2014

Seeking Justice in the Empire State: Court of Appeals Broadens the Reach of Long Arm Jurisdiction and Clarifies the Statutory Guidelines for Application of CPLR Section 302(A)(1)

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SEEKING JUSTICE IN THE EMPIRE STATE: COURT OF APPEALS BROADENS THE REACH OF LONG ARM JURISDICTION AND CLARIFIES THE STATUTORY GUIDELINES FOR APPLICATION OF CPLR SECTION 302(A)(1)

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I. INTRODUCTION

This article will discuss developments in long-arm jurisdiction under CPLR section 302(a)(1)[1] and analyze the recent New York State Court of Appeals's thoughtful and instructive decision in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*.[2] *Licci* decided the question of whether a non-domiciliary's maintenance of a bank account in New York constituted a "transaction of business" out of which the plaintiff's claims arose under the state's long-arm statute. The *Licci* plaintiffs had alleged that the defendant funded a terrorist organization responsible for the injuries and deaths of certain plaintiffs and decedents they represented.[3] The *Licci* opinion did not decide if New York had jurisdiction over the

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[1] N.Y. C.P.L.R. 302(a)(1) (McKinney 2013). Section 302 of the CPLR is New York's long-arm statute. 2 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶ 302.00 (David L. Ferstendig ed., 2d ed. 2013). It allows New York State courts to assert jurisdiction over non-domiciliary persons and foreign corporations incapable of being served within New York, but who have the necessary contacts with the state that are listed in section 302. Such defendants may be served in New York pursuant to CPLR 313. N.Y. C.P.L.R. 313 (McKinney 2013).

[2] Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012).

[3] *Id.* at 333, 984 N.E.2d at 896, 960 N.Y.S.2d at 698.

defendant but analyzed a certified question[4] from the United States Court of Appeals for the Second Circuit regarding whether there was a statutory basis for personal jurisdiction over the defendant.[5]

In *Licci*, the Empire State's highest court answered the Second Circuit's question in the affirmative, expansively defining the "transaction of business" clause under CPLR section 302(a)(1)[6] and extending the jurisdictional reach of the long-arm statute's "arising out of" provision.[7] The *Licci* opinion is a broad and pragmatic statutory interpretation of CPLR section 302(a)(1) by the Court of Appeals. It signals the court's willingness to apply the state's long-arm statute as its drafters intended,[8] clarifies prior jurisprudential entanglement of statutory and constitutional issues,[9] and is welcome news for the plaintiff's bar.[10]

A. Jurisdiction in New York

A New York State court does not have jurisdiction to render a valid, binding judgment unless it has "subject matter jurisdiction (competence to entertain a claim or claims), *in personam* jurisdiction (power over the person or property), and proper notice."[11] Consideration of subject matter jurisdiction and notice are not included in this article. If the defendant consents, is

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[4] Interjurisdictional certification is the process that enables a federal court, prior to ruling on a matter, to "obtain a definitive answer from a state's highest court on an unsettled question of state law." Sol Wachtler, Lecture, *Federalism is Alive and Well and Living in New York*, 75 ALB. L. REV. 659, 661–62 (2012). The certification mechanism thereby eliminates a federal court's need to speculate as to how a state court would rule in such situations. *See generally* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000) (providing an in-depth treatment of the topic in New York).

[5] O'Neill v. Asat Trust Reg. (*In re* Terrorist Attacks on September 11, 2001), 714 F.3d 659, 681 n.16 (2d Cir. 2013); *see also* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 66, 74 (2d Cir. 2012) (certifying questions to the New York Court of Appeals), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).

[6] *See infra* Part III.A.

[7] *See infra* Part III.B.

[8] *See* Adolph Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFF. L. REV. 61, 62 (1966); *see also infra* Part IV.B.ii (discussing the Court of Appeals's application of the long-arm statute in *Licci*).

[9] *See infra* Part IV.

[10] *See* David D. Siegel, *Longarm Jurisdiction: Foreign Bank's Use of Correspondent N.Y. Bank for Money Transfers that Aid Foreign Terrorist Acts Can Support N.Y. Jurisdiction*, N.Y. ST. L. DIG., Dec. 2012.

[11] Jay C. Carlisle, *Recent Jurisdiction Developments in the New York Court of Appeals*, 29 PACE L. REV. 417, 418 (2009).

domiciled, incorporated, licensed to do business, or is doing business in New York, a state court may exercise personal jurisdiction over that defendant.[12] Jurisdiction over the property includes *in rem* and *quasi-in rem* jurisdiction.[13] These traditional grounds for *in personam* or power jurisdiction are referred to as general jurisdiction and were developed prior to the adoption of the CPLR.[14] They were incorporated into CPLR 301 by the New York legislature.[15]

Specific jurisdiction is authorized by CPLR 302.[16] It is a "single contact" long-arm statute, which permits the state's courts to restrictively assert *in personam* jurisdiction over non-domiciliary individuals, corporations and other entities designated by the statute that are not subject to general jurisdiction.[17] Jurisdiction under CPLR 302 is restricted by the contacts enumerated in the statute and the claims they are based on must arise out of those contacts.[18] The long-arm statute does not extend as far as is constitutionally permissible[19] and its application cannot violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[20]

In personam jurisdiction must be analyzed separately for each cause of action in the plaintiff's complaint and for each defendant, co-defendant, and third party defendant.[21] New York courts

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[12] *See* DAVID D. SIEGEL, NEW YORK PRACTICE §§ 80–82, 95, at 142–47, 176–78 (5th ed. 2011).

[13] *See id.* § 101, at 185–87. *In rem* jurisdiction occurs when the litigation directly involves property within the state such as mortgage foreclosures, liens or questions of ownership or status of the property. *Id.* § 101, at 186. *Quasi-in-rem* jurisdiction occurs when a non-domiciliary's property within New York is properly and timely attached to obtain a basis, up to the value of the property, in a cause of action having a substantial and meaningful relationship with the property. *See id.* § 104, at 190–94.

[14] Jay C. Carlisle, *New York Civil Practice*, 42 SYRACUSE L. REV. 343, 361–62 (1991).

[15] *Id.*

[16] N.Y. C.P.L.R 302 (McKinney 2013).

[17] Jay C. Carlisle, *Civil Practice*, 39 SYRACUSE L. REV. 75, 98–106 (1988).

[18] Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 339–40, 984 N.E.2d 893, 900–01, 960 N.Y.S.2d 695, 702–03 (2012); *see also* Johnson v. Ward, 4 N.Y.3d 516, 520, 829 N.E.2d 1201, 1203, 797 N.Y.S.2d 33, 35 (2005) (holding there was an insufficient nexus between the alleged transactions of business conducted in New York State and the plaintiff's personal injury claim from a motor vehicle accident); McGowan v. Smith, 52 N.Y.2d 268, 271, 419 N.E.2d 321, 322, 437 N.Y.S.2d 643, 644 (1981) (observing that courts may exercise personal jurisdiction over a non-domiciliary under CPLR section 302(1)(a) where the cause of action arises from the non-domiciliary's transaction of business within the state).

