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Retracting the Long Arm: World-Wide Volkswagen Corp. v. Woodson and Rush v. Sauchuk

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CASENOTES

Retracting the Long Arm: *World-Wide Volkswagen Corp. v. Woodson*[1] and *Rush v. Savchuk*[2] — Less than ten years after the ratification of the fourteenth amendment the Supreme Court of the United States in *Pennoyer v. Neff*[3] held that the due process clause prevented state courts from exercising jurisdiction over defendants who did not have some association with the forum state.[4] Specifically, the *Pennoyer* Court required that a defendant have some physical connection with the state before that state's courts could act.[5] This requirement could be met in either of two ways. First, jurisdiction would inure in any state where the defendant was present to receive process.[6] Second, wherever a defendant's property could be found, a state could attach it and render a judgment against the defendant to the extent of its value.[7]

In the years following *Pennoyer*, however, revolutions in commerce and transportation put increasing strain on the rigid requirement that either the person or property of the defendant be present within a state before jurisdiction could be exercised.[8] To accommodate the *Pennoyer* rule to new realities, several legal fictions extended jurisdiction to persons and things not actually present in the forum. For example, with the advent of the automobile, non-resident motorists causing tortious injury were deemed to have consented to the state's jurisdiction through the use of the state's highways.[9] Likewise, foreign corporations became subject to suit if they were "doing business" in the state.[10]

Ultimately, the doctrine of *Pennoyer* gave way to a more flexible approach, requiring only that a state have "minimum contacts" with both the defendant and the subject of the litigation in order to exercise jurisdiction.[11] Under this approach, first announced in *International Shoe Co. v. Washington,*[12] a requisite

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[1] 444 U.S. 286 (1980).

[2] 444 U.S. 320 (1980).

[3] 95 U.S. 714 (1878).

[4] *Id.* at 733.

[5] *Id.* at 724.

[6] *Id.*

[7] *Id.*

[8] *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

[9] *E.g.,* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (sustaining jurisdiction over a non-resident motorist, who caused tortious injury in the state but who was not present to receive process, on the theory that he had consented to jurisdiction through his use of the highways).

[10] *E.g.,* Washington v. Superior Court, 289 U.S. 361, 356-66 (1933) (sustaining *in personam* jurisdiction over a corporation "doing business" in the forum by holding that the corporation through its activities implicitly had given its consent both to the jurisdiction of the state courts and to the appointment of the secretary of state as its agent to receive process). A third example of a jurisdiction expanding legal fiction is Harris v. Balk, 198 U.S. 215, 224 (1905) (sustaining *quasi in rem* jurisdiction by attaching a debt owed to the defendant by a person present in the forum on the theory that a debt travels with the debtor).

[11] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See also* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (applying *International Shoe* to action *in rem* as well as actions *in personam*).

[12] 326 U.S. 310 (1945).

contact existed if the defendant had a sufficient association with the forum to make it reasonable and just for the court to entertain the suit.[13] The minimum contacts rule involved a balancing test in which the adequacy of the relationship between a defendant and the state was measured by weighing various factors that indicated the overall fairness of permitting state court jurisdiction.[14] It was a test that examined closely the reasonable expectations of the defendant. In a close case factors that might come into play to determine whether the defendant's relationship with the forum was adequate to support jurisdiction included: the relative convenience or inconvenience to the defendant of having to litigate before a foreign tribunal,[15] the overall convenience of the forum for all interested parties,[16] and the interest of the forum state in adjudicating the dispute.[17] If examination of these issues suggested that jurisdiction was reasonable and just, then there was no constitutional impediment to the state court proceeding with the case.[18] This test greatly extended the reach of state judicial power. It allowed a state to exercise jurisdiction over defendants who neither were present nor owned property in the state.[19]

Two cases recently decided by the Supreme Court, however, appear to restrict the scope of the minimum contacts test somewhat by shifting the focus from fairness to considerations of interstate federalism.[20] In *World-Wide Volkswagen Corp. v. Woodson*[21] and *Rush v. Savchuk*[22] the Court declared that even where the exercise of jurisdiction is entirely fair, a state tribunal nevertheless might lack the power to render a valid judgment.[23] The Court indicated that in order to insure an orderly administration of the laws it is essential that the judicial power of the states not encroach excessively on the coextensive authority of sister states.[24] Complete reliance on the *International Shoe* test of fairness as the measure of jurisdictional power, the Court suggested, often did not narrow sufficiently the number of possible forums, and, therefore, left potential defendants unable to predict where they might be subject to suit.[25] To combat this uncertainty, the Supreme Court indicated that before determining whether a contact is adequate to make jurisdiction fair, lower courts should decide first whether an assertion of jurisdiction comports with our system of federal

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[13] *Id.* at 316. *See also* Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952).

[14] *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[15] *See* Kulko v. California Superior Court, 436 U.S. 84, 97 (1978).

[16] *See* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950).

[17] Kulko v. California Superior Court, 436 U.S. 84, 98 (1978).

[18] *See id.* at 91.

[19] *See, e.g.*, McGee v. International Life Ins. Co., 356 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). In response to this expansion of jurisdiction, many states enacted "long arm" statutes, which specified various events and transactions that would be regarded as contacts. F. JAMES & G. HAZARD, CIVIL PROCEDURE 632 (2d ed. 1977).

[20] See text at notes 199-204 *infra*.

[21] 444 U.S. 286 (1980).

[22] 444 U.S. 320 (1980).

[23] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980); Rush v. Savchuk, 444 U.S. 320, 332-33 (1980).

[24] 444 U.S. at 293.

[25] *Id.* at 293-94.

government.[26] That is, lower courts should initially determine whether the exercise of state power will unreasonably interfere with the interests of other jurisdictions.

The establishment of this threshold inquiry is a significant departure from the approach in previous minimum contacts cases. In earlier cases all factors that were deemed relevant to a determination of the fairness of jurisdiction were balanced against one another in order to reach a decision. Such a balancing generally involved weighing the interests of the forum and the plaintiff in allowing jurisdiction against the inconvenience of the forum to the defendant.[27] In *World-Wide* and *Rush*, however, the need for order and predictability in a federal system was singled out as the preeminent consideration in this balancing of interests.[28] If this factor was not satisfied, all other inquiries became immaterial. Unless a defendant acted in a manner that had a direct and definite impact within the forum state, jurisdiction was foreclosed. No longer could a jurisdictional claim be rested upon an indirect effect within the forum along with an assertion that jurisdiction was fair because of other factors.

This casenote will examine the shift made by the Court in *World-Wide* and *Rush*. Toward this end, the casenote will first explore the evolution of the minimum contacts rule from *International Shoe* to *World-Wide* and *Rush*. Through this discussion it will be shown that the minimum contacts rule was conceived as, and until recently continued to be, a rule of substantial breadth, evaluating jurisdictional claims by balancing a variety of considerations to determine whether jurisdiction was fair. Following this overview, the Court's holdings in *World-Wide* and *Rush* will be examined. These cases, it will be demonstrated, expose a significant narrowing of the minimum contacts rule by placing greater emphasis on concerns of federalism at the expense of overall fairness to the parties. Finally, it will be argued that this change in the rule is unwise because in not balancing all of the relevant factors, it may lead to the denial of jurisdiction under circumstances that may work a substantial hardship against the plaintiff while not serving any interest of the defendant.

I. In Search of Fair Play and Substantial Justice: The Evolution of a Balancing Test

The minimum contacts rule as originally propounded in *International Shoe Co. v. Washington* stated simply "that in order to subject a defendant to a judgment . . . he [must] have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend the 'traditional notions of fair play and substantial justice.' "[29] In the course of the *International Shoe* opinion, the Court offered no substantive definition of a minimum contact. Rather, it stressed the need for flexibility in determining the adequacy of contacts in a given case.[30] The quality and nature of the contacts were to be evaluated in

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[26] *Id.*

[27] *Id.* at 292.

[28] *Id.* at 294.

[29] International Shoe Co. v. Washington, 326 U.S. 311, 316 (1945).

[30] *Id.* at 319.

relation to other factors indicating the overall fairness of proceeding in the forum.[31] Thus, while a state with utterly no relations with a defendant would be barred absolutely from exercising its judicial power over that defendant, a state with some minimal contact would have its jurisdictional authority determined by the overall fairness and reasonableness of permitting its courts to adjudicate the dispute.[32] As a result, a minimal contact that sustained jurisdiction in one case may, in a different factual and legal setting, fail to provide a fair basis for allowing the court to proceed.

