NEW YORK COURT OF APPEALS ROUNDUP:

PERSONAL JURISDICTION BASED UPON 'INSTANT MESSAGING,' ENFORCEMENT OF FOREIGN JUDGMENTS, PRODUCTS LIABILITY AND JUDICIAL MISCONDUCT

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The long-arm jurisdiction statute played a role in three cases in the Court of Appeals that we discuss this month. In the first, the Court found that an out-of-state institutional investor had entered the state electronically if not physically, and thereby subjected itself to jurisdiction in a suit arising out of the communication. In the second, the debtor on a judgment entered in South Korea attempted (to no avail) to avoid enforcement by arguing that it was not properly the subject of jurisdiction in that country under New York's standards of jurisdiction. In the third, an Alabama purchaser of manufacturing assets had the claims against it dismissed by the Appellate Division for the lack of jurisdiction, but the Court of Appeals affirmed dismissal on a different ground – that plaintiffs' theory of liability was contrary to New York law. The Court thereby resolved a split between the First and Third Departments, refusing to adopt a "product line" exception to the rule that an asset purchaser is not liable for the torts of the seller. Finally, we discuss two decisions on judicial misconduct.

"IM" Jurisdiction

One need not come to New York physically to be embraced by the long-arm statute, but may "enter" the state electronically and subject himself to personal jurisdiction for claims arising out of an electronic exchange, at least when he conducts substantial business through such means, the Court held in *Deutsche Bank Securities, Inc. v. Montana Board of Investments*.

On March 25, 2002, a Deutsche Bank employee initiated a discussion with an investment officer of the state agency managing Montana's public funds ("MBOI"), via an instant messaging system provided to subscribers of Bloomberg. Deutsche Bank proposed a trade of MBOI's Pennzoil-Quaker State ("Pennzoil") bonds for Toys R Us bonds. The agency was not interested, and the electronic conversation concluded. Approximately 10 minutes later,

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the MBOI investment officer contacted the same Deutsche Bank employee using the instant messaging service, and proposed a sale of the agency's Pennzoil bonds. Deutsche Bank investigated the market for such bonds, and shortly thereafter agreed to make the purchase at MBOI's asking price. That evening, Shell Oil announced that it was acquiring Pennzoil. The next day, MBOI stated that it would not honor the trade because it believed Deutsche Bank acted upon inside information.

Litigation ensued. MBOI asserted that it was not subject to personal jurisdiction in New York and, alternatively, that as a matter of comity, New York should honor defendant's request that the action be dismissed in favor of a Montana forum.

Chief Judge Judith S. Kaye authored the majority opinion rejecting these defenses. The Court observed that, in the past, it has recognized long-arm jurisdiction under CPLR 302(a)(1) over investors and other commercial actors who "project" themselves into New York to conduct business in the state via telephonic or electronic means.

The opinion distinguished MBOI from an individual investor who places a call to a broker in New York, describing MBOI as "a sophisticated institutional trader [that] enter[ed] our state . . . to negotiate and conclude a substantial transaction." While the Court noted that MBOI had concluded numerous large trades with Deutsche Bank in New York previously, it also pointed out that CPLR 302(a)(1) is a "single-act statute" that permits the assertion of jurisdiction over an out-of-state actor whose activities in New York are "purposeful" if there is a "substantial relationship" between the transaction and the claim asserted.

The Court also rejected MBOI's plea that the action be dismissed on the basis of sister-state comity. Pointing to New York's strong interest as a commercial center in providing a forum, the Court held that, where a commercial transaction arises because a state or its agent knowingly projects itself into New York to take advantage of our financial markets, New York courts should not dismiss an action arising out of such transaction on grounds of comity.

Judge Susan Phillips Read dissented in part, but did not take issue with the Court's rulings on jurisdiction and comity. Deutsche Bank had been granted summary judgment before MBOI had conducted all of the discovery it had sought concerning whether plaintiff had acted upon inside information, and Judge Read believed that MBOI should have been afforded a full opportunity to develop the facts relating to this issue. The majority had upheld the award of summary judgment because MBOI had failed to provide an evidentiary basis for its insider trading claim, and "[t]o order discovery based solely on a coincidence in timing would be to sanction a dubious quest for a defense."

