

MINIMUM CONTACTS ANALYSIS EXTENDED TO ASSERTIONS OF IN REM JURISDICTION: *Shaffer v. Heitner*

Plaintiff, a shareholder¹ in the Greyhound Corporation, a Delaware corporation with its principal place of business in Phoenix, Arizona, brought a stockholder's derivative suit² in the Delaware Chancery Court on behalf of Greyhound and its wholly-owned subsidiary³ against twenty-eight present and former corporate officers and directors. In his complaint, the plaintiff alleged that the misconduct of the individual defendants had caused Greyhound and its subsidiary to be held liable in a private antitrust suit⁴ and also for violation of a United States district court order⁵ both of which resulted in substantial losses to the corporations.⁶

Neither the plaintiff nor the individual defendants were Delaware residents.⁷ In order to subject the defendants to Delaware jurisdiction, the plaintiff invoked the procedure available under the Delaware sequestration statute.⁸ This procedure provides for seizure of Delaware property interests

¹ Plaintiff was the holder of one share of stock in the Greyhound Corporation. 433 U.S. 186, 189 (1977).

² *Id.* at 186.

³ The subsidiary, Greyhound Lines, Inc., is a California corporation with its principal place of business in Phoenix, Arizona. *Id.* at 189 n.1.

⁴ See *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *cert. granted*, 98 S. Ct. 716 (1978). A competitor brought suit against the Greyhound Corporation alleging that Greyhound violated the Sherman Act by engaging in forms of predatory conduct after the Interstate Commerce Commission had granted the competitor certain routes. *Id.* at 690. There was evidence that Greyhound had fraudulently concealed the existence of the antitrust cause of action sufficient to toll the statute of limitations. *Id.* at 698. A jury verdict awarded treble damages to the competitor in the amount of \$13,146,090. *Id.* at 688 n.1.

⁵ *United States v. Greyhound Corp.*, 370 F. Supp. 881 (N.D. Ill. 1974), *aff'd*, 508 F.2d 529 (7th Cir. 1974). The court held Greyhound in criminal contempt for knowingly violating the court's order that Greyhound voluntarily and accurately quote joint through routes involving the competitor and refrain from quoting the competitor's service unfavorably or inaccurately. The court also held the corporate officers of both the parent corporation and its subsidiary in civil contempt for failing to curb the violations. See 370 F. Supp. at 883.

⁶ The losses consisted of the \$13,146,090 plus attorney fees suffered in the antitrust suit and fines of \$100,000 and \$500,000 against the parent and its subsidiary respectively. See *United States v. Greyhound Corp.*, 370 F. Supp. 881, 883 (N.D. Ill. 1974).

⁷ *Shaffer*, 433 U.S. at 189, 191.

⁸ DEL. CODE ANN. tit. 10, § 366 (1974) provides in relevant part:

(a) If . . . the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear. . . . Such order shall be served on such nonresident defendant. . . by mail or otherwise, if practicable, and shall be published in such a manner as the Court directs. . . . 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 any order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

to compel a nonresident defendant to submit to the personal jurisdiction of Delaware courts for adjudication of claims against him. If the defendant does appear in answer to the sequestration order, he must make a general appearance and submit to the personal jurisdiction of the court.⁹ If he does not appear, the property which has been seized may be sold in satisfaction of an eventual default judgment.¹⁰ Should the defendant choose to make a general appearance, he may petition the court for a release of his property, which release will normally be granted absent a showing of a special reason by the plaintiff for continuation of the sequestration order.¹¹

Crucial to the operation of the sequestration statute in a derivative suit is the Delaware rule that stock in a corporation incorporated under Delaware law retains its situs in Delaware regardless of its physical location.¹² Employing this traditional situs rule under the sequestration procedure, the plaintiff applied for and obtained from the Delaware Court of Chancery a sequestration order to seize approximately 82,000 shares of Greyhound common stock belonging to nineteen of the defendants as well as options held by two other defendants.¹³ These seizures were effectuated through the placement of stop transfer or similar orders on the books of the Greyhound Corporation.¹⁴

The individual defendants were notified of the commencement of the suit by certified mail and through publication.¹⁵ In response, the defendants filed a notice and motion to quash service of process and to vacate the order of sequestration.¹⁶ They argued that their right to due process under the fourteenth amendment was violated by the ex parte sequestration procedure and that they did not have sufficient contacts with Delaware to support that state's assertion of in personam jurisdiction through the sequestration process.¹⁷ The court of chancery denied defendants' motions

(b) The Court may . . . require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title, and interest of the defendant in and to the property

⁹ *Id.* § 366(a).

¹⁰ *Id.* As the procedure has been interpreted and applied by the state and federal courts in Delaware, neither notice nor a hearing need be given prior to the actual seizure of property. See *United States Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1021-22 (D. Del. 1972) *rev'd on other grounds*, 540 F.2d 142, 155-157 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Gordon v. Michel*, 297 A.2d 420, 423 (Del. Ch. 1972).

¹¹ DEL. CODE ANN. tit. 10, § 366(a) (1974).

¹² DEL. CODE ANN. tit. 8, § 169 (1974).

¹³ *Shaffer*, 433 U.S. at 191-92. The remaining defendants owned no property affected by the sequestration order. *Id.* at 192 n.8. The value of the stock on May 23, 1974, the day the sequestration order was signed, was estimated at approximately \$1.2 million. *Id.* at 192 n.7. Other property sequestered included debentures, warrants and stock unit credits. *Id.* at 192 n.8.

¹⁴ 433 U.S. at 192.

¹⁵ *Id.* at 192.

¹⁶ *Id.* at 192-93.

¹⁷ *Id.* at 193. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see text at notes 42-57, 82-95, 103-18 *infra*.

and upheld the validity of the sequestration statute. The Delaware Supreme Court affirmed.¹⁸

In an opinion by Justice Marshall,¹⁹ the Supreme Court reversed the state supreme court²⁰ and HELD: A state which seeks to assert jurisdiction over a person outside its borders must demonstrate minimum contacts among the parties, the disputed transaction, and the forum state.²¹ The Court based its reasoning on its recognition of the often-stated premise that judicial jurisdiction over a thing actually refers to jurisdiction over the interests of persons in a thing.²² Accordingly, it concluded that state jurisdiction formerly allowed on the mere presence of a person's property within the forum, such as provided in the Delaware sequestration statute, can henceforth be justified only where that jurisdiction would satisfy the standard for jurisdiction over the interests of persons.²³ Whether in fact the exercise of jurisdiction over the interests of persons satisfies the due process clause must be determined under the minimum contacts standard for personal jurisdiction enunciated in *International Shoe Co. v. Washington*.²⁴ The Court further held, therefore, that Delaware's sequestration statute was constitutionally invalid since its purpose was to secure personal jurisdiction over a defendant solely on the basis of the statutory presence of the defendant's property in Delaware, without a showing of how such property provided sufficient contacts among the defendant, the forum state and the litigation.²⁵ Finally, on the facts of *Shaffer*, the Court held that Delaware's asserted jurisdiction failed not only because the sequestered property was neither the subject matter of the litigation nor of any relationship to the underlying cause of action, but also because other contacts sufficient to support jurisdiction were lacking.²⁶

The significance of *Shaffer* lies in its fundamental alteration of the bases for the assertion and determination of state court jurisdiction. The Court specifically rejected the territorial rationale of *Pennoyer v. Neff*²⁷ as the underlying basis for in rem jurisdiction; henceforth all assertions of state court jurisdiction in rem, as well as in personam, must satisfy the *International Shoe* standard of fairness and substantial justice.²⁸

¹⁸ *Greyhound Corp. v. Heitner*, 361 A.2d 225, 237 (Del. 1976).

¹⁹ Justice Marshall was joined in the opinion by Chief Justice Burger and Justices Stewart, White, Blackmun and Powell. Justice Brennan concurred in Parts I-III of the opinion and dissented as to Part IV. Justices Powell and Stevens filed concurring opinions. Justice Rehnquist did not participate in the consideration or the decision of the case.

²⁰ 433 U.S. at 195.

²¹ *Id.* at 207, 212-13.

²² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971). See *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), *appeal dismissed*, 179 U.S. 405, 410 (1900).

²³ 433 U.S. at 207.

²⁴ 326 U.S. 310 (1945).

²⁵ 433 U.S. at 208-09.

²⁶ *Id.* at 213-17.

²⁷ 95 U.S. 714 (1877).

²⁸ A judgment in personam imposes a personal liability or obligation upon one person in favor of another. A judgment in rem affects the interest of all persons in designated property. A judgment quasi-in-rem affects the interests of particular persons in designated property. Quasi-in-rem jurisdiction is of two types: (1) Where the plaintiff seeks to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons; (2) Where the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. See RESTATEMENT OF

This note will briefly trace the historical development of the conceptual structure of state jurisdiction to the point to which it had evolved before its examination by the Court in *Shaffer*. Attention will focus primarily upon the contrast presented by the development of substantive due process standards alongside the continued existence of quasi-in-rem jurisdiction. Next, the Court's reasoning in *Shaffer* will be set forth in sufficient detail to provide the basis for a subsequent assessment of the Court's application of minimum contacts analysis to the facts before it. Finally, the note will examine the impact the *Shaffer* should have upon the validity of the so-called "*Seider* attachment procedure"²⁹—a quasi-in-rem device employed by certain state courts for the assertion of jurisdiction in personal injury cases involving nonresident defendants whose insurers do business in the forum state.

