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Shaffer v. Heitner's Effect on Pre-Judgment Attachment, Jurisdiction Based on Property, and New York's Seider Doctrine: Have We Finally Given Up the Ghost of the Res?

Mark F. Flescher

Dennis P. Harkawik

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INTRODUCTION

Almost two decades ago, then Associate Justice Roger Traynor of the California Supreme Court, called for the application of a uniform standard to all forms of state court jurisdiction. Traynor observed that, while modern standards for personal jurisdiction had expanded the power of courts over nonresidents, no comparable change had occurred in standards for the exercise of jurisdiction over property. Traynor argued that these dual standards, and the archaic statutory provisions governing the exercise of jurisdiction, often forced courts away from modern notions of jurisdiction based on fairness and substantial justice.[1]

> It is time we had done with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res becomes stranger and stranger. Insofar as courts remain given to asking "Res, res—who's got the res?," they cripple their evaluation of the real factors that should determine jurisdiction. They cannot evaluate the real factors squarely until they give up the ghost of the res.[2]

In 1977 the Supreme Court, in *Shaffer v. Heitner*,[3] finally forced courts to consider "the real factors" behind any decision to exercise jurisdiction. Justice Marshall's majority opinion declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe v. Washington* and its progeny."[4] A defendant in an in rem[5] action must now have "certain mini-

1. Traynor, *Is this Conflict Really Necessary?*, 37 TEX. L. REV. 657, 657-64 (1959).
2. *Id.* at 663.
3. 433 U.S. 186 (1977).
4. *Id.* at 212.
5. Assertions of jurisdiction based on property are of three types: (1) in rem actions involving the ownership of the property on which jurisdictin is based, which affect the interests of all people in that property; (2) quasi in rem actions involving the ownership of the property on which jurisdiction is based, which affect the interests of the parties only; and (3) quasi in rem actions in which the property is conceded to belong to the defendant, but the plaintiff attempts to apply the property to a satisfaction of a claim against the defendant. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS,

mum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[6]

Although *Shaffer* has extended the minimum contacts standard to all assertions of jurisdiction, the majority opinion does not explicitly discuss the impact *Shaffer* will have on the procedures used to obtain some types of in rem jurisdiction, or the importance of the limited appearance in assessing the validity of some exercises of jurisdiction. Nor does the majority provide a clear indication of the validity of assertions of jurisdiction based on the attachment of certain types of intangibles, such as insurance policies, which may be related to the controversy. This Comment will first, attempt to explain the likely effect of *Shaffer* on these outgrowths of traditional in rem jurisdiction; and second, consider *Shaffer*'s effect on New York's *Seider* doctrine.[7] The starting point for any discussion of the effects of *Shaffer* must be *Shaffer* itself.

I. SHAFFER V. HEITNER

Arnold Heitner, the owner of one share of Greyhound Corporation stock, filed a shareholder's derivative suit charging that twenty-eight present and former officers or directors of Greyhound, or a wholly owned subsidiary, had breached their duty to the corporation. This alleged breach of duty resulted in a treble-damages antitrust judgment and a criminal contempt conviction against the corporation, both causing substantial economic loss. Although the activities which caused these penalties occurred in Oregon, and although Greyhound had its principal place of business in Arizona, Heitner filed his suit in Delaware, Greyhound's state of incorporation. He attempted to acquire jurisdiction by sequestering stock or options owned by twenty-one of the defendants. According to the record, none of the stock certificates were actually in Delaware. A state law,[8] however, placed the situs of ownership for sequestration in Delaware.

Heitner gave notice to all twenty-eight defendants by certified mail and by publication in Delaware. Only the twenty-one defendants

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Introductory Note at 191 (1971). This Comment will refer to all three categories collectively when it uses the term "in rem jurisdiction." Unless otherwise indicated, "quasi in rem jurisdiction" will refer only to the third type of jurisdiction.

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

7. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

8. *See* DEL. CODE tit. 8, § 169 (Rev. 1974).

whose property had been seized responded. They made a special appearance to challenge the jurisdiction of the Court of Chancery.

The court, in a letter opinion, refused to grant defendants' motion to quash the attachment and dismiss the suit. The vice chancellor held that Delaware could assert jurisdiction over the defendants simply because the situs of the stock was Delaware. The court also found the Delaware sequestration procedure to be constitutional.[9] After the motion to quash and dismiss was denied, the defendants appealed to the Supreme Court of Delaware. That court, after analyzing in detail the defendants' procedural due process argument, and rejecting cursorily the contention that "minimum contacts" were necessary to assert in rem jurisdiction, affirmed the vice chancellor's decision.[10]

The Supreme Court granted a writ of certiori and reversed. Justice Marshall, writing for the Court, stated that the appellants "contend[ed] that the sequestration statute as applied in this case violated the Due Process Clause of the Fourteenth Amendment . . . because it permit[ted] the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation and the State of Delaware . . . ."[11] In order to evaluate this contention, Justice Marshall was forced to decide which standards should be used to determine whether sufficient contacts existed in *Shaffer*.

He set the stage for his determination by giving a short history of jurisdiction in the United States.[12] The Court observed that *Pen-*

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9. Heitner v. Greyhound Corp., Letter Opinion of the Court of Chancery, Civil Action No. 4514 (Del. Ch. May 12, 1975), *reprinted in* Shaffer v. Heitner, 433 U.S. 186, Record at A24.

10. Greyhound Corp. v. Heitner, ___ Del. ___, 361 A.2d 225 (1976).

11. 433 U.S. at 189. Appellants' brief did not argue that Delaware needed to show contacts between the appellants and the forum in order to exercise quasi in rem jurisdiction. The brief argued that minimum contacts were required because Delaware was really attempting to acquire personal jurisdiction. Delaware Law does not allow for a limited appearance. *See* Sands v. Lefcourt Realty, 35 Del. Ch. 340, 117 A.2d 365 (1955). Appellants contended that this decision presented them with the choice of defending on the merits and subjecting themselves to personal liability in excess of the value of the seized property, or defaulting and losing the seized property. They claimed that this choice, in effect, coerced them into consenting to personal jurisdiction in a forum which could not constitutionally compel them to defend personally. Appellants' Brief on the Merits at 20-23. The appellants also contended that since the stock certificates were not in Delaware, the state could not validly exercise quasi in rem jurisdiction. Appellants' Reply Brief at 12.

Justice Marshall chose not to analyze these two narrow theories, and instead focused on whether minimum contacts were present for the assertion of any type of jurisdiction. 433 U.S. at 206. This broadening of the question indicates that the Court did not intend its decision to be construed narrowly.

12. 433 U.S. at 196-206. *See also* Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory*, 26 U. KAN. L. REV. 61, 68-69 (1977).

noyer v. Neff[13] had established a territorial theory of jurisdiction. Under that theory, a state had power over persons and property within its borders and could not adjudicate controversies involving persons and property beyond its boundaries. The state could, however, adjudicate controversies involving nonresident defendants who owned property within the state by attaching the property. Marshall then noted that the standards governing personal jurisdiction had outgrown the strict territorial theory of *Pennoyer,* and were now governed by the minimum contacts and fairness theory introduced by *International Shoe Co. v. Washington.*[14] The standards for the assertion of jurisdiction based on property, however, were still determined by the territorial theory. The Court recognized that most commentators[15] and several lower court opinions[16] had questioned the continued validity of a separate standard for in rem jurisdiction, especially in light of the expanded reach of personal jurisdiction under *International Shoe.* Marshall noted the extension of constitutional notice requirements to in rem jurisdiction, and observed:

> It is clear, therefore, that the law of state court jurisdiction no longer stands securely on the foundation established in *Pennoyer.* We think the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam.*[17]

Justice Marshall's main argument was that in rem jurisdiction does not really concern just property. When courts exercise in rem

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13. 95 U.S. 714 (1877).

14. 326 U.S. 310 (1945).

15. 433 U.S. at 205. Marshall cited Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens,* 65 YALE L.J. 289 (1956); Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241; Traynor, *supra* note 1; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909 (1960). Other good discussions questioning the validity of quasi in rem jurisdiction include Carrington, *The Modern Utility of Quasi In Rem Jurisdiction,* 76 HARV. L. REV. 303 (1962). Zammit, *Quasi In Rem Jurisdiction: Outmoded and Unconstitutional?* 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Long-Arm and In Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300 (1970).

16. 433 U.S. at 205. Marshall cited United States Indus. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J., concurring); Bekins v. Huish, 1 Ariz. App. 258, 401 P.2d 743 (1965); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1955), *appeal dismissed and cert. denied sub nom.* Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958); Camire v. Scieszka 116 N.H. 281, 358 A.2d 397 (1976). *See also* Steele v. G.D. Searle & Co. 483 F.2d 339 (5th Cir. 1973), *cert. denied,* 415 U.S. 958 (1974).

17. 433 U.S. at 206.

jurisdiction they actually exercise jurisdiction over *a person's interest* in the property. According to Marshall, since both in personam and in rem jurisdiction affect the person's interest in "the thing," the appropriate constitutional standard for determining whether either type of jurisdiction can be exercised is the *International Shoe* standard of minimum contacts and "traditional notions of fair play and substantial justice."[18] Marshall felt that most assertions of in rem jurisdiction would be unaffected by the adoption of the minimum contacts standard.[19] He said that in cases where the underlying controversy concerns either the ownership of the property on which jurisdiction is based,[20] or is directly related to the rights and duties flowing from that ownership,[21] no further contacts will usually be necessary to justify jurisdiction. The property itself would suggest that the owner had taken advantage of the forum state's protection and would indicate a cluster of other ties with the forum.[22]

Marshall cautioned, however, that this analysis would not apply to cases like *Shaffer,* which involved a cause of action totally unrelated to the property.[23] In such a case, the presence of property alone, which only *suggests* other ties to the forum, would not, by itself, support jurisdiction. "If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum."[24] Marshall noted that quasi in rem[25] actions that have no connection with the property upon which jurisdiction is based are merely attempts to bring the defendant into a court of the plaintiff's

18. *Id.* at 207.

19. *Id.*

20. *See* note 5 *supra.*

21. These cases would include some quasi in rem actions. (In this Comment, "quasi in rem" is used to describe only those actions in which the dispute does not directly concern title to the property, but where the property may be used to satisfy any judgment. *See* note 5 *supra.*) *See* note 23 *infra* for a discussion of when an action is related to property.

22. 433 U.S. at 207-08.

23. *Id.* at 213. Marshall used a narrow definition of "related." He apparently felt that an action is related to a piece of property only if it is related to "the rights and duties growing out of that ownership." *Id.* at 208. Marshall gave one example: a tort suit for injuries suffered on an absentee landowner's property. *Id.* at 208 n.29. He cited with approval Dublin v. City of Philadelphia, 34 Pa. D. & C. 61 (1938), which involved a tort action in which jurisdiction over the defendant was obtained under a long-arm statute that allowed jurisdiction to be asserted in actions arising from the ownership of real property. This type of statute, *see e.g.,* N.Y. CIV. PRAC. LAW § 302(a)(4) (McKinney Supp. 1977), has been interpreted more broadly, however, as allowing jurisdiction as long as the action is connected with the property. *See* Bowsher v. Digby, 243 Ark. 799, 422 S.W.2d 671 (1968).

24. 433 U.S. at 209.

