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RUSH v. SAVCHUK: IS THE SEIDER SPOILED OR JUST GETTING HARDER?

The Supreme Court's landmark decision in *International Shoe Co. v. Washington*\(^1\) established the "minimum contacts" standard for state-court assertion of personal jurisdiction over nonresident defendants. In light of this flexible standard,\(^2\) considerations including a state's strong regulatory interest\(^3\) and its desire to avoid financial detriment to itself\(^4\) have been recognized as important factors in determining the propriety of jurisdiction. Application of the principles of *International Shoe* also led to the development\(^5\) of state long-arm statutes specifying activities falling within the ambit of minimum contacts.\(^6\) Thus, the "magical and medieval concepts

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1. 326 U.S. 310 (1945). The Supreme Court held that: 
[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

2. Justice Stone, writing for the Court in *International Shoe*, rejected the attempts of earlier courts to define a quantitative standard for state-court assertion of in personam jurisdiction: 
 It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative . . . . Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.


6. For example, the uniform long-arm statute provides: 
(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's 
(1) transacting any business in this state; 
(2) contracting to supply services or things in this state; 
(3) causing tortious injury by an act or omission in this state; 
(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
of presence and power
upon which jurisdiction was once thought to be based became a vestigial reminder of an earlier era.

Despite this expansion of jurisdiction, not all potential defendants are amenable to the personal jurisdiction of a particular state court. The post-International Shoe boundaries of jurisdiction were for 14 years defined by Seider v. Roth. In Seider, the New York Court of Appeals, in a 4-3 decision, held that the contractual obligations of an insurance company were an attachable "debt" under New York's civil practice statute, thus allowing New York to assert quasi in rem jurisdiction over a nonresident defendant (the

persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]

(5) having an interest in, using, or possessing real property, in this state; [or]

(6) contracting to insure any person, property, or risk located within this state at the time of contracting].

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him.

UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03 (1962 version).

The New York long-arm statute is N.Y. Civ. PRAC. LAW § 302 (McKinney 1972).


8. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), overruled, Rush v. Savchuk, 444 U.S. 320 (1980). Mr. and Mrs. Roth, both residents of New York, were injured in an automobile accident on a highway in Vermont and they alleged that the defendant, Lemieux, a resident of Quebec, was negligent. Id. at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100. Lemieux was insured by the Hartford Accident and Indemnity Company, an insurer doing business in New York. The policy was issued in Canada. The plaintiff, seeking to bring suit in New York, proceeded by attaching Hartford's contractual obligations to defend and indemnify the defendant. The defendant was personally served in Quebec and attachment papers were served on Hartford in New York State. Id.

9. Id. at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The relevant sections of New York law were N.Y. Civ. PRAC. LAW §§ 5201, 6202 (McKinney 1978). Section 6202 is entitled "Debt or property subject to attachment; proper garnishee" and provides, in pertinent part: "Any debt or property against which a money judgment may be enforced . . . is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201 . . . ." Section 5201 describes debt or property subject to enforcement and the proper garnishee for the particular property or debt. Specifically, the provision in controversy, section 5201 stated:

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

N.Y. Civ. PRAC. LAW § 5201 (McKinney 1978).

10. The term quasi in rem jurisdiction, as used in this Comment, is the second
The result of *Seider* was the provision of a New York forum for a plaintiff injured outside New York when the defendant’s insurer does business in New York. Although the *Seider* doctrine was immediately subject to a barrage of criticism from commentators, 11

of the two types described by the Supreme Court:

A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.


Historically, early on, attachment of a defendant’s property within the forum was viewed as a means of compelling the defendant to appear before the court, and a judgment could not be entered unless the defendant appeared. Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303, 303-04 (1962); Kalo, *supra*, at 1157; Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 Brooklyn L. Rev. 600, 616 (1977). As the law of jurisdiction developed in this country, jurisdiction based on the attachment of the defendant’s property in the state and the availability of that property to satisfy a judgment made it possible for plaintiffs to bring suit against absconding debtors or tortfeasors. This development served to mitigate the rigors of securing personal jurisdiction in conformance with *Pennoyer v. Neff*, which required personal service upon the defendant within the territory of the forum state. Carrington, *supra*, at 303-05; Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. Rev. 102 (1978); Silberman, *supra* note 5. Thus, the rule in Harris v. Balk, 198 U.S. 215 (1905), discussed at note 23 infra, was viewed as serving a practical function and may have afforded due process at a time when pursuit of an absconding or out-of-state debtor was still difficult and expensive. Kalo, *supra*, at 1190; Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 Colum. L. Rev. 550, 563 (1967).

Personal jurisdiction is preferable to quasi in rem jurisdiction because the plaintiff’s potential recovery is not limited to the value of the property attached. Some commentators have observed that in light of the expansion of personal jurisdiction since *International Shoe*, a plaintiff was likely to employ quasi in rem jurisdiction only where no other jurisdictional basis existed, and thus force the defendant to defend in a forum where he ought not be asked to defend. The mode of analysis suggested was the minimum-contacts analysis of *International Shoe*. Carrington, *supra*, at 306-09; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 282; Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 St. John’s L. Rev. 688 (1975). But see Silberman, *supra* note 5, at 71-72 (suggesting “double standard” be employed to determine if assertion of quasi in rem jurisdiction comports with minimum contacts standard); Smit, *supra* at 614 (suggesting that under minimum contacts, quasi in rem jurisdiction is not necessarily congruent with personal jurisdiction).

11. See, e.g., Reese, *The Expanding Scope of Jurisdiction over Non-Residents—*
both the New York Court of Appeals\textsuperscript{12} and the United States Court of Appeals for the Second Circuit\textsuperscript{13} subsequently upheld the \textit{Seider} attachment against constitutional challenge. These decisions were founded upon two different rationales. The state court held that jurisdiction over the named defendant was quasi in rem based on attachment of the insurance company's contractual obligations, provided that the insurance company did business in the forum state and was thus properly subject to in personam jurisdiction.\textsuperscript{14} The circuit court believed that the New York Court of Appeals had created in effect a direct action statute against the insurance company,\textsuperscript{15} a procedure previously upheld against constitutional challenge in \textit{Watson v. Employers Liability Assurance Corp.}.\textsuperscript{16}

Recently, in \textit{Rush v. Savchuk},\textsuperscript{17} the Supreme Court held that jurisdiction based on the attachment of insurance obligations is an unconstitutional assertion of quasi in rem jurisdiction. The \textit{Savchuk} opinion was framed very narrowly and the arguments dealing with the \textit{Seider} doctrine as in effect a judicially created direct-action statute were treated summarily. Whether a state can constitutionally enact a direct-action statute was left unanswered by the Court. In addition, \textit{Savchuk} failed to address the serious choice-of-law problems attendant to direct actions.

\begin{footnotesize}
\begin{enumerate}
\item[(13)] Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), \textit{adhered to en banc}, 410 F.2d 117 (2d Cir. 1968), \textit{cert. denied}, 396 U.S. 844 (1969); \textit{see notes 39-49 infra} and accompanying text. The \textit{Simpson} court, in fact, expressly disavowed the direct-action rationale. 21 N.Y.2d at 310-12, 234 N.E.2d at 671-72, 287 N.Y.S.2d at 636-38; \textit{see text accompanying note 16 infra}. Not surprisingly, then, the appellants in \textit{Minichiello}, in petitioning and receiving a rehearing en banc, argued that the original panel paid insufficient attention to the quasi in rem/minimum-contacts basis of the \textit{Simpson} decision, an argument the \textit{Minichiello} court of appeals on rehearing felt warranted substantial discussion. \textit{See} 410 F.2d at 117-19.
\item[(14)] 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
\item[(15)] 410 F.2d at 109-10, \textit{adhered to en banc}, 410 F.2d 117.
\item[(17)] 444 U.S. 320 (1980).
\end{enumerate}
\end{footnotesize}
This Note will begin by examining the twin justifications offered for the Seider attachment: as a valid assertion of quasi in rem jurisdiction and as a judicially created direct-action statute. It will then review the affect of the Supreme Court’s decision to apply the concepts of International Shoe to all assertions of jurisdiction, regardless of their purported justification. The following two sections will examine choice-of-law problems inherent in Seider actions and the Supreme Court’s consideration of a direct-action statute in Watson. Thus, three issues will have been raised prior to the discussion here of Rush v. Savchuk: the appropriate jurisdictional analysis, the existence of choice-of-law problems, and the possibility of legislative action incorporating the Seider procedure. The final two sections will examine the various Savchuk decisions and the Supreme Court’s ultimate response to each of these three issues.

Seider as a Valid Assertion of Quasi in Rem Jurisdiction

Constitutional challenges to the Seider-attachment procedure were raised for the first time in Simpson v. Loehmann, the facts of which were substantially similar to those of Seider. The New York Court of Appeals summarily dismissed the defendant’s separate contentions that the attachment procedure imposed “an undue burden on interstate commerce in the field of insurance” and violated the Article I, Section 10 prohibition against “impairing the Obligation of Contracts.”

18. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), motion for reargument denied, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). An infant plaintiff, a resident of New York, was injured when he was cut by the propeller of a boat owned by the defendant, a resident of Connecticut. The plaintiff, concededly unable to secure personal jurisdiction over the defendant, attached the defendant’s liability policy and had the summons and complaint delivered to the defendant at his residence in Connecticut. Id. at 308, 234 N.E.2d at 670, 287 N.Y.S.2d at 634.

19. See note 8 supra.

20. 21 N.Y.2d at 303, 234 N.E.2d at 670, 287 N.Y.S.2d at 635. Defendant’s argument, founded on the commerce clause, U.S. Const. art. I, § 8, cl. 3, put forth the proposition that Seider-type attachments unduly hindered the interstate insurance business. The court, although holding that the defendant lacked standing to raise this issue, nonetheless went on to say that the Seider-type attachment “does not constitute an unconstitutional burden on commerce.” 21 N.Y.2d at 309 n.2, 234 N.E.2d at 670 n.2, 287 N.Y.S.2d at 635 n.2 (citing Davis v. C.C.C. & St. L.R. Co., 217 U.S. 157 (1910) (quoting Morris Plan Ind. Bank v. Gunning, 295 N.Y. 324, 332, 67 N.E.2d 510, 513 (1946)). No elaboration was given concerning the point at which an attachment procedure would raise such constitutional questions.

21. U.S. Const. art. I, § 10. The defendant’s contract-clause argument was
The court focused instead on the procedural validity of the attachment device. Notwithstanding the novelty of that mechanism, the court relied on ancient concepts of sovereign power given force by Pennoyer v. Neff,22 and extended to tangential associations by Harris v. Balk.23 Thus, the Simpson court found it precedentially consistent to hold that the presence of the insurance obligation in New York "represent[ed] sufficient of a property right in the defendant to furnish the nexus with and the interest in New York to

premised on the possibility that once jurisdiction was obtained via a Seider-type attachment, the named defendant would refuse to cooperate in the insurer’s defense of the action. The court held simply that this possibility could adequately be dealt with if the insurer chose to “withdraw and assert . . . lack of co-operation in . . . any action brought against” the insurer by the insured. 21 N.Y.2d at 309 n.2, 234 N.E.2d at 670 n.2, 287 N.Y.S.2d at 635 n.2.

