and perhaps unresponsive,[80] to the public which they are to serve.[81]

VI. CONCLUSION

A court can no more dictate what a privately owned newspaper can print than it can dictate what it cannot print.[82] No right of access exists for an advertiser who desires to have a paid advertisement placed in a newspaper. While the courts have been somewhat more willing to provide a right of access to the broadcast media, this right has been subject to erosion.[83]

Furthermore, a newspaper's obligation to provide a means for the dissemination of public information is not sufficient to elevate it to the status of a quasi-public institution. Finally, newspapers have received the benefit of exceptions to antitrust laws which have allowed them to establish a monopoly position, making it difficult for an advertiser whose ad has been rejected to seek judicial relief. The court decisions have failed to eliminate the ironic inconsistency in our constitutional law that allows newspapers actually to restrict the dissemination of ideas under the aegis of freedom of the press.

DONALD W. LAYDEN, JR.

CIVIL PROCEDURE—Jurisdiction—State May Not Assert Quasi In Rem Jurisdiction Over An Insurance Company's Contractual Obligations to Defend and Indemnify Its Insured. *Rush v. Savchuk,* 444 U.S. 320

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434 U.S.. 965 (1977).

80. B. BAGDIKIAN, THE INFORMATION MACHINES 127 (1971). The author notes:

> Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affair [sic] does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues.

81. It is questionable given the newspaper's commitment to its status as a private corporation whether it is responsive to the public in general or only that public with adequate resources to obtain access. *See* Barnet & Muller, *Global Reach* 230 (1974).

82. 92 Wis. 2d at 713, 285 N.W.2d at 894.

83. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

(1980). The United States Supreme Court, in *Rush v. Savchuk*,[1] recently laid to rest one of the last jurisdictional remnants of *Pennoyer v. Neff*[2] by holding that a state could not assert quasi in rem jurisdiction over an insurance company's contractual obligations to defend and indemnify its insured. This ingenious method for obtaining jurisdiction was first employed in the New York case of *Seider v. Roth*[3] and was found useful in those cases where personal jurisdiction could not be obtained over the insured. In *Rush*, the procedure was held to be unconstitutional because it violated the due process, minimum contacts test created in *International Shoe Co. v. Washington*[4] and extended in *Shaffer v. Heitner*[5] to in rem and quasi in rem jurisdiction. The *Rush* decision, however, not only ended the indirect exercise of jurisdiction permitted in *Seider*, it also called into question the analysis used to determine the constitutionality of direct action statutes. Before *Rush* and its potential impact on direct action law can be understood, the historical development of this procedure must be reviewed.

I. HISTORICAL BACKGROUND

A. *Jurisdiction From* Pennoyer *to* International Shoe

In the century-old case of *Pennoyer v. Neff*, the United States Supreme Court limited state courts' jurisdiction to those persons or properties which were physically located within the territorial boundaries of the state.[6] The Court also distinguished between the assertion of jurisdiction over a person and jurisdiction over property.[7] Jurisdiction over a person,

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1. 444 U.S. 320 (1980).
2. 95 U.S. 714 (1878).
3. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
4. 326 U.S. 310 (1945).
5. 433 U.S. 186 (1977).
6. 95 U.S. at 715. This decision was based on:
two well established principles of public law respecting the jurisdiction of an independent State over persons and property . . . . One of these principles of public law is, that every State possesses the exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

Id. at 722.

7. Shaffer v. Heitner, 433 U.S. at 196-202. *See generally* Hazard, *A General The-*

labeled "in personam" jurisdiction, imposed personal liability upon a defendant for the full amount of any judgment, but was sometimes difficult to obtain because a defendant could easily avoid service of process by simply leaving, or never entering, the forum state.[8] Jurisdiction over property, denominated "in rem" or "quasi in rem" jurisdiction,[9] was usually easier to obtain because property was more difficult to move. In rem jurisdiction, however, imposed liability only to the extent of the value of the property interest found in the forum state.[10]

Shortly after the formulation of these rigid rules, the Supreme Court began a long process of expanding the narrow scope of the *Pennoyer* decision. The Court slowly recognized that the nation's entrance into the modern, highly mobile twentieth century required more flexible jurisdictional standards.[11] At first, the Court faithfully followed *Pennoyer* and chose to remedy any inadequacies through the creation of legal fictions.[12] For example, a corporation doing business in a state was deemed to be "present" in that state in order to subject it to jurisdiction under *Pennoyer's* territorial limitations.[13] Similarly, in *Harris v. Balk*,[14] the Court assigned a situs to intangible property so that a state could determine if

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ory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241.