25. *See* note 5 *supra.*

choosing; worse, plaintiffs often then obtain in personam jurisdiction over the defendant through his appearance. Marshall reasoned that allowing this type of quasi in rem action, without proof of contacts sufficient to justify personal jurisdiction, allows states to do indirectly what they cannot do directly: assert personal jurisdiction over a defendant despite a lack of contact with him and in violation of fundamental fairness.[26]

Marshall considered and rejected three arguments in favor of maintaining the *Pennoyer* standards for in rem jurisdiction. He rejected the argument that quasi in rem jurisdiction without minimum contacts was necessary to prevent defendants from avoiding adverse judgments by moving assets to jurisdictions where they did not have enough contacts to be sued. Marshall questioned the practical significance of this argument by noting that, to obtain quasi in rem jurisdiction, a plaintiff need not show that the defendant was trying to hide his assets. Marshall discussed less drastic means of ensuring that the plaintiff can satisfy his judgment, such as allowing him to attach the defendant's assets wherever they might be found, once an action is commenced in an appropriate jurisdiction.[27] Another protection for the plaintiff, Marshall said, is the full faith and credit given valid in personam judgments rendered by sister states.[28] Marshall indicated that this gives the plaintiff sufficient ammunition against defendants who shift their assets in attempts to avoid paying their obligations.[29]

Marshall also rejected the argument that the minimum contacts test, when applied to quasi in rem jurisdiction, would create uncertainty in a heretofore settled area of the law. He felt that *International Shoe* could be applied to most assertions of quasi in rem jurisdiction with predictable results. What little certainty could be gained by applying *Pennoyer* is, according to Marshall, not worth the potential "sacrifice of 'fair play and substantial justice' " that such an application would cost.[30]

Marshall conceded that the long history of quasi in rem jurisdiction in the United States might itself indicate that the mere presence of property satisfies the due process requirements necessary for an assertion of jurisdiction. But since he could find no modern justification

26. *Id.* at 209-10.
27. This procedure was apparently followed in Carolina Light & Power Co. v. Uranex, 46 U.S.L.W. 2194 (N.D. Cal. 1977).
28. U.S. CONST. art. IV, § 1.
29. 433 U.S. at 210.
30. *Id.* at 211.

for jurisdiction based solely on the presence of property, the historical argument was outweighed by the potential unfairness to defendants.[31]

Marshall capped his analysis with what one commentator has called the "magnificent dictum which will almost certainly come to be known as the rule of *Shaffer v. Heitner*."[32] Marshall declared "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[33]

II. Some Problem Areas in Applying Shaffer

A. *The Procedural Due Process Requirements for Foreign Attachments*

In the wake of *Shaffer,* some courts have interpreted existing statutes that codified the *Pennoyer* standards for in rem jurisdiction as requiring that minimum contacts exist before in rem jurisdiction may be asserted.[34] These statutes usually require, however, that the

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31. *Id.* at 211-12.

32. Casad, *supra* note 12, at 72. It is a "dictum" because *Shaffer* directly concerned only an assertion of quasi in rem jurisdiction over intangibles only arguably located in the forum state, a state that did not provide for a limited appearance. It is clear, however, that *Shaffer* will not be limited to the facts before the Court. *See* O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 996 (E.D.N.Y. 1977); Comment, *Traditional Notions of Fair Play and Substantial Justice Extended: Shaffer v. Heitner,* 1977 Utah L. Rev. 361, 371.

33. 433 U.S. at 212. All the Justices who participated in *Shaffer* endorsed the extension of the minimum contacts standard to assertions of in rem jurisdiction. Marshall, however, went beyond merely declaring the change in the law and remanding the case to the lower court for further proceedings. He applied the minimum contacts test to the facts in *Shaffer* and concluded that neither the property within Delaware nor the appellants' other contacts with that state were sufficient to justify jurisdiction. *Id.* at 213-16. Justice Brennan dissented from this section of Marshall's analysis, and said that Delaware could constitutionally exercise jurisdiction. *Id.* at 219-29 (Brennan, J., dissenting).

Casad characterized the *Shaffer* majority opinion and Hanson v. Denckla, 357 U.S. 235 (1958), as stressing physical contacts with the forum state. Casad classified Justice Brennan's dissent, with its stress on choice of law factors, with cases that propose a wider view of minimum contacts and stress the fairness of allowing the forum state to impose its power on the defendant. Casad, *supra* note 12, at 73-77.

34. *See* Intermeat, Inc., v. American Poultry Inc., No. 77-7481 (2d Cir. April 14, 1978) (quasi in rem jurisdiction under N.Y. Civ. Prac. Law §§ 314, 315, 5201, 6202 (McKinney Supp. 1977), valid if sufficient contacts exist). This approach of construing a statute which authorizes attachment of property to obtain jurisdiction as containing a minimum contacts test was suggested in, *e.g.,* Note, *Shaffer v. Heitner: Reshaping the Contour of State Jurisdiction,* 11 Loy. L.A.L. Rev. 87, 105 (1977).

One commentator suggested, however, that *Shaffer* might require state legislatures to enact new attachment statutes. "*Shaffer* may stand for the proposition that under any state jurisdictional statute, the minimum contacts criteria upon which a statute is based must be elaborated within its text in order to withstand constitutional scrutiny." Olsen, *Shaffer v. Heitner: A Survey of its Effects on Washington Jurisdiction,* 13 Gonzaga L. Rev. 72, 87 (1977).

defendant's property in the forum state be attached before jurisdiction can be asserted.[35] Since the defendant is, at least temporarily, deprived of his property, in some circumstances the attachment may be an unconstitutional violation of the defendant's procedural due process rights.[36] In *Shaffer,* both the courts below[37] and the parties' briefs[38] stressed the procedural due process issue. The Supreme Court did not explicitly consider this issue,[39] concentrating instead on whether Delaware had the power to adjudicate the controversy. Nonetheless, both the Court's discussion of the lower court decisions and its extension of the minimum contacts test to quasi in rem jurisdiction will affect the procedural due process requirements for foreign attachments.[40]

During the last nine years the Court expanded and then contracted the procedural requirements for all forms of attachments.[41]

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35. *See, e.g.,* Fish v. Bamby Bakers, Inc., 76 F.R.D. 511 (N.D.N.Y. 1977).

36. *See, e.g.,* Schreiber v. Republic Intermodal Corp., ____ Pa. ____, 375 A.2d 1285 (1977).

37. Greyhound Corp. v. Heitner, ____ Del. ____, 361 A.2d 225, 230-36 (1976).

38. Appellants' Brief on the Merits, at 7-20, Shaffer v. Heitner, 433 U.S. 186 (1977); Appellees' Answering Brief at 2-11.

39. 433 U.S. at 189.

40. The application of minimum contacts to foreign attachments, *see* note 48 *infra,* may also pose some equal protection problems. Since foreign attachments are no longer helpful in asserting jurisdiction, the foreign attachment is now justified solely by security considerations. *See* note 48 *infra* and accompanying text. In those states in which it is easier to attach a nonresident's property than that of a resident, *e.g.,* N.Y. CIV. PRAC. LAW § 6201 (McKinney Supp. 1977), nonresident defendants may argue that these security considerations do not provide a rational basis for this distinction.

Those defendants who in the past argued that the state needed to show a compelling reason to distinguish between residents and nonresidents in attachment statutes, *see, e.g.,* Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974); Property Research Fin. Corp. v. Superior Court, 23 Cal. App. 3d 413, 422-23, 100 Cal. Rptr. 233, 239-40 (1972); North Gen. Corp. v. Dutch Inns of America, 15 Cal. App. 3d 490, 495-97, 93 Cal. Rptr. 343, 346-48 (1971), were thwarted because the court found either that the state need show only a rational basis for such a distinction, or, where defendants relied on the right-to-travel cases such as Shapiro v. Thompson, 394 U.S. 618 (1969), that the attachment did not substantially affect the right to travel. *See, e.g.,* Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. at 482 n.2. Since out-of-state residency appears not to be a suspect classification, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-8 (1978), the former finding, at least, seems accurate.

41. *See* Carey v. Sugar, 425 U.S. 73 (1976); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Aston Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See also* Brabham, *Sniadach Through Di-Chem and Backwards; An Analysis of Virginia's Attachment and Detinue Statutes,* 12 U. RICH. L. REV. 157 (1977). While the Supreme Court did not explicitly deal with the procedural requirements for foreign attachments—attachments designed to obtain quasi in rem jurisdiction—several lower courts have grappled with the issue. *See, e.g.,* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976); Lebowitz v. Forbes Leasing and Fin. Corp., 456 F.2d 979 (3d Cir.),

The expansion occurred in *Sniadach v. Family Finance Corp.*[42] and *Fuentes v. Shevin,*[43] in which the Court indicated that an adversary hearing was usually necessary before the plaintiff could deprive the defendant of the use of his property through an attachment or other judicial seizure. According to *Fuentes,* notice and a pre-seizure hearing could be dispensed with only in an "extraordinary situation."[44] The Court distinguished earlier cases upholding pre-hearing attachments:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[45]

In a footnote, the Court declared that attachments necessary to secure jurisdiction involved "a most basic and important public interest."[46] The Court cited *Ownbey v. Morgan,*[47] which involved a foreign attachment,[48] as an example of a case in which a pre-seizure hearing was unnecessary.

Lower court decisions interpreted this reference as approval of the procedures in *Ownbey,* which provided for no more than some sort of notice and an opportunity to be heard before final judgment

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cert. denied, 409 U.S. 843 (1972), (overruling Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976)); Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847 (D. Neb. 1977); Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975); *In re* Law Research Servs., Inc., 386 F. Supp. 749 (S.D.N.Y. 1974); Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972). One judge felt that the procedural due process requirements for foreign attachments had become so complicated that he could not rely solely on procedural due process to void a foreign attachment; he preferred instead to invalidate the attachment for lack of sufficient contacts between the defendant and the forum, despite the quasi in rem nature of the jurisdiction asserted. Jonnet v. Dollar Sav. Bank, 530 F.2d at 1130, (Gibbons, J., concurring).

42. 395 U.S. 337 (1969).

43. 407 U.S. 67 (1972).

44. *Id.* at 90.

45. *Id.*

46. *Id.* at 90 n.23. *Accord,* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (1975) (Powell, J. concurring); Aston Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 n.14 (1974); Mitchell v. W. T. Grant Co., 416 U.S. 600, 613 (1974); Sniadach v. Family Fin. Corp., 395 U.S. at 389.

47. 256 U.S. 94 (1921).

48. A foreign attachment is an attachment of a nonresident's property intended to provide the forum state with quasi in rem jurisdiction over the controversy.

was levied against the attached property.[49] Commentators attacked these decisions, asserting that they were based on an overreliance on *Ownbey*.[50] One commentator argued that the decisions also misinterpreted *Ownbey*, since *Ownbey* did not address the issue of what the full procedural requirements were for foreign attachments; it decided only that a state could constitutionally require a defendant to post a bond before he could contest the merits of a quasi in rem action.[51] Thus, any discussion of the procedural requirements for attachments was dicta. Other commentators stressed that *Fuentes'* reference to *Ownbey* suggested only that foreign attachments, by themselves, meet but one of the *Fuentes* criteria for an "extraordinary situation"—state interest. According to these commentators, the other two requirements[52] must still be met; the simple procedure suggested by *Ownbey* is not enough.[53] Prior to *Shaffer*, some courts accepted these arguments and invalidated various foreign attachment statutes for want of adequate procedural safeguards.[54]

While Justice Marshall's opinion in *Shaffer* did not emphasize the procedural due process issue, it did summarize the decision below,[55] which relied heavily on *Ownbey* in upholding the Delaware sequestration statute.[56] In a footnote to this summary, Marshall agreed that *Ownbey* did not involve a comprehensive analysis of the constitutional constraints on foreign attachments, and continued: "We do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause."[57] At a minimum, this footnote casts doubt on any fu-

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49. *See, e.g.*, Holtzman v. Holtzman, 401 F. Supp. 520 (S.D.N.Y. 1975); Merrill Lynch Gov. Sec., Inc. v. Fidelity Mut. Sav. Bank, 396 F. Supp. 318 (S.D.N.Y. 1975); Usdan v. Dunn Paper Co., 392 F. Supp. 953 (E.D.N.Y. 1975); Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975); Long v. Levinson, 374 F. Supp. 615 (S.D. Iowa 1974); Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972).

50. Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 763-65 (1973); Comment, *Foreign Attachment After Sniadach and Fuentes*, 73 COLUM. L. REV. 342, 344-46 (1973); Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1029-32 (1973).

51. Note, *supra* note 50, at 1030-32.

52. *See* text accompanying note 45 *supra*.

53. *See* Folk & Moyer, *supra* note 50, at 764-65; Comment, *supra* note 50, at 350-55.

54. Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976); Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847 (D. Neb. 1977); *In re* Law Research Servs., Inc., 386 F. Supp. 749 (S.D.N.Y. 1974).

