University of Baltimore Law Review

Volume 31
Issue 1 *Fall 2001*

Article 2

2001

Maryland's Diminished Long-Arm Jurisdiction in the Wake of Zavian v. Foudy

Jeffrey J. Utermohle
University of Baltimore School of Law

MARYLAND'S DIMINISHED LONG-ARM JURISDICTION IN THE WAKE OF *ZAVIAN v. FOUDY*

Jeffrey J. Utermohle†

I. INTRODUCTION

In *Zavian v. Foudy*,[1] the Court of Special Appeals of Maryland embraced an ultraconservative approach to extraterritorial personal jurisdiction in suits between agent and principal.[2] Specifically, the court adopted a rule that an agent's acts in Maryland *are* attributed to her nonresident principal whom a third party sues,[3] but such acts are *not* so attributed if the agent sues the principal.[4] According to the court, when an agent sues her out-of-state principal, the agent's in-state acts do not count towards satisfying the Maryland long-arm statute's "transacting business" prong[5] or establishing the necessary due process[6]

---

† B.S., 1984, Journalism, University of Maryland at College Park; J.D., 1987, University of Baltimore School of Law. Law Clerk to the Honorable Harry A. Cole, Court of Appeals of Maryland, 1987-1989; Adjunct Professor, Legal Writing Program, University of Baltimore School of Law; Member, Law Offices of Peter G. Angelos, P.C.

1. 130 Md. App. 689, 747 A.2d 764 (2000).
2. *See id.* at 699, 747 A.2d at 770; *see generally* Green v. H & R Block, Inc., 355 Md. 488, 503-05, 517-20, 735 A.2d 1039, 1047-48, 1055-56 (1999) (providing an excellent discussion of "principal-agent relationships, such as between an attorney and his or her client"); *accord* Kay v. Ehrler, 499 U.S. 432, 435-36 (1991) (noting that "the word 'attorney' assumes an agency relationship"). *But see* Perlman v. Martin, 332 N.Y.S.2d 360 (Sup. Ct. 1972) (declining to extend jurisdiction over a nonresident client in attorney's suit for fees because "a lawyer is an independent contractor and not his client's agent in any general sense").
3. The Court of Appeals of Maryland has shown no reluctance to attribute an agent's acts in Maryland to her nonresident principal whom a third party sues. *See* Mohamed v. Michael, 279 Md. 653, 659, 370 A.2d 551, 554 (1977) (sustaining jurisdiction where Kentucky defendant's agents, Maryland attorneys, engaged in six weeks of debt collection negotiations with the plaintiff in Maryland); Harris v. Arlen Props., Inc., 256 Md. 185, 196-97, 260 A.2d 22, 28 (1969) (upholding jurisdiction over a New York real estate developer that sent its "officers and agents" to Maryland to scout for locations, apply for a building permit, negotiate an easement, and arrange for the installation of storm drains); Novack v. Nat'l Hot Rod Ass'n, 247 Md. 350, 357, 231 A.2d 22, 26 (1967) (sustaining jurisdiction over a California-based racetrack sponsor that sent its regularly employed agent into Maryland on five occasions to inspect and safety-certify the racetrack where the injuries occurred).
4. *Zavian*, 130 Md. App. at 699, 747 A.2d at 770.
5. Maryland's long-arm statute provides, in pertinent part: "A court may exercise personal jurisdiction over a person, who directly or *by an agent*: (1) Transacts any business or performs any character of work or service in the

"minimum contacts."[7] This article posits that the *Zavian* court went astray in following New York's Nonattribution Rule[8] and dismissing a Maryland attorney's action against her nonresident clients for unpaid legal fees.

In *Zavian*, a case of first impression,[9] Maryland's intermediate appellate court considered whether the Maryland contacts of three nonresident professional soccer players justified exercise of long-arm personal jurisdiction. In the attorney's suit for unpaid legal fees, the soccer player's contacts included retaining a Maryland attorney's services and making repeated business-related appearances in Maryland.[10] The three clients, who were star members of the United States Women's National Soccer Team and domiciled in different states,[11] initiated contact with the plaintiff, Maryland lawyer Ellen Zavian, in late Summer 1996,[12] and asked her to become their agent.[13] Each player signed a Personal Management Agreement under which Ms. Zavian acted as their exclusive agent to negotiate footwear endorsement deals[14] and provide ancillary legal services.[15] All communications between Zavian and her clients were by telephone, fax, or mail.[16] During the subsequent nine months, Zavian, from her law office in Columbia, Maryland, successfully negotiated lucrative[17] endorsement contracts for Foudy, Overbeck, and Lilly with companies including

---

State." MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b) (Supp. 2001) (emphasis added). In 1964, the Maryland legislature enacted the long-arm statute to ensure a "comprehensive expansion of the judicial jurisdiction of the State of Maryland." Groom v. Margolis, 257 Md. 691, 702, 265 A.2d 249, 254 (1970). The "transacting business" prong was modeled after section 1.03(a)(1) of the 1962 Uniform Interstate and International Procedures Act. *Id.* The drafters of the Uniform Act intended that the "transacting business" prong be given an "expansive interpretation." UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03 cmt. at 362, 13 U.L.A. 361 (1986).

6. The Fourteenth Amendment states, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
7. *See infra* note 40 and accompanying text.
8. *See infra* note 50 and accompanying text.
9. *Zavian*, 130 Md. App. at 693, 747 A.2d at 767.
10. *Id.* at 692-702, 747 A.2d at 766-72. *See infra* note 195 and accompanying text.
11. Julie Foudy lived in California, Carla Overbeck lived in North Carolina, and Kristine Lilly lived in Connecticut. *Zavian*, 130 Md. App. at 691-92, 747 A.2d at 765-66.
12. Brief for Appellant at 4, 7 & 10, Zavian v. Foudy, 130 Md. App. 689, 747 A.2d 764 (2000) (No. 00074). Julie Foudy, on behalf of her teammates, had previously retained Ellen Zavian in 1995 for representation in a labor dispute. *Zavian*, 130 Md. App. at 691, 747 A.2d at 765-66.
13. *Zavian*, 130 Md. App. at 691, 747 A.2d at 766.
14. *Id.*
15. Brief for Appellant at 6, 8, & 11; Record Extract at 24-28, 46-59, & 81-126, Zavian v. Foudy, 130 Md. App. 689, 747 A.2d 764 (2000) (No. 00074).
16. *Zavian*, 130 Md. App. at 692, 747 A.2d at 766.
17. Record at 8-23, 33-45, 63-80.

Reebok, Fila, and Adidas,[18] and the players sent legal fee payments to Zavian's office in Maryland.[19] In July 1997, Zavian terminated each Personal Management Agreement in order to devote her attention to solely representing the United States Women's National Soccer Team.[20] Zavian sent final bills to the three clients, but after each refused to pay[21] she filed suit in the Circuit Court for Baltimore County.[22] The trial court granted the Defendants' Motions to Dismiss based on lack of personal jurisdiction,[23] and Zavian appealed to the Court of Special Appeals of Maryland.[24] In holding that the soccer players' attorney-client relationship with a Maryland lawyer, together with their repeated business-related appearances in Maryland, did not subject them to long-arm jurisdiction, the *Zavian* court adopted New

18. *Zavian*, 130 Md. App. at 692, 747 A.2d at 766.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* In *federal* practice, lack of personal jurisdiction will not always lead to dismissal of the action; instead of dismissal, the court may transfer the case to a forum where jurisdiction lies. *See* St. Paul Fire & Marine Ins. Co. v. Servidone Constr. Corp., 778 F. Supp. 1496, 1508 (D. Minn. 1991) (holding that a federal court has the power to transfer an action "notwithstanding that it lacks personal jurisdiction over some of the defendants"). Transfer may save a plaintiff's cause of action otherwise time-barred by limitations in the alternative forum. *See, e.g.*, Goldlawr, Inc. v. Heiman, 369 U.S. 463, 465 (1962) (observing that dismissal would have resulted in the loss of a substantial part of the cause of action). However, a court generally will not transfer a case if it finds that the plaintiff's attorney "could have reasonably foreseen when they brought their claims that the Maryland district court lacked personal jurisdiction." Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1202 (4th Cir. 1993).

24. *Zavian*, 130 Md. App. at 692, 747 A.2d at 766. The *Zavian* court considered whether the nonresident defendants had sufficient contacts with Maryland to warrant an exercise of "specific" jurisdiction. *Id.* at 694, 747 A.2d at 767. "Specific jurisdiction," which requires that the defendant have "minimum contacts" with the forum, is exercisable over a nonresident when the suit arises out of or relates to the contacts; "general jurisdiction," which requires that the defendant have "continuous and systematic" contacts with the forum, is exercisable over a nonresident when the suit does not arise out of or relate to the defendant's contacts. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8 & 9 (1984); *see also* Goodyear Tire & Rubber Co. v. Ruby, 312 Md. 413, 422-23, 540 A.2d 482, 486-87 (1988) (discussing "general jurisdiction"). The Court of Appeals of Maryland stated in *Presbyterian University Hospital v. Wilson*:

> [W]here a defendant may not have sufficient contacts to support general jurisdiction, a trial judge need not segregate factors tending to support general jurisdiction from those supporting specific jurisdiction. Rather, the court may utilize factors relevant to general jurisdiction in making a determination regarding the propriety of the forum's exercise of specific personal jurisdiction over a defendant.

337 Md. 541, 551 n.2, 654 A.2d 1324, 1330 n.2 (1995).

York's "Nonattribution Rule"[25] and affirmed the circuit court's dismissal of the lawsuit.[26]

Part II of this Article traces the history of personal jurisdiction jurisprudence and explains how most states' long-arm statutes, including Maryland's, seek to extend personal jurisdiction to the maximum extent permitted by due process.[27] Part III details the strong criticism that New York's Nonattribution Rule has received from courts and commentators.[28] It posits that the *Zavian* court went astray in adopting the Nonattribution Rule because the court did not appreciate the fundamental difference between Maryland's and New York's long-arm statutes: New York's ultraconservative approach to extraterritorial jurisdiction clashes with Maryland's historical commitment to extend its personal jurisdiction to the outermost constitutional limits.[29] Part III also discusses the flawed underpinnings of the Nonattribution Rule and describes why the cases used to justify the Rule form a poor foundation for a doctrine turning on agency-based distinctions.[30] Part IV analyzes why, contrary to *Zavian*'s holding, the facts warranted exercise of extraterritorial jurisdiction under Maryland's long-arm statute and the analytical roadmap of *International Shoe* and its progeny.[31] This Article concludes by calling on the Court of Appeals of Maryland to resolve the conflict between the Maryland federal district court's rejection of the Nonattribution Rule and the Maryland intermediate appellate court's embrace of the Rule.[32]

II. DEVELOPMENT OF PERSONAL JURSIDICTION LAW

A. Pennoyer v. Neff

The United States Supreme Court's personal jurisdiction jurisprudence originated in the seminal case of *Pennoyer v. Neff*.[33] According

25. *Zavian*, 130 Md. App. at 699, 747 A.2d at 770.
26. *Id.* at 702, 747 A.2d at 772.
27. *See infra* Part II.
28. *See infra* Part III.
29. *See infra* Part III.
30. *See infra* Part III.
31. *See infra* Part IV.
32. *See infra* Part V.
33. 95 U.S. 714 (1877). In *Pennoyer*, both parties claimed title to a piece of real estate in Oregon. *Id.* at 719. Pennoyer asserted title under a sheriff's deed resulting from the sheriff's sale of the property to Pennoyer to collect on a judgment entered in Oregon against Neff, a nonresident of Oregon, in favor of Neff's former attorney, Mitchell, for legal fees Neff owed. *Id.* The Supreme Court determined that Mitchell's judgment was invalid and, therefore, Pennoyer obtained no title by the sheriff's unauthorized sale of the property because in the underlying action of *Mitchell v. Neff*, Neff had not been personally served with process within Oregon; rather, the Oregon court had asserted personal jurisdiction over the nonresident based merely on constructive service by publication in Oregon. *Id.* at 719-20, 734. The *Pennoyer* Court reasoned that service by publication would, in the great majority of cases, never be seen by a nonresident defendant, and that

to *Pennoyer*, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[34] Therefore, the Court laid down principles that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"[35] and, conversely, "that no State can exercise direct jurisdiction and authority over persons and property without its territory."[36] The *Pennoyer* decision served another key function as it placed *in personam* jurisdictional analysis squarely under the aegis of the Fourteenth Amendment's Due Process Clause[37] and provided support for the Court's subsequent declaration that jurisdiction based on "physical presence" *ipso facto* satisfies due process.[38] After *Pennoyer*, interstate commerce-promoting innovations in transportation and communication created a vastly different world, and the Supreme Court responded to those changes in the granddaddy of all modern personal jurisdiction cases, *International Shoe v. Washington*.[39]

"[j]udgments for all sorts of claims upon contracts and for torts, real or pretended" could thus fraudulently be obtained in *ex parte* proceedings against nonresidents. *Id.* at 726. To assure "proper protection to citizens of other States," the Court held that due process required that a court could obtain personal jurisdiction over a nonresident only by personal service of process within the forum state, or by his voluntary appearance. *Id.* at 726, 733. Compare *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), in which the Supreme Court upheld "tag" jurisdiction over a nonresident individual solely because he was served with process while visiting in the forum state. *Id.* at 619.