8. 433 U.S. at 199.

9. A proceeding in rem determines the rights of all persons in the property. It is an action against the property itself. A quasi in rem proceeding deals with the state, ownership, or liability of particular persons as these relate to the property. A judgment affects not only title to the property but also the rights in it possessed by particular individuals. *Seider* would seem to be a quasi in rem proceeding, but courts often interchange these two terms. *See* 1 AM. JUR. 2d *Actions* §§ 40-41 (1963).

10. 433 U.S. at 199.

11. *See generally* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

12. Shaffer v. Heitner, 433 U.S. at 202-03.

13. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). Also, the advent of automobiles and the expansion of national mobility created a special problem which was handled by allowing the states to require every out-of-state motorist to appoint a designated state official as his agent to accept legal process. By using a state's roads, an out-of-state motorist "consented" to this requirement and *Pennoyer's* in-state service requirement was satisfied. Hess v. Pawloski, 274 U.S. 352 (1927).

14. 198 U.S. 215 (1905).

the property was located within its territorial limits and was thus subject to its jurisdiction.[15] The Court in *Harris* held that the situs of a debt accompanied the debtor, and the debt could therefore be garnished and subjected to a forum's jurisdiction wherever the debtor could be found.[16]

Finally, however, in *International Shoe Co. v. Washington,*[17] the Court rejected these fictions as they had been applied to in personam jurisdiction and formulated the following standard for determining jurisdiction:

> Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[18]

The method for determining whether sufficient minimum contacts existed was not to involve a mechanical test; rather, the nature and quality of the defendant's acts were to be viewed in relation to the forum's interests in the administration of its laws.[19] Therefore, *Pennoyer's* emphasis on the mutually exclusive sovereignty of each state over its own territory gave way to *International Shoe's* emphasis on "the relationship among the defendant, the forum, and the litigation."[20] The new standard announced in *International Shoe,* however, applied only to in personam jurisdiction. Thus, the *Pennoyer* decision and the legal fictions resulting therefrom remained and continued to grow in the areas of in rem and quasi in rem jurisdiction.[21]

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15. *Id.* at 225.

16. In *Harris,* one Epstein, a resident of Maryland, attached a $180 debt owed by Harris to Balk when Harris, a resident of North Carolina, happened to enter Maryland to conduct business. Epstein asserted that Balk owed him $300 and thus caused a writ of attachment to be personally served on Harris claiming the $180 owed to Balk. Judgment was later entered in Epstein's favor and Harris paid the $180 debt. At the same time, however, Balk commenced an action against Harris in North Carolina to recover the $180. In response, Harris pleaded the Maryland judgment as a bar to recovery. The Supreme Court concluded that the obligation of the debtor accompanies him wherever he goes so the attachment of the $180 debt and the judgment by the Maryland court were valid and entitled to full faith and credit.

17. 326 U.S. 310 (1945).

18. *Id.* at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

19. *Id.* at 319.

20. 433 U.S. at 204.

