New York's Attachment Statute and Seider v. Roth Held Valid
Under Shaffer v. Heitner (Intermeat, Inc. v. American Poultry Inc.;
O'Connor v. Lee-Hy Paving Corp.)

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Historically founded upon a state's inherent power over property situated within its territorial boundaries, quasi in rem jurisdiction often was invoked where due process considerations made in

1 The notion that a state has inherent power over persons and property located within its borders can be traced to Commentaries on the Conflict of Laws by Justice Story wherein he espoused the concept that "the laws of every state affect, and bind directly all property, ... persons, ... and acts done within [that state]." J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18 (1834). Justice Story analogized each state to a foreign nation and reasoned that laws similar to those governing international relations should apply to assertions of state jurisdiction. Id. at §§ 18-19; see Zammit, Quasi in Rem Jurisdiction: Outmoded and Unconstitutional?, 49 St. John's L. Rev. 666, 668-69 (1975). Under this view, each state has jurisdiction over persons and property located within the state, but the state has no jurisdiction over things located outside its borders. STORY, supra, at §§ 18, 20. These ideas on the jurisdictional power of states subsequently were adopted by the Supreme Court which noted that one of the principles of public law is "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Pennoyer v. Neff, 95 U.S. 714, 722 (1878). See generally Restatement (Second) of Judgments § 7, Comment a (Tent. Draft No. 5, 1978); Restatement of Conflict of Laws § 44, Comments a & b (1934).

2 See Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958); Freeman v. Alderson, 119 U.S. 185 (1886); Pennoyer v. Neff, 95 U.S. 714, 723 (1878). There are three types of jurisdiction: in personam, in rem and quasi in rem. In personam jurisdiction relates to the court's power to bind a particular party to personal liability on its judgment. The court obtains personal jurisdiction over the plaintiff when he commences an action. Jurisdiction over the defendant is obtained when he is properly served with the court's process, see D. Siegel, NEW YORK PRACTICE ch. 4 (1978), and has sufficient contacts with the state to satisfy due process considerations. See note 3 infra.

A court obtains in rem jurisdiction and is empowered to decide the interests of all persons claiming rights in certain property when it has actual or constructive possession of the property. A court's judgment in an in rem action is binding as against "the whole world." See Siegel, supra, at § 101. Under traditional analysis, the court does not have to obtain personal jurisdiction over the defendant, but notice of the action has to be given to interested parties. See Fyr, Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction, 26 EMORY L.J. 739, 745-46 n.33 (1977).

In a quasi in rem action, the court must obtain jurisdiction over the property in question pursuant to an order of attachment prior to the commencement of the action. The defendant does not have to be subject to the court's in personam jurisdiction. The litigation, however, relates to the interests of the defendant in the property and is binding only on him. See id. at 746 n.33. There are two types of quasi in rem jurisdiction. In the first instance, the attached property is related to the cause of action in which the plaintiff is attempting to assert his rights in the attached res. The second type involves situations wherein the attached property is unrelated to the cause of action and the plaintiff is merely using it as a predicate for jurisdiction to ensure satisfaction of a judgment. See Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958); Fyr, supra, at 746 n.33. Unless otherwise indicated, this Note will be referring to the second type of quasi in rem jurisdiction. For other discussions of jurisdictional bases, see Siegel, supra, §§ 101-106; Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U.L. Rev. 33, 44-53 (1978); Smith, The Enduring Utility of In Rem Rules: A Lasting Legacy of
personam jurisdiction over a defendant unavailable. The viability of this jurisdictional approach was drastically curtailed, however,


2 See, e.g., Louisville & Nashville R.R. v. Deer, 200 U.S. 176 (1906); Harris v. Balk, 198 U.S. 215 (1905); Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978); Steele v. G.D. Searle & Co., 483 F.2d 339 (5th Cir. 1973), cert. denied, 415 U.S. 958 (1974). Originally based upon a territorial view of judicial power as enunciated in Pennoyer v. Neff, 95 U.S. 714 (1878), the scope of in personam jurisdiction expanded with the advent of a mobile society and nationwide corporations. In several states, nonresidents were deemed to have given implied consent to personal jurisdiction if an automobile accident occurred within the state. Hess v. Pawloski, 274 U.S. 352, 356 (1927). Also, if a foreign corporation conducted continuous and substantial business within a state, its “presence” within the state subjected it to suit there. See International Harvester Co. v. Kentucky, 234 U.S. 579, 585-86 (1914); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917); Developments, supra note 2, at 919-23. In addition, if the defendant was a domiciliary of the forum state, personal jurisdiction could be obtained over him, even if he was not presently residing therein, by service reasonably calculated to afford him notice of the claim against him. See Milliken v. Meyer, 311 U.S. 457, 462-63 (1940); Restatement (Second) of Conflict of Laws § 25, Comment e (1971).