It will be submitted that upon the factual record before it and in view of the subject matter of the controversy, the *Shaffer* Court's minimum contacts analysis was unnecessarily restrictive. Furthermore, it will be suggested that the Court's minimum contacts approach under the standard of fairness in *Shaffer*, does not support the continued application of the *Seider* attachment procedure as a judicial device for the assertion of jurisdiction.

I. THE EVOLUTION OF THE CONCEPTUAL BASIS FOR STATE COURT JURISDICTION

A. Early Doctrine

Perhaps no other decision has had such a lingering influence upon the development of jurisdictional principles as the century old decision in *Pennoyer v. Neff*.³⁰ The theory of jurisdiction enunciated by Justice Field in that case asserted the sanctity of each state's geographic borders and the physical power which each exercised over persons and property within its borders.³¹ Implicit in the formulation was the assumption that state judicial power can be asserted separately over persons and over property.³²

JUDGMENTS, 5-9 (1942). The Court in *Shaffer*, as it had done in *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958), chose to use the term *in rem* to include both *in rem* and quasi-*in rem*. 433 U.S. at 199 n.17. This convention will be followed in this note where appropriate. However, an effort generally will be made to indicate the specific type of *in rem* jurisdiction at issue.

²⁹ See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See related discussion at notes 66-76, and 151-76 *infra*.

³⁰ 95 U.S. 714 (1877). *Pennoyer* was the defendant in an ejectment action brought in federal court on the basis of diversity of citizenship. He had purchased the land in question in a sheriff's sale held to satisfy the judgment in a previous action in an Oregon state court by one Mitchell against Neff for attorney fees. Neff was a nonresident of Oregon at the time of Mitchell's suit. However, Mitchell had obtained jurisdiction over Neff by means of an Oregon statute which provided service by publication on nonresidents with property in Oregon. The federal district court rejected the validity of Mitchell's judgment against Neff and awarded the property to Neff. The Supreme Court affirmed on the grounds that Neff did not receive personal service of process and, that even if he had, it would have been invalid since Neff was outside the state's territorial limits. *Id.* at 733-36.

³¹ *Id.* at 722.

³² The arguably logical contradiction which that assumption entails, namely, that adjudicatory authority can be exercised over things without at the same time exercising it in effect over persons, was a crucial point of departure for the Court in its reasoning in *Shaffer*. See text at note 22 *supra*.

This dichotomous view of persons and property created the possibility that even though a state could not exercise its jurisdiction over a person because he was located outside its territory it nevertheless might exercise jurisdiction over that person's property if such property were located within its borders and might use the property to satisfy a plaintiff's claim.³³ The exercise of this adjudicatory authority was quasi-in-rem when the plaintiff sought to determine the interests of particular persons in the property,³⁴ the use or possession of which had in some manner given rise to the interests asserted.

A second type of quasi-in-rem action gradually developed in which the plaintiff initiated a personal claim wholly unrelated to the nonresident defendant's property within the forum. The purpose of the seizure of the property in such a case was to satisfy the unrelated claim from the res considered to be under the state's exclusive power.³⁵ Where the res was neither tangible nor present within the forum, however, this quasi-in-rem device proved more awkward. In the well-known case of *Harris v. Balk*,³⁶ the Supreme Court held that a debt owed by one party to another was an intangible which could be attached by a third party if the debtor should chance to enter the third party's forum. This result was criticized as unfair since a creditor cannot control the movements of his debtor, and the rule therefore would make it possible for the creditor to be subjected to the jurisdiction of a state that had no relationship to the cause of action or to either of the parties.³⁷ Nevertheless, as long as the territorial view of jurisdiction persisted the result under the quasi-in-rem device of *Harris* was at least justifiable.

It soon became evident, however, that the concept of territoriality was too confining to serve states' legitimate policy concerns in matters increasingly affected by interstate transactions.³⁸ Thus, for example, with the advent of the automobile and the occurrence of accidents involving nonresi-

³³ 95 U.S. at 733.

³⁴ Quasi-in-rem actions typically included proceedings to foreclose a mortgage, to remove a cloud from title or to effect partition. Such actions were distinguishable from *pure* in rem actions in which the proceeding was directly against the property without reference to the title or interest of particular individuals. Pure in rem actions were not very common. One example was an action in admiralty directly against a vessel held responsible for causing injuries to persons. The in rem judgment affected the interests of all persons in the vessel. See RESTATEMENT OF JUDGMENTS, 6-7 (1942). See also note 28 *supra*.

³⁵ See Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 615-616 (1977).

³⁶ 198 U.S. 215 (1905). Harris, a North Carolina resident, owed Balk, a fellow resident, \$180. Balk in turn was the debtor of a third party, Epstein, who lived in Maryland. While Harris was visiting Maryland, Epstein served him with a writ of attachment garnishing his debt to Balk. A default judgment was subsequently entered against Balk, and Harris, in accordance with the judgment, paid Epstein. Balk then sued Harris in North Carolina for the \$180 but Harris argued in defense that he had made payment to Epstein under the garnishment in Maryland. The North Carolina court held the Maryland judgment invalid on the basis that the situs of the debt Harris owed Balk remained in North Carolina where Harris lived. The Supreme Court reversed. *Id.* at 228.

³⁷ See Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913). For a favorable view of the attachment procedure, see Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation*, 31 HARV. L. REV. 905, 910-918 (1918).

³⁸ See Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 305 (1970).

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dent motorists and local residents, the state arguably had a claim under its police power to protect the general welfare of its people. This substantive policy concern dictated that a means be devised to maneuver outside the rigid contours of conventional jurisdictional theory. In the leading case of *Hess v. Pawloski*³⁹ this was achieved by the admitted fiction of attributing consent to personal jurisdiction on the part of the nonresident motorist who caused injury to a plaintiff within the forum state. Similar exceptions to the territorial limits of the theory were developed on the basis of regulatory power to meet the states' needs in the areas of life insurance policies,⁴⁰ and the sale of investment securities.⁴¹

B. *Fundamental Departure: International Shoe*

The fictional devices to which the state resorted in specific substantive areas in fact did not alter the jurisdictional framework established in *Pennoyer*. It was not until the landmark case of *International Shoe Co. v. Washington*⁴² that the Supreme Court undertook a major departure from the jurisdictional foundation based upon physical power over persons and property within territorial limits. In that case, a Delaware corporation whose salesmen exhibited samples and solicited orders in the state of Washington, but maintained no office in that state, was sued in a Washington state court for failure to pay contributions to the state unemployment fund.⁴³ In upholding jurisdiction over the corporation, the Court declared:

[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."⁴⁴

This one declaration effectively shifted the underlying rationale of *in personam* jurisdiction from physical power to reasonableness—the concern of substantive due process.⁴⁵ The relevant inquiry became the relationship among the defendant, the forum and the particular litigation rather than the limits of territorial sovereignty.⁴⁶ A similarly radical change in the conceptual framework of quasi-*in-rem* jurisdiction did not occur with the rul-

³⁹ 274 U.S. 352 (1927).

⁴⁰ See, e.g., *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U.S. 147, 158 (1903).

⁴¹ See, e.g., *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

⁴² 326 U.S. 310 (1945).

⁴³ *Id.* at 311-14.

⁴⁴ *Id.* at 316.

⁴⁵ The Court was of the opinion that the proper focus of inquiry was not whether the corporation was present but rather whether there had been "such contacts of the corporation with the state of the forum as make it *reasonable*, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.* at 317 (emphasis added).

⁴⁶ It was the opinion of Judge Learned Hand that under the rule of *International Shoe* "the court must balance the conflicting interests involved: i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of 'forum non conveniens.'" *Kilpatrick v. Texas & P. Ry. Co.*, 166 F.2d 788, 790-91, (2d Cir. 1948), *cert. denied*, 337 U.S. 75 (1949). It is submitted in this note, however, that the approach advocated by Judge Learned Hand has not to date been adopted by the Supreme Court. See note 165 *infra*.

ing in *International Shoe*, despite suggestions⁴⁷ that its underlying rationale had been greatly weakened by that decision.

