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Comment: State Court Jurisdiction: Demise of the Seider Doctrine

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COMMENT

STATE COURT JURISDICTION: DEMISE OF THE *SEIDER* DOCTRINE

In Rush v. Savchuk, *the Supreme Court struck down the controversial* Seider *doctrine, which permitted a state to exercise jurisdiction over a nonresident defendant solely on the basis of his insurer doing business in that state. This Comment analyzes the development of in personam and quasi in rem jurisdiction and the constitutional principles that led to the* Rush *decision. The author concludes, in light of* Rush, *that direct action statutes against insurers would not withstand constitutional attack in cases in which the controversy at issue occurred outside the forum state and the tortfeasor was not otherwise subject to that state's jurisdiction.*

I. INTRODUCTION

Since its decision in *Pennoyer v. Neff*[1] over a century ago, the United States Supreme Court has held that the ability of state courts to enter judgments affecting rights or interests of nonresident defendants is limited by the operation of the due process clause of the fourteenth amendment.[2] Just where the line of limitation falls, however, has been the subject of fertile controversy.[3] Over the years, the Court has articulated guidelines in an attempt to give content to this amorphous restriction on state court jurisdiction. *International Shoe Co. v. Washington*[4] finally established the minimum contacts standard which has become the foundation of modern jurisdictional analysis. In that case, the Court held that a state's in personam[5] jurisdiction may extend to nonresidents who have sufficient contacts with the state so that adjudication of a controversy in that forum is

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1. 95 U.S. 714 (1877).
2. *See, e.g.*, Kulko v. California Super. Ct., 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 352 (1927); New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916); Harris v. Balk, 198 U.S. 215 (1905).
3. The source of the controversy lies in defining the relationship that must exist between the forum state and the litigants. *See* J. McCoid, Civil Procedure 498–99 (1974). It is undisputed, however, that authority to render binding judgments requires notice and an opportunity to be heard. *Id.*
4. 326 U.S. 310 (1945).
5. "A judgment in personam imposes a personal liability or obligation on one person in favor of another." Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) (citing Restatement of Judgments, Introductory Note, at 5 (1942)).

fair and reasonable.[6] More recently, *Shaffer v. Heitner*[7] extended that concept and held that jurisdiction in rem and quasi in rem[8] must conform to the same standard of fairness that *International Shoe* established for in personam jurisdiction.[9]

Shaffer eliminated much of the inconsistency and confusion that had arisen as a result of applying different rules to different types of jurisdiction. It was not immediately apparent, however, just what effect *Shaffer* had on the controversial theory espoused in *Seider v. Roth*,[10] which permitted a state to exercise jurisdiction over a nonresident on the basis of his insurance carrier's doing business in that forum. Recently, the Court considered the *Seider* doctrine in *Rush v. Savchuk*[11] and, relying on *Shaffer*, declared the doctrine unconstitutional as applied to a defendant whose only contact with the forum state is the "affiliating circumstance" of his liability insurer's doing business there.[12]

This comment examines the constitutional principles that led to the demise of the *Seider* doctrine. It then examines the implications of the Court's decision in *Rush*, particularly with respect to the viability of direct actions against insurers in cases in which, despite the plaintiff's residence in the forum and the insurer's doing business there, no relationship exists between the underlying cause of action and the forum state.

II. CONSTITUTIONAL BACKGROUND

Historically, the adjudicatory authority of a tribunal was said to be grounded on its de facto power over persons or property located within its borders.[13] Under this power-presence concept,[14] first given

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6. 326 U.S. 310, 319 (1945).
7. 433 U.S. 186 (1977).
8. A judgment in rem affects the interest of all persons in designated property. A judgment quasi in rem affects the interest of particular persons in designated property. The latter is of two types. In Type I, the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In Type II, the plaintiff seeks to apply what he concedes to be property of the defendant to the satisfaction of a claim against the defendant. Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958). Hereinafter quasi in rem will be used in reference to Type II.
9. 433 U.S. 186, 207 (1977).
10. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
11. 100 S. Ct. 571 (1980).
12. *Id.* at 580.
13. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).
14. For a discussion of the power-presence theory of *Pennoyer*, see Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

constitutional stature in *Pennoyer*,[15] jurisdiction in personam could be exercised only when the defendant was physically present in the forum state and was served with process there.[16] Similarly, jurisdiction in rem and quasi in rem required that the property of the defendant be located within the territorial boundaries of the forum and that it be brought before the court by attachment.[17] Any attempt to exercise judicial authority beyond territorial limits was regarded as an illegitimate assumption of power.[18]

A. *In Personam Jurisdiction*

Gradually, the exigencies created by multistate corporate growth and the increased mobility of society in general came into conflict with the rigid analytical strictures of *Pennoyer*.[19] Recognizing the need for an expanded view of state jurisdiction, yet constrained by stare decisis, the Court first resorted to legal fictions in an effort to permit states to widen the scope of their adjudicatory authority and meet the practical demands of the twentieth century. For example, foreign corporations doing business in a state[20] and nonresident motorists who made use of a state's highways[21] were held to have impliedly consented to the jurisdiction of the state with regard to causes of action arising from those activities. Personal

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15. *Pennoyer* was the first case to apply the due process clause to personal jurisdiction. The test arrived at and the language used, however, were virtually identical to that of D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), *cited* in Pennoyer v. Neff, 95 U.S. 714, 720, 729 (1877). The *D'Arcy* decision was prior to passage of the fourteenth amendment. In that case the Court found the concept of reciprocal restraints on the states' sovereignty to be embodied in the full faith and credit clause. 52 U.S. (11 How.) at 174–76. *See* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 303–05 (1970).
16. Pennoyer v. Neff, 95 U.S. 714, 733 (1877). Personal service in the state was seen as both a necessary and sufficient condition for the exercise of in personam jurisdiction. Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdictional Theory*, 26 U. KAN. L. REV. 61 (1978).
17. Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
18. *Id.* at 722–23.
19. *See* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 575–86 (1958); Note, *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 919–23 (1960).
20. *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). Originally, jurisdiction over corporations was thought to be confined exclusively to the state of incorporation; the idea being that the corporation could not legally exist elsewhere. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). This, however, did not prevent a corporation from engaging in activities in other states, and those interstate activities demanded an extension of jurisdiction which came even before *Pennoyer*. The solution was found in the theory of implied consent which repeatedly has been a tool for expanding jurisdiction. J. MCCOID, CIVIL PROCEDURE 510 (1974).
21. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927).

jurisdiction over foreign corporations was also sustained on the premise that the corporation could be treated as "present" in the forum if it conducted a sufficient quantum of business there.[22]

International Shoe Co. v. Washington[23] marked a major adjustment in personal jurisdiction analysis. Rejecting *Pennoyer's* premise that "presence" was the touchstone of judicial jurisdiction, *International Shoe* delineated a new test to permit states to exercise in personam jurisdiction beyond their territorial boundaries. At issue in *International Shoe* was whether the State of Washington could sue a Missouri-based Delaware corporation in Washington to collect an employment tax. The corporation employed several salesmen in Washington whose only activity on behalf of the corporation was the solicitation of orders. Although such activity, by itself, previously had been held not to constitute such "doing business" as would expose the corporation to personal jurisdiction,[24] the Court held that Washington was a proper forum. Rather than focusing upon a state's physical power over the defendant, *International Shoe* stated that the relevant inquiry is whether the defendant has certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[25] Factors considered by the Court in reaching the conclusion that Washington's exercise of jurisdiction over the nonresident corporation comported with notions of fairness included the degree of inconvenience to the defendant in defending an action away from home, the systematic and continuous nature of the contacts, and the relationship between the lawsuit and the defendant's activities in the forum state.[26] The Court stressed that these factors cannot be assessed in a mechanical or quantitative fashion: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[27] To the extent that a defendant enjoys the benefits and protections of state laws by conducting activities within that state, requiring him to enter the forum to defend his activity is not unfair.[28]