[19] Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd., 62 N.Y.2d 65, 71, 464 N.E.2d 432, 435, 476 N.Y.S.2d 64, 67 (1984) ("[I]n setting forth certain categories of bases for long-arm jurisdiction, [the New York long-arm statute] does not go as far as is constitutionally permissible.").

[20] *See* Carlisle, *supra* note 17, at 101–02.

[21] Jay C. Carlisle, *Second Circuit 2000-2001 Personal Jurisdiction Developments*, 21

determine if *in personam* jurisdiction exists by using a three-step process. First, assuming the court has competence to hear a matter, the court determines whether the plaintiff's service of process upon the defendant was procedurally proper.[22] Second, the court determines whether there is a statutory basis under CPLR 301 or 302 that renders the service of process effective.[23] Third, the court determines whether the exercise of *in personam* jurisdiction comports with constitutional principles.[24] The New York long-arm statute does not extend to the constitutional limits established by *International Shoe Co. v. Washington*[25] and its progeny. Thus, sometimes a court's statutory analysis under CPLR 302 may resemble the due process analysis under the Fourteenth Amendment leading to an entanglement in New York decisional jurisprudence.[26] This entanglement appears particularly evident with respect to CPLR section 302(a)(1)[27] and can result in a faulty jurisdictional analysis.[28]

Federal courts sitting in diversity actions hearing claims that do not involve nationwide service of process must, under *Erie* principals, first apply New York State substantive law to determine if there is a statutory basis for *in personam* jurisdiction under CPLR

QUINNIPIAC L. REV. 15, 17 (2001).

[22] *See* CIVIL PRETRIAL PROCEEDINGS IN NEW YORK § 9:2 (Philip M. Halpern et al. eds., 2000).

[23] *Id.* § 9:3–9:4.

[24] *Id.* § 9:1.

[25] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). The U.S. Supreme Court held that states' power to exercise *in personam* jurisdiction over non-domiciliary defendants was subject to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Thus, an out-of-state defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[26] *See* Best Van Lines, Inc. v. Walker, 490 F.3d 239, 246–47 (2d Cir. 2007) ("New York decisions thus, at least in their rhetoric, tend to conflate the long-arm statutory and constitutional analyses by focusing on the constitutional standard: whether the defendant's conduct constitutes 'purposeful[] avail[ment]' 'of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (alterations in original) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))); McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382, 229 N.E.2d 604, 607, 283 N.Y.S.2d 34, 37–38 (1967).

[27] *See* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 66, 74 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013); *see also* Chloé v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 169 (2d Cir. 2010) (taking note of the entanglement issue); Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 508, 881 N.E.2d 830, 834–35, 851 N.Y.S.2d 381, 385–86 (2007) (using a due process analysis as guidance in analyzing New York's long arm statute).

[28] *See infra* Part IV.B.i.

302.[29] Only if statutory jurisdiction exists, must the court then decide if an assertion of jurisdiction is permitted under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[30]

B. The Licci *Opinions*

The *Licci* case was originally filed in New York State Supreme Court and removed to the United States District Court of the Southern District of New York.[31] The district court dismissed plaintiff's claims, in part, on the grounds there was not a statutory basis for them under CPLR section 302(a)(1).[32] The court held that defendant Lebanese Canadian Bank ("LCB") did not "transact[] business" in New York State[33] and that the plaintiff's claims did not arise out of the act enumerated in the long-arm statute because there was not an "articulable nexus" or "substantial relationship" between the claims and the alleged "transaction of business" in New York.[34] The district court stated "[t]he injuries and death suffered by plaintiffs and their family members were caused by the rockets launched by Hizbollah, not by the banking services provided by LCB through its correspondent account or wire transfers with Amex Bank via New York."[35] Finally, the district court ignored the circuit court's "constitutional avoidance" doctrine and conducted a due

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[29] *See* Fort Knox Music, Inc. v. Baptiste, 203 F.3d 193, 196 (2d Cir. 2000) (stating that federal courts must apply the personal jurisdiction rules of the forum state); Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) (dismissing for lack of personal jurisdiction where plaintiff failed to allege that the defendant committed a tortious act in New York, as required under the New York long-arm statute); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985) ("[P]ersonal jurisdiction . . . is determined by reference to the law of the jurisdiction in which the court sits."); Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (holding that in diversity actions jurisdiction is governed by the law of the state in which the court sits).

[30] *E.g.*, A. I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 82–83 (2d Cir. 1993) (finding that the court's exercise of personal jurisdiction over defendant in a breach of contract action for defendant's failure to perform financial services in New York did not offend due process).

[31] *See* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 330–31, 984 N.E.2d 893, 894, 960 N.Y.S.2d 695, 696 (2012).

[32] *Id.* at 332, 984 N.E.2d at 895, 960 N.Y.S.2d at 697.

[33] *Id.*

[34] Licci *ex rel.* Licci v. Am. Express Bank Ltd., 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010) *aff'd in part sub nom.* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 672 F.3d 155 (2d Cir. 2012), *questions certified to* New York Court of Appeals, 673 F.3d 50 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).

[35] *Id.*

process inquiry finding there was no jurisdiction over LCB.[36]

Plaintiffs appealed to the Second Circuit which addressed solely the question of whether there was a statutory basis under CPLR section 302(a)(1) for *in personam* jurisdiction.[37] The circuit court, after a thoughtful and instructive statutory analysis, concluded that Court of Appeals law did not appear to have addressed the jurisdictional questions presented in *Licci* and that the decisions of other New York courts did not assist the circuit court in predicting with confidence how the Court of Appeals would decide them.[38] The circuit court concluded that important public policy choices, best left to New York's highest court, were involved and certified them to the Court of Appeals.[39]

Part II of this article will summarize the *Licci* holdings of the district and circuit court. Part III will analyze the Court of Appeals decision in *Licci*. Part IV will explain the Court of Appeals's helpful clarification of the jurisprudential entanglement issue under CPLR section 302(a)(1) and Part V predicts how *Licci* will impact future statutory jurisdictional inquiries in New York State and federal courts.

II. SUMMARY OF THE *LICCI* FEDERAL OPINIONS

A. Licci*: The United States District Court for the Southern District of New York*

The district court's opinion was issued on March 31, 2010 in the form of a Memorandum Decision and Order by Judge George B. Daniels.[40] The district court granted defendant American Express Bank Ltd.'s ("Amex Bank") motion to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) and defendant LCB's motion to dismiss under 12(b)(6) and Federal Rule of Civil Procedure 12(b)(2).[41]

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[36] *Id.* Under the doctrine of constitutional avoidance, if the plaintiffs premise their theory of *in personam* jurisdiction upon CPLR 302, and if the district court found the requirements of the long-arm statute were not satisfied, there was no need to address the question of whether jurisdiction would comport with the Due Process Clause of the Fourteenth Amendment. *Id.* at 406; *see also* United States v. Magassouba, 544 F.3d 387, 404 (2d Cir. 2008) (collecting the cases discussing the constitutional avoidance doctrine).

[37] *Licci*, 673 F.3d at 54.

[38] *See id.* at 61–66.

[39] *Id.* at 74–75.