34. *Pennoyer*, 95 U.S. at 720.
35. *Id.* at 722.
36. *Id.*
37. *Id.* at 733; *see also supra* note 6.
38. *See Burnham*, 495 U.S. at 619. However, the Supreme Court cautioned, "[i]t goes too far to say . . . that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State." *Id.* at 620.
39. 326 U.S. 310 (1945). In *International Shoe*, the Supreme Court upheld Washington's exercise of extraterritorial jurisdiction over a Missouri-based shoe company sued by the State of Washington for contributions owed to that State's unemployment compensation fund. *Id.* at 320-21. The debt arose from the in-state presence of eleven to thirteen of the company's salesmen, each of whom operated under the direct supervision and control of managers at the home office in Missouri. *Id.* at 313. By virtue of their Washington sales activities, the Court noted that the shoe company had "received the benefits and protections of the laws of the state, including the right to resort to the courts for the enforcement of its rights." *Id.* at 320. Reciprocally, conducting such in-state activities "may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* at 319. In essence, the *International Shoe* Court recognized a *quid pro quo* whereby a nonresident subjects itself to personal jurisdiction in exchange for the privilege of conducting in-state activities, provided the cause of action arises from those activities. *Id.* at 319-20.

B. International Shoe v. Washington

In recognizing the diminishing utility of "physical presence," the *International Shoe* Court formulated a completely new, and greatly expanded, test for constitutionally permissible extraterritorial jurisdiction, requiring only that the nondomiciliary have "certain minimum contacts"[40] with a forum such that exercising jurisdiction does not offend "traditional notions of fair play and substantial justice."[41]

To take advantage of *International Shoe*'s expanded constitutional concept of *in personam* jurisdiction, all fifty states and the District of Columbia enacted long-arm statutes[42] enabling a court to hale a nonresident into the forum to defend a lawsuit.[43] For example, the long-arm provision considered in *Zavian* provides, in pertinent part: "A court may exercise personal jurisdiction over a person, who directly or *by an agent* . . . [t]ransacts any business or performs any character of work or service in the State."[44] However, not all long-arm statutes are created equal: the overwhelming majority of states, including Mary-

40. *Id.* at 316.
41. *Id.*
42. Although state laws, long-arm statutes may be relied on in federal court as well as state court. FED. R. CIV. P. 4(k).
43. *See* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.60[1] (3d ed. 1997) (defining "long-arm statute" as the exercise of "statutory jurisdiction over nonresident defendants").
44. MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b) (Supp. 2001) (emphasis added). Maryland's long-arm statute, in its entirety, provides:

> (a) Condition.—If jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.
>
> (b) In general.—A court may exercise personal jurisdiction over a person, who directly or by an agent: (1) Transacts any business or performs any character of work or service in the State; (2) Contracts to supply goods, food, services, or manufactured products in the State; (3) Causes tortious injury in the State by an act or omission in the State; (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State; (5) Has an interest in, uses, or possesses real property in the State; or (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.
>
> (c) Applicability to computer information and computer programs—(1)(i) In this subsection the following terms have the meanings indicated. (ii) "Computer information" has the meaning stated in § 22-102 of the Commercial Law Article. (iii) "Computer program" has the meaning stated in § 22-102 of the Commercial Law Article. (2) The provisions of this section apply to computer information and computer programs in the same manner as they apply to goods and services.

Id.

land, extend personal jurisdiction to the full extent permitted by the due process decisions of the Supreme Court.[45] On the other hand, a small minority of states implement their long-arm authority more narrowly than due process allows.[46] For instance, New York clings to an anachronistic approach[47] best described as "half-way between *Pennoyer* and *International Shoe*."[48] The Nonattribution Rule epitomizes New York's conservative approach.[49]

III. THE NONATTRIBUTION RULE

Courts and commentators from New York to Maryland have strongly criticized the Nonattribution Rule's arbitrary dichotomy, and no court has ever fashioned a rational basis to support it.

A. Criticism of the Rule in New York and Maryland

In *Snyder v. Hampton Industries, Inc.*,[50] the United States District Court for the District of Maryland summarized the Nonattribution Rule, stating:

> The New York courts permit the exercise of personal jurisdiction over a nonresident who has acted in the state through an agent, when the nonresident is sued by a third party. When it is the agent suing the nonresident, those courts will not attribute the agent's in-state acts to the nonresident, even if a classic agency relationship is involved.[51]

From the courts of New York to those of Maryland, the Nonattribution Rule has sustained potent criticism. In *Galgay v. Bulletin Co.*,[52] the United States Court of Appeals for the Second Circuit disparaged the Nonattribution Rule's dichotomy, whereby an agent's in-state activities *are* imputed to his nonresident principal whom a third party sues,[53] but such activities are *not* so imputed if the agent sues the principal:

---

45. *See infra* note 68 and accompanying text; *see also* Camelback Ski Corp. v. Behning, 307 Md. 270, 274, 513 A.2d 874, 876 (1986) (describing the legislative purpose behind enactment of Maryland's long-arm statute as "the expansion of judicial jurisdiction up to but not beyond the outermost limits permitted in this area by the due process decisions of the Supreme Court").
46. *See infra* note 69 and accompanying text.
47. *See generally* Ingraham v. Carroll, 687 N.E.2d 1293, 1299-300 (N.Y. 1997) (Bellacosa, J., dissenting) (decrying New York's "rigid" approach to extra-territorial jurisdiction as "not reflect[ing] a progressive reassessment as to where the law is or ought to be, based on this flexible springboard of long-arm jurisdiction").
48. Recent Decision, *Jurisdiction—In Personam Over Non-Domiciliaries—Transacting Business Within the State Under 302(a)(1)*, 34 BROOK. L. REV. 148, 152 (1968); *see also infra* notes 87-88 and accompanying text.
49. N.Y. C.P.L.R. 302 (McKinney 2001).
50. 521 F. Supp. 130 (D. Md. 1981).
51. *Id.* at 141.
52. 504 F.2d 1062 (2d Cir. 1974).
53. *Id.* at 1065 n.1.

"Conceptually, it would not seem to be a supportable distinction and this is so noted by Dean McLaughlin."[54] Joseph McLaughlin, then Dean of Fordham Law School and an acknowledged "outstanding authority"[55] on New York procedural law, characterized the adoption of the Nonattribution Rule as "a regrettable turn in the tortuous road" of New York's long-arm statute.[56] The scholar cogently reasoned:

> If the acts of a true agent may be imputed to his foreign principal when the suit is between a third party, who dealt with the agent, and the principal, there is no analytical reason why the acts of the agent cannot similarly be attributed when the suit is between the agent and the principal.[57]

Although some jurists in New York have followed the Nonattribution Rule,[58] other courts in New York and other jurisdictions have not.[59] For example, in *Snyder v. Hampton Industries, Inc.*,[60] Maryland's

---

54. *Id.*; *see also* Merrill Lynch Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977) (noting that the Nonattribution Rule has received "strong criticism").
55. Walsh v. Ford Motor Co., 335 N.Y.S.2d 110, 113 (Sup. Ct. 1972).
56. N.Y. C.P.L.R. 302 (McKinney Supp. 1973-1974) (referring to the Practice Commentaries by Joseph M. McLaughlin in the Cumulative Annual Pocket Part).
57. *Id.*
58. *See, e.g.*, Stein v. Microelectronic Packaging, Inc., 98 Civ. 8952 (MBM), 1999 U.S. Dist. LEXIS 11375, at *4 (S.D.N.Y. July 21, 1999). "[I]n a suit between an agent and his out-of-state principal, a court cannot exercise jurisdiction over the defendant-principal based on the plaintiff-agent's own activities within the state." *Id.* (citations omitted).
59. *See supra* note 52 and accompanying text; *see also infra* notes 60, 242 and accompanying text. Although the *Zavian* opinion did not mention it, courts sitting in New York often *have* asserted jurisdiction over an out-of-state client sued by a New York lawyer for legal fees, provided the nonresident has visited the lawyer or substantially participated in the activities of the lawyer in New York. *See* Fly, Shuebruk, Gaguine, Boros & Braun v. Marcus, 94 Civ. 543 (KTD), 1996 U.S. Dist. LEXIS 2910, at *7 (S.D.N.Y. Mar. 12, 1996) (upholding New York's long-arm where New York law firm's contract to provide legal services to the nonresident defendant "was entered into and largely performed in New York and [ ] the defendant repeatedly met with the plaintiff in New York"); Carro, Spanbock, Kaster, & Cuiffo v. Rinzler, No. 88 Civ. 5280 (MJL), 1991 U.S. Dist. LEXIS 1212, at *7 (S.D.N.Y. Jan. 30, 1991) (upholding jurisdiction based on "the defendants' act of retaining a New York law firm to defend it in a suit in New York"); Reiner v. Durand, 602 F. Supp. 849, 851-52 (S.D.N.Y. 1985) (sustaining jurisdiction based on defendant's "various visits to and communications with the attorneys in New York" and also noting, "New York courts are divided over the question of whether the retainer of an attorney in New York by an out of state party is a transaction of business within the state so that jurisdiction can be exercised over the non-resident"); Jecies v. Matsuda, 503 F. Supp. 580, 582 (S.D.N.Y. 1980) (upholding jurisdiction in suit for unpaid legal fees because cause of action arose out of defendants' alleged retainer of plaintiff at plaintiff's New York law office); Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apartments, Ltd., 543 N.Y.S.2d 978, 981 (App. Div. 1989) (sustaining jurisdiction based on defendants' retention of New York law firm to provide representation in New York bankruptcy case, ex-

federal court flatly rejected the Nonattribution Rule after noting that the Second Circuit had also "questioned its soundness."[61] In *Snyder*, a Maryland-based marketer of men's clothing solicited purchase orders for many years from customer accounts in Maryland and other states for clothing products of New York and North Carolina-based Hampton, from whom it received commission checks drawn on North Carolina and New York banks.[62] Eventually, Snyder sued Hampton for breach of contract for failure to pay commissions.[63] In sustaining long-arm jurisdiction over Hampton, the Maryland federal district court held that "[c]ertain of the plaintiff's acts in Maryland can be attributed to Hampton for jurisdictional purposes."[64] In doing so, the court expressly repudiated New York's Nonattribution Rule.[65]

---

tensive communications between the parties, and payments sent by defendants into New York); Elman v. Belson, 302 N.Y.S.2d 961, 962 (App. Div. 1969) (sustaining jurisdiction over Illinois resident in action for attorney fees because defendant's Illinois attorneys had come to New York to retain New York attorneys to enforce Illinois judgments in New York, and subsequently made "several trips to New York, during which they participated in the efforts" to collect on the judgments); *see also* Polish v. Threshold Tech. Inc., 340 N.Y.S.2d 354, 357 (Sup. Ct. 1972) (explaining that "plaintiff's claim that he rendered legal services to the defendants in New York establishes a sufficient nexus for jurisdiction"); Mayer v. Goldhaber, 313 N.Y.S.2d 87, 88 (Sup. Ct. 1969) (upholding jurisdiction because "[t]he retainer by defendants of plaintiff for the purpose of legal representation in [New York] is a purposeful transaction of business within [New York]"). *But cf.* Amins v. Life Support Med. Equip. Co., 373 F. Supp. 654, 658 (E.D.N.Y. 1974) (noting that despite isolated meetings between the parties in New York, it was not "unreasonable or unfair" to deny a New York forum to a New York attorney who had "sought out and accepted in Massachusetts employment by a small Massachusetts concern"). New York courts have generally denied jurisdiction where the nonresident client's only contacts with New York have been activities performed there by his attorney. *See* Emmet, Marvin & Martin v. Maybrook, Inc., No. 90 Civ. 3105 (MGC), 1990 U.S. Dist. LEXIS 16753, at *6 (S.D.N.Y. Dec. 11, 1990) (deeming services performed by an attorney in New York an insufficient basis for jurisdiction where defendant did not come to New York to request plaintiff's legal services or undertake any other purposeful activity in New York); Haar v. Armendaris Corp., 294 N.E.2d 855 (N.Y. 1973) (holding that services performed by a nonresident attorney in New York, in the absence of in-state acts by the client, are an insufficient basis to assert jurisdiction in an action for legal fees); Winick v. Jackson, 268 N.Y.S.2d 768 (Sup. Ct. 1969) (stating that a nondomiciliary's hiring of a New York attorney for representation in a New York legal proceeding does not constitute "doing business" in New York).

60. 521 F. Supp. 130 (D. Md. 1981).
61. *Id.* at 142 n.10.
62. *Id.* at 133-36.
63. *Id.* at 133.
64. *Id.* at 141.
65. *Id.* at 141-42. The *Snyder* court observed that the Nonattribution Rule has been criticized by New York commentators, see, for example, McLaughlin, Practice Commentary, New York Civil Practice Law and Rule 302 (McKinney Supp. 1975), and is inconsistent with the conclusion reached by the District of Columbia Court of Appeals in *Rose v. Silver*, 394 A.2d 1368, 1369

In contrast to the well-reasoned criticism of the Nonattribution Rule by the Second Circuit, Maryland's federal district court, and the eminent New York scholar, Dean Joseph McLaughlin, no court or commentator has yet advanced a rational basis to support the Nonattribution Rule's arbitrary dichotomy.

B. Fundamental Differences in the Reach of the Long-Arm in New York and Maryland

In addition to the Nonattribution Rule's status as a "regrettable"[66] doctrine supported by "no analytical reasoning,"[67] another good reason for Maryland courts not to rely on New York precedent to support a denial of long-arm jurisdiction is that Maryland, like forty-two other states and the District of Columbia, extends its extraterritorial personal jurisdiction to the "full extent" authorized by the Due Process Clause,[68] but New York, like a small minority of only six other states,

---

(D.C. 1978). Writing for the court in *Rose*, Judge Ferren first distinguished *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808 (D.C. 1976), which held that the in-state acts of an "independent contractor" could not be attributed to the nonresident for jurisdictional purposes. *Rose*, 394 A.2d 1368, 1369 (D.C. 1978) (distinguishing Envtl. Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808 (D.C. 1976)). Judge Ferren reasoned that due process would not permit such attribution because "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of a contact with the forum State." *Id.* (alteration in original) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). In contrast, an agency relationship that contemplates some measure of control over the forum state actor "results in 'the defendant's purposeful avail[ing] itself of the privilege of conducting activities within the forum state.'" *Id.* (alteration in original) (quoting *Hanson*, 357 U.S. at 253). The *Snyder* "court [found] Judge Ferren's reasoning in *Rose* to be more persuasive than that employed by the New York courts, and therefore decline[d] to follow the nonattribution rule of *Haar*." *Snyder*, 521 F. Supp. at 142.

