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JUDICIAL JURISDICTION AND CHOICE OF LAW IN INTERSTATE ACCIDENT CASES: THE IMPLICATIONS OF *SHAFFER V. HEITNER*

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The doctrinal and pragmatic relationships between judicial jurisdiction and choice of law are most evident in interstate accident cases.¹ The essence of the doctrinal relationship is that when jurisdiction over an interstate accident case is constitutionally exercised pursuant to a tort long-arm statute, the forum may also constitutionally apply its substantive law. The “minimum contacts”² between the transaction and the forum that are constitutionally sufficient for the exercise of long-arm jurisdiction over a suit arising from the accident also are constitutionally sufficient for the forum to apply its substantive law.³ For example, if a state can constitutionally assert jurisdiction over a foreign manufacturer, whose products have caused injury within the state, it can constitutionally apply its standard of liability to the manufacturer.⁴

The pragmatic relationship between judicial jurisdiction and choice of law in interstate accident cases is perhaps more significant than the doctrinal relationship. When the plaintiff is domiciled in a recovery state and the defendant is domiciled in a nonrecovery state, each state

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1. See generally Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978).

2. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3. A state may constitutionally apply its law when it has an interest in doing so and the application is not fundamentally unfair to either party, *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964), or when it has legally significant factual contacts with the transaction. *Carroll v. Lanza*, 349 U.S. 408 (1955). For a discussion of the present status of constitutional limitations on choice of law, see generally R. CRAMTON & R. SEDLER, *THE SUM AND SUBSTANCE OF CONFLICT OF LAWS* § 13.1000 (1977).

4. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). There are few modern cases involving choice of law in products liability because once the forum has asserted jurisdiction under its long-arm statute the application of its law is foreordained. The choice of law question is, in effect, subsumed in the determination of the jurisdictional question.

has a real interest in applying its law⁵ regardless of the locus of the accident. The social and economic consequences of the accident will be felt by the parties and the insurer in the parties' home state.⁶ Although some commentators maintain that the forum should not necessarily apply its own law in this situation,⁷ most policy-oriented courts do so.⁸ When a plaintiff sues in the defendant's home state, the court applies the law of the forum to protect the resident defendant and insurer.⁹ In some cases, however, plaintiffs have been able to sue in their home states, with the courts usually applying the law of the forum to allow recovery.¹⁰

The decision in *Shaffer v. Heitner*¹¹ will have an important impact on the law of judicial jurisdiction. The essential thrust of *Shaffer* is that the minimum contacts and fundamental fairness test¹² applies to any exercise of jurisdiction, rendering violative of due process the exercise of jurisdiction over an unrelated personal claim on the basis of the forum's physical power over the defendant's property.¹³ And, although *Shaffer* did not expressly state that a court can not exercise jurisdiction when it is based solely on personal service in the forum,¹⁴ this conclusion seems to follow.¹⁵

5. See Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 222-27 (1977).

6. *Id.* at 228.

7. See the listing of methodologies that include the means for the resolution of true conflicts except through the application of the forum's own law. *Id.* at 217-18.

8. The term "policy-oriented courts" refers to courts that have abandoned the traditional approach. In practice, all such courts, regardless of the methodology they are purportedly applying, resolve torts conflicts cases by giving primary consideration to the policies and interests of the states involved. See Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 975-83 (1977).

9. See, e.g., *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (1974).

10. See *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973); *Foster v. Leggett*, 484 S.W. 2d 827 (Ky. 1972); *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974).

11. 433 U.S. 186 (1977).

12. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

13. *Pennoyer v. Neff*, 95 U.S. 714 (1877). See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

14. The Court declined to reexamine the facts of previously decided cases to determine whether jurisdiction could have been sustained under the *Shaffer* standards, but stated that to the extent these cases were inconsistent with the new standards they were overruled. 433 U.S. at 212 n. 39.

15. Personal service on the defendant in the forum, without more, would not give rise to either forum-defendant or forum-litigation contacts as defined in *Shaffer*. See *Kulko v. Superior Court*, 98 S.Ct. 1690 (1978).