In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court held that due process requirements mandate that certain “minimum contacts” exist between the state and the defendant before in personam jurisdiction can be asserted. Such contacts work to ensure “that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

In contrast to the minimum contacts approach taken with respect to in personam jurisdiction, due process requirements for quasi in rem jurisdiction were considered to be met by the presence of the defendant’s property in the forum and the attachment of the property prior to the adjudication of the underlying claim. See Pennoyer v. Neff, 95 U.S. 714, 727-28 (1878). Assuming proper notice to the defendant, such assertions of jurisdiction were considered proper because “[e]very State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.” Id. at 723, 727-28; see Restatement of Conflict of Laws § 106, Comments a, c (1934). In Harris v. Balk, 198 U.S. 215 (1905), overruled in part in Shaffer v. Heitner, 433 U.S. 186 (1977), the Court modified the quasi in rem doctrine by holding that intangible property, such as a debt, could be attached and used as the basis for a quasi in rem action. 198 U.S. at 222. Significantly, the Court stated that the situs of the debt is the state wherein the debtor is located. Id. Therefore, if local law provided, a debt could be attached and provide a basis for state court jurisdiction. Id. Although not specifically stated by the Court, Harris indicated that in a quasi in rem action no contacts between the forum and the defendant were required beyond the presence of the attached debt. Of course, personal jurisdiction over the debtor had to be obtained. Id. The plaintiff’s judgment in a quasi in rem action, however, was limited to the value of the attached property and collateral estoppel would not apply to subsequent actions against the defendant. See Pennoyer v. Neff, 95 U.S. 714, 730-33 (1878); Note, Effect of a General Appearance to the In Rem Cause in a Quasi In Rem Action, 25 Iowa L. Rev. 329, 339-40 (1940); Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023 (1973). There was much criticism of the bifurcated due process approach to jurisdiction. See, e.g., Hazard, A General Theory of State Court Jurisdiction, 1965 Sup. Ct. Rev. 241; Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1135-36 (1966); Zammit, supra note 1, at 676, 682-83; Developments, supra note 2, at 959-60, 965-66.
when the Supreme Court, in *Shaffer v. Heitner*, held that there must be minimum contacts between the defendant, the claim and the forum before any assertion of jurisdiction could be justified.\(^4\) In


\(^5\) Id. at 212. Arnold Heitner, a nonresident of Delaware, commenced a shareholders’ derivative suit in a Delaware chancery court against corporate officers for breaches of duty which subjected the corporation to substantial damages and criminal contempt fines. Id. at 189-90. Jurisdiction was acquired by sequestration of the defendants’ common stock in the corporation. Id. at 190-92. The defendants contended that jurisdiction was invalid since they had no contacts with the forum state as required by *International Shoe*. Id. at 193; see note 3 supra. Ultimately, the Delaware Supreme Court upheld the assertion of quasi in rem jurisdiction, holding that the defendants’ contacts with the forum need not be considered. 433 U.S. at 195; see Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976), rev’d sub nom. Shaffer v. Heitner, 433 U.S. 186 (1977).

On appeal, the Supreme Court noted the criticism levelled against the different due process standards used to evaluate the constitutionality of in personam and in rem actions, see note 3 supra, and stated that jurisdiction over a person’s property is an “‘elliptical way of referring to jurisdiction over the interests of [a person] in a thing.’” 433 U.S. at 205, 207 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)). Thus, the Court held that, when evaluating the due process requirements for adjudicating the interests of persons in property, the *International Shoe* minimum contacts test must be applied. Id. at 212. While the existence of the defendants’ property might be indicative of other contacts which could provide a nexus between the “defendant, the State, and the litigation,” id. at 209, the Court concluded that jurisdiction could not be upheld where the property serving as the jurisdictional predicate is wholly unrelated to the cause of action and no other contacts with the forum exist. Id. at 208-09. Under the *Shaffer* facts, the Court found it significant that the defendants, by merely purchasing stock, had not “‘purposely availed[ed] [themselves] of the privilege of conducting activities within the forum State.’” Id. at 216 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). In this sense, the Court noted that it would be unfair to assert jurisdiction over defendants who had never been in Delaware and who had no reason to suspect that they would be subject to its jurisdiction. See id. at 216 & n.47; note 38 and accompanying text infra. Therefore, the Court concluded that the defendants’ contacts did not meet the minimum contacts test. 433 U.S. at 216.

The *Shaffer* Court noted that in certain circumstances quasi in rem actions probably would be valid without additional contacts between the forum and the property:

> [When] claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant’s claim to property located in the State would normally indicate that he expected to benefit from the State’s protection of his interest.

Id. at 207-08 (footnotes omitted). Examples suggested by the Court included actions to ensure the marketability of real estate, procedures to provide for resolution of disputes over possession or ownership of property, and suits involving injury upon an absentee owner’s land. Id. at 208.

The Court’s holding in *Shaffer* was supported by the decisions of several state and lower federal courts. See, e.g., United States Indus., Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977); Bekins v. Huish, 1 Ariz. App. 258, 401 P.2d 743 (1965); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), appeal dismissed and cert. denied, 357 U.S. 569 (1958). For a broader discussion of *Shaffer* and its implications, see Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L.J. 1 (1977); Silberman, supra note 2; Comment, *Shaffer v. Heitner’s Effect on Pre-Judgment Attachment, Jurisdiction Based on Property, and New York’s Seider Doctrine: Have We Finally Given Up the Ghost of the Res?*, 27 BUFFALO L. REV. 923 (1978) [hereinafter cited as Pre-Judgment...
the wake of Shaffer, the Second Circuit recently considered whether New York's attachment statute and the doctrine of Seider v. Roth.