66. *See supra* note 56 and accompanying text.

67. *See supra* note 57 and accompanying text.

68. *See supra* note 45 and accompanying text; *see also* Maggos v. Helm, No. 98-15751, 1999 U.S. App. LEXIS 13244, at *2 (9th Cir. Apr. 27, 1999) ("Hawaii's long-arm statute allows a court to assert in personam jurisdiction over a defendant to the extent permitted by the due process clause."); Davis v. Am. Family Mut. Ins. Co., 861 F.2d 1159, 1161 (9th Cir. 1988) ("The Montana Supreme Court has interpreted the Montana long-arm statute to permit the exercise of personal jurisdiction over nonresident defendants to the maximum extent permitted by federal due process."); *In re* Celotex Corp. v. Rapid Am. Corp., 124 F.3d 619, 627 (4th Cir. 1997) (holding that "the West Virginia long-arm statute is coextensive with the full reach of due process . . ."); Commercial Diving Servs. v. Vice, No-00-59-BH-C, 2000 U.S. Dist. LEXIS 7671, at *3 (S.D. Ala. May 24, 2000) ("The Alabama Supreme Court has interpreted Alabama's 'Long Arm Statute,' Alabama Rule of Civil Procedure 4.2, to extend the jurisdiction of the Alabama courts to the permissible limits of due process."); Omniken, Inc. v. Shepherd Tissue, Inc., No. 98-5269, 2000 U.S. Dist. Lexis 5268, at *6 (E.D. Pa. Apr. 25, 2000) (stating that a court applying Pennsylania's long-arm statute "may exercise personal jurisdiction to the full extent permitted by the Constitution"); Pkware, Inc. v.

Meade, 79 F. Supp. 2d 1007, 1012 (E.D. Wis. 2000) (noting that the Wisconsin long-arm statute "is to be liberally construed in favor of exercising jurisdiction and is intended to confer jurisdiction to the extent allowed by due process"); Afflerbach v. Cunard Line, Ltd., 14 F. Supp. 2d 1260, 1264 (D. Wyo. 1998) (stating that the Wyoming long-arm statute "extends Wyoming court's jurisdiction to the limits of the due process clause"); Albertson's Inc. v. United Food & Commercial Workers, Civ. No. 96-0398-S-BLW, 1997 U.S. Dist. LEXIS 4554, at *7 (D. Idaho 1997) ("Because the Idaho long-arm statute exercises all jurisdiction consistent with due process, the test becomes simply whether personal jurisdiction over the defendants comports with due process."); Cramer v. Wade, 985 P.2d 467, 471 (Alaska 1999) (stating that Alaska's long-arm statute confers jurisdiction "'to the maximum extent permitted by due process under the federal constitution'"); DeMont v. DeFrantz, No. 2 CA-CVA 98-0038, 1999 Ariz. App. LEXIS 163, at *5 (Ariz. Ct. App. Aug. 27, 1999) ("Rule 4.2(a) Ariz. R. Civ. P., 16 A.R.S., authorizes long-arm 'jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution.'"); John Norrell Arms, Inc. v. Higgins, 962 S.W.2d 801, 803 (Ark. 1998) (quoting ARK. CODE ANN. § 16-4-101(B) (Michie Supp. 1997): "The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.")); Stone v. Texas, 90 Cal. Rptr. 2d 657, 659 (Ct. App. 1999) ("California's long-arm statute permits courts to exercise jurisdiction over nonresidents on any basis not inconsistent with the federal or state constitutions."); Union Pac. R.R. Co. v. Equitas Ltd., 987 P.2d 954, 957 (Colo. Ct. App. 1999) ("In enacting the long-arm statute, the General Assembly intended to extend the jurisdiction of Colorado courts to the fullest extent permitted by the due process clauses of the United States and Colorado Constitutions, pursuant to the minimum contacts requirements of *International Shoe*."); Friedman v. Alcatel Alsthom, 752 A.2d 544, 549 (Del. Ch. 1999) ("Delaware courts have construed the long-arm statute very broadly in order 'to confer jurisdiction to the maximum extent possible under the Due Process Clause.'"); Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 325 (D.C. 2000) ("Congress intended the District's long-arm statute, like the corresponding statutes in Maryland and Virginia, to be coextensive in reach with the exercise of personal jurisdiction permitted by the due process clause."); Galindo v. Lanier Worldwide, Inc., 526 S.E.2d 141, 144 (Ga. Ct. App. 1999) (quoting Bradlee Mgmt. Servs. v. Cassells, 292 S.E.2d 717 (Ga. App. 1982) and stating that "the policy of [Georgia's] Long Arm Statute is to exercise jurisdiction over nonresident defendants to the maximum extent permitted by procedural due process")); State *ex rel.* Miller v. Grodzinsky, 571 N.W.2d 1, 3 (Iowa 1997) ("Iowa Rule of Civil Procedure 56.2 provides for the broadest expanse of personal jurisdiction consistent with due process."); St. Francis Mercantile Equity Exch., Inc. v. Newton, 996 P.2d 365, 368 (Kan. Ct. App. 2000) ("Kansas appellate courts have consistently found that the Kansas long-arm statute is to be liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."); Davis-Johnson v. Parmelee, 18 S.W.3d 347, 352 (Ky. Ct. App. 1999) (stating that Kentucky's long-arm statute "permits the courts 'to reach to the full constitutional limits of due process in entertaining jurisdiction over nonresident defendants.'"); Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 885 (La. 1999) (stating that Louisiana's long-arm statute allows "Louisiana courts to exercise personal jurisdiction over non-resident defendants to the fullest extent allowed by the United States Constitution"); Dorf v. Complastik Corp., 735 A.2d 984 (Me. 1999) ("By express language

of the [Maine] long-arm statute, the courts must find personal jurisdiction to the fullest extent permitted by the due process clause of the United States Constitution."); Hansford v. District of Columbia, 329 Md. 112, 128 n.7, 617 A.2d 1057, 1064 n.7 (1993) ("As this Court has repeatedly stated, the purpose of the Maryland Long Arm Statute is to permit a Maryland court to exercise jurisdiction over the person to the full extent authorized by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553 (Mass. 1994) ("[T]he Massachusetts long-arm statute 'functions as "an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States."'"); Green v. Wilson, 565 N.W.2d 813, 825 n.12 (Mich. 1997) ("'[The long-arm statute] was intended to give Michigan courts the full extent of power possible to gain personal jurisdiction over nonresident defendants as is consistent with the principles of due process.'") (alteration in original) (quoting Kriko v. Allstate Ins. Co., 357 N.W.2d 882 (Mich. 1984)); Marshall v. Inn on Madeline Island, 610 N.W.2d 670, 672 (Minn. Ct. App. 2000) (noting that the Minnesota long-arm statute "permits courts to assert jurisdiction over defendants to the extent that federal constitutional requirements of due process will allow"); State *ex rel.* K-Mart Corp. v. Holliger, 986 S.W.2d 165, 167-68 (Mo. 1999) ("This Court has determined that the legislative intent of the Missouri General Assembly in passing [the long-arm statute] 'was to *extend* the jurisdiction of the courts of this state over nonresident defendants to the extent permissible under the due process clause of the fourteenth amendment of the constitution of the United States.'"); Castle Rose, Inc. v. Phila. Bar & Grill of Ariz., Inc., 576 N.W.2d 192, 195 (Neb. 1998) ("Nebraska's long-arm statute . . . expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits . . . ."); Baker v. Eighth Judicial Dist. Ct., 999 P.2d 1020, 1023 (Nev. 2000) ("Nevada's long-arm statute . . . reaches the limits of due process set by the United States Constitution."); South Down Recreation Ass'n v. Moran, 686 A.2d 314, 316 (N.H. 1996) ("[W]e construe our statutes providing personal jurisdiction over nonresidents 'to the full constitutional limit . . . .'"); F.F. v. G.A.D.R., 750 A.2d 786, 789 (N.J. Super. Ct. App. Div. 2000) (stating that New Jersey's "long arm jurisdictional rule is coextensive with constitutional due process jurisdictional limits"); Tercero v. Roman Catholic Diocese of Norwich, 980 P.2d 77, 80 (N.M. Ct. App. 1999) (noting that New Mexico's long-arm "statute extends the jurisdictional reach of New Mexico courts as far as constitutionally permissible"); Saxon v. Smith, 479 S.E.2d 788, 794 (N.C. Ct. App. 1997) ("Under [North Carolina's] 'long arm' statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution."); Auction Effertz, Ltd. v. Schecher, 611 N.W.2d 173, 176 (N.D. 2000) (stating that North Dakota's long-arm provision was "'designed to permit the state courts to exercise personal jurisdiction to the fullest extent permitted by due process'") (quoting Hebron Brick Co. v. Robinson Brick & Tile Co., 234 N.W.2d 250, 255 (N.D. 1975)); Ferrell v. Prairie Int'l Trucks, Inc., 935 P.2d 286, 288 (Okla. 1997) ("Oklahoma's long-arm statute extends the jurisdiction of its courts over non-residents to the outer-limits permitted by the Oklahoma Constitution and the United States Constitution."); Sutherland v. Brennan, 901 P.2d 240, 244-45 (Or. 1995) ("'[A]n Oregon court has jurisdiction to the limits of due process under the Fourteenth Amendment; those limits are "an issue of federal law to be decided pursuant to the controlling decisions of the United States Supreme Court."'"); Porter v. Porter, 684 A.2d 259, 261 (R.I. 1996) (Rhode Island's long-arm statute confers on its courts "jurisdiction over persons up to federal constitutional due process

does not.[69] The limited reach of New York's long-arm statute renders

limits"); Meyer v. Paschal, 498 S.E.2d 635, 638 (S.C. 1998) ("South Carolina enacted its version of the long-arm statute in 1966 and it has been interpreted to extend to the outer limits of the due process clause."); Ventling v. Kraft, 161 N.W.2d 29, 34 (S.D. 1968) (holding that South Dakota applies its long-arm statute to the fullest extent permissible under due process); Mfrs. Consolidation Serv. v. Rodell, 42 S.W.3d 846, 855 (Tenn. Ct. App. 2000) (stating that Tennessee's long-arm statute "authorizes the assertion of personal jurisdiction to the limits of federal due process"); CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex. 1996) (noting that the Texas long-arm statute reaches "'as far as the federal constitutional requirements of due process will allow'") (quoting Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 226 (Tex. 1991)); Starways, Inc. v. Curry, 980 P.2d 204, 206 (Utah 1999) ("[T]he Utah long-arm statute 'must be extended to the fullest extent allowed by due process of law.'"); Brown v. Cal Dykstra Equip. Co., 740 A.2d 793, 794 (Vt. 1999) (stating that the Vermont long-arm statute "'reflects a clear policy to assert jurisdiction over individual defendants to the full extent permitted by the Due Process Clause'") (quoting N. Aircraft v. Reed, 572 A.2d 1382, 1385 (Vt. 1990)); Glumina Bank v. D.C. Diamond Corp., 527 S.E.2d 775, 777 (Va. 2000) ("'The function of [Virginia's] long-arm statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in Virginia, to the extent permissible under the Due Process Clause of the Constitution of the United States.'") (quoting Nan Ya Plastics Corp. U.S.A. v. DeSantis, 337 S.E.2d 388, 391 (Va. 1989)); Nagy v. Williams, No. 23895-1-II, 1999 Wash. App. LEXIS 2071, at *3-*4 (Wash. Ct. App. Dec. 10, 1999) (stating that Washington's long-arm statute "is meant to be coextensive with the limits of federal due process").

69. New York is one of only seven jurisdictions (Connecticut, Florida, Illinois, Indiana, Ohio, Mississippi and New York) that do not interpret their long-arm statute as extending to the full extent of constitutional authority. *See* Anderson v. Ind. Black Expo, Inc., 81 F. Supp. 2d 494, 501 (S.D.N.Y. 2000) (noting that New York's long-arm statute "'does not extend New York's long-arm jurisdiction to the full extent permitted by the Constitution'") (quoting Levisohn, Lerner, Berger & Langsam v. Med. Taping Sys., 10 F. Supp. 2d 334, 339 (S.D.N.Y. 1998)); Thomason v. Chem. Bank, 661 A.2d 595, 602 (Conn. 1995) ("If the legislature had meant to allow our courts to exercise the full extent of constitutionally permissible long arm jurisdiction, it could have done so explicitly."); Gibbons v. Brown, 716 So. 2d 868, 869 (Fla. Dist. Ct. App. 1998) ("Generally speaking, Florida's long-arm statutes are of a class that requires more activities or contacts to allow service of process than are currently required by the decisions of the United States Supreme Court."); Rollins v. Ellwood, 565 N.E.2d 1302, 1314 (Ill. 1990) ("Illinois' long-arm statute . . . may well restrict the power that the courts of this State have to bring nonresidents before them to a greater extent than do the Federal due process clause and the 'minimum contacts' standard developed over the years by the Supreme Court."). The Appellate Court of Illinois has held that:

> Illinois courts are not to consider only the literal meaning of the text of the long-arm statute or the evolving federal constitutional standards of due process; they must consider the constraints imposed by the Illinois Constitution's guarantee of due process. . . . Under the Illinois constitutional standard, jurisdiction is to be asserted "only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." . . . The focus is on the

New York precedent denying jurisdiction inapposite in full-extent states such as Maryland. As one commentator noted, jurisdictions mistakenly adopt New York precedent without taking note of the limitations of New York's law, specifically, that New York's jurisdictional statute does not go to the limits of the Constitution, and that New York law additionally requires the defendant's physical presence.[70] From this it follows that New York case law denying long-arm jurisdiction is readily distinguishable in any state, such as Maryland, whose long-arm statute either goes to the constitutional limits or simply does not require physical presence in the state.[71]

The broad reach of Maryland's current long-arm law stands out in comparison to a predecessor statute[72] that subjected foreign corpora-

---

defendant's activities within the forum state, not those of the plaintiff.