21. *See generally* Zammit, *Quasi in Rem Jurisdiction: Outmoded and Unconsti-*

B. *The Legacy of* Seider v. Roth

One of the most ingenious legal fictions to arise out of the efforts to deal with the inadequacies of *Pennoyer* appeared in the New York case of *Seider v. Roth.*[22] In *Seider,* the plaintiffs, residents of New York, were injured in an automobile accident in Vermont, allegedly caused by the negligence of the defendant, a Canadian resident.[23] Unable to obtain personal jurisdiction over the defendant, the plaintiff commenced suit in New York by attaching the contractual obligations of the defendant's automobile insurer to defend and indemnify its insured.[24] Although the automobile insurance carrier was doing business in New York, the policy had been issued in Canada where the defendant resided.[25]

The New York court found that the obligations embodied in the insurance policy could be considered a "debt."[26] Further, because the situs of a debt accompanies the debtor under the rule announced in *Harris v. Balk,*[27] the debt was subject to garnishment wherever the debtor could be found.[28] Consequently, insofar as the defendant's insurance carrier was doing business and was therefore present in New York, the situs of the debt was in New York, and the New York courts could properly exercise jurisdiction over the debt *res* without offending due process.[29]

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tutional?, 49 ST. JOHN'S L. REV. 668 (1975).

22. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

23. *Id.* at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100. Roth, the other defendant, was a driver of a third car involved in the accident.

24. *Id.*

25. *Id.*

26. *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The court based this decision on Matter of Riggle's Estate, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962). According to the dissent, 17 N.Y.2d at 116, 216 N.E.2d at 315-16, 269 N.Y.S.2d at 103-04, *Riggle* does not stand for the proposition for which it is cited. *Riggle* involved an accident similar to *Seider's,* but the defendant had been personally served in New York and was thus subjected to in personam jurisdiction. The obligation to defend had accrued and the insurance company was actually defending the case when the defendant died. Due to the death, the action could not be continued in personam, so the court determined that the obligations contained in the insurance contract constituted a debt, thus conferring quasi in rem jurisdiction to the New York court.

27. 198 U.S. 215, 227 (1905).

28. 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

29. *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The court did not deal with the problem that under this analysis the situs of the debt *res* might be found in every

A year later in *Simpson v. Loehman*,[30] the New York court, faced with a due process challenge to an assertion of jurisdiction based upon the garnishment of an insurer's obligation,[31] responded by simply reiterating the *Seider* rationale and by citing *Harris v. Balk*.[32] The court also helped to solidify the *Seider* case by noting what it considered to be a trend toward the relaxation of jurisdictional requirements and by explaining the policies underlying such broad exercises of jurisdiction:

> 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 the 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 on 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.[33]

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state where the insurance company was doing business. Also, the debt might be found in several states at once.

30. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

31. In *Simpson*, there were three constitutional contentions made: (1) that the attachment offends due process; (2) that it imposes an undue burden on interstate commerce in the field of insurance; and (3) that it impairs the obligations of the insurance contract. The last two contentions were summarily dismissed as having no merit and were treated in a footnote. 21 N.Y.2d at 309 n.2, 234 N.E.2d at 670 n.2, 287 N.Y.S.2d at 635 n.2.

32. [W]e perceive no denial of due process since the presence of that debt in this State (*see, e.g.*, Harris v. Balk, 198 U.S. 215 supra)—contingent or inchoate though it may be—represents sufficient of a property right 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.

21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (parallel citations omitted).

33. *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637 (citations omitted). One of the cases cited for support, along with *International Shoe*, *see* notes 17-20 and accompanying text *supra*, was McGee v. International Life Ins. Co., 355 U.S. 220 (1957). *McGee* involved a situation in which personal jurisdiction over a foreign in-

Thus, in the name of realism, New York adopted what became known as the *Seider* doctrine.

The *Seider* case was strongly criticized and repeatedly challenged in the courts of New York. As a result, two major lines of argument developed. The first focused upon *Seider's* reliance on *Harris v. Balk* and the characterization of the insurance policy obligations as a debt. The second area of criticism centered around the case of *Watson v. Employers Liability Assurance Corp.*,[34] and the constitutionality of creating a state direct action statute to cover *Seider*-type situations.

