CPLR 302(a)(3)(i): Small Percentage of Defendant's Total Income May Constitute "Substantial Revenue" to Satisfy Minimum Contacts

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ents a novel development in the law of contribution and tort liability. In *Nolechek*, the Court found that a parent owes a duty not to expose third parties to liability for a child's injuries resulting in part from the parent's negligent entrustment of a dangerous instrument to a child. Significantly, a breach of this duty was held to support a claim for contribution against the parent. In the area of criminal procedure, the Court's decision in *People v. Settles* further delineates the right to counsel. The *Settles* Court held that once an indictment is returned, an unrepresented defendant's right to counsel indelibly attaches, thus precluding a waiver of that right in the absence of an attorney.

It is hoped that these and other cases examined in *The Survey* will serve to further the goal of informing the practitioner of noteworthy trends in New York practice.

**ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT**

*CPLR 302 (a)(3)(i)*: Small percentage of defendant's total income may constitute "substantial revenue" to satisfy minimum contacts

*CPLR 302(a)(3)(i)* permits a court to exercise personal jurisdiction over a nonresident defendant who commits an out-of-state tortious act that causes injury within the state.\(^1\) Apparently designed to meet the constitutional mandate of "minimum contacts" between the nonresident and forum,\(^2\) an additional provision of CPLR

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\(^1\) CPLR 302(a)(3)(i) (1972).

\(^2\) International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court enunciated the standards by which jurisdiction over a nonresident could be obtained. The traditional jurisdictional predicate of physical presence within the state, see *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), was broadened to include nonresidents who had "certain minimum contacts with [the state] such that the maintenance of the suit [would] not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Court expanded further the criteria for obtaining personal jurisdiction by permitting suit against a nonresident that had solicited one insurance contract and then mailed it into the state, based on the "substantial connection [of the contract] with that State." *Id.* at 223. Shortly thereafter, however, the Court cautioned against interpreting the holdings of *International Shoe* and *McGee* as signaling the abolition of all limitations on a state court's power to exercise personal jurisdiction over a nonresident. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958). The Court emphasized the necessity of purposeful activities on the part of the nonresident by which he "involves the benefits and protections of [the] laws" of the state seeking to assert jurisdiction. *Id.* at 253. Although CPLR 302 does not reach as far as is permissible under the federal Constitution, it does "represent . . . a healthy attempt to exploit some of that potential." *CPLR 302*, commentary at 60 (McKinney 1972). For instance, one jurisdictional predicate under the statute is a nonresident's commis-
302(a)(3)(i) requires the defendant to "deriv[e] substantial revenue from goods used or consumed or services rendered" in New York. While no uniform guidelines have been established to determine when revenue is or is not "substantial," many courts have used a proportionality test which compares the defendant's gross sales revenue from New York with its total gross sales revenue.

The activities required by CPLR 302(a)(3)(i) were intended to ensure that the nonresident's "overall contact" with the state is of sufficient magnitude so as to avoid unfairness in compelling it to defend in New York. The enumerated connections with the state are in the alternative; therefore, in addition to alleging a tortious act that occurred outside New York causing injuries inside the state, the plaintiff must establish that the defendant's conduct satisfies only one of the contacts listed in the statute. As a further measure of protection for the nonresident, however, the statute has been construed as demanding that the defendant engage in "a regular course of conduct in the state" rather than a single business transaction before being subjected to long-arm jurisdiction. It should be noted that there is no requirement under CPLR 302(a)(3) that any relationship exist between the defendant's contacts with the state and the tortious act that caused the injury within the state.

The courts have assumed that the meaning of "substantial revenue" is the same whether it relates to revenue derived from New York, CPLR 302(a)(3)(i), or from interstate or international commerce.
Recently, however, in *Allen v. Canadian General Electric Co.*, the Appellate Division, Third Department, held that a "substantial" amount of money earned in New York is a sufficient contact with the state to support jurisdiction, even though the sum constitutes only a small percentage of the defendant's total income.\(^6\)

The plaintiff in *Allen* claimed that she was injured by a tea kettle that allegedly had been manufactured defectively by the defendant Canadian General Electric Co. (CGE).\(^8\) Since CGE was a Canadian corporation not authorized to do business in New York,\(^9\) the plaintiff invoked CPLR 302(a)(3)(i) as the basis for New York jurisdiction.\(^10\) Although CGE's New York sales for 1976 were about $8.79 million, this amount represented only one percent of its total income.\(^11\) Relying on a proportionality test, the defendant moved to dismiss the complaint for lack of jurisdiction on the ground that the percentage was insufficient to satisfy the "substantial revenue" re-

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\(^7\) Id. at 43, 410 N.Y.S.2d at 709. The court stated that "[t]he mere showing by [the] defendant . . . that the percentage of New York revenue is small in comparison to total income is insufficient evidence to support a dismissal of the complaint." Id.