Exactly how considerations of fairness were to be balanced against the quality of the contact, however, remained unclear after *International Shoe.* Subsequent cases established a pattern. These cases showed that the Court was willing to extend traditional concepts of jurisdiction considerably where it believed the exercise of jurisdiction was reasonable and fair.[33] The breadth of the balancing approach espoused in *International Shoe* and its progeny perhaps is illustrated best in *McGee v. International Life Insurance Co.*[34] The jurisdictional controversy in *McGee* arose out of a suit brought by the beneficiary of a life insurance policy against the insurance company. The defendant, International Life Insurance Company, had refused to pay off the policy because it claimed the insured had committed suicide.[35] The beneficiary filed suit in California, her domicile, as well as the domicile of the deceased.[36] International Life responded by challenging the jurisdiction of the California courts. The company argued that as a Texas corporation with no offices or agents in California, it had no cognizable ties with the forum. In fact, so far as the record showed, this policy, which had been solicited through the mail pursuant to a reinsurance agreement with the deceased's original insurer, was all the business International Life had ever done in California.[37] Nevertheless, the California trial court held for the plaintiff on both the jurisdictional and substantive issues.[38]

When the case came before the United States Supreme Court, it upheld the state court.[39] The Supreme Court concluded that the use of the mail to solicit the policy in California, to deliver the contract there, and to receive premiums from the insured, although a weak contact, nevertheless was sufficiently strong so as not to offend traditional notions of fair play and substantial justice.[40] In reaching this decision, the Court balanced a variety of factors. With regard to those factors favoring jurisdiction, the Court focused on the

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[31] *Id.*

[32] *Id.* See also text at notes 11-19 *supra.*

[33] *See, e.g.*, Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648-49 (1950).

[34] 355 U.S. 220 (1957).

[35] *Id.* at 222.

[36] *Id.* at 221, 223.

[37] *Id.* at 221-22.

[38] *Id.* at 221.

[39] *Id.* at 223. The case came before the Supreme Court as a result of the Texas courts' refusal to enforce the judgment. *Id.* at 221.

[40] *Id.* at 222-23.

strong interests of both the plaintiff and California in having the claim adjudicated in California.[41] Particularly, the Court noted that in many cases where claims were small, if the plaintiff did not have a local forum the costs of litigation might preclude the plaintiff's pursuit of the action.[42] In examining factors that weighed against jurisdiction, the Court discounted any inconvenience to the defendant as a result of its being held amenable to suit in California.[43] It deemed any possible hardship on the defendant to be inconsequential because the due process requirements of notice and adequate time to prepare a defense had been observed.[44] Additionally, the Court rejected the defendant's claims that jurisdiction could not be sustained fairly because the California statute establishing jurisdiction was not enacted until after it had entered into the insurance contract.[45] Thus, in *McGee* although the contact between the defendant and the forum was slight, jurisdiction was sustained because under all the circumstances it was deemed to be fair at the time the litigation began.

Later in the same term, however, the Court considerably narrowed the balancing test. In *Hanson v. Denckla*,[46] the Court in a 5-4 decision held that in order to sustain jurisdiction it must be established that the defendant engaged in some activity that the defendant reasonably should have recognized would give the forum jurisdiction over the immediate dispute.[47] Under *Hanson,* therefore, the critical issue shifted from whether jurisdiction was fair at the time the action was brought to whether jurisdiction was fair at the time the defendant established contact with the forum. Specifically, jurisdiction would lie only where the defendant had reason to believe that its behavior was exposing it to the judicial power of the forum.[48]

In *Hanson*, like *McGee*, the plaintiff argued that jurisdiction over nonresidents was permissible because of business transactions conducted by mail between the defendants and persons residing in the forum.[49] The Supreme Court in *Hanson*, however, found that the due process clause prohibited jurisdiction.[50] The dispute in the case centered upon the validity of an inter vivos trust established in Delaware at a time when the grantor was a Pennsylvania domiciliary.[51] Subsequently, the grantor moved to Florida where she received trust income and from time to time conducted trust business with the Delaware trustees by mail.[52] When the grantor died the residuary legatees under her will

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[41] *Id.* at 223.

[42] *Id.*

[43] *Id.* at 224.

[44] *Id.*

[45] *Id.* Defendant argued that the statute impaired the obligation of contract, but the majority brushed this argument aside, observing that the statute was only "remedial, in the purest sense of that term," and that it in no way impaired defendant's substantive rights. *Id.*

[46] 357 U.S. 235 (1958).

[47] *Id.* at 253.

[48] *Id.*

[49] *Id.* at 250, 252.

[50] *Id.* at 254-55.

[51] *Id.* at 238-40.

[52] *Id.* at 238-39, 252.

brought an action in the Florida courts seeking to have the Delaware trust declared invalid so that the res would become part of the residuary estate.[53] Florida accepted jurisdiction and invalidated the trust.[54]

The Supreme Court reversed the holding of the Florida courts on the ground that there was no basis for jurisdiction.[55] It held that although certain contacts in this case were comparable to those in *McGee*,[56] these contacts could not support jurisdiction because they did not provide the defendants with reasonable notice that their activities exposed them to Florida jurisdiction.[57] Such notice, deemed essential to meet due process requirements, could have been achieved, the Court stated, either through stronger contacts between the forum and the defendants,[58] or through a showing that the state had a "manifest interest" in adjudication of the dispute.[59]

Although the Court asserted that *Hanson* was consistent with *McGee*, it failed to harmonize completely certain aspects of the broad fairness inquiry used in *McGee* with the narrower approach employed in *Hanson*. A subtle shift in the contacts test of both timing and scope evidently had taken place. In *McGee* the issue was whether at the time the action was instituted jurisdiction could be maintained fairly.[60] In *Hanson*, the inquiry was narrowed. It focused exclusively on whether the defendant could fairly expect to be exposing itself to the jurisdiction of the forum at the time the alleged contact was established.[61]

Despite this refinement of the issue in *Hanson*, the flexibility of the contacts rule was not seriously impaired. State courts continued to assess jurisdictional claims by balancing factors related to the overall fairness of litigating in the forum, reasoning that this inquiry was a central consideration in determining what the defendant's expectations should have been. For example, in *Gray v. American Radiator and Standard Sanitary Corp.*,[62] the Illinois Supreme Court sustained jurisdiction over an Ohio defendant who had sold defective valves to a Pennsylvania manufacturer of water heaters. The contact with the forum was established because the water heater manufacturer in turn had sold a water heater to an Illinois resident.[63] When the water heater exploded, allegedly because of the valves, the court ruled that an action against the valve manufacturer for injuries sustained by the purchaser could be maintained in Illinois because it was foreseeable that a water heater containing the valves would be sold in Illinois.[64] Implicit in this decision is the Illinois court's conclusion that if the defendant could foresee the use of its valves in Illinois, it reasonably should

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[53] *Id.* at 240.

[54] *Id.* at 242-43. The residuary legatees asserted that the grantor's exercise of her power of appointment was ineffective and that the property therefore should pass to them. *Id.*

[55] *Id.* at 256.

[56] *Id.* at 253.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 252.

[60] See text at notes 39-45 *supra*.

[61] See text at notes 55-59 *supra*.

[62] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[63] *Id.* at 438, 176 N.E.2d at 764.

[64] *Id.* at 442, 176 N.E.2d at 766.

expect to be subject to suit there. Presumably, such an expectation would arise because of the plaintiff's and Illinois's interest in having an Illinois forum available.

Similarly, in *Feathers v. McLucas*,[65] a New York action, jurisdiction was allowed where the defendant, a Kansas manufacturer of tank trailers, sold a trailer to a Pennsylvania shipper and the trailer exploded in New York.[66] The court reasoned that because of the mobility of the product, it was foreseeable that defendant's activities would cause harm in the forum.[67] Again, implicit in this holding is the court's conclusion that the foreseeability of harm was sufficient to raise the reasonable expectation of jurisdiction over the defendant. Because the defendant recognized that the product might travel to a foreign forum, it was also deemed to have recognized that it might be subject to suit in a foreign forum, provided it was fair. Thus, even after *Hanson* state courts continued to exercise their jurisdictional powers expansively.[68]

Recently, however, the Supreme Court has sought to curtail this liberal reading of *Hanson* and has utilized the distinction between the *McGee* test, and the *Hanson* test, to deny jurisdiction in certain cases. This effort by the Court presaged the modified minimum contacts rule later espoused in *World-Wide* and *Rush*. The landmark case of *Shaffer v. Heitner*,[69] in which the minimum contacts approach was first applied to an action brought under a *quasi in rem* theory, is a good example of this development.[70]

Shaffer involved a shareholders' derivative action brought by a shareholder of a Delaware corporation seeking to obtain jurisdiction over the directors of the corporation in Delaware. Because none of the directors resided in Delaware the plaintiff sought jurisdiction *quasi in rem* by sequestering the directors' stock in the corporation, which under Delaware statute was deemed to be constructively present in the state.[71] The Delaware courts accepted jurisdiction on this basis.[72] The defendant appealed this ruling to the United States Supreme

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[65] 21 A.D.2d 558, 251 N.Y.S.2d 548 (1964).