[40] *Licci*, 704 F. Supp. 2d at 404.

[41] *Id.*

1. *In Personam* Jurisdiction Over LCB

Judge Daniels explained that since no evidentiary hearing or discovery had been held plaintiffs need only make a prima facie showing that *in personam* jurisdiction over LCB exists.[42] He noted, "The Court is to accept all averments of jurisdictional facts as true, and construe the pleadings and affidavits in plaintiffs' favor," and that he "must . . . determine whether New York state law provides a basis to assert personal jurisdiction over LCB, and if so, must then determine whether the exercise of jurisdiction would comport with constitutional principles of due process."[43] Plaintiffs argued that LCB was subject to *in personam* jurisdiction under New York's long-arm statute, CPLR section 302(a)(1), which required a showing that LCB transacted business in New York and that the plaintiffs' claims arose from the business activity.[44] Judge Daniels stated, "The mere maintenance of correspondent bank account with a financial institution in New York is not, standing alone, a sufficient basis to subject a foreign defendant to personal jurisdiction under [section] 302(a)(1)."[45] He admitted that on rare occasions active use of a correspondent account may confer *in personam* jurisdiction over a non-domiciliary defendant but only if the use "constitute[d] the 'very root' of the claims against the foreign bank."[46] Furthermore Judge Daniels believed the use "of wire transfers [was] not a 'use' of a correspondent account which alone [was] sufficient to confer jurisdiction over a foreign bank."[47]

Judge Daniels also believed that "[n]o articulable nexus or substantial relationship existed between LCB's general use of its correspondent account for wire transfers through New York and the specific terrorist activities by Hizbollah underlying plaintiffs' claims."[48] He focused on the injuries and deaths suffered by

[42] *Id.* at 406 (citing Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985)).

[43] *Licci*, 704 F. Supp. 2d at 406 (citing Tex. Int'l Magnetics, Inc. v. Auriga-Aurex, Inc. (*In re* Magnetic Audiotape Antitrust Litig.), 334 F.3d 204, 206 (2d Cir. 2003), PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997), and Saudi v. Marine Atlantic Ltd., 306 F. App'x 653, 654 (2d Cir. 2009)).

[44] *Licci*, 704 F. Supp. 2d at 406.

[45] *Id.* at 407 (citing Tamam v. Fransabank SAL, 677 F. Supp. 2d 720, 726–27 (S.D.N.Y. 2010); Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 762 (S.D.N.Y. 2004); Leema Enters., Inc. v. Willi, 575 F. Supp. 1533, 1537 (S.D.N.Y. 1983)).

[46] *Licci*, 704 F. Supp. 2d at 407 (quoting Correspondent Servs. Corp. v. J.V.W. Invs. Ltd., 120 F. Supp. 2d 401, 405 (S.D.N.Y. 2000)).

[47] *Licci*, 704 F. Supp. 2d at 407.

[48] *Id.* at 408 (citing *Tamam*, 677 F. Supp. 2d at 726).

plaintiffs and their family members as being caused by Hezbollah's rockets and not by LCB's banking services provided via its correspondent account with Amex Bank in New York.[49] Judge Daniels reasoned, "LCB's maintenance or use of its correspondent bank account is too attenuated from Hizbollah's attacks in Israel to assert personal jurisdiction based solely on wire transfers through New York."[50] Judge Daniels, having found no statutory basis for *in personam* jurisdiction under CPLR section 302(a)(1), ignored the circuit court's constitutional avoidance doctrine and, after a due process inquiry, concluded an assertion of personal jurisdiction over LCB would not comport with constitutional principles under the Fourteenth Amendment.[51] The court did not reach the merits of LCB's alternative arguments to dismiss under section 12(b)(6) of the Federal Rules of Civil Procedure.[52] Judge Daniels also denied plaintiffs' alternative request to conduct limited jurisdictional discovery pertaining to LCB's correspondent banking analysis with Amex Bank.[53] The plaintiffs did not challenge this finding in their appeal to the Second Circuit.[54]

B. Licci*: The United States District Court of Appeals for the Second Circuit*

1. Introduction

The circuit court's opinion was rendered by Judges Amalya Kearse, Robert Sack and Robert Katzmann.[55] The court summarized the district court's holding with respect to the statutory construction of CPLR section 302(a)(1) and stated,

> The question of whether, and if so to what extent, personal jurisdiction may be established under N.Y. CPLR [section] 302(a)(1) over foreign banks based on their use of correspondent banking accounts in New York remains

[49] *Licci*, 704 F. Supp. 2d at 408.
[50] *Id.* at 408.
[51] *Id.*
[52] *See id.* at 408, 411.
[53] *Id.* at 408.
[54] Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 58 n.7 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).
[55] *Id.* at 54. *See generally Second Circuit Judges*, U.S. CT. APPEALS FOR SECOND CIRCUIT, http://www.ca2.uscourts.gov/judgesmain.htm (last visited Nov. 4, 2013) (providing biographies of the circuit court judges).

> unsettled. We conclude that New York law is insufficiently developed in this area to enable us to predict with confidence how the New York Court of Appeals would resolve these issues of New York State law presented on appeal. We therefore certify to the Court of Appeals two questions concerning the application of the New York long-arm statute.[56]

These questions were whether LCB had transacted business in New York under CPLR section 302(a)(1) and, if so, whether plaintiffs' claims arose out of the defendant's business transaction.[57]

2. Background

The circuit court devoted considerably more time to the procedural history, background, and allegations in the plaintiffs' complaint than did the district court.[58] The circuit court stressed that the plaintiffs alleged "LCB had actual knowledge that Hizbollah was a violent terrorist organization, as reflected on official government lists, and that Shahid was part of Hizbollah's financial arm."[59] The circuit court noted that "plaintiffs allege that the bank, as a matter of official LCB policy, continuously supports and supported Hizbollah and its anti-Israel program, goals and activities," and emphasized plaintiffs' allegation "that LCB carried out the wire transfers in order to assist and advance Hizbollah's goal of using terrorism to destroy the State of Israel."[60]

The circuit court explained the procedural history of the *Licci* case, referencing each of the plaintiffs' five claims against LCB, and noted plaintiffs' submission of "a declaration by a former Israeli counter-terrorism official attesting to the fact that Shahid is a financial front for Hizballah."[61] The court examined the district court's jurisdictional ruling at length, observing that the district

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[56] *Licci*, 674 F.3d at 55.

[57] *Id.* at 74–75.

[58] *Compare id.* at 55 n.2, 56 n.4, 56–57, 57 n.5 (discussing in-depth the procedural history, background and allegations in plaintiffs' complaint), *with* Licci *ex rel.* Licci v. Am. Express Bank Ltd., 704 F. Supp. 2d 403, 404–06 (S.D.N.Y. 2010) (focusing primarily on the allegations contained in plaintiffs' complaint), *aff'd in part sub nom.* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 672 F.3d 155 (2d Cir. 2012), *questions certified to* New York Court of Appeals, 673 F.3d 50 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).

[59] *Licci*, 673 F.3d at 56 (footnote omitted) (internal quotation marks omitted).

[60] *Id.* at 56–57 (internal quotation marks omitted).