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22. The corporate presence fiction was articulated by Justice Brandeis: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such a manner and to such extent as to warrant the inference that it is present there." Philadelphia & Reading Ry. v. McKibben, 243 U.S. 264 (1917).
23. 326 U.S. 310 (1945).
24. *See* International Harvester Co. of America v. Kentucky, 234 U.S. 579 (1914).
25. 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
26. 326 U.S. 310, 317, 320 (1945).
27. *Id.* at 319.
28. *Id.*

Expanding the principles set forth in *International Shoe,* the Court, in *McGee v. International Life Insurance Co.,*[29] sustained a California court's exercise of in personam jurisdiction over a nonresident defendant whose only contact with the forum was its offer to insure one California resident and its acceptance of premiums mailed from that state.[30] In support of its conclusion that due process requirements were satisfied in *McGee,* the Court emphasized that the suit was based on a contract which had a "substantial connection with that State,"[31] and that California had a legitimate interest in regulating insurers who solicited business there.[32]

In *McGee,* the Court indicated a willingness to permit exercises of jurisdiction based upon increasingly minimal contacts, noting that there was a trend toward expanding the scope of jurisdiction over nonresidents. One year later, however, *Hanson v. Denckla*[33] made it clear that *McGee* did not herald the demise of all restrictions on the personal jurisdiction of state courts.[34] In *Hanson,* a Florida court had attempted to assert jurisdiction over a Delaware trustee primarily because the settlor of the trust was domiciled in Florida.[35] Despite correspondence between the nonresident trustee and the settlor while the latter was in Florida, the Court concluded that Florida was without jurisdiction. In order to fulfill the minimum contacts test set

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29. 355 U.S. 220 (1957).
30. In *McGee,* a Texas insurance company took over the policies of another insurer. The Texas company then solicited a reinsurance agreement with a California resident who had been insured by the previous company. The California resident accepted the new offer and from that time until his death paid premiums by mail from his home. The insured's beneficiary filed a claim following his death. When the insurer refused to pay, suit was brought in California based upon a statute (CAL. INS. CODE §§ 1610–1620 (West 1972)) subjecting foreign insurance corporations to suit on insurance contracts with residents of California. The case reached the United States Supreme Court after a Texas court refused full faith and credit to the California judgment. 355 U.S. 220, 221–22 (1957).
31. *Id.* at 223. "The insurance agreement was delivered in California, the premiums were mailed from there and the insured was a resident of that state when he died." *Id.*
32. *Id.*; *see* CAL. INS. CODE §§ 1610–1620 (West 1972).
33. 357 U.S. 235 (1958).
34. *Id.* at 251.
35. The settlor had established the trust in Delaware before becoming a Florida resident. Once in Florida, however, she continued to exercise control over the trust by sending specific instructions to the trustee. Upon the settlor's death, her estate was probated in Florida. Florida attempted to obtain jurisdiction over all indispensable parties, including the Delaware trustee. The question before the United States Supreme Court was whether Florida, consistent with due process, could exercise jurisdiction over the trustee. Other than the trustee's correspondence with the settlor in Florida, there were no alleged contacts between the trustee and the state. The Court held that the correspondence alone was insufficient to satisfy the minimum contacts test. *Id.* at 238–39, 253.

forth in *International Shoe,* the Court declared, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[36]

B. Quasi In Rem Jurisdiction

Despite substantial modification of the constitutional standard of in personam jurisdiction, the status of quasi in rem jurisdiction remained static for nearly a century after *Pennoyer.* A plaintiff seeking a judgment against a defendant who did not have the requisite contacts with the forum to support in personam jurisdiction could proceed quasi in rem, attaching for jurisdictional purposes any property of the defendant that was located within the forum state.[37] The state court could thus obtain jurisdiction over the defendant up to an amount equal to the value of the property attached and a successful claim by a plaintiff could be satisfied with the proceeds of such property. Significant in the development of quasi in rem jurisdiction is *Harris v. Balk.*[38] In that case, Epstein, a Maryland resident, was owed money by Balk, a North Carolina resident. Harris, also a resident of North Carolina, owed money to Balk. While Harris was temporarily in Maryland, Epstein attached Harris' debt to Balk, obtained a judgment against Balk, and satisfied the judgment with the Harris debt. The Supreme Court ruled that the debt followed the debtor (Harris) wherever he went.[39] Because a state was deemed to have exclusive jurisdiction over any property found within its territory,[40] quasi in rem jurisdiction over the creditor (Balk) was established by attaching the debt when the debtor was in the forum state. *Harris* remained an accurate reflection of the scope of quasi in rem jurisdiction until the Court's recent pronouncement in *Shaffer v. Heitner.*[41]

C. The Shaffer *Standard*

As the rules governing quasi in rem and in personam jurisdiction evolved independently of each other, the inherent unfairness of proceedings typified by *Harris* became increasingly difficult to reconcile with the Court's growing emphasis upon "fair play and

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36. *Id.* at 253.
37. *See* Arndt v. Griggs, 134 U.S. 316 (1890).
38. 198 U.S. 215 (1905).
39. *Id.* at 222.
40. Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
41. 433 U.S. 186 (1977). Although *Harris* dates from 1905, its vitality was recognized in New York in 1966 when that state's court decided Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See text accompanying notes 49–53 *infra.*

substantial justice"[42] in the area of in personam jurisdiction. In *Shaffer*,[43] the Court eliminated this problem and declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[44] Recognizing that the assertion of jurisdiction over property is, in reality, the assertion of jurisdiction over its owner,[45] the Court held that the mere presence of property in a state does not establish a sufficient nexus between its owner and the state to support the exercise of jurisdiction when the cause of action is unrelated to that property.[46] While the ownership of property in a state may suggest the presence of other ties,[47] jurisdiction is lacking unless there are sufficient contacts among the defendant, the forum, and the litigation to satisfy the fairness standard of *International Shoe*.[48]

III. DEVELOPMENT OF THE *SEIDER* DOCTRINE

One of the earliest results of the Court's decision in *Shaffer* was a renewed attack on the vitality of the controversial jurisdictional theory first articulated in *Seider v. Roth*.[49] Based initially on the *Harris* concept that a debt travels with the debtor and may provide the basis for obtaining quasi in rem jurisdiction over the creditor,[50] *Seider* constructed an ingenious method of permitting a state to command a defendant to appear in its courts on the basis of his insurer