Twelve years later in *McGee v. International Life Insurance Co.*⁴⁸ the Supreme Court employed the "minimum contacts" test of fairness and held that the sale of a single life insurance policy within a state was a sufficient contact for the state court to assert jurisdiction in a suit by the beneficiary against the insurer.⁴⁹ In this and other decisions⁵⁰ the "minimum contacts" test appeared to have been considerably relaxed. However, a year after *McGee*, in 1958, the Court in *Hanson v. Denckla*⁵¹ emphasized that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁵² The controversy in *Hanson* centered around the competing claims of the residuary legatees of a will and the beneficiaries of an inter vivos trust to part of the corpus of the trust established in Delaware by a settlor who later became domiciled in Florida.⁵³ The settlor had both exercised the power of appointment under the trust and executed her will in Florida.⁵⁴ The Supreme Court held that the nonresident trustee had not committed acts sufficiently connected with the state of Florida to justify jurisdiction under *International Shoe*.⁵⁵ By insisting that minimum contacts analysis demonstrate evidence of the defendant's purposeful acts within the forum, the *Hanson* Court effectively reinforced "restrictions on the personal jurisdiction of state courts," consistent with *International Shoe*.⁵⁶ Such restrictions were intended to insure that the exercise of jurisdiction over the defendant satisfy the concerns of due process and not merely considerations of convenience.⁵⁷

C. The Continued Vitality of Quasi-in-Rem

While the "minimum contacts" test for in personam jurisdiction was undergoing expansion and reinterpretation by the courts, the quasi-in-rem rule of *Harris v. Balk* concerning attachable debts similarly underwent extended application. This rule, however, also was subjected to criticism.

Criticism of the jurisdictional device came from Judge Traynor of the California Supreme Court in *Atkinson v. Superior Court*.⁵⁸ There, two groups

⁴⁷ See, e.g., *United States Indus., Inc. v. Gregg*, 540 F.2d 142, 154 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

⁴⁸ 355 U.S. 220 (1957).

⁴⁹ *Id.* at 221, 223.

⁵⁰ E.g., *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (holding that a nonprofit organization's solicitation of new members through the unpaid efforts of present members satisfied the minimum contacts test).

⁵¹ 357 U.S. 235 (1958).

⁵² *Id.* at 253.

⁵³ *Id.* at 238-39.

⁵⁴ *Id.* at 239.

⁵⁵ *Id.* at 254. The Court distinguished *McGee* on the basis that the cause of action was not "one that arises out of an act done or transaction consummated in the forum State." *Id.* at 251.

⁵⁶ *Id.* at 251.

⁵⁷ See *id.*

⁵⁸ 49 Cal. 2d 338, 316 P.2d 960 (1957), cert. denied, appeal dismissed & cert. denied sub nom. *Columbia Broadcasting Sys., Inc. v. Atkinson*, 357 U.S. 569 (1958).

of California musicians sought a declaration to stop further payments of royalties and wages by their employers under a trust agreement to a New York trustee.⁵⁹ In the absence of a settled rule as to whether a court could assert full jurisdiction over conflicting claims to intangibles where it did not have personal jurisdiction over all the parties, Judge Traynor resolved the problem by examining the "totality of contacts"⁶⁰ with the forum in the context of fair play and substantial justice,⁶¹ and of the relative interests of the states concerned.⁶² The facts in *Atkinson* were so closely analogous to those in *Hanson*, decided by the Supreme Court less than a year later,⁶³ that Justice Douglas in his dissent in *Hanson* noted the similarity, and approved of both the California court's interest approach to the jurisdictional problem as well as its result.⁶⁴

Notwithstanding Judge Traynor's view that it was irrational to resolve jurisdictional problems by assigning a fictional situs to intangibles,⁶⁵ the New York Court of Appeals nevertheless found it reasonable to extend the quasi-in-rem device of *Harris* to insurance obligations. The case of *Seider v. Roth*⁶⁶ concerned a Canadian citizen insured by a New York company. While in Vermont, the Canadian had an auto accident involving New York residents. The court upheld the New York residents' assertion of quasi-in-rem jurisdiction to sue in New York on the basis of their attachment of the insurer's contractual obligation to defend and indemnify any place where jurisdiction was obtained over the insured defendant.⁶⁷ The court reasoned that the attachment of the policy obligation was proper since the obligation was a "debt" owed to the defendant by the insurer who was considered a resident of New York State.⁶⁸

In two subsequent cases, *Simpson v. Loehmann*⁶⁹ and *Minichiello v. Rosenberg*,⁷⁰ both the New York Court of Appeals and the United States Court of Appeals for the Second Circuit respectively, affirmed the *Seider* procedure on the authority of *Harris*.⁷¹ However, in both cases, New York's substantive policy interests in regulating insurers and in providing a forum for its injured residents were clearly articulated motivations behind the reliance upon *Harris*. In *Simpson*, the court noted that it was helpful to view the court's decision in terms of modern considerations of jurisdiction which required a "practical appraisal of the situation of the various parties rather

⁵⁹ 49 Cal. 2d at 340-41, 316 P.2d at 961-62.

⁶⁰ *Id.* at 347, 316 P.2d at 965.

⁶¹ *Id.* at 345, 316 P.2d at 965.

⁶² See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 662 (1959).

⁶³ In both *Atkinson* and *Hanson*, the plaintiff had a strong interest in undertaking the litigation in his particular choice of states, and the state had a strong interest in asserting jurisdiction since a substantial relationship existed between the state and the subject matter of the proceedings. Furthermore, the decree would not in either case impinge upon the personal rights of the nonresident trustee. Unlike *Atkinson*, however, the trust fund in *Hanson* was not in the forum state and fewer of the interested parties resided there. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 960-65 (1960).

⁶⁴ 357 U.S. at 263-64 (Douglas, J., dissenting).

⁶⁵ See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 662 (1959).

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

⁶⁷ *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

⁶⁸ *Id.*

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

⁷⁰ 410 F.2d 106, rehearing en banc, 410 F.2d 117 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969).

⁷¹ See 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636; 410 F.2d at 118.

than an emphasis upon somewhat magical and medieval concepts of presence and power."⁷² The court observed that the plaintiff's residence in the state and the insurer's presence in, and regulation by the state, as well as the insurer's full control of the litigation, were significant factors in the determination of New York's public policy and of the fairness of its assertion of jurisdiction.⁷³ In *Minichiello*, the Second Circuit affirmed the *Seider* procedure with the observation that the *Simpson* court clearly regarded the procedure as "in effect a judicially created direct action statute."⁷⁴ The court concluded that in view of what it as well as other commentators⁷⁵ regarded as the movement away from the jurisdictional bias favoring the defendant, New York constitutionally could enact a direct action statute in favor of its residents for out-of-state accidents.⁷⁶

The preceding analysis of the evolution away from the historical limitations on both in personam and in rem jurisdiction suggests the conclusion that the Supreme Court's decision in *Harris v. Balk* served as a principal catalyst in the conceptual developments of state jurisdiction up to the time of the *Shaffer* decision. It is submitted that the survival of *Harris* as authoritative precedent for the extended application of quasi-in-rem jurisdiction helped to generate two divergent judicial approaches to complex jurisdictional situations created by a society increasingly dependent upon intangible property and interstate transactions.

The first approach was typified by Justice Traynor's opinion in *Athinson*⁷⁷, roughly a decade after *International Shoe*.⁷⁸ Justice Traynor rejected the fictional situs definition of the jurisdictional problem before the court and instead identified the issue as one of jurisdiction over persons and property. He found that all the parties had appropriate minimum contacts with the forum to sustain the court's exercise of jurisdiction.⁷⁹ By contrast, the second approach, embodied in *Seider v. Roth*, sought to build upon the authority of *Harris* and extend its rationale to reach desired policy results. As seen in *Simpson v. Loehmann*,⁸⁰ although the court suggested consid-

⁷² 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

⁷³ *Id.* It is important to note that Judge Fuld's language should not be interpreted to mean that he believed the *Seider* attachment procedure satisfied the *International Shoe* standard. Rather, he set forth some of the considerations which underlay the decision and factors which would be significant in assessing fairness under the due process clause. His concluding statement was a request for thorough studies of the impact of in rem jurisdiction

on not only litigants in personal injury cases and the insurance industry but also our citizenry generally Absent new data suggesting the desirability of a departure from the general principles underlying in rem jurisdiction, as reflected in *Seider*, we find neither basis nor justification for departing from our holding in that case.

Id. at 312, 234 N.E.2d at 672-73, 287 N.Y.S.2d at 638.

⁷⁴ 410 F.2d at 109. The court compared the *Seider* procedure with the Louisiana Direct Action Statute, LA. REV. STAT. ANN. § 22.655 (West) (amended 1962), which had been upheld by the United States Supreme Court in *Watson v. Employers Liab. Assurance Corp., Ltd.* 348 U.S. 66 (1954). See text at notes 166-76 *infra*.

⁷⁵ See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

⁷⁶ 410 F.2d at 110.

⁷⁷ See text at notes 58-64 *supra*.

⁷⁸ 326 U.S. 310 (1945).

⁷⁹ 49 Cal. 2d at 346-48, 316 P.2d at 965-66.

⁸⁰ See text and note 73 *supra*.

erations which would be appropriate were the standard of fairness applied, it nevertheless relied upon *Harris* to apply the fictional *Seider* device. Similarly the United States Court of Appeals in *Minichiello*⁸¹ also chose to rely upon the authority of *Harris*.

Thus it may be argued that the two judicial approaches described developed in large part as a result of the continued authority of *Harris* for quasi-in-rem jurisdiction. By the time of the Court's deliberation in *Shaffer v. Heitner*, the moment was ripe for the Court to consider whether the standard of fairness and substantial justice, and not the mechanical requirements of presence and power, henceforth should govern the entire area of in rem jurisdiction.