Mellon First United Leasing v. Hansen, 705 N.E.2d 121, 127 (Ill. App. Ct. 1998); *see also* Anthem Ins. Cos. Inc. v. Tenet Healthcare Corp., 730 N.E.2d 1227, 1232 (Ind. 2000) (rejecting the proposition that the Indiana long-arm statute was "intended to be coextensive with the limits of personal jurisdiction under the Due Process Clause"); Stripling v. Jordan Prod. Co., 234 F.3d 863, 869 n.7 (5th Cir. 2000) ("Mississippi's long-arm statute is not co-extensive with due process."); Goldstein v. Christiansen, 638 N.E.2d 541, 545 n.1 (Ohio 1994) (noting that "Ohio has not extended long-arm jurisdiction to the limits of due process").

70. Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 577-78 (1999).

71. *Id.*; *see also infra* note 95 and accompanying text (discussing that Maryland's long-arm statute does not require the defendant's physical presence in the state); *supra* note 45 and accompanying text (discussing that Maryland's long-arm statute extends to the "outermost" constitutional limits). Although courts have consistently interpreted the "transacting business" prong of the Maryland long-arm statute as extending to the full extent permitted by due process, several courts applying Maryland law have questioned whether the "tortious injury" prongs of the statute reach the limits of due process. *See* MD CODE ANN., CTS. & JUD. PROC. §§ 6-103(b)(3), 6-103(b)(4) (Supp. 2001); Snyder v. Hampton Indus., Inc., 521 F. Supp. 130, 136 (D. Md. 1981) (questioning whether Maryland's long-arm statute's subsections (b)(3) and (b)(4) reach the full extent permitted by due process, but noting that federal courts have analyzed "transacting business" cases "under the Due Process standards developed by the Supreme Court"); Craig v. Gen. Fin. Corp., 504 F. Supp. 1033, 1036 (D. Md. 1980) (maintaining that sections 6-103(b)(3) and (b)(4) of Maryland's long-arm statute are not "coterminous with due process"); *see generally* Recent Decision, *The Fourth Circuit Court of Appeals Holds Occasional Interstate Telephone Calls Insufficient to Sustain Personal Jurisdiction by a Maryland Court*, 56 MD. L. REV. 1147, 1151 (1997) (noting federal and Maryland state courts' discord over whether the tortious injury prongs of Maryland's long-arm statute authorize jurisdiction to the full extent permitted by due process). *But see* Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135 (4th Cir. 1996), *cert. denied*, 519 U.S. 983 (1996) (applying sections 6-103(b)(3) and (b)(4) and noting that the Maryland long-arm statute is "coterminous with the limits of the Due Process Clause").

72. Maryland's federal district court discussed article 23, section 92(d) in *Bennett v. Computers Intercontinental, Inc.*, 372 F. Supp. 1082, 1084 (D. Md. 1974), stating:

tions to suit in Maryland on causes of action arising out of contracts "made"[73] within this State. The modern "transaction of business" concept extended such jurisdiction considerably:[74] it applies to both individuals and corporations and promotes a certain flexibility not found in jurisdiction based on the "making" of a contract.[75] For example, under the present scheme, a contract negotiated or performed in whole or in part in Maryland but "made" elsewhere may amount to a "transaction of business" in Maryland.[76] The Court of Special Appeals of Maryland illustrated the "transaction of business" concept's flexibility in *Jason Pharmaceuticals, Inc. v. Jianas Bros. Packaging Co.*[77] by debunking the trial judge's emphasis on where the contract was "made":

> The trial court also concluded that the contract was formed in Missouri and was persuaded that this was an important factor weighing against the exercise of personal jurisdiction over appellee: "Well, as far as [appellee was] concerned, the contract was negotiated in Missouri. . . . Well, they never left Missouri. Everything they did was in Missouri. . . ." [W]e view the conclusion of the trial judge on where the contract was formed *far from controlling* in the determination of personal jurisdiction.[78]

> Under an earlier version of the Maryland "Long Arm" Statute, the single act of making a contract within Maryland could serve as the basis for extraterritorial service of process. Art[icle] 23, [section] 92(d) of the 1957 edition of the Annotated Code of Maryland reads as follows: "[E]very foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in the State on *any cause of action arising out of a contract made within this State* or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State." . . . Under the current version of the "Long Arm" Statute [Art. 75, section 96(a)(1),] section 92(d) was incorporated into [section] 96(a)(1)—the "transaction of business" section of the statute—and the revised section "extends such jurisdiction . . . considerably."

Id. (alteration in original) (quoting, in part, Bernard Auerbach, *The "Long Arm" Comes to Maryland*, 26 MD. L. REV. 13, 34 (1966)).

73. Maryland follows the *lex loci contractus* rule, under which the law of the place where the contract was "made" governs its meaning and operation, and a contract is considered "made" where the last act necessary for the formation of a binding contract is performed. Baker v. Sun Co., 985 F. Supp. 609, 611 (D. Md. 1997).
74. Auerbach, *supra* note 72, at 34.
75. *Id.*; *see generally* Harris v. Arlen Props., Inc., 256 Md. 185, 195, 260 A.2d 22, 27 (1969) (noting the "more flexible approach" of Maryland's present long-arm statute). In the context of this article, the words "form" and "make" are synonymous. *Black's Law Dictionary* defines "make" as, *inter alia*, "to form" and "to execute." BLACK'S LAW DICTIONARY 967 (7th ed. 1999).
76. Auerbach, *supra* note 72, at 34.
77. 94 Md. App. 425, 617 A.2d 1125 (1993).
78. *Jason Pharms., Inc.*, 94 Md. App. at 432-33, 617 A.2d at 1128-29 (emphasis added) (alterations in original); *see also* Novack v. Nat'l Hot Rod Assoc., 247 Md. 350, 356, 231 A.2d 22, 26 (1967) (describing as "not decisive," for juris-

Despite that clear guidance by the court of special appeals, the *Zavian* trial judge exalted the importance of where the Personal Management Agreements were formed:

> [W]hat is apparent to this Court is the fact that the underlying contracts at issue were not *formed* in Maryland, supporting a lack of jurisdiction. Although the facts surrounding the formation of the personal representation agreements with each of the Defendants are disputed, it is undisputed that each of the individual players *signed* her respective agreement outside Maryland, thereby forming the contract outside Maryland. . . . Plaintiff offers several additional arguments in support of the proposition that there were sufficient contacts, including the argument that Plaintiff did substantive work in Maryland for the Defendants under her representation agreements with each. This Court, however, does not find these contacts relevant because they do not involve the *formation* of the agreements between the parties.[79]

Instead of correcting the trial court's heavy reliance on the "formation" of the retainer agreements, the *Zavian* court also stressed, "the personal management agreements were neither formed, examined, nor executed . . . in Maryland."[80] Although a contract's place of execution carried the day under the predecessor long-arm statute,[81] subsequent jurisprudence in Maryland and elsewhere has recognized it as a "fortuitous circumstance"[82] undeserving of weight in a modern jurisdictional analysis applying the expansive, flexible "transaction of business standard."[83]

C. New York's Distinctive "Physical Presence" Requirement

Unlike Maryland, New York generally requires the defendant's physical presence as a *sine qua non* to exercising long-arm jurisdiction; the Nonattribution Rule exemplifies this precept, which the Supreme

---

dictional purposes, that defendant's contracts with a Maryland entity were "made" in California); City of New York v. Cont'l Vitamin Corp., 254 F. Supp. 845, 848 n.13 (S.D.N.Y. 1966) ("The argument in defendant's brief devoted to where the contract was 'made' is specious. Even if the contract were 'made' outside New York, this factor would not be controlling.").

79. Brief for Appellant at 3, Zavian v. Foudy, 130 Md. App. 689, 747 A.2d 764 (No. 00074).

80. *Zavian*, 130 Md. App. 689, 702, 747 A.2d 764, 771 (2000). The redundancy inherent in its serial use of the words "formed," "examined," and "executed" underscored the tribunal's emphasis on where the contracts were made. *Id.*

81. *See supra* notes 72-73 and accompanying text.

82. Galgay v. Bulletin Co., 504 F.2d 1062, 1065 (2d Cir. 1974) (stating that the place of contract execution was a "purely fortuitous circumstance" and not determinative of personal jurisdiction).

83. *See supra* note 78 and accompanying text.

Court has held due process does not require. New York's long-arm statute's legislative history indicates that New York courts may subject nonresidents to personal jurisdiction only "when they commit acts *within the state*."[84] Shortly after the statute's enactment, a commentator highlighted the issues raised by New York's distinctive "physical presence" requirement:

> There is . . . little doubt that if the nondomiciliary physically comes into New York and commits certain acts there, the New York courts will have jurisdiction over him in any action arising out of those acts. . . . However, there are many cases in which the nondomiciliary, while committing no physical act in New York, still has some connection with that state: perhaps he has caused a consequence to be felt there by his actions out of state, or perhaps he has entered a contract to be performed in New York. In these situations the construction of the statute will be crucial in determining whether the defendant can be forced to answer the plaintiff's complaint in New York. If the statute goes to the limits permitted by due process, . . . then in many of these borderline cases jurisdiction over the nondomiciliary will be upheld. . . . But if the statute is to stop short of due process limitations, many of these borderline defendants may escape the in personam jurisdiction of the New York courts.[85]

As it turned out, in such "borderline" long-arm cases, New York's courts adopted a conservative[86] approach aptly described as "halfway between *Pennoyer* and *International Shoe*":[87] although a nonresident de-

---

84. James T. Ryan, Note, *New York Civil Practice and Rules Section 302*, 49 CORNELL L.Q. 110, 110 (1963) (emphasis added). One commentator observed that this limitation "would seem to exclude many situations where the defendant commits an act outside of the state with only the consequences occurring in New York." Donald W. Large, Note, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., Feathers v. McLucas, Singer v. Walker, *15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965)*, 51 CORNELL L.Q. 377, 381 (1966).

85. Large, *supra* note 84, at 379. Enacted in 1963, the New York statute analyzed in that article provided:

> [Section] 302. Personal jurisdiction by acts of nondomiciliaries. (a) Acts which are the basis of jurisdiction. A court may exercise jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he: 1. transacts any business within the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. 302 (McKinney 1973).

86. *See supra* note 49.

87. Recent Decision, *supra* note 48, at 152. The Nonattribution Rule, which in a suit by an agent against her nonresident principal, makes the principal's

fendant no longer had to be physically present within New York for service of process, the courts generally would not find that the nonresident had "transacted business" unless he had physically entered New York to further his business objectives.[88]

New York's physical presence requirement, which the Nonattribution Rule exemplifies,[89] lacks constitutional origins. According to the Supreme Court in *Burger King v. Rudzewicz*,[90] so long as a defendant's contacts with a forum are not "'random,' 'fortuitous,' or 'attenuated,'"[91] the mere fact that a defendant "did not *physically* enter the forum State" may not defeat *in personam* jurisdiction in an age when substantial amounts of business are transacted solely by non-in-person contacts.[92] The Court's "modern commercial life"[93] rationale has

---

"physical presence" a prerequisite to the exercise of personal jurisdiction, exemplifies New York's conservative approach to long-arm jurisdiction. *Id.* at 152.

88. *Id. See, e.g.*, Emmet, Marvin & Martin v. Maybrook, Inc., No. 90 Civ. 3105 (MGC), 1990 U.S. Dist. LEXIS 16753, at *7 (S.D.N.Y. Dec. 11, 1990) (deeming services performed by an attorney in New York an insufficient basis for jurisdiction where defendant did not come to New York to request plaintiff's legal services or undertake any other purposeful activity there); *Haar v. Armendaris Corp.*, 294 N.E.2d at 855 (holding that services performed by a nonresident attorney in New York, in the absence of in-state acts by the client, are an insufficient basis to assert jurisdiction in an action for legal fees). New York's particular emphasis on physical presence also finds expression in that state's distinctive rule that a nonresident's contacts with New York by telephone, fax, or mail generally merit little or no weight in a jurisdictional analysis. *See, e.g.*, Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 766 (2d Cir. 1983) ("New York courts have consistently refused to sustain section 302(a)(1) jurisdiction solely on the basis of defendant's communication from another locale with a party in New York."); Prof'l Pers. Mgmt. Corp. v. Southwest Med. Assoc., Inc., 628 N.Y.S.2d 919, 919 (App. Div. 1995) ("Interstate negotiations by telephone, facsimile or mail are insufficient to impose personal jurisdiction in New York upon a non-resident defendant."). *But see* Picard v. Elbaum, 707 F. Supp. 144, 148 (S.D.N.Y. 1989) (stating that the maintenance of an investment account in New York and telephone calls to New York ordering investment transactions were purposeful and continuous transactions of business in New York for jurisdictional purposes); Parke-Bernet Galleries, Inc. v. Franklyn, 256 N.E.2d 506, 508 (N.Y. 1970) (stating that participation in a New York auction by telephone conferred jurisdiction because the nonresident defendant had "projected himself" into New York commerce). An exception to New York's physical presence requirement is found in the portion of the Nonattribution Rule that designates a New York agent's in-state acts as attributable to a nonresident defendant-principal sued by a third party. In such cases the nonresident may be sued in New York without ever having set foot inside its borders. *See supra* note 51 and accompanying text.

89. *See supra* note 87.