While *Shaffer* will not affect the doctrinal relationship between jurisdiction and choice of law in interstate accident cases,¹⁶ it will have an important effect on the pragmatic relationship. It redefines and limits the circumstances in which a state court may exercise jurisdiction over a nonresident defendant. As Professor Vernon notes, *Shaffer* requires forum-defendant and forum-litigation contacts.¹⁷ If an accident involving a recovery state plaintiff and a nonrecovery state defendant occurs in the plaintiff's home state, the requirement of forum-litigation contacts is satisfied. The plaintiff can bring suit there, under the tort long-arm statute,¹⁸ and the forum will apply its law.¹⁹ If an accident occurs in the defendant's home state, however, the forum's long-arm statute may not be applicable.²⁰ Prior to *Shaffer*, there were a number of assumedly constitutional ways that a plaintiff, injured in an out-of-state accident, could obtain the jurisdiction of the courts of the home state. This commentary considers the effect of *Shaffer* on these jurisdictional bases.

When jurisdiction could be exercised solely on the basis of personal service on the defendant in the forum, the parties, if so inclined, could collusively arrange for service on the nominal defendant in the plaintiff's home state. In *Cipolla v. Shaposka*,²¹ the defendant, a Delaware resident, was served with process in Pennsylvania while he and the plaintiff, a Pennsylvania resident, were playing golf together.²² Ironically, the service was for naught because the Pennsylvania court applied Delaware law to deny recovery.²³ Other courts, however, have applied forum law in order to allow recovery.²⁴ The abandonment of

16. See Sedler, *supra* note 1, at 1035-36.

17. See Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273; Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997 (1978) [hereinafter cited as *A Preliminary Inquiry*].

18. See, e.g., CAL. CIV. PROC. CODE § 410.10 (Deering 1977); N.Y. CIV. PRAC. LAW § 302(a)(2) (McKinney 1972).

19. See, e.g., *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976).

20. Since *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), these statutes generally have been construed as applicable whenever the harm occurs in the forum, even when the act producing the harm occurs elsewhere.

21. 439 Pa. 563, 267 A.2d 854 (1970).

22. See Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 401 (1971).

23. See *id.* at 395-402.

24. See, e.g., *Bennett v. Macy*, 324 F. Supp. 409 (W.D. Ky. 1971); *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968).

the power theory of jurisdiction in *Shaffer* presumably renders unconstitutional the exercise of jurisdiction based solely on personal service in the forum.

In *Foster v. Leggett*,²⁵ the nominal defendant, although domiciled on the Ohio side of a Kentucky/Ohio functional socio-economic and mobility area,²⁶ was employed on the Kentucky side and rented a room there two nights per week. An automobile accident occurred in Ohio which resulted in the death of the passenger, a Kentucky resident. The trip began in Kentucky and was to terminate there. Decedent's estate brought suit in Kentucky which, unlike Ohio, does not recognize guest-host immunity. The Kentucky court asserted jurisdiction on the basis of personal service in the forum, and applied its own law to allow recovery.

Prior to *Shaffer*, when jurisdiction could be exercised solely on the basis of personal service in the forum, it was unnecessary to consider whether a defendant, who was brought before a court on this basis, had any other contacts with the forum state. *Shaffer* makes this a necessary consideration. If a case similar to *Foster* were to arise, Kentucky could probably still exercise jurisdiction based on the *International Shoe Co. v. Washington*²⁷ test because the defendant had sufficient minimum contacts with the forum state. It is consistent with the forum-defendant contacts aspect of *Shaffer* to subject a person to jurisdiction in a state where he resides part-time—even though not domiciled there—and engages in such regular activities as employment. This is comparable to the exercise of jurisdiction over nonforum related claims against a foreign corporation or nonresident individual engaging in substantial business activity within the forum.²⁸ The plaintiff may be able to bring suit in the home state notwithstanding that the accident occurred in the defendant's home state.²⁹ The forum may then apply its law allowing recovery,³⁰ assuming this would not be fundamentally unfair to the

25. 484 S.W.2d 827 (Ky. 1972).

26. See Sedler, *supra* note 22, at 399.

27. 326 U.S. 310 (1945).

28. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Budde v. Kenteow Hawaii, Ltd.*, 565 F.2d 1145 (10th Cir. 1977); *Bernardi Bros., Inc. v. Pride Mfg., Inc.* 427 F.2d 297 (3d Cir. 1970).

29. See, e.g., *Beja v. Jahangiri*, 453 F.2d 959 (2d Cir. 1971). When a recovery state plaintiff is injured by a nonrecovery state defendant in a nonrecovery state, suit may be brought in the state of injury under its long-arm statute and that state is likely to allow recovery. Cf. *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968) (Illinois guest statute not applied when accident occurred in Wisconsin which was also the forum).