II. THE COURT'S REASONING IN *SHAFFER V. HEITNER*

A. *A Departure From Categorical Analysis*

Whatever the degree of stability remaining in the conceptual foundation of in rem jurisdiction, it was evident to the Supreme Court in *Shaffer* that the mere characterization of jurisdictional procedures according to the traditional categories often could rigidify judicial analysis regardless of the underlying purposes of such procedures. The Delaware sequestration statute provided such an example. The principal purpose of the procedure as stated in the statute⁸² and as interpreted by the Delaware courts,⁸³ was to compel the personal appearance of the defendant through sequestration, most often of stock owned by the defendant in a Delaware corporation and defined statutorily as present in Delaware.⁸⁴ Once the defendant entered a general appearance, the sequestered property normally was released absent a showing by the plaintiff of a special reason for continuing the sequestration order.⁸⁵ Despite the in personam purpose of the sequestration statute, the Delaware Supreme Court had found that the quasi-in-rem basis for the operation of the statute, namely the presence of capital stock in the forum state, rendered the prior contacts test of *International Shoe* inapplicable.⁸⁶

In its review of the Delaware court's opinion, the United States Supreme Court termed the state court's dismissal of the *International Shoe* test "categorical analysis" which assumed the continued conceptual soundness of *Pennoyer v. Neff* as the foundation for in rem jurisdiction.⁸⁷ The Court began its own analysis by departing abruptly from *Pennoyer's* territorial premise that a state's authority to adjudicate is based upon its physical

⁸¹ 410 F.2d at 118.

⁸² DEL. CODE ANN. tit. 10, § 366 (1974). See note 8 *supra*.

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

⁸⁴ DEL. CODE ANN. tit. 8, § 169 (1974).

⁸⁵ See note 8 *supra*.

⁸⁶ *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (Del. 1976).

⁸⁷ 433 U.S. at 196. The Court noted that in fact that foundation had been seriously questioned and subsequently weakened by carefully reasoned lower court opinions and the analysis of a majority of commentators. *Id.* at 205. In addition, the Court acknowledged that it also had contributed to the tide of reasoning against *Pennoyer* by holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that reasonable and appropriate efforts must be made to give owners notice before their property can be subjected to a court's judgment. *Shaffer*, 433 U.S. at 206. The Court stated that in *Mullane*, it had also held that the requirements of the fourteenth amendment do not depend upon whether an action is labeled in rem or in personam. *Id.*

power over either persons or their property.⁸⁸ Instead, the Court embraced the view that judicial jurisdiction over a thing is actually direct jurisdiction over the interests of persons in a thing.⁸⁹ From this premise, the Court reasoned that jurisdiction in rem must meet the same due process standard that would justify the exercise of jurisdiction over the interests of persons in a thing. That standard was defined in terms of the minimum contacts test set forth in *International Shoe*.⁹⁰ The Court noted that the validity of its argument was not affected by the fact that the potential liability of a defendant in an in rem action is limited by the value of the property.⁹¹

B. The Test of Fairness Applied to In Rem Rules

Having reasoned that the in rem assertion of jurisdiction should satisfy the same standard applied to assertions of in personam jurisdiction, the Court was careful to emphasize that the single standard of *International Shoe* would not deprive state courts of all jurisdiction in rem. Specifically, two of the three types of in rem jurisdiction identified by the Court⁹² would not be affected. These two types were pure in rem jurisdiction and the first category of quasi-in-rem jurisdiction which concerns the interests of particular persons in property. In both cases, the Court explained, the "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant . . ."⁹³ It would be "unusual" in such circumstances for the state not to have jurisdiction⁹⁴ since the presence of property reasonably could be said to bear on the existence of jurisdiction by providing contacts among the forum state, the defendant, and the litigation.⁹⁵ The Court further observed that in such cases, the defendant's claim to property in the forum state usually would imply that he hoped to benefit from the state's protection of his interest.⁹⁶ In addition, the Court identified certain state policy interests to illustrate other factors which might support jurisdiction in the types of in rem actions it had identified.⁹⁷ The Court also suggested one further situation where the presence of property in the state alone might support in rem jurisdiction. Such a situation, it noted, arose in the case of *Dubin v. City of Philadelphia*⁹⁸ in which a resident plaintiff brought a tort action against the city for injuries suffered from a fall on a broken sidewalk abutting property owned by a non-resident.⁹⁹ The court upheld the city's joinder under a Pennsylvania statute

⁸⁸ 433 U.S. at 207.

⁸⁹ *Id.* The Court endorsed the introductory note of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971) which states: "The phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."

⁹⁰ 326 U.S. 310 (1945).

⁹¹ See 433 U.S. at 207 n.23, 209 n.32. See note 165 *infra*.

⁹² See note 28 *supra*.

⁹³ 433 U.S. at 207.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 207-08.

⁹⁷ *Id.* at 208. Such interests included the state's strong interests in guaranteeing the marketability of property within its borders, and in providing the means for the peaceful resolution of disputes concerning the possession of that property. The value of witnesses and records being located in the same state was also noted. *Id.* The Court was careful to point out that the illustrations it provided were not meant to include all factors which might influence the outcome of a decision or those which would necessarily be determinative. *Id.* at 208 n.28.

⁹⁸ 34 Pa. D. & C. 61 (1938).

⁹⁹ *Id.* at 62.

of the nonresident as a defendant by analogizing to nonresident motor vehicle operator statutes¹⁰⁰ which had been held constitutional by the Supreme Court in *Hess v. Pawloski*.¹⁰¹ The *Shaffer* Court noted that while the controversy in *Dubin* did not involve claims to the property itself, the cause of action nevertheless "related to rights and duties growing out of that ownership."¹⁰² Thus, within the in rem jurisdictional contacts it defined, the Court affirmed the proposition that the presence of property alone in the forum potentially could provide sufficient contacts among the forum, the defendant and the litigation to satisfy *International Shoe's* minimum contacts standard.¹⁰³

In contrast to this assessment of the impact of the fairness standard upon the first two categories of in rem actions, the Court concluded that the new test would significantly affect the quasi-in-rem action typified by *Harris v. Balk* and the Delaware sequestration procedure:

These are cases where the property which now serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.¹⁰⁴

The Court's negative assessment of this particular quasi-in-rem action flowed not only from the minimum contacts requirement itself but also from its view that the underlying rationales for the action were no longer persuasive. The least persuasive rationale was history itself. Since jurisdiction based solely on the presence of property in the state was in fact the assertion of jurisdiction over the owner, such a quasi-in-rem procedure merely perpetuated an ancient form at the expense of modern notions of due process.¹⁰⁵ A second rationale, namely, that the procedure avoids the uncertainty inherent in the *International Shoe* standard and assures the plaintiff a forum, was equally unpersuasive in the Court's view. In the "vast majority of cases," it observed, the fairness standard could be easily applied;¹⁰⁶ where the standard caused difficulty, the sacrifice of due process for the sake of simplifying the litigation by circumventing the jurisdictional issue was not acceptable.¹⁰⁷

The only rationale to which the Court appeared to make some concession was the traditional argument that the quasi-in-rem device prevented

¹⁰⁰ See *id.* at 63.

¹⁰¹ 274 U.S. 352 (1927).

¹⁰² 433 U.S. at 208.

¹⁰³ See *id.* at 207-08.

¹⁰⁴ *Id.* at 208-09. The Court noted that *Shaffer* did not raise, and therefore the Court did not consider, the question whether jurisdiction based on property alone is sufficient when the plaintiff would otherwise lack a forum. *Id.* at 211 n.37.

¹⁰⁵ *Id.* at 212.

¹⁰⁶ *Id.* at 211.

¹⁰⁷ *Id.*

the alleged wrongdoer from removing his assets to another forum to avoid payment of his obligations.¹⁰⁸ While still rejecting the assertion of jurisdiction on the basis of property alone, the Court acknowledged: "At most [the rationale] suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."¹⁰⁹ In other words, the Court recognized that where jurisdiction to adjudicate the underlying controversy has been obtained in one forum consistent with *International Shoe*, a more limited form of jurisdiction through the attachment of property in another forum may be permissible where there is the fear that the defendant may dissipate, conceal or remove assets necessary to satisfy a potential judgment.¹¹⁰ Therefore, except for the Court's apparent approval of this limited form of jurisdiction to order attachment, jurisdiction to adjudicate the underlying merits of a controversy cannot be based upon the presence of property alone in the forum where the property is completely unrelated to the plaintiff's cause of action.

