

STUDENT COMMENTS

JUDICIALLY ENACTED DIRECT ACTION STATUTES: SOUNDNESS OF THE NEW YORK RULE

I. INTRODUCTION

For the purpose of determining whether a court has jurisdiction to entertain a suit, three types of actions are recognized in the United States: in personam, in rem and quasi in rem.¹ An action in personam settles the rights and duties between parties and may be brought when the court has power over the person against whom the judgment is sought.² Jurisdiction in rem may generally be distinguished from jurisdiction in personam in that the court's judgment is based on its power over the res, an item of property. This type of action concerns the rights of the parties not in relation to each other, but in relation to the res. Even though the proceeding in rem will affect the defendant's personal rights in regard to the res, its primary purpose is to determine the title to or the status of property within the geographical jurisdiction of the court.³ The third basis for jurisdiction, quasi in rem, is based on a personal claim against the defendant, but is begun by attachment, garnishment or other seizure of property "where the court has no jurisdiction over the person of the defendant but has jurisdiction over a thing belonging to the defendant or over a person who is indebted to or under a duty to the defendant."⁴ After the attachment of the res, the property over which the court has power, a full trial will follow if the defendant appears or, if the defendant chooses not to appear, a default judgment will be entered against the res.⁵ The plaintiff must satisfy his claim out of the res. If the defendant defaults, and if the value of the res is not sufficient to satisfy the judgment entered, no deficiency judgment may be rendered against the defendant, since the court has no power over him.⁶

In 1966, in *Seider v. Roth*,⁷ a tort action, the New York Court of Appeals announced a unique amplification of the concept of quasi in rem jurisdiction. The plaintiffs, residents of the state of New York, were injured in an automobile collision with the defendant, a resident of Quebec, as they drove on a Vermont highway. The defendant had taken out, in Montreal, a liability insurance policy issued by a Connecticut corporation also licensed to do business in the state of New York. New York's Civil Practice Law provides that (1) money judgments may be enforced against debts,⁸ and

¹ Restatement of Judgments, ch. 1, Introductory Note, at 5 (1942).

² Id.

³ Id. at 6.

⁴ Id. at 8-9.

⁵ Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 949 (1960).

⁶ Restatement of Judgments, supra note 1, § 34(f).

⁷ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), noted in 8 B.C. Ind. & Com. L. Rev. 147 (1966).

⁸ N.Y. Civ. Prac. Law § 5201(a) (McKinney 1963).

(2) such debts are subject to attachment.⁹ A previous decision, *In re Estate of Riggle*,¹⁰ had held that an insurer's contractual obligation to defend the insured in any civil action stemming from losses covered by the policy constitutes personal property in the form of a debt, which can be attached in order to establish the court's jurisdiction over the controversy. Relying on this case as authority, the plaintiff in *Seider* attached the obligations of the defendant's insurer to defend and indemnify, and instituted a suit in a New York court against the Canadian defendant. The court of appeals ruled that the contractual obligations of the insurer came within the Civil Practice Law Section 5201 definition of a debt as an obligation "which is past due or which is yet to become due . . ."¹¹ Thus, their attachment for quasi in rem purposes was held to fall within the Civil Practice Law provisions for garnishment.¹² This comment will investigate and criticize the current New York approach to jurisdiction. It will examine the impracticability of attaching contingent obligations, as well as the constitutional and practical objections to grounding jurisdiction solely on state concern for a local and friendly forum for its residents without regard for the significance of state contact with the incident giving rise to the action.

II. SOUNDNESS OF THE *Seider* RULE: ATTACHMENT OF A CONTINGENT OBLIGATION

The *Seider* decision not only raises a number of constitutional questions but exposes itself to criticism on points of construction, procedure and practicality. In the first place, *Riggle*, the authority on which the court relied, is distinguishable, even though the court stated that it "cannot be distinguished away. . ."¹³ In that case the defendant Riggle, a resident of Illinois with no tangible property in New York, had acquiesced to the personal adjudication of a tort liability claim arising from an out-of-state accident, in the New York courts. Riggle was protected by an insurance policy indemnifying him against tort liability and obligating the insurer to defend against any claims. When the plaintiff sought, after Riggle's death, to continue the action against his estate, it was necessary that an ancillary administrator be appointed and served in New York, an appointment that could take place only if the deceased owned property within the state.¹⁴ On these facts, the court held that the obligation of the insurer to defend was a debt which could be attached for the purpose of the appointment. *Riggle* thus continued an action begun in personam by reestablishing a jurisdictional base. *Seider*, however, sought to establish a jurisdictional base by instituting an action quasi in rem.

⁹ Id. § 6202.

¹⁰ 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

¹¹ N.Y. Civ. Prac. Law § 5201(a) (McKinney 1963).

¹² 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

¹³ Id.

¹⁴ N.Y. Surr. Ct. Act § 45(3), N.Y. Gen. Laws 1920 ch. 928, § 45(3), as amended, N.Y. Gen. Laws 1927 ch. 635, § 45(3) (repealed and reenacted, 1966, as N.Y. Surr. Ct. Proc. Act § 206 (McKinney 1967)).

A. *Contingent Obligation as a Debt*

Even if it is assumed that the insurer's obligation to defend is unquestionably a debt, in *Riggle* the contract to defend had ripened into an obligation, since *Riggle* had, before his death, submitted to the court's jurisdiction and thus given the plaintiff a basis on which to commence his action. On the other hand, the contractual agreement attached in *Seider* was a contingent obligation that could ripen into an unconditional debt only upon the commencement of a suit.