30. See, e.g., *Meyer v. Chicago, Rock Island P.R.R.*, 508 F.2d 1395 (8th Cir. 1975); *Schwartz*

defendant.³¹

In *Foster*, the transaction giving rise to the injury also had substantial factual connections with Kentucky; the trip originated and was to terminate there. This satisfied the forum-litigation contacts aspect of *Shaffer*, and thus made reasonable the use of a long-arm statute to exercise jurisdiction over an accident which occurred elsewhere.³² In *Cipolla*,³³ the trip originated in Delaware but would have terminated in Pennsylvania had it not been aborted by the accident. This arguably would have been sufficient, in itself, to allow Pennsylvania to apply its long-arm statute because the transaction contemplated its consummation in the forum and application of the statute would have been proper had the parties reached the state line.³⁴ It is unclear whether courts will interpret existing long-arm statutes to authorize the exercise of jurisdiction on this basis but, if they are so interpreted or amended, the exercise of such jurisdiction is constitutional.³⁵

In *Rosenthal v. Warren*,³⁶ the Second Circuit, in a diversity case, upheld the exercise of jurisdiction over a physician even though there were neither forum-defendant nor forum-litigation contacts with regard to him. A New York resident had died on the operating table in a Massachusetts hospital allegedly because of the negligence of a Massachusetts physician and the hospital. The physician did not practice in New York and nothing connected with the fatality occurred there.³⁷ The court exercised jurisdiction by attaching the obligation of the malpractice insurer, which did business in New York, to defend the suit

v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976).

31. See Sedler, *supra* note 5, at 228-30.

32. *Bennett v. Macy*, 324 F. Supp. 409 (W.D. Ky. 1971); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968). See *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

33. *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). See notes 21-23 *supra* and accompanying text.

34. Professor Weintraub, who does not share my view that factual contacts between the forum and the accident are completely irrelevant for choice of law purposes, agrees that in this situation Pennsylvania law should apply. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 248-49 (1971).

35. This problem is avoided if the long-arm statute is construed as authorizing the exercise of jurisdiction within constitutional limits. See *Savchuk v. Rush*, — Minn. —, 245 N.W.2d 624, 628 (1976), *vacated*, 433 U.S. 903 (1977).

36. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

37. The court obtained jurisdiction over the hospital by personal service on an agent who was soliciting funds in New York. Presumably, this would not constitute sufficient activity in New York to satisfy the forum-defendant contacts requirement of *Shaffer*. See note 15 *supra*.

and indemnify the defendant. This jurisdictional base was in accord with the procedures authorized by the New York Court of Appeals in *Seider v. Roth*.³⁸

Massachusetts law limited the amount of recovery for wrongful death;³⁹ New York law did not.⁴⁰ The Second Circuit applied an interest and fairness test of choice of law and held that New York law applied. New York had a real interest in applying its law, and its application was neither unfair to the physician nor the insurer. The physician could not be held liable beyond the policy limits, and, because the policy did not distinguish between liability for personal injury and for wrongful death, the insurer reasonably could have foreseen being held liable in excess of the Massachusetts wrongful death limitation.⁴¹

If a case similar to *Warren* were to arise after *Shaffer*, could New York constitutionally exercise jurisdiction? Professor Vernon notes that *Seider* has an "in rem genesis," and was based on a forum-plaintiff nexus, whereas *Shaffer* requires a forum-defendant or forum-litigation nexus.⁴² When so viewed, the exercise of *Seider* jurisdiction is unconstitutional because the fictitious presence of the insurer's obligation to defend and indemnify in the forum does not constitute contact with the defendant or the litigation. Two lower New York state courts have so held.⁴³ Nevertheless, the Second Circuit has interpreted *Seider* jurisdiction to be the equivalent of a judicially created direct action statute,⁴⁴ and, on this basis, has upheld the constitutionality of *Seider* jurisdic-

38. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

Section 47 of the Surrogate's Court Act provided that, for the purpose of conferring jurisdiction upon a Surrogate's Court, 'a debt owing to decedent by a resident of the state' is regarded as personal property. . . . [W]ithin the broad meaning of section 47 this liability insurance policy, even though no judgment had been obtained against the insured, made decedent's estate a 'creditor' and the insurer a 'debtor' sufficient for the purposes of the statute.