C. *The Fairness Test Applied to the Delaware Sequestration Procedure*

Having concluded from its preceding analysis that the mere presence of a defendant's property in a forum would not support a state court's jurisdiction, the Court readily disposed of the jurisdictional argument based on the Delaware quasi-in-rem statute. The Court reasoned that since the defendants' corporate stock, defined statutorily as present in Delaware, was neither the subject matter of the litigation nor related to the underlying cause of action, it did not provide "sufficient" contacts to support the Delaware court's jurisdiction.¹¹¹ Thus, the Court held that the Delaware sequestration statute was invalid in that it permitted the assertion of state court jurisdiction solely on the basis of the statutorily defined presence of defendants' property without proof of other ties among the defendants, the state and the litigation.¹¹²

The Court devoted the major portion of its analysis to an evaluation of other ties or "minimum contacts" identified by the plaintiff in its brief before the Court in support of Delaware's exercise of jurisdiction. These alleged contacts were essentially of two types, both relating to the corporation law of Delaware.

¹⁰⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66, Comment a (1971).

¹⁰⁹ 433 U.S. at 210.

¹¹⁰ Indeed, in a recent case in California, *Carolina Power & Light Co. v. Uranex*, 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977), the United States District Court for the Northern District of California, held that, consistent with *Shaffer*, the court could constitutionally exercise jurisdiction to attach, as security for possible judgment in a suit between a North Carolina plaintiff and a French defendant, a debt owed to the defendant by a California corporation. The original suit was brought in California. The court stayed the attachment for a specified amount pending the plaintiff's filing of an action on the merits in which the plaintiff had in personam jurisdiction over the defendant.

¹¹¹ 433 U.S. at 213.

¹¹² *Id.* The Court did not question the propriety of Delaware's law, which establishes the presence of corporate stock by means of a fictional situs.

MINIMUM CONTACTS

First, the plaintiff argued that Delaware had a strong interest in supervising the management of its chartered corporations by officers and directors whose obligations were defined by Delaware law.¹¹³ Under that view the defendants' positions as corporate fiduciaries of a Delaware corporation were sufficient to tie them to the forum's interest in protecting its regulatory role.¹¹⁴ Second, the plaintiff asserted that substantial benefits under Delaware law provide incentives for persons such as defendants to assume positions in Delaware corporations;¹¹⁵ in view of these "acts" by the defendants in assuming positions from which they would receive benefits under Delaware law, fairness required that in return for such benefits, the defendants respond to Delaware when they are accused of abusing their powers.¹¹⁶

The Court rejected the first argument on the ground that Delaware law as defined in the sequestration statute did not assert the state interest claimed by the plaintiff.¹¹⁷ Jurisdiction was not based upon the defendants' status as corporate fiduciaries but rather upon the presence of their property in the state;¹¹⁸ moreover, the frequent use of the statute's procedure to reach corporate fiduciaries in derivative actions did not obscure the fact that it could be used in any suit against a nonresident.¹¹⁹ Finally, the Court noted that even assuming the importance of Delaware's interest, that interest might determine the appropriate choice of law but not necessarily the proper jurisdiction.¹²⁰

The Court rejected the second minimum contacts argument, premised on the defendants' assumption of management positions allegedly to receive benefits under Delaware law, noting that it was molded from the same line of reasoning as the first argument.¹²¹ Similar to the first argument, in the Court's view, the second argument failed to demonstrate any "purposeful acts" by the defendants in the forum such that they could be said to have availed themselves of the "privilege of conducting activities"¹²² in the forum state. Not only did plaintiffs simply have "nothing to do" with Delaware but also they had no reason on the basis of any "consent" statute to expect to defend before a Delaware court.¹²³ The Court thus concluded that there were insufficient contacts between the defendants, the state and the litigation to support Delaware's assertion of jurisdiction, and consistent with that view, it reversed the decision of the Delaware Supreme Court.¹²⁴

Justice Brennan, in a separate opinion, concurred with the reasoning of the majority in its decision to extend minimum contacts analysis to all as-

¹¹³ *Id.* at 213-14.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 215. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 143, 145 (1974) (interest-free loans, indemnification).

¹¹⁶ *Id.* at 216.

¹¹⁷ *Id.* at 214.

¹¹⁸ *Id.* *See* DEL. CODE ANN. tit. 10, § 366(a) (1974) at note 8 *supra*.

¹¹⁹ *Id.* *But see* United States Indus., Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) (use of the sequestration procedure to obtain jurisdiction over a nonresident defendant in a dispute concerning breach of contract disallowed on grounds that it violated the minimum contacts standard).

¹²⁰ 433 U.S. at 215, *quoting* Hanson v. Denckla, 357 U.S. at 254.

¹²¹ 433 U.S. at 216.

¹²² *Id.*, *quoting* Hanson v. Denckla, 357 U.S. at 253.

¹²³ 433 U.S. at 216.

¹²⁴ *Id.* at 217.

sertions of state court jurisdiction.¹²⁵ However, he dissented strongly from the majority's application of the minimum contacts analysis to the factual record before it and to the majority's conclusion that Delaware lacked sufficient contacts to support its assertion of jurisdiction over the fiduciary defendants.¹²⁶ In his view, the majority's application of the fairness test was premature since the issue of minimum contacts had never been considered by the lower courts;¹²⁷ moreover, in his analysis, the Court, despite the limited record, could have found sufficient contacts to support jurisdiction based on Delaware's strong substantive interest in regulating the fiduciary conduct of the officers and directors of its chartered corporations.¹²⁸

In sum, the immediate result of the Court's decision to extend minimum contacts analysis to determinations of in rem jurisdiction is effectively to abrogate a category of quasi-in-rem jurisdiction. Jurisdictional procedures such as were employed in *Harris* and in the Delaware sequestration statute must fail since the property upon which jurisdiction is based is wholly unrelated to the cause of action; the property simply does not give rise to the necessary contacts among the defendant, the forum and the underlying controversy.

III. AN ASSESSMENT OF THE REASONABLENESS OF THE COURT'S MINIMUM CONTACTS ANALYSIS IN *SHAFFER*

When assessed within the context of previous decisions, the Court's application of minimum contacts analysis in *Shaffer* is consistent. Indeed, the Court's strict adherence to the "purposeful act" view in *Shaffer* not only is consistent with, but also emphatically reinforces the Court's careful distinction in *Hanson*¹²⁹ between choice of law and jurisdictional determinations. It is submitted, however, that within the factual context of *Shaffer* the Court's application of the purposeful acts requirement first, is too literal, and second, as a result of such application, has the unfortunate consequence of unnecessarily separating the choice of law and jurisdiction questions when no danger of unfairness to the defendants really exists.

As to the first proposition, that the Court applied the purposeful acts requirement too literally, the Court's emphatic search within the record for

¹²⁵ *Id.* at 219.

¹²⁶ *Id.* at 220-22.

¹²⁷ *Id.* at 220. Justice Brennan noted that from a practical standpoint, the Court's finding precluded the Delaware courts from exercising the choice of reinterpreting the Delaware statute in terms of minimum contacts requirements to fulfill the legislature's primary purpose of securing the personal appearance of out-of-state defendants.

¹²⁸ *Id.* at 222-28. Justices Powell and Stevens concurred in separate opinions. *Id.* at 217-19. Both Justices agreed with the majority's extension of the *International Shoe* standard to all assertions of jurisdiction and with the finding that the Delaware statute was unconstitutional on its face. However, both registered concern that the majority's opinion not be read to invalidate the assertion of jurisdiction solely on the basis of real property located within the forum. Justice Powell in particular argued that in such cases the preservation of quasi-in-rem jurisdiction would avoid the uncertainty of the fairness standard. *Id.* at 217. Justice Stevens emphasized the importance of the due process requirement of fair notice in the context of securities purchases. He noted that Delaware's situs rule and sequestration procedure created the risk of judgment without notice for every purchaser of securities in the national market. *Id.* at 218-19.

¹²⁹ See text at note 120 *supra*.

evidence that the defendants "set foot" in Delaware or committed "acts" in Delaware related to the cause of action, ignored, without explanation, previous recognition that out-of-state acts whose effects in the forum state were *foreseeable*, may support in personam jurisdiction.¹³⁰ As Justice Brennan observed in his dissent in *Shaffer*, it could be fairly argued that the alleged breaches of trust by nonresident fiduciaries were acts such that the defendants should have foreseen the damaging effects upon the solvency and management of the state-chartered corporation.¹³¹ Although no explanation is provided, the majority's omission of any reference to this jurisdictional approach may be an indirect indication of its disapproval of the application of expectation analysis to cases such as *Shaffer* involving allegations of economic injury, rather than liability for personal injury. Expectation analysis heretofore has been applied almost exclusively to products liability cases involving interstate commerce.¹³² Such an approach does go considerably beyond the purposeful act view since it looks to the defendant's expectations without regard to the quantum or quality of contacts necessary to establish jurisdiction relative to a particular type of injury. The Court's refusal to embrace such an approach in *Shaffer*, therefore, may be viewed as consistent with previous applications of expectation analysis and supportive of lower courts which have rejected such analysis in economic injury cases.¹³³

Concerning the defendants' acts *within* the forum, it is submitted that Justice Brennan in dissent applied the more appropriate and persuasive reasoning. That is, the defendants' purposeful acts within the forum *were* demonstrable by virtue of their having "voluntarily associated themselves with the State of Delaware, 'invoking the benefits and protections of its laws', . . . by entering into a long term and fragile relationship with one of its domestic corporations."¹³⁴ In doing so, the defendants chose to assume powers and responsibilities "wholly derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials."¹³⁵

Justice Brennan's reasoning would seem to suggest the proposition that a defendant may be held to have invoked the benefits and protections of the forum's laws by *implication* as well as by the literal performance of acts within the forum. The assertion of state jurisdiction on this basis is both sensible and fair, since although nonresident directors and officers might never need physically to enter Delaware, the legitimacy and, to an extent, the effectiveness of their positions and activities elsewhere depend upon the benefits and protections provided by the state. The majority's view that in the absence of a "consent statute"¹³⁶ the defendants could not

¹³⁰ See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

¹³¹ 433 U.S. at 226 (Brennan, J., dissenting). See also Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 313, 317 (1970).