Enforcing Foreign Judgment

Interpretation of New York's long-arm statute also arose in an action to enforce a foreign judgment, *Sung Hwan Co., Ltd. v. Rite Aid Corp.* The defendant raised it as a defense to plaintiff's action to enforce a judgment entered in South Korea, but in keeping with New York's history and policy of being "a generous forum in which to enforce judgments for money damages rendered by foreign courts,"[1] the Court rejected defendant's arguments.

Sung Hwan Co. operated a chain of Thrifty brand ice cream stores in South Korea, supplied by Thrifty Payless in California through an importer/exporter. Sung Hwan's sales grew rapidly until the government discovered listeria monocytogenes in the ice cream and halted sales of the product pending testing. Sung Hwan brought an action in Seoul against Rite Aid, which had purchased Thrifty Payless. Rite Aid was served with the complaint but did not respond, and a default judgment in an amount worth approximately $5 million was entered on Sung Hwan's tort claim.

Sung Hwan instituted an action in New York pursuant to CPLR Article 53, the Uniform Foreign Money-Judgments Recognition Act, which was enacted in 1970 to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here."[2] The three requirements for enforcement of a foreign judgment are that: the foreign court's exercise of jurisdiction comports with New York's concept of personal jurisdiction; the foreign jurisdiction shares our notions of procedure and due process; and the judgment is not otherwise repugnant to New York's notions of fairness.

Rite Aid challenged the jurisdiction aspect of the above test. New York courts typically look to the long-arm statute for guidance in assessing the foreign court's exercise of jurisdiction, although Article 53 does not mandate that it be satisfied. Section 302(a)(3) provides that personal jurisdiction may be assented over a person who commits a tortious act outside the state that causes injury in the state, if he regularly does business in New York or other criteria are satisfied. Rite Aid argued that the fact New York does not award economic damages for torts and would recognize Sung Hwan's claim only as arising under contract, rendered CPLR 302(a)(3) inapplicable and thus removed any basis for the Seoul court to have exercised jurisdiction over it consistent with the long-arm statute.

This technical argument was rejected by the Court of Appeals unanimously, in an opinion by Judge Carmen Beauchamp Ciparick. The approach advocated by Rite Aid would undermine principles of comity by making paramount any substantive difference in the law of New York and the foreign forum. Although economic recovery for tort may be unavailable in New York, it is "neither repugnant to our public policy nor offensive to our notions of fairness," and Rite Aid's jurisdiction defense to the judgment therefore was rejected.

Products Liability

There are limited exceptions to the general rule that the purchaser of a corporation's assets is not liable for the torts of the seller.[3] Plaintiffs in *Semenetz v. Sherling & Walden, Inc.*, urged the Court to adopt a new exception, the "product line" exception, pursuant to which the purchaser of a manufacturing business that continues a line of products is strictly liable for defects in items from that line manufactured and distributed by the seller. The Court declined to do so.

S & W Edger Works ("Edger Works") sold most of its assets, including its real property, good will, trade names, and inventory, to Sawmills and Edgers, Inc. ("Sawmills"), which continued to manufacture products at the purchased plant. The sale agreement stated that Sawmills was not assuming Edger Works' liabilities. After the sale, Edger Works continued to pay its corporate debts and changed its name, and Sawmills began to advertise itself as "formerly S & W Edger Works."

Prior to the time that Edger Works sold its assets to Sawmills, the infant plaintiff caught his hand in an Edgar Works-produced sawmill, leading to the amputation of several fingers. Both companies were sued. The Appellate Division, Third Department, acknowledged that in a prior decision it had adopted the "product line" exception, but, because that was a theory of liability, not jurisdiction, and grounds for the assertion of personal jurisdiction over Sawmills did not exist, it dismissed the company from the action. The Court of Appeals did not address the jurisdiction issue, instead taking on the theory of liability, which it unanimously refused to adopt.

There were two rationales for the rejection of the "product line" exception, Judge Susan Phillips Read's opinion explained. First, it would be a radical change in existing New York law with economic effects, as it would impose huge potential liabilities upon manufacturing businesses and thus discourage the purchase of assets, forcing liquidation of potentially selling companies. Such a change is better left to the Legislature, in the Court's view. Second, the Court stated, the theory is contrary to the basic rationale of strict products liability, which it described as putting responsibility for a defective product on the party best placed to eliminate the risk, its manufacturer.

