Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth

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SHAFER v. HEITNER: NEW CONSTITUTIONAL QUESTIONS CONCERNING SEIDER v. ROTH

The Supreme Court decision in *Shaffer v. Heitner* marked the collapse of a century-old conceptual framework for assuring due process in the assertion of state court jurisdiction. This note will briefly trace the developments in the law of jurisdiction which led to *Shaffer* and will examine *Shaffer* in light of those past decisions. It will demonstrate that, while the Court was justified in its holding, it misapplied its holding to the facts of the case. Not only did the Court’s misapplication of the holding cause it to arrive at an unjust result, but this misapplication also created serious doubt as to the manner in which *Shaffer* should be interpreted.

Furthermore, this note will analyze the effect of *Shaffer* on the *Seider v. Roth* attachment procedure in New York, which developed as part of the earlier concept of jurisdiction. It will demonstrate that *Seider* should be overruled in light of *Shaffer*.

ONE HUNDRED YEARS OF STATE COURT JURISDICTION: A CHANGING CONCEPT FOR A CHANGING NATION

A century ago in *Pennoyer v. Neff*, the Supreme Court granted constitutional status to a concept of state court jurisdiction which had been adopted by several states almost a century earlier. *Pennoyer* was an action to recover possession of a tract of land. Neff sought to recover the land from Pennoyer, claiming that an earlier default judgment which caused him to forfeit his land was void because the court which rendered the judgment did not have personal jurisdiction over him. His assertion rested on three premises: (1) He was a nonresident of the forum state; (2) he was not personally served within the state; and (3) he did not appear therein. Thus, the issue in *Pennoyer* was whether the court in the

3. 95 U.S. 714 (1877).
5. Neff asserted title to the property under a patent. *Pennoyer v. Neff*, 95 U.S. 714, 719 (1877). Pennoyer claimed title to the land under a sheriff’s deed. The sheriff’s deed was made upon a sale of the property in execution of a judgment against Neff in a previous contract action against him by one Mitchell. *Id.*
6. *Id.* at 719-20.
previous action had authority to determine a nonresident's rights and obligations regarding a resident of the forum. In rendering the judgment void against Neff, Justice Field articulated what later became known as the “power”7 concept of jurisdiction.

Justice Field stated that the law of state court jurisdiction was defined by the principles of public law that govern relationships among independent nations.8 There were three basic principles. First, “the validity of every judgment depends upon the jurisdiction of the court before [the judgment] is rendered . . . .”9 Second, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”10 Third, “no State can exercise direct jurisdiction and authority over persons and property without its territory.”11 An important corollary to these rules was that “in virtue of the State’s jurisdiction over the property of the non-resident situated within its limits . . . its tribunals can inquire into that non-resident’s obligations to its own citizens . . . only to the extent necessary to control the disposition of the property.”12 Thus, unless a nonresident defendant owned property in the state, was served with process in the state,13 or voluntarily consented to suit in the forum,14 the state’s assertion of jurisdiction over him constituted a denial of his fourteenth amendment right to due process.15

The principles enunciated in Pennoyer provided a basis for establishing three classes of jurisdiction which have been utilized by courts throughout the last century.16 In Hanson v. Denckla,17 the Supreme Court enumerated those classes:

A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A

9. Id. at 728.
10. Id. at 722.
11. Id.
12. Id. at 723.
13. Id. at 733.
14. Id.
15. Id.
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.\textsuperscript{18}

Under the standard of Pennoyer, a judgment in personam can only be rendered against a resident defendant, a defendant who is served within the state, or a defendant who voluntarily submits to suit in the forum. Thus, under Pennoyer, it was difficult to gain personal jurisdiction over a nonresident defendant.

While the power notion may have been a sensible system for asserting jurisdiction in 1877, it subsequently became less effective. After Pennoyer the nation became more mobile.\textsuperscript{19} New modes of transportation provided faster, more convenient travel. Consequently, interstate travel and commerce increased. It became possible for nonresidents to visit a state and cause injury, and leave the state before they could be served with process. For years following Pennoyer, courts, subject to the constraint of stare decisis, resorted to legal fictions and attenuated logic to comply with the stringent requirements of Pennoyer, while providing a forum for resident plaintiffs.\textsuperscript{20}

Eventually, in \textit{International Shoe Co. v. Washington},\textsuperscript{21} the Court responded to the need for a new theory which would provide for personal jurisdiction over transient nonresidents, with no in-State property, who caused injury within the forum state. Con-

\textsuperscript{18} Id. at 246 n.12 (citation omitted).
\textsuperscript{20} For cases discussing the “implied consent” fiction, see, for example, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627-28 (1935); Hess v. Pawloski, 274 U.S. 352, 356 (1927); Flexner v. Farson, 248 U.S. 289, 293 (1918).
\textsuperscript{21} 326 U.S. 310 (1945). In \textit{International Shoe Co. v. Washington}, id., the State of Washington, pursuant to statute, sought to collect unemployment taxes from a shoe company, based on commissions paid by the firm to its Washington-based salesmen. The firm was sued by the state for nonpayment of those taxes. Subsequent to a judgment in favor of plaintiff, id. at 313, the firm appealed on the grounds that Washington lacked jurisdiction to render the judgment. \textit{Id.} at 311. The \textit{International Shoe Company} was incorporated in Delaware. Its principal place of business was in Missouri. \textit{Id.} at 313. The firm conducted no business in Washington except for the activities of its Washington-based salesmen, who solicited orders for the firm. \textit{Id.} There was no Washington office, but the salesmen sometimes rented display rooms in the state. \textit{Id.} at 314. The salesmen had no authority to enter contracts; all orders had to be approved by the home office. \textit{Id.} at 313-14.
testing jurisdiction of a Washington court, the International Shoe Company, a foreign corporation which conducted some of its activity in the State of Washington, claimed that its activities within the forum state were insufficient to manifest its "presence" there. The company insisted that due process forbade the Washington court to render an in personam judgment against it. The Supreme Court noted that under Pennoyer, defendant's "presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him," but rejected the Pennoyer rule in favor of a more functional view of jurisdiction. Justice Stone stated:

