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In Rem Jurisdiction; Attachment of Insurance Debts; State Statutes; O'Connorv. Lee-Hy Paving Corp.

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CIVIL PROCEDURE

*In Rem Jurisdiction • Attachment of Insurance Debts
State Statutes*

O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978).

THE UNITED STATES COURT OF APPEALS, Second Circuit, in *O'Connor v. Lee-Hy Paving Corp.*,¹ upheld New York's insurance attachment procedure which serves as a vehicle for gaining personal jurisdiction over out-of-state defendants in causes of action that arise outside of New York. The court thereby determined that New York federal courts, in applying the procedures, had not violated defendant's due process because the minimum contacts requirement of the recent United States Supreme Court case, *Shaffer v. Heitner*,² had been met.

For an illustration of how New York's attachment procedures affect the litigation and the parties involved, consider the following hypothetical cases:

Case 1³: X, a resident of New York, drove to Philadelphia to attend a conference. While there, she was involved in a rear end automobile collision. The cars were not seriously damaged, but X was left with severe back injuries. Y, the driver of the car behind her and the one responsible for the accident, was a Virginia resident, passing through Philadelphia.

Case 2: Z, a resident of Ohio, drove to Pittsburgh to have dinner there with an acquaintance. While in Pittsburgh, he was involved in a rear end automobile collision. Although the cars were not seriously damaged, he was left with severe back injuries. Y, the driver of the car behind him and the one responsible for the accident, was a Virginia resident who was passing through Pittsburgh.

In one week, Y was involved in two accidents. He was fully insured under a policy he had purchased in Virginia from State Farm Insurance Company, a company that also does business in New York and Ohio, among other states across the country. The two accidents were virtually identical in every significant detail except for the residence of the people whose cars were hit. X would be able to bring suit successfully in her home state of New York, but Z would not be able to maintain a similar suit in his home

¹ 579 F.2d 194 (2d Cir. 1978).

² 433 U.S. 186 (1977).

³ The facts of this case are fiction, though not legal fiction. They are very loosely based on *Hoops v. Norman*, 46 App. Div. 2d 672, 359 N.Y.S.2d 905 (1974), *appeal denied*, 35 N.Y.2d 957, 324 N.E.2d 555, 365 N.Y.S.2d 176 (1974).

state of Ohio. Instead, he would have to sue Y either in the state in which the accident occurred, Pennsylvania, or in Y's state of residence, Virginia.

*Harris v. Balk*⁴ was the United States Supreme Court case that created the option for X in Case 1 to sue in her home state. Harris, a resident of North Carolina, owed Balk, also a resident of North Carolina, \$180. At the same time, Balk owed Epstein, a resident of Maryland, \$300. When Harris was temporarily in Maryland, Epstein successfully attached Harris' debt to Balk. Harris had argued that since he was only casually and temporarily in Maryland and since the situs of his debt to Balk was North Carolina, a Maryland court could not exercise jurisdiction over the debt.⁵ The Court reasoned, however, that the debtor (Harris) carried his debt with him and that in any state that the creditor (Balk) could sue on the debt, so could it be attached by a third party (Epstein), providing such attachment was permitted by local law.⁶ Statutory attachment of a debt, in itself, became sufficient basis for jurisdiction.

More than sixty years after *Harris v. Balk* was decided, the New York Court of Appeals⁷ in *Seider v. Roth*⁸ held that an insurance company's contractual obligation to indemnify a tortfeasor should be considered a debt for purposes of New York's attachment statutes.⁹ Plaintiffs had sustained

⁴ 198 U.S. 215 (1905).

⁵ *Id.* at 221.

⁶ *Id.* at 222.

⁷ Recall that the court of appeals is the highest state court in New York.

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

⁹ *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The legislative bases for attachment in New York are:

N.Y. CIV. PRAC. LAW § 5201 (McKinney).

- (a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.
- (b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.
- (c) Proper garnishee for particular property or debt.
 1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.
 2. Where property consists of a right or interest to or in a decedent's estate

injuries in an automobile accident which occurred in Vermont. The defendant, a resident of Quebec, was insured by a company that did business in New York. Chief Judge Desmond stated that “[j]urisdiction [was] properly acquired by this attachment since the policy obligation [was] a debt owed to the defendant by the insurer, the latter being regarded as a resident of this State. . . .”¹⁰ New York’s quasi in rem jurisdiction over the named defendant, *i.e.*, jurisdiction by virtue of attaching the insurance company’s “debt” to the named defendant, actually resulted in a “direct action” against the insurer. The insurer would be required to defend in New York rather than either in the state in which the tort occurred or in the state or country in which the nominal defendant resided. To maintain the suit in New York, the “nominal” defendant would be considered the tortfeasor while the insurance company actually controlled the defense in the suit.

