

## Section 302(a)(3)--Real Property Activities

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manufactured by S. & C. and that this defect was the cause of the injury to plaintiff.

Defendant S. & C., in support of its motion to vacate service under rule 3211(a)(8), alleged that it was a Delaware corporation and that it did no business in New York. In considering the issue of jurisdiction under section 302(a)(2), the court cited, with approval the Illinois *Gray* case.<sup>31</sup> The court made a factual determination that "defendant's products are used and consumed in this state in sufficient quantity and this defendant knew that its product was being shipped to New York for us [*sic*] therein."<sup>32</sup> On this basis the court suggested that sufficient "contact" with New York was present. No reference was made to the *Feathers* decision.

Perhaps the distinguishing factor between *Feathers* and *Fornabaio* lies in the statement above quoted. However, the distinction is of questionable validity. The *Feathers* case did not rely on the quantity of the defendant's New York contacts; it held, simply, that if the tortious act occurred outside the state, section 302(a)(2) is inapplicable. There is some merit in defendant's contention that it committed no act in the state and that section 302(a)(2) requires such act, but this was not held to be a bar in the analogous *Gray* case under a similarly worded statute. Supporting the *Fornabaio* case is *Lewin v. Bock Laundry Machine Co.*,<sup>33</sup> which distinguished *Feathers* as involving only an "isolated" contact that defendant had with New York.

#### *Section 302(a)(3) — Real Property Activities*

The only significant case interpreting section 302(a)(3) is *Hempstead Medical Arts Co. v. Willie*.<sup>34</sup> In that case, defendant rented office space in New York from plaintiff. During the term of the lease he vacated the premises and defaulted in his payment of rent. At the time of the commencement of this action for rent due and for expenses incurred in re-letting the premises, defendant was a domiciliary of Maine. His motion to dismiss for lack of jurisdiction under rule 3211(a)(8) was denied. The court held that jurisdiction existed by virtue of section 302(a)(3), since the action arose out of defendant's use or possession of real property located in the state.<sup>35</sup>

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<sup>31</sup> *Supra* note 26.

<sup>32</sup> *Fornabaio v. Swissair Transport Co.*, 247 N.Y.S.2d 203 (Sup. Ct. 1964).

<sup>33</sup> (Sup. Ct., Kings County), 151 N.Y.L.J., Apr. 15, 1964, p. 17, col. 1.

<sup>34</sup> (Sup. Ct., Nassau County), 150 N.Y.L.J., Dec. 9, 1963, p. 18, col. 6.

<sup>35</sup> There is as yet no reported case on § 302(a)(3).