[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." "Minimum contacts" is an elusive concept. In International Shoe the Court stated:

[The criteria by which we mark the boundary line between those activities which justify the subject of a [defendant] to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Since the International Shoe standard was first articulated, courts, committed to applying that standard, have detailed the minimum contacts standard on a case-by-case basis. In addition, most states have responded to International Shoe by enacting "long
arm” statutes which specify those in-State acts which suffice to subject a defendant to suit in that state.28 Since it is the quality and nature of the act which is the focus of investigation, even an act having foreseeable in-State consequences committed outside the state may have sufficient connection with the state to justify assertion of jurisdiction.29

The Court in International Shoe sought to achieve two goals by adopting the new standard: first, fairness to the defendant, by preventing the inconveniences which result from a trial away from home.30 One commentator has suggested that these inconveniences include a defendant’s interest in avoiding the extra expense and effort, and in avoiding the problems which might arise in obtaining witnesses and evidence, for litigation away from home.31 In the wake of International Shoe, some courts have interpreted the standard of “fair play and substantial justice” to include the interests of the plaintiff, as well.32

Second, out of respect for federalism,33 the Court sought to

28. The uniform long arm statute provides:
(a) A court may exercise personal jurisdiction over a person, who acts directly or by 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 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;
   (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 103.4 (1962 version).


protect the interests of the state asserting jurisdiction. The Court stated:

[The due process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . .

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to suit brought to enforce them can, in most instances, hardly be said to be undue.34

Cases decided after International Shoe have identified legitimate interests that a state might seek to vindicate. These state interests include avoiding financial detriment to itself,35 avoiding multiple litigation,36 and permitting effective recourse to its laws.37

The nonresident defendant, whose conduct affects the interests of the resident plaintiff and those of the state seeking to assert jurisdiction, creates conflict in interests. This conflict may be resolved by balancing the interests of the state and the plaintiff in suing in the proposed forum against the interests of the defendant in being sued in a “reasonable” forum.38

Cases following International Shoe reveal that imposed upon this apparently neutral interest-balancing analysis is a prodefendant bias. Looking to the language of International Shoe, one commentator suggested: “[T]he purpose of the rules of in personam and in rem jurisdiction is to ensure that the defendant not be sued away from his natural forum without sufficient justification. This purpose

34. Id. at 319 (citations omitted).
38. International Shoe Co. v. Washington, 326 U.S. 310 (1945), referred to defendant’s right to be sued in a “reasonable” forum. Id. at 317.
39. The concept of characterizing the International Shoe standard as a balancing test is not new. See generally Smit, supra note 31.
is significantly different from that of ensuring that the forum chosen be reasonable from all points of view."

The prodefendant bias has been afforded varying degrees of respect as the law of jurisdiction has developed. Under the rigid framework of Pennoyer, the bias was clear. It was difficult to attain personal jurisdiction over a defendant who had to be served with process within the state. International Shoe relieved some of the difficulty in suing nonresidents, but did not eliminate jurisdictional limitations entirely. The Court in McGee v. International Life Insurance Co. justified the assertion of jurisdiction over a defendant whose contacts with the forum were indeed minimal, noting a "trend... toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." After the broad interpretation of International Shoe by the Court in McGee, it appeared that a proplaintiff bias was developing until, in Hanson v. Denckla, the Court clearly reaffirmed the prodefendant bias. Referring to the trend noted in McGee, the Court in Hanson stated:

[It] is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. ... Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

While reaffirming the prodefendant bias, Hanson established a threshold measure for courts to determine the sufficiency of a non-

40. Id. at 611 (emphasis added).
41. The prodefendant bias is ancient, emerging from Roman law. The Roman maxim, actor forum rei sequitur, means "the plaintiff must pursue the defendant in his forum." von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1127 n.13 (1966). One commentator suggested that justification for perpetuating this bias derives from the notion that the plaintiff, by instituting the suit, acts contrary to the social policy that discourages litigation; hence, the defendant should be favored. See Smit, supra note 31, at 608.
42. 355 U.S. 220 (1957).
43. Defendant's only contact with California was mailing a reinsurance contract to plaintiff's deceased. Id. at 221.
44. Id. at 222.
46. Id. at 251 (citations omitted).
residents' contacts with the state asserting jurisdiction. The Court found it "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protections of its laws." Thus, after Hanson, in any assertion of jurisdiction, the focus is on the activities of the defendant within the forum state which give rise to the defendant's obligation to submit to suit in the jurisdiction. In short, an interest-balancing analysis, in which the scale is tipped from the outset in favor of the defendant, is a convenient tool for applying the International Shoe standard.

Although the International Shoe standard ameliorated the problems created by the continued application of the Pennoyer rules in the sphere of in personam jurisdiction, the in rem rules remained intact. Recently, the Court in Shaffer declared that the in rem rules, as they existed a century ago in Pennoyer, no longer assure due process in and of themselves. Thus, the decision in Shaffer marks the final collapse of the power framework of state court jurisdiction, and creates a comprehensive, functional law of jurisdiction, suitable for a nation one hundred years more mature than it was in the days of Pennoyer.

**Shaffer v. Heitner**

The controversy in Shaffer concerned the constitutionality of Delaware's sequestration statute. That statute empowered the court to assert jurisdiction over a nonresident defendant by seizing any property the defendant owned in the state. The statute provided the defendant with two alternatives subsequent to seizure: either to enter a general appearance to defend the sequestered