[66] *Id.* at 558-59, 251 N.Y.S.2d at 551.

[67] *Id.* at 560, 251 N.Y.S.2d at 551.

[68] *E.g.*, Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818, 822-23 (4th Cir. 1972), *cert. denied sub nom.* Durell Prod., Inc. v. Ajax Realty Corp., 411 U.S. 966 (1973); Sheridan v. Cadet Chem. Corp., 25 Conn. Supp. 17, 22-23, 195 A.2d 766, 768-69 (1963); Duignan v. A.H. Robins Co., 98 Idaho 134, 136-37, 247 N.W.2d 375, 377-78(1977); Andersen v. National Presto Indus., Inc., 257 Iowa 911, 918-19, 135 N.W.2d 639, 643 (1965); Ehlers v. United States Heating & Cooling Mfg. Corp., 267 Minn. 56, 61-62, 124 N.W.2d 824, 827 (1963); Roy v. North American Newspaper Alliance, Inc., 106 N.H. 92, 97-98, 205 A.2d 844, 847 (1964). *Cf.* Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 258-59, 413 P.2d 732, 735-36 (1966) (holding that *Hanson* did not even require that the defendant foresee that his action might have an impact in the forum). *See also* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 494-95, 500 (1971) (supporting, in dictum, jurisdiction where the defendant dumped pollutants in a stream outside the forum, Ohio, but where through the action of the water the pollutants ultimately caused damage in Ohio).

[69] 433 U.S. 186 (1977).

[70] An equally good example of this move by the Court is Kulko v. California Superior Court, 436 U.S. 84 (1978). For a brief description of *Kulko*, see note 138 *infra*.

[71] Shaffer v. Heitner, 433 U.S. 186, 189-90 (1977).

[72] Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976).

Court arguing that the minimum contacts rule should be applied to *quasi in rem* actions, and that here the requisite contacts were lacking.[73]

Recognizing the possibility that the Supreme Court might accept the defendant's arguments and apply a contacts analysis, the plaintiff argued before the Court that the defendants' acceptance of positions as officers and directors of the corporation provided sufficient contact with the forum to make jurisdiction fair.[74] This argument was based upon the assertion that Delaware law conferred substantial benefits and responsibilities upon persons in top management positions and that the state had a substantial interest in adjudicating disputes between the managers and shareholders of a Delaware corporation.[75] Therefore, the plaintiff argued that the defendants, by assuming their respective positions in the corporation, performed acts of such a nature and quality as to have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,"[76] and under *Hanson* submitted themselves to Delaware jurisdiction.[77]

The Supreme Court first decided that the minimum contacts rule applied and that the constructive presence of the sequestered property in Delaware alone did not provide the contacts necessary to establish jurisdiction. The Court then proceeded to examine the alternative basis for jurisdiction urged by by the plaintiff.[78] It rejected plaintiff's assertion that the defendants' acceptance of positions as fiduciaries of a Delaware corporation was a purposeful act sufficient to sustain jurisdiction.[79] The Court determined that even if it were to accept the plaintiff's entire argument, it could not permit Delaware to exercise jurisdiction because the state interests described by the plaintiff were not sufficiently obvious to put the defendants on notice that their acts subjected them to jurisdiction.[80]

The Court observed that the arguments presented by the plaintiff in favor of granting jurisdiction rested upon the contention that there existed a strong state interest in adjudicating claims against officers and directors of Delaware corporations.[81] The Delaware sequestration statute, through which plaintiff was asserting jurisdiction, however, authorized jurisdiction only over shareholders.[82] Because directors need not be shareholders,[83] the Court questioned whether Delaware had expressed a manifest interest in insuring jurisdiction over officers and directors of its corporations.[84] Nevertheless, even assum-

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[73] Shaffer v. Heitner, 433 U.S. 186, 193 (1977).

[74] *Id.* at 213-14.

[75] *Id.* at 214, 215-16.

[76] *Id.* at 216 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[77] Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

[78] *Id.* at 213.

[79] *Id.* at 215-16.

[80] *Id.* at 216.

[81] *Id.* at 214.

[82] *Id.*

[83] In *Shaffer* the plaintiff was able to obtain jurisdiction over only 21 of 28 present and former officers and directors named as defendants because seven defendants owned no stock in the corporation. *Id.* at 191-92, 214.

[84] *Id.* at 214.

ing a substantial state interest, the Court held that the plaintiff had failed to show that jurisdiction was fair.[85] The only factor the plaintiff offered in support of allowing jurisdiction, aside from Delaware's interest in the litigation, was defendants' acceptance of the benefits provided to corporate fiduciaries under Delaware law.[86] This factor and Delaware's interest in the action, however, were not sufficient to outweigh defendants' interest in avoiding suit in a forum with which they had so little contact.[87] These factors did not, in view of all the circumstances, provide the defendants with a reasonable expectation that accepting a position with a Delaware corporation exposed them to suit in Delaware.[88]

If the *Shaffer* Court had utilized the contacts analysis developed in *McGee*, examining overall fairness at the time the action was instituted, it seems likely that it would have sustained jurisdiction. In *Shaffer* the principal obstacle to Delaware jurisdiction was the lack of an express state interest in exercising jurisdiction over corporate fiduciaries.[89] Because there was no clear interest, the Court reasoned, the defendants reasonably could not recognize that their acceptance of positions as officers and directors of a Delaware corporation subjected them to Delaware jurisdiction.[90]

In *McGee*, however, there was also no express state interest to put the defendant on notice. No California statute or judicial decision notified it that by soliciting a single reinsurance contract in California it was exposing itself to the jurisdiction of that state.[91] It was not until one year after the contract was formed that California enacted the Unauthorized Insurers Process Act expressly establishing jurisdiction in cases like *McGee*.[92] This statute, therefore, did not provide the defendant with notice at the time the act creating jurisdiction was committed. In *McGee*, such notice was not necessary.[93] It was only necessary that jurisdiction be fair at the time the action was begun.

If this standard had been applied to *Shaffer*, the case for allowing jurisdiction would have been strong. The Delaware statute provided the defendants in *Shaffer* with more warning regarding the possibility of suit in the forum than the California statute relied on in *McGee*. The Delaware statute at least provided notice to defendants that the state could assert jurisdiction over a stockholder if it could establish the constitutionally required contacts. The California act, having been passed after the fact, did not even provide this much notice. In *McGee* the lack of notice was outweighed by the forum's interest in providing its residents with an effective means of redress against foreign insurers who refuse to pay claims.[94] The Court recognized that if the claimant were forced to litigate in a distant forum, the added hardship, as a practical matter, might

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[85] *Id.* at 215.
[86] *Id.* at 215-16.
[87] *Id.* at 216.
[88] *Id.*
[89] See text at notes 79-85 *supra.*
[90] *Id.*
[91] McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 223.

foreclose pursuit of the litigation.[95] Similar problems confronted the plaintiff in *Shaffer*. Because the directors and officers lived in a number of jurisdictions,[96] if they all could not be sued together in Delaware, there may be no state forum where a single action could be brought against all of the defendants.[97] Under *McGee*, Delaware's interest in the litigation seemingly would have overcome the lack of notice. In *Shaffer*, however, it was not enough that the state's interest outweighed the lack of notice.[98] Under the *Hanson* approach the state's interest actually had to provide notice to the defendants that in accepting a position as a corporate fiduciary they were submitting themselves to Delaware jurisdiction.[99] On balance, the *Shaffer* Court concluded that Delaware's interest in the case did not meet this test.[100]

In reaching this conclusion, *Shaffer* seemed to apply the *Hanson* test more strictly than had earlier cases, which allowed jurisdiction on the basis of the forum's interest in the litigation.[101] *Shaffer* placed more weight on the defendant's interest at the expense of the forum's interest, and as a result, jurisdiction was denied. *Shaffer* did not obviously suggest, however, that a strong state interest could never provide sufficient notice to overcome a weak contact.