Section 5201(a) of the New York Civil Practice Law and Rules (NYCPLR) states that "[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 . . . ." N.Y. Civ. Prac. Law § 5201(a) (McKinney 1978). Section 6202 of the NYCPLR provides: "Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment." N.Y. Civ. Prac. Law § 6202 (McKinney Supp. 1964-1978). Section 314 of the NYCPLR permits out-of-state service "where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment . . . ." N.Y. Civ. Prac. Law § 314 (McKinney 1972).


In Seider, the New York Court of Appeals held that the obligation of an insurance company doing business in New York to defend and indemnify a defendant-insured was a debt that could be attached and used as a predicate for quasi in rem jurisdiction over the defendant. Id. at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

The Seider doctrine has withstood several constitutional challenges in the New York state courts and the Second Circuit. See Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir.), cert. denied, 396 U.S. 840 (1969); Minichielo v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969); Baden v. Staples, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978)(per curiam); Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). But see Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968). In Podolsky, the court held that Seider was unconstitutional on due process grounds because New York did not provide for a limited appearance. Id. at 500. The court reasoned that, in order to defend on the merits, a defendant would have to make a general appearance, thereby submitting himself to in personam jurisdiction and personal liability. Id. at 495. On the other hand, if the insured refused to appear, the insurer might claim that the insured breached the cooperation clause present in most insurance contracts. Id.

In a per curiam opinion denying a rehearing in Simpson, the Court of Appeals responded to the Podolsky decision by stating that, even if a defendant litigated a Seider-type proceeding on the merits, his liability is limited to the face value of the policy. 21 N.Y.2d at 991, 238 N.E.2d at 320, 290 N.Y.S.2d at 915. Shortly thereafter, the New York legislature amended § 320(c) of the NYCPLR, making provision for limited appearances in cases where jurisdiction is predicated upon the attachment of property within New York. See N.Y. Civ. Prac. Law § 320(c) (McKinney 1972).

Most recently, in Baden v. Staples, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978)(per curiam), the New York Court of Appeals stressed the principle of stare decisis and sustained the constitutionality of the Seider doctrine. Citing O'Connor with approval, id. at 891, 383 N.E.2d at 111, 411 N.Y.S.2d at 807, the court reasoned that, since "the primary risks and burdens of defending a Seider-type action rest on the insurer," the burden on the insured is insufficient to preclude the adjudication on constitutional grounds. Id. For a discussion of Baden and the Seider saga in New York practice, see The Survey, 58 St. John's L. Rev. 182 (1978).
both predicated on quasi in rem jurisdiction, could withstand constitutional scrutiny. In *Intermeat, Inc. v. American Poultry Inc.*,\(^8\) the court found that the attachment of a debt pursuant to New York's attachment statute was a valid predicate for quasi in rem jurisdiction where sufficient contacts exist between the defendant and the forum state to satisfy the minimum contacts test.\(^9\) Of greater significance, however, was the court's subsequent decision in *O'Connor v. Lee-Hy Paving Corp.*,\(^10\) wherein the constitutionality of *Seider* attachments was upheld.\(^11\)

Intermeat, Inc., a New York corporation, sued to recover damages for an allegedly wrongful rejection of a shipment of imported meat by American Poultry Inc.\(^12\) After the District Court for the Eastern District of New York held that in personam jurisdiction over the defendant was lacking,\(^13\) Intermeat was permitted to attach a debt owed to American Poultry by a corporation doing business in New York.\(^14\) Judgment was entered for Intermeat\(^15\) and American

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\(9\) Id. at 1023.


\(11\) 579 F.2d at 202.

\(12\) 575 F.2d at 1018.

\(13\) Id. American Poultry maintained no office in New York and had not consented to service of process through the Secretary of State. Id. at 1019.

\(14\) Id. at 1018. The amount of the debt exceeded the claim in question. Id. The district court found that American Poultry's contacts with New York satisfied the requirements of
Poultry appealed to the Second Circuit. Writing for a unanimous panel, Judge Gurfein utilized a two-tier approach to determine whether federal jurisdiction was appropriate, stating that "[t]he defendant must be subject to service of process under the law of the state of the forum, a question of state law, . . . and the exercise of such jurisdiction must be consistent with due process, a question of federal law." Noting that New York provides that jurisdiction over a nonresident corporation may be predicated on the attachment of a debt located within the state, the Intermeat court considered whether in this case the procedure comported with the minimum contacts standard enunciated in Shaffer. While stating that the presence of the debt within the

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Shaffer for quasi in rem jurisdiction. Id. at 1018-19. The contract in question was a form contract drafted by the plaintiff in New York and used in five previous transactions between the parties. Id. at 1019. Each contract contained an arbitration clause committing the parties to arbitrate in New York. In addition, the district court found that the defendant’s sales to New York companies aggregated as much as $7,000,000 per year and its purchase of imported meat from New York companies comprised 25-30% of its business. These purchases were paid for by checks mailed to the New York companies. Id.

16 Id. at 1018. American Poultry initially rejected the meat because it was marked "Tasmeats" rather than "Richardson Production" as was ordered. Id. at 1019. The defendant sold the meat, and the contract price less $19,800.99 was remitted to Intermeat. Id. The district court found that it was common knowledge in the trade that "Tasmeats" is the export name for "Richardson Production." Id. at 1024. The court held, therefore, that the meat was rightfully rejected and entered judgment for Intermeat. Id.