47. Id. at 253.
48. See text accompanying notes 16-18 supra.
51. DEL. CODE tit. 10, § 366 (1974) provides in pertinent part: The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure.
52. "A party who enters a general appearance in an action confers on the court jurisdiction to enter a judgment against his person." R. FIELD & B. KAPLAN, CIVIL PROCEDURE 700 (1973).
property or to default and lose the property. Appellee Heitner, a nonresident of Delaware, initiated a shareholders' derivative suit in a Delaware chancery court, naming as defendants Greyhound Corporation, Greyhound Lines, Incorporated (a subsidiary of Greyhound Corporation), and twenty-eight present or former officers, directors, or employees of both Greyhound and its subsidiary. Although the corporation was incorporated in Delaware and therefore subject to Delaware's assertion of in personam jurisdiction, the individual defendants were all nonresidents of that state, rendering personal jurisdiction impossible. Quasi in rem jurisdiction over the individual defendants was, however, asserted under the sequestration statute. The sequestered property consisted primarily of stock and options in the Greyhound Corporation. None of the certificates representing the seized property was physically present in Delaware, but since a Delaware statute establishes Delaware as the situs of stock in Delaware corporations, the stock and options were considered located in Delaware and subject to seizure under the Delaware Code. After receiving notice of the sequestration, defendants entered a special appearance to move to quash service of process, to vacate the sequestration order, and to contest Delaware's assertion of jurisdiction. In contesting jurisdiction, the defendants claimed that their contacts with Delaware were insufficient to sustain jurisdiction under the rule of International Shoe. In challenging the sequestration order, defendants argued that the absence of a meaningful opportunity to be heard denied them due process under the Sniadach line of cases. The chancery court re-

55. Id. at 2573.
56. Id.
57. Id. at 2574. DEL. CODE tit. 8, § 169 (1974) provides:
For all purposes of title, action, attachment, garnishment, and jurisdiction of all courts in this state, but not for purposes of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this state, whether organized under this chapter or otherwise, shall be regarded as in this state.
61. Id.
jected both arguments, and found for plaintiff.

Defendants appealed both the question of jurisdiction and the validity of the sequestration order. On appeal, the Delaware Supreme Court affirmed the judgment of the chancery court regarding both arguments.\textsuperscript{64} Most of that court's opinion was directed to rejecting appellants' contention that the sequestration procedure is inconsistent with due process according to the \textit{Sniadach} line of cases.\textsuperscript{65} The court summarily dismissed the jurisdictional argument. It held that since \textit{quasi in rem} jurisdiction was asserted under the Delaware Code,\textsuperscript{66} and therefore justified by the presence of defendant's stock in Delaware, defendant's contacts were irrelevant; the rule of \textit{International Shoe} was applicable only to assertions of \textit{in personam} jurisdiction.\textsuperscript{67}

Reversing the Delaware court's decision,\textsuperscript{68} the Supreme Court focused on the ruling that the \textit{International Shoe} test does not apply to \textit{quasi in rem} jurisdiction.\textsuperscript{69} The Court in \textit{Shaffer} stated: "This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of \textit{Pennoyer v. Neff}.”\textsuperscript{70} The remainder of the Supreme Court opinion concentrated on the following: (1) principles enunciated in \textit{Pennoyer};\textsuperscript{71} (2) developments in the law since \textit{Pennoyer};\textsuperscript{72} (3) the \textit{International Shoe} standard and its usefulness in solving problems generated by continued application of \textit{Pennoyer} to assertions of \textit{in personam} jurisdiction;\textsuperscript{73} (4) failure of the \textit{Pennoyer} principles to provide due process in jurisdiction \textit{in rem}.\textsuperscript{74} The Supreme Court concluded that the \textit{International Shoe} standard should govern actions \textit{in rem} as well as actions \textit{in personam} to assure procedural due process.\textsuperscript{75}

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65. \textit{id.}
69. \textit{Id.} at 2576.
70. \textit{Id.}
71. \textit{Id.} at 2576-78.
72. \textit{Id.} at 2578-79.
73. \textit{Id.} at 2579-80.
74. \textit{Id.} at 2580-81.
75. \textit{Id.} at 2584.
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The Court's rationale in *Shaffer* for applying the *International Shoe* test to *in rem* jurisdiction is "simple and straightforward":76

It is premised on the recognition 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." Restatement (Second) of Conflict of Laws § 56, introductory note. This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *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 minimal contacts standard elucidated in *International Shoe*.77

In deciding that minimal contacts must be present in all assertions of jurisdiction, the Supreme Court did not entirely eliminate the concept of *in rem* jurisdiction. Rather, the Court stated that the presence of in-State property, without additional contacts, is insufficient support for asserting jurisdiction. The Court noted that presence of defendant's property in a state might suggest other ties among the defendant, the state, and the litigation.78 Thus, the Court found that when claims to the in-State property itself are the source of the underlying dispute, or when the underlying dispute is a tort claim based on an injury suffered on the in-State property, minimal contacts are likely to be present.79 The class of *in rem* actions which the Court found would be most affected by its decision are assertions of quasi *in rem* jurisdiction in which the in-State property was "completely unrelated to the plaintiff's cause of action."80

76. *Id.* at 2581.
77. *Id.* at 2581-82 (footnotes omitted). Oddly enough, Justice Field recognized this basis for *in rem* jurisdiction in *Pennoyer v. Neff*, 95 U.S. 714 (1877), but attributed little weight to it throughout the rest of the opinion. *Id.* at 734.
79. *Id.*
80. *Id.* The Court explained that such instances are typified by the situation in *Harris v. Balk*, 198 U.S. 215 (1905). The Court in *Shaffer* explained that in *Harris*, Epstein, a resident of Maryland, had a claim against Balk, a resident of North Carolina. *Shaffer v. Heitner*, 97 S. Ct. 2569, 2578 (1977). Harris, another North Carolina resident, owed money to Balk. When Harris happened to visit Maryland, Epstein garnished Harris's debt to Balk. Harris did not contest the debt to Balk and paid it to Epstein's North Carolina attorney. When Balk later sued Harris in North Carolina, the Court held that the full faith and credit clause required that Harris's payment to Epstein be treated as a discharge of his debt to Balk. *Harris v. Balk*, 198 U.S. 215, 226 (1905). The Court reasoned that the debt owed Balk by Harris was intangible property belonging to Balk and that the situs of the debt traveled with the
Concluding that “all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,” the Court applied those standards to the facts of *Shaffer*. In so doing, it found that the statutory presence of defendants’ stock in Delaware was insufficient contact with Delaware to support a finding of jurisdiction over the nonresident defendants, and reversed the Delaware decision.

In *Shaffer* there were two concurring opinions and a dissenting opinion. Justice Powell’s concurrence suggested that “the ownership of some forms of property whose situs is indisputably and permanently located within a State [i.e., real property] may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property.” Acceptance of the existence of such property, he suggested, “would avoid the uncertainty of the general *International Shoe* standard.”