It was not until *World-Wide* and *Rush* that the Court declared that a forum's or a plaintiff's interest in allowing jurisdiction could never overcome a weak contact.[102] In *World-Wide* and *Rush* the Court held that where a defendant acted in a manner that he recognized *might* have an impact on a foreign forum, the contact between the defendant and the forum was too weak to sustain jurisdiction in that forum under any circumstances.[103] To sustain jurisdiction, the defendant must have committed an act that he reasonably should have recognized *would* have an impact on the forum.[104] Only where such a contact is established should a court proceed to determine whether jurisdiction is fair.[105]

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[95] *Id.*

[96] Shaffer v. Heitner, 433 U.S. 186, 190-191 (1977).

[97] A shareholder still might be able to bring an action in federal court under the diversity jurisdiction, 28 U.S.C. § 1332 (1976), but there are several potential problems with this approach. First, § 1332 requires that at least $10,000 be in controversy. *Id.* Second, there must be complete diversity of citizenship; if the plaintiff and *one* of the defendants are from the same state, § 1332 does not apply. *Id. See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 37 (2d ed. 1977). Finally, Congress is apparently seriously contemplating the abolition of diversity jurisdiction. *See* H.R. 2202, 96th Cong., 2d Sess. (1980); S.679, 96th Cong., 2d Sess. (1980).

[98] Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

[99] *Id.* at 215-16 (citing Hanson v. Denckla, 357 U.S. 235, 254 (1958)).

[100] Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

[101] *See, e.g.*, Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 432, 444, 176 N.E.2d 761, 767 (1961); Feathers v. McLucas, 21 A.D.2d 558, 560, 251 N.Y.S.2d 548, 551 (1964).

[102] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Rush v. Savchuk, 444 U.S. 320, 332-33 (1980).

[103] *Id.*

[104] See text at notes 138 & 183 *infra*.

[105] Rush v. Savchuk, 444 U.S. at 332-33.

II. FEDERALISM OVER FAIRNESS: *WORLD-WIDE VOLKSWAGEN CORP. V. WOODSON* AND *RUSH V. SAVCHUK*

A. *The Opinions of the Court*

The jurisdictional dispute in *World-Wide Volkswagen Corp. v. Woodson* arose out of a product-liability action. In September 1977, while plaintiff Kay Robinson and her two children were driving through Oklahoma on the way from their former residence in New York to a new home in Arizona, their car was struck from the rear by another vehicle.[106] The gasoline tank of the Robinsons' Audi automobile ruptured causing a fire in the interior of the car.[107] All three passengers were severely burned.[108] The Robinsons brought a product-liability action against the car's manufacturer, Audi NSU auto Union Akliengesellshaft alleging that the injuries they suffered were the result of the defective design and placement of the Audi's gasoline tank and fuel system.[109] Additionally, under Oklahoma law, which places distributors and retailers in the position of the manufacturer, the plaintiffs joined the importer, Volkswagen of America, Inc.; the regional distributor, World-Wide Volkswagen Corporation; and the retail dealer, Seaway Volkswagen, Inc., as defendants.[110]

Two of the four defendants, World-Wide and Seaway, responded to the suit by entering a special appearance.[111] They claimed that any attempt by the Oklahoma courts to exercise jurisdiction over them would violate the due process clause of the fourteenth amendment. Both corporations contended that they had no dealings in or with the state that could constitute the "minimum contacts" necessary to sustain *in personam* jurisdiction.[112] Evidence presented to the trial court showed that the Robinsons had purchased the car from Seaway in 1976, one year before the accident.[113] The sale took place in New York state, where Seaway was incorporated and had its sole place of business and where the Robinsons resided at the time.[114] World-Wide, which supplied the Robinson's Audi to Seaway, also was incorporated in New York and had its offices there, although it distributed vehicles, parts, and accessories to dealers in New

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[106] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 288.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Petitioner's Brief for Certiorari at 32, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[111] 444 U.S. at 288. Volkswagen of America also entered a special appearance in the Oklahoma District Court, but did not pursue its jurisdictional defense in the Supreme Court of Oklahoma. *Id.* at 288 n.3. Thus while Volkswagen of America and Audi are still defendants in the case pending before the trial court, they were not parties to the jurisdictional dispute decided by the Supreme Court of the United States.

A special appearance occurs when a defendant comes before the court solely to challenge the power of the court to assert jurisdiction over his person. No other issues may be considered in a special appearance. F. JAMES & G. HAZARD, CIVIL PROCEDURE 647-48 (2d ed. 1977).

[112] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 288-89.

[113] *Id.* at 288.

[114] *Id.* at 288-89.

Jersey and Connecticut as well as New York.[115] There was no showing that either corporation had any business dealings in or tangentially related to Oklahoma. In fact, with the sole exception of the plaintiff's car, there was no evidence that any automobile sold by either World-Wide or Seway ever entered Oklahoma.[116]

The trial court, however, rejected World-Wide and Seaway's argument, holding that the Oklahoma long-arm statute[117] permitted the exercise of jurisdiction and that the use of such authority would not be inconsistent with the Federal Constitution.[118] Following this ruling, World-Wide and Seaway petitioned the Supreme Court of Oklahoma for a writ of prohibition to prevent respondent trial judge, Charles Woodson, from exercising jurisdiction over them.[119] The Oklahoma high court denied the writ and sustained Judge Woodson's finding of jurisdiction.[120]

In its opinion, the Oklahoma Supreme Court concentrated on fitting the facts of the case to the state long-arm statute and virtually ignored the independent constitutional issue.[121] The court concluded that jurisdiction may be exercised under that portion of the long-arm statute that brings a person causing tortious injury in Oklahoma within the purview of the state courts if that per-

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[115] *Id.*

[116] *Id.* at 289. It should also be noted that Seaway and World-Wide are independent corporations. Their only relations with Volkswagen of America, Audi, or each other are contractual. *Id.*

[117] The portion of the Oklahoma long-arm statute upon which jurisdiction was based provides:

> A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action or claim for relief arising from the person's:
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> . . . .
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> (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

OKLA. STAT. tit. 12, § 1701.03(a)(4) (1980). *See* Woods, *Pennoyer's Demise: Personal Jurisdiction after Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 907-08(1978).

[118] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289 (1980).

[119] *See* World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 352 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

[120] *Id.* at 355.

[121] At the outset of its opinion the court acknowledged that in order to uphold a claim of personal jurisdiction it must determine "whether the exercise of jurisdiction is authorized by statute, and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process." *Id.* at 352-53. Following this introductory pronouncement, however, the court devoted the entire balance of the opinion to the statutory question alone. There is no clearly distinguishable discussion of the constitutional limitations. In writing the opinion for the Supreme Court of the United States, Justice White speculated that this omission probably occurred because the relevant portion of the long arm statute previously had been interpreted as conferring jurisdiction to the full extent permitted by the fourteenth amendment. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 290. *See also* Fields v. Volkswagen of America, Inc., 555 P.2d 48, 52 (Okla. 1976); Carmack v. Chemical Bank New York Trust Co., 536 P.2d 897, 900 (Okla. 1975); Hines v. Clendenning, 465 P.2d 460, 462 (Okla. 1970).

son derives substantial income from goods used in the state.[122] The court reasoned that because of the cost of a single automobile and because of the presence of the plaintiff's automobile in Oklahoma, it reasonably could be inferred that the defendants derived substantial revenue from cars that were from time to time operated in the state.[123] The court also observed that due to the mobility of the product involved, it was foreseeable that such products would be used in Oklahoma, and hence, defendants reasonably could have expected to be subject to suit there.[124] Consequently, the court found no impediment to the exercise of personal jurisdiction over World-Wide and Seaway.[125]

From this holding the Supreme Court of the United States granted certorari to determine whether this interpretation of the Oklahoma long-arm statute was consistent with the due process clause of the fourteenth amendment.[126] In a 6-3 decision, the Court reversed the judgment of the Supreme Court of Oklahoma and held that World-Wide and Seaway "have no 'contacts, ties or relations' with the State of Oklahoma" sufficient to support constitutionally an assertion of personal jurisdiction.[127] In reaching this decision, the majority opinion, written by Justice White,[128] outlined the broad principles involved in deciding the constitutional propriety of a state court's decision to exercise jurisdiction, and then applied these principles to the facts of the *World-Wide* case.

