

OPENING STATEMENT

"All those insurers not subject to suit in New York because they are not licensed and do not issue policies in New York and do not insure property in New York take one step forward. . . not so fast".

Non-admitted insurance companies may feel secure in their belief that they are not subject to suit in New York because they are not licensed and do not issue or deliver policies in New York or cover property located in New York. However, they have often found that sense of security to be unwarranted. The trend towards the expansion of jurisdiction by New York's Courts over non-licensed insurers who do not do business in New York is the subject of our lead article.

NEW YORK'S COURTS EXPANDING EXERCISE OF JURISDICTION OVER NON-ADMITTED INSURERS

By: Michael E. Gorelick and Andrew Kurtz

Insurers who are not licensed in New York and who do not issue policies to New York residents or cover property located in New York, have more and more frequently found themselves to be defendants in suits brought in New York. For example, insurers issuing health policies, life policies and long-term care benefits policies have found themselves as defendants in lawsuits because their insureds have moved into New York and filed suit in the State after the policy was issued. In addition, insureds having policies issued outside of New York, but which cover after acquired property, have purchased property located within New York after the issuance of the policy. Thus, when disputes have arisen over such claims, suits have frequently been commenced against such insurers in New York. While insurers have logically believed that they should not be amenable to suit in New York, they have often found that the Courts disagree.

For example, insurers issuing long term care or health insurance policies have found that insureds often move after obtaining such policies. Courts of a particular state must be able to assert personal jurisdiction over a defendant or the case will be dismissed without the court ever deciding the merits of the controversy. In order to satisfy the jurisdictional requirements, the defendant's contacts with the forum state must satisfy both the long-arm statute of that state (in New York, §§301 and 302 of the New York Civil Practice Laws and Rules) as well as the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In New York, an insurer by its actions may also subject itself to the jurisdiction of the courts under [New York Insurance Law §1213](#). This article focuses on §1213,

[and how insurers should be aware of the law in order to anticipate being sued in New York State.](#)

[Under the United States Constitution, the basic standard to determine personal jurisdiction is that defendant must have certain "minimum contacts" with the forum, such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice."](#) A finding of minimum contracts requires some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws," [Hanson v Denckla](#), or some effort by the defendant "purposefully directed" towards residents of the forum. [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 473 (1985).

Personal jurisdiction under §301 of the CPLR is not as broad as that permitted under the Due Process Clause of the Federal Constitution. [Intermeat, Inc. v. American Poultry, Inc.](#), 575 F.2d 1017, 1022 (2nd Cir. 1978) citing the New York Court of Appeals in [Simonson v. International Bank](#), 14 N.Y.2d 281, 251 N.Y.S.2d 433 (1964). To find jurisdiction under CPLR §301, Plaintiff must show that a corporation doing business in New York systematically, continuously, and with a fair measure of permanence. See [Landoil Resources v. Alexander & Alexander Services, Inc.](#), 77 N.Y.2d 28, 33-34, 563 N.Y.S.2d, 741, 565 N.E.2d, 488, 490 (1990). If a foreign entity is found to be doing business in New York it is subject to personal jurisdiction on any cause of action whether or not the cause of action arises out of business done in New York. [Hofritz For Cutlery Inc. v. Amajac, Ltd.](#), 763 F.2d 55, 58 (2nd Cir. 1985).

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Plaintiff must show that a corporation doing business in New York systematically, continuously, and with a fair measure of permanence. See [Landoil Resources v. Alexander & Alexander Services, Inc.](#), 77 N.Y.2d 28, 33-34, 563 N.Y.S.2d, 741, 565 N.E.2d, 488, 490 (1990). If a foreign entity is found to be doing business in New York it is subject to personal jurisdiction on any cause of action whether or not the cause of action arises out of business done in New York. [Hoffritz For Cutlery Inc. v. Amajac, Ltd.](#), 763 F.2d 55, 58 (2nd Cir. 1985).