Justice Stevens also concurred in a separate opinion. The thrust of his opinion was that the notice requirement of the due process clause necessitates “fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.” Thus, according to Justice Stevens, when adjudication in the forum state is a predictable risk of the defendant’s activity, an assertion of jurisdiction complies with due process requirements. Because Justice Stevens viewed foreseeability as the deciding factor in determining jurisdiction, he was concerned that the Court’s opinion reached too far, since in view of its facts, *Shaffer* can be read to deny jurisdiction in situations where suit in the forum state was foreseeable.

In dissent, Justice Brennan concurred with the Court’s finding that the due process clause requires the application of the *International Shoe* test to all assertions of jurisdiction. However, Justice

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82. *Id.*
83. *Id.*
84. *Id.* at 2587 (Powell, J., concurring).
85. *Id.* (Powell, J., concurring).
86. *Id.* (Stevens, J., concurring).
87. *Id.* at 2588 (Stevens, J., concurring).
Brennan dissented from the Court's finding that the defendants' activities in *Shaffer* did not constitute minimum contacts; he believed that defendants' acceptance of positions as corporate officers in a Delaware corporation was sufficient contacts to justify Delaware's assertion of jurisdiction. This note concurs with and will expand upon Justice Brennan's argument.

**Critical Analysis of Shaffer**

**An Anticipated Holding**

That the Supreme Court held that minimal contacts must be present in all assertions of jurisdiction is hardly surprising. After studying the literature on jurisdiction which followed *Pennoyer*, one court remarked:

Over the last thirty years, . . . a veritable army of courts and commentators have besieged the citadel of territorial jurisdiction. The old territorial standards have been castigated as at once too restrictive and too permissive, preventing states from obtaining jurisdiction in cases in which they had substantial "interest," while permitting the exercise of authority by states that were virtual strangers to both parties and the claim.

Commentators have urged that while *quasi in rem* jurisdiction initially served a useful role as a partial escape from the rigid framework of *Pennoyer*, it is rendered unnecessary by the increase in long arm jurisdiction. Furthermore, commentators and courts have consistently maintained that since a proceeding against property is, in effect, a proceeding against the owner of that property, rules of personal jurisdiction ought to apply in such instances. Some lower courts have already applied the *International...*

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88. *Id.* (Brennan, J., dissenting).
91. See generally authorities cited note 90 supra.
Shoe standard to defeat jurisdiction in in rem actions. Thus, the Court in Shaffer recognized that it was responding to criticism of quasi in rem jurisdiction as an obsolete doctrine.

An Unanticipated Result: Applying the International Shoe Standard to the Facts of Shaffer

While the Court's holding that the International Shoe standard must be applied in all assertions of jurisdiction is not surprising, its determination that the defendants had not met that standard was unexpected. In his dissenting opinion, Justice Brennan argued that the majority misapplied the minimum contacts test to the facts of Shaffer.

Fundamental to the application of the International Shoe standard is that the interests of the plaintiff and of the state asserting jurisdiction only become paramount when the defendant's interest in being sued at home is depreciated. Thus, the decisive questions in applying the standard are: (1) whether the plaintiff has any interest in bringing suit in the state asserting jurisdiction; (2) whether the state asserting jurisdiction has any legitimate interest in conducting the litigation; and (3) whether the defendant has, by his activities, submitted to the authority of the state such as to depreciate his interest in being sued in his home state. Thus, an examination of the parties' interests in Shaffer is appropriate.

Delaware had a legitimate interest in providing a forum for the litigation; a state has an interest in "permitting effective recourse to its laws." In Mullane v. Central Hanover Bank & Trust Co., the Court found the State of New York to be interested in managing a trust fund established under its laws because the fund was a legal entity of the State of New York. A corporation, like a trust fund, is an entity created under the laws of a state; thus, Delaware was similarly interested in managing a corporation created under the laws of Delaware. Petitioners advocated this position, stating:

95. Id. at 2588-89 (Brennan, J., dissenting).
97. Smit, supra note 31, at 608-09.
98. Id. at 612.
99. Id. at 306 (1950).
100. Id. at 313.
The Greyhound Corporation is a creature of the state of Delaware. Its purposes are sanctioned by that state. Appellant's authority and powers are regulated and defined by its laws. Delaware has a vital state interest in calling into account the officers, directors, and key employees of a corporation incorporated in Delaware for breach of the duties imposed by its laws.\textsuperscript{101}

For example, since a corporation is subject to taxation in the state of incorporation,\textsuperscript{102} Delaware has a significant interest in regulating the behavior of corporate directors and managers whose behavior will affect the profits of the corporation, and in turn, the tax revenue of the state.

The suggestion that the state of incorporation should have jurisdiction over the officers and directors of the corporation in actions arising out of their conduct as officers and directors is not new.\textsuperscript{103} The Wisconsin long arm statute provides for such jurisdiction.\textsuperscript{104}

The majority in \textit{Shaffer} acknowledged Delaware's interest in managing its corporations.\textsuperscript{105} It found that interest relevant to a choice-of-law question and not relevant to a jurisdiction question.\textsuperscript{106} While the majority may have been correct in its assertion that Delaware's greatest interest in the litigation was that of having its laws applied,\textsuperscript{107} the majority ignored the possibility that if the defendants could not be brought to suit, Delaware law would not apply.

The twenty-eight individual defendants were all nonresidents of Delaware. While it is unclear from the facts of \textit{Shaffer} where those defendants resided, it is unlikely that they all resided in a single state. Since a court must obtain \textit{in personam} jurisdiction over a defendant to bind him in a personal judgment, plaintiff

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\textsuperscript{103} R. Weintraub, \textit{Commentaries on the Conflict of Laws} 134 (1971).
\textsuperscript{104} \textit{Wis. Stat. Ann.} § 801.05 (West 1977) provides in pertinent part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action \ldots under any of the following circumstances:

\ldots

In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director \ldots.