The language of the majority in *Seider* indicates that they view the accident as the contingency which ripens the obligations to defend and indemnify into unconditional debts. In support of this position they point to the fact that other obligations, such as paying medical expenses and investigating the accident, fall upon the insurer at this time.¹⁵ The fact that these two obligations accrue immediately, however, strongly suggests that the obligations attached in *Seider* do *not* accrue on the occurrence of the accident, but vest only after additional contingencies attached to the contractual duties to defend and indemnify have been met. The insurer's obligation to defend will not come due *certainly* until a proper suit has been commenced,¹⁶ nor will the obligation to indemnify come due *certainly* until a judgment is entered.¹⁷ If the court is holding that the attachment of the obligation to defend ripens this obligation into a debt which gives the plaintiff the necessary *res* for quasi in rem jurisdiction in order to commence a proper suit, it is clearly employing a bootstrap. It is unclear how the court skirts the fact that a valid judgment must be entered before the obligation to indemnify matures unless the court is in fact saying that contingent debts are attachable.

If the court is saying that the obligations are attachable despite their contingent nature, then it must be determined whether, in New York, there is any policy or law which requires that a debt, to be attachable, must be unconditional. Section 6202 of the Civil Practice Law specifies that the debts which it allows to be attached are those debts denominated in section 5201 as "past due or which [are] yet to become due *certainly*."¹⁸ (Emphasis added.) Judge Burke, in his dissent in *Seider*, pointed to the rule expressed in *Herrman & Grace v. City of New York*,¹⁹ where the court held that the debt in question was nonattachable, since it would not accrue until after the levy of the attachment. The rule expressed by the court and quoted in the *Seider* dissent states, "It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future, and not dependable [*sic*] upon any contingency."²⁰ When this language is compared with section 5201's

¹⁵ 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

¹⁶ *Id.* at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (Burke, J., dissenting).

¹⁷ *Id.*

¹⁸ N.Y. Civ. Prac. Law §§ 5201, 6202 (McKinney 1963).

¹⁹ 130 App. Div. 531, 114 N.Y.S. 1107 (1909), *aff'd*, 199 N.Y. 600, 93 N.E. 376 (1910).

²⁰ *Id.* at 535, 114 N.Y.S. at 1110. See also *Dutch-American Mercantile Corp. v. Safticraft Corp.*, 17 App. Div. 2d 421, 234 N.Y.S.2d 683 (1962); *Sheehy v. Madison Sq. Garden*, 266 N.Y. 44, 193 N.E. 633 (1934).

definition of a debt,²¹ it becomes clear that the latter codification employs the same rule.²²

B. Procedural Complications

A procedural problem, revolving around the fact that the judgment entered is not against the insured's person, arises with the attachment of the obligation to indemnify. If the defendant does not appear and a default judgment is entered, it could well be argued that the obligation to indemnify has not ripened since the obligation is to indemnify the insured against judgments entered against his person. Since no personal default judgment can be entered for want of in personam jurisdiction,²³ the contingency attached to the debt, out of which the judgment must be satisfied, has not occurred. This result would provide the insurer with a defense, based on the terms of the policy, on any action which the plaintiff may bring against the insurer to satisfy the judgment.

A similar problem arises with the attachment of the obligation to defend. If the defendant refuses to appear to aid in the defense, the insurance company can enter a disclaimer,²⁴ thus causing the evaporation of the res and defeating the quasi in rem jurisdiction. On the other hand, if the insurer attempts a defense with the insured absent, the obligation to defend will be consumed by its fulfillment and the value of this portion of the attached res would be limited to the value of the few technical matters to which counsel must attend after the entry of a judgment.²⁵

In *Simpson v. Loehmann*,²⁶ however, a subsequent *Seider*-type case, the court, in dicta, dismissed the notion that the obligations attached may be of

²¹ N.Y. Civ. Prac. Law § 5201 (McKinney 1963).

²² 130 App. Div. at 535, 114 N.Y.S. at 110. *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), a subsequent case based on *Seider* jurisdiction, seemed to modify this rule when the court of appeals said, "[T]he presence of [this] debt in this state—contingent and inchoate though it may be—represents sufficient property rights in the defendant . . . [for] in rem jurisdiction. . . ." Id. at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (emphasis added). See generally Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550 (1967).

²³ Restatement of Judgments, supra note 1, § 14.

²⁴ "If there is a breach of the co-operation clause [by the insured], the insurer may cancel the policy and withdraw from the defense." 8 J. Appleman, Insurance Law and Practice § 4772, at 105 (1962). ". . . [The insured's] refusal to attend the trial has been held to constitute a breach of the cooperation clause." Id. § 4784, at 150. See also *Simpson v. Loehmann*, 21 N.Y.2d 305, 309 n.2, 234 N.E.2d 669, 670 n.2, 287 N.Y.S.2d 633, 635 n.2 (1967): "If the insured does refuse to co-operate, the insurer's recourse is clear: he may withdraw and assert such lack of co-operation as a defense in any action brought against him under Section 167 of the Insurance Law."

²⁵ It should be noted that § 6214(b) of the N.Y. Civ. Prac. Law (McKinney 1963) forbids the garnishee "to make or suffer any sale, assignment or transfer of, or any interference with any such property or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court. . . ." A theoretical argument could be made that this section freezes the res and thereby prohibits the insurer from fulfilling its contractual obligation to defend, since such defense would exhaust the value of the attached obligation.

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

value other than the face amount of the policy.²⁷ This conclusion ignores the constitutional limitation of quasi in rem jurisdiction, laid down by the Supreme Court in *Pennoyer v. Neff*,²⁸ that a judgment may be satisfied only out of the res attached at the commencement of the suit.²⁹ If it is the obligation to defend that is attached and the contingency which must occur before the obligation arises (*i.e.*, the commencement of a suit) is met, then, conceivably, this obligation's value would be only a few dollars after the almost total exhaustion of the obligation by defending. Even harder to reconcile with the traditional notion that a judgment quasi in rem can be satisfied only out of the attached res is the fact that the attached obligation to indemnify will not mature until a personal judgment is entered against the insured, a contingency that will not occur unless the insured could be subjected personally to the court's power.