While the New York court made no mention of *Harris* in *Seider v. Roth*, it did so in the subsequent case of *Simpson v. Loehmann*.¹¹ There, Chief Judge Fuld reasoned that the attachment of the insurance debt resulted in “no denial of due process since the presence of that debt in this State [citing *Harris*] . . . represent[ed] sufficient of a property right [*sic*] in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him.”¹² However, attachment of the debt was not the sole reason for the court’s exercise of jurisdiction; the court

or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.
4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the Uniform Commercial Code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee.

N.Y. CIV. PRAC. LAW § 6202 (McKinney).

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a “judgment debtor” in section 5201 . . . shall be construed to mean “defendant.”

¹⁰ 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102, *citing* Matter of Riggles Estate, 11 N.Y.2d 73, 76-77, 181 N.E.2d 436, 437-38, 226 N.Y.S.2d 416, 417-18 (1962).

¹¹ 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

¹² 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636. In rem jurisdiction over property here includes quasi in rem jurisdiction over intangible property.

realized that distinctions between "in rem" and "in personam" jurisdiction were becoming hazy. In *International Shoe Co. v. Washington*¹³ the United States Supreme Court had announced that in order not to offend "traditional notions of fair play and substantial justice" in the exercise of in personam jurisdiction, a defendant had to have certain "minimum contacts" with the forum state.¹⁴ The *Simpson* court did not extend the minimum contacts test of *International Shoe* to in rem actions, but it did consider the fairness of attaching the insurance debt as if it were applying the minimum contacts test. The court stated:

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.¹⁵

The court's justification for jurisdiction indicated that it had made the decision based on what it considered reasonable and fair in the circumstances.

In 1977, the Supreme Court extended the minimum contacts test by holding in *Shaffer v. Heitner* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."¹⁶ For jurisdictional purposes, the Supreme Court had negated the differences among in personam, in rem,¹⁷ and quasi in rem actions, prescribing the minimum contacts test for each. No longer would quasi in

¹³ 326 U.S. 310 (1945).

¹⁴ *Id.* at 316.

¹⁵ 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (citations omitted).

¹⁶ 433 U.S. at 212. Writers have been advocating the application of the *International Shoe* doctrine to all types of jurisdiction for some time, arguing that any standard less than the minimum contacts standard would be violative of the due process clause of the fourteenth amendment. See Reese, *The Expanding Scope of Jurisdiction Over Non-Residents — New York Goes Wild*, 35 INS. COUNSEL J. 118, 119 (1968); Comment, *Attachment of "Obligations" — A New Chapter in Long-Arm Jurisdiction*, 16 BUFFALO L. REV. 769, 776 (1967).

¹⁷ However, "the presence of the property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." 433 U.S. at 207. See also *id.* at 217 (Powell, J., concurring).

rem jurisdiction, as typified by a *Harris v. Balk* situation, be permitted where the only contact with the forum state was the presence of intangible property "completely unrelated to the plaintiff's cause of action."¹⁸ The *Shaffer* court explained:

[A]lthough the presence of defendant's property in a State might suggest the existence of other ties among the *defendant*, the *State*, and the *litigation*, the presence of 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 the forum.¹⁹

The implication of this language was that where contacts among the defendants, state, and litigation did exist, jurisdiction could lie. In *Shaffer v. Heitner*, the requisite contacts were missing. There the plaintiff brought a shareholders derivative action in Delaware against a corporation and its directors and officers for certain corporate activities in Oregon, resulting in a successful suit against the corporation for substantial damages. The sequestration (attachment) of corporate stock in Delaware was the basis of the plaintiff's attempt to assert jurisdiction. Defendants argued that having to defend in Delaware would be unfair because their only contact with that state was their stock ownership. The Supreme Court's decision that the defendants were correct is now history; the effect of that decision on courts attempting to comprehend its impact is history in the making.

O'Connor v. Lee-Hy Paving Corp. is one of the first attempts by the federal court system to reconcile New York's insurance attachment procedures with the Supreme Court's holding in *Shaffer*. In *O'Connor*, the United States Court of Appeals, Second Circuit, held that the attachment of an insurance debt as utilized in *Seider v. Roth* did not, in light of the *Shaffer* holding, violate the due process clause of the fourteenth amendment.²⁰ In other words, the court felt that "[t]he fall of *Harris v. Balk* . . . did not necessarily topple *Seider*. . . ."²¹

The *O'Connor* court heard four interlocutory appeals from four separate United States District Court cases,²² the facts of which were essentially the

¹⁸ *Id.* at 209.

¹⁹ *Id.* (emphasis added).

²⁰ U.S. CONST. amend. XIV.

²¹ 579 F.2d at 199.