[61] *Id.* at 57.

court had concluded that the LCB-Amex Bank wire transfer use of the correspondent bank account in New York was not a use sufficient to constitute a "transaction of business" and that the correspondent bank account was too attenuated from Hezbollah's attacks in Israel to fulfill the "arising out of" requirement under CPLR section 302(a)(1).[62]

3. Discussion

The circuit court explained that since the assertion of *in personam* jurisdiction rests on CPLR 302, a statutory inquiry was first necessary; if jurisdiction was permissible under the long-arm statute, a second constitutional inquiry was necessary.[63] It would involve the relevant constitutional restraints imposed by the Due Process Clause of the Fourteenth Amendment.[64] The court panel noted that since New York's long-arm statute is restricted and does not extend in all respects to the constitutional limits provided by *International Shoe* and its progeny: "The state statutory and federal constitutional standards are thus not co-extensive, as they are in many other states."[65] The court, speaking through Judge Sack opined, "In many cases, the jurisdictional analysis [statutory determination of basis] under the New York long-arm statute may closely resemble the analysis under the Due Process Clause of the Fourteenth Amendment."[66] He observed that sometimes the statutory analysis of whether CPLR 302 provides a basis for *in personam* jurisdiction and the analysis of federal constitutional limitations have become entangled in the jurisprudence of New York case law.[67] Judge Sack stated, "This similarity of state-law and constitutional standards appears particularly evident with respect to N.Y. CPLR [section] 302(a)(1), the subdivision of the New York long-arm statute under which the plaintiffs in this case argue the court has personal jurisdiction over LCB."[68]

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[62] *Id.* at 57–58.
[63] *Id.* at 59–60.
[64] *Id.* at 60.
[65] *Id.* at 60–61.
[66] *Id.* at 61 n.11 (citing Best Van Lines, Inc. v. Walker, 490 F.3d 239, 242 (2d Cir. 2007)).
[67] *Id.*
[68] *Id.* (citing Chloé v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 166, 169 (2d Cir. 2010); *Best Van Lines, Inc.*, 490 F.3d at 247; Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 508, 881 N.E.2d 830, 834–35, 851 N.Y.S.2d 381, 385–86 (2007)).

a. "Transaction of Business" Requirement

The circuit court first addressed the question of whether LCB's conduct constituted a "transaction of business" under CPLR section 302(a)(1).[69] The court, relying on the Court of Appeals decision in *Fischbarg v. Doucet*[70] focused on whether LCB had committed some act by which it purposefully availed itself of the privilege of conducting activities in New York.[71] The court stressed that the "defendant need not physically enter New York State in order to transact business" but that the quality and nature of the defendant's contacts in New York are crucial.[72] The court stated that "[t]he mere maintenance of [a] correspondent bank account" and its use in New York are distinct factors.[73]

The circuit court identified four Court of Appeals cases that involved similar sets of circumstances[74] and analyzed each. The principle case was *Amigo Foods Corp. v. Marine Midland Bank-New York*,[75] which had announced a general rule that a correspondent bank relationship alone is not sufficient to form the basis for long-arm jurisdiction under CPLR section 302(a)(1).[76] Judge Sack distinguished *Amigo* from *Licci* because LCB had repeatedly used its New York bank account with the knowledge it was funding Hezbollah.[77] The remaining cases, with *Amigo*, demonstrated to the circuit panel "that the 'transaction of business' prong of the test for jurisdiction under section 302(a)(1) may, in appropriate cases, be satisfied by a showing that the defendant maintained and used a correspondent bank account in New York."[78] This is true, according to Judge Sack, "even if no other contacts between the defendant and New York can be established, *if* the defendant's use of that account was purposeful."[79]

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[69] *Licci*, 673 F.3d at 61.

[70] Fischbarg v. Doucet, 9 N.Y.3d 375, 880 N.E.2d 22, 849 N.Y.S.2d 501 (2007); *see also* Carlisle, *supra* note 11, at 420–25 (discussing the *Fischbarg* case).

[71] *Licci*, 673 F.3d at 61–62.

[72] *Id.*

[73] *Id.* at 62.

[74] *See id.* at 63–64.

[75] Amigo Foods Corp. v. Marine Midland Bank-N.Y., 39 N.Y.2d 391, 348 N.E.2d 581, 384 N.Y.S.2d 124 (1976).

[76] *Id.* at 396, 348 N.E.2d at 584, 384 N.Y.S.2d at 127.

[77] *See Licci*, 673 F.3d at 65–66.

[78] *Id.* at 64.

[79] *Id.* at 66 (alteration in original).

b. "Arising Out of" Requirement:

i. "Articulable Nexus" and Substantial Relationship

The circuit court explained, "There is no bright-line test for determining whether the [articulable] 'nexus' [or substantial relationship tests are] present in a particular case."[80] The court stated, "This inquiry is a fact-specific one, and [the point at which] the connection between the parties' activities in New York and the [plaintiffs'] claim crosses the line from 'substantially related' to 'mere coincidence' is not always self-evident."[81] The circuit court criticized the district court's conclusion that there was no articulable nexus or substantial relationship between LCB's general use of its correspondent account and the specific terrorist activities underlying plaintiff's claim.[82] The circuit court noted the district court did not separately evaluate the plaintiffs' Anti-Terrorism Act, Alien Tort Statute ("ATS"), and Israeli-law claims.[83] The circuit court reasoned these factors and questions of whether the "arising out of" requirement under CPLR 302 should be applied narrowly or permissively, combined with the issue of whether a causal connection between the defendant's contacts with New York and the plaintiff's lawsuit is required, caused an ambiguity in the meaning of the statute which would best be answered by certifying the questions to New York's highest court.[84] The two questions were:

Certified Question No. 1

> Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect "dozens" of wire transfers on behalf of a foreign client, constitute a "transact[ion]" of business in New York within the meaning of N.Y. CPLR [section] 302(a)(1)?[85]

Certified Question No. 2

> If so, do the plaintiffs' claims under the Anti-Terrorism Act, the ATS, or for negligence or breach of statutory duty in violation of Israeli law, 'aris[e] from' LCB's transaction of business in New York within the meaning of N.Y. CPLR

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[80] *Id.* at 67.

[81] *Id.* (alteration in original) (quoting Sole Resort, S.A. De C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 103 (2d Cir. 2006)).

[82] *Licci*, 673 F.3d at 67–68.

[83] *See id.* at 68–75 (discussing the Anti-Terrorism Act, ATS, and Israeli-law claims with reference to New York's long-arm statute).

[84] *Id.* at 69–70, 74.

[85] *Id.* at 74 (first alteration in original).