¹³² See *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951). *Contra*, *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); *Johns v. Bay State Abrasive Prods. Co.*, 89 F. Supp. 654 (D. Md. 1950).

¹³³ See *Jack O'Donnell Chevrolet, Inc. v. Shankles*, 276 F. Supp. 998, 1004 (N.D. Ill. 1967) (rejecting expectation analysis in a case involving economic injury).

¹³⁴ 433 U.S. at 227-28 (Brennan, J., dissenting).

¹³⁵ *Id.* at 228.

¹³⁶ *Id.* at 216.

reasonably have expected to defend before a Delaware court, reflects too formal a perspective; as Justice Brennan observed, the defendants could surely be "charged" with the understanding that Delaware would seek to protect its substantial interests through its courts—especially in view of the past application of the sequestration statute for precisely that purpose.¹³⁷

As a second proposition, it is suggested that in view of the subject matter of the suit and the nature of the defendants' activities, the Court would not have violated the standard of fairness had it considered choice of law as a factor in its determination of jurisdiction. For example, in *Atkinson* and in *Hanson*, in which the validity of trusts were at issue, it was evident that the determination of the choice of law question could significantly shape the results of the litigation; therefore, the treatment of choice of law as merely a factor favoring or disfavoring jurisdiction conceivably could have violated the standard of fair play for the parties in such circumstances. In a factual context such as presented in *Hanson*, therefore, the Court's refusal to consider choice of law as a factor in jurisdiction and its insistence upon evidence of the defendant's purposeful acts within the forum may have produced a fair result, however questionable it might seem by comparison to the interest approach taken in the analogous case of *Atkinson*.¹³⁸ Under the facts of *Shaffer*, unlike the factual circumstances presented in *Atkinson* and *Hanson*, the possible alternative forum(s) would not likely have had a strong interest in the outcome of such litigation based upon claims of fiduciary mismanagement of a Delaware corporation. Indeed, in the past, despite the operation of the Delaware sequestration statute which threatened jurisdictional conflicts by defining the situs of all corporate stock within Delaware, states nevertheless deferred to Delaware law or held that Delaware's situs rule controlled.¹³⁹ Furthermore, Delaware law would most likely govern the litigation, since under general principles of conflicts of law the local law of the state of incorporation normally applies to determine the existence and extent of corporate officers' liability to the corporation and shareholders.¹⁴⁰

The starting point for a more liberal and arguably more reasonable jurisdictional analysis of the factual circumstances presented in *Shaffer* is the state interest in regulating its chartered corporations—the factor which the Court confined to choice of law considerations. The Court acknowledged that, in general, the law of the state of incorporation is held to govern the liabilities of officers and directors to the corporation and its stockholders.¹⁴¹ However, the Court rejected the notion that the general rule is

¹³⁷ *Id.* at 227 n.6 (Brennan, J., dissenting). Justice Brennan further noted: "Even in the absence of such a statute . . . the close and special association between a state corporation and its managers should apprise the latter that the state may seek to offer a convenient forum for addressing claims of fiduciary breach of trust." *Id.*

¹³⁸ See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 965 (1960).

¹³⁹ See *Mills v. Jacobs*, 333 Pa. 231, 4 A.2d 152 (1939). See also Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973).

¹⁴⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971). See also 433 U.S. at 225 n.3 (Brennan, J., dissenting). See also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). The authors suggest what arguably is the more reasonable and practical approach: "Rules respecting the assumption of jurisdiction must take the choice-of-law problem into account when choice is impossible either inherently or as a matter of practice—when the forum, if it adjudicates, will automatically regulate the controversy under its own domestic-law rule." *Id.* at 1129 (emphasis in original).

¹⁴¹ 433 U.S. at 215 n.44.

based upon the interest of the state of incorporation rather than upon the need for uniform standards to govern the internal affairs of a corporation.¹⁴² Thus, as Justice Brennan implied in his dissent, the Court, more by assertion than explanation, appeared to distinguish a state's incorporation law from other areas of law where the states have been held to have a regulatory interest, or a strong interest in monitoring the affairs of an entity whose creation is by virtue of state law.¹⁴³ In fact, the Court went further and suggested that even if Delaware had enacted a statute clearly designed to protect the alleged state interest, that interest, in the absence of defendants' purposeful acts, would only support the application of Delaware law to the controversy but not its power to enforce its law with respect to the parties.¹⁴⁴

It is submitted, however, that fair play and substantial justice describe the outer limits of constitutional due process and arguably must be determined in the context of each jurisdictional purpose.¹⁴⁵ In *Shaffer*, Delaware's jurisdictional purpose was to assert judicial control over a derivative action which raised "allegations of abuses of the basic management of an institution whose existence [was] created by the State and whose powers and duties [were] defined by state law"¹⁴⁶ Given the context of Delaware's jurisdictional purpose, therefore, as well as the state's acknowledged competence in interpreting its corporation law¹⁴⁷ and the high concentration nationally of corporations in Delaware, choice of law could validly have been considered by the Court as a factor favoring jurisdiction, without risk of unfairness to the defendant.¹⁴⁸ The Court's literal application of the

¹⁴² *Id.* see *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527-28 (1947).

¹⁴³ 433 U.S. at 223-24 (Brennan, J., dissenting), citing *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (insurance regulation); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (blue sky laws); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). Justice Brennan found the Court's position even more incongruous in view of its recent decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), in which it reaffirmed the paramount interests of the domestic forum in the conduct of its fiduciaries:

As the Court stated in *Cort v. Ash* . . . "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." 422 U.S. at 84."

430 U.S. at 479 (emphasis in original).

¹⁴⁴ 433 U.S. at 214-15.

¹⁴⁵ See Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 292 (1960).

¹⁴⁶ 433 U.S. at 224 (Brennan, J., dissenting).

¹⁴⁷ *Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 795 (1973).

¹⁴⁸ Under the present circumstances, the matter rests with the Delaware legislature to replace its constitutionally defective sequestration device with some litigation-centering procedure to enable Delaware to continue to enforce its corporation law in protection of its substantive interests. The most effective solution may be for the legislature to enact a special long-arm statute applying to nonresident officers, directors, and majority shareholders. This course of action has been suggested previously by students of Delaware corporation law. See *Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 798 (1973). The authors suggest that such a statute would clearly be constitutional since suits involving the activities of nonresident fiduciaries of domestic corporations are of substantial concern and relation to the forum. The Court's reasoning in *Shaffer* casts some doubt upon the certainty of such a conclusion since it characterizes the assertion of state interest by statute or otherwise as a choice of law question. See text at notes 111-28 *supra*. Nevertheless the Court's favorable

purposeful acts requirement and its restriction of Delaware's regulatory interest to a choice of law question provide evidence that the Court has not yet adopted the broader conflicting interests approach taken in *Atkinson*¹⁴⁹ and urged in various forms by commentators.¹⁵⁰

IV. A REAPPRAISAL OF THE *SEIDER* PROCEDURE UNDER THE COURT'S APPROACH TO THE STANDARD OF FAIRNESS IN *SHAFFER*

In conjunction with its conclusion that *all* assertions of state court jurisdiction must henceforth satisfy the standard of *International Shoe* and its progeny,¹⁵¹ the *Shaffer* Court made the following observation: "It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled."¹⁵² The statement suggests two conclusions. First, the Court's opinion should be read as a rejection of the territorial theory of jurisdiction set forth in *Pennoyer* and expanded by means of a "fictional situs" in *Harris*. Second, the Court's rejection of *Harris* as fundamentally unfair should not be understood to overrule all quasi-in-rem cases which relied upon *Harris* for authority. Instead, such cases should be re-examined under the standard of fairness and rejected only where "inconsistent" with that standard.

A logical focus for such a re-examination is the *Seider* attachment procedure admittedly fashioned on the *Harris* rationale¹⁵³ and recently upheld by a lower court following the Supreme Court's decision in *Shaffer*.¹⁵⁴ In view of the *Shaffer* Court's specific scrutiny of *Harris* under the fairness standard and its analogy of the Delaware sequestration procedure to *Harris*, it is important to assess whatever bearing the reasoning in *Shaffer*, specifically its approach under the standard of fairness, might have upon an evaluation of the fairness of the *Seider* procedure.