22. 95 U.S. 714 (1877).
23. 198 U.S. 215 (1905). Harris, a resident of North Carolina, owed Balk $180. Balk, also a resident of North Carolina, owed Epstein, a resident of Maryland, $344. While Harris was visiting Baltimore, Epstein caused to be issued a nonresident writ of attachment against Balk, attaching the debt due Balk from Harris. Harris did not protest the garnisheree process and paid the $180 to Epstein. Upon Harris’ return to North Carolina, Balk commenced an action against Harris to recover the $180. Harris pleaded that the Maryland judgment and his subsequent payment were conclusive against Balk because the judgment was a valid judgment in Maryland and entitled to full faith and credit in the North Carolina courts. U.S. CONST. art. IV, § 1. This contention was not allowed by the trial court and judgment was entered against Harris and affirmed by the Supreme Court of North Carolina on the ground that the Maryland court was without jurisdiction because Harris was but temporarily in the State and the situs of the debt was in North Carolina.

On appeal, the United States Supreme Court, after observing that attachment is a creature of local law, continued:

If there be a law of the State providing for the attachment of the debt, then if the garnisheree be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnisheree could himself be sued by his creditor in that State.

198 U.S. at 222.

The Court then found that the municipal law of Maryland permitted the garnishment. Id. at 224. Balk had the right to sue Harris in Maryland to recover the debt because, even though he was a citizen of North Carolina, he was entitled to all the privileges and immunities of the citizens of the several States, one of which is the right to institute actions in the courts of another State. Id. at 223; see U.S. CONST. art. IV. § 2, cl. 1. In dealing with the issue of the situs of the debt the Court found that it had no fixed place. Rather, “[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.” 198 U.S. at 222-23. That is, Balk’s ability to sue was not dependent on the situs of the debt; what was attached was the obligation to pay. Id. The jurisdictional justification of the decision was the age-old concept of power. As the Court said, “Power over the person . . . confers jurisdiction on the courts of the State . . . .” Id. at 222.
Having concluded that the Seider-type attachment was consistent with historical notions of state court jurisdictions, the court of appeals went on to evaluate the practical implications of its theoretical foundation. Tracing the “pragmatic approach” to International Shoe and its progeny, the court observed that “[t]he historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness.” The court examined the relationship among the parties and determined that the insurer is really the party in interest because it controls the litigation, making decisions concerning appointment of attorneys, potential settlement and procedural tactics. This “realistic” evaluation led the court to conclude that jurisdiction was fair and reasonable in light of International Shoe because:

[W]here the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process

24. 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (citation omitted). At the time Simpson arose, New York law did not permit the defendant in an in rem proceeding to make a limited appearance. The defendant argued that if he came in to defend, he could be found liable for a judgment in excess of the policy limits—that is, that the state was using the procedure as a subterfuge in order to obtain the greater potential liability of in personam jurisdiction. The court responded to this argument by finding that the decision in Seider did not purport to expand the basis of in personam jurisdiction and that any recovery was limited to the value of the asset attached—the face amount of the policy. Id., 287 N.Y.S.2d at 636-37. In denying reargument, the court of appeals further held that the limitation of any recovery to the face amount of the policy applied even if the defendant proceeded with a defense on the merits. 21 N.Y.2d 990, 991, 238 N.E.2d 319, 320, 290 N.Y.S.2d 914, 916 (1968) (per curiam).

One of the grounds on which the Seider attachment had been criticized was that there was no way to determine the value of the asset attached because it is a service. E.g., Comment, supra note 5, at 773. The argument was also made that the obligation to defend would be exhausted in the course of the proceedings and that under well-established garnishment principles, judgments can only be satisfied from assets attached. E.g., Comment, supra note 10, at 566-68. Thus, the effect of holding that the value of the asset attached was the face amount of the Insurance policy was to answer these criticisms.

25. 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
27. 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
28. Id.
clause and in determining the public policy of New York, such factors loom large.\footnote{Id.}

What is significant about the Simpson court's secondary analysis is the injection of the plaintiff's residence within the forum as a factor in the "fairness approach." Although the plaintiffs in both Simpson and Seider were residents of New York, the Seider court, in holding the contractual obligations an attachable debt justifying the exercise of quasi in rem jurisdiction, articulated the state's interest in terms of its exercise of power over a contractual obligation owing in New York.\footnote{Seider v. Roth, 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.} Thus, the bare fact that the insurance company was doing business in New York sufficed to answer the question whether the attachment device was a permissible assertion of jurisdiction. The fact that the Simpson court considered the plaintiff's residence a factor in determining the constitutionality of the mechanism at least raises the question whether the court would have had doubts if the plaintiff were not a forum resident.

The analytical framework emerging from Simpson, then, appeared to require both that the insurer be present and doing business in New York and that the plaintiff be a forum resident. The first requirement, that the insurer be present, is so easily satisfied as to be without meaning. In the first place, "it will be a very small insurance company that does not have a palpable contact with [the] State."\footnote{Simpson v. Loehmann, 21 N.Y.2d at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 641 (Breitel, J., concurring).} The Second Circuit, for example, found this requirement met where an insurer was licensed to do business and did "some" business in New York.\footnote{Beja v. Jahangiri, 453 F.2d 959, 962 (2d Cir. 1972). The plaintiff, a New York resident, was injured in California. The defendants, both of whom were citizens and residents of California, were insured by Farmers Insurance Group. Jurisdiction was obtained by attaching the insurance obligations in New York. The defendants removed the case to the United States District Court for the Southern District of New York and were granted a motion to dismiss on the ground that the attachment had been improperly served on the New York Superintendent of Insurance. \textit{Id.} at 960. A new order of attachment was ordered and served on Farmers' agent, Gotsch, Steinmetz and Winston, insurance brokers in New Rochelle, New York. This attachment was vacated on the ground that Farmers was not doing sufficient business in New York to sustain the attachment. \textit{Id.} The issue presented to the court of appeals was the extent to which an insurer must be "present in" or doing business in New York to give the courts jurisdiction over the parties consistent with \textit{Seider v. Roth}. \textit{Id.} One of the members of the Farm-}
are raised. Early critics of the *Seider* attachment, reaching to the insignificance of the first requirement, expressed concern that non-resident plaintiffs would be attracted to New York because of its reputation for large verdicts.\(^{33}\)

As to the second requirement, some post-*Simpson* courts held the *Seider*-type attachment procedure violative of due process where the plaintiff was not a New York resident.\(^{34}\) The New York ers' group had been licensed to do business in New York as a foreign reciprocal insurer since 1951; another member of the group had been similarly licensed since 1954. It was admitted that those companies were the defendant-insurers. *Id.*

The firm of Gotsch, Steinmetz and Winston had been Farmers' New York agent since 1951. In 1969, the only year for which figures were given, Farmers issued approximately $15,000 worth of workmen's compensation, $100 worth of automobile personal injury, and $60 worth of property damage insurance in New York. *Id.* The court held that jurisdiction was obtained over the defendants by virtue of the attachment. In reaching its conclusion the court found that "[t]here is no constitutional impediment to jurisdiction in the present case; the fact that Farmers has been continually licensed in New York for twenty years, has an agent and office there, and regularly does some business in the state is enough to meet the fairness test." *Id.* at 962.

\(^{33}\) 21 N.Y.2d at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 641 (Breitel, J., concurring). The *Seider* attachment was also criticized on a variety of grounds which did not raise constitutional issues. For example, the argument was made that the insurer's obligation to defend and indemnify does not arise until a suit is otherwise validly commenced. That is to say, the court could not logically justify its assertion of jurisdiction on an obligation that had yet to mature. See 17 N.Y.2d at 115-17, 216 N.E.2d at 315-17, 269 N.Y.S.2d at 103-05 (Burke, J., dissenting). See also Comment, supra note 10, at 555.

Another area of objection concerned the "intangible" nature of the obligations and the problem of assigning them a situs. Where the obligation is present in several states and there are multiple plaintiffs, the insurance company may be subject to claims in excess of the policy limits due to the multiplicity of litigation. See, e.g., Minichiello v. Rosenberg, 410 F.2d at 119 (en banc).

It becomes difficult to catalogue the criticisms of and problems with the *Seider* attachment. Professor David Siegel observed that "'[w]hatever problems one can conjure up in connection with [Seider] prove incomplete; more appear, and each partakes of the same theoretical and practical difficulties. These problems often prove so bizarre that they become difficult to even verbalize.' " N.Y. CIV. PRAC. LAW § 5201, commentary at 16 (McKinney Supp. 1967), quoted in *Simpson v. Loehmann*, 21 N.Y.2d at 317, 234 N.E.2d at 675, 287 N.Y.S.2d at 642 (1967) (Burke, J., dissenting).

\(^{34}\) See, e.g., Vaage v. Lewis, 29 A.D.2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968) where the court observed that where the plaintiff is a nonresident, the solitary nexus for the New York courts is the fact that the defendant's foreign insurer is authorized to do business in New York. Although the court invoked the doctrine of forum non conveniens to avoid an influx of unnecessary and unwanted lawsuits, the court also believed that an exercise of jurisdiction would deprive the defendants of due process. *Id.* at 318, 288 N.Y.S.2d at 524-25. See also *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812, 816 (2d Cir. 1969). There the court found that
Court of Appeals was faced with this issue in *Donawitz v. Danek.* The debate there between Judge Wachtler writing for the majority and Judge Jasen concurring separately raised serious questions concerning not only the *Seider* attachment and the related issue of nonresident plaintiffs, but also the appropriate analytical framework within which questions of quasi in rem jurisdiction should be considered.

The short majority opinion was largely a defense of its decision to adhere to the principles of stare decisis. The majority, however, while reaffirming *Seider,* declined to “expand the scope of the doctrine” to nonresident plaintiffs. In a one-sentence justification, the court wrote that,

> while the insurer’s ‘duty to defend and indemnify’ has been found to be an attachable debt where the plaintiff is a resident, this special type of contract duty, however it may be classified or

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Where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insured to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants. Id. at 816 (footnote omitted). Later it was determined that the plaintiff’s residence was to be determined as of the time of the accident and not the time of commencement of suit. *Fish v. Bamby Bakers, Inc.,* 76 F.R.D. 511 (N.D.N.Y. 1977).