The first line of argument, originally articulated by Judge

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surance company was based upon an isolated insurance contract delivered to the plaintiff in California. *McGee* is generally considered one of the Supreme Court's most liberal applications of *International Shoe*'s "minimum contacts" test. Note, however, that the *Simpson* court did not cite Hanson v. Denckla, 357 U.S. 235 (1958), decided the same year as *McGee*. In *Hanson*, a Florida court asserted jurisdiction over a trustee, located in Delaware, under a trust agreement executed in Delaware by a Pennsylvania resident who later moved her residence to Florida. *Id.* at 238-39. Although most of the beneficiaries and the executor resided in Florida, the Delaware courts refused to uphold the Florida court's judgment. The Supreme Court in *Hanson* upheld the Delaware court and in response to *McGee*'s broad interpretation of due process, the Court said:

> In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe* . . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of jurisdiction over him.

Id. at 250-51. In addition, the Court in *Hanson* specifically discussed in rem jurisdiction and pointed out that, while tangible property posed no problem in applying *Pennoyer*'s rule that property had to be within the territorial jurisdiction of the forum state, the situs of intangibles posed quite a different problem. *Id.* at 246-47.

Hanson was subsequently deemed a freak by most lower courts and limited to its facts. For example, Professor Foster, in his Revision Notes to Wisconsin's long-arm statute, § 801.05, stated that *Hanson*'s language was "probably too sweeping". Foster, *Long Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9, 33. *See* Zerbel v. H.L. Federman & Co., 48 Wis. 2d 54, 61-62, 179 N.W.2d 872, 876 (1970). *See also* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts; From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958); Scott, Hanson v. Denckla, 72 HARV. L. REV. 695 (1959).

34. 348 U.S. 66 (1954).

Burke in his *Seider* dissent[35] and reiterated in his dissenting opinion in *Simpson v. Loehmann*,[36] strongly attacked the majority's characterization of the policy obligations as a "debt." The contractual promise to defend was contingent upon a suit being commenced while the promise to indemnify was contingent upon an award of damages.[37] Thus, these "contingent" promises did not fall within New York's statutory definition of an attachable debt,[38] nor did they constitute an "ordinary" debt, such as that present in the *Harris* case.[39]

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35. Judge Burke also pointed out the circularity of the majority's logic. If the accrual of the obligations to defend and indemnify is contingent upon the valid commencement of suit, then the jurisdiction needed to validly commence the suit cannot be based upon the insurance policy obligations which do not accrue until after valid commencement. 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103.

36. 21 N.Y.2d at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 642. Judge Burke was joined by Judge Scileppi. Also, Judge Breitel, who was joined by Judge Bergan, noted in a separate concurring opinion that only the principles of stare decisis and the need for institutional stability influenced his decision to follow *Seider*. He went on to agree with the dissent and to attack the theoretical unsoundness of the case. *Id.* at 314-16, 234 N.E.2d at 674-75, 287 N.Y.S.2d at 240-42.

37. 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103. The policy promised to defend only if a suit was commenced and to indemnify only if damages were awarded against the insured. However, the court did not specify which obligation constituted the garnished *res*. It would seem, however, that the duty to defend would provide no recoverable damages and the duty to indemnify would not arise until after the duty to defend had been completely exercised and an unfavorable court decision entered against Lemiux. *See* Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

38. 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103. N.Y. Civ. Prac. Law § 5201 Subd. (a) defines an attachable debt as one which "is past due or which is yet to become due, certainly or upon demand of the judgment debtor." The dissent also quoted from Herrmann & Grace v. City of New York, 130 App. Div. 531, 535, 114 N.Y.S. 1107, 1110 (1909), *aff'd* 199 N.Y. 600, 93 N.E. 376, 123 N.Y.S. 1120 (1910), "It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future and not dependable upon contingency." For further discussion of New York law prior to *Seider*, *see* Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 553 (1967).

39. 21 N.Y.2d at 320, 234 N.E.2d at 677, 287 N.Y.S.2d at 645. In *Harris*, the Court said, "We speak of ordinary debts, such as the one in this case." 198 U.S. at 223.