17 The Second Circuit panel consisted of Judges Lumbard, Timbers and Gurfein.


19 575 F.2d at 1022-23. The exercise of quasi in rem jurisdiction in Intermeat was necessary due to the restrictive nature of New York's long-arm statute which permits courts to obtain in personam jurisdiction over nonresidents only in certain statutorily-defined instances. Section 301 of the NYCPLR authorizes a court "to exercise such jurisdiction over persons . . . as might have been exercised heretofore." N.Y. CIV. PRAC. LAW § 301 (McKinney 1972). This section incorporates the "doing business" test which evaluates a defendant's aggregate activities in determining whether the defendant is present for jurisdictional purposes. See Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964); Tauza v. Susquehanna Coal Co., 220 N.Y. 258, 115 N.E. 915 (1917). In addition to the codification of case law under § 301, § 302 authorizes assertions of jurisdiction for causes of action arising from certain enumerated activities within the state. Thus, if the defendant transacts business within the state or commits a tortious act other than defamation in the state, he is subject to in personam jurisdiction in New York. In addition, if the nondomiciliary commits a tortious act outside the state causing injury in New York and regularly conducts or solicits business within New York or should have expected the act to cause harm within New York and conducts a substantial amount of interstate or international commerce, he will
The state was to be viewed as only one contact between American Poultry and New York,\textsuperscript{21} the court found it significant that the contract upon which relief was sought had substantial connection with New York.\textsuperscript{22} Moreover, since the defendant had repeatedly committed itself to arbitration in New York with respect to numerous business transactions involving the state,\textsuperscript{23} the Second Circuit concluded that it would not be "unfair or unreasonable [to require the defendant] to defend in New York an action arising out of such commerce."\textsuperscript{24}

In O'Connor, the plaintiff brought suit in the District Court for the Eastern District of New York to recover damages for the wrongful death of her husband who, while inspecting a construction site for his employer, was fatally struck by a motorgrader negligently operated by an employee of defendant Lee-Hy Paving Corporation.\textsuperscript{25} Since the defendant, a Virginia corporation, lacked contacts with New York, out-of-state service will be permissible and jurisdiction may be acquired. N.Y. Civ. Prac. Law § 302 (McKinney 1972 & Supp. 1978-1979); see Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965); Siegel, supra note 2, at §§ 84-86.

\textsuperscript{21} 575 F.2d at 1022. Since the fortuitous presence of property within New York will generally be insufficient by itself to justify an assertion of jurisdiction, the Intermeat court noted that "some attachments still valid under New York law, and still constituting valid bases (so far as New York Law is concerned) for quasi in rem jurisdiction, will no longer satisfy the applicable due process requirement." Id. (emphasis in original).

\textsuperscript{22} Id. at 1023. A requirement of the "minimum contacts" test is that the claim have a "substantial connection" with the forum state. See Hanson v. Denckla, 357 U.S. 235, 252 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). In referring to the contract, Judge Gurfein remarked that "if it was not born in New York, [it] was at least conceived [there]." 575 F.2d at 1023.

\textsuperscript{23} Id. at 1023. An arbitration clause similar to that in Intermeat has been interpreted as a consent to personal jurisdiction for the purpose of enforcing arbitration. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977); Victory Transp. Inc. v. Comisaria General, 336 F.2d 354, 363 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). It has been suggested that one factor to be used in determining whether quasi in rem jurisdiction is constitutional in a particular case is whether a party "knowingly [assumes] some risk that the State will exercise its power . . . " over property within the state. See Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring); Feder v. Turkish Airlines, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977). It can be argued that an arbitration clause in previous contracts renders it foreseeable to the parties that New York courts would become involved if a controversy developed.

\textsuperscript{24} 575 F.2d at 1023. Reaching the merits, the court affirmed the district court's holding that American Poultry had wrongfully refused the shipment of imported meat. Id. at 1024. Turning to the question of damages, the Second Circuit noted that New York law does not limit "incidental damages" to those enumerated in § 2-710 of the Uniform Commercial Code. Id. The court concluded that, under this liberal view, the plaintiff was entitled to financing charges resulting from the breach. Id.

New York, the plaintiff invoked the *Seider* doctrine and attached the contractual obligations of two insurance companies doing business in New York to defend and indemnify the defendant under policies of liability insurance.⁴⁶

On appeal to the Second Circuit,⁴⁷ Lee-Hy Paving sought to have the attachment vacated, contending that jurisdiction predicated on a *Seider* attachment violates due process.⁴⁸ Writing for a unanimous court,⁴⁹ Judge Friendly stated that the *Shaffer* decision's "overriding teaching" is that when assertions of jurisdiction are evaluated, "courts must look at realities and not be led astray by fictions."⁵⁰ Viewing *Seider* in this light, the Second Circuit endorsed the notion that this type of attached jurisdiction is "*sui generis.*"⁵¹

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⁴⁶ 437 F. Supp. at 995. The operator of the motorgrader also was named as a defendant. *Id.* The obligations of the defendants' insurance companies to defend and indemnify provided a basis for jurisdiction pursuant to §§ 6201 & 5201(a) of the NYCPLR. *Seider v. Roth,* 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); note 6 supra.