\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
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would have to bring suit in each state where a defendant resided. Assuming that plaintiff would not choose to bear the cost of multiple litigation, he would be denied a reasonable vehicle for bringing his case to court. Under those circumstances, corporate directors, officers, and other key personnel would escape the consequences of corporate responsibility, and Delaware's interest in permitting effective recourse to its laws would not be vindicated. Therefore, Delaware had a substantial, legitimate interest in the activities of the individual defendants, relevant not only to a determination of choice of laws, but to an assertion of jurisdiction as well.

Identifying plaintiff's interest in suing in Delaware presents a problem. Appellee Heitner, who owned one share of Greyhound stock, was a nonresident of Delaware. However, in a shareholders' derivative suit, unlike a direct suit, the named plaintiff is not the primary beneficiary of the suit. Rather, the benefit inures to the corporation and to its shareholders. Thus, while Heitner was a nonresident of Delaware, suit was not brought in his behalf. The primary beneficiary of the action was Greyhound, a Delaware corporation. Thus, it is arguable that plaintiff had an interest in bringing suit in Delaware.

Hence, there was state interest and arguably plaintiff's interest sufficient to bring suit in Delaware. If defendant's interest in being sued at home is sufficiently depreciated, then Delaware was a reasonable forum for the dispute.

Although the majority rejected appellee's assertion that defendants had sufficient contacts with Delaware to depreciate their interest in being sued at home, appellee's argument was sound. In dissent, Justice Brennan focused on the Hanson requirement that the defendant "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking benefits and protections of its laws." Viewing their activities in this light, defendants chose to accept benefit and protection from Delaware.

The individual defendants were more than mere stockholders in the Greyhound Corporation. They were key employees, directors, and officers of the corporation. As such, they benefited significantly from the laws of Delaware:

108. Id. at 2572.
The provisions of the Delaware Corporate Law relating to benefits of officers, directors, and key employees are perhaps the most advanced provisions of kind. . . . [The law] offers generous indemnification protection to appellants. Delaware enacted this statute to induce capable and responsible businessmen to accept positions in corporate management. . . . In addition, [the law] provides for interest free loans to directors, officers, and employees under certain circumstances. . . . Certainly the foregoing benefits were in the minds of the individual appellants when they accepted the powers and authorities of officers, directors, and employees of a Delaware corporation.111

The flaw in the majority's reasoning is underscored by a single statement in the opinion. The majority claimed that the individual defendants "simply had nothing to do with the State of Delaware."112 The Court rejected without explanation appellee's argument that by choosing to become officers of a Delaware corporation, defendants had purposefully availed themselves of the benefits of the jurisdiction.113 It is clear, however, that defendants chose to become associated with Delaware, received their authority from that state, and could foresee the consequences in Delaware of any out-of-State activity conducted on behalf of the corporation. Thus, the majority's claim that defendants had nothing to do with the State of Delaware is questionable. Given the apparent defect in the majority opinion, it appears that the defendants had minimum contacts with Delaware. Even in the presence of the prodefendant bias, the defendants' interest in being sued at home was sufficiently depreciated. Considering the strong state interest present, Delaware's assertion of jurisdiction should have been held valid.

In the Supreme Court's eagerness to change the much-criticized law of jurisdiction,114 the Court in Shaffer exceeded what was necessary to accomplish that goal. Since it was possible for the Court to have rendered the identical holding and still have granted jurisdiction to Delaware on these facts, the Court's decision was unnecessarily severe. It appears that in the future, relatively exten-

113. Id.
114. The Court in Shaffer stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in International Shoe should be held to govern action in rem as well as in personam." Id. at 2581.
sive activity, not minimum contacts, is necessary to defeat the pro-
defendant bias. Thus, the immediate future of the law of jurisdiction
depends on whether future courts focus on the language of
Shaffer alone, or on its holding in conjunction with its facts.\(^{115}\)

**THE EFFECT OF SHAFFER V. HEITNER ON SEIDER V. ROTH\(^{116}\)**

The Court in *Shaffer* stated: "To the extent that prior deci-
sions are inconsistent with this standard, they are overruled."\(^{117}\)
While the Court established that *Pennoyer* and *Harris v. Balk*\(^{118}\)
were inconsistent with the opinion,\(^{119}\) the continuing utility of
other rulings must be determined by applying the *International
Shoe* test to the facts of each case.

In *Seider v. Roth*,\(^{120}\) plaintiffs, residents of New York, were
injured in an automobile accident on a Vermont highway, allegedly
through the negligence of a Canadian defendant.\(^{121}\) The defendant
was insured by the Hartford Insurance Company, which was doing
business\(^{122}\) in New York. An order of attachment directed the
sheriff to levy upon the contractual obligation of Hartford to defend
and indemnify the defendant under a policy of automobile liability
insurance issued by Hartford to the defendant.\(^{123}\) The insurance
company was served in New York while the defendant was served
in Quebec.\(^{124}\)

The insurance obligation was subject to attachment under sec-

\(^{115}\) At least one court has taken the position that *Shaffer* is "best read for the
legal concepts it enunciates rather than for application of them to the facts in the
(E.D.N.Y. 1977).
\(^{118}\) 198 U.S. 215 (1905).
\(^{121}\) Id. at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100.
\(^{122}\) Under *Pennoyer* presence within a state was sufficient ground for a state
to assert jurisdiction over a defendant. Pennoyer v. Neff, 95 U.S. 714, 733 (1877). In
the case of a corporation, which exists only as a legal entity, evidence that a corpora-
tion was conducting business within the state was considered an indication that the
 corporation was present within that state. International Shoe Co. v. Washington, 326
U.S. 310, 316 (1945). Under *International Shoe* evidence that a corporation does busi-
ness within a state provides the requisite minimum contracts to justify assertion of
jurisdiction by the courts of that state. Id. at 317-.
\(^{123}\) Seider v. Roth, 17 N.Y.2d 111, 112, 216 N.E.2d 312, 313, 269 N.Y.S.2d 99,
100 (1966).
\(^{124}\) Id.
tions 6202\textsuperscript{125} and 5201\textsuperscript{126} of the New York Civil Practice Law and Rules, which were constitutional under the doctrine of \textit{Harris v. Balk}.\textsuperscript{127} As \textit{Seider} has been interpreted by New York courts, the judgment against the nonresident defendant is limited by the face value of the policy even though the defendant proceeds on the merits.\textsuperscript{128} Also, courts have found that unless unusual circumstances exist,\textsuperscript{129} a plaintiff who is a nonresident of New York may not attach the insurance policy of a nonresident defendant to invoke the jurisdiction of a New York court.\textsuperscript{130} At least one court has ruled that the insurer cannot escape the consequences of a \textit{Seider} attachment by including a clause in the insurance policy which renders the policy ineffective in the event that it is attached.\textsuperscript{131}