[section] 302(a)(1)?[86]

III. *LICCI*: THE NEW YORK STATE COURT OF APPEALS DECISION

On November 20, 2012, the Court of Appeals unanimously answered both certified questions in the affirmative.[87]

A. "Transaction of Business" Requirement

The court, speaking through Judge Read, clarified the facts[88] and noted that the several dozen United States, Canadian, and Israeli plaintiffs asserted personal jurisdiction over LCB was proper under CPLR section 302(a)(1).[89] The court found that "LCB did not operate branches or offices, or maintain employees, in the United States. Its sole point of contact with the United States was a correspondent banking account with AmEx [Bank] in New York."[90] In determining whether LCB had transacted business under New York's long-arm statute, Judge Read reviewed four of the court's prior decisions.[91] First, and most closely analogous to *Licci*, was *Amigo Foods Corp. v. Marine Midland Bank-New York*.[92] In *Amigo*, one non-domiciliary defendant (Aroostock Trust Company) moved to dismiss for lack of jurisdiction.[93] Plaintiff had alleged that Aroostock and a New York bank, Irving Bank, were agents with a corresponding bank relationship upon which long-arm jurisdiction was based.[94] Alternatively, plaintiff asked for depositions on the question of jurisdiction.[95] The supreme court ordered depositions but a divided appellate division reversed and granted the jurisdictional motion to dismiss, concluding that the Irving Bank was not Aroostock's New York agent and that Aroostock had not transacted business in the Empire State.[96] The Court of Appeals reversed, holding that disclosure should proceed because Amigo had alleged an agency relationship between the two banks.[97] "After

[86] *Id.* at 75 (first alteration in original).

[87] Licci *ex rel.* Licci v. Lebanese Canadian Bank, 20 N.Y.3d 327, 341, 984 N.E.2d 893, 901, 960 N.Y.S.2d 695, 703 (2012).

[88] *See id.* at 330–33, 984 N.E.2d at 894–96, 960 N.Y.S.2d at 696–98.

[89] *Id.* at 331, 984 N.E.2d at 895, 960 N.Y.S.2d at 697.

[90] *Id.* at 332, 984 N.E.2d at 895, 960 N.Y.S.2d at 697.

[91] *See id.* at 334–38, 984 N.E.2d at 897–900, 960 N.Y.S.2d at 699–702.

[92] *See id.* at 335, 984 N.E.2d at 896, 960 N.Y.S.2d at 698.

[93] *Id.* at 335, 984 N.E.2d at 898, 960 N.Y.S.2d at 700.

[94] *Id.* at 335–36, 984 N.E.2d at 898, 960 N.Y.S.2d at 700.

[95] *Id.*

[96] *Id.* at 336, 984 N.E.2d at 898, 960 N.Y.S.2d at 700.

[97] *Id.*

discovery was completed, Aroostock again unsuccessfully moved to dismiss. The appellate division unanimously reversed."[98] The Court of Appeals affirmed for the reasons specified by the Appellate Division[99]: "In our view, disclosure has revealed nothing which forms the basis for long-arm jurisdiction over Aroostock in the present case."[100]

The *Licci* court explained that after *Amigo* some New York State courts had found "that a correspondent banking relationship 'standing by itself' is insufficient to establish long-arm jurisdiction" under the statutory requirements of CPLR 302.[101] The court pointed out that these state decisions had been relied on by federal district court judges in the Second Circuit for the proposition that "the 'mere maintenance' of a correspondent bank account in New York does not suffice to establish personal jurisdiction there."[102] The *Licci* court explained that under New York law *Amigo* stands for the proposition that the mere maintenance of a correspondent bank account may, depending on the particular facts of a case, be sufficient to constitute a transaction of business provided that "the defendant's use of that account was purposeful."[103]

The Court of Appeals reasoned that the *Amigo* facts, unlike those in *Licci*, "revealed . . . [that] Aroostock's purported use of the account . . . was essentially adventitious—i.e., it was not even Aroostock's doing."[104] The court distinguished *Amigo* on the grounds of the complex nature of the interbank activity in *Licci* whose sole purpose was to facilitate the flow of money throughout the world.[105] The court stated:

> Nonetheless, complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a "course of dealing"—show purposeful

[98] *Id.*

[99] Amigo Foods Corp v. Marine Midland Bank-N.Y., 46 N.Y.2d 855, 857, 387 N.E.2d 226, 226, 414 N.Y.S.2d 515, 515 (1979).

[100] *Licci*, 20 N.Y.3d at 337, 984 N.E.2d at 899, 960 N.Y.S.2d at 701 (quoting Amigo Foods Corp. v. Marine Midland Bank-N.Y., 61 A.D.2d 896, 897, 402 N.Y.S.2d 406, 408 (App. Div. 1st Dep't 1978)).

[101] *Licci*, 20 N.Y.3d at 337, 984 N.E.2d at 899, 960 N.Y.S.2d at 701.

[102] *Id.* (quoting Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 65 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013)).

[103] *Licci*, 20 N.Y.3d at 338, 984 N.E.2d at 899, 960 N.Y.S.2d at 701 (quoting *Licci*, 673 F.3d at 66).

[104] *Licci*, 20 N.Y.3d at 338, 984 N.E.2d at 900, 960 N.Y.S.2d at 702.

[105] *Id.* at 338–39, 984 N.E.2d at 900, 960 N.Y.S.2d at 702.

> availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States.[106]

Thus, the Court of Appeals concluded that LCB's contacts with New York had satisfied the statutory requirements of CPLR section 302(a)(1).[107] In so doing the court reminded the bench and bar that "purposeful availment" inquiries are objective and require a detailed examination of the particular facts in each case with a focus on the quality and nature of the defendants' contact or contacts with the Empire State.[108] The court's holding represents a more precise definition of what constitutes a "transaction of business" under CPLR section 302(a)(1) and provides proper precedent for future jurisdictional inquires by the bench and bar of New York.[109]

B. "Arising Out of" Requirement

The Court of Appeals reaffirmed its interpretation of the second prong of CPLR section 302(a)(1)'s statutory jurisdictional inquiry as mandating an "articulable nexus" or "substantial relationship" between the business transaction and the claim asserted.[110] The court then stated, "[w]e have consistently held that causation is not required, and that the inquiry under the statute is relatively permissive."[111] The court explained that the "arising from" prong of

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[106] *Id.* at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702 (citations omitted).

[107] *Id.* at 340–41, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

[108] *Id.* at 338, 984 N.E.2d at 899–900, 960 N.Y.S.2d at 701–02.

[109] *See* DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 86, at 20–21 (5th ed. Supp. July 2013).

[110] *Licci*, 20 N.Y.3d at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702 (quoting Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467, 522 N.E.2d 40, 43, 527 N.Y.S.2d 195, 198 (1988) and McGowan v. Smith, 52 N.Y.2d 268, 272, 419 N.E.2d 321, 323, 437 N.Y.S.2d 643, 645 (1981)).