Id. at 114, 216 N.E.2d at 314, 269 N.Y.S.2d at 102.

39. 7a MASS. ANN. LAWS. ch. 229, § 92 (Michie/Law. Co-op Supp. 1971).

40. N.Y. EST., POWERS & TRUSTS LAW § 5-41 (McKinney 1967).

41. 475 F.2d at 441-46. Despite the absence of factual contacts with a transaction, a state may constitutionally apply its law, provided the interest and fairness test is satisfied. *See Sedler, supra* note 22, at 402-04.

42. *See A Preliminary Inquiry, supra* note 17, at 1017-20.

43. *Katz v. Umansky*, 92 Misc.2d 285, 399 N.Y.S.2d 412 (Sup. Ct. 1977); *Kennedy v. Deroker*, 91 Misc. 2d 648, 398 N.Y.S.2d 628 (Sup. Ct. 1977).

44. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969). Professor Vernon asserts that *Seider* cannot properly be interpreted as equivalent to a direct action statute because of its "in rem genesis." *A Preliminary Inquiry, supra* note 17, at 1018.

tion after *Shaffer*.⁴⁵

Ten days before the Supreme Court decided *Shaffer*, the New York Court of Appeals, in *Donawitz v. Danek*,⁴⁶ held that *Seider* jurisdiction should not be exercised when a nonresident plaintiff brings suit. The court, however, recognized that *Seider* "in effect established by judicial fiat, a 'direct action' against the insurer."⁴⁷ It then asserted that because the New York legislature had not taken any action in response to *Seider*, "it must be concluded that they are satisfied with it."⁴⁸

If *Seider* is interpreted as equivalent to a judicially created direct action statute,⁴⁹ the critical issue is whether, after *Shaffer*, a state can constitutionally require an insurer engaged in substantial in-state business activity⁵⁰ to defend suits brought in the forum against one of its insureds by a resident plaintiff who suffers injury in another forum. My contention is that not only can a state constitutionally require the insurer to defend such actions but it can also apply its substantive law. On the basis of this fusion of jurisdiction and choice of law, the remainder of this commentary distinguishes the exercise of such jurisdiction in suits brought in the forum by residents and nonresidents.⁵¹ Because *Donawitz* preceded *Shaffer*, it is unclear whether New York still would exercise such jurisdiction or apply its law in a suit arising from an accident occurring in the defendant's home state and involving a resident plaintiff and a nonrecovery state defendant.⁵² I will therefore develop my thesis using Minnesota as the forum state.

45. O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd*, 579 F.2d 194 (2d Cir. 1978).

46. 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

47. *Id.* at 142, 366 N.E.2d at 255, 397 N.Y.S.2d at 595.

48. *Id.*

49. I do not consider the question whether the New York court can properly interpret the statute on which the exercise of *Seider* jurisdiction is based without regard to its "in rem genesis." Nevertheless, a court can judicially create a "borrowing statute" by looking to the shorter limitations period of the state whose substantive law it is applying. See *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). It should then be able to create the equivalent of a direct action statute by holding that the insurance company is the real party in interest and allowing suit to be brought against it. In *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969), the Florida Supreme Court did this when the named insured was before the court; the legislature, however, has substantially restricted the circumstances in which the insurer could be joined. FLA. STAT. ANN. § 627.7262 (West Supp. 1978).

50. Many casualty insurance companies are national in scope, engaging in substantial business activity in most states.

51. See note 63 *infra* and accompanying text.

52. See generally *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Sedler, *supra* note 8, at 983-94.

Minnesota statutorily authorizes the exercise of *Seider* jurisdiction,⁵³ albeit on a quasi in rem basis, on behalf of resident plaintiffs. The Minnesota Supreme Court upheld the constitutionality of the statute in *Savchuk v. Rush*,⁵⁴ noting that the nonresident insured could not be held liable beyond the policy limits and that it was applicable only when the plaintiff was a resident of the forum.⁵⁵ Further, Minnesota will apply its substantive law allowing recovery whenever a resident plaintiff is injured by a nonrecovery state defendant in a nonrecovery state.⁵⁶

The following hypothetical illustrates the constitutionality of the Minnesota statute: A Minnesota resident is injured in Illinois while riding as a guest in an automobile owned and operated by an Illinois resident. The trip began in Illinois and was to terminate there. Illinois has a guest statute;⁵⁷ Minnesota does not. The driver's insurer writes policies nationally and engages in substantial business activity in Minnesota.