⁴⁷ After granting the attachment order, Judge Dooling certified interlocutory appeals from his decision. 579 F.2d at 197; see 28 U.S.C. § 1292(b) (1976).

⁴⁸ 579 F.2d at 197. In addition to the *O'Connor* suit, the Second Circuit considered appeals from three other cases wherein the lower court sustained *Seider.* Schwartz v. Boston Hospital for Women, Nos. 78-7044, 7076 (2d Cir. Oct. 21, 1977), involved a suit for medical malpractice which occurred in Massachusetts. 579 F.2d at 196 n.1. In Kotsunis v. Superior Motor Express, No. 78-7058 (2d Cir. Dec. 6, 1977), the plaintiff sued for the damages resulting from an automobile accident in Maryland in which her husband was fatally injured. 579 F.2d at 196 n.1. In Ferruzzo v. Bright Trucking Inc., No. 78-7047 (2d Cir. Dec. 22, 1977), the plaintiff sued for injuries suffered in a collision in Indiana with a tractor-trailer owned by a Wisconsin corporation and driven by a Wisconsin resident. 579 F.2d at 196 n.1.

⁴⁹ The *O'Connor* panel was comprised of Judges Gurfein, Meskill and Friendly.

⁵⁰ 579 F.2d at 200.

⁵¹ *Id.* The court quoted with approval from district court Judge Dooling's opinion:

> *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. *


The *O'Connor* court first considered the defendants' argument that the fall of *Harris v. Balk,* 198 U.S. 215 (1905), in *Shaffer,* necessitates the downfall of *Seider.* *See* 579 F.2d at 198-99. On several occasions, the New York Court of Appeals discounted the direct action aspects of *Seider* and emphasized its basis as a *Harris*-type quasi in rem action. *See* *Simpson v. Loehmann,* 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967); *Seider v. Roth,* 17 N.Y.2d 111, 114, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 102 (1966). The Second Circuit, however, distinguished *Seider* from *Harris,* reasoning that in a *Seider* action "a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability . . . ." 579 F.2d at 199. In addition, the court reasoned that, unlike the *Harris* situation, the debt attached in a *Seider* action is related to the cause of action, since the contractual obligations to defend and indemnify were procured for the purpose of financial security in the event of such litigation. *Id.*
Noting the interest of the plaintiff is being able to sue in a forum of his choosing. Judge Friendly could find no unfairness in a result which compels the insurer doing business in New York to litigate there. In addition, the court found unpersuasive the contention that Seider resulted in undue hardship on the policy holder. The court concluded, therefore, that there was no due process violation in the application of the Seider procedure in O'Connor. 

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22 579 F.2d at 201. The court noted "'a movement away from the bias favoring the defendant' in matters of personal jurisdiction "toward permitting the plaintiff to insist that the defendant come to him" when there is a sufficient basis for doing so." Id. (quoting Minichiello v. Rosenberg, 410 F.2d 106, 110 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969) (quoting von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1128 (1966))). This statement is difficult to reconcile with the district court's recognition of the pro-defendant bias enunciated by the Supreme Court in Shaffer. See 437 F. Supp. at 996. In Hanson v. Denckla, 357 U.S. 235 (1958), commenting upon the pro-plaintiff bias that some commentators suggested existed after McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Supreme Court emphatically stated that despite the convenience of the plaintiff in suing at home, the test was whether the defendant had sufficient contacts with the forum. 357 U.S. at 254. The Shaffer Court relied heavily upon Hanson, see 433 U.S. at 215-16, and its ruling that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny," id. at 212 (emphasis added). This would seem to indicate that the Court is primarily concerned with fairness as judged from the defendant's vantage point. Several courts and commentators also have expressed the opinion that it is the defendant who needs protection against unfair assertions of jurisdiction: "Simply stated, plaintiff contacts cannot cure a jurisdictional defect that derives from a lack of defendant contacts with the forum." Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1141 (3d Cir. 1976) (Gibbons, J., concurring); accord, Smit, supra note 2, at 611-12; Pre-Judgment Attachment, supra note 5, at 345; Note, Shaffer v. Heitner and the Seider Doctrine, 39 U. Pitt L. Rev. 747, 766 (1978) [hereinafter cited as Seider Doctrine].

23 579 F.2d at 201-02. In balancing the insurer's interest in having the suit brought where the tort occurred against the plaintiff's interest in suing in New York, the court emphasized that the insurer maintained an office in New York and regularly transacted business there. Id. at 201. Thus, due process would be satisfied, and jurisdiction over the defendant would exist, if the insurer had sufficient contacts with New York so as to be considered "doing business" in the state. Id. at 200-01 (citing International Shoe Co. v. Washington, 326 U.S. 310, 317-19 (1945)); RESTATEMENT (SECOND) OF JUDGMENTS § 8a (Tent. Draft No. 5, 1978).

24 579 F.2d at 201-02. The court believed it unlikely that a Seider judgment would be given collateral estoppel effect in another jurisdiction since "the whole theory behind [Seider] is that it is in effect a direct action against the insurer and the [insurer] rather than the insurer will conduct the defense." Id. at 201 (quoting Minichiello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969)); cf. Note, Direct-Action Statutes: Their Operational and Conflict-of-law Problems, 74 Harv. L. Rev. 357, 367-69 (1960) (collateral estoppel effect should be given to direct actions against the insurer). But see note 63 infra.

