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Recent Jurisdiction Developments in the New York Court of Appeals

Jay C. Carlisle*

This article will discuss recent developments in long-arm jurisdiction under CPLR section 302[1] and two related New York Court of Appeals decisions. Specifically, the article will address *Fischbarg v. Doucet*,[2] which presents the court's expansive view of long-arm jurisdiction in light of recent technological developments,[3] and *Ehrenfeld v. Mahfouz*,[4] in which the court's decision

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1. *See* N.Y. C.P.L.R. 302 (McKinney 2001 & Supp. 2009). Section 302 of the CPLR is New York's long-arm statute. 2 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE CPLR ¶ 302.00, at 3-57 (2d ed. 2004). It allows New York State courts to assert jurisdiction over non-domiciliary persons and foreign corporations incapable of being served within New York, but which have the necessary contacts with the state that are listed in section 302. *See id.* Such a defendant may be served in New York pursuant to CPLR 313. *See id.* ¶ 313.00. Personal jurisdiction pursuant to section 302 is limited by the terms of section 302 as well as constitutional considerations. *See id.* ¶¶ 302.00-.01. CPLR 302 is a "restricted" long-arm statute in that it does not go as far as is constitutionally permissible. *Id.* ¶ 302.00, at 3-57. For a thorough historical discussion of the origins of CPLR 302, see Adolph Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFF. L. REV. 61 (1966). *See also* Jay C. Carlisle, *New York Civil Practice*, 42 SYRACUSE L. REV. 343, 361-67 (1991) [hereinafter Carlisle, *New York*] (describing basis for general jurisdiction under CPLR 301 and reach of long-arm jurisdiction under CPLR 302); Jay C. Carlisle, *Civil Practice*, 39 SYRACUSE L. REV. 75, 98-106 (1988) (same).

2. 880 N.E.2d 22 (N.Y. 2007).

3. *See id.* at 26-29. *See also* Patrick M. Connors, *The Golden Age of Personal Jurisdiction*, N.Y. L.J., May 19, 2008, at 3, col. 1. For a discussion of the Second

to limit long-arm jurisdiction was rejected by subsequent legislation, signaling a more expansive application of CPLR 302 in the future.[5]

I. Jurisdiction in New York

A New York State court cannot render a valid, binding judgment without jurisdiction.[6] Jurisdiction consists of subject matter jurisdiction (competence to entertain a claim or claims),[7] *in personam* jurisdiction (power over the person or property),[8] and proper notice.[9] All three components are necessary for a court to assert jurisdiction.[10] Subject matter jurisdiction and proper notice will not be discussed in this article.

If the defendant is domiciled, incorporated, or licensed to do business in New York, a New York court may exercise personal jurisdiction over that defendant.[11] Jurisdiction over the property includes both *in rem* and *quasi in rem* jurisdiction.[12] The former occurs when the litigation involves property within the territorial boundaries of New York.[13] The latter occurs when a non-domiciliary's property within the State is attached to ob-

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Circuit's interpretation of CPLR 302 with regard to electronic communication, see Jay C. Carlisle, *Second Circuit 2000-2001 Personal Jurisdiction Developments*, 21 QUINNIPIAC L. REV. 15, 33-39 (2001).

4. 881 N.E.2d 830 (N.Y. 2007).

5. Libel Terrorism Protection Act, ch. 66, § 3, 2008 N.Y. Laws 66 (codified as amended at N.Y. C.P.L.R. 302(d) (McKinney Supp. 2009)); *Ehrenfeld*, 881 N.E.2d at 833-38.

6. *See* Kagen v. Kagen, 236 N.E.2d 475, 477-79 (N.Y. 1968); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.01, at 3-8.

7. *See* Lacks v. Lacks, 359 N.E.2d 384, 387-88 (N.Y. 1976); Gager v. White, 432 N.Y.S.2d 388 (App. Div. 1980); 1 CIVIL PRETRIAL PROCEEDINGS IN NEW YORK § 9:1 (Philip M. Halpern et al. eds., 2000); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.02.

8. *See* Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd., 464 N.E.2d 432, 434-55 (N.Y. 1984); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00.

9. *See* Macchia v. Russo, 496 N.E.2d 680, 681-82 (N.Y. 1986); DAVID D. SIEGEL, NEW YORK PRACTICE § 58, at 83 (4th ed. 2005); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.04.