III. CONSTITUTIONALITY OF THE *Seider* RULE

A. *Coercion of the Parties to Appear*

Although the New York application of quasi in rem raises substantial questions as to the technical soundness of the *Seider* rule, the fact that this method of obtaining jurisdiction effectively works to coerce the insured into submission to in personam jurisdiction raises problems of greater import under constitutional due process. The insured is faced with a rather difficult choice. If he enters the jurisdiction to defend his "property," Civil Practice Rule 320(c)³⁰ allows him to enter only jurisdictional objections and, if these do not prevail, requires him either to submit personally and defend on the merits or to leave the jurisdiction and forfeit the res through default. If the defendant were to choose to leave the jurisdiction, the insurance company could disclaim any obligations under the policy, because of the insured's failure to cooperate in the defense.³¹ The insurer could assert such non-cooperation as a policy defense in any action to satisfy the judgment, and it could also disclaim future obligations to the defendant under the policy.³²

Because of the rule against limited appearances, if the defendant did submit to full in personam jurisdiction and defend on the merits, he would be liable for the entire in personam judgment, a sum very possibly in excess of the policy limits. This arrangement also leaves the insurance company in a dilemma for it has an obligation to protect the interest of the insured,³³ an obligation that it may well be violating if it presses for the defendant to appear. On the other hand, if it advises the insured not to appear, such advice would, in all likelihood, vitiate any policy defense of non-cooperation.³⁴

The dilemmas in which the insured and the insurer are placed by the

²⁷ *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 637.

²⁸ 95 U.S. 714 (1877).

²⁹ *Id.* at 727-28.

³⁰ N.Y. Civ. Prac. R. 320(c) (McKinney 1963).

³¹ 8 J. Appleman, *supra* note 24, §§ 4772, 4784.

³² *Id.*

³³ *Podolsky v. Devinney*, 281 F. Supp. 488, 498 & n.27 (S.D.N.Y. 1968).

³⁴ *Id.* at 499.

Seider rule were pointed out to the state court in *Simpson v. Lochmann*.³⁵ The court chose to ignore these dilemmas by viewing the constitutional issue so raised not as whether the rule coerced the defendants into appearing in violation of due process, but as whether it caused an impairment of a contractual agreement. The issue was characterized as contractual because the situation "literally invites the insured to withhold cooperation"³⁶ in the defense, although the insured has agreed in the policy contract to aid in defending all claims. The court's answer to the problem which it had itself posed was simply that the insurer is free to disclaim liability and assert lack of cooperation as a policy defense.³⁷ As a result, the court never examined the possibility that a due process problem exists in the dilemma confronting the insured.³⁸

Since a *Seider* dispute necessarily involves diversity of citizenship, the federal courts were soon brought into the controversy. The Federal District Court for the Southern District of New York, in *Podolsky v. Devinney*,³⁹ did not feel that it could so easily dismiss the constitutional objections raised in *Simpson*. The court saw that the denial of the defendant's right to make a limited appearance would result either in a default judgment denying the insurer its property without due process of law, or in a disclaimer denying the insured his property without due process.⁴⁰ The court's conclusion that the *Seider* rule is unconstitutional was based on the dilemma confronting the insured, that is, he must choose between subjecting himself to an in personam judgment in New York, a jurisdiction with which he has no real contacts, or forfeit his rights under the policy. It held that this dilemma, occasioned by the attachment of "the complicated composite of rights and obligations represented by an insurance contract,"⁴¹ operates "to coerce the defendant into an otherwise unattainable submission to personal jurisdiction, which amounts to a denial of fair play and substantial justice . . ."⁴² and therefore violates constitutional due process. But the court saw in addition the choice which the insurer must face: it has the obligation to defend the insured's interest and would be obliged at least to apprise the insured of the possibility of extended liability if he appears. By so warning off the insured, the insurer would in all likelihood be estopped from pleading non-cooperation as a policy defense, would have to pay out funds to satisfy a judgment on an action which could not be adequately defended, and consequently would be deprived of its property without due process.⁴³ On these grounds the district court vacated the writs of attachment and dismissed the case.

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

³⁶ *Id.* at 309 n.2, 234 N.E.2d at 670 n.2, 283 N.Y.S.2d at 635 n.2.

³⁷ *Id.*

³⁸ An additional constitutional question, the only one given detailed consideration by the *Simpson* court, was whether the contract obligations of the insurer to defend and indemnify the insured were sufficient property interests to enable the New York courts to exercise jurisdiction by attachment of the obligations. The court held that they were. *Id.* at 310, 234 N.E.2d at 671, 283 N.Y.S.2d at 636.

³⁹ 281 F. Supp. 488 (S.D.N.Y. 1968).

⁴⁰ *Id.* at 496.

⁴¹ *Id.* at 497.

⁴² *Id.*

⁴³ *Id.* at 498, 499.

After the *Podolsky* court's ruling, the New York Court of Appeals held a rehearing in *Simpson v. Loehmann*.⁴⁴ In this decision the court responded to the *Podolsky* conclusion of unconstitutionality. It observed that in the first *Simpson* decision it had specified that "for the purpose of pending litigation . . . the value of the assets attached is its face amount." The court now explained that ". . . this [language], it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of the insurance policy even though [the insured] proceeds with the defense on the merits."⁴⁵