\textit{Seider} has been subject to a barrage of criticism by commentators\textsuperscript{132} and courts.\textsuperscript{133} Of those criticisms, two are relevant to the present discussion.\textsuperscript{134} First, \textit{Seider} has been criticized as, in effect,

\begin{itemize}
  \item \textsuperscript{125} This section provides in pertinent part: "Any debt of property against which a money judgment may be enforced . . . is subject to attachment." N.Y. Civ. PRAC. LAW § 6202 (McKinney 1963).
  \item \textsuperscript{126} This section describes in detail types of debts and property against which a money judgment may be enforced. N.Y. Civ. PRAC. LAW § 5201 (McKinney 1963).
  \item \textsuperscript{127} 198 U.S. 215 (1905). \textit{See} text accompanying note 80 \textit{supra}.
  \item \textsuperscript{128} Simpson v. Lochman, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).
  \item \textsuperscript{129} \textit{See}, e.g., McHugh v. Paley, 63 Misc. 2d 1092, 314 N.Y.S.2d 209 (Sup. Ct. 1970).
  \item \textsuperscript{134} The third criticism attacks \textit{Seider} for permitting attachment of a contingent debt when the attachment statute required a "debt which is past due or yet to become due, certainly or upon demand." N.Y. Civ. PRAC. LAW § 5201(a) (McKinney 1963). \textit{See}, e.g., Podolsky v. Devinney, 281 F. Supp. 488, 494 (S.D.N.Y. 1968).
\end{itemize}
permitting an *in personam* judgment against an out-of-State defendant who has no minimal contacts with the forum state.\(^{135}\) Second, the opinion has been criticized as a judicially created direct action against the insurer.\(^{136}\) Despite the pronouncements against *Seider*, courts in New York have followed *Seider* extensively.\(^{137}\)

A *Seider* attachment produces the following practical effects: A defendant whose insurance debt has been attached may either appear in New York to defend on the merits, or he may default; if he defaults, he breaches the cooperation clause\(^{138}\) of his policy and his insurance company is relieved of the obligation to indemnify him.\(^{139}\) Thus, if plaintiff so chooses, he may sue defendant in defendant's home state and obtain a personal judgment against him which defendant must pay out-of-pocket, since he is no longer insured; uninsured, defendant may be judgment-proof. If he appears in New York to defend, the judgment is only effective to the limits of his policy.\(^{140}\)

The defendant is not only protected by limitations on the nature of the judgment, but there probably can be no res judicata or collateral estoppel effect to any findings of the New York court.\(^{141}\) Thus, the only negative jurisdictional effect produced by defen-


\(^{136}\) See id. at 490, 499.


\(^{138}\) In the cooperation clause, the defendant effectively enters into a contract with the insurer to act as witness in his own behalf. See O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 1002 (E.D.N.Y. 1977).

\(^{139}\) If the insurance company is not relieved of that obligation, the insurance company would be forced to pay a judgment when it has had no opportunity to defend the action on its merits. See Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 658 (1967).

\(^{140}\) See text accompanying note 128 supra.

\(^{141}\) See Minichiello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969). The Minichiello court indicated that commentators are divided as to whether a *quasi in rem* judgment may be given collateral estoppel effect. For an article suggesting that a *quasi in rem* judgment may not be given such effect, see Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 384 (1963). For authority suggesting that collateral estoppel effect would be permissible, see *Restatement of Judgments* § 76(2) (1942). The Minichiello court believed that despite the effect of collateral estoppel on an ordinary *quasi in rem* judgment, given the nature of *Seider* as a direct action against the insurer, collateral estoppel effect is inappropriate. Minichiello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969).
The inconvenience to the defendant is reduced to some degree, since the insurance company is likely to cover reasonable travel expenses incurred by the defendant. See Comment, Quasi in Rem Jurisdiction Based on Insurer's Obligations, 19 STAN. L. REV. 654, 668 n.25 (1967). For a discussion of this practice, see Note, Direct Action Statutes: Their Operational and Conflict-of-Law Problems, 74 HARV. L. REV. 357 (1960).


144. Hanson v. Denckla, 357 U.S. 235, 253 (1958). However, it may not always be true that in-State activity is the only factor which can depreciate a defendant's interest in being sued at home. Assume a situation in which two out of three litigants, the plaintiff and one defendant, are New York residents. Assume further that the statute of limitations has run in the nonresident defendant's home state. Jurisdiction might be granted on the theory that the necessity for bringing the litigation in New York, in addition to the other defendants' residence in New York, sufficiently depreciates the nonresident defendant's interest in being sued at home to favor the state and plaintiff's interests. For a case following International Shoe, which, in effect, establishes jurisdiction by necessity, see Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). The Court in Shaffer purposefully left this question unanswered. See Shaffer v. Heitner, 97 S. Ct. 2569, 2584 n.37 (1977).

despite the state and plaintiff interest in asserting jurisdiction, the lack of defendant's contacts with New York prevents that state from asserting jurisdiction if the resulting judgment would have the effect of an in personam judgment.\textsuperscript{146} \textit{Seider v. Roth}\textsuperscript{147} and the cases which limit the \textit{Seider} attachment procedure to New York plaintiffs\textsuperscript{148} focus on the interests of the state and plaintiff without a sufficient showing that defendant's interests have been depreciated.