55. 433 U.S. at 194.

56. Greyhound Corp. v. Heitner, ___ Del. ___, 361 A.2d 225, 230-35 (1976). Although the court's primary emphasis was on *Ownbey*, it also discussed the affirmative procedural safeguards the Delaware statute accorded the defendant.

57. 433 U.S. at 194 n.10.

ture reliance on *Ownbey* for the proposition that the Constitution imposes no procedural safeguards for the defendant in the foreign attachment situation.

Shaffer's dictum that minimum contacts are required for assertions of in rem jurisdiction may also deprive foreign attachments of their status as one of the "extraordinary situation" exceptions of *Fuentes.* Prior to *Shaffer,* it had been argued that states with long-arm statutes had no governmental interest in foreign attachments.[58] Most pre-*Shaffer* court decisions rejected this contention, however, either because of *Fuentes'* reference to *Ownbey,*[59] or because the use of the long-arm statute required an uncertain and potentially complex minimum contacts analysis which could be avoided by the assertion of quasi in rem jurisdiction.[60] *Shaffer,* however, has weakened both of these considerations. Justice Marshall's restrictive interpretation of *Ownbey* casts doubt on the first. And the extension of *International Shoe* to quasi in rem jurisdiction eliminates the second: since *Shaffer* has mandated that the same kind of minimum contacts analysis be made in quasi in rem as in in personam jurisdiction, the jurisdictional analysis required of foreign attachments is now as uncertain and as complex as that required of the long-arm statutes. Accordingly, one court has already questioned the "extraordinary situation" status of the foreign attachment, reasoning that since minimum contacts are now required, "a state with a long-arm statute may have no governmental interest in obtaining jurisdiction over nonresidents through attachment."[61]

The importance of the "extraordinary situation" exception to foreign attachments has been limited, however, by changes in the standards for all pre-judgment remedies since *Fuentes.* In *Mitchell v. W. T. Grant Co.,*[62] the Court held that an *ex parte* sequestration without a pre-seizure hearing could be constitutional if sufficient post-seizure safeguards for the defendant exist. While some commentators have suggested that *Mitchell* should be limited to cases where the

58. *See* Folk & Moyer, *supra* note 50, at 763-65; Note, *supra* note 50, at 1034-36. *Contra,* Seidelson, *Sniadach, Fuentes, Sub Chapter II and Foreign Attachments,* 13 DUQ. L. REV. 1, 29 n.77 (1974).

59. National Gen. Corp. v. Dutch Inns of America, Inc., 15 Cal. App. 3d 490, 496 n.4, 93 Cal. Rptr. 343, 347 n.4 (1971).

60. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 982 (3d Cir.), *cert. denied,* 409 U.S. 843 (1972).

61. Schreiber v. Republic Intermodal Corp., ____ Pa. ____, 375 A.2d 1285, 1290 n.7 (1977).

62. 416 U.S. 600 (1974).

plaintiff has some sort of pre-existing interest in the attached property,[63] the Court's explicit application of the *Mitchell* criteria in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[64] where no pre-existing security interest existed, ignored this distinction. Thus, even if foreign attachments are not "extraordinary situations," *Di-Chem* indicates that they may be permitted without a pre-seizure hearing if sufficient post-seizure safeguards exist.[65]

These *Mitchell/Di-Chem* procedural requirements may prove unworkable, however, because of *Shaffer*'s application of *International Shoe* to quasi in rem jurisdiction. One of these requirements is that the defendant be allowed an immediate post-seizure hearing wherein the plaintiff must prove the grounds upon which the attachment was allowed with the minimum contacts test.[66] Since foreign attachments

63. *See, e.g.*, Zammit, *supra* note 15, at 679.

64. 419 U.S. 601 (1975). *See* Brabham, *supra* note 41, at 177.

The necessary post-seizure safeguards have been interpreted to be:

(1) The writ of attachment must issue only upon an affidavit containing facts. The affidavit must be by the creditor or his attorney who has personal knowledge of the facts.
(2) The writ must be issuable by a judge or at least involve judicial participation.
(3) The creditor must be required to indemnify the debtor from the risk and damages of a wrongful taking.
(4) The debtor must be able to dissolve the attachment by filing a bond.
(5) The debtor must be afforded an immediate post-seizure hearing wherein the creditor shall have to prove the grounds upon which the writ was issued.

Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847, 852 (D. Neb. 1977). *See also* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1129-30 (3d Cir. 1976). It is not certain that all of these safeguards must be present in order for an attachment without a pre-seizure hearing to be valid. Some commentators have suggested that *Mitchell* mandates that a more flexible balancing test be used. *See, e.g.*, Note, *Provisional Remedies and Due Process in Default— Mitchell v. W. T. Grant Co.*, 1974 WASH. U.L.Q. 653. Indeed, one commentator criticized *Jonnet* for not using a more flexible test such as the one in Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975). Note, *Foreign Attachment Power Constrained—An End to Quasi In Rem Jurisdiction?*, 31 U. MIAMI L. REV. 419, 431-32, 435 (1977). Indeed, even if the *Mitchell* criteria are necessary, there is some doubt as to whether a judge or merely a competent official with discretionary powers must be involved in the issuance of the writ of attachment. *Compare* Jonnet v. Dollar Sav. Bank, 530 F.2d at 1130 n.15 *with* Guzman v. Western State Bank, 516 F.2d at 131 n.7. Not much more is certain than that "official seizures can be constitutionally accomplished only with either 'notice . . . [and an] opportunity for a hearing or other safeguard against mistaken taking.' " Jonnet v. Dollar Sav. Bank, 530 F.2d at 1129 (quoting North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975)).

65. One commentator has suggested that the "extraordinary situation" exception should now be ignored because it is unnecessary after *Mitchell* and *Di-Chem*. Brabham, *supra* note 41, at 188. Both Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976). and Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847 (D. Neb. 1977), applied the *Mitchell* criteria to foreign attachments, and *Jonnet* hinted that these criteria would be applied whether or not foreign attachments are "extraordinary situations." 530 F.2d at 1129 n.13.

66. This requirement was stressed by the Court in Carey v. Sugar, 425 U.S. 73 (1976) (per curiam), although as a matter of federalism, tht court ordered the lower

must now pass muster under the minimum contacts test, the existence of such contacts between the defendant, the forum, and the litigation is a jurisdictional ground upon which the attachment is based. It would therefore seem necessary[67] that the plaintiff demonstrate such contacts at the post-seizure hearing which, under *Mitchell* and *Di-Chem,* must follow right on the heels of the attachment.[68] In many cases it is difficult, if not impossible, to conduct quickly the kind of discovery necessary to prove minimum contacts.[69] Thus all but the most clearly constitutional assertions of quasi in rem jurisdiction might be defeated by this time constraint.

The law concerning attachments, a volatile one in the past several years, has thus been buffeted again by *Shaffer.* Just when *Mitchell* and *Di-Chem* had at least begun to narrow the unsettled areas of the law, a fundamental assumption—that presence of the res within the forum was sufficient to establish at least a limited jurisdiction over the owner —has been upset. The statutes and procedures, created on the basis that assumption, are now of dubious constitutional validity and diminished practical value.

B. *Jurisdiction Over Permanently Located Tangible Property*

1. *A per se rule conferring jurisdiction?* The property seized in *Shaffer,* shares in a Delaware corporation, was intangible and was located in Delaware solely by operation of state law.[70] By its nature this property had few other contacts with Delaware. Thus the Court did not consider whether some forms of property could ever, solely because of the contacts they suggest, provide the power to adjudicate an unrelated claim. But Marshall's general analysis of jurisdiction indicates that the mere presence of property, unrelated to the claim, cannot support an assertion of jurisdiction.[71] Two of the concurring Justices took different views on this question. Justice Powell explicitly reserved judgment, but argued that the preservation of jurisdiction

court to abstain on the issue of whether the New York statute was constitutional until it had been construed by the state courts.

67. If the plaintiff is not required to prove minimum contacts at the post-seizure hearing, the defendant loses much of the procedural protection of this safeguard. The plaintiff has taken his property without proving an essential component of the constitutionality of the attachment.

68. One recently enacted statute requires that this hearing be held within five days of the seizure. N.Y. Civ. Prac. Law § 6211 (McKinney Supp. 1977).

69. Justice Brennan, in his opinion in *Shaffer,* stressed the need for proper discovery when one makes a minimum contacts analysis. 433 U.S. at 221 (Brennan, J., concurring and dissenting).

70. Del. Code tit. 8, § 169 (rev. 1974).

71. 433 U.S. at 213-16.

based upon ownership of real property within the forum state would provide certainty and result in little unfairness.[72] He thus would create a per se exception to the minimum contacts standard. Justice Stevens, who concurred only in the judgment, would also permit jurisdiction based solely on the presence of permanently located, tangible property, since the risk of being brought into court is foreseeable to a nonresident owner of such property. Justice Stevens would also apply this foreseeability test to assertions of in rem jurisdiction involving intangible property.[73] He suggests, however, that a nonresident property owner would not foresee being held liable in an amount exceeding the value of his property.[74]

The positions taken by Justices Powell and Stevens have been criticized as "narrow interpretations of *Shaffer*" that are inconsistent "with the Court's reasoning or with jurisdiction theory as shaped by *International Shoe*."[75] Their positions, however, have three possible justifications: first, the certainty created by a per se rule concerning ownership of permanently located, tangible property may outweigh any possible unfairness; second, in cases involving real or other tangible property, sufficient contacts may always be present to justify the assertion of jurisdiction; and third, a limited appearance, with its reduced potential liability, may justify sustaining in rem jurisdiction with fewer contacts than are required for in personam jurisdiction.

The argument that a per se rule would avoid the uncertainty of the minimum contacts test now seems doctrinally untenable. The majority specifically subrogated the certainty of the old in rem rules to the reasonableness standard of *International Shoe*,[76] despite Powell's limitation of his proposed per se rule to certain forms of property which would make an unreasonable assertion of jurisdiction unlikely.[77]

The second justification for a per se rule, the contacts suggested by the presence of immovable property in a state, has been advocated most strongly in the case of real property. The concurrences of Jus-

72. *Id.* at 217 (Powell, J., concurring).

73. *Id.* at 217-19 (Stevens, J., concurring). Stevens' analysis was followed in a recently decided case involving the attachment of a bank account. *See* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977).

74. 433 U.S. at 218-19 (Stevens, J., concurring).

75. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 158-59 (1977).

76. 433 U.S. at 211. *See The Supreme Court, 1976 Term, supra* note 75, at 159-60. *See also* Carrington, *supra* note 12, at 309.

77. This point is buttressed by the escheat cases in which the Court did apply a per se jurisdictional situs rule. *See, e.g.*, Texas v. New Jersey, 379 U.S. 674 (1965).

tice Powell and Justice Stevens singled out real estate ownership as uniquely justifying assertions of jurisdiction over nonresidents.[78] One commentator has supported this view by pointing out that personal jurisdiction has been upheld under the *International Shoe* standard in cases involving single acts of the defendant which constituted far less substantial contact with the forum state than the continuous ownership of real property.[79] This commentator suggests, however, that real property not be deemed a proper basis of jurisdiction if the cause of action has no connection with the forum, since such an assertion of jurisdiction would not be "consonant with the reasonable expectations of the defendant . . . ."[80]

The third justification for the application of a per se rule is the special protection which the limited appearance offers the defendant in a quasi in rem action. Justice Powell qualified his advocacy of such a rule to quasi in rem actions which offer such protection.[81] Presumably, they felt that the limited liability afforded by the limited appearance justifies a lowering of the quantum of contacts required by the minimum contacts standard. In such a case, the mere ownership of real property might then provide a substantial enough connection with the state to justify the assertion of quasi in rem jurisdiction.

2. *Is the limited appearance useful after Shaffer?* Traditionally, the primary purpose of allowing the defendant to make a limited appearance was to mitigate the potential unfairness to the defendant of basing jurisdiction solely on the presence of his property in the forum state.[82] *Shaffer* ended jurisdiction which was based solely on property,

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78. 433 U.S. at 217 (Powell, J., concurring); *id.* at 218-19 (Stevens, J., concurring).