After *Simpson's* ruling that the insured may appear without being personally liable for any judgment in excess of the policy limits, another *Seider*-type case rose in the same federal district which had decided *Podolsky*. In this case, *Jarvik v. Magic Mountain Corp.*,⁴⁶ the insured was not joined by his insurer in objections to the jurisdiction. The court ruled that the violation of the insured's constitutional rights, found in *Podolsky* to be substantial enough to warrant dismissal, was sufficiently cured by the limitation on recovery announced in the *Simpson* rehearing, and refused to dismiss the case.⁴⁷ A short time after the *Jarvik* ruling, a series of similar cases presented themselves to the federal courts in New York. The Second Circuit considered, in *Minichiello v. Rosenberg*,⁴⁸ the constitutional questions raised in the various cases based on the *Seider* rule, and, with Judge Friendly writing for the majority, held that the constitutional infirmity revealed in *Podolsky* was removed by the *Simpson* rehearing. The court did not consider whether any other constitutional defects remained. But major problems are still alive in *Seider's* rule. There is still a strong coercive element compelling the insured to appear for the defense—he stands to lose his insurance policy if he does not. In addition, the fact that the insurer may still be compelled to defend in what may be a remote and inconvenient forum is a factor compelling the insurer to settle claims that would be litigated if the forum were appropriate. But *Seider* will not be overruled unless these problems are more than additional symptoms of the questionable approach that New York has used to provide a local forum for injured residents, an approach which it has consistently ratified. The results of the *Seider* rule will have to be shown to impair substantially the constitutionally protected rights of the parties affected.

B. *Seider as a Direct Action Procedure*

In form, *Seider* and its progeny are quasi in rem cases. But, in fact, they are direct (and therefore in personam) actions against the insurer. Judge Friendly points out in *Minichiello* that "it is reasonably clear that the Court of Appeals regards *Seider v. Roth* as in effect a judicially created direct action statute

⁴⁴ 21 N.Y.2d 990, 239 N.E.2d 204, 290 N.Y.S.2d 914 (1968) (per curiam).

⁴⁵ Id. at 990-91, 239 N.E.2d at 205, 290 N.Y.S.2d at 915-16.

⁴⁶ 290 F. Supp. 998 (S.D.N.Y. 1968).

⁴⁷ Judge McLean granted the defendant a change of venue as "[i]t was possible to bring [this action] in New York only because of the coincidence that defendant's insurance company has an office [in New York]," although it was "essentially a Vermont case." Id. at 1000.

⁴⁸ No. 32534 (2d Cir. Dec. 12, 1968).

... [even though] the non-resident insured ... has to be named as a defendant in order to provide a conceptual basis for getting at the insurer."⁴⁹ The courts, in determining the federal question of constitutionality, will look to the substance of an arrangement and not to its label.⁵⁰ Direct actions are provided for by statute in several states, with the important distinction that certain contacts with the forum state other than power over the insurer and residence of the injured are demanded by the statutes presently in force.⁵¹ It is this lack of contacts that could ultimately prove to be fatal to *Seider*-based jurisdiction. This consequence, of course, depends on the minimum contacts constitutionally required to bring a direct action.

Since the insurer is not the alleged tortfeasor in a direct action, it must be considered whether the mere fact that it is licensed to do business within the state in which the plaintiff resides constitutes sufficient contact with that state to warrant personal action against the insurer. The present state of the law holds overwhelmingly that it is. One of the firmly established rules of the common law,⁵² succinctly stated by Justice Holmes in *McDonald v. Mabee*,⁵³ is that "[t]he foundation of jurisdiction is physical power. . . ."⁵⁴ If a person or a res is actually present within the geographical limits of a state, the courts of that state have jurisdiction to adjudicate the rights and liabilities regarding that person or thing.⁵⁵ Even more directly in point is a line of cases almost a century old supporting the proposition that a cause of action may be brought against a corporation in any state in which that corporation has been licensed to do business regardless of whether the action arose in the state.⁵⁶

The physical power doctrine of jurisdiction was obviously the unspoken rationale of the New York case of *Oltarsh v. Aetna Ins. Co.*⁵⁷ In this case New York allowed an action to be brought directly against the insurer with no more contacts than were present in *Seider*. The insured, the alleged tortfeasor, was domiciled in Puerto Rico (the situs of the alleged tort and the place where the policy was issued), a jurisdiction having a direct action statute. The plaintiff brought the action in New York, urging the court to apply the

⁴⁹ Id. at 581. See *Simpson v. Loehmann*, 21 N.Y.2d at 313, 234 N.E.2d at 673, 283 N.Y.S.2d at 639 (Keating, J., concurring).

⁵⁰ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950).

⁵¹ La. Stat. Ann. § 22:655 (West 1959) (accident occurring within the state); P.R. Laws Ann. tit. 26, § 2003(1) (Supp. 1967) (accident occurring within the jurisdiction); R.I. Gen. Laws Ann. § 27-7-2 (1956) (action on policy issued within the state when the assured cannot be served locally); Wis. Stat. Ann. § 260.11(1) (West Supp. 1968) (accident occurring within state).

⁵² Ross, *The Shifting Basis of Jurisdiction*, 17 Minn. L. Rev. 146 (1933).

⁵³ 243 U.S. 90 (1917).

⁵⁴ Id. at 91. But see *Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 296-300 (1956).

⁵⁵ Restatement of Conflict of Laws §§ 77-78 (1954).

⁵⁶ For a compilation of these cases, see Annot., 30 A.L.R. 255, 258-62 (1924); Annot., 96 A.L.R. 366, 368 (1935). But cf. *Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1142-44 (1966). The authors suggest that the modern trend is for the state to grant specific jurisdiction over corporations only when the action arises out of activities connected with the forum community.

⁵⁷ 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

Puerto Rico statute by characterizing it as a substantive rule of law. The question raised on appeal was whether New York's policy against direct action, evidenced by Insurance Law Section 167,⁵⁸ which provides that an injured party may sue the defendant's insurance company only to compel payment of an already entered judgment, was strong enough to force dismissal of the case. The question whether New York had sufficient contacts to entertain the suit was not considered. The court ruled that the policy against direct action was not so strong as to prevent their application of the Puerto Rican law in such an instance and applied the statute. *Oltarsh* was relied upon in *Seider* as authority for the absence of any policy against compelling a New York-licensed insurer to defend a non-resident insured, when the insured cannot be personally served and when the forum has no significant contacts other than the residence of the plaintiff.⁵⁹ Thus *Seider*, as well as *Oltarsh*, based jurisdiction not on the contacts of the cause of action with the state, but solely on the power of the state over the insurance company.