Minnesota can—consistent with due process—allow the plaintiff to sue the insurer in Minnesota and apply its own law on the guest-host immunity issue. The core concept of due process, both for jurisdictional and choice of law purposes, is reasonableness and fairness. Minnesota is providing a forum for its residents injured elsewhere by a party insured by a company doing business in Minnesota.⁵⁸ Practically, the suit is between a resident and a liability insurer⁵⁹ who has “purposefully avail[ed itself] of the privilege of conducting activities within the forum

53. MINN. STAT. § 571.41(2) (1969).

54. — Minn. —, 245 N.W.2d 624 (1976), *vacated*, 433 U.S. 903 (1977).

55. Notice was given to the nonresident insured, and, consistent with *Seider* procedures, the insured could appear without incurring liability beyond the policy limits. *Id.* at —, 245 N.W.2d at 628-29.

56. *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976).

57. ILL. ANN. STAT. ch. 95 1/2, § 10.201 (Smith-Hurd 1971).

58. The Minnesota Supreme Court can interpret the statute to free it of its “in rem genesis.” The legislature intended to provide a Minnesota forum for residents injured elsewhere by a person insured by a company doing business in Minnesota. It utilized a doctrinal approach that was assumed to be constitutional prior to *Shaffer*. Now that this approach is unconstitutional, the intention of the legislature can be effectuated by reinterpreting the statute as a direct action statute limited to the insurer. The United States Supreme Court vacated and remanded *Savchuk* for reconsideration in light of *Shaffer*. 433 U.S. 903 (1977).

59. Because the suit against the insurer is based on the actions of the insured, due process would still probably require that the insured be given notice of the suit and the opportunity to appear.

State. . . ."⁶⁰ It is also reasonable to apply the Minnesota guest-host immunity statute because the economic and social consequences of the accident will be felt there.⁶¹ Finally, the choice of law is fair to the insurer; it in no sense relied on the Illinois guest statute, and its rates—which are based on the loss experience of many insureds—are affected only peripherally, if at all, by the tort law of any particular state.⁶²

Minnesota, by statute, is permitting its residents to accomplish directly, what the New York courts allow its residents to accomplish indirectly through the exercise of *Seider* jurisdiction. The Minnesota approach is preferable because it eliminates the insured, usually merely a nominal defendant, and instead treats the insurer as the real party in interest.

If, in the hypothetical, the plaintiff was an Illinois resident, there still would not appear to be a constitutional objection to the exercise of jurisdiction because the forum-defendant contacts of the insurer with Minnesota remain sufficient even after *Shaffer*. Minnesota, however, could not constitutionally apply its own law in the absence of any factual contacts with the accident or a real interest in the outcome of the resulting litigation. Because the only factual connections are the forum-defendant contacts of the insurer, and the forum has no real interest in the outcome of litigation between an Illinois resident and a national insurer, application of Minnesota law would violate the due process rights of the insurer.⁶³

With the exception of Minnesota and New York, jurisdiction in cases

60. *Shaffer v. Heitner*, 433 U.S. at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1957)).

The insurer is analogous to a foreign corporation doing business in a state. Such a corporation may be required to defend nonforum-related claims because of its connections with the state. For the view that jurisdiction over the insurer can be exercised on this basis after *Shaffer*, see Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 Ky. L.J. 1, 32-33 (1977).

61. In *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954), the Court sustained the constitutionality of Louisiana's direct action statute as applied to a suit against an insurance company doing business in Louisiana on a claim arising from an accident in Louisiana involving a nonresident insured. The Court emphasized Louisiana's interest in providing a forum for the injured resident because the social and economic consequences of the accident would be felt there. *Id.* at 72-73. This interest is the same when an accident occurs in another state because the social and economic consequences of the accident will still be felt in the forum. See *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.), *cert. denied*, 396 U.S. 344 (1969).

62. Professor Weintraub has reminded us that "to talk of 'surprising' the insurer is very likely to be talking nonsense." R. WEINTRAUB, *supra* note 34, at 206.