²² *Ferruzzo v. Bright Trucking Inc.*, No. 78-7047 (E.D.N.Y. Dec. 22, 1977); *Kotsonis v. Superior Motor Express*, No. 78-7058 (E.D.N.Y. Dec. 6, 1977); *Schwartz v. Boston Hospital for Women*, Nos. 78-7044, 7076 (S.D.N.Y. Oct. 21, 1977); *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977). Hereinafter references to *O'Connor* are to the Second Circuit opinion unless otherwise specified.

same.²³ In all of these cases the plaintiffs were residents or domiciliaries of New York;²⁴ the named defendants were residents of foreign states; and the plaintiffs obtained jurisdiction over the defendants by attaching the defendants' insurance policies, which were held by companies doing business in the state of New York. The primary problem facing the court in *O'Connor* was:

whether *Seider v. Roth*, sanctioning a procedure for obtaining jurisdiction in a negligence action by a New York resident against a non-resident defendant for wrongful death or personal injury in an out-of-state accident through attachment of a policy of liability insurance issued by an insurer doing business in New York, [had] been undermined by *Shaffer v. Heitner*. . . .²⁵

Rather than deciding whether or not *Seider* had originally been a wise decision, the Second Circuit in *O'Connor* chose only to review the case in light of *Shaffer*. The court could have decided that *Shaffer* gave it the excuse to hold that *Seider* was no longer applicable. This would have been the easy decision and would have satisfied those who had been critical of *Seider*.²⁶ Instead, the Second Circuit determined whether *Seider* could withstand the force of *Shaffer*. If it could, it would not be overturned simply because of its unpopularity.

The defendants in *O'Connor* urged that since *Harris v. Balk*, a quasi in rem situation, had been overruled by *Shaffer*, all such quasi in rem cases were necessarily overruled.²⁷ In examining the opinion in *Seider v. Roth* on

²³ *Katz v. Umansky*, 92 Misc. 2d 285, 399 N.Y.S.2d 412 (1977), involved facts identical to those in *Schwartz v. Boston Hospital for Women*, where the New York plaintiff attached the insurance policy of a nonresident doctor for malpractice that occurred outside of New York. The New York Supreme Court, Kings County, which found insufficient contacts to sustain jurisdiction, assumed that *Shaffer's* effect on *Harris* invalidated *Seider*. As evidenced by the *O'Connor* opinion, that assumption was incorrect. See text accompanying notes 21 *supra* & 80 *infra*.

²⁴ In *Ferruzzo, Kotsonis, and O'Connor*, the injured parties were residents of New York at the times the injuries occurred; in *Schwartz* the plaintiffs were not New York residents at the time of the injury, but they were New York domiciliaries.

²⁵ 579 F.2d at 195. A secondary problem facing this court was a choice of law question pertaining to the specific facts heard by the district court in *O'Connor v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977), but that issue is outside the scope of this case-note. At least one commentator suggests that jurisdiction over nominal defendants is appropriate, but that choice of law should then be restricted so that the substantive law of the forum will be applied only when there are more substantial contacts with the forum than are present in insurance attachment cases. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 97-99, 101 (1978).

²⁶ Reese, *supra* note 16; Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075 (1968); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligation*, 19 STAN. L. REV. 654 (1967); Note, 43 ST. JOHN'S L. REV. 58 (1968).

²⁷ 579 F.2d at 198. See also R. LEFLAR, AMERICAN CONFLICTS LAW, §§ 24 & 25 (3d ed. 1977).

which the *O'Connor* court relied, nowhere was it asserted that the decision was based on a *Harris*-type attachment of a debt of one individual to another. Although *Harris* may have been the "catalyst" which initiated the possibility of attaching insurance policies and enabled the *Seider* court to hold as it did,²⁸ *Seider* was found to be valid under the minimum contacts test as well.

In *Shaffer v. Heitner*, the Supreme Court observed that "in cases such as *Harris* . . . , the only role played by the property [was] to provide the basis for bringing the defendant into court."²⁹ Contrast *Harris*, where the property attached had no connection to the cause of action, with *Seider* and *O'Connor*, where the property attached was an integral part of what established the connection with the litigation.³⁰ The *Seider* attachment is one of the insurance debt owed by the insurer to the insured, as provided by statute.³¹ In spite of the insurance community's general dislike of the statutes and the insurance attachment practice in New York,³² the legislature has not modified the statutes either by prohibiting attachment of insurance policies as the basis of jurisdiction or by extending the "judicially created direct action remedy"³³ to cases other than those like *Seider* and *O'Connor*. New York's insurance law provides that an injured person may sue the insurance company after first obtaining judgment against the insured.³⁴ In other words, New York does

²⁸ Note, 19 B.C.L. REV. 772, 780 (1978).

²⁹ 433 U.S. at 209.

³⁰ Fuchsberg, *Seider v. Roth: Alive and Well*, 12 TRIAL LAW. Q. 97 (1968) (counsel for plaintiffs in *O'Connor*).

³¹ See N.Y.CIV. PRAC. LAW §§ 5201, 6202.

³² Reese, *supra* note 15.

³³ Fyr, *Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739, 769 n.129 (1977). See also Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660, 686-87 (1971), for a direct action statute proposal that served as a guide for legislation that the New York legislature did pass, but which the late Governor Rockefeller vetoed. Governor's Veto Message, 1973 N.Y. LEGIS. ANN. 349.

³⁴ N.Y. INS. LAW § 167 (McKinney).