It is submitted that the view of direct action as a natural application of the physical power doctrine of jurisdiction is a misconception of the basis for jurisdiction in direct action. Historically, it appears that direct action has been based not on power but on sufficient state contact with the incident or alleged wrong to justify its exercise of jurisdiction. The direct action statutes presently in force require contacts other than the state's interest in compensation for their resident plaintiffs. Rhode Island requires that the action be on a policy issued within the state when the insured cannot be locally served.⁶⁰ Puerto Rico,⁶¹ Louisiana⁶² and Wisconsin⁶³ allow a direct action when the accident occurs within the jurisdiction. That direct action statutes are based on contacts and not on power is also evidenced by the history of Louisiana's direct action statute. The state's original statute apparently provided that an action could be brought directly against an insurer on any cause of action covered by the insurer's policy, regardless of where the incident occurred or where the policy was issued.⁶⁴ The statute was repealed and recodified in 1948, and a federal district court interpreted the amended law to apply only to policies issued in Louisiana.⁶⁵ The court felt that any other construction would render the statute unconstitutional. While a later legislative resolution indicates that the recodification was not intended to have any substantive effect on the original act,⁶⁶ and thus that the district court's interpretation was incorrect, the court's view that any other reading would cause the statute to be found unconstitutional seems to have led the Louisi-

⁵⁸ N.Y. Ins. Law § 167(b) (McKinney 1966). See 15 N.Y.2d at 115-16, 204 N.E.2d at 624, 256 N.Y.S.2d at 580.

⁵⁹ 17 N.Y.2d at 114-15, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

⁶⁰ R.I. Gen. Laws Ann. § 27-7-2 (1956).

⁶¹ P.R. Laws Ann. tit. 26, § 2003(1) (Supp. 1967).

⁶² La. Stat. Ann. § 22:655 (West 1959).

⁶³ Wis. Stat. Ann. § 260.11(1) (West Supp. 1968).

⁶⁴ The Louisiana courts, prior to the amendment of the statute in 1950, interpreted it in this manner, e.g., *Stephenson v. List Laundry & Dry Cleaners, Inc.*, 182 La. 383, 162 So. 19 (1935); *Robbins v. Short*, 165 So. 512 (La. Ct. App. 1936).

⁶⁵ *Belanger v. Great Am. Indem. Co.*, 89 F. Supp. 736, 738-40 (E.D. La. 1950), aff'd, 188 F.2d 196 (5th Cir. 1951).

⁶⁶ 188 F.2d at 197-98.

ana legislature to amend its statute to apply to all insurance contracts, foreign or local, *provided that the injury occurred within the state*.⁶⁷ This proviso is an indication that the legislature felt that the state must have an interest more substantial than mere provision of a convenient forum in which their residents could seek compensation for injuries received anywhere.

The Louisiana statute, as amended, was ultimately brought before the United States Supreme Court in order to test the constitutionality of direct action. In holding, in *Watson v. Employers Liab. Assurance Corp.*,⁶⁸ that it was constitutional, the court stressed that

[p]ersons 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 on friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages.⁶⁹ (Emphasis added.)

The language of the Court seems to support the proposition that the incident giving rise to the cause of action, or at least some contact other than merely an injured resident and a licensed insurer, must be present to support jurisdiction. However, the language could also be read as indicating a governmental interest in the mere presence of an injured resident, regardless of where the injury occurred. Although the Court speaks of persons injured in the state, it may be that the state has such an overriding interest in seeing that persons who might become wards of the state be compensated that the presence of the insurer and an injured resident may be enough to support jurisdiction. At a later date the Court, in *Crider v. Zurich Ins. Co.*,⁷⁰ a workmen's compensation conflict of laws case, stated, in dicta, that the state has a legitimate interest in the compensation of an injured resident.⁷¹ Similarly, the Appellate Division of the New York Supreme Court, in *Vaag v. Lewis*,⁷² emphasized that the constitutional power to exercise jurisdiction in a *Seider*-type case is grounded in the state's interest in providing compensation for its residents.⁷³ In *Vaag*, the plaintiff was not a resident of New York and was

⁶⁷ La. Stat. Ann. § 27-7-2 (1956).

⁶⁸ 348 U.S. 66 (1954).

⁶⁹ Id. at 72.

⁷⁰ 380 U.S. 39 (1965).

⁷¹ As we said in *Carroll v. Lanza* [349 U.S. 408, 413 (1955)], "The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these. . . ." The State where the [injured] employee lives has perhaps even a larger concern, for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt.

Id. at 41 (dicta). But in *Crider*, as in *Watson*, the injury occurred in the home state of the injured party.

⁷² 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (1968).