36. Id. at 140-43, 366 N.E. 2d at 254-56, 397 N.Y.S.2d at 593-95.

37. Id. at 143-51, 366 N.E.2d at 256-61, 397 N.Y.S.2d at 595-601 (Jasen, J., concurring).

38. The majority opinion, which runs three pages in the New York Reports, consists of a one-and-one-half page statement of the case, a one-page defense of *Seider* vis-a-vis the principle of stare decisis, and a one-paragraph “discussion” of the question raised by the existence of a nonresident plaintiff seeking utilization of the *Seider*-type attachment. Id. at 140-43, 366 N.E.2d at 254-56, 397 N.Y.S.2d at 593-95. As to its reliance on the principle of stare decisis, the majority wrote:

> We are not unmindful of the continued criticism of our holdings in *Seider v. Roth* and *Simpson v. Loehmann.* Although several members of the court may believe in the legitimacy of some of this criticism, the majority cannot fail to take into account considerations of institutional stability and the mandates of *stare decisis.* A court should not depart from its prior holdings “unless impelled by ‘the most cogent reasons.’ “

As recently as July of last year, this court unanimously reaffirmed the *Seider-Simpson* doctrine, and it would be scandalous for us to abandon it at this time . . . .


39. 42 N.Y.2d at 142, 366 N.E.2d at 256, 397 N.Y.S. at 595.
denominated, is not of sufficient substance to support quasi in rem jurisdiction where the plaintiff is a nonresident.\(^4^0\)

The significance of the court’s statement is its characterization of the substance of the attachable debt not in terms of the debt itself, but instead in terms of the plaintiff’s residence.\(^4^1\) While this approach appears facially untenable, a more probing question must be asked before that conclusion can be reached. That is, “What is the basis of state court jurisdiction”? If the Pennoyer v. Neff\(^4^2\)—Harris v. Balk\(^4^3\) concept of sovereign power provides the basis, the state’s power in rem over the debt in question should be unaffected by the residence of the plaintiff. If, on the other hand, the minimum contacts-fairness approach initiated by International Shoe\(^4^4\) provides the relevant basis, the residence of the plaintiff may be a factor to be considered in determining the propriety of the jurisdiction claimed.

Since Seider was the determinant precedent in Donawitz,\(^4^5\) and because Seider unquestionably relied upon Pennoyer-type notions of a state’s in rem power,\(^4^6\) the Donawitz majority’s inclusion of plaintiff’s residence in the decisional calculus is a clear break with precedent. Still, it can be argued that the result was correct in spite of faulty reasoning, a conclusion reached by Judge Jasen.\(^4^7\)

Further, if Seider and its progeny relied on the Pennoyer-power foundation, the validity of the Seider-type attachment warranted re-examination in light of the long-standing concepts of International Shoe. These questions were to be addressed in 1980, two

\(^{40}\) Id. (emphasis added) (footnote omitted).

\(^{41}\) As Judge Jasen noted in his concurring opinion, “the substance of an attachable debt is in [no] way affected, much less diminished, by the nonresidence of the attaching party.” Id. at 143, 397 N.Y.S.2d at 596 (Jasen, J., concurring). Judge Jasen also believed that the distinction between residents and nonresidents raised equal protection problems. See U.S. CONST. amend. XIV. As Judge Jasen wrote, [A]n asset of a nonresident defendant is made no less substantial by the fact that the plaintiff who would seize the asset is not from New York. Indeed, to deny a nonresident plaintiff the right to attach the same debt upon which a resident plaintiff could sue in itself poses grave questions of fundamental fairness and constitutionality.

\(^{42}\) N.Y.2d at 143, 366 N.E.2d at 256, 397 N.Y.S.2d at 596 (Jasen, J., concurring).

\(^{43}\) 95 U.S. 714 (1877); see text accompanying notes 22-24 supra.

\(^{44}\) 198 U.S. 215 (1905); see note 23 supra.

\(^{45}\) 326 U.S. 310 (1945); see notes 2-3 supra.

\(^{46}\) See 42 N.Y.2d at 140-43, 366 N.E.2d at 254-56, 397 N.Y.S.2d at 593-95.

\(^{47}\) See 17 N.Y.2d at 112-14, 216 N.E.2d at 313-15, 269 N.Y.S.2d at 100-02.

\(^{42}\) See 42 N.Y.2d at 143-51, 366 N.E.2d at 256-61, 397 N.Y.S.2d at 595-601.
years after the Donawitz decision,\textsuperscript{48} by the Supreme Court in Rush v. Savchuk,\textsuperscript{49} and will be elaborated upon later in this Note.\textsuperscript{50}

**SEIDER as a Judicially Created Direct Action Statute**

The United States Court of Appeals for the Second Circuit was faced with the Seider-attachment question in Minichiello v. Rosenberg.\textsuperscript{51} Judge Friendly, writing for the majority, characterized Seider as "in effect a judicially created direct action statute,"\textsuperscript{52} based on his reading of the New York Court of Appeals' Simpson opinion. Relying on Watson v. Employers Liability Assurance Corp.,\textsuperscript{53} Judge Friendly believed that the Supreme Court would sustain the validity of direct-action statute in favor of residents as well as on behalf of persons injured within the state, but doubted whether the Court would sanction such a direct-action statute where the forum was neither the place of injury nor the plaintiff's residence.\textsuperscript{54}

The most interesting aspect of the initial Minichiello opinion is its defense of the direct-action rationale in *International Shoe* terms. The factors given primary consideration, \textit{i.e.}, the state's in-

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\item \textsuperscript{48} For a discussion of judicial inefficiency attributable to a lack of guidance by the Supreme Court, see Lusky, \textit{Public Trial and Public Right: The Missing Bottom Line}, 8 \textit{Hofstra L. Rev.} 273, 318-23 (1980).
\item \textsuperscript{49} 444 U.S. 320 (1980).
\item \textsuperscript{50} See text accompanying notes 141-162, 198-211 infra.
\item \textsuperscript{51} 410 F.2d 106 (2d Cir.), adhered to en banc, 410 F.2d 117 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969).
\item \textsuperscript{52} \textit{Id.} at 109. Judge Friendly arrived at this conclusion despite the fact that both the Seider and Simpson courts denied that the attachment was the equivalent of direct action:
\begin{quote}
It is said that by affirmance here we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured.
\end{quote}
\item \textsuperscript{53} 348 U.S. 66 (1954); \textit{see} notes 103-117 infra and accompanying text.
\item \textsuperscript{54} 410 F.2d at 110. The court also considered the Supreme Court's dismissal of an appeal in Victor v. Lyon Assocs., 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), \textit{appeal dismissed for want of a substantial federal question sub nom. Hanover Ins. Co. v. Victor}, 393 U.S. 7 (1968). The Minichiello court was not the only court to rely on the Supreme Court's dismissal of Victor, a companion case to Simpson; the dismissal was cited as recently as Savchuk v. Rush, 272 N.W.2d 888, 891 n.4 (Minn. 1978). While the Supreme Court itself did not cite Victor in its final opinion in Rush v. Savchuk, 444 U.S. 320 (1980), it would appear that Victor is overruled by that opinion.
\end{itemize}
\end{footnotesize}
terest in protecting and providing care for its citizens and the "movement away from the bias favoring the defendant," in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him' where there is a sufficient basis for doing so," fall within the ambit of a minimum contacts-fairness analysis. Yet, as noted above, Seider and its progeny, at least in the state courts of New York, rested on the state-power concepts of the Pennoyer line of cases. It was thus, in the Second Circuit's en banc rehearing of Minichiello, that the court found merit in petitioner's contention "that the previous majority opinion was overly preoccupied with a conception of Seider v. Roth as 'in effect a judicially created direct action statute,'" that is, as a constitutional fairness issue, rather than a constitutional power question.

The en banc majority opinion began by properly noting that Harris v. Balk was the foundation of the Seider rule. Once this recognition was stated, however, the opinion compared the fairness of requiring Balk to defend in Maryland vis-a-vis the fairness of requiring the defendant-insured to participate at trial in New York.

55. 410 F.2d at 109-10.
56. Id. at 110.
57. See text accompanying notes 22-24 supra.
58. 410 F.2d at 117.
59. Id. at 118.
60. See note 23 supra.
61. The court determined that the defendant's problem was less serious than Balk's because unlike Balk he was deprived not of any personal property but only the proceeds of the policy which was purchased to protect against losses to others. 410 F.2d at 118. The defendant was found to have an additional protection because, by definition, Seider attachments always involve diversity and may be removed from the state court to a federal court where they may be transferred to a more convenient forum. Id. at 119.

Cases which are brought in a state court may be removed to the federal district court under 28 U.S.C. § 1441 (1976). 28 U.S.C. § 1404(a) (1976) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The court refused to transfer in the companion case to Minichiello, Stevens v. Tyng, because the trial judge there "found that the preponderant issue was the extent of plaintiff's injury." 410 F.2d at 119. The Second Circuit found that decision to "sufficiently [indicate] that the places of accident or of defendant's residence are not always the most convenient fora." Id. (citation omitted).

The court also dealt with the assertion that the defendant would suffer unfairly if a judgment against him were given collateral estoppel effect in a second action by summarily finding that "we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so." Id. at 112. In fact, the court foresaw that that application of the Seider attachment could produce several due process problems; it expressed particular concern in the area of counterclaims but found that New York had no compulsory counterclaim rule and concluded
This analysis, as recognized by the en banc dissenters, was inapposite to the Harris foundation, for Harris rested on state power over the attachable debt, and not on the "fairness" consequences of such an exercise of jurisdiction. As the dissenters explained it, "[t]he rule of Harris, which in effect sanctions the mere presence of the garnishee as a sufficient jurisdictional base, [was not and] 'cannot be justified in terms of fairness.' "

Following Minichiello, Simpson, and Donawitz, the status of the Seider attachment in New York federal and state courts was left in an interesting confusion. The New York Court of Appeals correctly interpreted Harris v. Balk in upholding Seider attachments but failed to recognize that since International Shoe the pure-power concepts of Harris were of questionable precedential value. The Second Circuit, on the other hand, upheld Seider attachments (correctly or otherwise) in terms of contemporary concepts of fairness, but incorrectly attributed this rationale to Harris v. Balk. Thus, both courts failed to account for the magnitude of the change in jurisdictional principles initiated by International Shoe, and were led, albeit in different ways, to a mistaken reliance on Harris v. Balk. Regardless of the variety of muddled reasoning, Seider-attachment procedures were found to be constitutional—at least as long as Harris v. Balk stood.

**Shaffer v. Heitner: Extending International Shoe**

The Supreme Court's 1977 decision in Shaffer v. Heitner came to grips with the wisdom of applying the minimum contacts-
fairness analysis of *International Shoe*, previously made explicitly applicable to assertions of only in personam jurisdiction, to assertions as well of in rem and quasi in rem jurisdiction. As Justice Marshall stated the issue for the Court, “*quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State . . . . This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*.”