- (1) No policy or contract insuring against liability for injury to person . . . or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions which are equally or more favorable to the insured
- (b) A provision that in case judgment against the insured . . . shall remain unsatisfied . . . then an action may . . . be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract
- (7) Subject to the limitations and conditions of subsection one, paragraph (b), an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance which is governed by said paragraph (b), to recover the amount of a judgment against the insured
 - (a) A person who . . . has obtained a judgment against the insured . . . for damages for injury sustained or loss or damage occasioned during the life of the policy or contract; and
 - (b) Any person who . . . has obtained a judgment against the insured . . . to en-

not furnish injured persons with general direct actions against all insurers of tortfeasors. Rather, by judicial construction, *Seider* and the cases which followed it stand as authority for a kind of direct action in limited circumstances where a New York resident is injured by an out-of-state tortfeasor who is insured by an insurance company doing business in New York.³⁵

An examination of *Seider* and its progeny³⁶ reveals a trend moving away from the pro-defendant bias³⁷ of earlier courts and towards a *Shaffer* tripartite test,³⁸ a trend which started even before *Shaffer* became the law of the land.³⁹ The New York state and federal courts had not mechanically been holding that they had jurisdiction whenever the nominal defendants happened to be insured by an insurance company doing business within the state. For example, in *Farrell v. Piedmont Aviation, Inc.*,⁴⁰ the court refused to extend

force a right of contribution or indemnity, or any person subrogated to the judgment creditor's rights under such judgment; and

- (c) Any assignee of a judgment obtained as specified in paragraph (a) or paragraph (b) of this subsection

³⁵ Judicially and statutorily created direct actions against the insurer do not present diversity of citizenship problems for federal courts where the insurance company is doing business in the forum state unless the forum state is also the state of the insurance company's incorporation or its principal place of business. 28 U.S.C. § 1332(c) (1970) provides:

For purposes of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

See also 1 MOORE'S FED. PRAC. ¶ 0.71 (4-6), at 701.63-701.64, ¶ 0.77(2.-1), at 717.40-717.43, ¶ 0.77(4), at 721-721.6 (2d ed. 1974); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3624 at 777-88, § 3629 at 829-35 (1975).

³⁶ *Beja v. Jahangiri*, 453 F.2d 959 (2d Cir. 1972); *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir. 1969), cert. denied, 396 U.S. 840 (1969); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), aff'd on rehearing en banc, 410 F.2d 117, cert. denied, 394 U.S. 844 (1969); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Neuman v. Dunham*, 39 N.Y.2d 999, 355 N.E.2d 294, 387 N.Y.S.2d 240 (1967); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), motion for reargument denied, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). Judge Friendly wrote the opinions in *Farrell*, *Minichiello*, and *Buckley*, as well as the opinion in *O'Connor*.

³⁷ *Minichiello v. Rosenberg*, 410 F.2d 110 (Judge Friendly quoting *Buckley v. New York Post Corp.*, 373 F.2d at 181 and vonMehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128 (1966)); accord, *Williams, The Validity of Assuming Jurisdiction by the Attachment of Automobile Liability Insurance Obligations: The Impact of Shaffer v. Heitner upon Seider v. Roth*, 9 RUT.-CAM. L.J. 241, 265 (1977); Note, 6 HOFSTRA L. REV. 393, 399 (1978).

³⁸ The tripartite test promoted by *Shaffer* required contacts among the defendant, the litigation, and the forum state. 433 U.S. at 189, 204 & 207.

³⁹ See text accompanying note 15 *supra*.

⁴⁰ 411 F.2d 812 (2d Cir. 1969), cert. denied, 396 U.S. 840 (1969).

the *Seider* type of jurisdiction⁴¹ because, in its opinion, the contacts of the plaintiffs (administrators of out-of-state decedents), with defendants; the litigation (multiple tort suit on a plane crash that occurred out-of-state); and the forum state of New York, were so insubstantial that to allow jurisdiction would be unfair. The *only* real contact with New York in the *Farrell* case was that the insurer did business there and that contact was not found to be strong enough by itself to provide jurisdiction. Where plaintiffs were not forum state residents, the forum state had no substantial and continuing interest in the controversy.⁴² In *Farrell*, the facts resembled those of *Harris v. Balk* to the extent that the only basis for jurisdiction in the forum state was the debt,⁴³ but the *Farrell* court chose not to apply *Harris*, even without benefit of *Shaffer*. *Farrell* illustrates that *Shaffer's* overruling of *Harris*⁴⁴ was not such a radical change in the law.⁴⁵ Attachment that surpassed the means for attaining jurisdiction and became an end in itself was no longer permitted⁴⁶ but the New York courts did not need *Shaffer* in order to reach that conclusion.