10. 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.01, at 3-8.

11. *See* SIEGEL, *supra* note 9, §§ 80-82, at 138-43; *id.* § 95, at 170; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-6.

12. SIEGEL, *supra* note 9, § 101, at 179; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-7.

13. *See* SIEGEL, *supra* note 9, § 101, at 179; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-7.

tain a basis for jurisdiction in a cause of action not directly related to the property.[14] These traditional grounds for jurisdiction, referred to as general jurisdiction,[15] were developed prior to the adoption of the CPLR and were subsequently incorporated into CPLR 301.[16]

Specific jurisdiction pursuant to CPLR 302 permits New York courts to assert long-arm jurisdiction over non-domiciliary individuals and corporations that are not subject to general jurisdiction.[17] Jurisdiction under CPLR 302 is, however, restricted to the contacts listed in the statute,[18] and the claim over which jurisdiction is asserted must arise out of those contacts.[19] Moreover, the long-arm statute does not extend as far as is constitutionally permissible.[20] In addition to being constrained by the Due Process Clause of the Fourteenth Amendment, long-arm jurisdiction is also restricted by article I, section six of the New York State Constitution.[21]

In personam jurisdiction must be determined separately for each cause of action asserted in the plaintiff's complaint.[22] Similarly, a third-party plaintiff must establish personal jurisdic-

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14. *See* SIEGEL, *supra* note 9, § 101, at 179-80; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-7. *See also* Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd., 464 N.E.2d 432, 434 (N.Y. 1984) ("Prior to the Supreme Court's expansion of the recognized bases for extraterritorial jurisdiction over a nondomiciliary, those who wished to sue in this State often resorted to the doctrine of quasi-in-rem jurisdiction to force a nondomiciliary defendant to litigate a claim in a forum where the defendant happened to own property.").

15. *See* 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-6; Carlisle, *New York*, *supra* note 1, at 361.

16. *See* 2 WEINSTEIN ET AL., *supra* note 1, ¶ 301.00, at 3-6; Carlisle, *New York*, *supra* note 1, at 361. *See also* Vincent Alexander, *'Doing Business' Jurisdiction: Some Unresolved Issues*, N.Y. L.J., Mar. 19, 2001, at 3, col. 1.

17. *See* 1 CIVIL PRETRIAL PROCEEDINGS, *supra* note 7, §§ 9:1, 9:13; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.00, at 3-57.

18. *See* 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.00, at 3-57; Connors, *supra* note 3.

19. *See* McGowan v. Smith, 419 N.E.2d 321, 323 (N.Y. 1983); Williams v. Enterprise Rent-A-Car of Boston, Inc., 826 N.Y.S.2d 59, 60 (App. Div. 2006); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.00, at 3-57.

20. Kreutter v. McFadden Oil Corp., 522 N.E.2d 40, 46 (N.Y. 1988); Talbot v. Johnson Newspaper Corp., 522 N.E.2d 1027, 1027 (N.Y. 1988); SIEGEL, *supra* note 9, § 84, at 144; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.00, at 3-57.

21. *See* Carlisle, *New York*, *supra* note 1, at 346 (citing Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169 (N.Y. 1978)).

22. *See* 1 CIVIL PRETRIAL PROCEEDINGS, supra note 7, §§ 9:1, 9:13; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.03, at 3-66.

tion over a third-party defendant on an impleader action and over a co-defendant on a cross-claim action.[23] Courts have considerable leeway in deciding a motion to dismiss for personal jurisdiction and, if the plaintiff makes a prima facie showing of jurisdiction, may order "jurisdictional discovery" under CPLR 3211(d).[24]

II. Current Long-Arm Developments

A. Fischbarg v. Doucet

In *Deutsche Bank Securities, Inc. v. Montana Board of Investments*,[25] the Court of Appeals acknowledged that "technological advances in communication enable a party to transact enormous volumes of business within a state without physically entering it."[26] The court's observation harkens back to a series of its earlier cases reflecting this same principle.[27] Commentators had predicted that the Court of Appeals would explicitly reduce the importance of presence indicating contacts by finding that it is immaterial whether the non-resident defendant ever entered New York to transact business.[28] Finally, in De-

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23. *See* SIEGEL, *supra* note 9, § 58, at 83; *id.* § 80, at 138; 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.03, at 3-66.