In his dissent in *Simpson*, Judge Burke also foresaw the new approach to in rem jurisdiction which the Supreme Court would later take in Shaffer v. Heitner, 433 U.S. 186 (1977), and in *Rush*. Judge Burke noted that due process may bar assigning a situs to intangibles as had been done under *Harris* and that Hanson v. Denckla, 357 U.S. 235 (1958), may have even undercut *Harris* altogether. 21 N.Y.2d at 320, 234 N.E.2d at 678, 287 N.Y.S.2d at 645. (For a further discussion of *Hanson*, *see* note 33 *supra*).

Judge Burke suggested that the minimum contacts test created in International Shoe Co. v. Washington, 326 U.S. 310 (1945), be applied not only to in personam

This same issue was considered a short time later in *Podolsky v. Devinney*.[40] There, the federal district court held the *Seider* doctrine to be unconstitutional, distinguishing the "ordinary" debt found in *Harris* from the complex insurance contract obligations reviewed in *Seider*.[41] Most importantly, however, the court noted that the debt in *Harris* was of a fixed amount, while the amount of "debt" in *Seider* could not be determined until a judgment had been rendered against the insured.[42] This fact created a dilemma for an insured. He could not defend his property without personally appearing in the action. Yet, if he were to appear, he would subject himself to the court's jurisdiction and to the possibility of a judgment in excess of his insurance policy limits. Consequently, in a negligence action where the damages might exceed the policy limits, no knowledgeable insured would subject himself to personal jurisdiction.[43] The insurer, in turn, could not appear and litigate its interests in the negligence action since it was not a party defendant.[44] Instead, it would be forced to allow a default judgment to be entered against its insured, and thereafter would be subject to a suit by the plaintiff for satisfaction of the judgment to the extent of the policy limits. By this time, however, the issues concerning liability and damages would already have been settled by default and could not be

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jurisdiction but also to in rem jurisdiction.

> The assigning of situs to intangibles is, as we all know, but a legal fiction and while justice or convenience may on occasion require such an assignment of situs to intangibles, considerations of the purpose for which such an assignment of situs is necessary and fairness to those claiming an interest in the subject property ought to govern the selection process.

21 N.Y.2d at 321, 234 N.E.2d at 676, 287 N.Y.S.2d at 646 (footnotes omitted).

40. 281 F. Supp. 448 (S.D.N.Y. 1968). *See* Comment, Podolsky v. Devinney *and the Garnishment of Intangibles: A Chip Off the Old* Balk, 54 VA. L. REV. 1426 (1968).

41. 281 F. Supp. at 494.

42. *Id.* at 497. *See* Minichiello v. Rosenberg, 410 F.2d 106, *aff'd on rehearing*, 410 F.2d 117, 121 (1969) (Anderson, J., dissenting).

43. 281 F. Supp. at 498. It would seem to be the insurer's obligation to inform the insured of this possibility. Also, any unauthorized appearance by the insurer on the insured's behalf would be null. *Id.* at 499. *See generally* Note, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966).

44. This problem did not exist in *Rush* because of MINN. STAT. § 571.51, which allows a plaintiff to file a supplemental complaint making the garnishee (insurance company) a party to the action in the event the garnishee denies liability.

relitigated.[45]

Scarcely more than a month after the *Podolsky* decision was handed down, the New York court, in a per curiam opinion, responded to the seemingly deadly blow struck by *Podolsky*.[46] In denying a motion for reargument in the *Simpson* case, the court noted that neither *Seider* nor *Simpson* had purported to expand the basis for in personam jurisdiction; any recovery was necessarily limited to the value of the asset attached, namely the liability insurance policy. This meant that "there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits."[47]

This statement, however, did not lay this line of argument to rest. In *Minichiello v. Rosenberg*,[48] the appellant raised the possibility of a New York judgment collaterally estopping a defendant from relitigating these issues in a suit for any unpaid balance *in another state* where personal jurisdiction had been acquired.[49] The court handled this new twist by assuring the appellant that it did not think another state would permit such a thing and by comforting the appellant with his right to appeal to the United States Supreme Court.[50]

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45. 281 F. Supp. at 499. The only possible defense open to the insurer is the insured's failure to cooperate. However, insofar as the insurer was obligated to explain to the insured the possible consequences of defending the suit, it is unlikely that a court would then allow the insurer to claim noncooperation when the insured made the most intelligent decision given the insurer's advice. *But see* Barker v. Smith, 290 F. Supp. 709, 714 (S.D.N.Y. 1968); *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 658 (1967).

46. Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S. 2d 633, *motion for rehearing denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

47. *Id.* at 990-91, 238 N.E.2d at 320, 290 N.Y.S.2d at 915-16. Professor Siegel has termed this "a miraculous per curiam opinion." N.Y. Civ. Prac. Law § 5201, Commentary at 15 (McKinney Supp. 1968), *cited in* Minichiello v. Rosenberg, 410 F.2d 106, 111 (2d Cir. 1968). Such a finding cannot be supported by New York law.

48. 410 F.2d 106 (2d Cir. 1968).

49. *Id.* at 111-12.

50. *Id.* at 112. The court also mentioned other problems which might arise. One is created by the New York law which requires parties to appear in New York for the taking of their depositions. *Id.* A second problem is created by placing the defendant in a position where he can assert a counterclaim only at the expense of subjecting himself to liability above the policy limits. *Id.* at 112-13. A third problem, raised by Judge Anderson, dissenting from the *en banc* rehearing decision, is that a *Seider* debt may exist in several states at once because a corporation may be doing business in

The second line of argument grew out of Judge Keating's separate concurring opinion in *Simpson.*[51] Judge Keating relied on the United States Supreme Court case of *Watson v. Employer's Liability Assurance Corporation*[52] to support the *Seider* doctrine. In *Watson,* the Court reviewed the constitutionality of applying Louisiana's direct action statute[53] to an insurance contract which contained a "no action" clause[54] expressly forbidding such direct actions.[55] The defendant argued that, although the accident occurred in Louisiana, the contract had been executed outside of Louisiana and therefore Louisiana could not disregard the "no action" clause without violating due process.[56] The Court found, however, that such a statute did not violate due process because Louisiana had a legitimate interest in the people who were injured in Louisiana and in the insurance covering such people.[57] The Court stated:

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many states at the same time. In *Harris,* the debtor/garnishee could only be present in one state at a time. *Id.* at 121. *Cf.* Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1979) (insurer may be subjected to double liability in paying for the defense and in paying plaintiff's damages). *But see* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.) *cert. denied,* 439 U.S. 1034 (1978). Justice Powell, dissenting, noted the possibility of a second trial without the benefit of lawyers supplied by the insurance company and without old witnesses or with new evidence.

51. 21 N.Y.2d at 312, 234 N.E.2d at 673, 287 N.Y.S.2d at 638.

52. 348 U.S. 66 (1954).

53. The applicable part of Louisiana's direct action statute reads as follows:

> The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the state of Louisiana or not and whether or not such policy contains a provision for permitting such direct action, provided the accident or injury occurred within the State of Louisiana . . . . It is the intent of this section that any action brought hereunder shall be subject to all the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and the conditions of such policy or contract are not in violation of the laws of this state.

Id. at 68, n.4 quoting LA. REV. STAT. ANN. § 22:655 (West 1950).

54. "No action" clauses prohibit direct actions against the insurer until after a final determination of the insured's liability.

55. 348 U.S. at 67-69.

56. *Id.* at 70. It was conceded that Louisiana had the right to ignore "no action" clauses made within its own state.

57. *Id.* at 72.

> Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interests in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases . . . . What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process.[58]

In Judge Keating's view, the *Watson* decision turned on Louisiana's legitimate governmental interest in protecting the rights of injured persons rather than on the mere fact that Louisiana was the site of the accident.[59] A similar interest, reasoned Judge Keating, might exist in a forum where the accident did not occur, but where the plaintiff was a resident and the defendant's insurer—the truly interested party—was doing business. Thus, Judge Keating viewed *Seider*-type actions as judicially created direct actions against insurers.[60]

In response to this argument, Judge Burke noted that *Seider* required only that the insurer be present in the forum. This requirement, by itself, was insufficient to establish the necessary state interest under *Watson*.[61] Judge Burke observed that the language used in *Watson* clearly stressed the fact that the accident occurred within the forum.[62] This fact rendered the exercise of direct action jurisdiction permissible.