79. Note, *Ownership, Possession or Use of Property as a Basis of In Personam Jurisdiction,* 44 IOWA L. REV. 374, 377 (1959). *See also* Leeper v. Leeper, 114 N.H. 294, 298, 319 A.2d 626, 629 (1974). "The State has a clear interest in providing a forum for adjudicating rights in property located within its borders because the availability of legal procedures to determine such rights is necessary to enable the society to function in an orderly fashion." *Id.*

80. Note, *supra* note 79, at 378. *Accord,* Comment, *supra* note 15, at 338.

81. 433 U.S. at 217 (Powell, J., concurring) Justice Stevens endorsed Justice Powell's views without specifically mentioning the role of the limited appearance. *Id.* at 219 (Stevens, J., concurring).

82. *See* Currie, *Attachment and Garnishment in the Federal Courts,* 59 MICH. L. REV. 337, 379-80 (1961); Smit, *International Res Judicata and Collateral Estoppel in the United States,* 9 U.C.L.A. L. REV. 44, 56, 60 (1962). Where limited appearances were not permitted the defendant was faced with a dilemma. He had the choice of either defaulting and losing his property, or defending on the merits and submitting to the general jurisdiction of the court. This general appearance could result in liability for a judgment in excess of the value of the defendant's property in the state. *See, e.g.,* United States v. Balanovski, 236 F.2d 298 (2d Cir. 1956); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. Dist. Ct. App. 1970). To avoid this unfairness, a number of

and thus eliminated the humanitarian rationale for the limited appearance. Since Delaware law does not permit limited appearances,[83] it is unclear whether the Court in *Shaffer* would have rejected the limited appearance as a factor in determining whether jurisdiction should be asserted. Dicta in the majority opinion suggests that the majority would have done so.[84] On the other hand, Justice Powell endorsed the use of the limited appearance as a justification for some assertions of jurisdiction based solely on the presence of the defendant's property in the forum state.[85]

But if a limited appearance is now to serve as a factor in determining whether minimum contacts exist, it will serve a very different purpose than it did before *Shaffer*. If sufficient contacts exist to justify

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courts have ruled that defendants should not be coerced into this choice and have allowed limited appearances. *E.g.*, Dry Clime Lamp Corp. v. Edwards, 389 F.2d 590 (5th Cir. 1968); Fount Wip, Inc. v. Golstein, 33 Cal. App. 3d 184, 108 Cal. Rptr. 732, 736 (1973). Some of the leading proponents of extending the minimum contacts test to in rem actions also had endorsed the limited appearance as an interim measure to reduce the unfairness of jurisdiction based on property alone. *See, e.g.*, Hazard, *supra* note 15, at 281-88; Von Mehren & Trantman, *supra* note 15, at 1135, 1164.

In a jurisdiction which allows a limited appearance, a defendant may defend on the merits in an in rem action without subjecting himself to personal liability. He participates in the action to defend his interest in the property on which jurisdiction rests. RESTATEMENT OF JUDGEMENTS § 40 (1942). The plaintiff in such a jurisdiction is not barred from relitigating the controversy in another forum. Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916). Any damages awarded are not merged into the judgment, but are instead deducted from any award in a later action on the same claim. RESTATEMENT (SECOND) OF JUDGMENTS § 75, comment d (Tent. Draft No. 1 1973). A trial in which the defendant entered a limited appearance might, however, have some collateral estoppel effects. The parties involved might be prevented from recontesting any issues of fact which were fully litigated. Taintor, *Foreign Judgments In Rem; Full Faith and Credit v. Res Judicata In Personam*, 8 U. PITT. L. REV. 223, 234 (1942). Some courts might also bar the parties from raising any legal issue which was litigated at the first trial, RESTATEMENT (SECOND) OF JUDGMENTS § 75, comment a (Tent. Draft No. 1 1973), and for example, a defendant might be precluded from raising a defense if it was raised at the first trial.

83. Sands v. Lefcourt Realty, 35 Del. Ch. 340, 117 A.2d 365 (1955).

84. 433 U.S. at 207 n.23. "The fairness of subjecting a defendant to state court jurisdiction does not depend on the size of the claim being litigated." *Accord, id.* at 209 n.33. While Marshall was discussing the ability of a defendant in in rem litigation to limit his losses to the amount of property in the forum by defaulting, the limited appearance just extends this option and allows a defendant to defend on the merits without making a general appearance.

On the other hand, Marshall cited with approval a commentator whose main thesis is that limited liability should affect the standards used in evaluating the assertion of in rem jurisdiction.

Id. at 208 n.30 (citing Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977)).

85. 433 U.S. at 217 (Powell, J., concurring). Justice Stevens endorsed Justice Powell's views. *Id.* at 219 (Stevens, J., concurring). *See The Supreme Court, 1976 Term, supra* note 75, at 157-58.

jurisdiction without consideration of the limited appearance as a factor in the minimum contact analysis, then the limited appearance becomes a bonus for the defendant. He receives the benefit of the limited appearance, although the harshness which originally justified its use is no longer a threat after *Shaffer*. If, however, the limited appearance is used to lower the quantum of contacts necessary to assert jurisdiction, the plaintiff becomes the beneficiary of the doctrine, since he can bring his action in a forum from which the action would be precluded were the limited appearance not permitted.

A doctrine which makes the plaintiff's task of obtaining jurisdiction easier seems less important than one which serves to mitigate the harshness of in rem jurisdiction for the defendant,[86] and may not be justified in light of the burdens which such jurisdiction would impose on some defendants. The defendant must still enter the forum to litigate the cause of action. He thus incurs the same litigation expenses and inconveniences as if he were subject to in personam jurisdiction—assuming he decides not to default. The similarity of the burdens imposed by litigating in a general and a limited appearance suggests that uniform standards should apply to the assertion of both kinds of jurisdiction.[87] Furthermore, the limited appearance has been criticized as an unnecessary burden on the judicial system, since it permits two adjudications of the same controversy, creating the possibility of conflicting decisions and unnecessary waste of the judicial system's scarce resources.[88]

After *Shaffer,* the limited appearance does not seem to serve a strong jurisdictional purpose. While the judicial economy arguments against the limited appearance were not affected by *Shaffer*, the original purposes have been undermined. If sufficient contacts between the forum and the defendant exist to support jurisdiction without its consideration, it is superfluous—an archaic shield against an extinct threat. Since the defendant is no less inconvenienced by defending on the merits in a limited appearance than in a general appearance, it

86. *See* Smit, *supra* note 84, at 608, for the contention, from a strong advocate of a broad minimum contacts standard, that the defendant's interests are more important than the plaintiff's.

87. 1 J. WEINSTEIN, H. KORN, A. MILLER, NEW YORK CIVIL PRACTICE, ¶ 320. 16 (1977).

88. *See, e.g.,* United States v. Balanovski, 236 F.2d 298 (2d Cir. 1956); Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH. L. REV. 1, 22-24 (1951). In practice, however, few cases have been litigated twice because of the limited appearances. For an example of such a case, *see* Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939).

seems unfair to lower the quantum of contacts required when a limited appearance is permitted. The only one who benefits from such a reduction is the plaintiff, but his gain seems not to outweigh the defendant's inconvenience.

3. Conclusion. The justifications suggested for allowing a forum to assert jurisdiction solely on the basis of the defendant's ownership of real or tangible property in the forum state are of dubious strength. The greater certainty that such a rule would provide was expressly subrogated to considerations of fairness by *Shaffer*. That mere ownership of such property gives rise to a presumption of adequate contacts with the forum to sustain jurisdiction seems questionable, especially where the controversy is unrelated to the forum. The limited appearance, once the protector of the defendant in the quasi in rem action, is now an obsolete vestige of a discredited form of jurisdiction. Thus a per se rule seems inappropriate, especially so soon after *Shaffer* has opened the windows wide to considerations of fairness and reasonableness. It would seem appropriate at this time for the courts to take a fresh look at the kinds of action that have traditionally been litigated under quasi in rem jurisdiction, to scrutinize them for essential fairness, and only then to consider the application of per se rules.

C. *The Seider Doctrine After Shaffer v. Heitner*

The *Seider* doctrine is a particular exercise of quasi in rem jurisdiction first successfully used in *Seider v. Roth*.[89] In that case the New York Court of Appeals upheld the assertion of quasi in rem jurisdiction over a nonresident defendant who was alleged to have tortiously injured the plaintiff in an out-of-state automobile accident. The intangible property attached was the contractual debt owed by the automobile liability insurance company to the insured defendant to defend and indemnify him.[90]

The constitutionality of this controversial jurisdictional device, despite affirmation by the New York Court of Appeals[91] and the Second Circuit Court of Appeals,[92] is again under attack as a result of

89. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

90. *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.

91. Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977) (*Seider* limited to resident plaintiffs); Neuman v. Dunham, 39 N.Y.2d 999, 355 N.E.2d 294, 387 N.Y.S.2d 240 (1976) (mem.) (*Seider* affirmed on the ground of *stare decisis* alone); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

92. Minichiello v. Rosenberg, 410 F.2d 106, *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). The Second Circuit has recently upheld

Shaffer v. Heitner. *Shaffer* has shifted the primary focus of criticism of the *Seider* doctrine from that of statutory construction[93] to analysis of the contacts among the defendant, the forum, and the litigation in the *Seider* situation.

The first post-*Shaffer* observations left little doubt that *Seider* was no longer viable.[94] This conclusion was premature, however, because litigation challenging *Seider* has not been completely successful. In *O'Connor v. Lee-Hy Paving Corp.*,[95] *Seider* jurisdiction was sustained on a finding by the district court that the insurance attachment was in reality a judicially-created direct action,[96] and in conjunction with the procedural safeguards required for its use,[97] did not "offend the policy considerations underlying *Shaffer*."[98]

Most recent New York Supreme Court decisions, however, have agreed with the predictions that *Seider* is no longer valid.[99] They have

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Seider in a post-*Shaffer* opinion, O'Connor v. Lee-Hy Paving Corp., No. 78-7050 (2d Cir., June 12, 1978).

93. The *Seider* court permitted attachment of the insured's right to be indemnified and defended by the insurer as a 'debt' within the meaning of CPLR § 5201. *See* N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963). This triggered a flurry of critical commentary almost unanimously rejecting this interpretation of § 5201. One of the earliest, and certainly most persistent critics in this area has been Professor Siegel. *See* Siegel, *Supplementary Practice Commentaries,* N.Y. CIV. PRAC. LAW § 5201 (McKinney Supp. Pamphlet 1964-1977). Courts in states that have rejected the *Seider* action have relied almost exclusively on statutory interpretation to find attachment inappropriate. The last pre-*Shaffer* state court rejection occurred in California. *See* Javorek v. Superior Court, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976). *Shaffer* has not, however, ended criticism of this interpretation of § 5201. *See* Katz v. Umansky, 92 Misc. 2d 285, 290, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977) (the obligation to defend and indemnify remains inchoate until jurisdiction has been acquired over the insured, therefore attachment for jurisdiction is precluded under § 5201(a)); Siegel, *Article of Special Interest: In Rem and Quasi In Rem Jurisdiction,* 400 N.Y.S.2d 25, 37-38 (1978) (*Seider* deserves blame for its lawlessness because it authorizes the levy of inchoate rights, a levy which § 5201(a) forbids).

94. "[I]t is difficult to escape the conclusion that under *Shaffer v. Heitner,* the *Seider* principle cannot survive." McLaughlin, *New York Trial Practice,* 178 N.Y.L.J. at 2, col. 3 (Sept. 9, 1977). "It is fair to say that [the *Seider*] type of jurisdiction has been wiped out." *Quasi In Rem Jurisdiction—Supreme Court Nullifies Seider v. Roth,* NEW YORK STATE L. DIG., (Mid-June 1977).

95. 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd,* No. 78-7050 (2d Cir., June 12, 1978).

96. 437 F. Supp. at 1001. A direct action is one in which the injured party sues the insurer directly, thus circumventing the usual requirement that the injured procure a judgment against the insured before proceeding against the insurer.