63. See generally *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396

similar to the original hypothetical is generally unavailable. New Hampshire exercises jurisdiction in automobile accident cases—but only where the driver is a resident of New York—apparently on a “do unto others” theory.⁶⁴ Only Louisiana,⁶⁵ Wisconsin,⁶⁶ and Puerto Rico⁶⁷ have complete action statutes; and both the Louisiana and Wisconsin statutes expressly provide that the insurer can be sued only if the policy was issued or delivered in the state or the accident occurred there.⁶⁸ These statutes, therefore, constitute functionally restrictive sub-

U.S. 840 (1969) (*Seider* jurisdiction should not be exercised in favor of nonresidents, in principal part because of its view that extension of *Seider* to nonresidents would be unconstitutional).

64. *See* *Robitaille v. Orciuch*, 382 F. Supp. 977 (D.N.H. 1974); *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973).

65. LA. REV. STAT. § 22.655 (West Supp. 1978) provides:

The injured person or his or her survivors or heirs . . . , at their option shall have a right of direct action against the insurer within the terms and limits of the policy. . . . This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

66. WIS. STAT. ANN. § 803.04(2)(a) (West 1977) provides:

In any action for damages caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

67. P.R. LAWS ANN. tit. 26, §§ 2001, 2003 (1958 & Supp. 1975). Section 2001 provides:

The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury, death, or damage to property of a third person, shall become absolutely liable whenever a loss covered by the policy occurs, and payment of such loss by the insurer to the extent of its liability therefore under the policy shall not depend upon payment by the insured or upon any final judgment against him arising out of such occurrence.

Section 2003 provides:

Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly. The direct action against the insurer may only be exercised in Puerto Rico. The liability of the insurer shall not exceed that provided for in the policy, and the court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section shall be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured.

68. *See* notes 65-66 *supra*.

stantive rules,⁶⁹ inapplicable to out-of-state accidents involving out-of-state insured defendants. The Louisiana and Wisconsin courts would not have the power to authorize a direct action against the insurer.⁷⁰

Some courts have expressly rejected *Seider* jurisdiction,⁷¹ although this is inconsistent with the interest analysis approach to choice of law that most policy-oriented courts follow. Their reluctance to exercise *Seider* jurisdiction may be explained by a failure to fully recognize the relationship between jurisdiction and choice of law. If the forum's substantive tort law favors recovery, sound policy considerations dictate that its jurisdictional law should maximize the circumstances in which forum residents can constitutionally obtain the benefit of that law. Courts and legislatures can accomplish this by permitting a direct action against an insurer doing business in the forum whenever an insured is involved in an accident with a forum resident in another state. *Shaffer* may stimulate a reanalysis of the relationship between judicial jurisdiction and choice of law. Recognition of this relationship in interstate accident cases may lead to the adoption of this policy.

*As this commentary went to press, both New York and Minnesota affirmed the constitutionality—in light of Shaffer—of the exercise of Seider jurisdiction.*⁷²

69. See Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 CAL. L. REV. 27, 44-50 (1976).

70. See *Esteve v. Allstate Ins. Co.*, 351 So.2d 117 (La. 1977). But see *Kirchen v. Orth*, 390 F. Supp. 313 (E.D. Wis. 1975). The Puerto Rico statute expressly authorizes suit against the insurer when an accident occurs in another state involving a nonresident insured and a resident plaintiff, P.R. LAWS ANN. tit. 26, § 2003 (1958 & Supp. 1975), therefore the courts would have the power to authorize such suits.

71. See, e.g., *Robinson v. Shearer & Sons, Inc.*, 429 F.2d 83 (3d Cir. 1970); *Ricker v. LaJoie*, 314 F. Supp. 401 (D. Vt. 1970); *Kirchman v. Mikula*, 258 So.2d 701 (La. App. 1972); *Missouri ex rel. Government Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo. App. 1970); *Johnson v. Farmers Alliance Mut. Ins. Co.*, 499 P.2d 1387 (Okla. 1972); *Jardine v. Donnelly*, 413 Pa. 474, 198 A.2d 513 (1964) (per curiam); *De Rentiis v. Lewis*, 106 R.I. 240, 258 A.2d 464 (1969); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970); *Housely v. Anaconda Co.*, 19 Utah 2d 124, 417 P.2d 390 (1967); *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974).

72. *Savchuk v. Rush*, 47 U.S.L.W. 2290 (Minn. Oct. 20, 1978); *Baden v. Staples*, 47 U.S.L.W. 2291 (N.Y. Oct. 24, 1978).

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