\(^8\) Id. at 40, 410 N.Y.S.2d at 707.

\(^9\) Id.

\(^10\) The complaint premised jurisdiction on the alleged tort that had been committed outside the state, resulting injury in New York and an assertion that Canadian General Electric Co. (CGE) "derive[d] substantial revenue from goods used within the State." Id. The complaint asserted a second basis for jurisdiction over the defendant. CGE was the subsidiary of General Electric Co., a New York corporation. Id. Plaintiff contended that, by virtue of this fact, defendant was doing business in New York in the traditional sense. Id.; see CPLR 301 (1972). Special Term, however, denied that the mere existence of a parent-subsidiary relationship could support a finding of "substantial presence" in the state. Id., 410 N.Y.S.2d at 707-08; accord, Nursery Plastics, Inc. v. Newton & Thompson, Inc., 19 Misc. 2d 883, 884, 191 N.Y.S.2d 655, 657 (Sup. Ct. N.Y. County 1959). See generally Wellborn, *Subsidiary Corporations in New York: When Is Mere Ownership Enough to Establish Jurisdiction Over the Parent*, 22 BUFFALO L. REV. 681 (1973).

\(^11\) 65 App. Div. 2d at 41, 410 N.Y.S.2d at 708. The defendant claimed that only 1% of its total sales were to customers in New York. The plaintiff, however, alleged that the defendant's total sales were $879 million; from this the court calculated the figure of $8.79 million, which was not disputed by the defendant.
quirement of CPLR 302.12. The Supreme Court, Special Term, denied the motion, finding that, on its face, the large sum of $8.79 million constituted "substantial revenue." On appeal, the Appellate Division, Third Department, affirmed, finding that "the sum of $8.79 million . . . is prima facie 'substantial.'" The court acknowledged that the proportionality test generally was an effective method of determining the importance of income derived from New York, but noted that, in most cases, small percentages would not represent large amounts of money. In the present case, however, the court concluded that it would be difficult to consider the amount involved as not "substantial revenue." The court reasoned that use of the proportionality test only would often allow a large corporation to avoid liability to residents of this state on the strength of its high total income. According to the court, not only was this result unacceptable, but asserting jurisdiction over a defendant with $8.79 million in New York sales "does not offend 'traditional notions of fair play and substantial justice.'" It is suggested that the Allen court's concentration on the amount of the revenue derived from New York rather than the revenue's relationship to the total income of the nonresident defendant was necessary in order to effectuate the legislative intent behind

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13 65 App. Div. 2d at 41, 410 N.Y.S.2d at 708.

14 Id. at 43, 410 N.Y.S.2d at 709.

15 65 App. Div. 2d at 41-42, 410 N.Y.S.2d at 708-09; see note 4 and accompanying text supra.

16 Id. at 42, 410 N.Y.S.2d at 708. But see Nichols v. Surgitool, Inc., 419 F. Supp. 58, 62 (W.D.N.Y. 1976). In support of its motion to dismiss for lack of jurisdiction, the Allen defendant relied on Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 357 N.Y.S.2d 547 (3d Dep't 1974), wherein the court stated that the term "substantial revenue" "should be construed to require comparison between a defendant's gross sales revenue from interstate or international business with total gross sales revenue . . . ." Id. at 333, 357 N.Y.S.2d at 550. The Auto Specialties court, however, in addition to comparing the income generated by activities in New York with gross revenue, required a calculation of the percentage of profits those figures represented. Id. The Allen court found it significant that the defendant had not "offer[ed] . . . any comparison of its profits and the New York sales . . . when the Auto Specialties court] specifically noted that profits were relevant to the issue of 'substantial revenue.'" Id. at 42, 410 N.Y.S.2d at 709.