In reviewing the case law surrounding the minimum contacts rule, the Court observed that the purpose of the restrictions imposed by the due process clause and the minimum contacts rule is (1) to protect defendants from the hardships of litigating in an inconvenient or inappropriate forum, and (2) to ensure that state courts will not attempt to exercise their power so as to infringe upon the sovereignty of other states.[129] With respect to the first consideration, the Court noted that defendant's interest in avoiding suit in an inappropriate forum is not protected absolutely. It must be balanced against other interests, such as the forum state's interest in adjudicating the dispute, the plaintiff's in-

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[122] World-Wide Volkswagen Corp. v. Woodson, 585 P.2d at 354-55. For the text of that portion of the long arm statute relied on by the court, see note 117 *supra*.

[123] 585 P.2d at 354.

[124] *Id.* Although the court failed to explain why it is important that the petitioners could reasonably foresee the use of the automobile in Oklahoma, it must be presumed that this is a reference to the constitutional requirement that the defendant have "reason to expect to be haled before" the courts of that state. Shaffer v. Heitner, 433 U.S. 187, 216 (1977). *See also, e.g.*, Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978).

The court also rejected an argument that the state might assert jurisdiction under OKLA. STAT. tit. 12, § 1701.03(a)(3) (1980), which provides for personal jurisdiction over persons "causing tortious injury in this state by an act or ommission in this state . . . ,"the court concluding that it was not possible to construe the defendants' allegedly tortious acts or omissions as having occurred in Oklahoma. World Wide Volkswagen Corp. v. Woodson, 585 P.2d at 353-54.

[125] 585 P.2d at 354-55.

[126] World-Wide Volkswagen Corp. v. Woodson, 440 U.S. 907 (1979).

[127] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 299.

[128] *Id.* at 287. Justice White's opinion was joined by Chief Justice Burger and Justices Stewart, Powell, Rehnquist, and Stevens.

[129] *Id.* at 291-92.

terest in obtaining convenient and satisfactory relief, shared interest in judicial efficiency, and the furtherance of fundamental substantive social policies.[130] As to the second factor, the Court saw the limitations placed upon state judicial power by considerations of federalism as absolute. No countervailing factor could alter its requirements.[131] Where a contact between the defendant and the forum is weak, concern for the maintenance of a genuinely federal system of government may foreclose jurisdiction irrespective of other fairness interests.[132]

Applying this second factor to the facts of *World-Wide*,[133] the Court found that jurisdiction could not be sustained. Under the Court's interpretation of the Oklahoma long-arm statute two types of contact, present here, might have established jurisdiction: (1) tortious injury caused in Oklahoma by the defendants through foreseeable circumstances,[134] or (2) substantial income accruing to the defendant from activities in the forum.[135] Both of these contacts, however, were rejected as too weak to serve as bases for jurisdiction under the due process clause.[136]

With respect to the first potential contact the Court held that foreseeability of tortious injury alone was insufficient.[137] The defendants must purposefully avail themselves of the forum's privileges.[138] It is not enough that the defendants' acts *may* have an impact on the forum. The defendants must have committed acts that they anticipated *would* have an effect on the forum.[139] The Court asserted that the orderly administration of the laws demanded a stricter standard that would permit potential defendants to structure their behavior so as to be able to avoid suit in a particular jurisdiction.[140] The unilateral act of the plaintiff in bringing goods sold by the defendant into the state, even when

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[130] *Id.* at 292.
[131] *Id.* at 294.
[132] *Id.*
[133] *Id.* at 295.
[134] *Id.* at 295-96.
[135] *Id.* at 298.
[136] *Id.* at 299.
[137] *Id.* at 297
[138] *Id.*
[139] *Id.* The Court cited two cases in support of this proposition. In both cases, the court asserted, the defendant could foresee the creation of the contact, but jurisdiction was nonetheless denied. First, the Court cited Hanson v. Denckla, 357 U.S. 235 (1958), in which Florida was denied jurisdiction over a Delaware trust and its trustees even though the grantor of the trust had moved to Florida following the creation of the trust and from there she had exercised her power of appointment. *Id.* at 254-55. Second, it referred to Kulko v. California Superior Court, 436 U.S. 84 (1978), in which a woman, after obtaining a divorce, moved from New York, the domicile of the marriage, to California and attempted to obtain legal custody of her daughter through the California courts. In *Kulko* the Court held that jurisdiction may not be obtained over the woman's husband who remained in New York even though he had from time to time sent the child to California to visit her mother. *Id.* at 101. These two cases, however, are not clear support for the position taken by the Court. Up until *World-Wide*, *Hanson* was construed to allow jurisdiction where the contact was foreseeable and jurisdiction was fair. *See* cases cited in note 68 *supra*. In *Kulko*, although the contact was foreseeable, the Court denied jurisdiction because it was not fair. Kulko v. California Superior Court, 436 U.S. 84, 101 (1978).
[140] 444 U.S. at 297.

combined with the defendants' ability to reasonably forsee that plaintiff would do so, was not enough.[141]

As for the contention that jurisdiction can be sustained because World-Wide and Seaway derive substantial revenue from goods used in Oklahoma, the Supreme Court both questioned the factual findings of the Oklahoma courts and rejected their conclusions as to the law. With respect to the facts, the Court found "less than compelling" the inference drawn by the state court that because the Robinsons' automobile had been used in Oklahoma, the petitioners' probably derived substantial income from other cars that operated in the state.[142] Even accepting this inference, the Court held that whatever revenue the defendants might have received because their cars could be driven in Oklahoma was "far too attenuated a contact" to suport *in personam* jurisdiction.[143] Having found no contact sufficient to sustain jurisdiction over World-Wide and Seaway, the Supreme Court reversed the judgment of the Oklahoma court.[144] The Court found it unnecessary to engage in a balancing of interests to determine whether Oklahoma jurisdiction was consistent with due process notions of fairness.[145]

The Court reached a similar result in *Rush v. Savchuk*, a case decided the same day as *World-Wide*. *Rush* also arose out of a tort action involving an automobile accident.[146] The jurisdictional issues involved, however, were distinctly different. *Rush* concerned a single-car accident occurring on January 13, 1972, in the State of Indiana.[147] The plaintiff, Savchuk, was a passenger in the car and sustained serious injuries.[148] At the time of the accident both Savchuk and the driver of the car, defendant Rush, were residents of Indiana, as was the owner of the car, Rush's father.[149] Nearly two and one half years after the accident, Savchuk, who subsequently had moved to Minnesota, filed suit in the state courts of his new domicile.[150] Because Rush appeared to have no contacts with Minnesota that would support *in personam* jurisdiction, Savchuk sought to obtain *quasi in rem* jurisdiction by garnishing Rush's automobile liability insurance policy.[151] Although the policy was issued in Indiana, plaintiff argued that Minnesota nevertheless could garnish the insurer's obligation

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[141] *Id.* at 298.

[142] *Id.*

[143] *Id.* at 299.

[144] *Id.*

[145] *Id.* at 292-93.

[146] Rush v. Savchuk, 444 U.S. 320, 322-23 (1980).

[147] *Id.* at 322.

[148] *Id.*

[149] *Id.*

[150] *Id.* Indiana would have barred a claim by Savchuk against Rush under its guest statute. *Id. See* IND. CODE § 9-3-3-1 (1973). Furthermore, by the time suit had been filed in Minnesota, Indiana's two-year statute of limitations had run. Savchuk v. Rush, 311 Minn. 496, 502 n.5, 272 N.W.2d 888, 891 n.5 (1978).