24. *See* Peterson v. Spartan Industries, 310 N.E.2d 513, 514-15 (N.Y. 1974); 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.01, at 3-59 to -60. Ultimately, the plaintiff must establish jurisdiction by a preponderance of the evidence. 2 WEINSTEIN ET AL., *supra* note 1, ¶ 302.00, at 3-59; Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 974 (2006). In making the prima facie determination, New York courts should consider the pleadings and affidavits in the light most favorable to the plaintiff. *See* SIEGEL, *supra* note 9, § 93, at 168-69; Paul H. Aloe, *Civil Practice*, 58 SYRACUSE L. REV. 713, 740 (2008).

25. 850 N.E.2d 1140 (N.Y. 2006).

26. *Id.* at 1142-43. Specifically, the Court of Appeals in *Deutsche Bank* held that a sophisticated institutional trader who never physically entered New York in any way did, in fact, transact business in the state by initiating communications with a New York securities broker through an electronic instant messaging service when agreeing to sell fifteen million dollars in bonds. *See id.* at 1141-43. Recent New York trial court decisions build on the Court of Appeals' pronouncement in analyzing jurisdiction in the context of electronic communications. *See* Mark A. Berman, *Long-Arm Jurisdiction, E-mail and Web Sites*, N.Y. L.J., Mar. 31, 2009, at 5, col. 1.

27. *Deutsche Bank*, 850 N.E.2d at 1143 (citing Ehrlich-Bober & Co. v. Univ. of Houston, 404 N.E.2d 726 (N.Y. 1980); Parke-Bernet Galleries, Inc. v. Franklyn, 256 N.E.2d 506 (N.Y. 1970)).

28. *See* OSCAR G. CHASE & ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK § 1.06, at 55 (2d ed. 1990) (questioning "whether physical presence should be a *sine*

cember 2007, the Court of Appeals acted. In *Fischbarg v. Doucet*,[29] the Court of Appeals unanimously agreed to exercise long-arm jurisdiction, pursuant to CPLR 302(a)(1), over two Californian defendants who had retained the plaintiff attorney to represent them in a lawsuit litigated in Oregon.[30]

In *Fischbarg*, one of the defendants, the president of a California corporation, telephoned the plaintiff, an attorney in New York, to discuss a potential claim against an Oregon corporation.[31] The defendant then sent a letter to the plaintiff confirming that he would represent her company on a contingency fee basis. The defendant enclosed "contracts, copyrighted material, [an] outline of events, and copies of correspondence for plaintiff's review."[32] When the California corporation was sued in the United States District Court for the District of Oregon, the plaintiff was admitted to practice *pro hac vice* and represented the corporation from his office in New York City.[33] The plaintiff took depositions, conducted court conferences, and even argued a summary judgment motion by telephone from his New York office.[34] Ultimately, the plaintiff sent the defendant a bill for approximately $60,000.[35] The representation terminated when the defendants disputed the plaintiff's fees.[36] The plaintiff tried to collect his fees by filing an application with the Oregon district court, but his claim was dismissed.[37] He then commenced an action against the California defendants in the Supreme Court of New York County.[38] The defendants made a pre-answer motion to dismiss for lack of jurisdiction on the grounds

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qua non in an age in which presence through electronic means is for many purposes as effective as a visit to New York" (emphasis added)).

29. 880 N.E.2d 22 (N.Y. 2007). *Fischbarg* was handed down simultaneously with *Ehrenfeld v. Mahfouz*, 881 N.E.2d 830 (N.Y. 2007), and reflects the multi-jurisdictional nature of law practice in the new electronic technological age. *See* Connors, *supra* note 3.

30. *See Fischbarg*, 880 N.E.2d at 24.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 25.

36. *Id.*

37. *Id.*

38. *Id.*

that they did not have minimum contacts with New York, which the trial court dismissed.[39]

Based on these facts, the Court of Appeals affirmed the prior 3-2 decision by the Appellate Division for the First Department,[40] which had found the defendants subject to jurisdiction under CPLR 302(a)(1) because the dispute arose out of a business transaction within New York.[41] The Court of Appeals applied the criteria set forth in *Deutsche Bank*, deciding first that the defendants had purposefully availed themselves "'of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[42] The defendants' lack of physical presence in New York was entirely irrelevant.[43] The quality and nature of the defendants' electronic contacts with the state was sufficient to reasonably conclude that they had deliberately reached out to the plaintiff in New York to derive benefits from his representation of them in Oregon.[44]

Further, the court held that there was a "substantial relationship" between the defendants' activities and the plaintiff's claim.[45] The defendants' conversations with the New York

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39. *Id.* at 26.