In *Minichiello*, the court again considered the effects of *Watson* upon the *Seider* doctrine.[63] The court found that al-

58. *Id.* at 72-73.
59. 21 N.Y.2d at 313, 234 N.E.2d at 673, 287 N.Y.S.2d at 639.
60. *Id.*
61. *Id.* at 318-19, 234 N.E.2d at 676, 287 N.Y.S.2d at 643-44.
62. *Id.* at 319, 234 N.E.2d at 677, 287 N.Y.S.2d at 644.
63. 410 F.2d at 109. *See generally* Minichiello v. Rosenberg: *Garnishment of*

though Louisiana's direct action statute applied only to accidents or injuries occurring in Louisiana,[64] the same considerations advanced to sustain the direct action statute in *Watson* would apply with equal force to a statute permitting direct actions against insurers by residents of a forum irrespective of where the accident occurred.[65] In other words, a state has a legitimate interest in protecting not only the rights of persons injured in the state, but also the rights of its residents wherever they are injured.[66]

The dissenting opinion in *Minichiello* criticized the majority for reading *Watson* as an exhaustive treatment of all relevant due process considerations, rather than as a limited list of pertinent Louisiana interests.[67] It also noted that every

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Intangibles—In Search of a Rationale, 64 NW. U.L. REV. 407 (1969).

64. 410 F.2d at 69. *See* note 53 *supra*.

65. *Id.* at 110. The majority broke *Watson* into three considerations and found:

> The first set of considerations marshalled by Mr. Justice Black in favor of its validity, . . . would relate with equal force to one on behalf of residents. He stressed that "persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives or the public for help." On the other hand, his next argument, that "Louisiana courts in most instances provide the most convenient forum for trial of these cases," by its very terms could not apply. While the place of plaintiff's residence may be a convenient forum for the trial of an action arising from an out-of-state accident in that not only he but much of the evidence of the damages may be there, it will rarely be "the most convenient" one since the other witnesses to the accident are elsewhere—probably far away. But the Justice's final consideration—the plaintiff's difficulty in bringing the defendant before the forum—applies with even greater force to the state of plaintiff's residence than to that of injury in light of the development of long-arm statutes that will generally allow the state of injury to obtain personal jurisdiction of the insured and so avoid the need for a direct action against the insurer.

Id. at 109-10.

66. *Id.* at 110. In support of its analysis, the court also noted the new realistic approach to determining jurisdiction which the *Simpson* majority had emphasized. *See* note 33 and accompanying text, *supra*. The *Minichiello* court said,

> While the burden on the insurer in trying a case in a state other than the locus of the accident is heavier, there has been, as we have recently 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. at 110, *quoting* Buckley v. New York Post Corp., 373 F.2d 175, 181 (2d Cir. 1967), *which in turn was quoting* Von Mehran & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128 (1966).

67. 410 F.2d at 114. The dissent chided the majority for believing that Louisiana

plaintiff was simply not entitled to a legal remedy in the forum most convenient to himself.[68] *Watson* and Louisiana's direct action statute were fair only because the nonresident defendant, by driving into Louisiana, voluntarily brought himself within the jurisdiction of Louisiana.[69]

These two independent lines of argument thus developed in response to *Seider*. However, a conflict between these two separate criticisms soon surfaced. In *Donawitz v. Danek*,[70] the New York court was asked to extend the *Seider* doctrine to situations involving nonresident plaintiffs.[71] Clearly, if the *Seider* doctrine was to continue to be characterized as a judicially created direct action, it could not be expanded to situations where the plaintiff was not a resident of the forum.[72] In this regard, the second line of argument required that either the accident or the plaintiff's residence be located in the forum in order to provide the forum with a legitimate interest to invoke its jurisdiction. Conversely, if the insurance policy obligations were to continue to be viewed as a garnishable debt, then *any* person, regardless of residency, ought to be permitted to garnish the debt.[73] Indeed, precluding nonresidents from using the same legal processes afforded residents could be viewed as violating the equal protection clause of the