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42. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
43. 433 U.S. 186 (1977). *Shaffer* involved a suit by a nonresident of Delaware against other nonresidents of Delaware whose only contact with that state consisted of holdings of stock in a Delaware corporation which had its principal place of business in Arizona. The Delaware court sequestered this stock and asserted quasi in rem jurisdiction. The suit arose out of events that occurred in Oregon. Although the defendants participated in these events, they did so in their capacities as officers and directors of the corporation and not as stockholders. Thus, there was no relationship between the cause of action and the sequestered stock. *Id.* at 213–14. In holding that attachment of the stock to obtain jurisdiction denied the defendants' right to due process, the Court noted that there was no relationship between the property forming the basis of jurisdiction and the plaintiff's cause of action. This being the case, Delaware had no contacts with the defendants that would satisfy the test of *International Shoe*, which the Court held applicable to all forms of state jurisdiction. *Id.* at 212–17.
44. *Id.* at 212.
45. *Id.*
46. *Id.* at 208–09. Illustrative of another case in which the property serving as the basis of jurisdiction is completely unrelated to the plaintiff's cause of action is *Harris*. The Court noted that to the extent that such decisions are inconsistent with the *International Shoe* standard, they are overruled. *Id.* at 212 n.39.
47. *Id.* at 209.
48. *Id.*
49. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
50. Harris v. Balk, 198 U.S. 215 (1905).

doing business in that state.[51] In *Seider,* the Court of Appeal of New York held that the obligation of an insurance company to defend and indemnify a nonresident tortfeasor constitutes a debt within the meaning of New York's attachment statute and, as such, can be attached for the purpose of establishing jurisdiction over the nonresident defendant.[52] Seen as the most extreme form of quasi in rem jurisdiction to date, *Seider* provoked a storm of comment, the vast majority of which suggested that the decision was illogical as well as unfair in practical application.[53]

Simpson v. Loehmann[54] afforded the Court of Appeals of New York its first opportunity to reconsider *Seider* in light of the argument that the procedure sanctioned therein was offensive to due process. Concluding that *Seider* presented no constitutional problems, the court, relying on *Harris,* reasoned that the presence of the insurer's debt in New York created a sufficient nexus between the state and the defendant's interest in the policy to support jurisdiction.[55] In addition, the court maintained that the presence of both the plaintiff and the insurance company in the forum gave the state "a substantial and continuing relationship with the controversy"[56] so as to eliminate any due process problems. In order to avoid the harsh effects of a New York statute,[57] which would subject a defendant in a *Seider* proceeding to in personam jurisdiction if he tried to contest the attachment of his insurer's obligation, the court further held that recovery by a plaintiff in a *Seider* proceeding would be limited to the

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51. In *Seider,* New York residents brought suit against a resident of Canada for damages allegedly sustained in an automobile accident which occurred in Vermont. Pursuant to the New York Civil Practice Law and Rules, New York attached the defendant's insurance policy, issued through a company doing business in New York, to obtain quasi in rem jurisdiction. The statute provides in pertinent part:

> A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly, or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or nonresident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1978).

52. 17 N.Y.2d 111, 113–14, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101–02 (1966).
53. *E.g.,* Reese, *The Expanding Scope of Jurisdiction Over Nonresidents — New York Goes Wild,* 35 INS. COUNSEL J. 118 (1968); Rosenberg, *One Procedural Genie Too Many Or Putting* Seider *Back Into Its Bottle,* 71 COLUM. L. REV. 660 (1971); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation,* 67 COLUM. L. REV. 550 (1967).
54. 21 N.Y.2d 305, 234 N.E.2d 667, 287 N.Y.S.2d 633 (1967).
55. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636–37.
56. *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
57. N.Y. CIV. PRAC. LAW § 320(c) (McKinney Supp. 1966).

face amount of the insurance policy, even if the defendant should contest the matter on the merits.[58]

Although the majority in *Simpson* clearly viewed *Seider* as an exercise of quasi in rem jurisdiction, implicit in the court's rationale was the idea that *Seider* embraced not only a quasi in rem basis, but also an in personam basis. Emphasizing the degree of control that liability insurers exercise over litigation as well as the continuing relationship New York has with the controversy when the plaintiff is a resident and the insurer is present in and extensively regulated by the state, *Simpson* seemed to suggest that *Seider* was really an in personam action against the insurer.[59] Judge Keating, concurring in *Simpson,* maintained that the *Seider* doctrine was, in effect, a judicially created direct action statute against the insurer and could be sustained on that basis alone.[60] This alternative view of *Seider* also found support in the United States Court of Appeals for the Second Circuit. In *Minichiello v. Rosenberg,*[61] *Seider* was found acceptable as "in effect a judicially created direct action."[62] Viewed as such, the Second Circuit believed that *Watson v. Employer's Liability*

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58. 21 N.Y.2d 305, 310, 234 N.E.2d 667, 671, 287 N.Y.S.2d 633, 636–37 (1967). This unexpected interpretation of New York law was promptly affirmed by the legislature which revised the statute, § 320(c) of the New York Civil Practice Law and Rules, to provide, in effect, that an insured does not submit to personal jurisdiction by entering an appearance in a *Seider* proceeding. *See* N.Y. Civ. Prac. Law § 320(c) (McKinney Supp. 1970).
59. Chief Judge Fuld, writing for the majority in *Simpson,* stated:
> Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. . . . Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.

21 N.Y.2d 305, 311, 234 N.E.2d 667, 672, 287 N.Y.S.2d 633, 637 (1967) (citations omitted)
60. Reasoning that because New York could validly enact a direct action statute in favor of its residents, Judge Keating argued that there was no policy reason for not holding that "service of process on the real party defendant — the insurer — is sufficient to compel it to defend in this State, provided it transacts business here and is thus subject to the jurisdiction of our courts." *Id.* at 213–14, 234 N.E.2d at 673, 287 N.Y.S.2d at 639 (concurring opinion).
61. 410 F.2d 106, *rehearing en banc,* 410 F.2d 117 (2d Cir. 1968), *cert. denied,* 396 U.S. 844 (1969). The factual background of *Minichiello* is typical of the *Seider*-type cases. The controversy arose out of an automobile accident which occurred in Pennsylvania. The plaintiff was a resident of New York and brought suit in that state. The defendant was a Pennsylvania resident insured by Allstate Insurance Company, a corporation doing business in New York. *Id.* at 107.
62. *Id.* at 109. On rehearing en banc, the *Minichiello* majority expressed the view that *Seider* was constitutional so long as *Harris* was good law. *Id.* at 118.

Assurance Corp.,[63] a United States Supreme Court case which upheld Louisiana's direct action statute, would be dispositive as to the issue of *Seider's* constitutionality.[64]

In *Watson*, the Supreme Court permitted a Louisiana resident to sue a defendant's insurer directly, pursuant to that state's direct action statute.[65] The accident at issue had occurred in Louisiana. Although the defective product which caused the damage was manufactured in Illinois, it had been sold and used in Louisiana. Against the claim that the statute violated the insurer's due process rights, the Court ruled that application of Louisiana's law did not violate due process because the state had a "legitimate interest"[66] in litigation over an accident occurring therein and in the protection of parties injured within its bounds.[67]

The *Minichiello* court believed that similar interests of the State of New York would support the judicially created direct action of *Seider*. Notwithstanding the fact that the Louisiana direct action statute, unlike the *Seider* procedure,[68] applied only to accidents occurring in the state,[69] the court nonetheless concluded that the United States Supreme Court would sustain the *Seider* doctrine.[70]

Therefore, two very distinct rationales emerged in support of the constitutionality of the *Seider* doctrine: that it is an attachment

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63. 348 U.S. 66 (1954).
64. Minichiello v. Rosenberg, 410 F.2d 106, 110, *rehearing en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).
65. Louisiana's statute provides in part:
> 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.