Court may also obtain personal jurisdiction over a party under New York's other long-arm statute, CPLR § 302. That statute provides that "a court may exercise personal jurisdiction over any non-domiciliary who, in person or through an agent, "transacts business within the State or contracts anywhere to supply goods or services in the state." The claim against the non-domiciliary must arise out of that business activity that occurred in New York. See [McGowan v. Smith](#), 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645 (1981). "A non-domiciliary 'transacts business' under § 302(a)(1) when he 'purposefully avails [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws." [Cutco Industries v. Naughton](#), 806 F.2d 361, 365 (2nd Cir. 1986).

What about an insurer that does not "do" or "transact" business in New York in the traditional sense? New York Insurance Law §1213 provides an additional basis for jurisdiction. The statute authorizes substituted service on the Superintendent of the Insurance Department for insurers unlicensed in New York that insure risks in this state. §1213(a) states that the purpose of the statute is to protect New York residents who hold policies of insurance, "issued or delivered in this State by insurers while not authorized to do business in this state..." The statute also provides that New York residents may assert their rights "under such policies" by litigating in New York State, rather than an "insuperable" distant forum. §1213(b) sets forth the actions of an insurer that, by themselves alone, make the company amenable to service in this state and place an insurer under New York's jurisdiction. Specifically, the statute states that, "Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer..." constitute submitting to New York's jurisdiction. The acts include under §1213(b)(A) "issuance or delivery of contracts to residents of this state or corporations authorized to do business [in this state]," (B) solicitation of applications [for insurance], (C) "collection of premiums, membership fees, assessments or other considerations for such contracts," or the catch-all phrase of (D) "any other transaction of business."

An important issue is whether courts will consider the language "issued or delivered in this State" as a prerequisite to an insurer's actions taken under §1213(b) or whether actions taken under (b) by an unlicensed out of state insurer alone are sufficient. Courts have ruled both ways on this question. In [Weinstein v. Occidental Life Insurance](#), 206 Misc. 128, 134 N.Y.S.2d 207 (Sup. Ct. 1954), the plaintiff was a resident of California when he obtained a life insurance policy from the defendant. Plaintiff subsequently moved to New York where he received premium notices from the defendant, and mailed payments back to the defendant. The court dismissed plaintiff's complaint despite the sending of premiums to New York holding that Insurance Law §59-a did not apply (§59-a was the predecessor statute to 1213 with essentially the same wording). See also [Clifton Products, Inc. v. American Universal](#)

found that the statute applied only to New York residents whose policy was delivered to them in this State).

However, other courts have held that the actions taken under §1213(b) alone are sufficient and ignore the first paragraph of the statute. For example, in [Farm Family Mut. Ins. Co. v. Nass](#), 481 N.Y.S.2d 329, 126 Misc.2d 329 (N.Y.Sup. 1984), the court found that the statute's mention of the acts of issuance or deliverance of insurance contracts or the collection of premiums are each sufficient alone to satisfy the law. See also [Zacharakis v. Bunker Hill Mut. Ins. Co.](#), 281 A.D. 487, 120 N.Y.S.2d 418 (1st Dept. 1953), (where the Appellate Division found that an insurer that collected premiums from a New York resident, delivered the policy in New York, and sent correspondence regarding the policy to New York, fell under §1213 because each act fell under the ambit of the statute). Plainly, would the statute need to include the issuance or delivery of policies in New York under (b) if the policies need to be issued or delivered in New York?

There is another statute, Insurance Law §1101(b) (2) (D), that may apply in situations where an insured moves after the policy is issued. §1101(b) (2) (D) exempts "transactions with respect to policies or annuity contracts lawfully issued without this state occurring subsequent to issue, if, at the time of issue, such policies or contracts covered subjects of insurance or risks not resident or located in this state." This statute, however, applies only where a plaintiff is claiming jurisdiction pursuant to New York's long-arm statute. The act specifically states that §1213 is still applicable under such circumstances.

Clearly, insurers must be careful when issuing policies regarding risks that may occur in more than one state. Insurers should attempt to negotiate such issues with insurance regulator in the respective state to determine how to deal if an insured moves to another jurisdiction. If possible, a company may place a choice of law clause in the policy. Alternatively, a clause allowing the insurer to change the rates or services provided under the policy if the insured moves to another jurisdiction may be possible. This would make the coverage of the policy consistent with the costs and practices of the new jurisdiction. Due to the increased life expectancy and increases in cost of health care services, this will be an issue appearing with greater frequency in the years to come. [Paul M. Maintenance, Inc. v. Transcontinental Ins. Co.](#), 300 A.D.2d 209, 755 N.Y.S.2d 3 (decided December 31, 2002).

