

## Interplay Among Paragraphs of Section 302(a)

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*Interplay Among Paragraphs of Section 302(a)*

It is conceivable that a given activity may constitute both a tort under section 302(a)(2) and a transaction of business under section 302(a)(1). In *Totero v. World Telegram Corp.*,<sup>16</sup> the defendant, columnist Robert Ruark, was a Spanish resident (*i.e.*, domiciliary). He mailed his articles from Spain to the defendant United Features, a corporation doing substantial business in New York. This corporation distributed his work to, among others, the defendant World Telegram Corporation, with which defendant Ruark had no contractual arrangement. It was alleged that one of Ruark's articles defamed the plaintiff. Although the action was for libel, jurisdiction could not be predicated on section 302(a)(2), since a cause of action for defamation is expressly excluded by that paragraph. To avoid this prohibition, the plaintiff claimed that the cause of action arose from Ruark's transaction of business within New York, thus predicated jurisdiction on section 302(a)(1).<sup>17</sup>

In denying the defendant Ruark's motion to dismiss the complaint because of lack of in personam jurisdiction, the court held that Ruark's activity of sending articles into New York and the distribution of them by United Features pursuant to a contract with Ruark, together constituted a "transaction of business" by Ruark despite the fact that the defamation could not be supported by section 302(a)(2). Such a determination appears to conform to the Revisers' intent. They recognized that the transaction of business within the state might be a sufficient jurisdictional basis for the exercise of in personam jurisdiction in a defamation case, although the defamation itself is excluded as a tort under section 302(a)(2).<sup>18</sup>

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<sup>16</sup> 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. 1963).

<sup>17</sup> The plaintiff's contention on this point is supported by the "Practice Commentary" to McKinney's CPLR § 302. The Commentary states that "if the defamation grows out of the transaction of business in New York, the preceding subdivision [§ 302(a)(1)] would ensnare the defendant since no exceptions are made therein for defamation." 7B MCKINNEY'S CPLR § 302, commentary 433.

<sup>18</sup> SECOND REP. 39. According to Weinstein, Korn and Miller, jurisdiction in a defamation action can be sustained under § 301 if the corporation is doing business in New York, or, if an individual, he is served within the state. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.11 (1963). While the Revisers contemplated the use of § 302(a)(1) for defamation actions, expressly excluded under the tort provision of § 302(a)(2), there is danger that the legislative purpose will be subverted by too frequent resort to § 302(a)(1) to admit that which § 302(a)(2) expressly excludes.