*Pennoyer*, based on a sensitivity to the nineteenth-century pre-industrial concept that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,” had become an anachronism with the achievement of a highly mobile, heavily interdependent society. As Justice Marshall noted, the development of national corporations and the automobile forced the courts to develop fictional concepts of consent in order to stay within the *Pennoyer* rule. In practice, however, the theoretical fictions were actually attempts to develop a theory based on *fairness*, rather than on antiquated notions of power or consent to power. This progression led to the *International Shoe* decision, which defined fairness in terms of contacts, and produced something of a revolution regarding in personam jurisdiction. Yet, some 32 years after the revolution, there was a difference of opinion as to the applicability of *International Shoe* to assertions of in rem and quasi in rem jurisdiction.

The determinative fact in *Shaffer* was that the property sequestered was entirely unrelated to the cause of action. The de-
fendants had objected to the Delaware courts' assertion of jurisdiction, claiming that their contacts with the state were insufficient to sustain jurisdiction in conformance with International Shoe.\textsuperscript{73} In order to approve of the defendants' theory, the Court first needed to cross the theoretical bridge spanning in personam and in rem/quasi in rem assertions of jurisdiction. The Court successfully made the crossing, reasoning that,

'[t]he phrase, "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.' This recognition leads to the conclusion that in order to justify an exercise of jurisdiction \textit{in rem}, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in International Shoe.\textsuperscript{74}

Given this reasoning, cases where "the only role played by the property is to provide the basis for bringing the defendant into court,"\textsuperscript{75} could not satisfy due process standards.\textsuperscript{76} The type of quasi in rem action typified by \textit{Harris v. Balk} and \textit{Shaffer} clearly fell into this category; \textit{Harris} was overruled\textsuperscript{77} and \textit{Shaffer} reversed.\textsuperscript{78} Hence, the constitutionality of the Seider attachment\textsuperscript{79}

\textsuperscript{73.} Id. at 193.
\textsuperscript{74.} Id. at 207 (citations omitted) (footnotes omitted) (quoting \textsc{Restatement (Second) of Conflict of Laws} § 56, Introductory Note (1971)).
\textsuperscript{75.} Id. at 209 (footnote omitted).
\textsuperscript{76.} The Court was careful to state that it was not entirely eliminating the concept of in rem jurisdiction and noted that the presence of the defendants' property in a state might suggest other ties among the defendant, the state, and the litigation. \textit{Id.} at 207-08. The Court found, for example, that where claims to the in-state property itself are the source of the underlying controversy or where the suit was for injury suffered on the land of an absentee owner, the minimum-contacts standard of \textit{International Shoe} would probably be satisfied. \textit{Id.} at 208.
\textsuperscript{77.} See \textit{id.} at 209.
\textsuperscript{78.} \textit{Id.} at 217.
\textsuperscript{79.} It is worth noting here that the Court also wrote that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion . . . should be equally impermissible." \textit{Id.} at 209. When it is clear who the real party in interest is this standard is easy enough to apply. However, when the defendant is not that party, the terms "direct" and "indirect" have less meaning. As Justice Stevens noted, dissenting in \textit{Rush v. Savchuk}, 444 U.S. 320, 333-34 (1980) (Stevens, J., dissenting), one function of quasi in rem jurisdiction is to reach the real party in interest where the property serving as the purported basis for jurisdiction over the named defendant is actually controlled by that "real" party. \textit{Id.} Thus, Justice Stevens' separate opinion in \textit{Shaffer}, in which he ex-
was immediately called into question.  

Seider Reconsidered

The Seider doctrine was quickly challenged. Although lower courts were divided on whether the assertion of jurisdiction comported with due process, both the Court of Appeals for the Second Circuit and the New York Court of Appeals found that Seider remained viable after Shaffer. While both courts were mindful of Shaffer, the Second Circuit's opinion in O'Connor v. Lee-Hy Paving Corp. more closely scrutinized the instant facts vis-a-vis the Supreme Court's analysis. Judge Friendly, writing for the court as he did in Minichiello, began by noting that Shaffer demanded that the property attached not serve as the sole basis for jurisdiction, particularly where it is unrelated to the cause of action. He expressed a fear that the Court ignored "long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit," 433 U.S. at 219 (Stevens, J., concurring in the judgment), may have defined an area between the egregious sequestration procedure at issue in Shaffer, and the clearly appropriate in rem procedure used where the claim arises "for injury suffered on the land of an absentee owner." Id. at 208. On the basis of Justice Stevens' dissent in Rush v. Savchuk, 444 U.S. at 333-34 (Stevens, J., dissenting), one might well conclude that the Shaffer opinion did indeed "decide a great deal more than [was] necessary," 433 U.S. at 219 (Stevens, J., concurring in the judgment), to invalidate Delaware's use of the sequestration procedure.

Rush v. Savchuk was on the Supreme Court docket at the same time as Shaffer and was remanded to the Minnesota Supreme Court for reconsideration in light of Shaffer three days after the Shaffer decision. 433 U.S. 902 (1977). A new barrage of commentary on the viability of Seider after Shaffer quickly appeared. See, e.g., Dachs, Sipping Seider Through a Straw, 45 Brooklyn L. Rev. 533 (1979); Dooling, Seider v. Roth after Shaffer v. Heitner, 45 Brooklyn L. Rev. 505 (1979); Note, The Constitutionality of Seider v. Roth After Shaffer v. Heitner, 78 Columbia L. Rev. 409 (1978) [hereinafter cited as COLUMBIA Note]; Note, Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth, 6 Hofstra L. Rev. 393 (1978) [hereinafter cited as HOFSTRA Note].


579 F.2d 194.

410 F.2d 106, adhered to en banc, 410 F.2d 117 (2d Cir. 1968).
tion.\textsuperscript{86} He then provided a three-part analysis of the jurisdictional question.

The first part of Judge Friendly's analysis examined the nature of the debt attached. Insofar as the relation of that debt to the substantive claim was concerned, the court had little trouble distinguishing \textit{Shaffer}. The sole purpose of the obligation to defend (the "debt" attached) was "to protect against the type of liability which is the subject of the lawsuit . . . ."\textsuperscript{87} Thus, a clear relationship existed between substance and procedure. Further, the insured could suffer no substantial deprivation. Unlike in \textit{Harris v. Balk}, where Balk stood to lose $180 and/or attorney's fees,\textsuperscript{88} the effect of "a \textit{Seider} judgment would mean simply that liability policies, on which [insured parties] could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured."\textsuperscript{89} That is, whatever the defendant stood to lose was directly related to the potential judgment against him.

The second portion of the \textit{O'Connor} opinion was an attempt to satisfy the need, attributed to \textit{Shaffer},\textsuperscript{90} for a realistic approach—an approach which would evaluate the actual interests at stake in the litigation. On this point, the Second Circuit, in interpreting New York law, believed that the second portion of the opinion in \textit{Simpson v. Loehmann}\textsuperscript{91} predicted \textit{Shaffer}. Thus, the court simply repeated the well-known arguments that the insurer in all aspects controls the litigation\textsuperscript{92} and, since New York could properly assert in personam jurisdiction over the insurer without undue hardship arising,\textsuperscript{93} the insurer "has no justifiable ground for complaint at

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\item[86.] 579 F.2d at 198-99.
\item[87.] \textit{Id.} at 199.
\item[88.] \textit{Id.}
\item[89.] \textit{Id.} (emphasis omitted) (quoting Minichiello v. Rosenberg, 410 F.2d at 118).
\item[90.] \textit{Id.} at 200.
\item[91.] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); see text accompanying notes 25-29 \textit{supra}.
\item[92.] 579 F.2d at 200; see text accompanying notes 27-29 \textit{supra}.
\item[93.] 579 F.2d at 200-01. Here the sufficient basis is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damages will be more readily available and the fact that in the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought at the site of the accident or the residence of the insured. \textit{Id.} at 201. The court noted that the insurer might be prejudiced by fear of the greater liberality of New York juries in awarding damages, but concluded that this interest was not su-
\end{enumerate}
\end{footnotesize}
New York's asserting a jurisdiction over the insured . . . .” 94

It was this argument, however, which took the court out of the Shaffer approach, for Shaffer never suggested that a real-party-in-interest analysis was the type of "realistic evaluation" it sought. 95 What Shaffer did require was an analysis of the named defendant's interest in the attachable property as it related to the litigation. 96 The Second Circuit, however, sidestepped this command, instead arguing that,

Seider v. Roth and Simpson are sui generis in the field of jurisdiction. They cannot be pigeon-holed as in rem or in personam. They are in real terms in personam so far as the insurer is concerned. For the named defendant the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is plaintiff's claim for the payment of his alleged damages by the insurer. 97

Whether or not it was “beside the point” to examine the procedure purely in terms of the named defendant would await consideration by the Supreme Court. 98

If the Second Circuit was somewhat disingenuous in its attempt to explain away Shaffer, it at least sought a new framework for decision. The New York Court of Appeals, on the other hand,

94. Id. at 200.
95. Cf. note 79 supra (explaining weakness of Shaffer Court's reluctance to allow indirect methods of reaching real-party defendants).
96. See 433 U.S. at 207.
98. As mentioned in text, see text accompanying note 86 supra, Judge Friendly's analysis was three-pronged. The third prong evaluated the hardships imposed on the insured by the New York assertion of jurisdiction, even though the court recognized that it was somewhat anomalous to consider the insurer the real party in interest and nonetheless place significant emphasis on the insured. 579 F.2d at 201. The court proceeded to review issues of collateral estoppel, see note 61 supra, and the ability of the insured to appear in New York, 579 F.2d at 202, and concluded that, at least on the facts of O'Connor, the Seider attachment procedure met the due process requirements of International Shoe and Shaffer. See id. Other issues given brief consideration in O'Connor are reviewed at note 61 supra.
seemed weary of the issue it had first raised in Seider,99 and made little effort to offer new justification for its past opinions.

The court, in a per curiam memorandum, stated first that even if Seider relied on Harris v. Balk, Simpson foresaw the coming of Shaffer and predicted the appropriate analysis.100 With no further justification, the court concluded that “[t]he Seider rule therefore satisfies the jurisdictional standards set forth in the Shaffer case.”101 The remainder of the memorandum was a one-and-one-half page restatement of the court’s reliance on stare decisis,102 a reliance, however well-placed, that failed to account for the need to address in depth the Supreme Court’s lengthy opinion in Shaffer.

Choice-of-Law Considerations

The Seider rule has been criticized, not only as an erroneous jurisdictional doctrine, but also because it presented an opportunity for forum shopping—shopping for the possibility of obtaining higher damages from traditionally generous New York juries103 and shopping for the potential of more favorable law.104 In Tjepkema v.

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99. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The court’s “weariness” is evident from the first paragraph of its per curiam opinion:

The issue is whether Seider v. Roth should be overruled. The issue is not new for the court; it has been raised with frequency in the 12 years since the Seider case was first decided. Considerations of stare decisis and institutional stability, absent compelling grounds to the contrary, require that this challenge, like the others, be rejected.


100. 45 N.Y.2d at 891, 383 N.E.2d at 111, 410 N.Y.S.2d at 899.

