

# Section 302(a)(1)--The "Transaction of Business"

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At the end of the Survey is an Appendix of 1964 amendments affecting procedural provisions. The Survey's time of publication prevents the list of legislative changes (as approved by the Governor) from being an exhaustive one, but it does contain what is likely a substantial majority of those changes. The list of changes in such of the CPLR rules as were promulgated in 1964 by the Judicial Conference is, however, a complete one and also appears in the Appendix.

#### JURISDICTION AND SERVICE

Article 3 of the CPLR, covers jurisdiction, service and appearance. The Legislature has not only retained the bases of jurisdiction that existed under the CPA, but has also sought to take advantage of the minimum contacts doctrine of *International Shoe Co. v. Washington*<sup>2</sup> by enacting a "longarm statute" to provide yet further bases, Section 302 of the CPLR.

##### *Section 302(a)(1) — The "Transaction of Business"*

Section 302(a)(1) of the CPLR provides for the exercise of in personam jurisdiction over a non-domiciliary when a cause of action arises out of his transaction of business within the state. Any application of this subdivision necessarily presents the problem of whether a particular activity constitutes the transaction of business. In *Patrick Ellam, Inc. v. Nieves*,<sup>3</sup> the plaintiff's assignor and the defendant executed a contract in New York whereby the assignor contracted to provide a crew to take the defendant's boat to the Virgin Islands. The plaintiff commenced this action for breach of contract by serving the defendant personally in the Virgin Islands, where defendant had established a domicile (which the court termed "residence") subsequent to the making of the contract. The defendant premised his motion to set service aside (which is actually a motion to dismiss under rule 3211(a)(8)) on the theory that section 302 requires that the defendant be transacting business within the state at the time of the commencement of the suit. Since the transaction had occurred almost two years prior to the commencement of the suit, the defendant contended that the section was not applicable to him. In rejecting the defendant's position, the court held that the making of such a contract in New York was the transaction of business within the meaning of section 302. In relying on McKinney's Practice Commentary, the court quoted the following: "With the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints."<sup>4</sup>

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<sup>2</sup> 326 U.S. 310 (1945).

<sup>3</sup> 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963).

<sup>4</sup> *Id.* at 188, 245 N.Y.S.2d at 547.

There are some, notably Weinstein, Korn and Miller, who argue that although section 302 *permits* the courts to extend jurisdiction to its "outer limits," it need not be so interpreted.<sup>5</sup> Whether the intent was to extend jurisdiction to its "fullest . . . potential" is doubtful, but the Advisory Committee on Practice and Procedure did state, however, that its intention was to "broaden the bases of jurisdiction."<sup>6</sup> This seems to favor a liberal construction.

Although the *Ellam* case has adopted a liberal interpretation of "transaction of business" under section 302, the counterpart provision of the UDCA<sup>7</sup> was construed more narrowly. In *Home Crafts, Inc. v. Gramercy Homes, Inc.*,<sup>8</sup> the plaintiff, whose place of business was situated in Nassau County, brought a breach of contract action against the defendant. The defendant had mailed an order for chimney extensions to the plaintiff at its Nassau business address and subsequently enlarged the order by telephone, both of these originating from the defendant's place of business in New York City. The jurisdictional predicate for the plaintiff's cause of action was Section 404(a) of the UDCA. It was alleged by the plaintiff that these two acts constituted the transaction of business within the county.

In granting the defendant's motion to dismiss for lack of jurisdiction, the court observed that it was *plaintiff's* business alone which was transacted in Nassau County. The court, in construing the statute, gave the section a "doing business" connotation by stating:

It is not intended that any little contact with Nassau County or any isolated transaction in this county shall serve as a convenient excuse to bring into our courts defendants from other states and counties. The intent is to subject to the jurisdiction of this court those persons or corporations who engage in commerce and industry in this county. There must be some pattern or continuity of activity of a substantial nature within the county.<sup>9</sup>

<sup>5</sup> 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.01 (1963).

<sup>6</sup> 1958 N.Y. LEG. DOC. NO. 13, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 41 [hereinafter cited as SECOND REP.].

<sup>7</sup> UDCA § 404(a). Since the relevant words of that provision are identical with those of § 302(a), the case has relevance under the CPLR provision as well as under the UDCA. The converse is also true, *i.e.*, a § 302 construction should have equal applicability under the UDCA. See commentary on CCA § 404 in 29A MCKINNEY'S JUDICIARY—COURT ACTS (Pt. 3) 104.

<sup>8</sup> 41 Misc. 2d 591, 246 N.Y.S.2d 153 (Nassau County Dist. Ct. 1964).

<sup>9</sup> *Id.* at 593-94, 246 N.Y.S.2d at 1555-56.

In opposition to such an attitude, some authorities believe that "solicitation of a single order may be enough to predicate jurisdiction over a cause of action arising from that order. . . ." <sup>10</sup>

In the course of its opinion the court intimated that there are two bodies of law, *i.e.*, one for the small individual and one for the large corporation. Said the court: "A corporation being a creature of law whose presence anywhere is identified by its agents is more likely to be called to defend a suit out of county or out of state particularly where its business is affected by a strong public interest." <sup>11</sup>

The interesting point raised by this decision is whose business must be transacted within the jurisdiction. Is a person who is not in business and who personally purchases something in another jurisdiction subject to in personam jurisdiction where he bought the goods? That is, will the "longarm statute" apply to a transaction of the *plaintiff's* business, or must it be a transaction of the defendant's business? Although the legislative history of the CPLR is silent on this point, at least one authority has suggested that if a person unilaterally and without other contacts mails an offer to a person in New York, where it is accepted, the courts would not sustain jurisdiction.<sup>12</sup> This position is borne out by *Home Crafts*. The case is not clear as to whether it deemed the transaction a piece of the defendant's business, or only a transaction of the plaintiff's business. Both parties being corporations, it would appear that it was a "transaction of business" for *both* of them. Therefore the holding appears to be that the defendant's contacts with the county were insufficient.

With respect to the requirement that there be a transaction of business, as opposed to other (*i.e.*, non-commercial) activities, a recent case has held that the making of a separation agreement between spouses did not constitute the transaction of business.<sup>13</sup> The court noted that the Legislature did not intend to exploit the "outer limits of permissible jurisdiction," <sup>14</sup> and held that section 302(a)(1) was meant to apply only to commercial transactions.<sup>15</sup>

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<sup>10</sup> 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.06 (1963).

<sup>11</sup> *Home Crafts, Inc. v. Gramercy Homes, Inc.*, 41 Misc. 2d 591, 593, 246 N.Y.S.2d 153, 155 (Nassau County Dist. Ct. 1964).

<sup>12</sup> CARMODY-FORKOSCH, NEW YORK PRACTICE § 198 (1963).

<sup>13</sup> *Willis v. Willis* (Sup. Ct., New York County), 151 N.Y.L.J., Jan. 15, 1964, p. 16, col. 2.

<sup>14</sup> *Ibid.*

<sup>15</sup> In *Jump v. Duplex Vending Corp.*, 41 Misc. 2d 950, 246 N.Y.S.2d 864 (Sup. Ct. 1964), the court held that where a third-party defendant foreign corporation had no contact with New York, except that it shipped the orders of the third-party plaintiff by sight draft to a warehouse in New York, the third-party defendant transacted no business in New York and it was not subject to in personam jurisdiction under § 302(a)(1).