[111] *Licci*, 20 N.Y.3d at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702. The court cites *McGowan* and *Kreutter* in support of its "relatively permissive" standard, but neither citation contains explicit language supporting that proposition. *See id.* The *McGowan* court, speaking through Judge Dominick Gabrielli, cited, but did not discuss, *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). *McGowan*, 52 N.Y.2d at 272, 419 N.E.2d at 323, 437 N.Y.S.2d at 645. The court said: "Essential to the maintenance of a suit against a nondomiciliary under CPLR [section] 302 (subd [a], par 1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon." *Id.* In *Longines-Wittnauer*, a New York plaintiff claimed he was injured in Connecticut while using a defective hammer manufactured in Illinois by a non-domiciliary corporation whose New York sales representative had sold the hammer to the retailer from whom the plaintiff bought it. *Longines-Wittnaur*, 15 N.Y.2d at 464–65, 209 N.E.2d at 80, 261 N.Y.S.2d at 24–25. The court found long-arm jurisdiction under CPLR section 302(a)(1). *Id.* at 467, 209 N.E.2d at 81–82, 261 N.Y.S.2d at 26–27 ("[T]he cause of

CPLR section 302(a)(1) limits the broader "transaction of business" prong by restricting jurisdiction to claims arguably connected in a meaningful way to the business transacted in New York.[112] If the claim is "'too attenuated' from the transaction, or 'merely coincidental' with it" the statutory mandate of the second prong of CPLR section 302(a)(1) is not satisfied.[113]

Then, in a new twist and without citing specific supporting authority, the court declared:

> CPLR [section] 302(a)(1) does not require that every element of the cause of action pleaded must be related to the New York contacts; rather, where at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute.[114]

This broad statement follows the *Licci* court's view that the plaintiffs' allegations included reference to LCB's engagement in terrorist financing by using its correspondent account in New York to move dollars necessary to enable Hezbollah to inflict physical damages upon them.[115] The court believed these references arguably violated duties owed to plaintiffs under the various statutes upon which the subject matter jurisdiction of plaintiffs' complaints were based.[116] While the court's reformulation and extension of the "arising out of" requirement is arguably fact specific to *Licci*, nonetheless it bodes well for the plaintiff's bar.[117]

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action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market."); *see also* Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964) (refusing to find an articulable nexus between a "transaction of business" in New York under CPLR section 302(a)(1) and the subsequent injury to plaintiffs in Nevada). Based on precedent the only New York case which applies a permissive "arising from" standard is the *Longines-Wittnaur* court.

[112] *Licci*, 20 N.Y.3d at 339–40, 984 N.E.2d at 900–01, 960 N.Y.S.2d at 702–03.

[113] *Id.* at 340, 984 N.E.2d at 901, 960 N.Y.S.2d at 702 (citing Johnson v. Ward, 4 N.Y.3d 516, 520, 829 N.E.2d 1201, 1203, 797 N.Y.S.2d 33, 35 (2005)).

[114] *Id.* at 341, 984 N.E.2d at 901, 960 N.Y.S.2d at 703. This language is not found in any of the Court of Appeals's prior "arising out of" jurisprudence. It is an obvious extension of the requirement and is probably fact specific to the repeated use of the New York banking account by LCB.

[115] *Id.* at 340–41, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

[116] *Id.* at 340, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

[117] *See* Siegel, *supra* note 10.

IV. COURT OF APPEALS CLARIFIES THE ENTANGLEMENT ISSUE IN CPLR SECTION 302(A)(1)

In answering the certified questions, the Court of Appeals in *Licci* was cognizant of prior New York long-arm jurisprudence, some of which had entangled statutory and constitutional jurisdictional findings under CPLR section 302(a)(1).[118] The *Licci* court's thoughtful clarification of the entanglement issue requires a brief review of New York long-arm jurisprudence.

A. Background

The Court of Appeals has traditionally used a two part inquiry to determine if a non-domiciliary is subject to *in personam* jurisdiction under CPLR 302.[119] The first step is to decide if the statutory requirements of the restricted long-arm statute have been satisfied.[120] Do the defendant's contacts with the State fit within the acts enumerated in the statute's language? If so, the next step is to decide if the exercise of jurisdiction comports with due process.[121]

CPLR 302 is a restricted long-arm statute! It does not extend as far as the constitutional limits permitted by *International Shoe* and its progeny.[122] As the Second Circuit observed in its *Licci* opinion, New York State's statutory standards and the Fourteenth Amendment due process constitutional standards are not co-

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[118] See *infra* notes 129–39 and accompanying text for discussion of the entanglement of statutory and constitutional considerations pertaining to *in personam* jurisdictional inquiries.

[119] LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 214, 735 N.E.2d 883, 886, 713 N.Y.S.2d 304, 307 (2000) ("To determine whether a non-domiciliary may be sued in New York, we first determine whether our long-arm statute (CPLR 302) confers jurisdiction over it in light of its contacts with this State. If the defendant's relationship with New York falls within the terms of CPLR 302, we determine whether the exercise of jurisdiction comports with due process."). The *LaMarca* analysis is in the context of CPLR section 302(a)(3), but the two-step drill is presented more clearly than in any other Court of Appeals case. *Id.* When courts conflate the statutory and constitutional inquiries, the two-step drill is far less obvious and sometimes not at all used in the jurisdictional analysis. *See, e.g.*, Chloé v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163–64 (2d Cir. 2010); Penguin Group (USA) Inc. v. Am. Buddha, 609 F.3d 30, 35 (2d Cir. 2010).

[120] *LaMarca*, 95 N.Y.2d at 214, 735 N.E.2d at 886, 713 N.Y.S.2d at 307; SIEGEL, NEW YORK PRACTICE, *supra* note 12, § 84, at 148–49; WEINSTEIN, KORN & MILLER, *supra* note 1, ¶ 302.00.

[121] *LaMarca*, 95 N.Y.2d at 214, 735 N.E.2d at 886, 713 N.Y.S.2d at 307; SIEGEL, NEW YORK PRACTICE, *supra* note 12, § 58, at 85; WEINSTEIN, KORN & MILLER, *supra* note 1, ¶ 302.01.

[122] Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 60–61 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *and certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).

extensive, as they are in many states whose long-arm laws provide that jurisdiction is permitted to the full extent authorized by the U.S. Constitution.[123] Thus, New York State jurisprudence analyzing the statutory and constitutional requirements has become somewhat entangled.[124]

In most states, federal courts determining *in personam* jurisdictional issues have only to consider whether a non-domicillary defendant has sufficient statutory contacts to satisfy the federal due process requirements.[125] By contrast, since the New York long-arm statute is not compatible with the federal Due Process Clause, the courts must engage in two separate inquiries in order to find whether *in personam* jurisdiction exists.[126] If there is no statutory jurisdiction under CPLR 302, a constitutional analysis is not necessary.[127] Unfortunately, some courts in the Empire State, including the Court of Appeals, have inadvertently conflated the statutory and constitutional inquiries.[128]

B. Discussion

1. "Transaction of Business" Clause: CPLR Section 302(a)(1)

The purposeful availment language used by some New York State courts to define a "transaction of business" has been adopted from United States Supreme Court opinions examining the federal constitutional limits on state powers to assert jurisdiction over non-domiciliary defendants.[129] In decisions such as *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*,[130] *McKee Electric Co. v. Rauland-Borg Corp.*,[131] *George Reiner & Co. v. Schwartz*,[132] and *Deutsche*

[123] *Id.*; *see also* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 122 & n.17 (collecting examples of long-arm statutes from other states that extend to constitutional limits).

[124] *See Licci*, 673 F.3d at 61 n.11.

[125] *See* Borchers, *supra* note 123, at 122 & n.17.

[126] *Licci*, 673 F.3d at 61.

