for jurisdiction.*

In *A. Millner Co. v. Noudar, LDA.*,<sup>63</sup> the defendant in Portugal sent a letter to the plaintiff, an independent sales broker in New York, offering to make the plaintiff its sole sales outlet for its goods in the United States and Canada. The plaintiff accepted by mail. The defendant, pursuant to orders, shipped its goods to purchasers in New York, and, on occasion, officers of the defendant came to New York to engage in sales on the defendant's behalf. The court, in reaffirming case law prior to the CPLR, held that the acts of the independent broker could not serve as a basis for personal jurisdiction over the defendant.<sup>64</sup> Thus, the CPLR's substitution of the "transaction of business" test for the CPA's "doing business" test<sup>65</sup> has not altered this principle.

The court held that neither the shipping of goods into New York nor the mailing of a contract into New York was a sufficient basis for jurisdiction. The court noted that while the mere mailing of an insurance contract into a state is a sufficient basis for jurisdiction,<sup>66</sup> it could not construe CPLR 302(a)(1) in a like manner for commercial contracts.

The court ultimately upheld jurisdiction, however, on the basis of the acts performed by the defendant's officers, who negotiated sales in New York. This factor was considered to be a sufficient "transaction of business," since it was an attempt by the defendant while in New York "to effectuate . . . a purpose directly related to . . . [its] economic affairs. . . ." <sup>67</sup>

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<sup>62</sup> *Id.* at 32, 215 N.E.2d at 162, 267 N.Y.S.2d at 904.

<sup>63</sup> 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

<sup>64</sup> *Greenberg v. Lamson Bros. Co.*, 273 App. Div. 57, 75 N.Y.S.2d 233 (1st Dep't 1947); *McKeon v. P. J. McGowan & Sons*, 229 App. Div. 568, 242 N.Y. Supp. 700 (2d Dep't 1930).

<sup>65</sup> CPA § 229-b.

<sup>66</sup> N.Y. Ins. Law § 59-a. This procedure with respect to insurance contracts was held constitutional by the United States Supreme Court in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>67</sup> *A. Millner Co. v. Noudar, LDA.*, 24 App. Div. 2d 326, 331, 266 N.Y.S.2d 289, 295 (1st Dep't 1966), *citing* *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 629 (N.D. Ill.), *aff'd*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).