⁷³ Id. at 316-17, 288 N.Y.S.2d at 523; See also R. Leflar, *American Conflicts Law* § 109, at 253 (student ed. 1968): "[T]he mere fact of the domicile of a party . . . in a state will ordinarily not be enough to give rise to a real governmental interest in that state."

not injured there. Because neither of the parties to the action was a resident of New York and because no special considerations or contacts with the state of New York were advanced, the court held that it was obliged to dismiss on the grounds of *forum non conveniens*. The court felt that it was so obliged for the sake of judicial administration, but it went on in dicta to express the opinion that if the New York court chose to exercise jurisdiction, despite a motion for dismissal on the ground of *forum non conveniens*, when it had no interest in the action, it would deprive the defendant of basic due process.⁷⁴

It is possible that the only interest necessary for a state to entertain a direct action is compensation of its injured residents. But the Supreme Court's language in *Watson* does speak of persons injured in the jurisdiction and further notes that the plaintiff, if it were not "for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is *for injuries from a product bought and used there*."⁷⁵ (Emphasis added.) This language and the Court's phrase, "persons injured or killed in Louisiana,"⁷⁶ can certainly be read as limiting direct actions to situations in which there are contacts other than the state's interest in seeing that the injured parties who may have to depend on the state are compensated. The Court, emphasizing the place of the accident, may well have had in mind the equities that exist in favor of the defendant insurance company. The insurance company may be forced to defend in a forum that is so wholly inconvenient and inappropriate that the insurer may be financially compelled to settle what it considers a doubtful or inflated claim. For example, if the insurer in *Oltarsh* had wished to present his defense, he would have had to transport all the witnesses, evidence and the insured from Puerto Rico to New York.⁷⁷ Similarly, in *Jones v. McNeill*,⁷⁸ the insured was a resident of California, the incident occurred in New Mexico, and the action was brought in New York by means of the *Seider* rule. As Judge Burke's dissent in *Simpson* points out,

Seider may be upheld only if we may constitutionally provide for our residents . . . an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent, only if we may say to such persons that no matter which State or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character.⁷⁹

⁷⁴ 29 App. Div. 2d at 318, 288 N.Y.S.2d at 525.

⁷⁵ 348 U.S. at 72-73.

⁷⁶ Id. at 72, quoted at p. 720 supra.

⁷⁷ Subsequent to *Oltarsh*, Puerto Rico amended its statute to provide that "direct action against the insurer may only be exercised in Puerto Rico." P.R. Laws Ann. tit. 26, § 2003(1) (Supp. 1967).

⁷⁸ 51 Misc. 2d 527, 273 N.E.2d 517 (Sup. Ct. 1966).

⁷⁹ 21 N.Y.2d at 318-19, 234 N.E.2d at 677, 283 N.Y.S.2d at 644 (Burke, J., dissenting). *Minichiello v. Rosenberg*, No. 32534 (2d Cir. Dec. 12, 1968), specifically addresses itself to the question of contacts constitutionally required for direct action. Judge Friendly feels that the language in *Watson*, apparently limiting direct action to

In light of these considerations, it is difficult to discern how the court in *Vaage* found that granting a forum to a non-resident plaintiff would violate due process any more than granting a forum to a resident plaintiff who can show no other contacts with the forum than the state's interest in having him compensated. The availability of such a forum would work no greater hardship on the defendant than would the necessity of defending in an action initiated by the *resident* injured elsewhere. The only additional inconvenience possibly arising from non-resident use of the courts would be congestion of the docket.

IV. ADEQUACY OF TRADITIONAL THEORIES OF JURISDICTION

The trend in jurisdiction is growing away from emphasis on power over persons and things.⁸⁰ Von Mehren and Trautman suggest that "the appropriate mode of analysis begins by directing attention to the relationship of the parties and of the controversy to the forum, and by taking other litigational and enforcement considerations into account."⁸¹ With this view in mind, some have urged that quasi in rem jurisdiction be abolished altogether, since general jurisdiction over the person is available through longarm statutes which require that the forum have more rational contacts with the controversy than the mere existence of an asset belonging to the alleged wrongdoer within the physical power of the court.⁸² It has also been urged that the law should be changed to prevent the possibility that an individual in transit through a remote jurisdiction may be served personally and required, at "his great expense and greater annoyance,"⁸³ to defend a lawsuit. The laws expanding personal jurisdiction through the reach of the longarm statutes emphasize a fair, practicable opportunity for defendant to be heard. This consideration need not arise for a court concerned merely with jurisdiction based on physical power over the defendant. For purposes of a just forum, the statutes prescribe certain minimum contacts. The New York longarm statute specifies that the state courts may exercise personal jurisdiction over any non-domiciliary if the

injuries occurring within the state, is not controlling. He argues that the Supreme Court also spoke of providing a method for bringing the defendant before the forum, a method that would have little use if limited to injuries in the state since a longarm statute would provide personal jurisdiction over non-resident defendants involved in an accident within the state. Judge Anderson, dissenting, replies that

[e]very plaintiff . . . is not entitled to a legal remedy in the form of a device to bring the defendant into the forum most convenient to the plaintiff . . . regardless of all other considerations. Certainly it must first be determined whether the plaintiff has the right to require defendant's presence in plaintiff's forum and the resolution of the question depends upon the fairness and reasonableness of the device as it affects all of the parties involved. . . . *Watson* and the long-arm statutes are plainly grounded in fairness because the non-resident defendant has of his own volition brought himself within the bounds and jurisdiction of the state where the accident occurred.

Id. at 593 (dissenting opinion).

⁸⁰ A. Ehrenzweig, *A Treatise on the Conflict of Laws* § 25(2) (1962).

⁸¹ VonMehren & Trautman, *supra* note 56, at 1166.

⁸² See generally Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962); VonMehren & Trautman, *supra* note 56.

⁸³ Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).

cause of action arises from his transaction of business within the state,⁸⁴ a tortious act committed within the state⁸⁵ or realty owned, used or possessed within the state.⁸⁶ Such a statute's primary purpose is to provide a convenient forum for a plaintiff to seek redress. However, the limitations on the exercise of jurisdiction imposed by the requirement of minimum contacts is a defendant-oriented protection designed to insure that the defendant will not be called into a forum inappropriate for adjudication of the controversy.