25 579 F.2d at 202. On appeal, Lee-Hy Paving also contested the district court's ruling that New York law should be applied in the wrongful death action. Id. Under Virginia law, since O'Connor's employer and Lee-Hy Paving were both engaged in developing a shopping center and therefore would be considered in the "same employ," Mrs. O'Connor's sole remedy would be workmen's compensation benefits. Id. at 203; see 9A Va. Code §§ 65.1-5, -29, -35, -40, -103 (1950 & Supp. 1978). On the other hand, if New York law was applied, the plaintiff...
Intermeat and O'Connor typify the reevaluation of the traditional bases of quasi in rem jurisdiction that will be necessary in the post-Shaffer era. Under the Shaffer rule, in order to acquire in rem jurisdiction, the predicate must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." Thus, the assertion of jurisdiction over property is not to be based solely upon theories of territorial power, but rather is to be governed by the due process standard generally applicable to assertions of in personam jurisdiction. In mandating that this constitutional inquiry be made in the face of a challenge to any form of state jurisdiction, the Court has rejected the idea that jurisdiction may be predicated on the fortuitous presence of intangible property within the forum state.

It is submitted that, in Intermeat, the Second Circuit correctly followed the Supreme Court's mandate in concluding that, although the attached debt was unrelated to the cause of action, the defendant's contacts with New York made the assertion of jurisdiction by New York fair and appropriate. Intermeat illustrates that the cur-

would have a wrongful death cause of action. See N.Y. Est., Powers & Trusts Law § 5-4.1 (McKinney 1997).


In Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F.2d 1206 (8th Cir. 1977), the Eighth Circuit stated that the factors to be considered in determining whether the minimum contacts standard is satisfied are "the nature and quality of the contacts with the forum state; . . . the quantity of contacts with the forum state; . . . the relation of the cause of action to the contacts; . . . the interest of the forum state in providing a forum for its resident; and . . . the convenience of the parties." Id. at 1209. It is important to note that the Aaron court stated that the last two factors are "secondary factors . . . and are not determinative." Id. at 1210 n.5.

In explaining the requirements of the minimum contacts test, the Supreme Court has stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (emphasis added). See Pre-Judgment Attachment, supra note 5, at 344; Seider Doctrine, supra note 32, at 763-64.

See 433 U.S. at 207-08.

See 575 F.2d at 1023; notes 20-24 and accompanying text supra. It is of interest to note
rent utility of the quasi in rem doctrine lies in situations where in personam jurisdiction over a nonresident defendant would theoretically be available under the due process standard of minimum contacts, but is impossible to assert due to a state's narrowly drawn long-arm statute. In this sense, jurisdiction based on the attachment of property located within the forum state can be thought of as an alternate form of long-arm jurisdiction. While a plaintiff may be given the opportunity to secure at least partial satisfaction that the *Intermeat* court declined to pass upon the constitutionality of New York's attachment statute which does not require that the defendant's contacts with the forum be considered prior to attachment of the property. See note 6 supra. By limiting the exercise of quasi in rem jurisdiction under New York's attachment statute to those cases in which defendants possess the required contacts with the forum, it appears that the Second Circuit has engrafted restrictions on the statute which continue its viability. This approach is consistent with the general rule of statutory construction that statutes should be construed to uphold their constitutionality. See *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917); *Marcellus v. Kern*, 170 Misc. 281, 283, 10 N.Y.S.2d 73, 75 (Sup. Ct. N.Y. County 1939); N.Y. STATUTES § 150(c) (McKinney 1971).

A proposed amendment to the NYCPLR would incorporate the minimum contacts test into New York's long-arm statute, thereby permitting out of state service based on attachment jurisdiction. The proposed amendment states in pertinent part:

(b) Property or debt forming the basis of non-personal jurisdiction. A plaintiff may cause any property belonging to the defendant or debt owing to him, against which a money judgment may be enforced . . . , to be attached . . . , thereby giving the court jurisdiction to the extent and value of the property or debt attached, provided that plaintiff demonstrate minimum contacts with the state sufficient to conform to due process of law requirements of the fourteenth amendment to the constitution of the United States. In determining the existence of minimum contacts the court shall consider:

1. the plaintiff's relationship to the state;
2. the relationship of plaintiff's cause of action to the state;
3. the defendant's relationship to the state;
4. any benefit accruing to the defendant because of the relationship of his property or debt to the state;
5. the relationship of the garnishee to the state;
6. whether the property is tangible or intangible and if tangible, whether it is permanently or temporarily located in the state;
7. whether there is another forum reasonably convenient to plaintiff in which he can obtain adequate relief.


of his claim, however, the relief available would be limited to the value of the attached property. To the extent that the value of the property will often be less than the judgment sought, it will be preferable for the plaintiff to proceed in personam against the defendant in another state.