When the "classical rule of physical personal service"⁴⁷ required by *Pennoyer v. Neff*⁴⁸ to gain in personam jurisdiction was molded into the *International Shoe* rule of "minimum contacts" in light of "fair play and substantial justice," the extreme flexibility of this new standard for testing in personam jurisdiction was criticized.⁴⁹ In spite of this criticism, the new rule's reasonableness gave it life, and it proved to be a manageable standard for the courts to use. Evaluated in light of what is most reasonable, the extension of what had originally been the test for in personam jurisdiction to in rem or quasi in rem jurisdiction seems natural, just, and manageable.⁵⁰ *Shaffer* did for in rem and quasi in rem jurisdictions what *International Shoe* had done for in personam jurisdiction. Where the latter extended in personam jurisdiction beyond the mere territorial boundaries of the state,⁵¹ *Shaffer* provided for an analysis of all contacts with the forum state. No longer would

⁴¹ See also *Varady v. Margolis*, 303 F. Supp. 23 (S.D.N.Y. 1968); *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977) (decided ten days before *Shaffer v. Heitner*).

⁴² 411 F.2d at 817 (Judge Friendly citing *Simpson v. Loehmann*).

⁴³ See text accompanying note 29 *supra*.

⁴⁴ 433 U.S. at 212 n.39.

⁴⁵ R. LEFLAR, *supra* note 27, at § 24A.

⁴⁶ 433 U.S. at 209.

⁴⁷ Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 312 (1956).

⁴⁸ 95 U.S. 714 (1877).

⁴⁹ Ehrenzweig, *supra* note 47.

⁵⁰ See generally Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977); vonMehren and Trautman, *supra* note 37.

⁵¹ Note, 9 TOL. L. REV. 333, 341-42 (1978).

such rigid and mechanical rules as the mere presence or absence of property or obligations⁵² with the forum state determine whether or not a case could be heard there. Instead, contacts necessary for sustaining jurisdiction, without regard to the *kind* of jurisdiction,⁵³ would be identified as those relating to the defendant, the forum state, and the litigation. Since these contacts were not restricted to those between the defendant and the forum state, but included the contacts of the litigation with forum and defendant, the type of *Seider* insurance cases were not affected when *Harris* was overruled. In *Seider* and *O'Connor*, where the contacts between the forum state and the nominal defendants might not, by themselves, have been strong enough to warrant sustaining jurisdiction over the defendants,⁵⁴ given those contacts and the additional element of the litigation,⁵⁵ traditional notions of fair play and substantial justice were not violated when the plaintiff sued in his own state a foreign defendant 1) who was responsible for the injury, 2) who would not be substantially deprived of anything in case of a holding for plaintiff,⁵⁶ and 3) whose defense in the litigation was really being controlled by a company regularly and systematically, not temporarily and casually, doing business in plaintiff's state.⁵⁷

Because of the holding in *Shaffer*, courts will not have to fabricate assigning a situs to an intangible, whether that intangible is characterized as a debt due the plaintiff or an asset, in the form of an insurance policy, "due" the nominal defendant.⁵⁸ This exercise had already been described as objec-

⁵² *Shaffer v. Heitner* did not say that attachments or debts could no longer serve as bases for jurisdiction; it only said that attachments or debts were not sufficient bases for jurisdiction. See, e.g., text accompanying note 29 *supra*.

⁵³ See Judge Dooling's analysis in the *O'Connor v. Lee-Hy Paving Corp.* district court opinion, 437 F. Supp. at 1002, quoted by Judge Friendly in the Second Circuit's opinion, 579 F.2d at 200:

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

⁵⁴ At least one commentator suggests that the contacts of the nominal defendant with the forum state might indeed satisfy the requisite minimum contacts in these cases. See Williams, *supra* note 37, at 274-77.

⁵⁵ Consideration of contacts with the additional element of the litigation is not an extension of the minimum contacts standard. An attempted extension of the standard was held to violate due process. *Kulko v. Superior Court of Cal.*, 98 S. Ct. 1690 (1978).

⁵⁶ *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d at 199.

⁵⁷ 21 N.Y.2d at 311-12, 234 N.E.2d at 672, 287 N.Y.S.2d at 672; *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 167, 225 N.E.2d 503, 507, 278 N.Y.S.2d 793, 799 (1967). See also vonMehren & Trautman, *supra* note 37, at 1167.

⁵⁸ For a suggestion that the plaintiff might be attaching the nominal defendant's asset rather than the insurance company's debt, see Note, *supra* note 51, at 343.

tionable even prior to *Shaffer*.⁵⁹ Now the test has become one of deciding, after weighing all of the circumstances, whether or not a finding of jurisdiction would be reasonable.⁶⁰ Jurisdictional requirements of minimum contacts among the forum, the defendant, and the litigation would help the courts rid themselves of the legal fiction⁶¹ that attaching a debt, obligation, or contract is attaching property⁶² that has a situs.⁶³ In the past, quasi in rem bases for jurisdiction sometimes had to be found by the courts even where there were sufficient contacts to warrant in personam jurisdiction.⁶⁴ Justice Marshall, in *Shaffer*, stated that asserting jurisdiction over property was actually asserting jurisdiction over the owner of the property.⁶⁵ His opinion affirmed Chief Judge Fuld's justification in *Simpson v. Loehmann* for the acknowledgment that *to the extent used to gain jurisdiction* for New York, the basis for the *Seider* holding was really direct action against the insurance company,⁶⁶