97. Jurisdiction is exercised (a) only in favor of resident plaintiffs; (b) only against insurers which have in personam minimum contacts with New York; (c) only after giving adequate notice to the insured. Further, the defendant is not precluded from relitigating the merits of the case if there is a subsequent suit. *Id.* at 1004. *See* note 82 *supra.*

98. 437 F. Supp. at 1004.

99. Attanasio v. Ferre, 401 N.Y.S.2d 685 (Sup. Ct. 1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 400 N.Y.S.2d 478 (Sup. Ct. 1977); Katz v. Umansky, 92

rejected the analysis of *Seider* jurisdiction as a direct action against the insurer,[100] and found the liability insurance policy, the only contact between the named nonresident defendant and the New York forum, to be unrelated to the cause of action[101] and by itself insufficient to sustain jurisdiction.[102] The first Appellate Division decision on the subject, *Alford v. McGaw*,[103] disagreed. In upholding the *Seider* doctrine, the court found that the presence of the insurer's debt and other ties between the defendant and the New York forum established sufficient contacts to permit jurisdiction.[104] This finding was based on the realization that the insurer, present in the state, plays the critical role in handling the litigation for the defendant, and that the attachment of the contractual debt arises only because of its relation to the underlying cause of action.[105] The court came to this conclusion without finding *Seider* to be a direct action, but rather merely to have the "effect" of being one.[106]

The future of the *Seider* doctrine is presently an open question. The preliminary litigation in New York indicates that perhaps the key to *Seider's* future is whether it will be treated as a direct action, with the insurer viewed as the actual defendant, rather than as a pure attachment process against the property of the named defendant. However, threshold examination must be directed at the standard by which *Shaffer* determines constitutionally allowable quasi in rem jurisdiction. The *Shaffer* standard is the hurdle that *Seider* must overcome, whether it is labelled an attachment device or direct action.

1. *The Shaffer minimum contacts standard.* Justice Marshall, writing for the majority in *Shaffer,* concluded that "all assertions of

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). *Contra,* Rodriguez v. Wolfe, 93 Misc. 2d 364, 401 N.Y.S.2d 442 (Sup. Ct. 1978).

100. Wallace v. Target Store, Inc., 92 Misc. 2d 454, 459, 400 N.Y.S.2d 478, 482 (Sup. Ct. 1977); Katz v. Umansky, 92 Misc. 2d 285, 290, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977). In Kennedy v. Deroker the court explicitly avoided the direct action issue. 91 Misc. 2d 648, 651, 398 N.Y.S.2d 628, 630 (Sup. Ct. 1977). See note 96 *supra* for an explanation of the direct action.

101. Wallace v. Target Store, Inc., 92 Misc. 2d 454, 458, 400 N.Y.S.2d 478, 481 (Sup. Ct. 1977).

102. Attanasio v. Ferre, 401 N.Y.S.2d 685, 687 (Sup. Ct. 1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454 ,458, 400 N.Y.S.2d 478, 481 (Sup. Ct. 1977); Katz v. Umansky, 92 Misc. 2d 285, 290, 399 N.Y.S.2d 412, 416, (Sup. Ct. 1977); Kennedy v. Deroker, 91 Misc. 2d 648, 650, 398 N.Y.S.2d 628, 630 (Sup. Ct. 1977). *Contra,* Rodriguez v. Wolfe, 93 Misc. 2d 364, 367 401 N.Y.S.2d 442, 444 (Sup. Ct. 1978) ("the insurance policy *is* at the heart of plaintiff's cause of action").

103. 61 A.D.2d 504, 402 N.Y.S.2d 499 (4th Dept. 1978).

104. *Id.* at 507, 402 N.Y.S.2d at 502.

105. *Id.* at 508, 402 N.Y.S.2d at 502.

106. *Id.* at 509, 402 N.Y.S.2d at 503.

state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[107] with primary emphasis upon the contacts among the defendant, the forum, and the litigation.[108] The Court said that sufficient contacts would exist when the property within the forum is itself the cause of controversy.[109] The defendant's ownership of property within the forum and the controversy concerning that property would normally indicate that the defendant expected to benefit from state protection of his interest.[110] However, the quasi in rem jurisdiction found in *Harris v. Balk*[111] was all but explicitly overruled. The presence of property unrelated to the plaintiff's cause of action, without the existence of other ties between the forum and the defendant, no longer supports jurisdiction.[112]

Shaffer's application of *International Shoe* to in rem proceedings evinced a concern primarily for the contacts between the defendant and the forum. *Shaffer* stressed the lack of evidence that the defendants had ever set foot in Delaware,[113] or that they had other contacts with the forum that might result in an expectation that they would be summoned before a Delaware court.[114] These deficiencies overshadowed any interest that the state might have in the litigation stemming from the defendants' position as corporate fiduciaries in a Delaware corporation,[115] or from the need to apply Delaware law to litigation concerning the management of Delaware corporations.[116] *Shaffer,* by emphasizing the physical presence of the defendant and his ability to foresee the forum state's assertion of jurisdiction, subordinated the interests of the plaintiff and the state.[117] State interests were discussed in *Shaffer,* but they were clearly secondary; the interests of the plaintiff were ignored altogether.

The majority's emphasis of the defendant's role in jurisdictional analysis was questioned by Justice Brennan, who in a concurring and

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107. 433 U.S. at 212 (footnote omitted).
108. 433 U.S. at 204, 207.
109. *Id.* at 207-08.
110. *Id.*
111. 198 U.S. 215 (1905). *Harris* has been characterized as the foundation upon which *Seider* is built. Siegel, *Supplementary Practice Commentaries,* N.Y. CIV. PRAC. LAW § 5201 at 17 (McKinney Supp. Pamphlet 1964-1977). *But see* note 216 & accompanying text *infra.*
112. 433 U.S. at 208-09.
113. *Id.* at 213.
114. *Id.* at 216.
115. *Id.* at 215-16.
116. *Id.* at 216.
117. Casad, *supra* note 12, at 74-76.

dissenting opinion, placed less weight on the contact of the defendant with the forum and more on the state's valid substantive interests.[118] As one example of such an interest he cited the forum's concern in assuring restitution for its own residents.[119] He also felt that application of the *International Shoe* test should include the forum's contacts with the plaintiff.[120] Justice Brennan's approach resembles that of *McGee v. International Life Insurance Co.*[121] In *McGee,* the Supreme Court permitted personal jurisdiction to be asserted over an insurance company that had transacted no business within the forum other than the sale, by mail, of the single policy contract at issue.[122] State interest in providing redress for its residents[123] and in regulating insurance contracts[124] were the substantial connections between the litigation and the forum that persuaded the Court that the exercise of jurisdiction was fair. The presence of the single contract of the insurer in the state was sufficient to allow the Court to invoke these state interests.[125]

The *Shaffer* majority's approach, unlike that of Justice Brennan, has a distinctive *Hanson v. Denckla*[126] flavor. In *Hanson,* however, the Court required the defendant's contact with the forum to be coupled with some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[127] Minimum contacts were found to be absent because the defendant neither had offices located in the state, nor had transacted business there.[128]

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118. 433 U.S. at 223-25 (Brennan, J., concurring and dissenting).
119. *Id.* at 223 (Brennan, J., concurring and dissenting).
120. *Id.* at 225 (Brennan, J., concurring and dissenting).
121. 355 U.S. 220 (1957).
122. Zammit, *supra* note 15, at 674.
123. 355 U.S. at 223 (1957).
124. *Developments, supra* note 15, at 928.
125. "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . . The contract was delivered in California, the premiums were mailed from there . . . ." 355 U.S. at 223 (1957). *See* Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies,* 21 INT'L & COMP. L.Q. 335, 351 (1972).
126. 357 U.S. 235 (1958). The contrast between *Hanson* and *McGee* stems from an ambiguity latent in *International Shoe.* Casad, *supra* note 12, at 77.
127. 357 U.S. at 253.
128. *Id.* at 251. The *Hanson* and *McGee* minimum contacts standards do not by any means exhaust the possible judicial approaches to applying the precepts of *International Shoe. See* Comment, *supra* note 15, at 314-16, which discusses five separate approaches to the *International Shoe* standard found in the case law. The *Shaffer* opinion hints that a different test might be applied to a natural person. "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes State jurisdiction over one type of defendant

Although most application of the *International Shoe* minimum contacts analysis have involved assertions of in personam jurisdiction, there are some pre-*Shaffer* cases that applied the analysis to assertions of quasi in rem jurisdiction. These cases reveal a trend of thought which culminated in the *Shaffer* decision and, when combined with the broad principles of *Shaffer,* help to provide a consistent standard by which *Seider* and other quasi in rem schemes may be judged. For example Judge Gibbons, in a concurring opinion in *Jonnet v. Dollar Savings Bank,*[129] recognized two different aspects of the *International Shoe* standard and characterized them as "twin limitations upon the scope of state judicial power."[130] One limitation was that the state must have some palpable interest in the controversy, an interest that is connected with public policy. The second limitation was that the parties have sufficient contacts with the forum to justify the forum's assertion of jurisdiction over them.[131] Significantly, he made it clear that the contacts between the defendant and the forum are to be primary in the jurisdictional inquiry.[132] In *U.S. Industries, Inc. v. Gregg,*[133] the Third Circuit Court of Appeals invalidated a use of the same Delaware sequestration statute struck down in *Shaffer* a year later. The majority relied on Judge Gibbons' analysis in *Jonnet* and applied *International Shoe* to the quasi in rem action.[134] The only contacts that the parties had with the forum were the Delaware incorporation of the plaintiff corporation and the fictional status of the defendant's stock in the state.[135] Although *Gregg* can be read as placing the residency of the plaintiff and the strength of state interests in protecting its citizens on an equal footing with the defendant's contacts with the forum,[136] the Delaware District Court subsequently re-

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but not over the other." 433 U.S. at 204 n.19. It has also been proposed that *Hanson's* preference for the defendant's interests be reversed when the action involves a localized plaintiff against a multi-state defendant. *See* Comment, *supra* note 15, at 314-15. Another approach would assign equal importance to all the interests of the parties and the State. *Id.* at 315-16; Developments, *supra* note 15, at 923-48.

129. 530 F.2d 1123 (3rd Cir. 1976) (Gibbons, J., concurring).

130. *Id.* at 1140 (Gibbons, J., concurring).

131. *Id.* (Gibbons, J., concurring).

132. "Simply stated, plaintiff contacts cannot cure a jurisdictional defect that derives from a lack of defendant contacts with the forum." *Id.* at 1141 (Gibbons, J., concurring).

133. 540 F.2d 142 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

134. *Id.* at 154.

135. *Id.* at 155.

136. *Id.* Note, however, that the court in *Gregg* did not find this to be the case, but only hypothesized the relevance of the plaintiff's contacts, and then deemed them insufficient to support jurisdiction. *Id.* n.9. For an analysis of *Gregg* that interprets the court's opinion as according substantial weight to the plaintiff's residence and the state's

lied on *Gregg* to preclude, mainly on the basis of insufficient contacts between the defendant and the forum, an assertion of quasi in rem jurisdiction.[137]

These decisions anticipated *Shaffer,* both in applying the *International Shoe* standard to quasi in rem jurisdiction and in emphasizing the contacts of the defendant with the forum. The courts required that the contacts be physical or purposeful, as mandated by *Hanson.* The contact of the plaintiff with the forum, the fictional location of the intangible debt, the limited liability of the defendant, the burden to the defendant of litigating in a foreign jurisdiction, and the state interests in the litigation were relevant, but were assigned an inferior position in the hierarchy.