LA. REV. STAT. ANN. § 22:655 (West 1978).
66. 348 U.S. 66, 73 (1954).
67. *Id.* at 72. The Court described Louisiana's interest as follows:
> Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . Louisiana courts in most instances provide the most convenient forum for trial of these cases.

Id.
68. The *Seider* procedure is only necessary when the accident occurred outside the forum and the defendant is a nonresident. Otherwise, the defendant would be subject to in personam jurisdiction.
69. *See* note 65 *supra*.
70. 410 F.2d 106, 110, *rehearing en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). The court justified its position, stating:
> While the burden on the insurer in trying a case in a state other than the locus of the accident is heavier, there has been . . . "a movement away from the bias favoring the defendant" in matters of personal jurisdiction "toward permitting the plaintiff to insist that the defendant come to him" where there is a sufficient basis for doing so . . . .

Id. (quoting Buckley v. New York Post Corp., 373 F.2d 175, 181 (2d Cir. 1967)).

device for purposes of quasi in rem jurisdiction over the defendant; and that it is, in practical effect, a judicially created direct action procedure allowing in personam jurisdiction over the defendant's insurer.

Prior to *Shaffer,* few courts took issue with *Seider's* constitutionality. Instead, most jurisdictions that considered the matter rejected *Seider* on the basis of state law, holding that an insurer's obligations do not constitute a res subject to attachment.[71] *Shaffer,* however, in overruling *Harris,* one of the major foundations of the *Simpson* and *Minichiello* decisions, raised serious doubts as to *Seider's* continued utility. The majority of commentators concluded that *Seider* could not meet the minimum contacts requirement prescribed by *Shaffer.*[72]

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71. *See* Kirchman v. Mikula, 443 F.2d 816, 817 (5th Cir. 1971); Robinson v. O.F. Shearer & Sons, 429 F.2d 83, 85–86 (3d Cir. 1970); Sykes v. Beal, 392 F. Supp. 1089, 1094–97 (D. Conn. 1975); Ricker v. LaJoie, 314 F. Supp. 401, 402–03 (D. Vt. 1970); Javorek v. Superior Ct., 17 Cal. 3d 629, 641–45, 552 P.2d 728, 737–40, 131 Cal. Rptr. 768, 777–80 (1976); Hunt v. Fireman's Fund Ins. Co., 345 So. 2d 1235, 1238 (La. App. 1977); Belcher v. Government Employees Ins. Co., 282 Md. 718, 726, 387 A.2d 770, 773–74 (1978); State Gov't Employees Ins. Co. v. Lasky, 454 S.W.2d 942, 950 (Mo. App. 1970); Hart v. Cote, 145 N.J. Super. 420, 426, 367 A.2d 1219, 1222 (1976); Johnson v. Farmers Alliance Mut. Ins. Co., 499 P.2J 1387, 1390 (Okla. 1972); Howard v. Allen, 254 S.C. 455, 458–62, 176 S.E.2d 127, 129–30 (1970).

72. Most commentators reasoned that assertion of jurisdiction over the defendant in such cases is invalid, because sufficient contacts do not exist among the state, the defendant, and the litigation as mandated by *Shaffer.* McLaughlin, Seider v. Roth — *Dead or Alive?* N.Y.L.J., Dec. 9, 1977, at 1, col. 1; Zammit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15, 20 (1978); Note, Shaffer v. Heitner: *Reshaping the Contours of State Court Jurisdiction,* 11 LOY. L.A. L. REV. 87, 118 (1977); Note, Shaffer v. Heitner *And The* Seider *Doctrine,* 39 U. PITT L. REV. 747, 768 (1978); *See* Comment, *Quasi In Rem on the Heels of* Shaffer v. Heitner: *If International Shoe Fits,* 46 FORDHAM L. REV. 459, 485 (1977) (connection between forum and litigation too slight to support jurisdiction); Comment, *The Expanding Scope of the Sufficient Minimum Contacts Standard*: Shaffer v. Heitner, 63 IOWA L. REV. 504, 512 (1977) (insufficient contacts on which to base jurisdiction); Note, *Minimum Contacts Analysis Extended to Assertions of In Rem Jurisdiction*: Shaffer v. Heitner, 19 B.C. L. REV. 772, 793–94 (1978) (litigation contact not established); Note, Shaffer v. Heitner: *The Supreme Court Established a Uniform Approach to State Court Jurisdiction,* 35 WASH. & LEE L. REV. 131, 141 n.63 (1978) (intangibility of res attached suggests insufficient contacts between owner and forum).

In addition, many argued that the defendant did not purposefully submit to the forum's jurisdiction. Zammit, *supra,* at 20; *Quasi In Rem on the Heels of* Shaffer v. Heitner, *supra,* at 484; Comment, Shaffer v. Heitner — *If the International Shoe Fits, Attach It,* 31 RUTGERS L. REV. 308, 330 (1978); *Minimum Contacts Analysis Extended to Assertions of In Rem Jurisdiction, supra,* at 791–93; Note, *The Supreme Court 1976 Term,* 91 HARV. L. REV. 152, 158, 160 (1977); Note, Shaffer v. Heitner: *New Constitutional Questions Concerning* Seider v. Roth, 6 HOFSTRA L. REV. 393, 413 (1978); *Reshaping the Contours of State Court Jurisdiction, supra,* at 108; Shaffer v. Heitner *And The* Seider *Doctrine, supra,* at 763; Note, Shaffer v. Heitner: *A New Attitude Toward State Court Jurisdiction,* 13 TULSA L.J. 82, 96 (1977).

Other criticisms included the potential of leaving defendants open to suit in any of the fifty states, McLaughlin, *supra,* at 1, col. 1; *New Constitutional*

Despite *Shaffer's* condemnation of jurisdiction based solely on the presence of a defendant's property in the forum, the United States Court of Appeals for the Second Circuit, in *O'Connor v. Lee-Hy Paving Corp.*,[73] concluded that the *Seider* doctrine remained a viable means of obtaining jurisdiction over an out-of-state defendant. The Second Circuit held that the attachment of an insurance policy does not so offend "traditional notions of fair play and substantial justice" as to violate due process.[74] *O'Connor* met the argument that the overruling of *Harris* was fatal to *Seider,* by distinguishing the circumstances of *Harris* from the typical *Seider* fact pattern and by stressing the insurer's contacts with the forum, as opposed to those of the insured, in determining the fairness of the procedure.[75]

O'Connor characterized the *Seider* procedure as sui generis in the field of jurisdiction,[76] distinguishable as such from the quasi in rem actions typified by *Harris* and proscribed by *Shaffer,* in which jurisdiction is based on the attachment of property bearing no relation to the cause of action.[77] Unlike *Harris,* in which the indebtedness on a personal loan attached for jurisdictional purposes had no relation to the lender's separate debt to the plaintiff,[78] the insurance policy in a *Seider* proceeding is necessarily related to the litigation because the specific purpose of the policy is to protect the insured against the type of liability that is the subject of the litigation.[79]

The Second Circuit believed that *Shaffer's* most important mandate was that courts must look at realities and not become absorbed in fictional concepts.[80] Based on that notion, the court concluded that the insurer is the real party in interest in a *Seider*

Questions Concerning Seider v. Roth, *supra,* at 413, the "bootstrapping" involved in attaching, to obtain jurisdiction, an obligation that does not mature until jurisdiction has been obtained, *see* Reese, Shaffer v. Heitner: *Implications for the Doctrine of* Seider v. Roth, 63 Iowa L. Rev. 1023, 1025 (1977) (arguments for attachability of obligations under insurance policy "highly conceptual and hardly convincing"), and overemphasis in the *Seider* procedure of concern for plaintiffs, Shaffer v. Heitner *And The* Seider *Doctrine, supra,* at 765–66; *see* Note, *Traditional Notions of Fair Play and Substantial Justice Expanded*: Shaffer v. Heitner, 1977 Utah L. Rev. 361, 371 (extending *Seider,* which creates unfair hardships on nonresident defendants, ignores the fact that *Shaffer* sought to remedy inequities).