Certainly a purchaser is not able to correct for defects in the design or manufacture of a product that was placed into the stream of commerce prior to the time that it acquired the assets of a manufacturing business, but in the case of accidents occurring after an acquisition, arguably the party continuing a product line is in a better position than the customer to avoid injuries caused by a failure to warn. On the facts of this case, however, where the accident occurred before Sawmills purchased the assets, imposition of liability upon it for failure to warn or any other basis for strict liability in tort, would shift the burden to a party that could not have prevented the injury.

Judicial Misconduct

Within roughly 30 days, the Court of Appeals was called upon to review determinations of the Commission on Judicial Conduct involving charges of alleged misconduct by two Justices of the Supreme Court and the sanctions imposed upon them. In *Matter of Hon. Laura D. Blackburne*, the Court accepted the sanction of removal, and in *Matter of Hon. Duane A. Hart*, the Court accepted the sanction of censure. *Per Curium* opinions were filed by the Court in both cases and drew the strong dissents by Judge George Bundy Smith, which were joined in by Judge Robert S. Smith (in *Blackburne*) and Judge Susan Phillips Read (in *Hart*).

What can be learned from both decisions is that judicial misconduct cases are, by their very nature, "sui generis," and that while the specific conduct of a judge may be determinative, the judge's acknowledgement of misconduct, expressed determination that it will not be repeated, and candor with the Commission, may make a difference on the level of sanction that will be accepted by the Court of Appeals.

Justice Blackburne, who acknowledged her misconduct, and whose position was supported in the Court by the briefs of significant *amici* and, before the Commission, by the testimony of respected political and judicial witnesses, could not overcome the basic fact that her actions were seen as impeding law enforcement and "exceeded all measure of acceptable judicial conduct."

Justice Blackburne, who sat in a Queens Treatment Court, which dealt with non-violent felons with a history of drug addiction, reached the erroneous conclusion that a Police Detective who had come to the court to arrest a defendant scheduled to appear before her that day, had misrepresented that he was in court only to interrogate the defendant. Without directly trying to determine from the Detective the purpose of his presence, the judge (despite being warned of the serious implications of what she planned to do) arranged for the suspected felon, when he arrived in court, to be removed from the building by a court officer via a back stairway reserved for judges, jurors and court staff, thereby avoiding arrest.

The burden of Justice Blackburne's position in the Court, which was embraced by the dissent, was that her conduct amounted to a single act of bad judgment, involving no venality, breach of trust, moral turpitude or personal gain and did not, under established precedents, justify removal as determined to be the appropriate remedy by the Commission. In rejecting this argument, the Court observed that the judge's conduct in "facilitat[ing] the escape of an accused violent felon" was itself unprecedented and sustained the sanction of removal.

Justice Hart, in what can be described only as a bizarre set of circumstances, summarily found a litigant before him in contempt of court, having previously concluded not to do so, and then reversed himself only when counsel for the litigant sought to make a record of the judge's conduct. When the trial concluded at the end of the day, the judge reversed himself again and vacated the contempt finding.

Here, unlike in *Blackburne*, the judge persisted in his judgment that he had been guilty of no misconduct and took the position that he would engage in the same conduct again if presented with similar circumstances. It appears that, at the core of the Court's ultimate determination -- sustaining censure rather than the lesser sanction of admonition -- was the exercise by Justice Hart of the awesome power of summary contempt, unjustified by the facts or the law, coupled with his intransigence, showing that if the more harsh sanction of reprimand were not imposed, he would do the same next time.

[1] Quoting *CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V.*, 100 N.Y.2d 215, 221 (2003).

[2] Quoting *CIBC Mellon Trust Co.*, 100 N.Y.2d at 221.

[3] The Court explained in *Semenetz* that the four exceptions to the rule against liability it previously had recognized are when (1) the corporation purchasing the assets expressly or impliedly assumes the selling corporation's tort liability, (2) the purchasing corporation consolidates or merges with the selling corporation, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transaction is entered into fraudulently escape the selling corporation's tort liabilities.