Once the contact of the defendant with the forum is satisfied, the minimum contacts requirement of *International Shoe* is met. But *International Shoe* imposes a second requirement: that the forum be a fair and reasonable place to litigate.[138] It is in the application of this test that these other criteria, including the contacts between the plaintiff and the forum, and the extent of the defendant's liability, are important.[139]

2. *Seider as a quasi in rem attachment.* If *Seider* jurisdiction is viewed as relying only on the attachment of an intangible res within the forum,[140] without reference to its direct-action qualities, the post-*Shaffer* pessimism of the commentators about the future of *Seider* seems justified.[141] In the typical *Seider* situation, the defendant is a nonresident insured whose only contact with the forum is the attached insurance policy debt, owed to the policyholder by the insurer.[142]

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interest in the litigation, see Note, *U.S. Industries, Inc. v. Gregg; Due Process Limits A State's Power to Fix the Situs of Intangibles for Purposes of Quasi-in-Rem Jurisdiction,* 38 U. PITT. L. REV. 789, 802-03 (1977).

137. Barber-Greene Co. v. Walco National Corp., 428 F. Supp. 567 (D. Del. 1977). The court specifically discussed the significant interest that the State of Delaware had in the litigation. "[T]he litigation here involves the relationship between a Delaware corporation and its shareholders . . . . The . . . distinction [between this case and *Gregg*] is that [here] Delaware has a greater interest and . . . more significant contacts with a dispute . . . ." *Id.* at 570-71.

138. 326 U.S. 310, 317 (1945).

139. Strachan, *In Personam Jurisdiction in Utah,* 1977 UTAH L. REV. 235, 256 (1977). *But see* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977), a post-*Shaffer* decision, where the court found a bank account in New York sufficient entry into the jurisdiction to allow for quasi in rem jurisdiction. Analysis was made of neither the interests of the plaintiff nor of the forum.

140. The view taken by the courts in Attanasio v. Ferre, 401 N.Y.S.2d 685 (Sup. Ct. 1977); 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).

141. *See* note 94 *supra.*

142. 7A J. WEINSTEIN, H. KORN, & A. MILLER, NEW YORK CIVIL PRACTICE § 6202.06a at 62-50.10 (1977).

Shaffer makes it clear that the attached property is, in and of itself, an inadequate contact with the forum when it is completely unrelated to the cause of action and when it does not suggest the existence of other ties between the defendant and the state.[143] If the insurer is not viewed as the actual defendant, the *Seider* action does not present the named defendant's physical presence in the forum, his expectation of suit there, nor any purposeful act which he may have committed there.[144] Several New York courts, however, have justified *Seider* actions in light of *Shaffer* by stressing the relationship of the attached insurance policy debt, to defend and indemnify the insured, to the cause of action. The relationship is predicated upon the occurrence of the accident, which establishes the existence of both the debt and the cause of action.[145] Although the strength of this relationship has been questioned by other New York courts,[146] it is probably less critical to a post-*Shaffer* analysis than the courts have assumed.[147] In a *Seider* action, the relationship of the attached property to the cause of action is not indicative of any expectation by the insured defendant to benefit from New York State protection of his interest in the property. The out-of-state purchase of an insurance policy by a nonresident defendant could not provide any basis for the insured to believe that he would have to defend, in New York, against an alleged tort that occurred elsewhere. This is true whether or not the insurance company is doing business in New York at the time when it sold the defendant the policy. Without this expectation, the importance of the relationship between the attached property and the cause of action diminishes,[148] since the purpose of the minimum contacts test, which the

143. Shaffer v. Heitner, 433 U.S. 186, 209 (1977); Attanasio v. Ferre, 401 N.Y.S.2d 685, 687 (Sup. Ct. 1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 456, 400 N.Y.S.2d 478, 480 (Sup. Ct. 1977); Katz v. Umansky, 92 Misc. 2d 285, 290, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977); Kennedy v. Deroker, 91 Misc. 2d 648, 650, 398 N.Y.S.2d 628, 630 (Sup. Ct. 1977).

144. Comment, *supra* note 15, at 333.

145. Alford v. McGaw, 61 A.D.2d 504, 508, 402 N.Y.S.2d 499, 502 (4th Dept. 1978). *See* Rodriguez v. Wolfe, 93 Misc. 2d 364, 367, 401 N.Y.S.2d 442, 444 (Sup. Ct. 1978) ("the insurance policy *is* at the heart of the plaintiff's cause of action").

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> [I]t is still clear that the insurance policy is not at the heart of the plaintiff's cause of action in negligence. The sole relationship of the policy is to satisfy any potential judgment. For all intents and purposes it is as unrelated to the cause of action as the sequestered stock was in . . . *Shaffer* . . . .

Wallace v. Target Store, Inc., 92 Misc. 2d 454, 458, 400 N.Y.S.2d 478, 481 (Sup. Ct. 1977). *See* Attanasio v. Ferre, 401 N.Y.S.2d 685, 687 (Sup. Ct. 1977); Katz v. Umansky, 92 Misc. 2d 285, 289-90, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977); Kennedy v. Deroker, 91 Misc. 2d 648, 650, 398 N.Y.S.2d 628, 630 (Sup. Ct. 1977).

147. *But see* O'Connor v. Lee-Hy Paving Corp., No. 78-7050 (2d Cir., June 12, 1977).

148. Shaffer v .Heitner, 433 U.S. at 207-08.

relationship is said to satisfy, is to assure that the defendant not be brought before a forum in a state the laws of which the defendant has not purposely availed himself.[149] Further, the *Shaffer* majority seems to have considered this relationship important only in cases involving the attachment of tangible property, or at least property of marketable value.[150] Absent additional ties between the defendant and the forum, the attached insurance policy by itself is too tenuous upon which to ground jurisdiction.[151]

Prior to *Shaffer,* courts had upheld the constitutionality of the *Seider* doctrine without resort to the theory that *Seider* authorizes a direct action. These courts relied, however, upon a number of jurisdictional grounds that after *Shaffer* no longer seem valid. In *Simpson v. Loehmann,*[152] the mere presence in New York of the insurance company's debt—to defend and indemnify the insured—was found to fulfill due process requirements for quasi in rem jurisdiction. The court based this primarily on the rationale of *Harris v. Balk.*[153] *Shaffer,* however, overrules *Harris* to the extent that the location of the debt in the forum alone is insufficient contact between the defendant and the state to permit jurisdiction.[154] *Minichiello v. Rosenberg*[155] upheld *Seider* for two reasons. First, it found that the burden *Seider* imposed upon the defendant was minimized by the procedural protection afforded him by a limited appearance.[156] Second, *Minichiello* emphasized the forum's interest in protecting its residents.[157] But these factors are not controlling absent a showing that the principal requirement of *Shaffer,* that there be sufficient contact between the defendant and the forum, is met.[158]

Seider, when viewed as a quasi in rem attachment procedure against the named defendant, cannot provide the necessary contacts

149. Hanson v. Denckla, 357 U.S. 235, 251-52 (1958).
150. 433 U.S. at 208 & n.25.
151. *But see* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977). In this post-*Shaffer* case, quasi in rem jurisdiction was permitted on thee basis of only a single contact with the forum: a bank account unrelated to the cause of action. The court found that the bank account of the defendant, voluntarily opened in the furtherance of defendant's business, placed it on notice of the possibility of its having to defend such property in the foreign forum. *Id.* at 1278-79.
152. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).
153. 198 U.S. 215 (1905).
154. *See* text accompanying notes 111-12 *supra.*
155. 410 F.2d 106, *aff'd en banc,* 410 F.2d 117 (2d Cir. 1968), *cert. denied,* 396 U.S. 844 (1969).
156. *Id.* at 111.
157. *Id.* at 110.
158. *See* text accompanying notes 129-39 *supra.*

the *Shaffer* standard requires. *Seider* will probably fail as an exercise of jurisdiction if the role of the insurer is ignored.

3. *Seider as a direct action against the insurer.* The "first step [toward] extruding *Seider* through the narrow opening of the *Shaffer* case" is to view the insurance company as the real party in interest on the defendant's side.[159] From this perspective, *Seider* permits a direct action, thus circumventing the usual practice that the insurer submit to suit by injured parties only after judgment is obtained against the insured defendant.[160] The significance of labelling *Seider* a direct action is that it shifts analysis of the first prong of the *Shaffer* standard away from the contacts of the insured with the forum to those between the insurer and the forum.[161]

The federal courts have readily construed *Seider* as a direct action. They have found that "[t]he insurer doing business in New York is . . . the real party in interest and the nonresident insured . . . [acts] simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer."[162] The New York courts have not embraced the direct action concept so readily. In *Seider,* the court of appeals was ambiguous: "[a direct action would be established] to the extent only that affirmance [of the judgment below] will put jurisdiction in New York State and require the insurer to defend here . . . because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured."[163] In *Simpson v. Loehmann,*[164] the majority conceded that realistically the insurer was in "full control of the litigation," but did not characterize the suit as a direct action.[165] In a recent case, *Donawitz v. Danek,*[166]

159. Siegel, *supra* note 111, at 18.

160. Note, *Direct-Action Statutes: Their Operational Conflict-of-Law Problems,* 74 HARV. L. REV. 357, 357 (1960). Five states have statutes that permit the direct action suit. *See* ARK. STAT. ANN. § 66-3244 (1966); GA. CODE ANN. § 68-612 (1975); LA. REV. STAT. ANN. § 22:655 (West 1978); R.I. GEN. LAWS § 27-7-2 (1956); WIS. STAT. ANN. § 260.11(1) (West Supp. 1968). Direct actions have also been judicially created in several states, as an adjunct to compulsory insurance for motor vehicles, on the ground that legislative intent to permit such actions can be inferred from the primary purpose of the insurance requirement, that the injured party be protected. *See* Note, *supra,* at 358.

161. *See* Siegel, *supra* note 111, at 18.

162. Minichiello v. Rosenberg, 410 F.2d 106, 109, *aff'd en banc,* 410 F.2d 117 (2d Cir. 1968), *cert. denied,* 396 U.S. 844 (1969). *See* O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 1001 (E.D.N.Y. 1977), *aff'd* No. 78-7050 (2d Cir., June 12, 1978).

163. 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

164. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

165. *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637. In a concurring opinion, Judge Keating was willing to admit the direct action basis of *Seider.* "Although no direct action is presently in effect [in New York], I see no policy reason for not holding

the court of appeals seemed finally willing to admit that it had indeed created a direct action.[167] This interpretation of *Donawitz* is not universally shared in New York, however, since two lower courts have found that *Donawitz* did not construe *Seider* as a direct action,[168] and at least one other lower court has since insisted that the *Seider* doctrine is not predicated on the direct-action theory.[169]

It has been argued that section 167 (1) (b) of the New York Insurance Law[170] precludes the Court of Appeals from creating a direct action against insurers.[171] Section 167, enforceable against insurers, requires that each insurance policy contract sold in the State of New York permit an injured plaintiff to sue the defendant insurer directly once the plaintiff has obtained a valid judgment against the insured.[172] Thus section 167 seems to allow the insurance companies to state that, as a condition precedent to a direct action by an injured plaintiff, the plaintiff must obtain a judgment against the insured. This apparent statutory authorization of the condition precedent is the basis of the conclusion, reached by some, that the judiciary has no power to create a direct action for the injured plaintiff who has not obtained a judgment against the insured.[173]

This analysis of the effects of section 167 ignores, however, the framework within which the critical language of the statute is found. Section 167, by placing an affirmative duty upon *insurers* to include a specific provision in their contracts, makes some plaintiffs, those with judgments against insureds, third party beneficiaries of the insurance contracts. But section 167 does not purport to make these

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that service of process on the real party defendant—the insurer—is sufficient to compel it to defend in this State . . . ." *Id.* at 313, 334 N.E.2d at 673, 287 N.Y.S.2d at 639.

166. 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

167. "Moreover, . . . [the *Seider* court] in effect established, by judicial fiat, a 'direct action' against the insurer. . . . Thus, this court did indirectly that which the Legislature could have done, but failed to do, directly . . . ." *Id.* at 142, 366 N.E.2d at 255, 397 N.Y.S.2d at 595.

168. Alford v. McGaw, 61 A.D.2d 504, 509, 402 N.Y.S.2d 499, 503 (4th Dept. 1978); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 459, 400 N.Y.S.2d 478, 482 (Sup. Ct. 1977).