101. Id. The only jurisdictional analysis in the memorandum, in fact, is a brief summary of the Second Circuit’s rationale in O’Connor, see text accompanying notes 86-98 supra, and a New York intermediate court’s opinion in Alford v. McGaw, 61 A.D.2d 504, 402 N.Y.S.2d 499 (4th Dep’t), appeal dismissed, 45 N.Y.2d 776 (1978).

102. 45 N.Y.2d at 892-93, 383 N.E.2d at 111-12, 410 N.Y.S.2d at 809-10. The gist of the court’s reliance on stare decisis was the following:

[The Seider rule] provoked sharp disagreement at its inception; it is still the subject of controversy. The balance of those in support and in opposition to the rule may have shifted, as it may shift again. Yet if such shifts are reflected in decisional law, stability is lost, and to no commensurate gain. The practical effect of the rule is so insignificant that, in this instance, there is validity in the aphorism, always to be charily applied, that it is more important that the law be settled than that it be settled “correctly.”

Id. at 892, 383 N.E.2d at 111, 410 N.Y.S.2d at 810.

103. E.g., Comment, supra note 10, at 565.

104. E.g., Chase, Quasi in Rem Jurisdiction in Social Context: Some Thoughts
Kenney,\textsuperscript{105} for example, New York refused to apply another state’s wrongful death limitation where jurisdiction was obtained via the Seider attachment. Although the accident occurred in Missouri and the defendant was a resident of that state, the court held that the Missouri wrongful death limitation should not be applied because the decedent was a New York resident, the estate was being administered in New York, and the plaintiff-widow and her children who were distributees were New York residents.\textsuperscript{106} Thus, the same interests cited by New York as providing a basis for jurisdiction also served as the basis for application of forum law.

The coincidence of rationale for asserting jurisdiction and applying forum law most certainly presents a question, at least on a case-by-case basis, concerning the wisdom of the Seider-attachment device. The coincidence, however, may be no more than that, as the choice-of-law jurisprudence had a development all its own, even though in theory it parallels the development of jurisdictional principles from Pennoyer to International Shoe.\textsuperscript{107} Judge Fuld of the New York Court of Appeals summarized the choice-of-law development in Babcock v. Jackson,\textsuperscript{108} a landmark case\textsuperscript{109} in the conflicts field:

\textit{The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws (§ 384), and until recently unquestionably followed in this court, has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort. It had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law. Although espoused by such great figures as Justice Holmes and Professor Beale, the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in

\textit{on a New Statute, 45 BROOKLYN L. REV. 617, 629-30 (1979); Comment, Quasi in Rem Jurisdiction Based on Insurer’s Obligations, 19 STAN. L. REV. 654, 660 (1967).}
\textsuperscript{105} 31 A.D.2d 908, 298 N.Y.S.2d 175 (1st Dep’t 1968).
\textsuperscript{106} Id.
\textsuperscript{107} See Preface to R. Crampton, D. Currie, & H. Kay, CONFLICT OF LAWS at xiii (2d ed. 1975).
\textsuperscript{109} See Rosenthal v. Warren, 475 F.2d 438, 441 (2d Cir. 1973); R. Crampton, D. Currie, & H. Kay, supra note 107, at 243-44.
evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. . . . More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. 110

Thus, the choice-of-law jurisprudence moved from a place-of-injury analysis analogous to Pennoyer-power concepts to a state interest-"grouping of contacts"111 analysis analogous to the minimum contacts-fairness analysis of International Shoe. And just as the post-Shaffer cases were criticized for incorrectly applying the minimum-contacts test,112 the interest analysis courts were criticized113 for misreading choice-of-law issues in the Seider content.

The facts of Rosenthal v. Warren114 illustrate the choice-of-law issues involved. Dr. Rosenthal, a resident of New York, travelled to Boston, where he was examined and diagnosed by Dr. Warren. He died in a Boston hospital while under Dr. Warren's care eight days after surgery was performed by Dr. Warren. Rosenthal's survivors brought a wrongful death suit in New York state court, alleging malpractice and asking $1,250,000 damages. Jurisdiction over Dr. Warren was obtained through use of the Seider attachment.115 The defendants removed to federal court on the basis of diversity of citizenship. The Massachusetts wrongful death statute limited recoverable damages to a maximum of $50,000 and prescribed that damages be dependent on the tortfeasor's degree of culpability.116 New York, however, had a strong policy against any such limitation, enshrined in a constitutional prohibition against them.117 On the surface, then, there appeared to be a true conflict

110. 12 N.Y.2d at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746 (citations omitted) (footnote omitted).
111. Id. at 479. Whether the Babcock case set up a contacts analysis or interest analysis is subject to some dispute if based solely on a reading of the Babcock text. However, as the Second Circuit observed, the New York Court of Appeals relied almost entirely on the interest-analysis interpretation of Babcock subsequent to that case. See Rosenthal v. Warren, 475 F.2d at 442-43.
112. See text accompanying notes 81-101 supra.
113. See Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185, 227 (1976); Silberman, supra note 5, at 99.
115. Id. at 439-40.
116. Id. at 439.
117. N.Y. Const. art. I, § 16; see 475 F.2d at 441.
between New York’s interest and Massachusetts’ interest in having its own law applied.

In arguing that Massachusetts’ interest was superior, the defendants introduced an affidavit of the head of the casualty underwriting division of the insurer’s Boston office indicating that a general surgeon’s liability policy in Massachusetts had a basic limit premium of $192, while a New York City surgeon paid $1,139, and that “one factor contributing to the difference is the ‘dollar exposure’ in New York, which has no wrongful death limitation.”118 Massachusetts’ wrongful-death limitation, however, applied to all such actions, and not just to those involving claims of medical malpractice.119 Thus, the state’s interest was a general one “in limiting damages for wrongful deaths allegedly caused by Massachusetts citizens or occurring in Massachusetts.”120

New York, on the other hand, was a pioneer state in blocking wrongful-death limitations;121 further, after New York began refusing to apply contrary wrongful-death rules in choice-of-law cases, other states moved toward the New York position.122 Thus, the Second Circuit, charged with divining the result the New York Court of Appeals would reach, had little reason to believe New York would come to a conclusion contrary to a trend it had initiated.123 The court concluded that the New York Court of Appeals would view the Massachusetts limitation as “so ‘absurd and unjust’ that the New York policy of fully compensating the harm from

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118. 475 F.2d at 440 (quoting affidavit of defendant).
119. Id. at 444-45.
120. Id. at 444. Two concepts may have been behind the Massachusetts law. First, the state may have feared the bringing of excessive or fraudulent wrongful-death claims. Cf. Babcock v. Jackson, 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.2d at 750-51 (discussing Ontario’s interest in guest-host statute bar to recovery in wrongful-death action). More likely, Massachusetts’ policy may have been a remnant of the mistaken notion that at common law no action existed for wrongful death. As the Rosenthal court recognized, it was not until 1972 that the Supreme Court of Massachusetts recognized that the notion was mistaken. 475 F.2d at 445 (construing Gaudette v. Webb, 362 Mass. 60, 68, 284 N.E.2d 222, 229 (1972)). In any case, however, the Second Circuit considered Massachusetts’ interest to be a true one; that is, effectuation of the Massachusetts policy in New York federal and state courts would impact upon the affairs of Massachusetts in a manner considered positive by the Massachusetts legislature. Thus, it was only left to compare one state’s interest to the other’s.
122. 475 F.2d at 445.
123. Id. at 445-46.
wrongful death would outweigh any interest Massachusetts has in keeping down in this limited type of situation the size of verdicts (and in some cases insurance premiums)." 124

Nevertheless, the Rosenthal decision was criticized as erroneous and possibly unconstitutional. 125 While it cannot be demonstrated with absolute certainty, it seems reasonable to conclude that the results in Tjepkema and Rosenthal would have been different had they been tried in other fora. The New York plaintiff obtained not only the convenience of a New York forum, but also the benefit of New York law which in all likelihood would not have been applied by a forum which obtained jurisdiction because it had greater contacts with the litigation. The dimension of the choice-of-law problem in cases involving Seider attachments was addressed in the debate over the viability of the Seider doctrine after Shaffer v. Heitner. Several commentators believed the Seider attachment to be consistent with the due process requirements of Shaffer only if the availability of a local forum for a resident plaintiff did not automatically imply the appropriateness of a forum law. 126 However, this direct relationship, even if justified at the second level of analysis as an interest comparison, may in fact have been established. 127

124. Id. at 445 (quoting Medinger v. Brooklyn Heights R.R., 6 A.D. 42, 46, 39 N.Y.S. 613, 616 (1896)). The opinion cannot be characterized solely as an interest analysis. On the one hand, the fact that a New York citizen was plaintiff certainly implicates a state interest in that New York's wrongful-death policy serves to protect its own citizens. On the other hand, however, the court minimized Massachusetts' interest in part by finding that the incident was not purely localized in Massachusetts because the decedent was from out of state and the defendant hospital was a national one in terms of its patients, staff, and efforts to obtain out-of-state contributions. Id. at 446. One might argue that if Massachusetts had an interest in keeping the cost of in-state hospital care low, the above-mentioned factors would not lessen the validity of that interest. On these grounds, then, one might conclude that the Rosenthal court was somewhat caught in the remnants of the contacts analysis used in jurisdictional cases and sometimes suggested in choice-of-law cases. See note 111 supra.

125. E.g., Martin, supra note 113, at 227; Silberman, supra note 5, at 99.

126. E.g., Silberman, supra note 5, at 90-99; COLUMBIA Note, supra note 80, at 446.

127. The second issue in O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978), see text accompanying notes 84-98 supra, was whether the district court was correct in holding that the defendant's liability be determined by New York law. The accident occurred in Virginia; under Virginia law no liability would exist. Under New York law, liability would exist if negligence were established. 579 F.2d at 196. The court determined that the New York Court of Appeals would apply New York law:

[W]e see no indication that the highest court of New York has wavered in its
Factoring in the Direct-Action Statute

Seider was first characterized as a judicially created direct-action statute in Judge Keating’s concurring opinion in Simpson v. Loehmann and later by the Second Circuit in Minichiello. Both Judge Keating and the Second Circuit cited Watson v. Employers Liability Assurance Corp. for the proposition that New York’s interest in applying its forum law to protect resident plaintiffs paralleled those interests considered significant by the Watson court. Thus, if the direct-action statute were constitutional, the jurisdictional and choice-of-law problems would, per force, be extinguished. The question, however, particularly in light of subsequent developments, is whether there was a solid foundation for the analytical framework erected by those courts relying on Watson.

A direct-action statute permits a plaintiff to bring an action directly against an insurance company. There are two general types of direct-action statutes. New York, for example, permits direct action against the insurer where the plaintiff has obtained a judgment against the insured remaining unsatisfied thirty days after its issuance. Louisiana’s statute permits an injured plaintiff to bring an action directly against an insurer before he has obtained a judgment to afford New York tort plaintiffs the benefit of New York law more favorable than the law of lex loci delictus whenever there is a fair basis for doing so.