With respect to Seider-attachments, it is submitted that under the approach utilized by the Second Circuit in O'Connor, the requirements of Shaffer are not satisfied. Implicitly recognizing that the named defendant's contacts with New York were insufficient to justify an assertion of jurisdiction by New York, the O'Connor court de-emphasized the inconvenience to the insured and considered the insurer the real party in interest. This approach would appear to ignore the realities by which the court professed to be guided since it is clear that the named defendant will suffer to his financial detriment. Appearance at trial, or at the giving of a deposition, will often prove to be expensive and time-consuming. In addition, a judgment rendered against an insurer will likely result in an increase in the defendant's insurance premiums. Finally, if the insurer fulfills its obligation by defending and indemnifying in the Seider action, the insured may be deprived of his contractual right to a defense in a subsequent in personam suit based on the same accident.

433 U.S. at 207 n.23 (emphasis added); accord, Hanson v. Denckla, 357 U.S. 235, 251 (1958).

Justice Powell, dissenting from the denial of certiorari in O'Connor, noted the extent to which the named defendant would be affected by the suit and concluded that Seider violates due process. 99 S. Ct. 639 (1978) (Powell, J., dissenting) denying cert. to O'Connor v. Le-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978).


Podolsky v. Devinney, 281 F. Supp. 488, 495 n.17 (S.D.N.Y. 1968); see N.Y. CIV. PRAC.
Notwithstanding the unfairness accruing to the named defendant under the direct action analysis employed in *O'Connor*, the claim’s nexus to the forum would also appear to be tenuous. While a state has an interest in providing residents with a forum to sue nonresident tortfeasors, this interest lessens when the tort occurs outside the state. In addition, the site of the tort, the witnesses to
it and the named defendant himself would have no contact with the forum, bringing into question arguments that a relationship between the forum and the claim exist.\textsuperscript{53}

As occurred in \textit{O'Connor}, New York's choice of law rules favor applying the law of the forum in actions where jurisdiction is based on a \textit{Seider} attachment.\textsuperscript{54} This approach has the effect of aggravating the unfairness of the \textit{Seider} doctrine since it may result in liability greater than that which could have been possible had personal jurisdiction been obtained in the state where the wrong occurred.\textsuperscript{55} \textit{Shaffer} stands for the proposition that all assertions of state jurisdiction must be fair to the defendant. The objectionable consequences that may result from choice of law rules in the forum acquiring quasi in rem jurisdiction are further evidence that, with regard to considerations of fairness, \textit{Seider} jurisdiction is deficient.

It was generally assumed that \textit{Seider} actions would be the first casualty of the minimum contacts standard adopted in \textit{Shaffer}.\textsuperscript{56} Although the \textit{sui generis} view of \textit{Seider} taken by the \textit{O'Connor} court prevented this occurrence, it seems unlikely that other jurisdictions will follow. For example, in \textit{Camire v. Scieszka},\textsuperscript{57} the New Hamp-

\textsuperscript{53} The \textit{O'Connor} court reasoned that the defendant purchased the insurance policy to protect against the liability involved in a \textit{Seider} action and, “since the obligation to defend clearly encompasses the litigation,” the cause of action is sufficiently related to the attached debt. 579 F.2d at 199. It would seem obvious, however, that in a \textit{Seider} action, the insured is not invoking the benefit of the forum state's protection. Further, the “source of the underlying controversy” is usually a tort committed by the insured which seems to be independent of the attached property. The attached property would be related to the cause of action when the policy is attached to secure satisfaction of the judgment after the defendant is declared liable. Under these circumstances, the parties are actually litigating the rights and obligations arising out of the policy. See \textit{Torres v. Townmotor, Inc.} 457 F. Supp. 460 (E.D.N.Y. 1977); \textit{Alford v. McGaw, 61 App. Div. 2d 504, 511, 402 N.Y.S.2d 499, 504 (4th Dept '78)} (Hancock, J., concurring).

Some courts have held that if the defendant’s contacts with the forum are minimal or isolated, the cause of action must arise out of the contact. \textit{E.g.}, \textit{Deveny v. Rheem Mfg. Co.}, 319 F.2d 124, 129 (2d Cir. 1963); \textit{L.D. Reader Contractors v. Higgins Indus., Inc.}, 265 F.2d 768, 773 n.10 (9th Cir. 1959); \textit{accord}, \textit{2 Moore's Federal Practice }\S 4.25[5] at 4-266 (2d ed. 1978).

\textsuperscript{54} See \textit{note 35 supra.}


\textsuperscript{57} \textit{116 N.H. 281, 358 A.2d 397 (1976).}
shire Supreme Court analyzed the reasonableness of a Seider-type action and held that, since the state's only connection with the claim was the residence of the plaintiff, asserting jurisdiction would be inconsistent with "'principles of fair play and substantial justice.'" Implicitly rejecting a direct action analysis, the court concluded that, absent special circumstances, a uniform test should be employed to review the constitutionality of all assertions of jurisdiction.

It appears that several procedures peculiar to quasi in rem jurisdiction will have to be reevaluated as a result of Shaffer. For example, ex parte attachments utilized to obtain quasi in rem jurisdiction may no longer be viable, as pre-attachment notice and a hearing regarding the propriety of the attachment would appear

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8 Id. at 283, 358 A.2d at 399 (quoting Leeper v. Leeper, 114 N.H. 294, 296, 319 A.2d 626, 628 (1974)). Earlier, in Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973), the New Hampshire Supreme Court had adopted the Seider procedure. Since the Forbes defendant was a New York resident, one federal court held that the New Hampshire procedure was retaliatory in nature and applicable only when the defendant was a resident of a state which utilized the Seider procedure. Robitaille v. Oriuch, 382 F. Supp. 977, 978 (D.N.H. 1974). This view was later rejected in Rocca v. Kenny, 381 A.2d 330, 331 (1977).