For more information, call or e-mail mgorelick@agfjlaw.com.

- **RECENT AUTOMOBILE CASE DEVELOPMENTS**

Automobile accidents give rise to more tort and insurance coverage litigation than any other type of occurrence. The following recent decisions from New York's Appellate Courts are of significance to insurers, claims professionals and counsel defending such cases:

VICARIOUS LIABILITY UNDER VEHICLE & TRAFFIC LAW § 388 – EMPLOYER/OWNER CAN AVOID STATUTORY LIABILITY WHILE THE LESSOR/OWNER CANNOT

In Murdza v. Zimmerman, 99 N.Y.2d 375, 756 N.Y.S.2d 505 (decided 2/18/2003) New York's Court of Appeals issued a decision which interprets § 388 of the Vehicle & Traffic Law (the implied liability statute) in a manner which appears to defy logic.

In Murdza, an employer leased a car from a rental agency for a term longer than 30 days. Accordingly, under § 128 of V&T Law, the employer was considered an "owner" and thus, would be vicariously liable for accidents resulting from the permissive use of the vehicle by its employees.

The employer allowed one of its employees to drive the car in the course of her employment, but with instructions contained in the employee handbook, that only the employee or the employee's spouse was permitted to drive the vehicle. In violation of that restriction, the employee let her boyfriend drive.

While the boyfriend was driving, he was involved in an accident. A party injured in the accident sued the driver, the employer and the rental agency who leased the vehicle to the employer.

Plaintiff obtained summary judgment on liability against the driver. The remaining question was whether the employer and/or the owner were derivatively liable for the driver's negligence. The Court of Appeals ruled that while the rental agency might be, the employer was not, as a matter of law.

In its unanimous opinion, the Court of Appeals stated that its decision was motivated by public policy concerns surrounding the intent of V&T § 388. The Court found it to be more reasonable for an employer to expect its employee to comply with a restriction as to how the vehicle could be used and by whom, than for a lessor to expect such compliance from a lessee. The Court found that an at will employment relationship between the employer and the employee and the frequent contact between them demand the employee's compliance with the employer's restrictions on the vehicle's operation. The Court could not find any comparable compliance called for when the car rental agency imposed such restrictions on the renter/employer.

AN OWNER RIDING IN A CAR DRIVEN BY HIS SPOUSE AS A VALID CLAIM AGAINST CO-OWNERS OF THE VEHICLE UNDER V&T § 388

In Hassan v. Montouri, 99 N.Y.2d 348, 756 N.Y.S.2d 126 (also decided 2/18/2003) the Court of Appeals was presented with a case in which a car was owned by a leasing company and leased to the employer. The employer provided the car to its employee for personal, as well as for business use. Because she had the exclusive use of the car for an extended period, she was defined as an "owner" by § 128 of the Vehicle & Traffic Law.

The employee's husband was driving the leased vehicle with her permission when he was involved in an accident. The employee/owner was a passenger in the car at the time of the accident.

The injured employee brought suit against the leasing company and her employer, alleging that her husband was negligent in his operation of the vehicle and that his negligence was imputed to them.

The other owners moved to dismiss, arguing that plaintiff, as one of the owners of the vehicle, could not bring suit for imputed liability. However, the Court of Appeals found that "assuming without deciding" that the plaintiff/employee is deemed an owner under the statute, there was no barrier to allowing an injured owner to sue the other owners to whom the driver's liability is imputed under § 388 of the Vehicle & Traffic Law. Thus, the plaintiff/employee/"owner's" suit against the other "owners" was permitted to stand.

UTOMOBILE INSURANCE — "USE OF" A VEHICLE INCLUDES LOADING AND UNLOADING WITHIN THE MEANING OF THE VEHICLE & TRAFFIC LAW.