Id. at 205. This decision was criticized as “dangerously close to the constitutional fairness line” and “probably erroneous.” Silberman, supra note 5, at 99. Moreover, Judge Friendly observed that the “same consequences would ensue if New York had authorized a direct action on behalf of New York residents against insurers doing business in New York,” 579 F.2d at 206 n.18, thus pointing out the inadequacy of dealing with Seider attachments as a jurisdictional issue only, and not a joint jurisdictional and choice-of-law issue. See text accompanying notes 222-226 infra.

128. 21 N.Y.2d at 313-14, 234 N.E.2d at 673, 287 N.Y.S.2d at 639-40 (Keating, J., concurring).
129. 410 F.2d at 109-10.
130. 21 N.Y.2d at 313, 234 N.E.2d at 673, 287 N.Y.S.2d at 639 (Keating, J., concurring).
131. 410 F.2d at 109-10, adhered to en banc, 410 F.2d at 117-18 n.1.
133. Since the validity of the direct-action statute rests on the state’s interest in applying its own law, see id. at 72-73; text accompanying notes 154-157 infra, the state court’s decision to apply its forum law, as long as in conformance with the direct-action statute, would necessarily meet due process standards.
134. See text accompanying notes 198-211 infra.
ment against the insured and is probably the broadest such statute at present.\textsuperscript{136}

Historically, if a plaintiff was successful in recovering a judgment against the assured but the assured was bankrupt or unable to meet the judgment, the plaintiff could be denied compensation. Courts held that under these circumstances the plaintiff had no action against the insurance company; he was not a party to the insurance contract and the policy was written for the benefit of the insured, not persons whose injuries might give them a claim against him.\textsuperscript{137} To correct this situation the Louisiana legislature enacted a statute in 1918 which guaranteed an injured party his right to recover from the liability insurer by providing a cause of action directly against the insurance company where the insured became insolvent or bankrupt before the injured party could obtain or enforce a judgment against him.\textsuperscript{138} This act was the forerunner of the direct-action statute.

The Louisiana legislature expanded the 1918 law in 1930 to produce what became known as the direct-action statute. This act allowed the injured party to sue a liability insurer directly, before the claim was reduced to a judgment against the insured; the plaintiff was given the options of bringing suit against either the insured, the insurance company, or against both the insured and the insurance company jointly and severally.\textsuperscript{139} The Louisiana Supreme


\textsuperscript{138} The Act read in part:

Be it enacted by the General Assembly of the State of Louisiana, that after the passage of this act, it shall be illegal for any company to issue a policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the insured person or his or her heirs, against the insurer company.


\textsuperscript{139} The Act read in part:

[A]ny judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy by the insured person or his or her heirs against the insurer company within the terms, and limits of the policy . . . in the parish were the accident or injury occurred, or
Court has interpreted the statute to permit direct action where the accident occurs within the state or where the accident occurs out of state if the policy was written or issued within the state. Thus, Louisiana’s interest was not defined in terms of protecting injured citizens, but instead in terms of injuries occurring within the state and the regulation of insurers operating within the state.

The Watson Decision—Pursuant to the Louisiana statute, Mr. and Mrs. Watson brought a direct action in Louisiana state court claiming damages against the Employers Liability Assurance Corporation (hereinafter Employers). Mrs. Watson claimed to have been injured in Louisiana when she bought and used in that state a Toni Home Permanent. The manufacturer, the Toni Company of Illinois, was a subsidiary of the Gillette Safety Razor Company, which had its headquarters in Massachusetts. The insurance policy sued on, which was negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois, contained a clause prohibiting direct actions against the insurance company until after final determination of the obligations to pay damages. The clause was recognized as binding and enforceable under both Massachusetts and Illinois law.

The action was removed to federal district court by reason of diversity. Employers moved for dismissal, contending in pertinent part that the Louisiana statute contravened the due process and full faith and credit clauses of the Constitution. The district court dismissed the case, holding the statutory provisions uncon-
stitutional as to policies written and delivered outside Louisiana. The Court of Appeals for the Fifth Circuit affirmed.149

On appeal to the Supreme Court, Employers argued that on due process grounds "a state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries."150 Thus, Employers reasoned, the full faith and credit clause compelled Louisiana to apply the "no-action" provision sanctioned by the laws of Massachusetts and Illinois.151 The appellee's argument was firmly based on the state-power concepts of Pennoyer v. Neff. In rejecting Employer's analysis, the Supreme Court went beyond these limiting jurisdictional principles.152 The Court viewed the case in choice-of-law terms and combined elements of both a contracts and interest analysis. On the former foundation, the Court recognized that the interstate nature of business conducted by large corporations necessarily implicated the interests of any given number of states dependent upon the factual circumstances involved.153

The gravamen of the Court's analysis, however, was founded upon interest terms.154 The Court stressed the fact that Louisiana, whether through public or private assistance, would likely be re-

149. 202 F.2d 407 (5th Cir. 1953).
150. 348 U.S. at 70.
151. Id. at 69.
152. It is interesting to note here that Watson was decided in 1954 and the first comprehensive long-arm statute was not enacted until 1955. See R. FIELD, D. KAPLAN, & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 756 n.w. (4th ed. 1978).
153. The Court reasoned that some contracts made locally, affecting nothing but local affairs, may well justify a denial as other states of power to alter those contracts. But, as this case illustrates, a vast part of the business affairs of this Nation does not present such simple local situations. Although this insurance contract was issued in Massachusetts, it was to protect Gillette and its Illinois subsidiary against damages on account of personal injuries that might be suffered by users of Toni Home Permanents anywhere in the United States . . . . As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states.
154. It is the interest analysis of the Watson opinion which has been most frequently relied upon since. See, e.g., Minichiello v. Rosenberg, 410 F.2d at 110; Simpson v. Loehmann, 21 N.Y.2d at 313, 234 N.E.2d at 673, 287 N.Y.S.2d at 639 (Keating, J., concurring).
RUSH v. SAVCHUK: IS THE SEIDER SPOILED?

required to care for the injured. Further, the Court reasoned that Louisiana had an interest in seeing that insurance companies were ultimately liable to the extent of the policy issued for the purpose of affording payment to injured individuals. Finally, the Court believed that the state had an interest in providing a forum convenient to those injured within its borders. While the Court recognized Massachusetts' interest in the regulation of policies issued in that state, it found this interest insufficient to compel Louisiana "to subordinate its direct action provisions to Massachusetts contract rules." 

The Court's analysis is reflective of a change in choice-of-law thinking from territorial-power concepts to interest concepts. However, the Court's opinion did not cite Mrs. Watson's Louisiana residence as a paramount factor in the interest analysis. Rather, the Court articulated Louisiana's interests in terms of "liability insurance that covers injuries to people in that State." In contrast, courts upholding the Seider attachment subsequent to both Seider and Shaffer continued to articulate New York's interest in providing the protection of its forum law to its residents as an integral part of the analysis.

Indeed, there are other significant differences between the Seider attachment and the Watson direct action. The occurrence of the accident outside the forum in a Seider action is not an insignificant difference; the Watson court was at pains to emphasize the fact that the plaintiff suffered her injury within the forum. Furthermore, the Watson Court emphasized the multi-state activities of Toni and Gillette, whose products were sold nationwide; in contrast, the characterization in Seider of the insurance company as national is diaphanous.

This Note has identified the two most prominent features of

155. 348 U.S. at 72-73.
156. Id. at 73.
157. See text accompanying notes 107-111 supra.
158. In fact, in Home Ins. Co. v. Dick, 281 U.S. 397 (1930), the Court concluded that "[t]he fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made." Id. at 408.
159. 348 U.S. at 73.
160. E.g., Minichiello v. Rosenberg, 410 F.2d at 109-10, adhered to en banc, 410 F.2d at 117-18 n.1; Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
162. Seider v. Roth, 17 N.Y.2d at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
the analysis in Seider and its progeny: the state's interest, with re-
spect to both jurisdictional and choice-of-law questions, in pro-
tecting its residents, and the analogy of New York's interest in
Seider attachments to Louisiana's in the Watson case. These argu-
ments were made both before and after Shaffer v. Heitner, and
without direct contradiction by the United States Supreme Court.
It was with these questions extant that the Court considered Rush

RUSH v. SAVCHUK

The Facts

After years of litigation in the state and federal courts of New
York, it was with some irony that the case which would decide the
validity of the Seider attachment arose in the Minnesota court sys-
tem. On January 13, 1972, Jeffrey Savchuk was injured in a single-
car accident in Elkhart, Indiana. The car was driven by Randall
Rush and insured by the State Farm Mutual Automobile Insurance
Company (State Farm) under a liability policy issued in Indiana,
the residence of both parties.164

Savchuk moved to Minnesota in June of 1973 and on May 28,
1974 commenced an action against Rush in Minnesota state court,
although Rush had no contacts with Minnesota that would support
jurisdiction.165 As Minnesota had adopted the Seider attachment
procedure (but not a direct-action procedure) by statute,166 and

164. Id. at 322.
165. Id. The complaint alleged negligence and sought $125,000 damages. Id. at
322-23. The plaintiff later reduced his claim to $50,000, the policy limit, a fact the
Minnesota Supreme Court considered to be an implicit recognition of the fact that
personal jurisdiction over the defendant was not justified. Savchuk v. Rush, 311
Minn. 480, 490, 245 N.W.2d 624, 629 (1976).
166. MINN. STAT. ANN. § 571.41(2) (West Supp. 1979) provides in relevant part:
Notwithstanding anything to the contrary herein contained, a plaintiff in any
action in a court of record for the recovery of money may issue a garnishee
summons before judgment therein in the following instances only:

(b) If the court shall order the issuance of such summons, if a summons and
complaint is filed with the appropriate court and either served on the de-
fendant or delivered to a sheriff for service on the defendant not more than
30 days after the order is signed, and if, upon application to the court it shall
appear that:

(3) The purpose of the garnishment is to establish quasi in rem jurisdiction
and that

(b) defendant is a nonresident individual, or a foreign corporation, partner-
ship or association.
State Farm did business in Minnesota, Savchuk sought quasi in rem jurisdiction by garnishment of the insurer's obligations to defend and indemnify Rush. State Farm responded to the garnishment summons, claiming that nothing was due Rush as judgment debtor. Savchuk then moved for permission to file a supplemental complaint, making the garnishee, State Farm, a non-defendant party to the action pursuant to the Minnesota garnishment statute. Rush and State Farm then moved for dismissal for lack of jurisdiction over the defendant. The trial court granted Savchuk's motion for leave to file a supplemental complaint and denied the motion to dismiss. The order was then appealed to the Minnesota Supreme Court.

Savchuk I

The Minnesota Supreme Court affirmed the trial court's decision. The court first held that as a matter of state law an automobile insurance company's obligation to defend and indemnify its insured in a res subject to prejudgment garnishment for the purpose of obtaining quasi in rem jurisdiction as long as the plaintiff is a resident of Minnesota.