90. 471 U.S. 462 (1985).

91. *Id.* at 475 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

92. *Id.* at 476. The *Burger King* Court observed:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential

only increased in cogency with the growth of interstate business transacted through Internet, electronic mail, cellular, and fax communications.[94] In harmony with the Supreme Court's approach, Maryland's courts have characterized physical presence as inessential to an exercise of jurisdiction under the long-arm statute's "transact[ing] business" prong.[95] Maryland's and New York's divergence on the physical presence issue makes New York long-arm case law readily distinguishable in Maryland.

D. The Nonattribution Rule's Flawed Underpinnings

In *Haar v. Armendaris Corp.*, the New York case that spawned the Nonattribution Rule, the court relied on four cases that did not con-

---

> defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Id. The *Burger King* Court approved a Florida federal court's exercise of long-arm jurisdiction over a Michigan Burger King franchisee alleged to have breached a franchise agreement with a Florida corporation by failing to make required payments in Florida. *Id.* at 487. The Court reasoned that the Michigan resident purposefully availed himself of the benefits of Florida law by entering into a significant, long-term franchise agreement with a company headquartered in Florida, and by agreeing that all disputes would be governed by Florida law. *Id.* at 482.

93. *Id.* at 476.

94. *See* Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 411 (1998) (discussing the difficulty in applying traditional principals of jurisdiction to cyberspace-based disputes).

95. Sleph v. Radtke, 76 Md. App. 418, 427, 545 A.2d 111, 115, *cert. denied*, 314 Md. 193, 550 A.2d 381 (1988) (stating that the requirements of due process for exercise of long-arm jurisdiction are satisfied if the suit is based on a contract that has a substantial connection with Maryland, even if the defendant has never entered the state). The Court of Appeals of Maryland has not considered the issue of whether "transacting business" requires the defendant's "physical contacts," but in light of (1) the Supreme Court's holding that due process does not require the defendant's physical presence in the forum; and (2) the Court of Appeals of Maryland's frequent pronouncements that the state's long-arm jurisdiction reaches to the full extent permitted by due process, it appears implausible that Maryland's highest court would make physical presence a prerequisite to finding a "transaction of business" in Maryland. *Id.* at 427-29; Snyder v. Hampton Indus., Inc., 521 F. Supp. 130, 141 (D. Md. 1981) ("[T]aking the Court of Appeals [of Maryland] at its word regarding the constitutional reach of subsection (b)(1) [of the Maryland long-arm statute], this court holds that a nonresident who has never entered the state, either personally or through an agent, may be deemed to have 'transacted business' in the state within the meaning of subsection (b)(1).").

cern true agency relationships; as such, those cases formed a poor foundation for a doctrine turning on agency-based distinctions. In addition to its shaky case law underpinnings, the *Haar* opinion's extreme brevity foreshadowed the conclusory approach taken in *Zavian.*

The *Zavian* court provided no exegesis for its embrace of the Nonattribution Rule; instead, the court's conclusory holding read as follows:

> In our view, for personal jurisdiction to be exercised over a nonresident defendant by attributing an agent's in-state activities to the nonresident defendant would offend traditional notions of fair play and substantial justice. . . . [T]o require the nonresident appellees to defend appellant's Maryland action based solely on appellant's professional services rendered in Maryland unilaterally by appellant would, in our view, stretch the doctrine of *International Shoe* beyond the limit of due process.[96]

1. *Haar v. Armendaris Corporation*

Just as the *Zavian* opinion failed to explain *why* attributing a plaintiff-agent's in-state acts to her nonresident defendant-principal offended due process and traditional notions of fair play and substantial justice, *Haar v. Armendaris Corporation,*[97] the Nonattribution Rule's progenitor, also lacked elucidation. Only two paragraphs long, the *Haar II* decision simply reversed the appellate division's decision by adopting Judge Capozzoli's dissent in the appellate division's opinion.[98] The plaintiff, Charles Haar, who resided in Massachusetts but held a New York attorney's license, sued in New York to recover fees owed to him by the California-based defendant, Armendaris Corporation,[99] for legal services related to the development of a residential community in New York City.[100] Those services included negotiations in New York City and a visit to the site of the real property in New York.[101] In opposing Armendaris' motion to dismiss for lack of personal jurisdiction, Haar argued that his work performed in New York on behalf of Armendaris constituted a transaction of business in New York by Armendaris, thereby subjecting the California company to New York jurisdiction under New York's long-arm statute,[102] which

96. Zavian v. Foudy, 130 Md. App. 689, 699-700, 747 A.2d 764, 770 (2000).
97. 294 N.E.2d 855, 855 (N.Y. 1973) [hereinafter *Haar II*].
98. *Id.*
99. Haar v. Armendaris Corp., 337 N.Y.S.2d 285, 287 (Capozzoli, J., dissenting) [hereinafter *Haar I*]. The Armendaris Corporation was headquartered in California, incorporated in Delaware, and served with process in Missouri. *Id.*
100. *Id.* at 286.
101. *Id.* at 287 (Capozzoli, J., dissenting).
102. *Id.* at 288.

provided, in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent: 1. transacts any business within the state."[103] The Appellate Division for the Supreme Court affirmed the trial court's denial of Armedaris' motion to dismiss for lack of personal jurisdiction,[104] but the New York Court of Appeals reversed,[105] adopting the lower appellate court's dissenting opinion,[106] which it paraphrased as follows:

> [A]s in cases, *all involving agents suing their principals*, in which the Court of Appeals had denied jurisdiction, and which were cited by it in a footnote in Parke-Bernet Galleries v. Franklin, the present plaintiff was relying on his own activities within the State rather than on defendant's independent activities, and that [sic] the record in the present case failed to disclose any purposeful activity engaged in by defendant itself within the State, out of which plaintiff's action arose, so as to render it subject to the court's jurisdiction.[107]

---

103. N.Y. C.P.L.R. 302 (McKinney 1973); *see generally* Whitaker v. Fresno Telsat, Inc., 87 F. Supp. 2d 227, 229-31 (S.D.N.Y. 1999).
104. *Haar I*, 337 N.Y.S.2d at 286.
105. *Harr II*, 294 N.E.2d at 855.
106. *Id.*
107. *Id.* (citations omitted) (emphasis added). The actual text of the Judge Capozzoli's dissenting opinion read as follows:

> I dissent and would reverse the order appealed from which denied defendant's motion to dismiss the complaint herein on the ground of lack of personal jurisdiction.
>
> Plaintiff and defendant are both admittedly nondomiciliaries. On June 15, 1971, defendant, in California, wrote to plaintiff, in Massachusetts, allegedly engaging him to "proceed to begin negotiations with the Welfare Island Development Corporation toward the execution of a development agreement." Plaintiff, who now sues for services rendered, based upon service on defendant in Missouri, failed to submit an affidavit at Special Term in opposition to defendant's motion to dismiss. The only affidavits submitted in opposition were those of an attorney who claims to have been "engaged as associate attorney in this matter by plaintiff" and they alleged in conclusory fashion that he and plaintiff had negotiated in New York City with the Welfare Island Development Corporation and had visited the Welfare Island site here.
>
> This is not an action between defendant and a third party, but rather between plaintiff as agent for defendant and defendant-principal. In the former situation I would not hesitate to find jurisdiction, but I conclude differently under the facts of this case. This precise issue was the subject of a footnote in Parke-Bernet Galleries v. Franklyn, which reads as follows:
>
> > 2. The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. (See Glassman v. Hyder; Standard Wine & Liq. Co. v. Bombay Spirits Co.; McKee Elec. Co. v. Rauland-Borg Corp.; Kramer v. Vogl.) It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the plaintiff was relying on his own activities within the State,

Thus, New York's highest court established what would later be known as the Nonattribution Rule, whereby an agent's acts in New York *are* attributed to his nonresident principal whom a third party sues, but such acts are *not* so attributed if the agent sues the principal.[108]

2. *Parke-Bernet Galleries, Inc. v. Franklyn*

In lieu of offering a rational basis to justify this dichotomy, the *Haar II* court instead merely cited to a "cryptic"[109] footnote in *Parke-Bernet Galleries, Inc. v. Franklyn*,[110] which read as follows:

> The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. It is sufficient to point out that in each of those cases, *all of which involved agents who were suing their principals*, the plaintiff was relying on his own activities within the State, and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent.[111]

Upon close scrutiny, the four cases cited in the *Parke-Bernet* footnote[112] offer no insight supporting the Nonattribution Rule's agency-based dichotomy.[113] Contrary to the assertion in *Parke-Bernet* that each of the four cases involved "agents who were suing their principals,"[114] in actuality, none of the cases involved true agency relationships.[115] Consequently, they formed a weak foundation for a rule

---

> and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent.
>
> As in the cases in the quoted footnote, the present plaintiff is relying on his own activities within the State, rather than on defendant's *independent* activities. This record fails to disclose any "purposeful activity" engaged in by defendant itself within this State, out of which this action arose, so as to render it subject to our jurisdiction in the plaintiff's action against it.

Haar I, 337 N.Y.S.2d at 287-88 (Capozzoli, J., dissenting) (citations omitted).

108. *Haar II*, 294 N.E.2d at 855.
109. N.Y. C.P.L.R. 302 (McKinney Supp. 1973-1974) (noting that the "cryptic" footnote 2 of the *Parke-Bernet* opinion "has always confused the writer and is now causing consternation in the courts").
110. 256 N.E.2d 506, 509 n.2 (N.Y. 1970).
111. *Id.* (citations omitted) (emphasis added).
112. *Id.*; *see also supra* note 107 (listing the four cases cited in *Parke-Bernet*).
113. *See supra* note 51.
114. *Parke-Bernet*, 256 N.E.2d at 509 n.2.
115. *See infra* notes 120-63 and accompanying text; *see also supra* note 2.

turning on agency-based distinctions. What the four cases *did* exemplify was New York's "physical presence" rule:[116] each of the cases denied jurisdiction primarily because the defendant *itself* never physically entered New York and performed a purposeful act from which the cause of action arose.[117] Moreover, two of the four cases involved suits against defendants from foreign countries,[118] a scenario that considerably raises the bar for personal jurisdiction.[119] As the sole ostensible support for New York's formulation of the Nonattribution Rule, each of the four cases cited in the *Parke-Bernet* footnote deserve careful analysis.

3. *Kramer v. Vogl*

In *Kramer v. Vogl*,[120] the Court of Appeals of New York considered whether to exercise personal jurisdiction over a European defendant on the theory that the plaintiff's cause of action arose from the defendant's transaction of business within New York.[121] Kramer, a dealer in imported leather, received one year's exclusive American purchasing rights for the Austrian defendant Vogl's leather goods.[122] The plaintiff earned neither a salary nor a commission from the defendant, but simply "bought the leather and paid for it."[123] Thus, contrary to the assertion in *Parke-Bernet*,[124] *Kramer* did not involve an agency situation at all, but rather, a relationship between a seller and an independent distributor of goods.[125] In alleged violation of Kramer's exclusive purchasing rights, Vogl sold its wares to other American leather dealers, and Kramer sued for willful fraud and deceit.[126] According to the *Kramer* court,

> The issue boils down to whether the phrase "transacts any business within the state" covers the situation of a nonresident who *never comes into New York State* but who sells and

116. *See infra* notes 120-63 and accompanying text.
117. *See infra* notes 137-80 and accompanying text.
118. *See* Kramer v. Vogl, 215 N.E.2d 159, 160 (N.Y. 1966). See *infra* notes 121-28 and accompanying text for a discussion of *Kramer*. *See* Standard Wine & Liquor Co. v. Bombay Spirits Co., 228 N.E.2d 367, 368 (N.Y. 1967). See *infra* notes 129-40 and accompanying text for a discussion of *Standard Wine*.
119. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 115 (1987) (cautioning that "the Federal Government's interest in its foreign relations policies" requires "[g]reat care and reserve" when extending personal jurisdiction over defendants from outside the United States).
120. 215 N.E.2d 159 (N.Y. 1966).
121. *Id.* at 160.
122. *Id.*
123. *Id.* at 161.
124. *See supra* notes 110-11 and accompanying text.
125. *Kramer*, 215 N.E.2d at 161.
126. *Id.* at 160.