73. 579 F.2d 194 (2d Cir.), *cert. denied,* 439 U.S. 1034 (1978).
74. *Id.* at 198 n.4.
75. *Id.* at 198–200.
76. *Id.* at 202 n.11.
77. *Id.* at 199.
78. *See* text accompanying notes 38–40 *supra.*
79. 579 F.2d 194, 199 (2d Cir.), *cert. denied,* 439 U.S. 1034 (1978).
80. *Id.* at 200 (citing Shaffer v. Heitner, 433 U.S. 186, 207 (1977)).

proceeding.[81] Believing that the insurer's contacts with New York would sustain in personam jurisdiction in a direct action against it, *O'Connor* held that no reason existed for ruling the attachment of an insurance policy invalid as a means of obtaining quasi in rem jurisdiction.[82]

IV. *RUSH v. SAVCHUK* — DEMISE OF THE *SEIDER* DOCTRINE

In its determination that a state may not constitutionally exercise quasi in rem jurisdiction over a nonresident defendant who has no forum contacts by attaching the contractual obligation of an insurer to defend and indemnify him in connection with the suit, *Rush v. Savchuk*[83] represents the final chapter in the *Seider* doctrine saga. Similar in its facts to those of *Seider* and its progeny, *Rush* arose out of a single-car accident in Indiana in which the plaintiff, Savchuk, was injured while riding as a passenger in an automobile operated by the defendant, Rush.[84] Although both parties were Indiana residents at the time of the occurrence, Savchuk later took up residence in Minnesota and, some two years after the accident, filed suit against Rush in Minnesota.[85] As Rush had no contacts with Minnesota that would support in personam jurisdiction there, Savchuk attempted to obtain quasi in rem jurisdiction pursuant to a Minnesota statute,[86] which, in essence, codified the *Seider*

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81. The Second Circuit reasoned that because the insurer's obligation to defend essentially placed it in complete control of the litigation, and because the judgment rendered for the plaintiff would be limited to the proceeds of the insurance policy, the determination as to whether sustaining jurisdiction would violate due process depended not upon the relations of the defendant to the State of New York, but upon those between New York and the insurance company. *Id.* at 200–01. The court conceded that the defendant in a *Seider* proceeding would have no contacts with the forum. *Id.* at 198.
82. *Id.* at 201.
83. 100 S. Ct. 571 (1980).
84. Savchuk v. Rush, 311 Minn. 480, 482, 245 N.W.2d 624, 626 (1976).
85. In *Rush v. Savchuk*, the Supreme Court noted that Savchuk's claim would have been barred by Indiana's two year statute of limitations. 100 S. Ct. 571, 574 n.2 (1980) (citing Savchuk v. Rush (Savchuk II), 272 N.W.2d 888, 891 n.2 (Minn. 1978)). In addition, Indiana's guest statute would have precluded the action. 100 S. Ct. at 574.
86. The statute provides in relevant part:

> Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:
>
> . . . .
>
> (b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the

procedure.[87] The trial court denied a motion by Rush and his insurer, State Farm Mutual Automobile Insurance Co., to dismiss the action for lack of jurisdiction over the defendant.[88]

On appeal, the Minnesota Supreme Court, in *Savchuk I*,[89] affirmed the decision of the trial court, holding that the obligation of an insurer to defend and indemnify a nonresident defendant is a garnishable res for jurisdictional purposes. Although it expressly recognized that Rush had not engaged in any voluntary activity that would justify an exercise of in personam jurisdiction, the court concluded that considerations of fairness supported the exercise of quasi in rem jurisdiction.[90] These considerations included the fact that State Farm did business in Minnesota, that the insurer controlled the defense in cases of accident litigation, and that Minnesota had an interest in protecting its residents and providing them with a forum in which to litigate their claims.[91]

When *Savchuk* first appeared before the United States Supreme Court, the Minnesota judgment was vacated, and the case was remanded for further consideration in light of *Shaffer*.[92] On remand, however, the Minnesota Supreme Court, in *Savchuk II*,[93] remained steadfast in its earlier ruling and held that Minnesota's *Seider*-type procedure complied with the due process standards enunciated in

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> defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:
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> . . . .
>
> (2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that . . . .
>
> (b) defendant is a nonresident individual, or a foreign corporation, partnership or association.
>
> (3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

MINN. STAT. ANN. § 571.41(2) (West Supp. 1978). The Minnesota Supreme Court held that this statute embodies the rule stated in *Seider*. Savchuk v. Rush, 272 N.W.2d 888, 890 (Minn. 1978).

87. Savchuk, pursuant to the statute, garnished the obligation of Rush's insurer, State Farm Mutual Automobile Insurance Co., to defend and indemnify Rush. State Farm was doing business in Minnesota. Rush was personally served in Indiana. The complaint, alleging negligence, sought $125,000 in damages. Rush v. Savchuk, 100 S. Ct. 571, 575 (1980). The prayer was later reduced voluntarily to $50,000, the face amount of Rush's policy with State Farm. *Id.* at 575 n.5.
88. *Id.* at 575. In light of State Farm's response to the garnishment summons that it did not owe the defendant anything, the trial court granted a motion by Savchuk for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action. *Id.* at 574.
89. Savchuk v. Rush, 311 Minn. 480, 245 N.W.2d 624 (1976).
90. *Id.* at 487, 245 N.W.2d at 629.
91. *Id.*
92. *See* Savchuk v. Rush, 433 U.S. 902 (1977).
93. 272 N.W.2d 888 (Minn. 1978).