⁵⁹ Smit, *supra* note 50, at 622-23. Professor Smit criticizes assigning a situs to an intangible for two reasons. First, assigning a physical location to something that has no physical existence is a "fictional exercise," the implication being that the exercise is not recognizing reality. Second, jurisdiction is no longer based on power, therefore "reification of a debt owed to defendant is unnecessary." While Smit projected that under the reasonableness standard *Harris* would have to be overruled, he correctly made no such assertion regarding *Seider*, since *Seider*, and therefore *O'Connor*, do meet the standard.

⁶⁰ *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978). See also, Note, 12 AKRON L. REV. 317 (1978).

⁶¹ Ficto, in old Roman law . . . [signified] a false averment on the part of the plaintiff which the defendant was not allowed to traverse . . . [Now] the expression "Legal Fiction" [signifies] any assumption which conceals, or affects to conceal, the fact that a rule has undergone alteration its letter remaining unchanged, its operation being modified . . . [T]he very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves. H. MAINE, ANCIENT LAW, 30-31, 33 (1912).

⁶² For reference to another jurisdictional fiction, implied consent, see *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1916); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855); Ehrenzweig, *supra* note 47, at 310.

The fiction of suing a nominal defendant instead of directly suing the liability insurance company remains viable to accomplish the purpose of protecting "the insurance company against overly sympathetic juries." *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d at 167, 225 N.E.2d at 507, 278 N.Y.S.2d at 799.

⁶³ M. GREEN, BASIC CIVIL PROCEDURE 42 (1972).

⁶⁴ Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657, 662 (1959). Chief Justice Traynor described a California case, *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), cert. denied, 357 U.S. 569 (1958), wherein the court had to find quasi in rem based jurisdiction in order to hear resident plaintiffs' case against a nonresident defendant over whom the minimum contacts test of *International Shoe* would have applied to establish in personam jurisdiction had such jurisdiction been allowed by statute on the particular facts.

⁶⁵ 433 U.S. at 212. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971): "The phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."

⁶⁶ 21 N.Y.2d at 311, 234 N.E.2d at 671-72, 287 N.Y.S.2d at 637 (quoting *Seider v. Roth*, 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102). Cf. *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), where a Louisiana "direct action" statute was found constitutional.

i.e., an assertion of in personam jurisdiction over the insurance company. Judge Keating, concurring in *Simpson*, maintained that *Seider* and its progeny represented "a recognition of realities and not fictions."⁶⁷ One might contend that if the suit were in reality against the insurer, the requisite contacts between the nominal defendant and the forum would be missing.⁶⁸ The contact between the defendant and the forum, taken alone, also might not be sufficient to support jurisdiction. However, the added contact that the nominal defendant would have with the litigation by virtue of the injury he caused to a plaintiff who resided within the forum, coupled with the possession of the insurance policy, would make a sustaining of jurisdiction reasonable and fair. Although judicially created direct action functions to serve New York's needs, the state, as a matter of public policy, does not want a direct action against insurance companies in every local cause of action for fear that juries might be inclined to return excessive verdicts against insurance corporations.⁶⁹ *Seider* and *O'Connor* are narrow decisions, specifically limited to insurance cases where the named defendant is an out-of-state tortfeasor who is insured by a company doing business in New York. *Seider* was never extended by New York courts to the attachment of corporate stock, as the plaintiff had attempted to do in *Shaffer v. Heitner*. Marshall's statement, then, that "continued acceptance [of the fiction that a debt has a situs] would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant,"⁷⁰ must be modified by the argument that where fair play has *not* been violated, subjecting the defendant to the jurisdiction of the state court should be allowed if his other contacts with the litigation and the state are substantial.

In the interest of fairness, courts must allow the nominal defendant to make a limited appearance⁷¹ in order to limit the defendant's liability to the amount of the insurance policy.⁷² Before *Shaffer*, when quasi in rem actions were distinguished from in personam actions, the limited appearance was not needed in attachment cases if the attachment statute limited defendant's liability to the value of the property attached. Jurisdiction over property or

⁶⁷ 21 N.Y.2d at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.

⁶⁸ J. MARTIN, CONFLICT OF LAWS 559 (1978).

⁶⁹ Morton v. Maryland Cas. Co., 1 App. Div. 2d 116, 123-27, 148 N.Y.S.2d 524, 530-33 (1955); Appleman, *Joinder of Policyholder and Insurer as Parties Defendant*, 22 MARQ. L. REV. 75, 81 (1938); Note, 74 HARV. L. REV. 357, 358 (1960); Note, 41 MINN. L. REV. 784, 788 (1957).

⁷⁰ 433 U.S. at 212.