17 65 App. Div. 2d at 42-43, 410 N.Y.S.2d at 709. The court assumed that the defendant's parent corporation would deem $8.79 million "substantial" were the amount representative of a loss. Id. at 42, 410 N.Y.S.2d at 709. The court also noted that an economist most likely would regard sales of $8.79 million as substantial "regardless of their ratio to total sales." Id. at 43, 410 N.Y.S.2d at 709.

18 Id.

19 Id. (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1948)).
CPLR 302(a)(3)(i). While the comparison test had proven to be an adequate method of determining when revenue is "substantial" in the majority of cases, it did not deal effectively with large business concerns whose high New York incomes constitute only a small percentage of their total earnings. The purpose of CPLR 302(a)(3)(i) was to subject to in personam jurisdiction nonresidents whose contacts with the state were of a nature and quality so that it would not be unfair to compel them to defend an action in a New York court. It therefore would appear to be fair to require a nonresident defendant who has earned $8.79 million from sales in New York to come to the state to litigate a lawsuit, since an organization of this size is protected by the laws of the forum and should be equipped to handle the expense.

The Allen court's decision not to confine its "substantial revenue" inquiry to a mere comparison properly will prevent a large corporation carrying on a small percentage of its business in New York from escaping jurisdiction when it derives significant benefits...
from the state. Such continued flexibility in interpreting the provisions of CPLR 302 will preserve the intent of the draftsmen.

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CPLR 302(a)(3)(ii): Injunctive relief available against nondomiciliary to prevent threatened economic harm and loss of trade secrets

CPLR 302(a)(3) permits New York to exercise long-arm jurisdiction over nondomiciliaries whose tortious acts outside the state cause injury in the state. Principally due to the difficulty in deter-

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See note 18 and accompanying text supra.

CPLR 302(a)(3)(ii) (1972) extends jurisdiction over a nondomiciliary if he

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR 302(a)(3) was enacted in direct response to the New York Court of Appeals decision in Feathers v. McLucas, reported sub nom. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), which held CPLR 302(a)(2) inapplicable to out-of-state tortious acts which cause injury within the state. Id. at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24; Memorandum of Judicial Conference on Approval of Ch. 590, N.Y. Laws (N.Y.S. 2681, N.Y.A. 3086, 189th Sess.), in TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 21, 21 (1967); see Reese, A Study of CPLR 302 in Light of Recent Judicial Decisions, ELEVENTH ANN. REP. N.Y. JUD. CONFERENCE 132, 132 (1966). Feathers involved a personal injury action precipitated by the explosion of a defective propane gas tank while it was being transported through New York to Vermont. The Court held that jurisdiction could not be exercised over the nondomiciliary corporate defendant since the negligent manufacture, and therefore the tort, occurred without the state.

In recommending that the legislature amend the long-arm statute to encompass such tortious conduct, a study commissioned to examine CPLR 302 noted that, "as a matter of policy, jurisdiction should not be exercised over a [defendant] who causes tortious injury in the state by an act or omission outside the state unless he had other contacts with the state." Reese, supra, at 136. This is accomplished by the affiliating requirements found in clauses (i) and (ii) of CPLR 302, which mandate sufficient contacts to ensure constitutionality. 1 WK&M ¶ 302.14, at 3-120; see note 48 infra. But cf. Note, Jurisdiction in New York: A Proposed Reform, 69 COLUM. L. REV. 1412, 1432-33 (1969) (additional requirements unnecessary to satisfy due process).

CPLR 302(a)(3)(ii) adds two conditions to the tortious-act and resultant-injury requirements. TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 343 (1967). The injury caused in New York must have been foreseeable, although it is not necessary that the defendant expected, or reasonably should have expected, that the specific injury would occur. It is only required that some forum consequences would foreseeably result from the nonresident's tortious act. TWELFTH ANN. REP. N.Y. JUD. CONFERENCE 343-44 (1967); CPLR 302, commentary at 92 (McKinney 1972); see Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 337 N.Y.S.2d 547, 550 (3d Dep't 1974); Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, 291, 315 N.Y.S.2d 51, 56 (Sup. Ct. Queens County), aff'd, 35 App. Div. 2d 720, 315 N.Y.S.2d 815