Shaffer.[94] The court depreciated *Shaffer's* significance and distinguished it on its facts, noting that Minnesota's garnishment statute differed from the Delaware stock sequestration procedure held unconstitutional in *Shaffer* because the garnished res (the insurer's obligations) in *Savchuk* was intimately related to the litigation.[95] As was the case in *O'Connor v. Lee-Hy Paving Corp.*,[96] *Savchuk II* side-stepped *Shaffer's* requirement that there be minimum contacts among the defendant, the forum, and the litigation. Although Rush himself had no contacts with Minnesota, the court attributed the insurer's contacts to him by considering the "defending parties" as a unit and aggregating their forum contacts to reach the conclusion that jurisdiction was proper under *Shaffer*.[97] Focusing on the insurer's contacts, the plaintiff's interest in suing at home, and Minnesota's interest in facilitating recoveries for its residents, the court affirmed without reservation its earlier ruling in *Savchuk I*.[98]

The United States Supreme Court reversed. Writing for the majority in *Rush,* Justice Marshall found that Minnesota's exercise of *Seider*-type jurisdiction did not comport with notions of due process as measured by the minimum contacts standard.[99] As in *Shaffer,* the inquiry in *Rush* focused exclusively on "the relationship among the defendant, the forum and the litigation,"[100] without regard for the insurer's contacts or the interests of the plaintiff.[101] In considering the relationship between Rush and Minnesota, the fact that Rush's insurer was doing business in that state was labelled an "affiliating circumstance,"[102] not a contact, because the insurer's decision to do business in Minnesota was "completely adventitious as far as Rush was concerned."[103] Similarly, the presence of the insurer's obligation to defend and indemnify Rush was found lacking

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94. *Id.* at 893.
95. *Id.* at 891.
96. 579 F.2d 194 (2d Cir.), *cert. denied,* 439 U.S. 1034 (1978).
97. The Minnesota Supreme Court considered the practical relationship between the insurer and the defendant, the limitation of liability to the amount of the policy, and the restriction of the garnishment procedure to resident plaintiffs and concluded that the relationship among the "defending parties," the litigation, and the forum state was sufficient to sustain the exercise of jurisdiction. 272 N.W.2d 888, 892–93 (Minn. 1978).
98. 272 N.W.2d 888 (Minn. 1978).
99. 100 S. Ct. 571, 579–80 (1980).
100. *Id.* at 577.
101. *Id.* at 578–79.
102. *Id.* at 577.
103. *Id.* The Court noted that Rush had no control over State Farm's decision to do business in Minnesota and that it was unlikely that he would have expected that, by buying insurance in Indiana, he had subjected himself to suit in any state to which a potential future plaintiff might decide to move. *Id.*

in jurisdictional significance[104] in light of *Shaffer's* declaration that the mere presence of property in the forum does not establish a sufficient relationship between the owner of the property and the state to support an exercise of jurisdiction.[105] Inasmuch as the Minnesota courts had conceded that Rush had no contacts with the state as would permit in personam jurisdiction[106] and because the accident at issue had occurred in Indiana, the Court concluded that Rush had engaged in no "purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable."[107]

The Court also found that there was no significant link between the litigation and the forum. Although the Minnesota Supreme Court had viewed the insurance policy as so important to the litigation that it provided sufficient contacts to satisfy due process,[108] Justice Marshall indicated that such a focus on insurance was misplaced because the insurance agreement was not the subject matter of the litigation nor was it in any way related to the operative facts of the negligence action.[109] Given that the contractual arrangements between the defendant and the insurer pertained to the conduct, not the substance of the litigation, insurance had no jurisdictional significance absent any contacts between the forum and the defendant.[110]

The alternative view of *Seider*-type jurisdiction, which attributes the insurer's forum contacts to the defendant by treating the attachment procedure as, in effect, a direct action against the insurer, was viewed with equal disdain by the Court. In support of its conclusion that "*Seider* actions are not equivalent to direct actions,"[111] the Court noted that the state's ability to exert its authority over the insured defendant is "analytically prerequisite to the insurer's entry into the case as a garnishee."[112] If due process prohibits jurisdiction over the insured defendant on the basis of his

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104. The Court did not consider whether an insurer's obligation to its insured is a garnishable res, noting that such a determination is a matter of state law. Proceeding on the assumption that it is garnishable, the Court focused on the significance of the insurer's obligation to the relationship among the defendant, the forum, and the litigation. *Id.* at 577 n.14.
105. *Id.* at 577.
106. *Id.* at 575.
107. *Id.* at 577–78.
108. *Id.* at 578. In *Savchuk II*, the court explained that "the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation." 272 N.W.2d 888, 892 (Minn. 1978) (emphasis in original). The court believed that the insurance was really the focus of the litigation. *Id.*
109. 100 S. Ct. 571, 578 (1980).
110. *Id.*
111. *Id.*
112. *Id.*

insurance policy, then there is no reason or basis for bringing the garnishee into the action. Thus, the Court reasoned, the question of jurisdiction over the nonresident insured cannot be avoided because the party with the forum contacts (the insurer) can only be reached through the nonresident.[113]

Rush also condemned the attempt in *Savchuk II* to view the "defending parties" as a unit in order to exercise jurisdiction over Rush based solely on the activities of State Farm.[114] Although the parties' relationship with each other may be significant in evaluating their ties with the forum, the Court posited that the minimum contacts requirement must be met as to each individual defendant over whom a state court exercises jurisdiction.[115]

V. ANALYSIS

A. *Immediate Implications of* Rush

The Court's decision in *Rush* eliminates any doubt as to the continued vitality of the *Seider* doctrine, making it clear that neither rationale offered in its support satisfies the requirements of due process enunciated by the Court. Although *Rush* is factually distinguishable from *Seider* and its progeny in that the plaintiff in *Rush* was not a resident of the forum state at the time the cause of action arose,[116] the Court took no note of this distinction in reaching its holding.[117] Focusing only on those facts which *Rush* shares in

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113. *Id.* at 579. The Court cited with approval its decision in *Watson v. Employer's Liability Assurance Corp.*, see text accompanying notes 65–67 *supra*, noting that the direct action statute upheld in *Watson*, which permitted the plaintiff to sue the insurer without naming the insured as a defendant, was applicable only if the accident or injury occurred in the forum state or the insured party was domiciled there. *Id.* at 579 n.19.

114. *Id.* at 579.

115. *Id.*

116. The Second Circuit, in O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978), observed that *Savchuk I* presented a forum shopping problem because the plaintiff was not a resident of Minnesota at the time of the accident. Noting that New York had refused to allow nonresident plaintiffs to use *Seider* jurisdiction, *see* Farrell v. Piedmont Aviation, 411 F.2d 812, 817 (2d Cir. 1967), *O'Connor* suggested that the Supreme Court could reverse *Savchuk* without adversely affecting the *Seider* doctrine. 579 F.2d at 199 n.6.

117. The Court did note that the decisions limiting *Seider* jurisdiction to actions by forum residents are demonstrative of what the Court viewed as the *Seider* doctrine's most objectionable attribute, that is, the shift in focus from the defendant to the plaintiff such that the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated. Such an approach, the Court concluded, is forbidden by *International Shoe* and its progeny. 100 S. Ct. 571, 579 (1980).

common with all of the *Seider* cases,[118] the Court's analysis applies with equal vigor to any case of *Seider* jurisdiction and leaves no basis on which to distinguish *Rush* and thereby circumvent its holding in the future.[119]

In condemning *Seider* jurisdiction, the Court found it unnecessary to express its view of the propriety of treating an insurer's obligations to its insured as a garnishable res.[120] Although the Court deemed the issue a question of state law,[121] its holding, as a practical matter, precludes further use of such a procedure.[122] As noted earlier, *Rush* requires minimum contacts among the insured, the forum, and the litigation before jurisdiction can be asserted over the nonresident insured, notwithstanding the presence of his insurer in the forum. Consequently, it is difficult to envision a situation in which a plaintiff would prefer to invoke quasi in rem jurisdiction on the basis of an insurance policy rather than in personam jurisdiction, because the same contacts are required in either proceeding.[123] Thus, without prohibiting the garnishment of an insurer's obligations, *Rush* practically guarantees that such a procedure will never surface again, at least in a jurisdictional context.