40. *Id.* at 30.

41. *See* Fischbarg v. Doucet, 832 N.Y.S.2d 164, 167-69 (App. Div. 2007).

42. *Fischbarg*, 880 N.E.2d at 26 (quoting McKee Elec. Co. v Rauland-Borg Corp., 229 N.E.2d 604, 607 (N.Y. 1967)).

43. *Id.* at 27 (citing Parke-Bernet Galleries, Inc. v Franklyn, 256 N.E.2d 506, 508 (N.Y. 1970)). *See also id.* at 26 ("CPLR 302(a)(1) jurisdiction is proper 'even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.'" (quoting Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 850 N.E.2d 1140, 1142 (N.Y. 2006))).

44. *Id.* at 27-28.

45. *Id.* at 29-30. Similarly, a New York trial court recently upheld jurisdiction in a case in which a Netherlands corporation and its agents had initiated phone calls and e-mail messages to the plaintiff in New York, had attended meetings in New York, and where the loan at issue was prepared and negotiated in New York. Berman, *supra* note 26 (citing NA Parnassus B.V. v. Ornelas-Hernandez, No. 600997/08, at 4 (Sup. Ct. Jan. 27, 2009)). In contrast,

> a trial court recently found that electronic communications and a single meeting in New York were too minimal for defendant to have reasonably anticipated being hauled into court in New York, where the subject agreement was not negotiated or to be performed in New York, and the parties conferred by e-mail, express mail and telephone from their respective foreign residences.

plaintiff attorney focused directly on his work in representing the defendants, which therefore demonstrated that his claim arose out of the business transaction in New York.[46] Thus, the "arising out of" requirement was met.[47] For the above reasons, the court also found that it would not violate fundamental notions of due process and fairness to subject the defendants to jurisdiction in New York "because they should have reasonably expected to defend against a suit based on their relationship with plaintiff in New York."[48]

Fischbarg, however, does not provide the clarity that some assume it does.[49] The decision does not explain precisely what level of communication is necessary to constitute a transaction of business. Unlike the Court of Appeals decision in *Parke-Bernet Galleries, Inc. v. Franklyn*,[50] it is not clear from *Fischbarg* what and how many contacts between a client and his or her attorney are sufficient to provide a basis for jurisdiction.[51] For example, can jurisdiction be established where a Californian cli-

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Id. (citing Shahidsaless v. Ebadi, No. 115835/07 (Sup. Ct. Jan. 12, 2009)).

46. *Fischbarg*, 880 N.E.2d at 29-30.

47. *See id.* at 30. *See also* McGowan v. Smith, 419 N.E.2d 321, 323 (N.Y. 1981) ("Essential to the maintenance of a suit against a nondomiciliary under CPLR 302 . . . is the existence of some articulable nexus between the business transacted and the cause of action sued upon.").

48. *Fischbarg*, 880 N.E.2d at 30.

49. *See* Connors, *supra* note 3 ("[T]he result in future cases may be less predictable if the lawyer initiates the attorney-client relationship through permissible advertising and solicitation, the client's contacts with New York are minimal, or the client is not a sophisticated user of legal services. As the Court conceded, 'it is impossible to precisely fix those acts that constitute a transaction of business' giving rise to long-arm jurisdiction in New York."). In a recent New York trial court decision on a motion to dismiss, the court, utilizing a veil-piercing theory,

> upheld jurisdiction on a claim for legal fees, notwithstanding that neither defendant had signed a retainer agreement with plaintiff New York counsel and the corporate defendant's offices were registered in the British Virgin Islands, and that such defendant did no business in New York, and did not maintain offices, employ personnel or have a corporate bank account in New York.

Berman, *supra* note 26 (citing John E. Osborn, P.C. v. Jasper Int'l Bus. Inc., No. 601190/08 (Sup. Ct. Jan. 12, 2009)).

50. 256 N.E.2d 506 (N.Y. 1970). In *Parke-Bernet*, the Court of Appeals engaged in a very detailed analysis of the facts of the case and how they supported a finding of valid long-arm jurisdiction. *See id.* at 507-09. This analysis is explained in detail below.