The court then considered whether the seizure and resultant quasi in rem jurisdiction conformed with constitutional requirements of due process. The court held that due process is not violated by the attachment procedure provided:

(1) [that] proper notice is given to the defendant-insured, adequate to give him opportunity to defend his property; (2) that the defendant-insured's liability is limited to the applicable policy limits of his insurance contract; and (3) that the plaintiff in the

(3) The garnishee and the debtor are parties to a contract of the 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.

A version slightly different from that above was in effect at the time of the initial Minnesota Supreme Court hearing in Savchuk, but differed in no material respect. See 444 U.S. at 322 n.3.

167. 444 U.S. at 322.
168. Minn. Stat. Ann. § 571.51 (West Supp. 1979) provides in relevant part: [I]n all ... cases where the garnishee denies liability, the judgment creditor may move the court at any time before the garnishee is discharged, on notice to both the judgment debtor and the garnishee, for leave to file a supplemental complaint making the latter a party to the action, and setting forth the facts upon which he claims to charge him; and, if probable cause is shown, such motion shall be granted.
170. Id. at 324.
171. 311 Minn. at 485, 245 N.W.2d at 627-28.
action is a resident of the state at the time the action is commenced.\textsuperscript{172}

The court found that the first and third requirements were met. The second requirement proved problematic. Because Minnesota law did not allow the defendant a limited appearance for the purposes of quasi in rem actions,\textsuperscript{173} the defendant claimed that he would be subject to damages beyond the policy limits, that is, to the extent of an in personam action.\textsuperscript{174} The court approved of the solution utilized in Simpson v. Loehmann\textsuperscript{175} and held that the bar did not apply in this case. Just as basic fairness justified the attachment procedure, the court held, similar considerations mandated that the procedure be restricted as to the potential recovery.\textsuperscript{176}

The court rested its due process requirements on the “[b]asic considerations of fairness”\textsuperscript{177} which provided the rationale for International Shoe and its progeny. Conceding that Rush had engaged in no activity which justified an assertion of personal jurisdiction, the court found that the due process requirements for personal jurisdiction were not necessarily congruent with those for the assertion of other types of jurisdiction. Rather, “considerations of fairness suggest the need for quasi-in-rem jurisdiction obtainable via a prejudgment garnishment procedure like that permitted by”\textsuperscript{178} the Seider rule. The court recognized that the insurer controls the defense.\textsuperscript{179} Minimum contacts sufficient to provide a constitutional basis for quasi in rem jurisdiction were found to exist because of the insurer’s registration to do business in the state, presence in the state, and the state’s “legitimate” interest in protecting its residents and providing them a forum.\textsuperscript{180} However, at the same time, the court commented that if the plaintiff were not a resident of the forum state, the state would lack sufficient meaningful contact with the suit to justify the exercise of jurisdiction.\textsuperscript{181}

\textsuperscript{172} Id. at 488, 245 N.W.2d at 629. As Savchuk was not a resident of Minnesota at the time he was injured, the court interpreted the test to require residency at the time of commencement of the suit. Id. at 486, 245 N.W.2d at 628.

\textsuperscript{173} MINN. STAT. ANN. RULES OF CIV. PROC. R. 4.04(2) (West 1979) states that “when quasi in rem jurisdiction has been obtained, a party defending such action thereby submits personally to the jurisdiction of the court.”

\textsuperscript{174} 311 Minn. at 486, 245 N.W.2d at 628.

\textsuperscript{175} See text accompanying notes 22-24 supra.

\textsuperscript{176} 311 Minn. at 486-87, 245 N.W.2d at 629.

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} Id. at 486 n.6, 245 N.W.2d at 628 n.6.
This statement proves analytically weak. A large insurance company such as State Farm is likely to do business in all fifty states and the District of Columbia. Yet, the necessary factor in the court’s decision was the plaintiff’s forum residence. Thus, the court’s reasoning led to the anomalous result that sufficient contacts to justify an exercise of quasi in rem jurisdiction would be based on the insurance company’s presence in the forum only if the plaintiff were a forum resident. Rush appealed to the United States Supreme Court which vacated the judgment and remanded the case to the Minnesota Supreme Court for reconsideration in light of Shaffer v. Heitner.

Savchuk II

The Minnesota Supreme Court distinguished Shaffer and upheld the attachment procedure as consistent with the minimum contacts analysis made applicable by Shaffer to all assertions of jurisdiction. The court found the Seider-type attachment significantly different than that at issue in Shaffer. First, the sequestration procedure at issue in Shaffer did not parallel the asserted state interest in regulation of the state-chartered corporations. In contrast, the Minnesota garnishment statute paralleled the state interest in facilitating recoveries for resident plaintiffs by providing a local forum. Indeed, satisfaction of the interest necessitated the garnishment procedure.

Second, the res used in Shaffer to assert jurisdiction was completely unrelated to the cause of action. Again by way of contrast, the res used in Seider-type attachments—the insurer’s obligations to defend and indemnify—are intimately related to the cause of action and are “inevitably the focus, determining the rights and obligation [sic] of the insurer, the insured, and practically speaking, the victim.”

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182. 444 U.S. at 330.
185. Id. at 891; see text accompanying notes 72-78 supra. That interest would be satisfied by application of Delaware law, but did not necessitate the provision of a Delaware forum. 272 N.W.2d at 890.
186. Id. at 891.
187. Id. at 892. Another factor in the court’s adherence to its initial decision was the omission in the historical discussion in Shaffer of any discussion of the Seider attachment—a procedure the Savchuk II court characterized as “undoubtedly the most highly controversial and significant contemporary application of the doctrine of quasi in rem jurisdiction.” Id. at 891. The court interpreted the omission of any discussion of the Seider procedure as an indication that the Court at least did not disapprove of the attachment procedure. The Savchuk II court also relied on the Su-
Having distinguished Shaffer, the court reiterated several of the well-known fairness arguments cited in support of the Seider attachment: the defendant’s liability is limited and, in any case, he stands to lose nothing of convertible value; in convenience to defendants can be remedied by application of the doctrine of forum non-conveniens; the action is essentially one against the insurer, requiring only the nominal defendant’s cooperation in his defense; and the overall effect serves to “minimize the traditional ‘jurisdictional bias’ in favor of the nominal defendant.”

However, by framing the issue primarily in jurisdictional terms, the Minnesota Supreme Court camouflaged—and confused—a serious choice-of-law problem. The issue in Savchuk was not merely one of “fair forum,” for Savchuk was barred from bringing suit in Indiana (the place of the accident) by that state’s guest statute. The court’s analysis was limited to its statement that “Minnesota’s legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum, but may override traditional choice of law analysis.” Clearly, Indiana had some interest in seeing its resident defendants protected in guest-host situations. Yet, a balancing of these interests was never undertaken by the Minnesota court.

It is not uncommon in cases of true conflicts of interest for the forum state to apply its own law. Unfortunately, the Minnesota court neither compared the conflicting interests nor considered the importance of Savchuk’s place of residence at the time of the accident. (Indeed, New York courts did not allow utilization of the Seider procedure unless the plaintiff was a resident at the time of the accident.) Further, the Minnesota court argued that “[a] state’s interest in providing a forum for its residents is particularly

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188. 272 N.W.2d at 892 & n.6 (quoting O’Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 198 (2d Cir. 1978) and Minichiello v. Rosenberg, 410 F.2d 117, 118 (2d Cir. 1969) (en banc)).
189. Id. at 893.
190. Id. at 892.
191. Id. at 893.
192. Id. at 891 n.5; see IND. CODE ANN. § 9-3-3-1 (Burns 1973).
193. 272 N.W.2d at 891-92 (citations omitted).
strong where an alternative forum would not have permitted recovery," thus justifying its jurisdictional holding in part on the possible outcome of an Indiana court's choice-of-law analysis. Thus, it was clear that the Minnesota court's approach to the jurisdictional question obviated any need to consider further the choice-of-law problems involved. Rush appealed once again to the Supreme Court.197

The Supreme Court Opinion

The Supreme Court, in an opinion by Justice Marshall, put an end to the long-standing assertion that Seider attachments were a justifiable exercise of quasi in rem jurisdiction. The court's analysis was premised on its holding in Shaffer—that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."198 In determining whether those standards are met, the Court required that the inquiry focus on "the relationship among the defendant, the forum, and the litigation."199

The Court first found that there existed no contacts between Rush and Minnesota, a conclusion the state court had also reached.200 The Court then considered the significance of the "contact" provided by the presence of the debt—the obligation to defend and indemnify—within the forum. The Court concluded that:

State Farm's decision to do business in Minnesota was completely adventitious as far as Rush was concerned. He had no control over that decision, and it is unlikely that he would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move. In short, it cannot be said that the defendant engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, merely because his insurer does business there.202

196. 272 N.W.2d at 891 n.5.
198. Id. at 327 (quoting Shaffer v. Heitner, 433 U.S. at 212).
199. Id. (quoting 433 U.S. at 204).
200. Id. at 327-28; see 311 Minn. at 487, 245 N.W.2d at 629 (Savchuk I).
201. The Court assumed that the debt was garnishable property because state law controlled. Thus, the question whether the debt arose before or after jurisdiction was obtained over the defendant was not answered. As to the relevance of the garnishment, the Court held that "the question is what significance that fact has to the relationship among the defendant, the forum, and the litigation." 444 U.S. at 328 n.14.
202. 404 U.S. at 328-29 (emphasis in original) (citations omitted). But see id. at 304 (Brennan, J., dissenting).
Having found no contacts between the defendant and the litigation, the Court next examined the relationship between the forum and the litigation. The Court found that the State's interest in the insurance policy, to whatever extent it existed, was irrelevant because it related only to the conduct of litigation properly commenced. Because the insurance policy was neither the subject matter of the tort claim, nor related to the operative facts of the asserted negligence, it could provide no substantive ties between the forum and the litigation.\footnote{Id. at 329.}

The Court briefly examined the direct-action rationale for upholding \textit{Seider} attachments. Its conclusion was based squarely on its requirement that the focus of jurisdictional analysis be on the named defendant. Thus, the Court held that "[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."\footnote{Id. at 330-31.} The opinion did not, however, consider the validity of a legislative direct action enacted to cover \textit{Seider}-type situations.\footnote{Some guidance might be provided by the Court's footnote reference to the direct-action statute upheld in \textit{Watson} as "applicable only if the accident or injury occurred in the State or the insured was domiciled there and which permitted the plaintiff to sue the insurer alone, without naming the insured as a defendant." \textit{Id.} at 331 n.19 (emphasis added); see text accompanying note 140 \textit{supra}.}

The precedential value of the Court's \textit{Savchuk} opinion lies in its statement that due process requires the jurisdictional inquiry to focus on "the relationship among the defendant, the forum, and the litigation [and not on] that among the plaintiff, the forum, the insurer, and the litigation."\footnote{\textit{International Shoe} can logically be interpreted as either a minimum-contacts test or a "fair play and substantial justice" test.} The \textit{Savchuk} Court settled any question on this matter by holding that a finding of minimum contacts is analytically prerequisite to a consideration of whether "fair and substantial justice" is served—or offended—by an assertion of jurisdiction based on those minimum contacts.\footnote{The flaw, then, in the...}

\footnote{\textit{Id.} at 331 n.19 (emphasis added); see text accompanying note 140 \textit{supra}.}

\footnote{\textit{Seidér} courts had limited such actions to forum residents on the ground that permitting nonresidents to avail themselves of the procedure would violate due process was viewed by the Court as support for its conclusion that those courts had substituted plaintiff’s contacts for those of the defendant in the jurisdictional calculus. \textit{Id.}}


\footnote{\textit{444 U.S. at 332}.}
opinions written by those courts upholding the Seider procedure was a predilection to view the overall fairness of the assertion of jurisdiction as the determinative factor. The Supreme Court's return to or reaffirmance of, the emphasis on the defendant will likely simplify jurisdictional analysis. Thus, the confusion evident, for example, in the Minnesota Supreme Court's second Savchuk opinion, a confusion which considered the ultimate choice-of-law determination as a factor in the jurisdictional decision, will be avoided in the future. But if the simplicity of the Court's analysis has its benefits, it also has its flaws. By taking a small step backward to the "magical and medieval concepts of presence and power" that typified the Pennoyer era, the Court necessarily left at least two questions unresolved, questions that are unlikely to remain forever dormant.