In light of *Shaffer's* mandate that all assertions of state jurisdiction require minimum contacts, the conclusion in *Rush* that the mere presence of the insurer is insufficient contact between the nonresident and the forum was inescapable. The Court's terse dismissal of *Seider* insofar as it embodied the concept of direct action against insurers, on the other hand, is not quite so persuasive. In their dissenting opinions, Justices Stevens and Brennan suggested that the Court's only apparent reason for rejecting *Seider's* alternative basis was the mere fact that the insured defendant was a nominal party to the suit.[124] Citing *Watson v. Employer's Liability Assurance Corp.*, which upheld Louisiana's direct action statute,[125]

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118. *Rush* is typical of other *Seider*-type cases by virtue of the common denominator of a forum state attempting to assert jurisdiction over a nonresident defendant for the purpose of adjudicating a claim that arose outside the forum state, solely on the basis of the nonresident's insurer doing business in the forum.
119. *See* Davilla v. O'Connor, No. 79–4168 (S.D.N.Y., May 16, 1980) (*Rush* precludes further use of *Seider* jurisdiction).
120. Most states rejecting the *Seider* doctrine did so on the basis of a reluctance to treat the insurer's obligations as a res subject to garnishment. *See* note 71 *supra*.
121. 100 S. Ct. 571, 577 n.14 (1980).
122. The Court noted that only three states, New York, New Hampshire, and Minnesota, had used the attachment or garnishment procedure to effect jurisdiction over a nonresident. *Id.* at 576. *Rush* eliminates the utility of this procedure in those states and insures that no other states will permit the garnishment or attachment of insurance obligations in a jurisdictional context.
123. See note 68 *supra*.
124. 100 S. Ct. 571, 580 (1980) (Stevens, J., dissenting); *id.* at 583 (Brennan, J., dissenting).
125. 348 U.S. 66 (1954). See text accompanying notes 65–67 *supra*.

the dissents maintained that the Court in *Rush* could and should have ignored the technicality of the insured being a nominal party inasmuch as the real impact of the suit was on the insurer.[126] If the Court's only reservation about *Seider*-type direct actions is that the insured is named as a party to the action, the question becomes whether the Court would sustain a legislatively enacted direct action statute applied to a case such as *Seider* or *Rush* in which the cause of action arises outside the forum state and the tortfeasor is a nonresident. For reasons to be discussed, the conclusion that must be drawn from *Rush* is that a direct action statute against insurers would be unconstitutional as applied to the typical *Seider*-type factual scenario, even though the nonresident tortfeasor would not be a party to the action.

B. Direct Actions Against Insurers

Although the Supreme Court upheld a direct action against an insurance company in *Watson,* its holding in that case cannot be viewed as authority for sanctioning the procedure envisioned by the application of a direct action statute in a *Seider*-type setting, especially in light of the narrowly drafted Louisiana statute at issue in *Watson.*[127] Unlike a direct action in a *Seider* situation, the Louisiana statute only applied to accidents which occurred in that state.[128] In essence, the direct action against the insurer in *Watson*

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126. Justice Stevens wrote:

> I believe such a direct action statute is valid as applied to a suit brought by a forum resident . . ., even if the accident giving rise to the action did not occur in the forum State . . ., so long as it is understood that the forum may exercise no power whatsoever over the individual defendant. As so understood it makes no difference whether the insurance company is sued in its own name or, as Minnesota law provides, in the guise of a suit against the individual defendant.

100 S. Ct. 571, 580 (1980) (Stevens, J., dissenting) (citations omitted). Justice Brennan wrote:

> The real impact on the named defendant is the same as it is in a direct action against the insurer, which would be constitutionally permissible. . . . The only distinction is the formal, "analytical prerequisite," . . . of making the insured a named party. Surely the mere addition of appellant's name to the complaint does not suffice to create a due process violation.

Id. at 583 (Brennan, J., dissenting) (citations omitted).

127. *See* note 65 *supra.*

128. *Id.* Wisconsin has a similar direct action statute which provides in pertinent part:

> 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

was but a convenient substitute for an action against the nonresident tortfeasor who, in the absence of a direct action statute, could have been sued in personam in Louisiana anyway.[129] Louisiana's statute was therefore not a superficial attempt by the forum to circumvent the due process limitations on jurisdiction over nonresidents. As the Court observed, "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers."[130] Quite to the contrary, the application of a direct action statute in a *Seider* case would provide a state with a means of obtaining jurisdiction over matters which it would not otherwise have authority to adjudicate.[131] Despite the contentions of Justices Stevens and Brennan,[132] *Watson* is hardly clear and convincing authority for sustaining a direct action statute in cases in which the controversy at issue occurred outside the forum state and the tortfeasor is not otherwise subject to jurisdiction. If anything, *Watson's* emphasis on Louisiana's interest in accidents occurring within its borders,[133] implicitly suggests that a direct action in a *Seider*-type case is unconstitutional.[134]

> 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.*

WIS. STAT. ANN. § 803.04(2)(a) (West 1977) (emphasis added).

129. In *Watson*, plaintiffs, Louisiana residents, were injured by a product which had been purchased and used in Louisiana, but which had been manufactured in Illinois. 348 U.S. 66, 67 (1954). Although the Court did not explicitly consider minimum contacts, it is clear that the Illinois corporation was subject to in personam jurisdiction in Louisiana under the *International Shoe* standard. By selling its products in Louisiana, the Illinois corporation had purposefully availed itself of the benefits and privileges of Louisiana's laws, thereby establishing contacts between itself and Louisiana. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). See text accompanying notes 35 & 36 *supra*. Contacts between the forum and the litigation lie in the fact that the accident and injury had occurred in the forum. *See* Rush v. Savchuk, 100 S. Ct. 571, 578 (1980). As there was a relationship among the defendant, the forum, and the litigation, the nonresident tortfeasor in *Watson* would have been subject to the adjudicatory authority of Louisiana's courts. LA. CODE CIV. PROC. ANN. § 13:3201 (West 1965 & Supp. 1980).
130. 348 U.S. 66, 72 (1954).
131. In the absence of a *Seider*-type direct action statute, the forum would have no jurisdiction over the nonresident tortfeasor because of the lack of contacts between the nonresident tortfeasor and the forum and between the forum and the litigation. *See* Rush v. Savchuk, 100 S. Ct. 571, 577–78 (1980).
132. *See* note 126 *supra*.
133. 348 U.S. 66, 72 (1954).
134. As indicated by its note pointing out the distinguishing features of *Watson*, the Court in *Rush* seemed to feel that *Watson* was not dispositive of a *Seider*-type direct action. 100 S. Ct. 571, 579 n.19 (1980).