9 116 N.H. at 283, 358 A.2d at 399. In Camire, the accident occurred in Connecticut and the defendant was a Missouri resident, id. at 284, 358 A.2d at 398, who had "in no way invoked New Hampshire jurisdiction by entering [the] State." Id. at 285, 358 A.2d at 399. Noting that quasi in rem jurisdiction is restricted by the same "'general principles governing jurisdiction over persons,'" the court held that assertion of jurisdiction over the defendant would be improper. Id. (quoting Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957)).


11 In Fuentes v. Shevin, 407 U.S. 67, 90, 91 n.23 (1972), the Supreme Court recognized that ex parte attachments deprive people of their property without notice and an opportunity to be heard and thus are constitutionally deficient. Id. at 80-81. It was recognized, however, that there were "'extraordinary situations' that justif[ed] postponing notice and opportunity for a hearing." Id. at 90. One exception noted by the Court is when the attachment serves as a predicate for jurisdiction. Id. at 91 n.23.

In Shaffer it was noted that the Delaware court's opinion was primarily concerned with whether it was necessary to give the defendants notice and the opportunity for a hearing prior to the attachment of their property. 433 U.S. at 194. Relying on the Supreme Court's opinion in Ownbey v. Morgan, 256 U.S. 94 (1921), the Delaware court concluded that such a procedure was not required. Greyhound Corp. v. Heitner, 361 A.2d 225, 235 (Del. 1976), rev'd sub nom. Shaffer v. Heitner, 433 U.S. 186 (1977). Indicating that Ownbey may not be "consistent with more recent decisions interpreting the Due Process Clause," 433 U.S. at 194 n.10, the Shaffer Court intimated that jurisdictional attachments were not "extraordinary situations" under the Fuentes standard. Id. The Supreme Court's language, coupled with the decisions of other courts that require notice and a hearing prior to jurisdictional attachment,
necessary to ensure fairness. Moreover, since all assertions of jurisdiction must be fair, in most situations there will no longer be a need for a limited appearance. Similarly, the notion that collateral estoppel should not attach to a quasi in rem judgment will have to be reconsidered.

It is suggested that a logical development in state court jurisdiction would be for those states with restrictive long arm statutes to amend them in order to encompass all assertions of jurisdiction permitted by due process. Until this occurs, quasi in rem jurisdiction will have utility as an alternative means to acquire jurisdiction over persons who have sufficient contacts with the forum state to satisfy the minimum contacts test.

John F. Finston

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A limited appearance allows the defendant to defend on the merits without subjecting himself to personal liability. See, e.g., Miller Bros. Co. v. State, 210 Md. 635, 95 A.2d 286 (1953), rev'd on other grounds sub nom. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916). See generally Carrington, Collateral Estoppel and Foreign Judgments, 24 OHIO ST. L. J. 381 (1963); Curie, Attachment and Garnishment in Federal Courts, 69 MICH. L. REV. 337 (1961); Developments in the Law—Res Judicata, 65 HARV. L. REV. 818, 833-35 (1952). This procedure was developed to protect the interests of a defendant who would otherwise be put in the position of having to consent to personal jurisdiction in order to defend his interest in attached property or refuse to defend and have a default judgment entered against him. The opportunity for a limited appearance, however, is not constitutionally required in quasi in rem actions. See, e.g., United States Indus., Inc. v. Gregg, 58 F.R.D. 469, 478-81 (D. Del. 1973), rev'd on other grounds, 540 F.2d 142 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977); Greyhound Corp. v. Heitner, 361 A.2d 225, 236 (Del. 1976), rev'd on other grounds sub nom. Shaffer v. Heitner, 433 U.S. 186 (1977). Since Shaffer requires that assertions of jurisdiction be fair and reasonable, the need to protect the defendant has diminished and the major justification for a limited appearance appears to have been weakened. See RESTATEMENT (SECOND) OF JUDGMENTS § 11, Comment g (Tent. Draft No. 5, 1978); Leathers, supra note 5, at 25; Pre-Judgment Attachment, supra note 5, at 337-40.

At the present time, collateral estoppel effect is not given to quasi in rem actions for several reasons. First, the defendant usually is required to defend in a forum where an in personam judgment would violate due process. See RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(e)(iii), Comment j at 182 (Tent. Draft No. 1, 1973). In addition, it is argued that if collateral estoppel effect were given to a quasi in rem judgment, the utility of a limited appearance would be abrogated. See Carrington, supra note 62, at 394.

See note 44 supra. Some states do have broad long-arm statutes which allow their courts to exercise jurisdiction to the full extent permitted by due process. See, e.g., ALA. R. CIV. P. 4.2(a)(1); ALASKA STAT. § 09.05.015 (1973); CAL. CIV. PROC. CODE § 410.10 (West 1973); R.I. GEN. LAWS § 9-5-33 (1969); VA. CODE § 8.01-330 (1977).

See note 41 supra.