> sends goods into the State pursuant to an order sent from within the State.[127]

In declining to exercise jurisdiction over the Austrian defendant, the *Kramer* court observed that Vogl: 1) conducted no sales, promotion, or advertising activities in New York; 2) generated only 1% to 2% of its total sales from the plaintiff; and 3) offered no evidence that the leather it sold to the plaintiff was resold or used in New York.[128]

4. *Standard Wine & Liquor Co. v. Bombay Spirits Co.*

On facts very similar to those in *Kramer v. Vogl*,[129] New York's state supreme court also denied jurisdiction in *Standard Wine & Liquor Co. v. Bombay Spirits Co.*[130] In that case, Penrose, a liquor importer and distributor, acquired the United States distribution rights to the Scottish defendant's Bombay liquor products.[131] Penrose and Bombay then granted the plaintiff, Standard Wine, a liquor distributor, exclusive New York metropolitan area rights for five years to distribute and sell Bombay brand gin and vermouth.[132] Subsequently, in alleged violation of those exclusive rights, Penrose and Bombay granted distribution rights to other New York metropolitan area liquor dealers, and Standard Wine then sued the Scottish defendant for breach of contract.[133] The New York court noted, "Penrose dealt *independently* of Bombay and was not the latter's agent."[134] Likewise, it may be reasonably inferred that Standard Wine also dealt "independently" of Bombay and was not its agent. Thus, contrary to the assertion in *Parke-Bernet*,[135] *Standard Wine* did not involve an agency situation at all, but rather, as in *Kramer*, a relationship between a seller and an independent distributor of goods.[136] In declining to exercise jurisdiction over the Scottish distiller, the *Standard Wine* court observed that, as in *Kramer*,[137] the foreign defendant conducted no in-state "sales, promotion or advertising."[138] This scenario stands in "sharp contrast"[139] to cases sustaining jurisdiction, in which "the foreign corporations sent substantial quantities of goods into New York in response to orders

---

127. *Id.* at 161 (emphasis added).
128. *Id.* at 161-62.
129. In each case, the plaintiff sold the products of a non-American defendant, the defendant had no physical presence in New York, and the parties shared no agency relationship. *See supra* notes 120-26 and accompanying text.
130. 228 N.E.2d 367 (N.Y. 1967).
131. *Id.* at 368.
132. *Id.*
133. *Id.*
134. *Id.* at 369 (emphasis added).
135. *See supra* notes 110-11 and accompanying text.
136. *See Standard Wine*, 228 N.E.2d at 368.
137. *See supra* note 128 and accompanying text.
138. *Standard Wine*, 228 N.E.2d at 369.
139. *Id.*

which they had solicited through catalogues and widespread advertising [in New York]."[140]

5. *McKee Electric Co. v. Rauland-Borg Corp.*

In *McKee Electric Co. v. Rauland-Borg Corp.*,[141] the Court of Appeals of New York again considered whether to exercise jurisdiction over a nondomiciliary on the theory that the plaintiff's cause of action arose from the defendant's transaction of business within New York.[142] The New York-based plaintiff, McKee, a dealer in audio equipment, was granted non-exclusive rights to distribute the Chicago-based defendant Rauland-Borg's sound equipment products.[143] Subsequently, a disagreement arose between the plaintiff and the plaintiff's customers, and Rauland-Borg sent its representative to New York to look into the difficulties.[144] Thereafter, Rauland-Borg terminated McKee's distributorship, and McKee sued for breach of contract.[145] The *McKee Electric* court observed that McKee was one of "a number of distributors, all of whom are *independent* businessmen selling the sound equipment of other manufacturers as well as that of Rauland-Borg."[146] Thus, contrary to the assertion in *Parke-Bernet*,[147] *McKee Electric* did not involve an agency situation at all, but rather, a relationship between a seller and an independent distributor of goods.[148] In refusing to exercise jurisdiction over the Illinois defendant, the *McKee Electric* court characterized Rauland-Borg's New York contacts as so "infinitesimal"[149] that personal jurisdiction could not be sustained.[150] The court held that if jurisdiction was exercised under the instant facts, then "every corporation whose officers or sales personnel happen to pass the time of day with a New York customer in New York runs the risk of being subjected to the personal jurisdiction of [New York's] courts."[151]

140. *Id.* (contrasting the instant factual scenario with that of *Singer v. Walker*, 298 N.E.2d 681 (N.Y. 1973) where an allegedly improperly manufactured geologist's hammer caused the loss of an eye).
141. 229 N.E.2d 604 (N.Y. 1967).
142. *Id.* at 605.
143. *Id.*
144. *Id.* at 606.
145. *Id.*
146. *Id.* at 605 (emphasis added).
147. *See supra* notes 110-11 and accompanying text.
148. *McKee Electric*, 229 N.E.2d at 605.
149. *Id.* at 607.
150. *Id.*
151. *Id.*

6. *Glassman v. Hyder*

In *Glassman v. Hyder*,[152] a New York-licensed real estate salesman, Charles Glassman, entered into a broker agreement with three New Mexico residents who wanted to sell a building they owned in New Mexico.[153] Mr. Glassman alleged that, after he found a suitable buyer whose offer the New Mexico owners agreed to accept, the owners refused to sign a written contract and failed to pay the agreed commissions.[154] The salesman sued to collect his commission; however, the New York court dismissed the suit for lack of personal jurisdiction, noting that the broker contract, which was never even reduced to writing, "was brought about through the *initiative of the broker*, who telephoned New Mexico and proffered his services"[155] to the property owners.[156] The property owners "were *at no time physically present* in New York."[157] Under the circumstances, and citing *A. Millner Co. v. Noudar, LDA.*,[158] the *Glassman* court held, "[t]he acts of the *indepen-*

152. 244 N.E.2d 259 (N.Y. 1968). The *Glassman* case was decided under section 404 of the New York City Civil Court Act. *See* Sparks & Co. v. Gallos, 220 A.2d 673, 674 (N.J. 1966) (noting that, apart from its territorial restrictions, section 404 of the New York City Civil Court Act "is identical with New York State's 'long arm' statute").

153. *Glassman*, 244 N.E.2d at 260.

154. *Id.*

155. *Id.* at 260, 263 (emphasis added).

156. *Id.* at 260 (emphasis added).

157. *Id.* (emphasis added).

158. 266 N.Y.S.2d 289 (App. Div. 1966). In *Millner*, the Portuguese defendant had granted the New York plaintiff exclusive rights to market its olives and other food products in the United States and Canada. *Id.* at 292. Under the contract, the plaintiff received a three percent commission on all orders it obtained for the defendant. *Id.* After four years, the defendant cancelled the contract, and the plaintiff sued for breach. *Id.* at 291-92. In declining to exercise long-arm jurisdiction, the *Millner* court stated:

> The question presented is whether the defendant transacted some business in New York with respect to the contract out of which this action arises. If the plaintiff were an employee of or an agent acting exclusively for the defendant, plaintiff's acts, in and of themselves, performed for the defendant in New York would suffice to establish jurisdiction of the action against the defendant. But it is asserted and not denied that the plaintiff is an *independent* broker representing many different companies on a commission basis, in no way under the defendant's control. In such circumstances the acts of the broker representative, the plaintiff herein, are not the acts of the so-called principal, and do not create a basis for jurisdiction against this defendant.

Id. at 292-93 (citations omitted) (emphasis added). The *Millner* case thus established what one commentator dubbed New York's "exclusive agent" rule, whereby if the plaintiff serves as the nonresident defendant's exclusive agent in New York, the nonresident is deemed to have transacted business in New York, but if the plaintiff represents several companies on a commission basis, the court cannot assert personal jurisdiction over the one company the broker representative is suing solely on the grounds of the "so-called" agency relationship. Recent Decision, *supra* note 48, at 155 n.38.

dent broker within New York should not . . . be attributed to the owners so as to become acts of the owners in New York."[159] Thus, contrary to *Parke-Bernet's* assertion that *Glassman* involved an agent suing his principal,[160] the *Glassman* court viewed the real estate broker as an "independent" party and therefore undeserving of having his in-state activities imputed to the New Mexico defendants for jurisdictional purposes.[161] In *Proctor v. Holden*,[162] the Court of Special Appeals of Maryland offered persuasive reasoning that supports the *Glassman* court's characterization of the realtor as an independent party, and not a true agent:

> One may doubt the realism or good sense of applying traditional agency law to real estate brokerage. The broker's social and economic purpose is as an intermediary, bringing seller and buyer together and perhaps making both give a little bit in the process, for their own good. He has a sense of obligation to both, if he is conscientious, yet he really is a self-dealer, seeking monetary reward for fulfilling his useful social and economic role.[163]

IV. CRITICISM OF *ZAVIAN v. FOUDY*

A. *Distinguishing* Zavian *from* Haar

Haar v. Armendaris[164] presented a far weaker case for personal jurisdiction than did *Zavian v. Foudy*[165] because in *Haar, both* parties were nonresidents,[166] a scenario not invoking the forum's "rightful interest and legitimate power" to provide a venue for the redress of wrongs to its citizens. One may distinguish the facts in *Haar* from those in *Zavian* because in *Zavian*, the plaintiff *was* a domiciliary of the forum state.[167] Although the *Zavian* court overlooked this important distinction, the United States Supreme Court,[168] the Fourth Circuit Court of

159. *Glassman*, 244 N.E.2d at 263 (emphasis added).
160. *See supra* notes 110-11 and accompanying text.
161. *Glassman*, 244 N.E.2d at 263.
162. 75 Md. App. 1, 540 A.2d 133 (1988).
163. *Id.* at 17, 540 A.2d at 141 (quoting W.B. Raushenbush, *Problems and Practices with Financing Conditions in Real Estate Purchase Contracts*, 1963 WIS. L. REV. 566, 594 (1963)).
164. 337 N.Y.S.2d 285 (App. Div. 1972), *rev'd*, 294 N.E.2d 855 (N.Y. 1973) (reversing the Appellate Division's decision based on the dissent in the Appellate Division's opinion).
165. 130 Md. App. 689, 747 A.2d 764 (2000).
166. *Haar I*, 337 N.Y.S.2d at 287 (Capozzoli, J., dissenting).
167. *Zavian*, 130 Md. App. at 691, 747 A.2d at 766.
168. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987) (holding that the plaintiff's nonresidency diminished California's interest in exercising long-arm jurisdiction); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.").

Appeals,[169] and New York jurists[170] have emphasized the significance of the plaintiff's forum residency *vel non.* A plaintiff's residency in the forum weighs in favor of jurisdiction because it invokes that state's manifest and legitimate interest to ensure the economic health of its citizens by providing them with a convenient forum to redress wrongs inflicted by out-of-state actors.[171] Conversely, a plaintiff's nonresidency fails to invoke such interests and therefore diminishes the state's rightful interest in exercising long-arm jurisdiction.[172] In *Haar,* the plaintiff's nondomiciliary status failed to implicate the state's interest in providing its residents a forum in which to sue,[173] but in *Zavian,* the plaintiff's Maryland citizenship *did* implicate that interest.[174] Unlike other courts,[175] the *Zavian* court neglected to recognize that this important distinction weighed in favor of its exercising jurisdiction and rendered *Haar* an inapt precedent.[176]

B. Mischaracterizing Legal Services as "Unilateral Activity"

The *Zavian* court misapplied Supreme Court and Maryland precedent by dismissing the Maryland attorney's services as *unilateral* activity despite the clearly *bilateral* nature of the parties' attorney-client relationship, and by disregarding the defendants' purposeful and repeated business-related appearances in Maryland.

In *Hanson v. Denckla,*[177] the Supreme Court held that a plaintiff's "unilateral activity"[178] cannot satisfy due process;[179] rather, the "mini-

169. Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 479 (4th Cir. 1993). Applying Maryland law, the court held that "Maryland, of course, has an interest in adjudicating the action insofar as it seeks to ensure the economic health of its citizens and the fair resolution of their disputes." *Id.*

170. *See, e.g.*, Ingraham v. Carroll, 687 N.E.2d 1293, 1299 (N.Y. 1997) (Bellacosa, J., dissenting) ("New York has its own rightful interest and legitimate power to protect and to provide judicial access here for the redress of wrongs to its residents and citizens.").

171. *See supra* notes 162-64 and accompanying text.

172. *See Asahi Metal Indus. Co.*, 480 U.S. at 114 (noting that plaintiff's nonresidency diminished California's interest in exercising long-arm jurisdiction).

173. *See supra* note 99 and accompanying text.

174. *See supra* note 12 and accompanying text.

175. *See* Savitz v. Zim Chem. Co., 364 N.Y.S.2d 661, 664 (Sup. Ct. 1974) (exercising long-arm jurisdiction and distinguishing "the facts set forth in Haar v. Armendaris Corp . . . from the facts in the instant case in that in *Haar* the parties were both nondomiciliaries of the State of New York"); Carro, Spanbock, Kaster, & Cuiffo v. Rinzler, No. 88 Civ. 5280 (MJL), 1991 U.S. Dist. LEXIS 1212, at *4 (S.D.N.Y. 1991) (exercising long-arm jurisdiction and rejecting the defendants' reliance on *Harr* as "misplaced" because, unlike the instant case, in *Haar* the parties were both nondomiciliaries of New York).

176. *See infra* notes 205-08 and accompanying text.

177. 357 U.S. 235 (1958).

178. *Id.* at 253.

179. *Id.*

mal contacts"[180] required by due process are not met unless the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[181] Applying that standard, the *Hanson* Court invalidated Florida's assertion of personal jurisdiction over a Delaware trust company because the only connections between the nonresident defendant and the State of Florida were those initiated by and for the benefit of the plaintiff.[182] In other words, the Delaware company had committed no volitional act bearing a connection to the forum or a resident of the forum; thus, the only contacts with the forum were those created by the settlor's unilateral decision to relocate to Florida and exercise her power of appointment there.[183] *Hanson* distinguished *McGee v. International Life Insurance, Co.*,[184] where the nonresident defendant had, for its own benefit, initiated connections

180. *Id.* at 251.

181. *Id.* at 253 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

182. *Id.* at 252. The Court of Appeals of Maryland skillfully summarized *Hanson's* convoluted facts in *Geelhoed v. Jensen*, 277 Md. 220, 352 A.2d 818 (1976), stating:

> The cause of action in *Hanson* arose out of a trust settled in Delaware and concerned the effectiveness of the exercise of a power of appointment in Florida. At the time of execution of the deed of trust in Delaware, the settlor was a Pennsylvania domiciliary and the trustee was a Delaware bank. Subsequently the settlor moved to Florida where she attempted to exercise the power of appointment in question. After the death of the settlor, a Florida court, in a proceeding in which the Delaware trustee did not appear, held that the trust, and therefore the power of appointment, was invalid under Florida law. When a Delaware court refused to give full faith and credit to the Florida court's decree, the jurisdiction of the Florida court over the Delaware trust company became the issue.
>
> The Court held that the contacts of the Delaware trust company with Florida were insufficient for the exercise of personal jurisdiction by the Florida courts. The trust company was neither present, nor did it transact any business in Florida. Moreover, this was not a case, said the Court, like *McGee* where the cause of action arose out of a transaction having a substantial connection with the forum. The cause of action in *Hanson*, according to the Court, arose out of the Delaware trust agreement, which, when entered into, had no connection with the Florida forum. It was only years later that there arose any connection between the trust agreement and the State of Florida, after the settlor moved there and initiated several "bits" of trust administration from Florida while receiving periodic payments from the trust company of trust income; it was also in Florida, of course, that the settlor executed the power of appointment in question. These connections between the trust agreement, the transaction out of which the cause of action arose, and the forum, because of their nature and quality, were found to lack the substantiality necessary for the exercise of jurisdiction over the Delaware trust company.