[151] 444 U.S. at 322. *In personam* jurisdiction is based on having legal authority directly over the defendant's person. Alternatively, jurisdiction may be predicted upon a state's legal authority over property owned by the defendant. Such a proceeding is generally known as an action *in rem*, of which there are three specific types: *in rem*, against all the world; *quasi in rem*, against

to indemnify Rush because Rush's insurance company, State Farm Mutual Automobile Insurance Co. (State Farm), did business in Minnesota.[152]

Rush and State Farm moved to dismiss the complaint for lack of jurisdiction, arguing first that, because Rush had not yet been adjudged liable for Savchuk's injuries, no garnishable debt had arisen as between State Farm and Rush and, second, that, even if a garnishable debt did exist, an assertion of *quasi in rem* jurisdiction based upon such a garnishment was contrary to constitutional due process requirements.[153] The trial judge denied the motion.[154] On appeal to the Supreme Court of Minnesota, the defendant's jurisdictional arguments were again rejected.[155] The state supreme court found that Minnesota law did not require that a debt be due absolutely before it may be garnished,[156] and that the facts of the case constitutionally supported *quasi in rem* jurisdiction.[157]

In deciding the constitutional issue, the Minnesota Supreme Court relied on a theory developed by the New York Court of Appeals in *Seider v. Roth*[158] and *Simpson v. Loehmann.*[159] This theory rested largely upon two legal fictions that were at the time approved by the United States Supreme Court. The first fic-

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specific persons; and *quasi in rem*, attachment. F. JAMES & G. HAZARD, CIVIL PROCEDURE 628-29 (2d ed. 1977). *Rush* was brought on a theory of *quasi in rem*, attachment, in which the forum state seizes property within its borders belonging to the defendant and holds it pending a judgment. Should the plaintiff be successful, the property seized will be used to settle the claim. *Id.* at 629. See also text at note 7 *supra*.

[152] 444 U.S. at 322. Such a claim of jurisdiction is based on a mixture of two theories: (1) a corporation is deemed to be present in a state if it is doing business there, International Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914), and (2) a debt, for jurisdictional purposes, is held to be at all times with the debtor, Harris v. Balk, 198 U.S. 215, 224 (1905). Therefore, because State Farm was doing business in Minnesota, any debt it may have owed to Rush was attachable in Minnesota.

[153] Savchuk v. Rush, 311 Minn. 480, 483, 245 N.W.2d 624, 627 (1976).

[154] *Id.*

[155] *Id.* at 490, 245 N.W.2d at 630.

[156] *Id.* at 484, 245 N.W.2d at 627. In so finding, the court relied on MINN. STAT. § 571.41 subd. 2 (1975) (repealed 1976) which stated in relevant part:

> Garnishment shall be permitted before judgment in the following instances only . . . (2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

Id. The court observed that this provision appeared to be in direct conflict with MINN. STAT. § 571.43 (1975) which reads: "No person or corporation shall be adjudged a garnishee by reason of . . . [a]ny money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency." The court, however, found that § 571.41 controls under MINN. STAT. § 645.26 (1975), because it is more specific in its language. Savchuk v. Rush, 311 Minn. 480, 484-85, 245 N.W.2d 624, 627 (1976). Additionally, the court concluded § 571.41 better served judicial policies favoring the provision of a forum to Minnesota residents and the extension of the state's jurisdiction to the maximum limits permitted by the Constitution. *Id.* at 485, 245 N.W.2d at 628.

[157] *Id.* at 487-88, 245 N.W.2d at 629.

[158] 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966).

[159] 21 N.Y.2d 111, 269 N.Y.S.2d 633, 234 N.E.2d 669 (1967), *rehearing denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319 (1968). The focus in *Seider* was the legality under New York statutes of attaching an insurance debt contingent upon the pending litigation. The constitutionality of such action apparently was assumed. 17 N.Y.2d at 112, 269 N.Y.S.2d at 100,

tion was developed in the case of *Harris v. Balk*[160] in which the court held that for purposes of jurisdiction *in rem,* a debt, as intangible property, travels with the debtor.[161] If a debtor was present in the forum, the debt would be there as well, subjecting it to attachment and the creditor to *quasi in rem* jurisdiction.[162] The second fiction relied upon in these cases was that a corporation was present in a forum when it was doing business there.[163] In *Seider* and *Simpson* the New York court utilized these fictions in the following manner. The court treated the potential liability of an insurer for the tortious injury caused by the insured as a debt owed by the insurer to the insured.[164] Consequently, under the theory of *Harris,* wherever the insurer was present, the insurance proceeds could be attached and the insured subjected to *quasi in rem* jurisdiction.[165] Under the second fiction, an insurance company was deemed to be present wherever it wrote policies.[166] Thus, an insured tortfeasor might be subject to suit wherever his insurance company had a policy in force. This broad jurisdictional theory was subject only to two constitutional restrictions. First, out of considerations of basic fairness, notice had to be given to the defendant,[167] and second, to ensure that the forum had a genuine interest in the adjudication, the plaintiff had to be a domiciliary of the forum. In applying this approach to the facts in *Rush*, the Minnesota court found (1) that the insurer and therefore the debt, were present in the state, (2) that the defendant received adequate notice, and (3) that the plaintiff was a resident of Minnesota. Therefore, the court affirmed the ruling of the trial court that grounds for jurisdiction existed.[169]

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216 N.E.2d at 313. In *Simpson*, a case involving facts similar to *Seider*, the defendant directly attacked the *Seider* rule on due process grounds. 21 N.Y.2d at 308, 287 N.Y.S.2d at 634-35, 234 N.E.2d at 670. Therefore, it is in *Simpson* that the New York Court of Appeals first addressed the constitutionality of a *Seider* attachment.

[160] 198 U.S. 215 (1905).

[161] *Id.* at 224.

[162] *Id.*

[163] *See, e.g.*, Washington v. Superior Court, 289 U.S. 363, 365-66 (1933).

[164] Simpson v. Loehmann, 21 N.Y.2d 305, 310, 287 N.Y.S.2d 633, 636, 234 N.E.2d 669, 671 (1967); Seider v. Roth, 17 N.Y.2d 111, 114, 209 N.Y.S.2d 99, 102, 216 N.E.2d 312, 314 (1966).

[165] *See* cases cited in note 164 *supra.*

[166] Simpson v. Loehmann, 21 N.Y.2d at 311, 287 N.Y.S.2d at 637, 234 N.E.2d at 672; Seider v. Roth, 17 N.Y.2d at 114, 209 N.Y.S.2d at 102, 216 N.E.2d at 314.

[167] Simpson v. Loehmann, 21 N.Y.2d at 309, 287 N.Y.S.2d at 635, 234 N.E.2d at 670. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 307 (1950).

[168] *See* Simpson v. Loehmann, 21 N.Y.2d at 311, 287 N.Y.S.2d at 637, 234 N.E.2d at 672. *See also* Minichiello v. Rosenberg, 410 F.2d 106, 117 (2d Cir. 1968) (interpreting New York law), *aff'd on rehearing en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969). This final requirement is derived from the contacts test of International Shoe v. Washington, 326 U.S. 310, 319-20 (1945). The plaintiffs' residence in the forum along with the fact that the garnishee-insurer was present and regulated by the forum was viewed as creating sufficient contact between the controversy to make the exercise of jurisdiction fair. Simpson v. Loehmann, 21 N.Y.2d 305, 311, 287 N.Y.S. 633, 637, 234 N.E.2d 669, 672 (1967). *International Shoe*, however, stressed the need for contacts between the defendant and the forum, 326 U.S. at 316, not just for contacts between the litigation and the forum. *See* Casenote, 8 B.C. IND. & COM. L. REV. 147, 150-51 (1966).

[169] Savchuk v. Rush, 311 Minn. 480, 490, 245 N.W.2d 624, 630 (1976).

When the case first came to the Supreme Court of the United States on appeal, the judgment of the Minnesota high court was vacated and remanded for further consideration in light of the Court's recent decision in *Shaffer v. Heitner*.[170] *Rush* had been decided on the assumption that the mere presence of a defendant's property in a state was enough to support *quasi in rem* jurisdiction. *Shaffer*, of course, held that all personal jurisdiction cases must be decided by reference to the minimum contacts rule.[171] Although the presence of property owned by the defendant in a forum might in some instances provide minimum contacts, in situations where the property was wholly unrelated to the cause of action and was "present" in the state only on the basis of a legal fiction, that property could not serve as a contact permitting jurisdiction.[172] In *Shaffer* the Court was especially critical of *Harris v. Balk*, in which jurisdiction had been sustained even though the property seized was both unrelated to the suit and present in the forum solely by virtue of a legal fiction.[173] Indeed, to the extent *Harris* was inconsistent with *Shaffer* it was expressly overruled.[174] In relying on *Seider* and *Simpson*, the Minnesota court indirectly rested its holding on *Harris*.[175] As a result, the United States Supreme Court concluded that the Minnesota court erred in its reasoning and that the case should be remanded to give the Minnesota court an opportunity to develop a rationale consistent with *Shaffer*.

