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Statute of Limitations—Licensed Foreign Corporation Held Non-Resident under C.P.A. § 13

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An apparent exception to the privity rule in New York and several other states allows the ultimate consumer to recover from a seller that traded directly with the consumer's agent. This agency theory has been applied to a wife's purchases from a retailer as agent of her husband. *Ryan v. Progressive Grocery Stores,* 255 N. Y. 388, 175 N. E. 105 (1937); *Gearing v. Berkson,* 223 Mass. 257, 111 N. E. 785 (1916). The theory was rejected where an infant was injured by goods bought by his mother. *Redmond v. Borden's Farm Products Co.,* 245 N. Y. 512, 157 N. E. 838 (1927).

The extension of warranty liability to other than the purchaser in the instant case was limited to the agency theory. The complaint alleged plaintiff resided with and jointly kept house with her sister, that food was purchased at joint expense and for joint consumption and that in purchasing from the defendant the sister acted "for herself and also as agent for plaintiff." The court carefully pointed out that strict privity was still necessary, but this case involved a plaintiff who was "an actual party to a contract negotiated through the agency of another."

Regardless of whether the agency theory is termed an exception to the privity requirement in New York, it nevertheless provides fertile ground for overcoming the stringency of the privity requirement and drastically expanding the scope of warranty liability.

Thomas Hagmeir

STATUTE OF LIMITATIONS — LICENSED FOREIGN CORPORATION HELD NON-RESIDENT UNDER C. P. A. § 13

An Illinois corporation licensed to do business in New York brought action in New York on an indemnity agreement executed in Maryland against an individual resident of New York who had been a resident of Maryland at the time of execution of the contract. *Held* (3-2): Judgment dismissing complaint on ground that action was barred by Maryland three year limitation statute affirmed. *American Lumbermen's Mutual Casualty Company of Illinois v. Cochrane,* 284 App. Div. 884, 134 N. Y. S. 2d 473 (1st Dep't 1954).

Section 13 of the Civil Practice Act provides:

> Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of

> action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a *resident* of this state, the time limited by the laws of this state shall apply. [Emphasis added.]

Plaintiff in the instant case alleged that as a corporation licensed to do business in New York, it was a "resident" of New York within the meaning of section 13, and entitled to the application of the New York six year statute of limitation.

It has been held that a foreign corporation which is *not* qualified to do business in the state is clearly not a resident under section 13. *Chesapeake Coal Co. v. Mengis,* 102 App. Div. 15, 92 N. Y. Supp. 1003 (1st Dep't 1905). While there are apparently no cases interpreting section 13 where a foreign corporation licensed to do business in New York has been involved, it has been held that such a corporation is not absent from the state for purposes of the tolling of the statute of limitations. *Comey v. United Surety Company,* 217 N. Y. 268, 111 N. E. 832 (1916). In a similar case, the Court of Appeals stated: "For the purposes of the Statute of Limitations this defendant is not a non-resident." *McConnell v. Caribbean Petroleum Co.,* 278 N. Y. 189, 194, 15 N. E. 2d 573, 578 (1938). The court in both the *Comey* and *McConnell* cases used "resident" in describing foreign corporations licensed to do business in the state. However, C. P. A. § 19 was being interpreted; for purposes of this section, "presence within the State, not residence, is made the test of whether the period of statutory limitation runs against a debtor." *Mack v. Mendels,* 249 N. Y. 356, 363, 164 N. E. 248, 255 (1928).

The court, in dealing with the inherent power of a court of equity to restrain the prosecution of an out-of-state action, found that a foreign corporation authorized to do business in the state was to be deemed a citizen of this state, and a *resident* thereof. *Webster v. Columbian Nat. Life Ins. Co.,* 131 App. Div. 837, 116 N. Y. Supp. 404 (1st Dep't), *aff'd mem.* 196 N. Y. 523, 89 N. E. 1114 (1909). In a similar holding, it was stated that when a corporation "has filed designation pursuant to the laws of this state, and received its license to do business here; it is . . . a resident of this state within the contemplation of the law." *Gaunt v. Nemours Trading Corporation,* 194 App. Div. 668, 671, 186 N. Y. Supp. 92, 95 (1st Dep't 1921). In a case concerned with the issue of residence for the purpose of a preference under a rule for bringing an action in New York County, it was held that foreign corporations doing business in the county "may be considered residents for the purpose of litigation." *Continental Grain Co.*

Inc. v. Christie, 259 App. Div. 126, 127, 18 N. Y. S. 2d 257, 259 (1st Dep't 1940). A foreign insurance corporation authorized to do business in this state was not required to give security for costs, the court holding that "such corporations are deemed to be, for most legal purposes and as parties to actions, domestic corporations." *Standard Marine Ins. Co. Ltd. v. Verity,* 243 App. Div. 639, 640, 276 N. Y. Supp. 801, 802 (2d Dep't 1935). A New Jersey manufacturing corporation authorized to do business in New York was found to be "a resident of the State within the contemplation of the law." *Dictaphone Corp. v. O'Leary,* 262 App. Div. 359, 364, 29 N. Y. S. 2d 352, 357 (3d Dep't 1941), *rev'd on other grounds,* 287 N. Y. 491, 41 N. E. 2d 68 (1942).

It should be noted that the cases holding that a foreign corporation licensed to do business in the state is to be treated as a domestic corporation dealt with New York business and the courts have stated their positions in terms which could be restricted to situations involving such business. For example in one case the court said: ". . . it [the foreign corporation] owes to the law of this state the privilege of doing business within our borders. . . . *In its transaction of business in New York,* it is to be dealt with, *pro hac vice,* as a domestic corporation." (Emphasis added.) *Comey v. United Surety Company, supra* at 274, 111 N. E. at 834.

It has been expressly held that a foreign corporation though qualified to do business under a license from the State of New Jersey is not a "resident" of that state. *Cramer v. Borden's Farm Products Co. Inc.,* 58 F. 2d 1028 (S. D. N. Y., 1932). This holding was relied on in interpreting the same New Jersey statute with the result that a New York corporation licensed to do business in New Jersey was not a "resident" within the New Jersey statute of limitations. *Heinzelman v. Union News Co.,* 191 Misc. 267, 76 N. Y. S. 2d 496 (Sup. Ct. 1948), aff'd 275 App. Div. 931, 90 N. Y. S. 2d 721 (1st Dep't 1949) *aff'd* 300 N. Y. 444, 92 N. E. 2d 37 (1950).

In the light of the purpose of section 13, to prevent forum shopping, it would seem expedient not to allow a foreign corporation, even though it is licensed to do business in the state, to use the New York statute of limitations on a foreign cause of action. Construing the language of section 13 *in vacuo,* the court's holding that this corporation was not a "resident" would seem quite correct. However, for the sake of uniformity, a holding that this corporation was a "resident" would be justifiable.

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