In situations where longarm or direct action statutes are employed, the defendant has at his disposal a defense of lack of jurisdiction. The success of such a defense turns on the existence of the contacts required by the direct action or longarm statute intended to insure substantial fairness and justice for the party whose property is in jeopardy. The jurisdictional cases indicating what contacts constitute substantial justice and fair play all point to the fact that the defendant must be given a reasonable opportunity to present the merits of his side of the case.⁸⁷ Integrally related to this opportunity is the appropriateness of the forum. If the court does not have the defendant's person within its power, does it find within its geographical limits sufficient other contacts with the action to make this forum a reasonably appropriate place to adjudicate the merits of the case? That is, was the contract formed there?⁸⁸ Did the injury occur there?⁸⁹ Was the wrong done there?⁹⁰ If any of these questions can be answered in the affirmative, the court may assume jurisdiction over the person of the defendant.

The tendency to expand personal jurisdiction to include places of significant contact with the cause of action should not ignore certain implicit limitations of a due process or fair-play nature. If such implicit limitations exist it would seem that they should extend to areas where the court is now free to exercise jurisdiction in the power sense, either over a transient de-

⁸⁴ N.Y. Civ. Prac. Law § 302(a)(1) (McKinney 1963).

⁸⁵ Id. § 302(a)(2).

⁸⁶ Id. § 302(a)(3).

⁸⁷ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Cf. *Hanson v. Denckla*, 357 U.S. 235 (1958).

⁸⁸ In the case of *Compania de Astral v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (dissenting opinion reported at 108 A.2d 372) (1954), cert. denied, 348 U.S. 943 (1955), service against a Panamanian corporation was sustained as the negotiations took place and the contract was formed in the forum state. Similarly, in *McGee v. International Life Ins. Co.*, 353 U.S. 220 (1957), where a life insurance policy was issued and serviced by mail from Texas to California, the presence of the insured risk in California was held to be sufficient contact with the state to sustain jurisdiction.

⁸⁹ In *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), Illinois service was sustained against an Ohio corporation which sold, in Ohio, a defective water heater safety valve which was resold and ultimately installed in Illinois and caused injury in that state. See also *Cosper v. Smith & Wesson Arms Co.*, 53 Cal. 2d 77, 346 P.2d 409 (1959), cert. denied, 362 U.S. 927 (1960).

⁹⁰ Some states have held that the "tortious act" must be committed within the state. The Second Circuit sustained the dismissal of an action against a German drug company which failed to send warnings to a New York woman that a drug she purchased in Europe and used in New York might cause birth defects in a child later born to her in New York. The court said that no "tortious act" was done in New York, and, thus, there was no jurisdiction under N.Y. Civ. Prac. Law § 302 (McKinney 1963). *Harvey v. Chemie Grunenthal*, 354 F.2d 428 (2d Cir. 1965), cert. denied, 384 U.S. 1001 (1966). See text at note 85 supra.

fendant or over a res in an inappropriate forum. It is incongruous that the courts have not viewed the minimum contact requirements for expanded personal jurisdiction as displacing the archaic power rules which so often work the hardships sought to be eliminated by minimum contacts.

Substantial justice and fair play are not served by flagrant disregard of justifiable expectations, as, for example, when a California driver is sued in New York for an accident that occurred in New Mexico.⁹¹ Or, in other terms, due process and popular respect are both affronted by the exercise of jurisdiction in the absence of any reasonable connection with the transaction or occurrence. Yet, if a court sees fit to entertain an action brought before it where the defendant was served as he fortuitously passed through the state or where the defendant happens to own an asset in a forum unconnected with the action, the court has the power to exercise jurisdiction. In *Seider v. Roth*⁹² the New York court has legislated a direct action procedure which, unlike the direct action statutes in force, is based on the "power myth." It requires no contacts other than the presence of an injured resident and an office of the defendant's insurer. In fact, the *Seider* rule expands bare power jurisdiction in that it applies it to a situation in which the defendant in fact, the insurer, is not even the party charged with the wrong.

At present, the only recourse available to a defendant who feels that he has been maneuvered into a forum that is so inappropriate as to work a hardship is to move for dismissal on the grounds of *forum non conveniens*.⁹³ But the granting of such a motion rests with the discretion of the trial judge.⁹⁴ There are no clear guidelines which he must follow.⁹⁵ New York emphasizes the convenience of its courts as the rationale behind the doctrine and has ruled that, since its residents pay taxes and otherwise contribute to the upkeep of the court, the court has a duty to provide them with a forum and will not let inconvenience to the court outweigh the resident parties' interest in a local forum.⁹⁶ The extension of the power doctrine of jurisdiction in *Seider v. Roth*, coupled with New York's view of discretion in *forum non conveniens*, makes it apparent that the time has come to consider motion for dismissal for *forum non conveniens* as a due process-protected right, a defense available to the defendant when he can show that the forum does not have sufficient connection with the action to satisfy the requirement of "fair play and substantial justice." At the very

⁹¹ See *Jones v. McNeill*, 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. 1966).

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

⁹³ "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction . . .," even though it has the power to hear the case, if it feels that it is an inappropriate forum for trial. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); see generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947); *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 1008-13 (1960).

⁹⁴ See A. Ehrenzweig, *supra* note 80, § 34.

⁹⁵ In the exercise of its discretion the criteria which a court will use depend upon the court's concept of whom the doctrine is primarily intended to benefit: the court or the parties. See Barrett, *supra* note 93, at 404-09.

⁹⁶ *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 139 N.E. 223 (1923). The holding in *Vaage v. Lewis*, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (1968), discussed on pp. 720-22 *supra*, is certainly consistent with this holding.

least, this defense should be regarded as a right in those situations in which the defendant is not the charged wrongdoer.