Id. at 228-29, 352 A.2d at 823-24.

183. *Hanson*, 357 U.S. at 253.

184. 355 U.S. 220 (1957).

with the forum by soliciting an insurance contract with a California resident.[185] The Supreme Court thus drew a distinction whereby a *plaintiff's* initiation of forum contacts weighs against an exercise of jurisdiction, but a *defendant's* initiation of forum contacts by, for example, initiating a contractual relationship with a forum resident, weighs in favor of jurisdiction.[186] The "purposeful availment" requirement established in *Hanson* became an integral part of the minimum contacts analysis.

In *Zavian*, the court mischaracterized the Maryland attorney's legal services when it termed them, "as the Supreme Court [in *Hanson*] put it, '*unilateral* activity.'"[187] To the contrary, the soccer players, to further their own business aims, initiated contact with the Maryland lawyer when each "individually contacted"[188] Ms. Zavian and "proposed that she act as their agent,"[189] thereby inaugurating *bilateral* contractual ties that would obligate them to send payment into Maryland for services to be performed in Maryland by a Maryland resident.[190] The *Zavian* court justified its characterization of the lawyer's services as "unilateral activity" by asserting, "[a]lthough the appellees contacted appellant to obtain her professional services, it was because her name appeared on a list of lawyers willing to perform such services for female athletes and not because she was a Maryland lawyer."[191] In giving the defendants' purposeful initiation of the business relationship little weight,[192] the *Zavian* court failed to view the facts in the light most favorable to the nonmoving party,[193] and ignored an important

185. *Id.* at 221. In *McGee*, the Supreme Court ruled that a nonresident's single act of soliciting an insurance contract with a resident of the forum state was enough to confer jurisdiction because of the forum's interest in providing effective redress for its resident when a nonresident refuses to pay pursuant to a contractual relationship initiated by the nonresident. *Id.* at 223. In reviewing developments since *Pennoyer*, the *McGee* Court noted:

> [A] trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-23.

186. *Hanson*, 357 U.S. at 252.

187. *Zavian*, 130 Md. App. at 700, 747 A.2d at 770-71 (emphasis added).

188. *Id.* at 691, 747 A.2d at 766.

189. *Id.*

190. *Id.* at 692, 747 A.2d at 766.

191. *Id.* at 701, 747 A.2d at 771.

192. *Id.* at 702, 747 A.2d at 771.

193. *Zavian* was a groundbreaking case not only for its adoption of the Nonattribution Rule, but also because, for the first time, a Maryland state appel-

advisement from the court of appeals: "The *Hanson* principle does not mandate an inquiry into motive; it is sufficient that, *for whatever reason*, the defendant has purposefully availed himself of the privilege of conducting activities in the forum."[194]

The *Zavian* court also gave little weight to the defendant soccer players' repeated appearances in Maryland to "'personally conduct business, perform, play, train, conduct meetings, and attend promotional appearances.'"[195] Of these contacts, the court said: "Unfortunately for appellant, appellees' only contacts with Maryland are because they are members of the [United States Women's Soccer] Team. . . . In other words, the appellees appear wherever the Team's schedule takes them, be it Maryland or Timbuktu."[196] Once again, the *Zavian* court failed to heed *Geelhoed*'s mandate that a nonresident's purposeful activities in Maryland, conducted "*for whatever reason*," merit due consideration in a jurisdictional analysis.[197] Under *Geelhoed*'s interpretation of *Hanson*, it is irrelevant that the soccer players' repeated appearances to conduct purposeful activities in Maryland were required by their status as Team members.[198] On facts analogous to those in *Zavian*, in *Geelhoed* the Court of Appeals of Maryland upheld jurisdiction after rejecting the defendant's assertion that his temporary "presence in Maryland was not voluntary because he was required to work in the State by the Public Health Service in connection with his Selective Service obligation."[199]

---

late court held that a court considering a motion to dismiss for lack of personal jurisdiction must consider the facts in the light most favorable to the nonmoving party. *Zavian*, 130 Md. App. at 702, 747 A.2d at 771-72. Specifically, the *Zavian* opinion stated:

> Lastly, appellant contends it was reversible error for the trial court to grant appellees' Motion to Dismiss without considering evidence in the *light most favorable* to appellant. *It was error* for the trial court to say there were "simply too many disputed facts surrounding this matter to support a finding of jurisdiction given that the supporting affidavits are at odds," but it was harmless error. Had the trial court viewed the facts in the *light most favorable* to appellant, the result would have been the same.

Id. (emphasis added). *Cf.* Mun. Mortgage & Equity, LLC v. Southfork Apartments Ltd. P'ship, 93 F. Supp. 2d 622, 626 (D. Md. 2000) (quoting Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989)) ("In considering a challenge to personal jurisdiction, 'the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.'").

194. Geelhoed v. Jensen, 277 Md. 220, 231, 352 A.2d 818, 825 (1976) (emphasis added).

195. *Zavian*, 130 Md. App. at 701, 747 A.2d at 771.

196. *Id.*

197. *Geelhoed*, 277 Md. at 231, 352 A.2d at 825.

198. *See id.*

199. *Id.* at 230-31, 352 A.2d at 824-25.

C. Initiation of the Attorney-Client Relationship

The *Zavian* court should have assigned weight in its jurisdictional analysis to the nonresident defendants' *initiation* of the parties' attorney-client relationship. In assessing the sufficiency of a nonresident's contacts with the forum state, the "constitutional touchstone"[200] is whether the contacts were "purposefully established"[201] by the defendant such that he "will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts."[202] Amplifying on *Hanson*'s "purposeful availment" doctrine,[203] the Supreme Court in *Burger King* articulated a dichotomy whereby contacts with the forum state that are "purposefully established"[204] by the defendant weigh in favor of jurisdiction, but those that are "'random,' 'fortuitous,' or 'attenuated'" do not.[205] Although the *Zavian* court failed to cite *Burger King*,[206] the Court of Special Appeals of Maryland implicitly (and incorrectly) found that the "constitutional touchstone"[207] of purposeful contact with the forum state was not met.[208] Despite acknowledging that the defendant soccer players initiated the business relationship with their Maryland attorney,[209] the *Zavian* opinion incongruously asserted that the defendant soccer players "did not *purposely* seek a Maryland agent"[210] and "did not *purposely* engage in adequate activities in Maryland."[211] To the contrary, what acts of a defendant could be more "purposeful" than the soccer players' selecting, soliciting, and retaining Ms. Zavian, a Maryland attorney, to represent them in substantial business transactions?[212] A nonresident's purposeful, deliberate, and voluntary creation of a significant interstate attorney-client

200. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).
201. *Id.*
202. *Id.* at 475 (citations omitted) (internal quotation marks omitted).
203. *See supra* note 186 and accompanying text.
204. *Burger King*, 357 U.S. at 474.
205. *Id.* at 475 (citations omitted).
206. See *supra* notes 107-09 and accompanying text for a discussion of the significance of *Burger King*.
207. *Burger King*, 471 U.S. at 475.
208. *Zavian*, 130 Md. App. at 702, 747 A.2d at 771.
209. *Id.* at 701, 747 A.2d at 771.
210. *Id.* at 702, 747 A.2d at 771 (emphasis added).
211. *Id.* (emphasis added).
212. *See* Cramer v. Lupka, No. D.N. CV91 0120228 S, 1992 Conn. Super. LEXIS 878, at *2 (Conn. Super. Ct. Mar. 25, 1992) (noting that the nonresident's hiring of a Connecticut attorney to perform legal services in Connecticut "constitutes a single purposeful business transaction sufficient to impose jurisdiction under our Long Arm Statute"); Mouzavires v. Baxter, 434 A.2d 988, 997 (D.C. 1981) (noting that hiring an attorney, "far from being fortuitous or accidental," created a contact with the attorney's forum that was "deliberate and voluntary"); *see generally* Nueva Eng'g, Inc. v. Accurate Elec., Inc., 628 F. Supp. 953, 954-55 (D. Md. 1986) ("Entering into a contract is always 'purposeful' in some way, and commercial transactions with a forum plaintiff always implicate the benefits and protections of the forum's laws to some extent.").

relationship may readily be distinguished from factual scenarios properly characterized as "'random,' 'fortuitous,' or 'attenuated.'"[213] Examples of cases falling within the latter category include *World-Wide Volkswagen Corp. v. Woodson*,[214] *Kulko v. California Superior Court*,[215] and *Hanson v. Denckla*.[216] In each of those cases, the nonresident defendant did not participate in the act establishing contacts with the forum; rather, the *unilateral and fortuitous* act of the plaintiff created the forum contacts.[217] On the other hand, establishing an interstate attorney-client relationship, such as present in *Zavian*,[218] inherently requires the *bilateral and purposeful* assent of both the attorney and the nonresident client. When the nonresident initiates the relationship, as in *Zavian*,[219] the case for extraterritorial jurisdiction grows even stronger.[220]

The United States District Court for the District of Maryland elevated the initiation factor in *Potomac Design, Inc. v. Eurocal Trading, Inc.*,[221] observing that "a determination of whether the defendant initiated the business relationship in some way" has been viewed as the "strongest factor" or even a "dispositive" factor when deciding the propriety of exercising long-arm jurisdiction.[222] As in Maryland, courts in New York[223] and elsewhere[224] have recognized the materiality of who

---

213. *Burger King*, 471 U.S. at 475.
214. 444 U.S. 286 (1980) (holding that due process forbids the exercise of personal jurisdiction over an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there).
215. 436 U.S. 84 (1978) (holding that due process forbids exercising personal jurisdiction over a divorced husband sued for child-support payments whose only affiliation with the forum was created by his former spouse's decision to live there).
216. 357 U.S. 235 (1958) (holding that due process forbids exercising jurisdiction over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there).
217. *See supra* notes 215-16 and accompanying text.
218. 130 Md. App. at 691, 747 A.2d at 766.
219. *Id.*
220. *See infra* notes 221-24 and accompanying text.
221. 839 F. Supp. 364 (D. Md. 1993).
222. *Id.* at 370. The *Potomac Design* court observed:
> "[T]he courts have considered various factors in the contract situation, including whether the parties contemplated that the work would be performed, where payment was made, etc. The strongest factor that seems to have emerged, however, is a determination of whether the defendant initiated the business relationship in some way . . . . The Fourth Circuit also seems to have adopted the determination of whether the defendant initiated the business relationship in some way as a dispositive factor . . . ."

Id. (alterations in original) (quoting *Nueva Eng'g, Inc.*, 628 F. Supp. at 955).
223. *See* Williams v. Nathan, 897 F. Supp. 72, 76 n.5 (E.D.N.Y. 1995) (stating that the fact that plaintiff initiated contacts with defendant "weighs against a finding that this Court may exercise jurisdiction over the defendant") *citing* Citicorp Int'l Trading Co. v. W. Oil & Refining Co., 708 F. Supp. 86, 88-89 (S.D.N.Y. 1989).

initiated the business relationship. Although the *Zavian* court acknowledged that the soccer players initiated their attorney-client relationship with Ms. Zavian,[225] the court of special appeals went against the weight of authority in according that fact no weight in its jurisdictional analysis.

D. Analyzing Asahi*'s Reasonableness Factors*

The *Zavian* court failed to consider any of the five "reasonableness" factors identified by the Supreme Court in *Asahi Metal Industry v. Superior Court of California*; if it had, it would have found that each of the four relevant factors weighed in favor of Maryland's exercise of jurisdiction. In *Asahi Metal Industry v. Superior Court of California*,[226] the Supreme Court set forth five factors that a court "must consider"[227] to determine the "reasonableness"[228] of the exercise of extraterritorial jurisdiction: 1) "the burden on the defendant;" 2) "the interests of the forum State;" 3) "the plaintiff's interest in obtaining relief;" 4) "'the interstate judicial system's interest in obtaining the most efficient resolution of controversies;'" and 5) "'the shared interest of the several States in furthering fundamental substantive social policies.'"[229] The *Zavian* court considered none of these factors.[230] If it had, it would have found that four of the factors weighed in favor of exercising jurisdiction over the nonresident soccer players, and that the fifth factor was inapplicable. First, whereas the *Zavian* defendants' vocation required frequent interstate travel to locations including Maryland,[231] and two of the three defendants resided in relatively nearby eastern seaboard states,[232] the burden on them to defend a suit in Maryland would have been relatively slight. Second, Maryland had a strong interest in providing Ms. Zavian, a Maryland citizen, a forum to enforce her contractual rights, which, according to the Personal Management

224. *See, e.g.*, Ideal Ins. Agency v. Shipyard Marine, Inc., 572 N.E.2d 353, 357 (Ill. App. Ct. 1991) ("The initiation of a transaction is an important factor in determining whether a defendant transacted business in [the] State.").
225. *Zavian*, 130 Md. App. at 701, 747 A.2d at 771.
226. 480 U.S. 102 (1987).
227. *Id.* at 113.
228. *Id.* If the exercise of extraterritorial jurisdiction is "reasonable" under the *Asahi* factors, it will not "offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 316).
229. *Id.* at 113 (citations omitted); *see also infra* note 236.
230. *See generally Zavian*, 130 Md. App. 689, 747 A.2d 764.
231. *Id.* at 701, 747 A.2d at 771.
232. Julie Foudy, Carla Overbeck, and Kristine Lilly resided in California, North Carolina, and Connecticut, respectively. *Id.* at 691-92, 747 A.2d at 766. *Compare* Nueva Eng'g, Inc. v. Accurate Elec., Inc., 628 F. Supp. 953, 957 (D. Md. 1986) (taking "judicial notice of the fact that Connecticut and Maryland are not very far apart in the modern world") *with Asahi*, 480 U.S. at 114 (the "unique burdens" on the Japanese defendant would have been "severe" because of the great distance between Japan and California, and the disadvantages of litigating in a foreign country's judicial system).