⁷¹ See *Cheshire Nat'l Bank v. Jaynes*, 224 Mass. 14, 17-18, 112 N.E. 500, 502 (1916) (*quoting* *Bissell v. Briggs*, 9 Mass. 462, 468 (1813)). See also F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.23 (2d ed. 1977).

⁷² The limited appearance would accomplish the same purpose as pre-*Shaffer* quasi in rem jurisdiction, that is, the nominal defendant would be bound only to the extent of the value of the res, *i.e.*, the insurance policy. Note, 69 COLUM. L. REV. 1412, 1416 (1969).

obligations did not confer power over the person. Any judgment was limited to the value of the property or obligation.⁷³ However, in post-*Shaffer* situations, the nominal defendant's liability in cases where the defendant's insurance policy is attached must be limited to the face value of the insurance policy; any liability beyond this value would violate the minimum contacts standard. In these situations, the nominal defendant would have availed himself of the protection of the forum court only to the extent of the insurance policy. Contacts in a *Seider/O'Connor* type of action among the defendant, forum and litigation would not support a *general* appearance. The defendant's contacts with the litigation would be less than the requisite minimum contacts if the defendant were forced to appear without benefit of the aid of the insurer.⁷⁴

O'Connor is the most authoritative answer for questions of jurisdiction in insurance attachment cases such as *Seider. Erie Railroad v. Tompkins*⁷⁵ requires that federal courts hearing diversity suits apply state substantive law.⁷⁶ At the time that *O'Connor* was decided by the Second Circuit, the New York Court of Appeals had not yet decided whether the *Seider* doctrine was still good law, even though a conflict was apparent in lower state courts on this issue.⁷⁷ In October, 1978, the court of appeals held in *Baden v. Staples*⁷⁸ that because the *Seider* rule "[did] not appear to have worked extensive injustice,"⁷⁹ there were no "'cogent reasons' . . . to abandon [the *Seider*] precedent. . . ."⁸⁰ The court of appeals' continued endorsement of *Seider* was less than enthusiastic, but it explicitly refused to overrule the case, stating that if the rule was to be changed, it would have to be changed by the legislature.⁸¹

In another recent case, *Savchuck v. Rush*,⁸² the Minnesota Supreme

⁷³ Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 109 (1913).

⁷⁴ For an opinion that post-*Shaffer* limited appearance "is now an obsolete vestige of a discredited form of jurisdiction," see Note, 27 BUFFALO L. REV. 323, 337-40 (1978).

⁷⁵ 304 U.S. 817 (1938).

⁷⁶ *Id.* at 822.

⁷⁷ Cases supporting the *Seider* doctrine included *Alford v. McGaw*, 61 App. Div. 2d 504, 507-09, 402 N.Y.S.2d 499, 501-02 (Sup. Ct. 1978), *appeal dismissed*, 45 N.Y.2d 776 (Ct. App. 1978); *Rodriguez v. Wolfe*, 93 Misc. 2d 364, 401 N.Y.S.2d 442 (Sup. Ct. 1978). Cases rejecting the *Seider* doctrine included *Attanasio v. Ferre*, 401 N.Y.S.2d 685 (Sup. Ct. 1977); *Wallace v. Target Store, Inc.*, 92 Misc. 2d 454, 400 N.Y.S.2d 478 (Sup. Ct. 1977); *Katz v. Umansky*, 399 N.Y.S.2d 412 (Sup. Ct. 1977); *Kennedy v. Deroker*, 91 Misc. 2d 648, 398 N.Y.S.2d 628 (Sup. Ct. 1977).

⁷⁸ 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978).

⁷⁹ *Id.* at 890, 383 N.E.2d at 111, 410 N.Y.S.2d at 809.

⁸⁰ *Id.* at 891, 383 N.E.2d at 112, 410 N.Y.S.2d at 810.

⁸¹ *Id.* at 890, 383 N.E.2d at 111, 410 N.Y.S.2d at 809.

⁸² ____ Minn. ____, 245 N.W.2d 624 (1976), *vacated and remanded sub. nom.* *Rush v. Savchuck*, 433 U.S. 902 (1977), *aff'd on rehearing sub. nom.* *Savchuck v. Rush*, ____ Minn. ____, 272 N.W.2d 888 (1978).

Court had initially affirmed a garnishment of an insurer's obligation to the defendant insured, having based its decision on a state statute⁸³ and *Seider*, citing "[b]asic considerations of fairness" as underlying their decision.⁸⁴ The United States Supreme Court vacated that judgment and remanded the case to Minnesota for rehearing in light of *Shaffer*.⁸⁵ By remanding the case, the Supreme Court had refused an opportunity to expressly overrule *Seider*. On rehearing, the Minnesota court distinguished *Savchuck* from *Harris v. Balk* and *Shaffer v. Heitner* by construing the Minnesota statute as being "consistent with the standards established in *International Shoe v. Washington*."⁸⁶ Minnesota's decision bears out a prediction that "state courts [would] interpret their statutes to comply with a minimum contacts analysis so as to give effect to the legislative intent to allow personal jurisdiction over non-resident defendants."⁸⁷ The decision also illustrated that *Shaffer v. Heitner* may not have had as astounding an impact as was initially believed.