169. Katz v. Umansky, 92 Misc. 2d 285, 290, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977).

170. N.Y. INS. LAW § 167 (McKinney 1966).

171. Alford v. McGaw, 61 A.D.2d 504, 509, 401 N.Y.S.2d 499, 503 (4th Dept. 1978); D. SIEGEL, NEW YORK PRACTICE 130 (1978).

172. Thus the courts have held that a valid judgment against the insured is a prerequisite to bringing a cause of action under the Insurance Law. *See* McNamara v. Allstate Ins. Co., 3 A.D.2d 295, 299, 160 N.Y.S.2d 51, 55 (1957); Sandak v. Allstate Ins. Co., 202 N.Y.S.2d 47, 48 (Sup. Ct. 1960); Bornhurst v. Massachusetts Bonding & Ins. Co., 12 Misc. 2d 149, 151, 175 N.Y.S.2d 542, 545 (Sup. Ct. 1958).

173. *See* note 171 *supra.*

plaintiffs the only third party beneficiaries of insurance contracts, nor does it expressly authorize insurance companies to exclude plaintiffs who have not obtained judgments in their favor from third party beneficiary status. Furthermore, a reading of 167 as limiting the ability of the judiciary to create a direct action for the benefit of plaintiffs without judgments ignores two important facts.[174] First, it is possible for the courts to find *implied* contractual terms granting rights to third parties. Second, contract is not the sole source of a plaintiff's rights. Since section 167 is merely a requirement that insurance contracts protect some third parties, it seems unreasonable to construe it as prohibiting actions by other third parties based upon grounds other than the contractual term.

Seider can be seen as a judicial extension of a legislatively-created right. The justification for this extension is that the Court of Appeals was confronted with a problem that the Insurance Law seems not to have anticipated: the New York resident plaintiff who faces the prospect of litigating in an inconvenient forum an action in which the defense is controlled by an insurer who might just as readily litigate in New York as in the defendant's home state. Judicial extensions of existing rights and creation of entirely new rights are neither novel nor precluded by separation-of-powers considerations, at least where the legislature has not forbidden the right that the court seeks to establish. For example, in *MacPherson v. Buick Motors, Inc.*,[175] the court of appeals provided a new cause of action in negligence for a party injured by a defectively manufactured automobile, although the plaintiff was not in privity of contract with the manufacturer. The court of appeals there, as it did in *Seider*, "put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else."[176] In *Codling v. Paglia*,[177] the court of appeals extended the protection of strict products liability to a plaintiff who had neither purchased the product causing the injury, nor was using it at the time he was injured. The creation of this cause of action was not authorized

174. It may also be argued that a legislative restraint upon judical development of causes of action between private parties raises serious separation of powers questions. Similar considerations may explain the "miracle of *Seider*," in which the New York Court of Appeals allowed a defendant to make a limited appearance in spite of a statute apparently forbidding it. Simpson v. Loehmann, 21 N.Y.2d 305,234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). The "miracle" of *Seider* is described more fully in D. SIEGEL, *supra* note 171, at 127-30.

175. 217 N.Y. 382. 111 N.E. 1050 (1916).

176. *Id.* at 390, 111 N.E. at 1053.

177. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

by statute or by pre-existing common law.[178] The court was persuaded, however, that "from the standpoint of justice as regards the operating aspects of today's products,"[179] a new cause of action should be permitted. This creation of a broad, new right,[180] based upon a recognition of the practical realities of the modern world, is similar to the conception of the direct action which *Seider* seems to have wrought.

Judicial creation of a direct action seems consistent with the legislative purposes of the relevant provisions of the Insurance Law. "Prior to the enactment of section 109 of the Insurance Law,"[181] the predecessor of section 167, "an injured person possessed no cause of action against the insurer of the tort feasor because of [a] lack of privity of contract."[182] Thus if the insurer were insolvent and unable to satisfy the judgment against him, the insurer would be released from obligation. This was based on the theory that the "policy [was] one of indemnity against loss suffered" by the insured. If, due to his insolvency, he suffered no damage, there was no loss for the insurer to indemnify.[183] Section 109 was enacted to correct this apparent injustice by providing the injured plaintiff with a causee of action against the insurer, once the insured defendant was found liable.[184] In *Materazzi v. Commercial Casualty Insurance Co.*,[185] the court found this provision to be for the benefit of persons injured or suffering damage, not solely for the benefit of the insured.[186] It is therefore somewhat curious that section 167 of the Insurance Law, found to grant a cause of action to injured plaintiffs, might subsequently be used as a ground for precluding a cause of action—a direct action against the insurer—for this same class of litigants.[187] While strict construction of the Insurance Law might prohibit all direct actions except those authorized by section 167, strict construction seems unwarranted; these

178. *See id.* at 338, 298 N.E.2d at 626, 345 N.Y.S.2d at 466.
179. *Id.* at 341, 298 N.E.2d at 627, 345 N.Y.S.2d at 468.
180. *Id.* at 339, 298 N.E.2d at 626, 345 N.Y.S.2d at 467.
181. 1909 N.Y. LAWS, c. 33.
182. Jackson v. Citizens Cas. Co., 277 N.Y. 385, 389, 14 N.E.2d 446, 447 (1938).
183. *Id.*
184. *See id.* at 390, 14 N.E.2d at 448.
185. 157 Misc. 365, 283 N.Y.S. 942 (Sup. Ct.), *aff'd*, 246 A.D. 522, 283 N.Y.S. 430 (1st Dep't 1935).
186. 157 Misc. at 368, 283 N.Y.S. at 944.
187. Professor Siegel hints that a direct action can be fitted into Insurance Law § 167 by judicial construction. He feels that even if such a construction is precluded by the language of the statute, the barrier could be overcome. Siegel, *Supplementary Practice Commentaries*, N.Y. CIV. PRAC. LAW § 5201, at 51-52 (McKinney 1978).

provisions could just as readily be found merely to authorize a limited cause of action, and not to preclude others.[188]

The judicial creation of a right to a direct action against an insurer would not be unique to New York. In *Shingleton v. Bussey*,[189] the Florida Supreme Court affirmed the use of a direct action against an insurer in a motor vehicle liability suit. Basing the suit of the injured plaintiff on the insurance contract, the court found that

> "[T]he general public, subjected to possible injury through [the insured's] negligent operation of a motor vehicle, possessed more than a mere 'incidental' benefit from the contract to procure public liability insurance. It was, in effect, a real party in interest to this contract. . . . [Automobile insurance] is no longer a private contract merely between two parties." [W]e think there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus to render motor vehicle liability insurance amenable to the third party beneficiary doctrine.[190]

Thus, by characterizing the injured plaintiff as a third party beneficiary of the insurance contract, and by reading into that contract an implied term obligating the insurer to defend the insured wherever the insurer is doing business, the New York Court of Appeals could create a direct action in *Seider* situations.

The New York courts' reluctance to characterize *Seider* as permitting a direct action against the insurer may be attributable in part to the desire to avoid inflated jury awards by preserving the anonymity of the defending insurance company.[191] However, as the Court of Appeals recognized in *Oltarsh v. Aetna Insurance Co.*,[192] it is a rare juror who does not know that defendants in automobile negligence

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188. Section 109 (now § 167) has been classified as both a remedial statute, Jackson v. Citizens Casualty Co., 277 N.Y. 385, 389, 14 N.E.2d 446, 447 (1938), and as a statute in derogation of the common law, Royal Indemnity Co. v. Traveler's Ins. Co., 244 A.D. 582, 584, 280 N.Y.S. 485, 487 (1st Dep't 1935). Remedial statutes are construed so that "the intention of a remedial statute will always prevail over the literal sense of its terms." H. BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS, 487 (2d ed. 1911). On the other hand, a statute in derogation of the common law is strictly construed. H. BLACK, *supra* at 367. *See* Dean v. The Metropolitan Elevated Ry. Co., 119 N.Y. 541, 547 (1890). Although a construction of § 167 as in derogation of the common law might preclude the use of a direct action by a *Seider* plaintiff, the courts have not in recent years found such characterizations of statutes to be controlling.

189. 223 So. 2d 713 (Fla. 1969).

190. *Id.* at 715-16 (quoting Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965)).

191. O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 1004 (E.D.N.Y., 1977), *aff'd*, No. 78-7050 (2d Cir. June 12, 1978); Rodriguez v. Wolfe, 93 Misc. 2d 364, 367-68, 401 N.Y.S.2d 442, 445 (Sup. Ct. 1978).

192. 15 N.Y.2d 111, 118, 204 N.E.2d 622, 626, 256 N.Y.S.2d 577, 583 (1965) (quoting Oltarsh v. Aetna Ins. Co., (S.D.N.Y. Nov. 8, 1963)).

cases are insured, and that an insurance company is defending the action. Further, the desire to keep jury awards down may be misplaced. It has been asserted that juries in two major direct action states render lower verdicts than those in most other states.[193]

Seider actions differ from direct actions allowed in other states in two significant ways. In a typical statutory direct action, the named defendant is the insurance company.[194] In the *Seider* action, however, while the insurer is the real party in interest, it is not the named defendant. More significantly, the direct action statutes "limit application of the direct action to tortious acts occurring within the borders of the state."[195] Thus the direct action statutes predicate jurisdiction upon the fact that the insurer has some contacts with the state where the action is brought, because its policy holder has committed the tortious act there. Thus there is no need to consider whether the insurance company is doing business within the state.[196] *Seider* jurisdication differs from these statutes in that it applies to torts occurring outside of the forum state.[197] *Seider* instead bases its jurisdiction on the location of the insurance company in the state. With the possible exception of the single attached insurance policy, the insurer's activity within New York is unrelated to the dispute.

In analyzing *Seider's* viability as a direct action in light of *Shaffer's* jurisdictional requirement, the first question is whether these contacts between the insurer and the forum satisfy the *Shaffer* standard. When the insurer is considered the real party defendant, the attached insurance policy remains no less questionably related to the cause of action than when it is not.[198] However, other contacts between the defendant and the forum emerge that are not present when the insured is deeemed the defendant. *Seider,* in fact, requires the plaintiff to show the existence of such additional contacts between the insurer and the forum before jurisdiction will be asserted: the plaintiff must demonstrate the insurer's "presence" in the state.[199]

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193. Note, *supra* note 160, at 358 n.12.

194. *E.g.* LA. REV. STAT. ANN. § 22:655 (West 1959).

195. Comment, *Jurisdiction—Quasi In Rem: Seider v. Roth to Turner v. Evers—Wrong Means to the Right End,* 11 SAN DIEGO L. REV. 504, 513 (1974). *See* Koss v. Hartford Accident and Indem. Co., 341 F.2d 472 (7th Cir. 1965) (Wisconsin statute); Weingartner v. Fidelity Mut. Ins. Co., 205 F.2d 833 (5th Cir. 1953) (Louisiana statute).

196. Note, *Attachment of Liability Insurance Policies: What Remains of the Seider Doctrine After Seven Years of Conflict,* 34 OHIO STATE L.J. 818, 835 (1973).

197. Note, *Quasi in Rem Jurisdiction Based on Insurer's Obligations,* 19 STAN. L. REV. 654, 655 n.7 (1967).

198. *See* notes 148-154 & accompanying text *supra.*

199. Beja v. Jahangiri, 453 F.2d 959, 963 (2d Cir. 1972); Simpson v. Loehmann, 21 N.Y.2d 305, 311, 324 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967).