Thus, if \textit{Seider v. Roth}\textsuperscript{149} is viewed as an action against the insured, the jurisdictional restraints of \textit{International Shoe} imposed on \textit{Seider} by \textit{Shaffer v. Heitner}\textsuperscript{150} compel the conclusion that \textit{Seider} would probably be decided differently today. \textit{Seider}, however, may be viewed in a manner in which \textit{International Shoe} is irrelevant. As the \textit{Seider} court recognized,\textsuperscript{151} and as many commentators\textsuperscript{152} and courts\textsuperscript{153} have argued, \textit{Seider} created a direct action against the insurer. That is, the real party in interest is the insurer rather than the insured.

Practically, the insurer in a case such as this is in full control of the litigation. It selects the attorneys, decides if and when to settle, and makes all procedural decisions.\textsuperscript{154} Furthermore, the insurer has its own interest to protect, since it must pay the judgment.\textsuperscript{155} Under this scheme, there is no difficult jurisdictional question. The defendant insurance company, doing business in New York, is subject to in personam jurisdiction. The insured is merely called into the state because of a private contractual agreement with his insurance company in which he agreed to appear as a witness in his defense.

Under the direct action scheme, the nonresident defendant is

\begin{enumerate}
\item \textsuperscript{146} However, it was argued in O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 1002 (E.D.N.Y. 1977), that the effect of \textit{Seider}, as it has been interpreted by the courts, is unique since a \textit{Seider} attachment achieves a judgment less than in personam. See text accompanying notes 138-140 supra.
\item \textsuperscript{147} 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
\item \textsuperscript{148} See text accompanying note 130 supra.
\item \textsuperscript{149} 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
\item \textsuperscript{150} 97 S. Ct. 2569 (1977).
\item \textsuperscript{152} \textit{See, e.g.}, Comment, Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction, 16 \textit{Buffalo} L. Rev. 769, 774 (1967); Note, \textit{Seider v. Roth}: The Constitutional Phase, 43 \textit{St. John's} L. Rev. 55 (1968).
\item \textsuperscript{153} \textit{See, e.g.}, Minichiello v. Rosenberg, 410 F.2d 106, 109 (2d Cir. 1968), \textit{cert. denied}, 396 U.S. 844 (1969).
\item \textsuperscript{155} \textit{See Comment}, \textit{Quasi in Rem Jurisdiction Based on Insurer's Obligations}, 19 \textit{Stan. L. Rev.} 654, 656 (1967).
\end{enumerate}
called on to defend in a distant state by the use of a coercive measure. In effect, it leads to the same result as under a quasi in rem attachment. However, in assessing coercion under this scheme, the relevant questions are not those of minimum contacts and interest balancing, but those involving the validity of a direct action against an insurer. As one commentator has stated: "Liability insurance policies customarily provide that no action shall lie against the company until the amount of the insured’s obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company."  

Despite this general rule, the Supreme Court in *Watson v. Employers Liability Assurance Corp.* ruled that a Louisiana statute creating a direct action against the insurers of tortfeasors causing injury in Louisiana was not a denial of due process. The Court found that Louisiana had a legitimate interest which justified the statute:

"Louisiana’s direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases."

Since the Supreme Court ruled on the constitutionality of a direct action statute, other states have enacted such statutes.

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158. *Id.* at 73. The situation in *Watson*, however, can be distinguished from that in *Seider*, since the Louisiana statute applied only to accidents or injuries occurring in Louisiana. However, the court in *Minichiello* analyzed the Court’s underlying purpose in *Watson* and found that the same policy considerations apply to residents of a state as well as to persons injured within the state. Thus, the court concluded that the Supreme Court was likely to sustain the validity of a direct action in a *Seider* situation. Minichiello v. Rosenberg, 410 F.2d 106, 110 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).
New York already provides by statute for a direct action against the insurer under limited circumstances. The statute provides that if, at the expiration of thirty days from the entry of judgments against the insured, plaintiff's claim is still unsatisfied, a direct action may be brought against the insurer. Case law in New York suggests the New York courts will look favorably upon a direct action statute. In *Oltarsh v. Aetna Insurance Co.*, the New York State Court of Appeals upheld a direct action when it was authorized by the situs jurisdiction. The United States District Court for the Southern District of New York advanced one step further: It accepted a direct action in the absence of a direct action statute in either New York or the situs state.

While *Seider* employed the language of *quasi in rem* jurisdiction, it effectively created a general direct action against the insurer. In light of the constitutionality of direct action statutes and New York's apparent willingness to accept them, *Seider v. Roth* may be found constitutionally sound when viewed as creating a direct action against the insurer, broader than the limited direct action statute now in effect in New York, with the named defendant merely a fictional representative. Recently, one court has taken this position in upholding the validity of *Seider* in light of *Shaffer*.

However, the reasons for overruling *Seider* are more compelling than those for its affirmance. While permitting a general direct action against insurers may be desirable, *Seider* is not the proper vehicle for achieving that end. First, general direct actions against insurers have been created in other states by legislatures, not courts. New York itself has statutorily created a right of direct action against insurers under limited circumstances. New York has had the opportunity for eleven years to enact a general direct action statute.
action statute in lieu of Seider, but it has not done so.\textsuperscript{170} Even if there presently remains any intent on the part of the legislature to create such a direct action, it is inappropriate for the New York State Court of Appeals to accomplish indirectly that which the legislature will not do directly.\textsuperscript{171} Thus, reliance on the direct action effect of Seider is misplaced, since it is not the province of the courts to legislate.

Moreover, even if it is desirable to permit a court to make a determination which has heretofore been legislative, Seider is poorly reasoned authority for permitting direct action. Seider invites confusion: The opinion focuses on the insured as the real party in interest; the direct action effect is underplayed. Thus, it would be confusing to retain Seider to achieve direct action since the opinion gives least weight to the point which would now be considered most significant.

Only the legislature wields power to create a direct action statute. Such a statute would presumably be drafted to avoid the inconsistencies of Seider. Since a court is the wrong forum in which to create direct actions against the insurer, Seider should be overruled.