On remand the Supreme Court of Minnesota reinstated its earlier judgment, holding that the facts of *Rush* were distinguishable from those of *Shaffer* and *Harris* and that they supported *quasi in rem* jurisdiction.[176] The court found

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[170] *See* Rush v. Savchuk, 433 U.S. 902 (1977).

[171] Shaffer v. Heitner, 433 U.S. 198, 212 (1977).

[172] *Id.* at 208-09.

[173] *Id.*

[174] *Id.* at 212 n.39. In *Harris*, a resident of Maryland, Epstein, had a claim against Balk, a North Carolina resident. 198 U.S. at 216. Harris, also a North Carolina resident, owed money to Balk, so when Harris happened to visit Maryland, Epstein attached Harris' debt to Balk. *Id.* As a result, Harris paid to Epstein the amount of his indebtedness to Balk. *Id.* at 217. When Balk subsequently sued Harris for default, the Supreme Court held that a debt travels with the debtor so that when Harris went to Maryland the debt went too. *Id.* at 221-22. Thus Harris' payment to Epstein represented a discharge of Balk's debt to Epstein and Harris's debt to Balk. *Id.* at 222.

In *Shaffer* the plaintiff sought to obtain *quasi in rem* jurisdiction in Delaware over the directors and officers of a Delaware corporation by sequestering their stock. 433 U.S. 186, 189-90 (1977). Under Delaware law, stock of a Delaware corporation, even if not physically in the state, is deemed to be legally present in the state and subject to seizure. *Id.* at 192 (citing DEL. CODE tit. 8, § 169 (1975)). Here the Supreme Court held that although the defendants voluntarily had become officers, directors, and shareholders of a Delaware corporation, and although the suit involved the defendants' management of that corporation, Delaware's sequestation statute was insufficient to establish minimum ties between defendant, forum, and litigation. 433 U.S. at 213-17. Clearly, the forum's contacts with the defendants and litigation are far stronger in *Shaffer* than in *Harris* where Balk's only relation with Maryland was the presence of his debtor, Harris, in that state, a circumstance over which he had no control. It is obviously unquestionable that *Shaffer* is indistinguishable from *Harris*, and, therefore, equally obvious that *Shaffer* completely overrules *Harris*.

[175] See text and notes at notes 159-65 *supra*.

[176] *See* Savchuk v. Rush, 311 Minn. 496, 502-03, 505, 272 N.W.2d 888, 891-92, 893 (1978).

the defendant's purchase of automobile insurance from State Farm to be an adequate contact to support jurisdiction under *International Shoe*. The court based this conclusion on three factors. First, the plaintiff was a resident of the forum.[177] Second, the insurance obligation garnished was related directly to, indeed contigent upon, the substantive controversy.[178] Third, the action was the functional equivalent of a direct *in personam* action against an insurance company that was present in Minnesota.[179] The first two factors, the court reasoned, demonstrated the state's clear interest in adjudication of the suit; the third factor showed that the defendant was not significantly inconvenienced by the plaintiff's choice of Minnesota as a forum.[180]

In assessing the overall fairness of asserting jurisdiction, the court relied on all three factors, but it placed greatest emphasis on the last one. The court viewed the suit as a direct action for two reasons. First, under the terms of the insurance policy State Farm had complete control over the course of the litigation. Second, because it was a *quasi in rem* action, Rush's liability was limited to the face value of the policy, in effect making State Farm the only liable party. Since State Farm was in control of the defense and the only party at risk, the court viewed it as the actual defendant and Rush as merely a nominal defendant.[181] By viewing State Farm as the real defendant, the court transformed the case into an *in personam* action against a corporation that was actively doing business in Minnesota and, therefore, clearly subject to suit there. Thus, even though Rush's contact with Minnesota was tenuous, it was fair to maintain this action because the inconvenience to him as a result of the suit was also slight.

When the case returned to the Supreme Court of the United States, the Justices in a 7-2 decision[182] held that jurisdiction could not be supported because the defendant, Rush, had not taken any action that reasonably should have caused him to expect that he *would* be subject to suit in Minnesota.[183] The Court rejected the argument that the defendant's dealings with an insurer doing business in Minnesota might create such an expectation, and as in *World-Wide*, it did so without weighing the factors traditionally balanced to determine overall fairness of the forum's jurisdictional claim.[184]

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[177] *Id.* at 502-03, 272 N.W.2d at 891-92.

[178] *Id.* at 502, 272 N.W.2d at 891.

[179] *Id.* at 504-05, 272 N.W.2d at 892-93.

[180] *Id.* at 502-03, 505, 272 N.W.2d at 891, 893.

[181] *Id.* at 504, 272 N.W.2d at 892. Although the court does not cite it, this direct action rationale was employed in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969). *Minichiello* is cited in Savchuk v. Rush, 311 Minn. 480, 485, 489, 245 N.W.2d 624, 628, 630 (1976), but not for its direct action argument.

[182] The opinion of the court was delivered by Justice Marshall, and was joined by Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist. Justice Stevens dissented. Justice Brennan expressed his disapproval of the disposition of this case in his dissent in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting).

[183] Rush v. Savchuk, 444 U.S. 320, 331-32 (1980). *See generally* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[184] Rush v. Savchuk, 444 U.S. 320, 332-33 (1980).

The Court rejected all three factors favoring jurisdiction put forth by the Minnesota court.[185] It concluded that the Minnesota court's attempt to derive jurisdictional contacts from the plaintiff's residence in the state at the time of trial was intolerable because it made a "subtle shift in focus" from contacts between the defendant and the forum, as required by *International Shoe* and *Shaffer*, to contacts between the plaintiff and forum.[186] The Court declared that a defendant's due process rights may not be determined through an examination of a plaintiff's status.[187] The Court acknowledged that plaintiff's contact with the forum was one of the factors that might have been weighed in determining the overall fairness of jurisdiction once a minimum contact had been established, but in *Rush* this issue never was reached because no contact between forum and defendant was established.[188]

Turning to the presence in Minnesota of the inchoate debt owed to the defendant under his insurance policy, the Court found that this contact suffered from two fatal flaws, both of which were described in *Shaffer v. Heitner*.[189] First, the debt was wholly unrelated to the cause of action, and second, it was merely "present" in the forum state because of a legal fiction. The latter point was conceded by the Minnesota court,[190] and therefore, was not discussed in detail by the Justices. The first point, however, was in direct conflict with the conclusion of the court below. The state court specifically had distinguished *Rush* from *Shaffer* on the ground that the debt garnished in *Rush* was tied closely to the litigation.[191] The Supreme Court, however, held that the Minnesota court had misconstrued the *Shaffer* opinion when it found that there was an adequate relationship between the property garnished and the cause of action.[192] *Shaffer*, the Court declared, requires that property attached in an *in rem* action pertain to the substance of the dispute, not that it merely stand as the potential spoils of victory.[193] For example, attachment of property to which both the defendant and plaintiff claim title would support jurisdiction. Likewise, the presence of an absentee defendant's property may sustain jurisdiction where the suit arises out of an injury caused by that property. The insurance carried by the defendant, however, had no such relationship to the substantive question whether the defendant was liable in tort for plaintiff's alleged injuries.[194] It merely represented the source from which a judgment against the defendant would be paid. Thus, the potential debt the insurance company owed to the defendant could not be a source of jurisdictional power over the defendant.

Finally, the Court held that the suit may not be saved by treating it as the functional equivalent of a direct action against the insurer.[195] The Court noted

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[185] *Id.*
[186] *Id.* at 332.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 328-29.
[190] *See* Savchuk v. Rush, 311 Minn. 496, 503, 272 N.W.2d 888, 892 (1978).
[191] *Id.* at 502-03, 272 N.W.2d at 891-92.
[192] Rush v. Savchuk, 444 U.S. 302, 328-29 (1980).
[193] *Id.*
[194] *Id.* at 329.
[195] *Id.* at 330.

that the scheme established by Minnesota required that the state have jurisdictional power over the insured before the insurer can be drawn into the action.[196] Therefore, because Minnesota did not have the necessary contacts with the insured to exercise constitutionally judicial jurisdiction over him, there was no basis in Minnesota law for asserting jurisdiction over his insurer.[197] The Court flatly rejected the argument that because liability was limited to the policy amount, the insured was only a "nominal defendant." Even if this was the substantive effect of the action, the Court stated, on a procedural level "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee."[198] Thus, as in *World-Wide*, the Supreme Court, without fully examining the fairness of jurisdiction, rebuffed the state court's attempt to exercise power over an out-of-state defandant by holding that the defendant had performed no act calculated to affect any interest of the forum.