[127] *Id.*

[128] *See id.* at 61 n.11.

[129] *E.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945))).

[130] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 457–58, 209 N.E.2d 68, 75–76, 261 N.Y.S.2d 8, 19 (1965) (describing the activities engaged in by appellant as "assuredly adequate to meet the liberal statutory criterion" as well as "any constitutional objection").

[131] McKee Elec. Co. v. Rauland-Borg Corp. 20 N.Y.2d 377, 381–82, 229 N.E.2d 604, 607, 283 N.Y.S.2d 34, 37 (1967) ("There is no fixed standard by which to measure the minimal

Bank Securities, Inc. v. Montana Board of Investors,[133] the Court of Appeals has relied on and cited federal jurisprudence involving Fourteenth Amendment considerations to decide if a non-domiciliary defendant's contacts fit within the statutory limits of CPLR 302. These decisions "tend to conflate the long-arm statutory and constitutional analysis by focusing on the constitutional standard[s]" which results in a significant overlap of definitions for what constitutes a "transaction of business" under CPLR section 302(a)(1) with the constitutional "minimum contacts" doctrine.[134]

For example, in *Deutsche Bank*, the Court of Appeals discusses the statutory requirements of CPLR section 302(a)(1) and due process requirements simultaneously.[135] While one may applaud the result in *Deutsche Bank*, the court's two part statutory and jurisdictional analysis is flawed. Obviously there is some distance between the jurisdiction permitted by the Due Process Clause and that permitted under CPLR 302.[136] This is particularly true with CPLR section 302(a)(1).[137]

Unfortunately, many pre-*Licci* New York State and federal courts have relied too heavily on Fourteenth Amendment due process considerations, instead of state statutory authorities, when analyzing whether a non-domiciliary has transacted business in

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contacts required to sustain jurisdiction under the provisions of CPLR 302 (subd. [a], par. 1).").

[132] George Reiner & Co. v. Schwartz, 41 N.Y.2d 648, 653, 363 N.E. 551, 554, 394 N.Y.S.2d 844, 847 (1977) ("Here, [defendant] was physically present in New York at the time the contract, establishing a continuing relationship between the parties, was negotiated and made and, the contract, made in New York, was the transaction out of which the cause of action arose. . . . [T]he defendant's coming into New York purposefully seeking employment, his interview and his entering into an agreement with a New York employer which contemplated and resulted in a continuing relationship between them, certainly are of the nature and quality to be deemed sufficient to render him liable to suit here.").

[133] Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs., 7 N.Y.3d 65, 71–72, 850 N.E.2d 1140, 1142–43, 818 N.Y.S.2d 164, 166–67 (2006) (applying both New York statutory and federal due process analysis to bond transactions negotiated via electronic means).

[134] Best Van Lines, Inc. v. Walker, 490 F.3d 239, 247 (2d Cir. 2007).

[135] *Deutsche Bank*, 7 N.Y.3d at 71–72, 850 N.E.2d at 1142–43, 818 N.Y.S.2d at 166–67 ("In short, when the requirements of due process are met . . . a sophisticated institutional trader knowingly entering our state . . . to negotiate and conclude a substantial transaction is within the embrace of the New York long-arm statute."); *see also* Carlisle, *supra* note 11, at 422–23 (describing application of the *Deutsche Bank* purposeful availment criteria in *Fischbarg*, in which the court determined that lack of physical presence was irrelevant in view of the quality and nature of the defendants' electronic contacts with the state).

[136] *Best Van Lines, Inc.*, 490 F.3d at 248 ("Some distance remains between the jurisdiction permitted by the Due Process Clause and that granted by New York's long-arm statute.").

[137] *See* Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 61 n.11 (2d Cir. 2012), *certified questions accepted*, 18 N.Y.3d 952, 967 N.E.2d 697, 944 N.Y.S.2d 472 (2012), *certified questions answered*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012), *and vacated and remanded*, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189 (Oct. 18, 2013).

New York under CPLR section 302(a)(1).[138] Excessive emphasis on the federal Due Process Clause has obstructed and distorted the statutory inquiry of CPLR section 302(a)(1) by New York State and federal courts. This has produced a body of confusing precedent and has frustrated the legislative intent of the CPLR's drafters.[139] Increased emphasis on the proper statutory construction of CPLR section 302(a)(1) will result in a less restrictive application of New York's long-arm statute and will give our state's judiciary discretion to more permissively apply the statute.

2. The Correct *Licci* Analysis

The Court of Appeals *Licci* decision correctly analyzes the statutory prerequisites of the "transaction of business" clause by defining "'purposeful availment' [as] an objective inquiry, . . . requir[ing] a court to closely examine the defendant's contacts for their quality."[140] The court's analysis does not rely on due process jurisprudence, but on statutory analysis by New York State courts.[141] The *Licci* court's reformulation of its test for what constitutes a "transaction of business" provides the bench and bar with clear guidelines and a focus on a fact-specific, "quality of contact" standard, which contemplates an increase in jurisdictional discovery and fact-specific jurisdictional allegations by the party asserting long-arm jurisdiction.

3. Court of Appeals Extends Jurisdictional Reach of "Arising Out of" Provision

Assuming the party asserting jurisdiction has shown beyond a

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[138] *See supra* notes 125–34 and accompanying text; *see also* Hi Fashion Wigs, Inc. v. Peter Hammond Adver., Inc., 32 N.Y.2d 583, 587, 300 N.E.2d 421, 423, 347 N.Y.S.2d 47, 50 (1973) ("[Defendant] must be deemed to have 'purposefully' availed himself 'of the privilege of conducting activities within [this] state,' thereby 'invoking the benefits and protections of its laws.'" (second alteration in original) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).

[139] *See, e.g.*, Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 16–17, 256 N.E.2d 506, 507–08, 308 N.Y.S.2d 337, 339–40 (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 15–19, 256 N.E.2d at 507–09, 308 N.Y.S.2d at 338–41. Forty years later, in *Fischbarg*, the court presented a similar analysis with the purpose of applying the long-arm statute to the full extent authorized by the drafters of CPLR section 302(a)(1). Fischbarg v. Doucet, 9 N.Y.3d 375, 380–85, 880 N.E.2d 22, 27–30, 849 N.Y.S.2d 501, 506–09 (2007).

[140] Licci *ex rel.* Licci v. Lebanese Canadian Bank, 20 N.Y.3d 327, 338, 984 N.E.2d 893, 899–900, 960 N.Y.S.2d 695, 701–02 (2012) (citing *Fischbarg*, 9 N.Y.3d at 380, 880 N.E.2d at 26, 849 N.Y.S.2d at 505).