V. ADDITIONAL PROBLEMS POSED BY *Seider*

Aside from the direct action aspects of *Seider v. Roth*,⁹⁷ *Seider*-based jurisdiction, as it is characterized by the New York courts (*i.e.*, as quasi in rem), poses, even after the modification made in the *Simpson* rehearing, some very practical problems suggestive of additional constitutional questions. The first difficulty is the question of the effect of a limited appearance on subsequent actions against the defendant. The general rule is that a plaintiff's cause of action is not merged in a quasi in rem judgment.⁹⁸ In a *Seider*-type action, then, it follows that if the judgment entered against the defendant is not satisfied by the limits of the insurance policy the plaintiff could then come to the defendant's forum and seek a judgment against the defendant personally. Or, if the defendant prevailed in New York, then logically the plaintiff should be able to reinstitute his action in a forum in which the defendant could be reached either personally or through his property. However, although the *res judicata* effect of a limited appearance has apparently never been decided, it has been suggested that the plaintiff should never be permitted to relitigate a claim that he has lost on the merits when the defendant has specially appeared.⁹⁹ Of course, this view would constitute an exception to the rule of mutuality of collateral estoppel, which requires that if both of the litigants would not be bound by a judgment neither would be.¹⁰⁰ However, "it seems fair that a plaintiff who has elected to take advantage of the quasi in rem procedure in a particular forum should thereafter be precluded by an adverse judgment. . . ."¹⁰¹

An examination of the distinctions between the effects of a traditional quasi in rem default and a default in a *Seider*-type action indicates that this exception to the rule of mutuality of estoppel should be extended to the point of refusing to the plaintiff the right to bring any subsequent actions for satisfying the deficiency claim. After a traditional quasi in rem judgment by default, the value realized by the plaintiff from his collection of the res must be deducted from any subsequent judgments obtained against the defendant.¹⁰² In a *Seider*-type quasi in rem action, however, the defendant, by defaulting, may well lose the res (his insurance policy) without being allowed to deduct the amount of the policy from future judgments, because the insurer may interpose a defense of non-cooperation and disclaim all present and future liability under the policy. Thus, although the *Simpson* rehearing has diminished the likelihood of depriving the defendant of his property¹⁰³ without due process, it has not altogether eliminated it. There is still a strong element of coercion

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

⁹⁸ Restatement of Judgments § 34(g) (1942).

⁹⁹ Developments in the Law—State-Court Jurisdiction, *supra* note 93, at 954-55.

¹⁰⁰ F. James, Civil Procedure § 11.31 (1965).

¹⁰¹ Developments in the Law—State-Court Jurisdiction, *supra* note 93, at 955.

¹⁰² Restatement of Judgments § 34(g) (1942).

¹⁰³ In addition the loss of the policy may raise the insured's premiums on a new policy, or may make it impossible for the defendant to be reinsured.

of the defendant to come into a jurisdiction—to which he would never have traveled under ordinary circumstances—and defend. Not incidentally, this element also burdens the insurer with the cost of bringing the witnesses, other evidence and the defendant into a jurisdiction remote from the state where the cause of action arose.

If the element of coercion and inconvenience of the forum are not deemed substantial enough to impair constitutional rights, it is suggested that they should be considered at least substantial enough to cause the New York court to characterize the appearance of the defendant as in personam with limitation on damages to the face of the policy. Characterization of the action as quasi in rem causes multiple difficulties. A judgment thus entered against the defendant personally would serve procedurally to bar the plaintiff from bringing subsequent actions¹⁰⁴ and lessen, to a degree, the burden on the insurer and insured of appearance in New York under these circumstances. Such a characterization would also eliminate the problem faced by the insurer called upon to fulfill his obligation to defend the insured's interests in all subsequent suits on a cause of action for which he has already indemnified the defendant to the limits of the policy. Similarly, it would alleviate the technical difficulty that the contingency attached to the obligation to indemnify—a personal judgment against the insured—would never occur in an in rem judgment.

One obstacle to the New York court's adoption of such a characterization, however, may be found in the court's holding in *Kilberg v. Northeast Airlines*.¹⁰⁵ That case evidenced a strong state policy against limitations on damages in actions in personam, a policy so strong that the New York court, in a situation in which the choice of law process compelled them to apply the Massachusetts wrongful death statute, refused to apply the Massachusetts limitation on damages which is a part of that statute. On the other hand, Civil Practice Law Section 320(c),¹⁰⁶ the statutory policy against limited appearances, did not deter the court from making an exception to this rule in the *Simpson* rehearing. The considerations favoring an exception to the rule against limited damages are even stronger, since such a limitation will not only mitigate the technical problems but also will make the *Seider* rule somewhat more equitable for the insured and insurer.

VI. CONCLUSION

The simplest solution to the problems caused by the *Seider* rule would be the enactment of a direct action statute. It appears that the courts will persist in the *Seider* rule until a smoother path is made available to New York plaintiffs seeking a forum at home. The problems with *Seider*-based jurisdiction have been described as "so bizarre that they become difficult even to verbalize."¹⁰⁷ An attempt at solution through juristic gymnastics may well result

¹⁰⁴ Restatement of Judgments § 47(a) (1942). Where a valid and final personal judgment in an action on the recovery of money is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action against the defendant on the cause of action. *Id.*

¹⁰⁵ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

¹⁰⁶ N.Y. Civ. Prac. Law § 320(c) (McKinney 1963).

¹⁰⁷ N.Y. Civ. Prac. Law § 5201, Siegel, Supplementary Practice Commentary pt. IV, at 39 (McKinney Supp. 1968).

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in the creation of new and even more "bizarre" problems. The insurance companies, although they traditionally oppose direct action statutes, must eventually realize that in New York direct action is actually in force now, with many more problems in attendance than statutory direct action presents for them in the states where it is formally in force. In addition, a direct action statute would bring the assurance that the action would be connected with the forum, provided of course that the New York legislature required contacts similar to those required by statutes already in existence.¹⁰⁸ If the insurance companies cannot persuade the courts or the legislature to overrule *Seider*, New York may witness the anomalous spectacle of lobbying by insurance companies in support of a direct action statute.

MICHAEL C. TOWERS

¹⁰⁸ See text at notes 61-64 supra.