B. *Constricting State Jurisdiction over Non-Resident Defendants*

The decisions of *World-Wide* and *Rush* delineate a shift in the Court's approach to jurisdictional questions under the minimum contacts rule. Previously, jurisdiction could be sustained where the defendant acted in a fashion that had an impact on the forum.[199] If the impact was slight or very indirect, jurisdiction nevertheless could be supported if it was fair to do so.[200] Fairness was measured by balancing the interests of the forum and the plaintiff in allowing jurisdiction against any hardship imposed upon the defendant by having to go to trial in a foreign state.[201] As a result of *World-Wide* and *Rush*, however, jurisdiction now can be sustained only where the defendant's effect on a state's interests is clear and direct.[202] If this prerequisite is not met, jurisdiction must be denied even where its exercise would be completely fair.[203] This seemingly inequitable result, the Court said in *World-Wide*, is necessary to keep the exercise of judicial power in one state from encroaching upon the power of other states.[204]

The holdings in *World-Wide* and *Rush* undeniably succeed in restricting state court jurisdiction, but it is not clear that they do so in a beneficial manner. First, it is doubtful that the decisions in *World-Wide* and *Rush* will make jurisdictional decisions any more predictable. Second, they are likely to produce occasionally results that are unjust to plaintiffs or that are judicially inefficient.

Prior to *World-Wide* and *Rush*, a contact was evaluated in absolute terms. Either the defendant did or did not have some contact, however slight, with the forum. If a contact existed, jurisdiction was decided on the basis of whether or

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[196] *Id.* at 330-31.
[197] *Id.* at 331.
[198] *Id.* at 330-31.
[199] See text at notes 30-32 *supra.*
[200] See text at note 40 *supra.*
[201] See text at note 41 *supra.*
[202] See text at notes 129-31 *supra.*
[203] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).
[204] *Id.* at 293.

not it was fair.[205] Under *World-Wide* and *Rush*, the existence of a contact in the absolute sense is not sufficient to allow a court to proceed to the issue of fairness. A qualitative judgment about the contact must also be made. The court must decide whether the contact was direct and definite enough to have provided the defendant with notice that his actions were affecting the interests of the forum.[206] In some instances, however, there may not be a principled basis for making such a judgment.

For example, in *World-Wide* the defendants had a contact with the forum in an absolute sense because they sold cars that they could have reasonably foreseen would travel to the forum and because one such car caused injury in the forum.[207] Under the old contacts approach this contact would be sufficient to allow the court to settle the jurisdiction question by examining the fairness of the forum. Under the new approach an additional hurdle was interposed before the Court could reach the fairness question. The Court had to decide whether the defendants knew that their car sales in New York would have a direct impact in Oklahoma.[208] Intuitively the answer to this question is no, but the question becomes more difficult when the states are in greater proximity. Is a car dealer subject to jurisdiction in states immediately surrounding his domicile? At what point did the plaintiffs in *World-Wide*, as they traveled from New York to Arizona, cease to be able to sue in the state through which they were then traveling? These questions are left unanswered in *World-Wide* and because of their subjective nature they are questions that are not likely to be resolved in a consistent and predictable manner in each of the fifty state-court systems.

Similarly, in *Rush* an absolute contact existed because the defendant's insurer did business in the forum.[209] Under the old approach this left the court to determine whether such a slender connection between defendant and forum fairly permitted jurisdiction.[210] Under the new rule, however, it first has to decide whether the defendant should have recognized that his purchase of insurance would affect the interests of Minnesota.[211] At first glance the answer clearly appears to be negative, but such a result may be inconsistent with the Court's approach to direct actions against insurers because the effect of allowing jurisdiction in *Rush* is virtually indistinguishable from the effect of a direct action.[212] Nevertheless, the Court denied jurisdiction in *Rush*, even though it found no constitutional impediment to direct actions.[213] Consequently, the Court appears to be sanctioning a form over substance approach to jurisdiction. This result, like the one in *World-Wide*, does not lend itself to either order or predictability.

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[205] See text at notes 30-32 *supra*.

[206] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297; Rush v. Savchuk, 444 U.S. at 332-33.

[207] World-Wide Volkswagen, 444 U.S. at 288.

[208] *Id.* at 297.

[209] Rush v. Savchuk, 444 U.S. 320, 322 (1980).

[210] See text at note 32 *supra*.

[211] See text at note 188 *supra*.

[212] *See* Rush v. Savchuk 444 U.S. 320, 333-34 (1980) (Stevens, J., dissenting).

[213] *Id.* at 330-31.

A second problem posed by *World-Wide* and *Rush* is the danger that some plaintiffs will be left without a practical forum to pursue their claims. Persons with relatively limited resources may not be able to afford the costs of bringing a claim in a distant forum. Furthermore, where there are multiple defendants, denial of jurisdiction in the one possible common forum may force the plaintiff to bring multiple suits or to forego the claim. Such results are illogical where the inconvenience to the defendant of having to litigate in the plaintiff's chosen forum is slight or nonexistant.

For example, in *World-Wide,* by denying jurisdiction in Oklahoma the Court left the plaintiffs only the New York courts in which to bring their claim. No other state had contacts with the subject matter of the litigation and the defendant. Moreover, the federal courts had refused to hear the case because there was no diversity of citizenship. The plaintiffs, because they had not established a new domicile after leaving New York, were deemed to be, like the defendants, domiciliaries of New York.[214] If the cost of transporting witnesses and evidence to New York for trial was high, the plaintiffs might be forced to drop their claim. Where the relative cost to the defendant of having to litigate in Oklahoma is minimal, this result appears to be unjust.

Similar problems might arise in a case like *Shaffer.* The logical place to sue all of the officers and directors of a Delaware corporation is in Delaware. Because the defendants in such a suit probably have different domiciles, there may be no other common forum. If the plaintiff was forced to sue the defendants individually in their respective domiciles, the cost and inconvenience of multiple litigations might force the plaintiff to abandon his effort. Although, as in *Shaffer*, such considerations may not always tip the balance in favor of jurisdiction, they are at least factors that should be examined.

Additionally, in a case with multiple defendants, if the plaintiff is unable to bring a single action and decides to pursue suits in each defendant's domicile, several problems arise. First, such a course represents a significant waste of judicial resources. Several judges and courtrooms are tied up where one should be sufficient. This presents considerable expense to the parties and the public, and may pose significant logistical problems as witnesses and evidence criss-cross the country from trial to trial. Furthermore, there is the possibility of different courts reaching different results. This may occur because of different choices of law, different interpretations of the same law, or different findings of fact. Whatever the reason, divergent results do not further justice.

Admittedly, to counterbalance these evils, there lies on the other side of the equation the problem of forum shopping. Inevitably, where there are a number of forums for the plaintiff to chose from, the case will be heard in the one least favorable to the defendant. Thus, liberal jurisdiction rules give plaintiffs a significant advantage. One response to this problem is to reduce the number of forums by requiring stronger contacts between the defendant and the forum. This was the approach of *World-Wide* and *Rush.* As noted above, however, this approach has serious drawbacks because it focuses only on the

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[214] Brief for Respondent at 3, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

problem of forum shopping and ignores other legitimate jurisdictional concerns.

Another way to reduce the number of forums is to require fairer forums. Rather than circumventing the balancing test weighing all factors, it would be better to re-evaluate the relative importance of the factors that are balanced. If the danger of forum shopping has not been addressed adequately in the past, courts should give it greater weight in determining whether jurisdiction is fair in the future.[215] Such a factor, however, should not be given, as they were in *World-Wide* and *Rush*, the power to preempt all other considerations. The dangers inherent in giving a factor too much weight are the same as the dangers of giving a factor insufficient consideration.

CONCLUSION

The Supreme Court is properly concerned with the potential dangers of excessively permissive and haphazard rules of state jurisdiction. In its effort to control this problem in *World-Wide* and *Rush*, however, the Court appears to have embarked on a course that will not always produce just and predictable results. By making it more difficult to reach issues concerning the fairness and reasonableness of jurisdiction, the Court has made it less likely that a decision will be fair and reasonable.

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[215] A third alternative for solving the forum shopping problem might be the enforcement of narrower choice of law rules through either the due process clause or the full faith and credit clause.