A general contractor who was potentially liable under New York's Labor Law § 240 for injuries to a subcontractor's employee upon whom a piece of equipment fell while being loaded with a hoist onto the subcontractor's truck sought coverage under the subcontractor's commercial automobile policy.

The general contractor had been named as an "insured" under the subcontractor's business auto coverage policy and was entitled to defense and indemnification under the subcontractor's policy for claims arising out of the use of the subcontractor's vehicle.

The Appellate Division, Second Department, found that under these circumstances, the "use" of the vehicle included under the Vehicle & Traffic Law included the loading and unloading operations being engaged in and thus, the general contractor was entitled to defense and indemnification under the subcontractor's automobile policy. (Paul M. Maintenance, Inc. v. Transcontinental Ins. Co., 300 A.D.2d 209, 755 N.Y.S.2d 3 (decided December 31, 2002).

SUMMARY JUDGMENT: SECOND CAR IN A THREE CAR CHAIN COLLISION WAS ENTITLED TO SUMMARY JUDGMENT, DESPITE THE DRIVER OF THE THIRD CAR'S CLAIM THAT HE SKIDDED ON A WET CONSTRUCTION PLATE

In *Palermo v. Hamdan and Martinez*, (decided May 27, 2003) Judge Baily-Schiffman of the Civil Court, Queens County, found that the excuse proffered by the third-party defendant that it was not negligent in striking the co-defendant's vehicle in the rear because, despite his efforts to stop, he skidded on a wet construction plate were insufficient, as a matter of law.

In granting the second car's motion for summary judgment, the Court found that those allegations were insufficient, as a matter of law to rebut the inference of negligence and to raise a triable issue of fact as to liability.

The moving defendant (Martinez) was represented by Manna Morejon of Abrams, Gorelick, Friedman & Jacobson, P.C. For more information on that decision, please call or e-mail mmorejon@agfjlaw.com

- **OTHER CASES OF INTEREST**

INDEMNIFICATION AGREEMENTS MUST BE IN WRITING AND SIGNED PRIOR TO THE LOSS, TO BE ENFORCEABLE

In *Flores v. Lower East Side Service Center, Inc.*, the third-party defendant/employer was sued by the premises owners for defense and indemnification.

In *Flores*, plaintiff commenced action against the owner of the premises alleging that as the result of an incident at the workplace, he suffered severe injuries to his eye. The owner commenced a third-party action against the contractor/employer of plaintiff, Procida Realty & Construction Corp.

Procida moved to dismiss the third-party action seeking common law and contractual indemnification. The common law cause of action was dismissed because the Court found that the injury did not qualify as a "grave injury" within the definition of § 11 of the Workers Compensation Law. Thus, the third-party action for common law indemnification was precluded by statute.

The Court also dismissed the claim for contractual indemnification because it was brought on a written, but unsigned, contract. In doing so, Justice Crispino of Supreme Court, Bronx County, relying on prior Appellate Division cases, held that unless the employer entered into a written contract prior to the accident by which it had expressly agreed to defend or indemnify the owner, the contractual indemnification claim was also barred under § 11 of the Worker's Compensation Law (decided April 11, 2003).

Procida was represented by Steven DiSiervi of Abrams, Gorelick, Friedman & Jacobson, P.C. For more information on that case, please call or e-mail sdisiervi@agfjlaw.com.

- **AGFJ DEVELOPMENTS**

At the invitation of the International Underwriters Association, Dan Friedman made a presentation entitled "Demystifying the American Jury Trial" in London on April 9, 2003. If you are interested in the presentation, call Daniel J. Friedman or e-mail dfriedman@agfjlaw.com.

AGF&J is pleased to announce that Elizabeth George has become associated with the firm. Ms. George obtained her JD from Hofstra University and her BA from SUNY Binghamton. Elizabeth was a paralegal at AGF&J previously. Ms. George will soon be admitted to practice in New York.

With the growing importance of ADR as an alternative to litigation, Glenn Jacobson has been working toward a post-graduate certificate in Dispute Resolution at New York University. The program requires successful completion of several academic courses including Fundamentals of Dispute Resolution, Mediation, Negotiation and Arbitration.

- **PUBLIC EDUCATION SERVICE**

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

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