Agreements, were to be enforced according to the laws of Maryland.[233] The *Zavian* opinion failed to mention this important fact.[234] Third, Ms. Zavian had a strong interest in avoiding the inconvenience of litigating her common-issue claims in three different states.[235] Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of controversies should have weighed heavily in favor of Maryland's exercising jurisdiction over the common issues instead of separately adjudicating the same issues three times over in the courts of California, Connecticut, and North Carolina.[236]

E. The Zavian *Court's Refusal to Acknowledge Precedents from Fourteen Other Jurisdictions*

The *Zavian* opinion's survey of on-point cases painted an incomplete picture because it neglected to cite any of the court decisions from fourteen jurisdictions exercising judicial authority over a nonresident client sued by their attorney for unpaid legal fees.

In support of its adoption of the Nonattribution Rule,[237] the *Zavian* court cited cases from only two states, New York and Illinois.[238] Both states belong to the small minority of seven states that interpret their long-arm statutes as not extending personal jurisdiction to the full extent constitutionally permissible.[239] Further, *Zavian* acknowledged only one case supporting the contrary position, i.e., supporting attribution, for jurisdictional purposes, of a plaintiff-agent's in-state acts to

233. Brief for Appellant at 2, Zavian v. Foudy, 130 Md. App. 689, 747 A.2d 764 (2000) (No. 00074).

234. *See generally Zavian*, 130 Md. App. 689, 747 A.2d 764. *Cf. Asahi*, 480 U.S. at 114 (stating that California's interest in exercising jurisdiction was "slight" because both parties were nonresidents, and because it was doubtful that California law would govern the dispute); *Burger King Corp*, 471 U.S. at 482 ("Nothing in our cases . . . suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes.").

235. *Cf. Asahi*, 480 U.S. at 114 (stating that it was no more convenient for the Japanese plaintiff to litigate in California than in Taiwan or Japan).

236. *Asahi's* fifth "reasonableness" factor, "the advancement of substantive policies," was not implicated by the Zavian facts. *Id.* at 115 (stating that the Supreme Court cautioned that "the Federal Government's interest in its foreign relations policies" requires "[g]reat care and reserve" when extending personal jurisdiction over alien defendants).

237. *See supra* note 51 and accompanying text.

238. *See, e.g.*, Emmet, Marvin & Martin v. Maybrook, Inc., No. 90 Civ. 3105 (MGC), 1990 U.S. Dist. LEXIS 16753, at *1 (S.D.N.Y. Dec. 11, 1990) (deeming services performed by an attorney in New York an insufficient basis for jurisdiction where defendant did not come to New York to request plaintiff's legal services or undertake any other purposeful activity there); Jacobson v. Stram, No. 80 C 1228, 1980 U.S. Dist. LEXIS 15437, at *5 (N.D. Ill. Oct. 29, 1980) ("An attorney's mere performance of professional services in Illinois on behalf of an out-of-state client is not sufficient to subject the foreign party to in personam jurisdiction in Illinois.").

239. *See supra* note 69 and accompanying text.

a nonresident defendant-principal.[240] Unfortunately, the Zavian court's survey of on-point cases painted an incomplete picture of the relevant jurisprudence.[241] In fact, precedents in fourteen jurisdictions have upheld the forum's exercise of extraterritorial personal jurisdiction when an in-state lawyer sues a nonresident client to collect a fee.[242] On the other hand, until *Zavian*, only courts in the non-full-

240. *Zavian*, 130 Md. App. at 698-99, 747 A.2d at 769-70. The *Zavian* opinion cited *Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 141-42 (D. Md. 1981), discussed *supra* in notes 60-65 and accompanying text.

241. *Zavian*, 130 Md. App. at 696-98, 747 A.2d at 768-69.

242. *See* Fly, Shuebruk, Gaguine, Boros & Braun v. Marcus, No. 94 Civ. 543 (KTD), 1996 U.S. Dist. LEXIS 2910, at *7 (S.D.N.Y. Mar. 12, 1996) (holding that New York's long-arm statute was satisfied where New York law firm's contract to provide legal services to the nonresident defendant "was entered into and largely performed in New York and . . . the defendant repeatedly met with the plaintiff in New York"); Robins, Kaplan, Miller & Ciresi v. Senoret Chem. Co., No. 4-90-317, 1991 U.S. Dist. LEXIS 19852, at *2, *8 (D. Minn. Dec. 30, 1991) (holding that Missouri defendant, which retained Minnesota law firm to perform legal services, was subject to Minnesota's personal jurisdiction in suit for unpaid fees); Schwartz & Assocs. v. Elite Line, Inc., 751 F. Supp. 1366, 1370 (E.D. Mo. 1990) (holding that in a suit by a Missouri attorney to recover legal fees owed by California defendants, Missouri's exercise of long-arm jurisdiction comported with due process because "[d]efendants purposefully availed themselves of the benefits of the forum by initiating contact" with plaintiff); Jenner & Block v. Land Paving Co., No. 85 C 07552, 1986 U.S. Dist. LEXIS 28769, at *3 (N.D. Ill. Feb. 27, 1986) (holding that in an action for payment of attorney fees owed to an Illinois law firm, the Illinois long-arm statute and due process were satisfied because the Nebraska defendant "knew or should have known that the Illinois plaintiff would perform its contractual obligations in Illinois and could reasonably foresee that its conduct and connection with Illinois was such that they could anticipate being brought into court in Illinois"); Law Offices of Jerris Leonard, P.C. v. Mideast Sys., Ltd., 630 F. Supp. 1311, 1313 (D.D.C. 1986) (exercising long-arm jurisdiction over New York residents who retained District of Columbia lawyers and noting that "many courts, including the District of Columbia Court of Appeals, have found that defendants who sought legal counsel within a forum may be subject to personal jurisdiction in that forum for failure to pay legal fees"); O'Connor, Cavanaugh, Anderson, Westover, Killingsworth & Beshears, P.A. v. Bonus Utah, Inc., 750 P.2d 1374, 1376 (Ariz. Ct. App. 1988) (holding that plaintiff, a Utah corporation, subjected itself to Arizona's long-arm jurisdiction by contracting with an Arizona attorney for legal services to be performed in Arizona); Vorys, Sater, Seymour & Pease v. Ryan, 200 Cal. Rptr. 858, 859 (Ct. App. 1984) (holding that a California resident who had "hired an Ohio law firm to do legal work in Ohio" had committed to a "contract for legal services [that] was sufficiently connected with Ohio so that Ohio's exercise of personal jurisdiction was reasonable"); Cramer v. Lupka, No. DN CV91 0120228S, 1992 Conn. Super. LEXIS 878, at *2 (Conn. Super. Ct. Mar. 25, 1992) (holding that a nonresident's hiring of a Connecticut attorney to perform legal services in Connecticut "constitutes a single purposeful business transaction sufficient to impose jurisdiction under our Long Arm Statute"); Mouzavires v. Baxter, 434 A.2d 988, 997 (D.C. 1981) (noting that Florida appellees who solicited District of Columbia attorney to perform work primarily in the District "transacted business" within the meaning of the long-arm statute: "[F]ar from being fortuitous or accidental, appellees' contacts were deliberate and voluntary as evidenced

extent[243] states of New York and Illinois had denied jurisdiction under such facts.[244]

V. CONCLUSION

In light of the court of special appeals' decision in *Zavian v. Foudy*,[245] a practitioner may ask: are federal courts applying Maryland law bound to apply the Nonattribution Rule,[246] do they remain free to reject it, as the district court did in *Snyder*,[247] or does the real answer lie somewhere in between? The *Zavian* court made its view clear: "Federal district courts . . . are bound by the decisions of the Maryland *Courts of Appeal* interpreting Maryland law."[248] However, in *Craig v.*

---

by the communications between appellees and appellant in the District, which appellees had initiated in the first instance"); Bordelon, Hamlin, Theriot & Hardy v. Burlington Broad., Ltd., 652 So. 2d 1082, 1085 (La. Ct. App. 1995) (upholding long-arm jurisdiction over an Iowa defendant sued for legal fees despite the fact that he "never physically entered Louisiana;" factors weighing in favor of personal jurisdiction included defendant's initiation of contact with the plaintiff, the fact that the engagement letter was drafted in Louisiana, and "numerous telephone calls, facsimiles and mailings to and from Louisiana" during the six months of legal representation); Phillips v. Rhode Island, No. 94-5112-G, 1995 Mass. Super. LEXIS 460, at *9 (Mass. Super. Ct. Mar. 27, 1995) (holding that a Rhode Island defendant, sued by a Massachusetts law firm for unpaid fees, was subject to Massachusetts' long-arm jurisdiction because it "affirmatively sought out counsel in Massachusetts and entered into a contract with a Massachusetts partnership" with whom it "then remained in continual telephonic and written contact . . . for over three years"); Alan B. McPheron, Inc. v. Koning, 336 N.W.2d 474, 477, 478 (Mich. Ct. App. 1983) (upholding enforcement of an Oklahoma judgment against a Michigan resident, rendered pursuant to Oklahoma's long-arm statute, because "defendant made the initial contact seeking legal services to be rendered in Oklahoma"); Wilson & Reitman v. Berick, No. 59884, 1992 Ohio App. LEXIS 474, at *5 (Ohio Ct. App. Feb. 6, 1992) (upholding enforcement of a California judgment against an Ohio resident, rendered pursuant to California's exercise of extraterritorial personal jurisdiction, because the Ohio resident had "availed himself of the privileges of conducting business in the state of California" by hiring a California law firm to provide legal services in California for his son); O'Brien v. Lanpar Co., 399 S.W.2d 340, 342-43 (Tex. 1966) (holding that an Illinois judgment secured by an Illinois attorney through long-arm jurisdiction over a Texas client was enforceable in Texas); Toulouse v. Swanson, 438 P.2d 578, 580 (Wash. 1968) (holding that in a suit for unpaid legal fees, propriety of Washington's exercise of long-arm jurisdiction over Idaho resident was "undebatable" because "[i]t is beyond dispute that defendant consummated a transaction in this state when he employed plaintiff as his lawyer").

243. *See supra* note 69 and accompanying text.

244. *See supra* note 238.

245. 130 Md. App. 689, 702, 747 A.2d 764, 771 (2000).

246. *See supra* note 51 and accompanying text.

247. Snyder v. Hampton Indus., Inc., 521 F. Supp. 130, 141-42 (D. Md. 1981); *see also supra* notes 60-65 and accompanying text.

248. *Zavian*, 130 Md. App. at 698 n.2, 747 A.2d at 769 n.2 (emphasis added).

General Finance Corp.,[249] the United States District Court for the District of Maryland mentioned only Maryland's highest court, when it stated that "[t]his court is bound by the decisions of the *Court of Appeals* of *Maryland* as to whether a particular subsection [of the long-arm statute] will reach certain conduct."[250] The Supreme Court struck a middle ground in *Commissioner of Internal Revenue v. Estate of Bosch*,[251] advising:

> [W]hile the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. [Moreover,] "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*"[252]

Given the conflicting decisions of Maryland's federal district court[253] and the State's intermediate appellate court,[254] the Court of Appeals of Maryland may, if presented with the opportunity, choose to reassess whether the Nonattribution Rule[255] accords with Maryland's historical commitment to extend its long-arm jurisdiction to the full extent permitted by due process.[256] Until then, Maryland's bench and bar will harbor uncertainty as to which applies in federal court: the *Snyder* court's[257] rejection of the Nonattribution Rule,[258] or the *Zavian* court's[259] adoption of it.

Personal jurisdiction controversies evoke the wisdom expressed by Supreme Court Justice Oliver Wendell Holmes Jr.:[260] "I long have said there is no such thing as a hard case. I am frightened weekly, but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."[261] In

---

249. 504 F. Supp. 1033 (D. Md. 1980).
250. *Id.* at 1036 (emphasis added).
251. 387 U.S. 456 (1967).
252. *Id.* at 465 (alteration in original) (citations omitted) (quotations omitted).
253. *Snyder*, 521 F. Supp. at 141-42 (rejecting the Nonattribution Rule).
254. *Zavian*, 130 Md. App. at 699, 747 A.2d at 770 (embracing the Nonattribution Rule).
255. *See supra* note 51 and accompanying text.
256. *See supra* note 45 and accompanying text.
257. *Snyder*, 521 F. Supp. at 141-42.
258. *See supra* note 51 and accompanying text.
259. *Zavian*, 130 Md. App. at 699, 747 A.2d at 770.
260. Justice Oliver Wendell Holmes Jr., known as "The Great Dissenter," served with distinction on the United States Supreme Court from 1902 to 1932. *See* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 3 (Robert W. Gardner ed., Stanford Univ. Press 1992).
261. Young v. Progressive Cas. Ins. Co., 108 Md. App. 233, 235, 671 A.2d 515, 516 (1996) (quoting 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, 156 (Mark DeWolfe Howe ed., Rothman & Co. 1994)).

cases like *Zavian*, the "old donkey" concerns whether a nonresident's Maryland contacts justify the exercise of extraterritorial jurisdiction under Maryland's long-arm statute and the analytical roadmap of *International Shoe*[262] and its progeny. In such cases, Maryland's interest in providing its citizens a convenient forum to redress wrongs inflicted by nonresidents[263] should prevail over those using due process as a stalking horse to avoid their voluntarily assumed interstate obligations.[264]

262. *See supra* notes 27-33 and accompanying text.
263. *See supra* notes 168-71 and accompanying text.
264. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).