Problems Persisting Post-Savchuk

The Supreme Court's Savchuk opinion was narrowly framed in terms of quasi in rem jurisdiction. While it is not the purpose here to suggest that the Court should have considered the two issues that remain (direct actions in the Seider context and potentially resultant choice-of-law problems), the Court's analysis, by limiting the initial focus to the defendant's contacts, allowed the Court to avoid consideration of these questions. Should any state attempt to legislate around the Savchuk opinion, that opinion will lose its value because of its self-imposed limits.

Those courts which sustained the Seider procedure as in effect a judicially created direct action statute considered the difference between the quasi in rem action and the direct action to be one of form only. Several courts and commentators who believed

209. See text accompanying notes 192-196 supra.
210. See 444 U.S. at 308 (Brennan, J., dissenting).
211. Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.
214. E.g., Rosenberg, One Procedural Genie Too Many or Putting Seider Back into its Bottle, 71 COLUM. L. REV. 660, 669-87 (1971); HOFSTRA Note, supra note 80, at 44.
Seider to be unconstitutional nevertheless also believed that a legislature could constitutionally enact a direct-action statute incorporating Seider. The Supreme Court’s analysis, because it focused on the quasi in rem basis, provides little guidance in considering the constitutionality of such a statute.215

A corporation is considered to be “present” for jurisdictional purposes wherever it does business, and is considered to be amenable to suit on a cause of action unrelated to its presence in the forum.216 However, the Savchuk Court may have hinted that jurisdiction—even in personam—is more limited in the Seider circumstance by referring to the situs of the insurer’s obligation in the forum state as a legal fiction compounding “the legal fiction that a corporation is ‘present,’ for jurisdictional purposes, wherever it does business.”217 Under a direct-action statute incorporating Seider the only affiliation with the forum, beside the presence of the insurance company, is the residence of the plaintiff. Conceivably, a court could find that the insurance company’s activities of defending and indemnifying nonresidents of the forum state has no relation to the regulable activities which the insurer carries on within the forum. Thus, since there would be no relationship between the underlying substantive claim and the state’s regulatory interest, the direct-action statute could be overturned. Such a holding would be consistent with the emphasis in Savchuk on the relationship among the defendant, the forum, and the litigation.218

215. Such a statute might read:

A resident of (State X) who while outside his state, sustains bodily injury, including fatal injury, and/or property damage as a result of the tortious act of a person (including corporations) insured against liability for such injury or damage, shall have a right of action directly against the insurer, regardless of any contrary provision in the insurance contract, provided that the insurer has qualified to do business, or is doing business in this state.

See Rosenberg, supra note 214, at 670.


217. 444 U.S. at 328. Some courts that have sustained Seider have argued that the multistate nature of the insurer goes to minimize the traditional bias in favor of the defendant. E.g., Savchuk v. Rush, 272 N.W.2d at 892. This characterization is incorrect for two reasons: First, while the insurer is a large multistate corporation, it has not through any of its activities caused injury to the plaintiff. Second, the reversal of the “prodefendant bias” is less supportable where the plaintiff’s activities are multistate. See Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1168 (1966). By the very fact of the plaintiff having been injured outside the forum state, the plaintiff has engaged in “multistate activity.”

218. 444 U.S. at 332.
The Court's decision upholding Louisiana's direct-action statute in *Watson* provides little support for the constitutionality of a *Seider*-type direct action. First, the occurrence of the injury in Louisiana settled the jurisdictional question. Second, the defendant's conduct in *Watson* was the cause of injury. Nonetheless, the *Savchuk* Court's only reference to *Watson* indicated that the direct action would be allowed "if the accident or injury occurred in the State or the insured was domiciled there and [the statute] permitted the plaintiff to sue the insurer alone. . . ." Thus, the Court's lone statement concerning the in personam validity of the direct action would appear to allow a statutory direct action where the only relationship is the insured's residence, thus parrying the reality that the defendant in a direct action, upon whom the burdens of litigation would fall, is the insurer.

Were the *Seider*-type direct action upheld, serious choice-of-law problems would arise. *Savchuk* presented a particularly egregious choice-of-law decision. While the effect of the holding in *Rosenthal v. Warren* was to subject the defendant to greater liability than lex loci delictus would have mandated, the defendant in *Savchuk* was subject to liability where none would have existed had the Indiana guest statute been applied. The Minnesota Supreme Court did not attempt to balance its interests with those of Indiana. Instead, it premised its jurisdictional and choice-of-law holdings upon the same factors. Since the jurisdictional holding was overruled by the Supreme Court, the validity of the choice-of-law result is open to question. Whether the Minnesota approach to choice of law in *Savchuk* would serve as precedent should jurisdic-

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220. *Id.* at 67; see text accompanying notes 154-162.
221. 444 U.S. at 331 n.19.
222. 475 F.2d 438, 439-40 (2d Cir. 1973); see text accompanying notes 114-124 supra.
223. See text accompanying notes 192-196 supra.
224. A compelling argument can be made for the application of Indiana law on the facts of *Savchuk*. The accident occurred on an Indiana highway, both parties were residents of Indiana at the time of the accident, the car was registered in Indiana, and the insurance policy was issued in Indiana. 444 U.S. at 322. Indiana has a significant interest in application of its guest-host statute to protect resident defendants, to spread the cost of such accidents among guests and hosts, and to influence the cost of automobile liability insurance. By contrast, Minnesota's interest to provide recovery for those who became residents after an accident seems substantially less compelling.
225. See 272 N.W.2d at 891-92 (*Savchuk II*).
tion be upheld under a direct-action statute directly raises the question whether direct actions should constitutionally be permitted to provide not only fora for resident plaintiffs but also forum law.226

By structuring its Savchuk opinion so narrowly in terms of quasi in rem jurisdiction, the Supreme Court did not deal with the challenge to choice-of-law analysis. Once the assertion of jurisdiction was determined to be unconstitutional, the problem of Minnesota's aggressive and probably unconstitutional application of forum law became moot. It has been observed that the Supreme Court's recent decisions redefining jurisdiction move toward the provision of proper law in the proper forum.227 Nevertheless, the Court provided little in terms of guidelines for a court to utilize in determining whether its choice of law is constitutional.228

CONCLUSION

The Supreme Court's overruling of the Seider doctrine in Rush v. Savchuk signals the end of an era. Several important issues

226. The Court has consistently held jurisdiction and choice of law to be analytically distinct. See Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 237, 253-54 (1958). In these cases the Court has held state-court jurisdiction violative of due process because minimum contacts between the defendant and the forum were lacking, but it has commented in dicta that the interests asserted by the forum would probably be sufficient to sustain the forum's decision to apply its own law. The Court has spoken directly to only jurisdictional interests; yet, to imply that two states with conflicting law each have sufficient interests to support the choice of its law but only one has sufficient contacts to support jurisdiction is to decide in many fora which state's law will apply to the controversy. See, e.g., Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964). The Court's logic has produced the anomaly that a state needs a higher degree of contact to sustain jurisdiction than it does to support application of its law. See Silberman, supra note 5, at 84-88; Vernon, Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner, 1978 WASH. U.L.Q. 273, 292-93.


228. The Court adverted, in a footnote, 444 U.S. at 325 n.8, to the fact that Minnesota would decline to apply the Indiana guest statute and would apply its own comparative negligence law rather than Indiana's contributory negligence rule but concluded that the constitutionality of a choice-of-law rule was not before the Court. The Court then cited to Home Ins. Co. v. Dick, 281 U.S. 397 (1930), where it had held under facts similar to Seider that the decision to apply forum law where the only affiliating factor was the plaintiff's permanent residence was violative of due process. 444 U.S. at 325 n.8.
have been settled. A person who is injured out of state and is unable to secure personal jurisdiction over the tortfeasor will not be permitted a local forum. The confusion concerning application of the principles of International Shoe to Seider attachments, a confusion that existed both before and after Shaffer v. Heitner, has been laid to rest. It is now clear that these principles apply to all assertions of jurisdiction, regardless of the rationale, and that the relationship between the defendant and the forum must play a paramount role in jurisdictional analysis. Interestingly enough, the post-Seider jurisprudence, which first discredited the concepts traceable to Pennoyer v. Neff, has now allowed a touch of the old “magic” through the back door.

The Savchuk decision may, however, have a very short life. While one can only speculate whether a state will attempt to achieve the objectives of the Seider attachment by the enactment of a direct-action statute incorporating that procedure, it is clear that the interests served by the judicial decision could be equally well served by a legislative decision. Neither the Savchuk opinion nor previous Court decisions concerning direct-action and choice-of-law issues provides much guidance in assessing the potential statute’s constitutionality on either ground.229 Thus, after fourteen years of interesting confusion, an area of law already muddled to excess remains unsettled.

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229. On January 13, 1981, the Supreme Court announced its decision in Allstate Ins. Co. v. Hague, 49 U.S.L.W. 4071 (U.S. 1981). While it would be inappropriate here to discuss the importance of that decision, it should be noted that the decision provides no explicit guidance for analysis of the conflicts-of-law problems inherent in Seider-type attachments. The majority opinion in Hague relied on significantly greater contacts than those present in the cases discussed in this Note, see id. at 4075-76, in upholding the choice of law at question as constitutional. In limiting its decision to the facts, id. at 4073, the Court necessarily did not provide guidance for the Seider-type situation should it arise in the form of a direct action. For a thorough discussion of choice of law after Hague, see the symposium at 10 Hofstra L. Rev. 1 (forthcoming, 1981).