[141] *See Licci*, 20 N.Y.3d at 338–40, 984 N.E.2d at 899–901, 960 N.Y.S.2d at 701–03.

preponderance of the evidence that the non-domiciliary transacted business in New York, she has the same burden of showing her claim arose out of the transaction.[142] This involves consideration of the "articulable nexus" or "substantial relationship" tests.[143] The tests were created by the Court of Appeals to limit the broader reach of the "transaction of business" clause.[144] Accordingly, the claim must "in some way arguably [be] connected to the transaction," and "[w]here this necessary relatedness is lacking, . . . the claim [is] 'too attenuated' from the transaction."[145] Some New York State and federal courts have entangled constitutional due process limits with their "arising out of" statutory interpretation analysis.[146] These courts have viewed the "arising out of" requirement in restrictive terms using elements of proximate cause for findings of an articulable nexus or substantial relationship between the claim and business transaction. The *Licci* Court of Appeals rejects this approach.[147]

The *Licci* court stated, "We have consistently held that causation is not required, and that the inquiry under the statute is relatively permissive."[148] Nonetheless, the court explained its "relatively permissive" standard in terms of a relatedness between the transaction and the legal claim.[149] The court stated, "But these standards connote, at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim."[150]

The *Licci* court's "no causation" finding means the "arising out of" requirement need only relate to plaintiffs' allegations of LCB's transfer of money from its corresponding account in New York with the knowledge it would be used to fund violent acts by Hezbollah against the plaintiffs instead of finding an articulable nexus between the money transfer and the injuries sustained by the plaintiffs.[151] The court's distinction is crucial for a finding of

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[142] *Id.* at 339–40, 984 N.E.2d at 900–01, 960 N.Y.S.2d at 702–03.

[143] *Id.* at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702.

[144] *See id.* at 339–40, 984 N.E.2d at 900–01, 960 N.Y.S.2d at 702–03.

[145] *Id.* at 340, 984 N.E.2d at 901, 960 N.Y.S.2d at 703 (quoting Johnson v. Ward, 4 N.Y.3d 516, 520, 829 N.E.2d 1201, 1203, 797 N.Y.S.2d 33, 35 (2005)).

[146] *See supra* notes 128–134 and accompanying text.

[147] *See Licci*, 20 N.Y.3d at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702.

[148] *Id.*

[149] *Id.*

[150] *Id.* (footnote omitted).

[151] *Id.* at 341, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

jurisdiction over LCB. The *Licci* court went further by holding that because personal jurisdiction under CPLR section 302(a)(1) is "fundamentally about a court's control over the person of the defendant, the inquiry logically focuses on the defendant's conduct."[152] This suggests that a fact specific pleading connecting a claim or claims for injuries to allegations that a defendant's conduct violated a duty to plaintiffs, will satisfy the "arising out of" requirement.

The *Licci* court further liberalized the "arising out of" requirement by stating,

> Not all elements of the causes of action pleaded are related to LCB's use of the correspondent account. And the specific harms suffered by plaintiffs flowed not from LCB's alleged support of a terrorist organization, but rather from rockets. Yet CPLR [section] 302(a)(1) does not require that every element of the cause of action pleaded must be related to the New York contacts; rather, where at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute.[153]

Thus, even though not all of the *Licci* plaintiffs' claims related to LCB's use of the correspondent account in New York and some specific harm suffered by plaintiffs resulted from rockets rather than repeated bank transfers from New York, the plaintiffs' pled enough to satisfy the "arising out of" requirement. The court's language can be characterized as an expansive reading of the second prong of the CPLR section 302(a)(1) statutory inquiry. It is particularly helpful to plaintiffs in tort cases, involving claims arising from a "transaction of business" within New York, but involving injuries occurring outside the state's territorial boundaries. If these claims, even in some respects, bear a close connection to the transaction, the "arising out of" prong will be satisfied if the plaintiff alleges the defendant's negligent conduct has an articulable nexus to the transaction even though the injuries may not.

V. CONCLUSION

The Court of Appeals in *Licci* more precisely defines CPLR section

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[152] *Id.* at 340, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.
[153] *Id.* at 341, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

302(a)(1)'s "transaction of business" clause in objective, fact-specific terms, focusing on the quality and nature of a non-domiciliaries' purposeful conduct in New York. The court draws a clear line between the statutory conduct and constitutional due process inquires for a jurisdictional analysis which portends a more expansive application of the first statutory prong of CPLR section 302(a)(1).

The *Licci* court also reformulates and liberalizes the second "arising out of" statutory prong of CPLR section 302(a)(1). The *Licci* opinion defines the "arising out of" requirement as "fundamentally about a court's control over the person of the defendant."[154] The court specifically states the requirement is "relatively permissive" and is not causally related to the results of a claim.[155] Also, the *Licci* court makes it clear the "arising out of" requirement does not demand that all elements of a claim arise out of the business transaction but that "at least one element" does.[156] This suggests the court's willingness to accept statutory inquiries under CPLR section 302(a)(1) that are more permissive. The *Licci* court has signaled that the distance between statutory and constitutional jurisdictional inquiries has lessened and has clarified its prior jurisprudential entanglement of the statutory and constitutional analysis of CPLR section 302(a)(1). It is likely that the state's long-arm statute will be more expansively applied. It is also likely there will be an increased use of jurisdictional discovery and more emphasis on detailed jurisdictional pleading in New York State and federal courts.

Lastly, the *Licci* New York State Court of Appeals decided only that *in personam* jurisdiction exists over LCB under CPLR section 302(a)(1).[157] The Second Circuit still needed to conduct a due process inquiry under the Fourteenth Amendment of the U.S. Constitution before it could make a final determination that LCB was subject to *in personam* jurisdiction in the federal action. On October 18, 2013, the Second Circuit ruled that "the district court's exercise of personal jurisdiction over LCB is consistent with due process protections."[158] With the district court's jurisdictional

[154] *Id.* at 340, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

[155] *Id.* at 339, 984 N.E.2d at 900, 960 N.Y.S.2d at 702.

[156] *Id.* at 341, 984 N.E.2d at 901, 960 N.Y.S.2d at 703.

[157] *See Licci*, 20 N.Y.3d at 334, 339, 984 N.E.2d at 897, 900, 960 N.Y.S.2d at 699, 702.

[158] Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, No. 10-1306-cv, 2013 U.S. App. LEXIS 21189, at *31 (2d Cir. Oct. 18, 2013). The court held that subjecting LCB to specific jurisdiction was proper because LCB's "selection and repeated use of New York's banking system, as an instrument for accomplishing the alleged wrongs for which the plaintiffs seek

dismissal vacated and the matter remanded for further proceedings,[159] the issue remains whether the plaintiffs will succeed on the merits. The answer to that question, however, will have to wait until another day.

redress, constitutes 'purposeful[] avail[ment] . . . of the privilege of doing business in [New York].'" *Id.* at *21 (quoting Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002)) (alterations in original). Furthermore, the court stated that LCB failed to demonstrate that subjecting it to specific jurisdiction would be unreasonable and thereby offend "principles of fair play and substantial justice." *Licci*, 2013 U.S. App. LEXIS 21189, at *31. *See also* Martin Flumenbaum & Brad S. Karp, Jurisdiction Over Foreign Financial Institutions Based on Bank Accounts, N.Y.L.J., Nov. 29, 2013, at 3, col. 1 ("As a result of this decision, foreign financial institutions may be subject to personal jurisdiction in New York based on correspondent accounts they hold in the state, even when their business is otherwise outside of the United States.").

[159] *Licci*, 2013 U.S. App. LEXIS 21189, at *33.