51. *Compare Fischbarg* 880 N.E.2d at 26-30, *with Parke-Bernet*, 256 N.E.2d at 507-09. *See also infra* notes 52-58.

ent enters into a retainer agreement with a New York attorney through telephone or e-mail? Moreover, how much "litigation activity" must the lawyer conduct on behalf of the client? Does it matter if the activity is conducted within New York or elsewhere? Is one contact sufficient or must there be a series of contacts to constitute a transaction of business? While these and other questions remain unresolved, New York courts have provided some guidance.

For example, in *Parke-Bernet*, the defendant, a California resident, had actively participated in a New York auction run by the plaintiff through an open telephone line.[52] His bids were relayed to an employee of the plaintiff, who announced them to other bidders in the auction room.[53] The defendant bid successfully on two items but did not honor the purchase when the plaintiff demanded payment.[54] As a result, the plaintiff initiated an action against the defendant in the New York County Supreme Court.[55]

The Court of Appeals held that although the defendant only completed a single transaction, the requirements of CPLR 302(a)(1) were satisfied.[56] The court accepted the plaintiff's argument that the defendant had projected himself into New York through his participation in the bidding via telephone.[57] Viewing the defendant's direct and personal involvement in the auction by open telephone line as sufficient to establish "presence," the court found that such "presence," coupled with active participation in the bidding process, amounted to the sustained and substantial transaction of business in New York.[58]

It is possible that the nature and frequency of the communications to New York will be a determinative factor in evaluating jurisdictional issues in such cases. For example, in *Ehrlich-*

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52. 256 N.E.2d at 507.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 508.

57. *Id.*

58. *Id.* at 508-09. *But see* M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc., 270 N.Y.S.2d 672, 673 (App. Div. 1966) (holding that defendant, a New Jersey corporation, did not transact business when its employee ordered goods via telephone from the New York plaintiff).

Bober & Co. v. University of Houston,[59] jurisdiction over a nonresident defendant was sustained on the basis of telephone calls made to New York that were coupled with transactions between the parties—some of which were made when the defendant's representative came to the plaintiff's New York office.[60] Relying on *Ehrlich-Bober*, the Appellate Division has held that CPLR 302(a)(1) jurisdiction existed over a stockbroker's Alabama customer who placed orders via telephone and mail but never physically entered New York.[61] Similarly, in *Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apartments, Ltd.*,[62] which involved a fee dispute between a law firm and client,[63] the Appellate Division held that the defendant's extensive communications via telephone and letter with the plaintiff (totaling ninety-three contacts) were sufficient to constitute a transaction of business under CPLR 302(a)(1).[64]

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59. 404 N.E.2d 726 (N.Y. 1980).

60. *See id*. at 731.

61. L.F. Rothschild, Unterberg, Towbin v. Thompson, 433 N.Y.S.2d 6, 7 (App. Div. 1980). *But see* L.F. Rothschild, Unterberg, Towbin v. McTamney, 452 N.Y.S.2d 630, 631-32 (App. Div. 1982) (rejecting assertion of jurisdiction over a Pennsylvania defendant whose several telephone conversations with a New York broker resulted in a single purchase order).

62. 543 N.Y.S.2d 978 (App. Div. 1989).

63. *Id.* at 980.

64. *Id.* at 981. *See also* Kreutter v. McFadden Oil Corp., 522 N.E.2d 40, 43 (N.Y. 1988) ("With the growth of national markets for commercial trade and technological advances in communication and travel systems, however, an enormous volume of business may be transacted within a State without a party ever entering it. . . . So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State."); Black River Assocs. v. Newman, 637 N.Y.S.2d 880 (App. Div. 1996) (holding that a Californian defendant who contracted to purchase real property was subject to jurisdiction in New York even though he never entered the state but conducted negotiations by telephone). *But see* Libra Global Tech. Servs. v. Telemedia Int'l, Ltd., 719 N.Y.S.2d 53 (App. Div. 2001) (holding that a video conference where the parties negotiated part of a contract did not amount to transacting business under CPLR 302(a)(1)); Concrete Pipe & Prods. Corp. v. Modern Bldg. Materials, Inc., 624 N.Y.S.2d 496, 497 (App. Div. 1995) ("It is well established that a foreign defendant whose only contact with New York is the purchase of goods by telephone or mail from a New York plaintiff is not subject to long-arm jurisdiction.").