\section*{Conclusion}

It is too soon after Shaffer to examine the impact that that opinion has had on the law of state court jurisdiction;\textsuperscript{172} however,

\begin{flushright}
\textsuperscript{170} The legislature did attempt to enact a direct action statute in lieu of Seider, but the proposed enactment was vetoed by the Governor because of drafting deficiencies, not because of the merits of the legislation. See Governor's Message on Vetoing \#9 A. 8102; \#26 S. 2253, [1973] N.Y. ST. LEGIS. ANN. 349. Since the Governor's veto was based on a drafting deficiency, the legislature might have redrafted and reproposed the legislation. Since there is no direct action legislation in effect to date, it appears that the legislature did not choose to redraft the legislation. That the legislation appears not to have been redrafted casts doubt on the continuing intent of the legislature to enact such legislation.


\textsuperscript{172} There has, however, been one recent decision interpreting Shaffer. In Carolina Power & Light Co. v. Uranex, 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977) (excerpts of opinion), the federal district court granted jurisdiction to a California court which did not have minimum contacts with defendant; however, authority was granted to attach in-State property for the limited purpose of satisfying a judgment being sought in a New York court which had \textit{in personam} jurisdiction to arbitrate over the defendant. The United States District Court for the Northern District of California ruled that jurisdiction for this purpose was an exception to the Shaffer requirement that all assertions of state court jurisdiction require minimal contacts. \textit{Id.} at 2195. The court reasoned that this is an exception since the Court in Shaffer found that the initial purpose of \textit{quasi in rem} jurisdiction was to prevent a wrongdoer from
certain repercussions may be anticipated. Most apparent is the increase in the scope of *International Shoe*. A more subtle effect is that increased application of *International Shoe* is likely to exacerbate the problems inherent in that standard. In particular, *Shaffer* is likely to generate litigation over the meaning of vague terms such as "minimum contacts" and "fair play and substantial justice." In resolving those disputes, courts looking to *Shaffer* will perceive a similar message, whether they read the dicta or the holding of *Shaffer*. Although the latter message is stronger, *Shaffer*, in its emphasis of the relationships among the defendant, the forum, and the litigation, is a reaffirmation of the prodefendant bias. Thus, past decisions which underplay the significance of *Hanson v. Denckla*¹⁷³ are likely to come under attack.

*Seider* was one such decision. Although *Seider* was recently upheld in *O'Connor v. Lee-Hy Paving Corp.*¹⁷⁴ that conclusion of validity was only made possible by disregarding the message of *Hanson*.¹⁷⁵ Thus, on appeal, *O'Connor* should be reversed for disregarding the prodefendant bias which maintains its importance in light of *Shaffer*. Since *Seider* also disregarded the prodefendant bias, and since it cannot be justified as a direct action statute, it should be overturned.¹⁷⁶

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avoiding payment of a judgment by removing his assets to a jurisdiction where he was not subject to suit. Thus, the court in *Carolina Power* held California's jurisdiction effective, and acknowledged a distinction between jurisdiction to adjudicate the underlying merits and jurisdiction to attach property as security for a judgment being sought in a legitimate forum. *Id.* The court qualified its holding, stating that in some circumstances even limited jurisdiction to attach property would nonetheless violate standards of fair play and substantial justice as, for example, where presence of a defendant's property in the forum state is merely fortuitous. *Id.*

¹⁷⁵. *Id.* Judge Dooling stated: "Despite *Hanson v Denckla* . . . an analysis of jurisdictional propriety in the ultimate terms implied by *Shaffer* cannot ignore the claimants' circumstances and her interest in litigating in the forum of her residence." *Id.* at 997 (citation omitted).

¹⁷⁶. Since completion of this note, there has been much discussion in the legal community about *Seider* 's status in light of *Shaffer*. Commentators and lecturers attempt to resolve the issue by analysis such as that in this note. Seigal, Supplementary Practice Commentary to N.Y. CIV. PRAC. LAW § 5201 (McKinney 1977); McLaughlin, *Seider v. Roth—Dead or Alive*, N.Y.L.J., Dec. 9, 1977, at 1, col. 1 (commentators); Address by Thomas Walsh, Nassau County Bar Association, Nassau County, N.Y. (Jan. 25, 1978) (lecturer). Several New York courts have already ruled, but there is little agreement among them. In *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), Judge Dooling held *Seider* to be valid insofar as it
provides a basis for direct action against the insurer. *Id.* at 1004. However, both Judge Bramwell in *Torres v. Towmotor Div. of Caterpillar, Inc.*, Civ. No. 77-1819 (E.D.N.Y. Nov. 18, 1977), and Judge Composto in *Katz v. Umansky*, 46 U.S.L.W. 2302 (N.Y. Sup. Ct. Nov. 25, 1977) rejected *Seider* as based on a jurisdictional theory and lacking the minimum contacts required by *Shaffer*. Finally, the Supreme Court acknowledged that *Shaffer* would affect *Seider* in *Rush v. State Farm Mut. Auto. Ins. Co.*, 97 S. Ct. 2964 (1977). Before the Court would apply the *Seider* doctrine, it remanded the decision of the Minnesota Supreme Court which had adopted *Seider*, *Savchuk v. Rush*, 245 N.W.2d 627 (Minn. 1976), *judgment vacated and remanded sub nom.* *Rush v. State Farm Mut. Auto Ins. Co.*, 97 S. Ct. 2964 (1977), for reevaluation in light of *Shaffer*.

The first appellate court to address the continued validity of *Seider* held that *Seider*, because of its direct action effect on the insurer, satisfies the requirements of *Shaffer* and therefore still provides a basis for jurisdiction. *Alford v. McGaw*, 402 N.Y.S.2d 499 (App. Div. 4th Dep't 1978).

As this note went to press, the Second Circuit held that jurisdiction over a defendant foreign corporation under the New York attachment statute, upon which *Seider* is based, is constitutional under *Shaffer*, in view of defendant's contacts with New York other than its property attached within New York. *Intermeat, Inc. v. American Poultry, Inc.*, N.Y.L.J., Apr. 27, 1978, at 1, col. 6 (2d Cir. Apr. 14, 1978). However, because the court refused to determine whether the defendant's contacts would have been sufficient to assert *in personam* jurisdiction, this case may suggest that a lower standard for minimum contacts will be tolerated when jurisdiction is initiated under an attachment statute.