1. Minimum Contacts

For a direct action statute to withstand constitutional scrutiny in the context of a *Seider*-type factual setting, the criteria established in *International Shoe* and its progeny must be satisfied.[135] That is to say, there must be minimum contacts among the defendant (insurer), the forum, and the litigation (the resident plaintiff's cause of action against the nonresident tortfeasor), such that maintenance of the direct action does not offend "notions of fair play and substantial justice."[136] Establishing a nexus between the insurer and the forum poses little difficulty. Under the standard articulated in *Hanson v. Denckla,*[137] the insurer's contacts with the forum lie in the fact that the insurer, by maintaining an office and conducting business in the forum, has purposefully availed itself of the benefits and protections of the forum's laws.[138] It is therefore reasonable to require the insurer to respond to a suit brought in the forum when the suit relates to activities of the insurer within that state.[139] The problem with a direct action in a *Seider*-type case is that there is no relationship between the controversy and the forum. The accident or cause of action which forms the basis of the plaintiff's claim against the insurer takes place outside the forum state and the tortfeasor is a nonresident over whom the forum has no personal jurisdiction. Despite the insurer's contact with the forum, *Rush* made it clear that the subject matter of the litigation is the out-of-state accident, not the activities of the resident insurer.[140] Just as the mere presence of a defendant's property is an insufficient basis of jurisdiction in the wake of *Shaffer,* the mere presence of the insurer, without more, should be deemed inadequate to uphold jurisdiction in a direct action, in view of the Court's emphasis in *Shaffer* and *Rush* on contacts among the forum, the defendant, and the litigation.[141] Although the forum's interest in regulating insurers and providing a means of redress for its injured residents parallels the state interests given recognition in *Watson*[142] and *McGee v.*

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135. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977).
136. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
137. 357 U.S. 235, 253 (1958).
138. *See* text accompanying note 36 *supra.*
139. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
140. 100 S. Ct. 571, 578 (1980).
141. *See* Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 865 (1978) (*Shaffer* prohibits jurisdiction based upon mere physical presence of the defendant). *Accord,* Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction,* 45 BROOKLYN L. REV. 565, 587–97 (1978).
142. 348 U.S. 66, 72 (1954) (Louisiana has a valid interest in providing remedies for its residents who are injured in that state).

International Life Insurance Co.,[143] the Court noted in *Rush* that such interests will not take the place of contacts and are only relevant to the final determination of fairness once the requisite minimum contacts have been found to exist.[144] Given the Court's obvious distaste for the *Seider* doctrine as expressed in *Rush*, it appears likely that a direct action statute applied in a *Seider*-type case will be held unconstitutional on the basis of the lack of any relationship between the forum and the litigation.

2. Fairness

While minimum contacts have been the primary focus of the Court's decisions since *International Shoe*, the emphasis on "fair play" and "substantial justice" indicates that the ultimate due process consideration is whether a particular exercise of jurisdiction is fair and reasonable in light of the facts of the particular case.[145] In *World-Wide Volkswagen Corp. v. Woodson*,[146] an in personam case decided on the same day as *Rush*, the Court discussed the concept of fairness and explained that the terms "fairness" and "reasonableness" are merely convenient ways of referring to the guarantee embodied in the due process clause against inconvenient litigation.[147] Hence, the primary concern in assessing fairness is the burden placed on the defendant in having to litigate in the chosen forum.[148] Other relevant factors are weighed against that consideration, such as the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the shared interest of the interstate judicial system in obtaining litigational efficiency.[149]

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143. 355 U.S. 220, 223 (1957) (California has a manifest interest in regulating insurers and providing effective means of redress for its residents when their insurers refuse to pay claims).
144. 100 S. Ct. 571, 579 (1980).
145. *See* Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 861–62 (1978).
146. 100 S. Ct. 559 (1980). In *World-Wide*, plaintiffs instituted a products-liability action in Oklahoma for personal injuries sustained in Oklahoma in an accident involving an automobile that had been purchased by them in New York while they were New York residents. The defendants included the automobile retailer and its wholesaler, New York corporations that did no business in Oklahoma. The defendants claimed that Oklahoma's exercise of jurisdiction over them would offend due process. The United States Supreme Court held that Oklahoma was without jurisdiction because there was no contact between the forum and the automobile retailer and wholesaler inasmuch as it could not be shown that those defendants conducted any purposeful activity in Oklahoma.
147. *Id.* at 564.
148. *Id.*
149. *Id.*

In *McGee,* the Court considered some of these factors in reaching its conclusion that California's exercise of jurisdiction over a Texas insurance company comported with notions of fairness because California provided the most effective and convenient forum.[150] The Court attached significance to the interest of the forum in providing effective means of redress for its residents and the interest of the plaintiff in obtaining convenient relief,[151] but found dispositive the fact that all of the crucial witnesses in the case, including the plaintiff, were located in California.[152] Although the Court conceded that defending the action in California might be an inconvenience, it indicated that any burdens incumbent upon the Texas defendant paled in comparison to the overall efficiency and convenience of trying the case in that forum.[153]

Application of the *McGee* analysis to a direct action in a *Seider*-type case leads to the inescapable conclusion that jurisdiction in the plaintiff's forum is unfair. First, the burden on the insurer in a direct action is a heavy one because all of the witnesses that may be crucial to its case, including the insured tortfeasor, will be located outside the forum state where the availability of adequate process to secure them is questionable. Second, the interests of the plaintiff and the forum in a *Seider*-type case do little to offset the burden upon the defendant. In *McGee,* the forum's interest was substantial because the activity of the Texas insurer, which formed the basis of the plaintiff's claim, took place in California. The insurer's forum activity in a *Seider*-type case, contrary to the situation in *McGee,* is unrelated to the subject matter of the controversy. The plaintiff's interest in suing at home was also of considerably more significance in *McGee* because the insurer solicited an insurance policy in California and accepted premiums mailed from that state. In a *Seider*-type case, the plaintiff's interest in bringing the action in his own forum is substantially diminished by the fact that the controversy arose outside the forum and did not involve the defendant-insurer. Finally, the considerations of convenience and efficiency emphasized by the Court in *McGee* militate against a direct action in the plaintiff's forum in a *Seider*-type case. As noted above, most if not all of the crucial witnesses as well as the tortfeasor will be located outside the forum. Therefore, unlike *McGee,* considerations of litigational efficiency and convenience do not weigh in favor of a direct action, but instead are synonymous with the interest of the defendant in avoiding inconvenient litigation. A direct action in a *Seider*-type case, while convenient to the plaintiff, does not serve the

150. 355 U.S. 220, 223–24 (1957).
151. *Id.* at 223.
152. *Id.* at 223–24.
153. *Id.* at 224.

ends of justice and fair play which are the purposes of the due process clause.

VI. CONCLUSION

Over a decade after its emergence, the controversial *Seider* doctrine, which permitted a state to exercise jurisdiction over a nonresident defendant solely on the basis of his insurer doing business in that state, has been declared unconstitutional as applied to defendants who have no contact with the forum. The Supreme Court's condemnation of the *Seider* doctrine in *Rush* is consistent with its prior decisions, particularly *Shaffer*, which prohibited jurisdiction based on the mere presence of a defendant's property in the forum. Moreover, *Rush* underscores the unwillingness expressed by the Court in *Shaffer* to become absorbed in fictional concepts when analyzing a defendant's relationship to a particular forum. Because the Court did not consider the viability of a legislatively mandated direct action in the context of a *Seider*-type case, it is questionable whether such a procedure will survive *Rush*. Unless the Court wishes to exalt form over substance, however, it is clear that such a direct action should be found unconstitutional on the basis of the lack of any relationship between the forum and the controversy and because of the overall unfairness engendered by such a procedure.

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