It will be recalled that under the original physical power rationale of in rem actions, the judicial inquiry centered upon the presence of property within the forum. Under minimum contacts analysis, it was the Court's view that the presence of property remains relevant to the new inquiry since it

reference at the same time to existing statutes which seek to achieve Delaware's purpose, albeit by the earlier fictional device of consent, suggests that a specially designed statute which specifically defines the contacts of such management controversies with the forum might be upheld.

¹⁴⁹ See text at notes 58-64 *supra*.

¹⁵⁰ See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). See note 165 *infra*.

¹⁵¹ 433 U.S. at 212.

¹⁵² *Id.* at 212 n.39.

¹⁵³ See text and notes 66-76 *supra*. For a view distinguishing the rationale of *Harris* from the *Seider* procedure, see Judge Anderson's dissent in *Minichiello v. Rosenberg*, 410 F.2d 106, rehearing *en banc*, 410 F.2d 117, 120-22 (2d Cir. 1968) (Anderson, J., dissenting), *cert. denied*, 396 U.S. 844 (1969).

¹⁵⁴ See *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977) *appeal docketed*, No. 78-7050 (2d Cir. Oct. 25, 1977); see discussion of case at note 176 *infra*. For other jurisdictions which have applied the *Seider* procedure, see *Adkins v. Northfield Foundry and Mach. Co.*, 393 F. Supp. 1079 (D. Minn. 1974); *Savchuk v. Rush*, — Minn. —, 245 N.W.2d 624 (1976), *vacated*, 433 U.S. 902 (1977); *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973). *But see* *Robitaille v. Orciuch*, 382 F. Supp. 977 (D.N.H. 1974); *Camire v. Scieszka*, 116 N.H. 281, 358 A.2d 397 (1976).

may "bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation."¹⁵⁵ By the examples¹⁵⁶ it provided, the *Shaffer* Court sought to demonstrate that the presence of the defendant's property alone could sufficiently connect the defendant with the forum provided a relationship between the property and the cause of action could be shown: either the property was the subject matter of the litigation or somehow related to the cause of action. At this point in the Court's analysis it might be argued that in *Seider* and its progeny, the cause of action and the defendant's property (insurer's obligation) attached *were* related and thus provided sufficient contacts between the defendant and the forum for the exercise of jurisdiction. To be sure, when compared to the property attached in *Harris* (debt of defendant's debtor) or in *Shaffer* (defendants' stock holdings), the insurer's obligation to defend and indemnify the defendant in a suit resulting from an automobile accident is certainly "related" to the cause of action. However, for the following reasons, it is submitted that the assertion of jurisdiction on the basis of that observation alone would impose too casual a reading on the Court's reasoning in *Shaffer*.

The *Shaffer* Court's concern was with the sufficiency of the *defendant's* contacts with the *forum* such that it might reasonably be inferred that the defendant expected to enjoy the benefits and protections of the forum's laws, and thus also reasonably expected to have to defend in the forum. Throughout its analysis in *Shaffer*, the Court stressed that the inference of the defendant's expectation must be supported by minimum contacts analysis which demonstrates the defendant's "purposeful acts" within the forum—the view originally articulated by the Court in *Hanson*.¹⁵⁷ Moreover, as stated in *Hanson* and applied by the Court in *Shaffer*, the minimum contacts requirement with its emphasis upon purposeful acts, functions in the nature of a condition precedent.¹⁵⁸ Thus, in the in rem examples provided by the Court in *Shaffer*, the defendant's claim to ownership of property in the forum was the prerequisite act sufficient to support the inference that he expected to benefit from the state's protection of his interest against claims either to the property itself or somehow related to the rights and duties growing out of the defendant's ownership of the property.¹⁵⁹

By contrast to the Court's in rem examples, in both *Harris* and *Shaffer*, under the reasoning of the majority in *Shaffer*, the defendants could not be said to have purposefully acted in the forums involved and thereby to have expected to benefit from the state's protection of their property interests.¹⁶⁰

¹⁵⁵ 433 U.S. at 207.

¹⁵⁶ *Id.* at 207-08. See text at notes 92-102 *supra*.

¹⁵⁷ 357 U.S. at 253.

¹⁵⁸ The Court in *Hanson* stated: "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. See *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 . . ." *Id.* at 251. (emphasis added).

¹⁵⁹ See text at notes 92-102 *supra*.

¹⁶⁰ The Court does not actually state this proposition about the defendant's expectation in connection with its conclusion concerning *Harris*. However, in view of the fact that the Court does assert the proposition in relation to its discussion of in rem actions, 433 U.S. at 207-08, (see text at note 96 *supra*), and in its analysis of other possible contacts of defendants in *Shaffer*, 433 U.S. at 216, this inference would seem reasonable.

In *Harris*, the defendant's debtor was subject to garnishment wherever he might travel; in *Shaffer*, the defendants' holdings were assigned a "fictional situs" under Delaware law.¹⁶¹ Furthermore in *Shaffer*, it is significant that once the Court found the defendants' holdings in Greyhound insufficient as a basis to support jurisdiction, it consistently limited the focus of the remainder of its inquiry to possible contacts between the defendants and the forum, and did not extend its analysis to the "interests" of the state or of the plaintiff. Thus, it noted that no evidence existed that the defendants actually had ever set foot in Delaware or committed any acts in Delaware related to the cause of action.¹⁶² It was not persuaded by the plaintiff's assertion that Delaware's strong interest in regulating the management of its corporations provided sufficient "contacts, ties, or relations"¹⁶³ between the defendants' corporate positions and the forum.¹⁶⁴

In light of this reasoning by the Court in *Shaffer*, it is difficult to imagine the Court upholding jurisdiction in a *Seider*-type case where the defendant is a nonresident involved in an accident outside the plaintiff's state, but whose insurance company simply happens to do business in the plaintiff's state. Like the defendants in *Shaffer*, the nonresident defendant in such a *Seider* situation could not be said to have ever set foot in the plaintiff's state or to have committed any acts in that state related to the cause of action. The mere presence of the defendant's insurance company and its obligation in the forum state—and in many other states most likely—could not be regarded as the type of purposeful act by the defendant contemplated in *Hanson* and upon which the *Shaffer* Court insisted.¹⁶⁵

¹⁶¹ See DEL. CODE ANN. tit. 8, § 169 (1974).

¹⁶² 433 U.S. at 213.

¹⁶³ *Id.* at 213-14, quoting *International Shoe Co. v. Washington*, 326 U.S. at 319.

¹⁶⁴ The Court noted that Delaware's interest, however strong, did not demonstrate that the state was necessarily a "fair forum" for the litigation: "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]." *Id.* at 215 (emphasis added), quoting *Hanson v. Denckla*, 357 U.S. at 254.

¹⁶⁵ *Id.* It might be argued that the Court indirectly approved of *Seider* through the pointed reference in its opinion immediately following its conclusion that not every in rem action would be affected by the adoption of the *International Shoe* standard for all assertions of state court jurisdiction to the recent law review article by Columbia University Professor Hans Smit. See Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977). As part of his overall analysis of in rem actions, Professor Smit approves the *Seider* attachment procedure as meeting the test of reasonableness. *Id.* at 624, 628 n.114.

It is not the purpose of this note to examine the Professor's article in detail within the context of *Shaffer*. However, in view of both the Supreme Court's reference to it and the fact that in the recent case of *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977) appeal docketed, No. 78-7050 (2d Cir. Oct. 25, 1977), it was cited by the plaintiff as evidence of the Court's approval of *Seider*, it is important to make the following brief comments. First, unlike the Court in *Shaffer*, Professor Smit applies a balancing of interests approach to in rem actions under the fairness standard. 43 BROOKLYN L. REV. at 608. It is a "limited interest analysis" confined to the balancing of the interests of the defendant, the plaintiff, and the state, with primary weight given to the interest of the defendant in not being sued away from his home. However, the defendant's interest will be depreciated when the defendant has acted or has property within the forum. Professor Smit concludes that the quasi-in-rem jurisdiction exercised in *Seider* is reasonable where the obligation is owed by a debtor who is either a resident of, or permanently established in, the forum and the plaintiff's interest or that of the forum state or both, favor the forum. *Id.* at 624. In contrast to Professor Smit's interest formula, the *Shaffer* Court's analysis ignores the plaintiff's interest, defines the state's interest as a