The requirement of presence is the New York "doing business" test for jurisdiction under CPLR § 301.[200] This test was first articulated in *Tauza v. Susquehanna Coal Co.*, [201] where jurisdiction over a foreign corporation was permitted when it was present in the state, "not occasionally or casually, but with a fair measure of permanence and continuity," irrespective of the relationship between those contacts and the cause of action.[202] The "doing business" test does not require the primary activities of the defendant to be carried on in New York, but the defendant or its agent must solicit business in New York systematically.[203] In *Ford v. Unity Hospital*,[204] this test was equated with the *Hanson* standard, requiring the defendant to have purposefully availed itself of the privilege of conducting activities within the forum state.[205] Thus, *Seider's* traditional presence test, combined with the characterization of *Seider* as a direct action, provides the purposeful entry, physical presence, and foreseeability to suit mandated by the *Shaffer* standard.[206]

Once these contacts are established, the jurisdictional inquiry then proceeds to questioning the sufficiency of the nexus between the state and the litigation. This goes to the second prong of the *International Shoe* test—whether the forum is a fair and reasonable place to litigate the suit.[207] In *Watson v. Employers Liability Assurance Corp.*[208] the Supreme Court had occasion to assess the fairness of the choice of forum in litigation arising under the Louisiana direct action statute. The Court emphasized the interest that Louisiana had in trying the litigation, including the care which the state might have to provide to residents killed or injured in the forum.[209] The Court concluded that Louisiana's interests outweighed those of the state where the policy was issued.[210]

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200. Beja v. Jahangiri, 453 F.2d 959, 961 (2d Cir. 1972). Section 301 permits a court to "exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." N.Y. CIV. PRAC. LAW § 301 (McKinney 1972). This section permits jurisdiction to be exercised as it might have been prior to the effective date of § 301. McLaughlin, *Practice Commentaries*, N.Y. CIV. PRAC. LAW § 301 at 5 (McKinney 1972).

201. 220 N.Y. 259, 115 N.E. 915 (1917).

202. *Id.* at 267, 115 N.E. at 917.

203. McLaughlin, *supra* note 200 at 6.

204. 32 N.Y.2d 464, 299 N.E.2d 659, 346 N.Y.S.2d 238 (1973).

205. *Id.* at 471, 299 N.E.2d at 663, 346 N.Y.S.2d at 243.

206. *See* text following note 137 *supra.*

207. *See* text following note 137 *supra.*

208. 348 U.S. 66 (1954).

209. *Id.* at 72.

210. *Id.* at 73.

In *Minichiello v. Rosenberg*,[211] a pre-*Shaffer* case, the Second Circuit Court of Appeals upheld the *Seider* doctrine and found the state interests examined in *Watson* to be of equal importance in a *Seider* action.[212] The majority believed that in *Watson* it was not the location of the accident, but the interests of the injured plaintiff's state of residence, which compelled the litigation to be tried there.[213] Thus *Seider's* fairness was based on the interests of New York in caring for its injured residents.[214] The court in *Minichiello* noted that this was reflected in the *Seider* requirement that the plaintiff be a resident of New York.[215] The court's finding was bolstered by the limited appearance protection accorded the defendant.[216]

This interpretation of *Watson* is supported by with the Supreme Court's decision in *Crider v. Zurich Insurance Co.*[217] There the Court found the interest of the state in which the injured party resided greater than that of the forum where the injury occurred, because it was to his residence that the injured plaintiff returned, and it was his community that was apt to feel most keenly the impact of the injury.

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211. 410 F.2d 106, *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

212. *Id.* at 109-10.

213. *Id.* at 110.

214. Note, *supra* note 196, at 835. In Barker v. Smith, 290 F. Supp. 709 (S.D.N.Y. 1968), the facts showed that the plaintiff, injured outside of New York, had received significant medical treatment in New York, and that further treatment might be necessary. *Id.* at 713.

Judge Anderson, dissenting in *Minichiello*, disagreed with the comparison between interests in *Watson* and those in a *Seider* action. 410 F.2d at 114. He distinguished *Watson* on the ground that the nonresidents there had, by their own volition, brought themselves within the bounds of jurisdiction of the state where the accident occurred. *Id.* at 115. But this argument concerns the sufficiency of the contacts between the defendant and the forum, not considerations of fairness, which must also weigh the state's interests and the burden that out-of-state litigation imposes upon the plaintiff.

215. 410 F.2d at 110.

216. *Id.* at 111. Now that Shaffer has contradicted the assumptions underlying the limited appearance doctrine, *see* notes 82-88 & accompanying text *supra*, it is worth noting that when the *Seider* action is viewed as a direct action against the insurer, the limited appearance device is not necessary to limit the potential liability stemming from the lawsuit. If the insurer is being sued on the basis of a contractual obligation, contract law will limit the liability of the insurer to the limit specified in the insurer's policy with the insured.

On rehearing en banc, the court in *Minichiello* discussed the burden that *Seider* imposes on the defendant in light of *Harris v. Balk*. The majority felt that this burden was significantly less serious than that found in *Harris*. In *Seider* actions the named defendant is furnished counsel by the insurer. An unfavorable judgment against the defendant causes him no loss since the insurance policy debt could not have been realized in any other way. 410 F.2d at 118. Although *Harris* has been overruled by *Shaffer*, this analysis is still valid because it was the inadequacy of defendant *contacts* within the forum that *Shaffer* scored. The Supreme Court in *Shaffer* never examined the state interest or the burden imposed upon the defendant in *Harris*.

217. 380 U.S. 39 (1965).

Jurisdiction was thus upheld in the state where the plaintiff resided, although the cause of action occurred outside that forum.[218]

Thus, when *Seider* is viewed as a direct action, reaching the insurer while imposing few burdens on the named defendant, the *Shaffer* standard is met. In its application of *International Shoe* to all assertions of jurisdiction, *Shaffer* aimed at eliminating the type of quasi in rem jurisdiction that involves little contact between the defendant and the forum or, for other reasons, results in an unfair choice of forum. Since *Seider* as a direct action involves a defendant doing business in the forum state, it surpasses the hurdle of minimum contacts. The fairness of the choice of forum in the *Seider* action was determined years ago in *Minichiello.* There is no reason to believe that *Minichiello's* finding that the state interests involved in *Seider,* making New York a fair choice of forum, is affected by the *Shaffer* decision. This was recognized by the Eastern District of New York in *O'Connor v. Lee-Hy Paving Corp.*[219] which quoted at length from both *Minichiello* and *Simpson* in upholding *Seider* in a post-*Schaffer* challenge.[220] The language of *Minichiello* and *Simpson* was found to adumbrate *Shaffer,* and to rest, like *Shaffer,* on *International Shoe.*[221] Therefore, if the *Seider* doctrine is recognized to be a direct action aimed to reach the insurer, it should satisfy the new jurisdictional requirements of *Shaffer.*

CONCLUSION

Shaffer's extension of *International Shoe* to all assertions of state court jurisdiction is a landmark in American jurisdiction theory. Justice Marshall's opinion promises to eliminate the special role that property has played in defining state court power. While only time and future decisions can flesh out the jurisdictional scheme established by *Shaffer,* the opinion harkens to the call of commentators to give up the ghost of the res..

This ghost, however, may not be given up so easily. *Shaffer* has already been interpreted as retaining a determinative role for property in granting jurisdiction.[222] Such a role is unjustified. Even a defendant's ownership of real property—which concededly creates substantial

218. *Id.* at 41.
219. 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd,* No. 78-7050 (2d Cir., June 12, 1978).
220. *Id.* at 999-1001.
221. *Id.* at 999.
222. *See* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977).

contacts with the locale—does not by itself give rise to sufficient contacts among the defendant, the forum, and litigation unrelated to the res, to justify the forum's adjudication of such a controversy. Nor should the use of a limited appearance alter this conclusion by lowering the threshold of contacts necessary to sustain jurisdiction. Such an incorporation of the limited appearance into the minimum contacts calculus would only saddle *Shaffer* with a vestige of res-based jurisdiction inappropriate to a jurisdictional standard based on fairness. Use of the limited appearance in this way would mean that it no longer serves as a shield for the defendant, but would serve instead as a sword for the plaintiff.[223] This result would be of questionable constitutionality after *Shaffer,* and of dubious value as a matter of policy. Matters of fairness to the defendant, who would still be required to litigate a claim out-of-state, and of judicial economy argue against the retention of a doctrine which is, after *Shaffer,* of at best marginal value as a jurisdictional device. In sum, therefore, the jurisdictional role of the limited appearance should be greatly reduced, if not entirely eliminated.

Shaffer's emphasis upon the contacts between the defendant and the forum, combined with its weakening of the rationale underlying the limited appearance, calls into question the constitutionality of New York's *Seider* doctrine. *Seider* permits an injured New York resident to bring a personal injury action in New York regardless of the location of the alleged tort, provided that the defendant is insured by a company doing business in New York. Although the *Seider* doctrine exists for the benefit of the plaintiff, its fairness is assured because it does not seriously inconvenience the defendant. This is so because of the realities of litigation: In a *Seider* action, it is the insurer alone who presents the defense and is economically jeopardized by the litigation. Thus the nominal defendant, the insured, need not conduct a defense far from home. Nor is the insurer inconvenienced by the choice of a New York forum, since *Seider* affects only those insurers who are already doing business in New York.

However, a *Shaffer* analysis of the contacts between the *named* defendant and the New York forum would preclude an assertion of jurisdiction in a *Seider* action. The relationship between the liability in-

223. If the limited appearance had been constitutionally required for assertions of quasi in rem jurisdiction, it might have been said that the limited appearance always served as a sword for the plaintiff. Prior to *Shaffer,* however, no Supreme Court ruling had ever imposed such a requirement, and the Court in *Shaffer* passed up an opportunity to decide the case before it on just that point.

surance policy and the controversy does not aid jurisdiction because it does not indicate any expectation of the insured defendant to benefit from New York protection of his interest in the property. Only when *Seider* is viewed as a direct action against the insurance company is the *Shaffer* minimum contacts test met. The requirement in *Seider* that the insurer be present in the state, and New York's interest in the welfare of its injured citizens, together provide that contact between the insurer-defendant and the New York forum that is necessary for jurisdiction. If viewed as an action deriving from an implied contractual term benefitting the plaintiff, a third party, the direct action against the insurer is contractually limited in scope to the face amount of the insurance contract. This formulation of the direct action thus eliminates the need for the limited appearance in *Seider* actions.

Despite assertions to the contrary, there is no statutory provision precluding the creation of a direct action in New York. Section 167 of the New York Insurance Law provides for a limited form of direct action in favor of injured plaintiffs. By focusing on the limitations on that statutory cause of action, some courts and commentators have said that the judiciary cannot expand upon the statutorily-created existing direct actions.[224] This view, however, ignores the absence of any specific prohibition of judicial expansion of the direct action, the liberalizing intent behind section 167, and inherent powers of common law courts to develop new causes of action.

Viewing *Seider* as authorizing a direct action, therefore, serves two purposes. First, it assures the constitutionality of the doctrine after *Shaffer*. Second, by allowing the courts to base jurisdiction upon the presence of the insurer in New York, rather than that of the insurance contract, the direct action theory forgoes any reliance upon the presence of a res for its assertion of jurisdiction, harmonizing *Seider* with the philosophy underlying *Shaffer*.

Although *Shaffer*'s primary impact is on the ability of state courts to obtain jurisdiction over a controversy, it also affects traditional procedural due process requirements for foreign attachments. *Shaffer* casts doubt upon any future reliance upon *Ownbey v. Morgan* for the constitutionality of pre-judgment attachment procedures affording few safeguards for the defendant. Instead, *Shaffer* indicates that the *Mitchell v. W.T. Grant* procedural safeguards are probably necessary

224. *See* note 171 *supra.*

when a defendant's property is attached.[225] If this is the case, *Shaffer* will result in greater protection for nonresident defendants whose property is subject to attachment; and more uncertainty and cost to plaintiffs who attempt to acquire *in rem* jurisdiction, since the plaintiff will need to show the existence of minimum contacts at a prompt post-seizure hearing.

Shaffer v. Heitner makes the notion of fairness paramount in the exercise of state court jurisdiction. No longer is power over the res sufficient to justify the assertion of in rem jurisdiction. All assertions of that power, including New York's *Seider* doctrine, will survive only if they are deemed fair under the due process standards of *International Shoe* and its progeny. Some doctrines based upon old notions of in rem power, such as the limited appearance and the attachment of property as a device to obtain jurisdiction, may leave vestigal traces upon the corpus of jurisdictional practice. By and large, however, the ghost of the res will probably relinquish its hold on the living law, and pass at last into the domain of legal history.

MARK F. FLESCHER
DENNIS P. HARKAWIK

225. In this way, *Shaffer* buttresses, Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976), which required these safeguards.