B. Ehrenfeld v. Bin Mahfouz

In *Ehrenfeld v. Bin Mahfouz*,[65] the New York Court of Appeals held that long-arm jurisdiction did not extend to lawsuits against foreign litigants by New York victims of libel tourism.[66] The plaintiff, a New York author, published a book in the United States accusing the defendant, a Saudi Arabian businessman, of supporting terrorism.[67] A small number of the books were purchased in England through the Internet, and the defendant filed suit in London against the author for libel.[68] The defendant obtained a default judgment against the plaintiff, who failed to appear in the case.[69] The plaintiff then sued the defendant in the Southern District of New York to have the foreign judgment declared unenforceable in the United States.[70] The defendant moved to dismiss the plaintiff's claim, arguing that the court lacked personal jurisdiction over him because his contacts with New York were limited to providing the plaintiff, through mail and e-mail, with information regarding the foreign libel case and posting the English court's order on his website, which was accessible in New York.[71]

The district court subsequently granted the defendant's motion to dismiss,[72] holding that it lacked personal jurisdiction over the defendant.[73] The plaintiff appealed this decision to the Second Circuit, which certified the inquiry to the New York Court of Appeals.[74] The Court of Appeals resolved the issue by holding that the contacts did not constitute a "transaction of business" under CPLR 302(a)(1) because the defendant neither purposefully availed himself of the privileges and benefits of New York law nor sought to establish a business relationship with the plaintiff.[75]

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65. 881 N.E.2d 830 (N.Y. 2007).
66. *See id.* at 834-38.
67. *Id.* at 831-32.
68. *Id.* at 832.
69. *Id.* at 832-33.
70. *Id.* at 833.
71. *See id.* at 834-35.
72. Ehrenfeld v. Mahfouz, No. 04 Civ. 9641(RCC), 2006 U.S. Dist. LEXIS 23423, at *14 (S.D.N.Y. Apr. 25, 2006).
73. *See id.* at *9-14.
74. Ehrenfeld v. Mahfouz, 489 F.3d 542, 551 (2d Cir. 2007).
75. *Ehrenfeld*, 881 N.E.2d at 838.

The New York State Legislature has since overturned *Ehrenfeld* by enacting a new subdivision (d) to CPLR 302.[76] Specifically, CPLR 302(d) provides:

> The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States Constitution provided: 1. the publication at issue was published in New York, and 2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.[77]

As a result, jurisdiction can now be established over foreign defendants in circumstances like those present in *Ehrenfeld*.[78]

The question of whether the New York State nexus requirements in this new section are constitutional remains unanswered.[79] It has been argued that this statute may be too expansive and exceed constitutional restrictions on assertion of basis jurisdiction.[80] Also, a literal reading of CPLR 302(d) may give rise to "reverse libel tourism."[81] This means that any au-

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76. Libel Terrorism Protection Act, ch. 66, § 3, 2008 N.Y. Laws 66 (codified as amended at N.Y. C.P.L.R. 302(d) (McKinney Supp. 2009)).

77. N.Y. C.P.L.R. 302(d).

78. *See* Paul H. Aloe, *Unraveling Libel Tourism*, N.Y. L.J., June 18, 2008, at 4, col. 4.

79. *See id.*

80. *See id.*

81. *See id.*

thor with enough contacts and assets in New York may therefore be able to sue a foreign libel judgment holder.[82]

III. Conclusion

The Court of Appeals' recent holding in *Fishbarg* represents the court's commitment to expansive application of New York's long-arm statute in response to new technology.[83] This will likely have the effect of subjecting many more non-domiciliary defendants to jurisdiction in New York. Moreover, the Legislature's swift response in remedying the defects in the *Ehrenfeld* decision demonstrates that any reluctance the court has to extending the reach of New York's long-arm statute may be rectified legislatively.[84]

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82. *Id.* Professor Aloe explains:

> A party who is libeled can generally bring suit in any jurisdiction in which the libelous statement may have been published. Effectively, with modern commerce, this means that a libel plaintiff can choose to sue virtually anywhere the work may have been sold. The effect and intent of these tactics is to strip U.S. authors of the protections they would have under U.S. law even though the publication occurred in the United States.

Id.

83. *See supra* notes 29-48.

84. *See supra* notes 76-78.