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The preceding conclusion that a *Seider*-type assertion of jurisdiction cannot survive in light of *Shaffer* would appear necessary at least as long as the fiction is maintained that the insured is the real party at interest.¹⁶⁶ It is that fiction which the *Seider* procedure unmasks. From this note's earlier historical analysis¹⁶⁷ of the series of decisions which sustained the constitutionality of the *Seider* procedure, it seems evident that the principal motivation behind the judicial procedure is to facilitate the convenience of the New York plaintiff and to provide a direct remedy against the tortfeasor's insurer in cases where the plaintiff otherwise would have to pursue a non-resident tortfeasor in a foreign jurisdiction for an injury which occurred outside New York State.¹⁶⁸ This particular objective, premised only upon the plaintiff's domicile and the insurer's place of business, is not presently feasible under existing direct action statutes such as the one¹⁶⁹ approved by the Supreme Court in *Watson v. Employers Liability Assurance Corp. Ltd.*¹⁷⁰ The Court in *Watson* stressed the occurrence of the accident *within* the state as the event which gave rise to the state's legitimate interest in applying its direct action statute to protect its medical creditors and to prevent the expenditure of public funds to aid persons injured in the state.¹⁷¹ Judged within the context of *Shaffer*, it is not certain that New York could constitutionally authorize a local action against the insurer for the purpose of facilitating the New York plaintiff in an out-of-state accident. The Court's underlying concern in its minimum contacts analysis in *Shaffer* was that a relationship among the defendant, the forum, and the litigation be demonstrated, sufficient to justify the state's assertion of personal jurisdiction over the defendants.¹⁷² The Court's emphasis upon the defendants' purposeful acts within the forum was intended to assure that relationship. The defendant-insurer's doing business in the plaintiff's state is admittedly a purposeful act which invokes the benefits and protections of the state's laws. However, where neither the injury occurs within the plaintiff's state nor the insurance contract is written or delivered therein,¹⁷³ there remains

choice of law question, and focuses exclusively upon the defendant's purposeful acts within the forum. Second, Professor Smit premises the reasonableness and therefore the constitutionality of the *Seider* attachment in large part upon the limited liability of the defendant. *Id.* at 621, 628 n.114. However, the Court in *Shaffer* specifically rejected that limitation as a justification for the assertion of jurisdiction. See text at note 91 *supra*. Thus, whatever the persuasiveness of Professor Smit's interest approach to the *Seider* procedure under the standard of fairness, it is suggested that it does not coincide with the Court's approach in *Shaffer*. At most it would appear that the Court's citation was intended to refer the reader to a more detailed though differing analysis of its conclusion that many in rem actions in which property is related to the cause of action would not be affected by the *International Shoe* test.

¹⁶⁶ The law creates this fiction in order to protect the insurer against unduly sympathetic juries. See *Simpson v. Loehmann*, 21 N.Y.2d at 314, 234 N.E.2d at 673-74, 287 N.Y.S.2d at 639 (Keating, J., concurring).

¹⁶⁷ See text at notes 66-76 *supra*.

¹⁶⁸ New York presently provides for an "indirect" remedy against the insurer through its long-arm statute which permits the resident plaintiff to bring a local suit against the insured tortfeasor for injuries which occurred *within* the state. See N.Y. CIV. PRAC. LAW § 302 (McKinney 1972).

¹⁶⁹ See note 74 *supra*.

¹⁷⁰ 348 U.S. 66 (1954).

¹⁷¹ *Id.* at 72-73.

¹⁷² 433 U.S. at 204, 207, 216.

¹⁷³ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); see text and note 55 *supra*.

the question whether a sufficient relationship exists between the defendant, the forum and the litigation to satisfy the standard of fairness and to subject the insurer as the defendant to personal jurisdiction.¹⁷⁴

A constitutionally sufficient relationship might be founded on the recognition that the domicile state also has a financial interest similar to the accident state's in *Watson* of providing a forum for the convenience of its citizens in cases where they might otherwise be forced to resort to the state's welfare resources. However, in *Shaffer* the Court resisted such an expansive assertion of jurisdiction based on the state's alleged substantive interests; it relegated such considerations to choice of law questions.¹⁷⁵ Whether the *Shaffer* Court would distinguish between state regulatory interests which implicate its welfare resources and those which concern the management of its domestic corporations in assessing the constitutionality of a direct action statute for residents injured in out-of-state accidents, is unclear.¹⁷⁶

¹⁷⁴ See Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971). The author in this pre-*Shaffer* article proposed a direct action statute to achieve the underlying purpose of the *Seider* procedure. Relying on Judge Friendly's reasoning in *Minichiello*, see text at notes 74-76 *supra*, the author suggested that the constitutionality of such a statute probably would be upheld where the nonresident tortfeasor's insurer had qualified to do business or was doing business in the state. *Id.* at 668. Under the proposed statute, the new right of direct action would be limited to persons domiciled in New York State and to cases where personal jurisdiction over the insured was not possible. In view of the Supreme Court's reasoning in *Shaffer*, it is uncertain whether the proposed statute would be constitutional.

¹⁷⁵ 433 U.S. at 215-16.

¹⁷⁶ It is noteworthy that following the *Shaffer* Court's mandate to reassess in rem actions in terms of fairness, the recent case of *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), *appeal docketed*, No. 78-7050 (2d Cir. Oct. 25, 1977) upheld the *Seider* device. The plaintiff-decedent, a resident of New York, was killed through the alleged negligent operation of a grader owned and operated by a Virginia corporate defendant, at a construction site in Virginia. The plaintiff obtained a *Seider*-based attachment of the contractual obligations of the defendant's insurance companies which maintain offices in New York. On the facts before it, the district court admitted that it could not be argued that the defendant or its employee had "even a minimum of contacts with New York, . . . or that, if, instead of contract rights against two insurers, tangible property transiently in New York were the property attached, it would be easy to claim that jurisdiction could exist in a New York court." *Id.* at 997.

Nevertheless, the court reasoned that, consistent with the *Shaffer* Court's insistence upon the "purposeful acts" requirement, when allegedly tortious conduct causes death, a "legal relationship" is created between the alleged tortfeasor and the decedent's dependents. *Id.* Most importantly, however, the court distinguished *Shaffer* and *International Shoe* from the case before it on the ground that the latter did not involve the assertion of unlimited personal jurisdiction; rather, jurisdiction was based upon the insurer's obligation to defend, with recovery limited to the face value of the policy. It was "beside the point to test the constitutionality of the procedure in terms of the named defendant" since for the insured, the suit was "only an occasion of cooperation in the defense . . ." *Id.* at 1002. Moreover, "an analysis of jurisdictional propriety in the ultimate terms implied by *Shaffer* [could] not ignore the claimants' circumstances and her interest in litigating in the forum of her residence." *Id.* at 997. However desirable the results in *O'Connor*, it is submitted that the court seized upon the Supreme Court's mandate to reassess in rem actions under *International Shoe* and fashioned results that are not supported by the Court's reasoning in *Shaffer*. In effect, the district court adopted the 'interest analysis' suggested in *Simpson v. Loehmann*, see text at notes 72-73 *supra*, to determine the fairness of asserting jurisdiction. Significantly, a number of New York lower courts have subsequently held that *Shaffer* overruled *Seider*. See *Katz v. Umansky*, 92 Misc. 2d 285 (Sup. Ct. 1977); *Wallace v. The Target Store Inc.*, 92 Misc. 2d 454 (Sup. Ct. 1977). But see *Alford v. McGaw*, 402 N.Y.S. 2d 499 (App. Div. 1978).

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It is reasonable to conclude, however, that the *Seider* procedure can no longer stand upon the quasi-in-rem rationale of *Harris*, so clearly repudiated by the Court in *Shaffer*. Moreover, as long as the procedure functions as a judicially created direct action statute in which the nonresident tortfeasor still remains the real party at interest, it is of doubtful constitutional validity under the fairness standard adopted in *Shaffer*.

CONCLUSION

By rejecting the territorial theory underlying in rem jurisdiction and extending the principles of *International Shoe* to cover all assertions of state court jurisdiction, the Court in *Shaffer* provided a more sensible standard for the resolution of jurisdictional questions in a modern society in which disputes arise from complex interstate transactions involving both persons and property. However, in concluding upon the facts before it that the Delaware courts could not validly assert jurisdiction over nonresident corporate fiduciaries in a stockholder's derivative suit involving a Delaware corporation, the Court applied the minimum contacts test too restrictively. The Court's focus upon the absence of the defendants' literal "acts" within the forum ignored the defendants' implicit contacts with the forum as corporate officers and directors of a domestic corporation. Moreover, from a practical viewpoint, the fact that the controversy centered upon the mismanagement of a Delaware corporation virtually eliminated the choice of law question under the general rule of conflicts governing corporate officer liability. The Court's relegation of the state's regulatory interest to a choice of law consideration unnecessarily separated the jurisdictional and choice of law issues when no danger of unfairness to the defendants actually existed.

The eventual impact of the Court's decision upon other jurisdictional issues previously decided upon the in rem rationales of *Pennoyer* and *Harris* remains to be determined upon a case by case basis. With respect to the *Seider* jurisdictional procedure devised upon the now repudiated quasi-in-rem rationale of *Harris*, it would appear unlikely that the procedure can survive under the standard of fairness as applied by the *Shaffer* Court. *Shaffer* reveals that the Court, in its approach to questions of jurisdiction under the fairness standard, has not yet adopted interest analysis as urged by some commentators and as employed most recently by proponents of the continued validity of the *Seider* jurisdictional procedure.

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THE ROLE OF CIRCUMSTANTIAL EVIDENCE IN PROVING DISCRIMINATORY INTENT: DEVELOPMENTS SINCE *WASHINGTON V. DAVIS*

In its landmark decision in *Washington v. Davis*,¹ the Supreme Court held that proof of both an invidious discriminatory purpose and a racially disproportionate impact is necessary to establish that a law or other official

¹ 426 U.S. 229 (1976).