Not all courts will follow *O'Connor's* interpretation of *Shaffer v. Heitner*; not all courts have followed *Seider*.⁸⁸ The *O'Connor* case has little relevance to Ohio law because Ohio has never endorsed the *Seider* line of reasoning regarding attachment of insurance debts as a method of acquiring jurisdiction over the tortious defendant. Nor does Ohio grant direct action against in-

⁸³ MINN. STAT. § 571.41 subd. 2(b)(2)(b) (1976):

Subd. 2. Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only . . .

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

(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that . . . (b) defendant is a nonresident individual, or a foreign corporation, partnership or association

⁸⁴ 245 N.W.2d at 629.

⁸⁵ 433 U.S. 902.

⁸⁶ 272 N.W.2d at 889.

⁸⁷ Note, 11 AKRON L. REV. 333, 342 (1977).

⁸⁸ See, e.g., *Robinson v. O.F. Shearer & Sons, Inc.*, 429 F.2d 83 (3d Cir. 1970); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970); *Javorek v. Superior Court*, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *Missouri ex rel. G.E.I.C.O. v. Lasky*, 454 S.W.2d 942 (Mo. Ct. App. 1970); *Rocca v. Kenney*, 381 A.2d 330 (N.H. 1977); *Hart v. Cote*, 145 N.J. Super. 420, 367 A.2d 1219 (1976); *Johnson v. Farmers Alliance Mut. Ins. Co.* 499 P.2d 1387 (Okla. 1972); *Jordine v. Donnelly*, 413 Pa. 474, 198 A.2d 513 (1964); *DeRentiis v. Lewis*, 106 R.I. 240, 258 A.2d 464 (1969); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970); *Hously v. Anaconda Co.*, 19 Utah 2d 124, 427 P.2d 390 (1967); *Werner v. Werner*, 84 Wash. 2d 360, 526 P.2d 370 (1974) (dictum). See generally *Carpenter, New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?*, 22 HASTINGS L.J. 1173 (1971); Note, 14 CAL. W.L. REV. 204 (1978).

surance companies. The Ohio insurance statute⁸⁹ provides that the injured party may move against the insurer for satisfaction on a judgment already obtained against the defendant insured. There is no direct action against the insurance company until a judgment has already been rendered for the plaintiff. In *Chitlik v. Allstate Insurance Co.*,⁹⁰ the injured out-of-state plaintiff attempted to recover compensation for personal injuries directly from the insurance company on the theory that he was the third party beneficiary of the contract between the Ohio tortfeasor and the insurer.⁹¹ However, the court of appeals for Cuyahoga County maintained that even though liability had already been established in a settlement of property damage claims, the out-of-state plaintiff still had to sue the insured Ohio tortfeasor and obtain judgment before proceeding against the insurer.⁹² Although there may be some indication that Ohio courts might be moving toward allowing direct action suits in certain limited instances,⁹³ there is no indication that Ohio's strong policy against "prejudicial or harmful effect against the insurer" will undergo significant change in personal injury actions.⁹⁴ If Ohio refuses to extend legislative or judicial direct action to out-of-state residents suing insurance companies in Ohio as in *Chitlik*, it is inconceivable that an Ohio resident would be able to rely on any kind of attachment of an insurance debt to reach an out-of-state defendant as in *O'Connor*. For courts in New York, Minnesota, and other states that would choose to continue the *Seider v. Roth* tradition, *O'Connor v. Lee-Hy Paving Corp.* is ample precedent for doing so. Due process of law still protects defendants in that judgments for plaintiffs in *Seider/O'Connor* situations "will not deprive a defendant of anything substantial that would have been otherwise useful to him."⁹⁵

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⁸⁹ OHIO REV. CODE ANN. § 3929.06 (Page 1976):

Upon the recovery of a final judgment against any firm, person, or corporation by any person . . . for loss or damage on account of bodily injury or death . . . or for loss or damage . . . on account of [other causes], if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor . . . to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental petition in the action in which said judgment was rendered, in which the insurer is made [a] new party defendant in said action

Thereafter the action shall proceed as to the insurer as in an original action.

⁹⁰ 34 Ohio App. 2d 193, 299 N.E.2d 295 (1973).

⁹¹ *Id.* at 194-95, 299 N.E.2d at 296.

⁹² *Id.* at 198, 299 N.E.2d at 298.

⁹³ Browne, *The Demise of Declaratory Judgment Action as a Device for Testing the Insurer's Duty to Defend*, 23 CLEV. ST. L. REV. 423, 433-35 (1974) (citing *Heuser v. Crum*, 31 Ohio St. 2d 90, 285 N.E.2d 340 (1972)).

⁹⁴ 34 Ohio App. 2d at 197-98, 299 N.E.2d at 298.

⁹⁵ *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d at 199.