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would have a similar interest in protecting its medical creditors and its public funds if the accident did not occur there. The dissent said, "this might be true if the plaintiff is hardy enough to reach Louisiana before requiring medical aid or public assistance; otherwise, the state where the accident occurred would be required to pick up the tab." *Id.* at 114. *Contra,* Holzager v. Valley Hospital, 428 F. Supp. 629 (S.D.N.Y. 1979).

68. 410 F.2d at 115.

69. *Id.*

70. 42 N.Y.2d 138, 366 N.E.2d 253, 297 N.Y.S.2d 592 (1977).

71. *Donowitz* involved a nonresident plaintiff suing both a resident defendant and a nonresident defendant for separate acts of medical malpractice. The original accident occurred in Pennsylvania and the nonresident doctor's acts occurred in New Jersey.

72. 42 N.Y.2d at 142, 366 N.E.2d at 256, 397 N.Y.S.2d at 595.

73. *Id.* at 143-44, 366 N.E.2d at 256-57, 397 N.Y.S.2d at 596. *Harris v. Balk* had supported such a rule.

> If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court therefore acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state.

198 U.S. at 222. *See also* 38 C.J.S. *Garnishment* § 20 (1943); 6 AM. JUR. 2d *Attachment and Garnishment* § 62 (1963).

fourteenth amendment[74] as well as the privileges and immunities clause of the Constitution.[75]

Despite this conflict, the court in *Donawitz* upheld *Seider* on the grounds of stare decisis and of legislative failure to change the *Seider* doctrine.[76] However, the court, with little or no explanation, refused to extend the doctrine to nonresidents.[77]

C. Shaffer v. Heitner

Shortly after *Donawitz* was decided, the United States Supreme Court decided *Shaffer v. Heitner*.[78] In *Shaffer* the Court extended the due process, minimum contacts test of *International Shoe* to in rem and quasi in rem jurisdiction.[79] In so doing, the Court held that in order to exercise in rem or quasi in rem jurisdiction over a thing, there must also exist a legitimate basis for exercising jurisdiction over the interests of persons in that thing.[80] The standard for determining whether such a legitimate basis exists is *International Shoe's* due process, minimum contacts standard.

The decision in *Shaffer* ended reliance upon *Pennoyer* and its single determinative emphasis upon the location of the

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74. 42 N.Y.2d at 142, 366 N.E.2d at 256, 397 N.Y.S.2d at 595.

75. The U.S. CONST. art. IV, § 2 reads as follows: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." *See Harris v. Balk* where the Court said:

> There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state.

198 U.S. at 223.

76. 42 N.Y.2d at 142, 366 N.E.2d at 256, 397 N.Y.S.2d at 595.

77. Federal courts had previously hinted at the unconstitutionality of extending *Seider* to nonresidents. Minichiello v. Rosenberg, 410 F.2d 106, *aff'd on rehearing*, 410 F.2d 117, 119 (1969) (Hayes, J., concurring); Farrell v. Piedmont Aviation, 411 F.2d 812 (2d Cir. 1969); Varady v. Margolis, 303 F. Supp. 23 (S.D.N.Y. 1968).

78. 433 U.S. 186 (1977). Heitner commenced a shareholder's derivative suit in Delaware against two corporations and their officers and directors. Heitner and all the natural person defendants were nonresidents of Delaware whose only contact with Delaware was the ownership of stock in the defendant Delaware corporations. To obtain jurisdiction in Delaware over these individual defendants, Heitner sequestered their stock, which had a Delaware situs per statute, and thus asserted quasi in rem jurisdiction. *Id.* at 189-95.

79. *Id.* at 207-12.

80. *Id.* at 207.

property.[81] The presence of property in the forum instead became just one contact to consider in determining jurisdiction. For a state to exercise jurisdiction over property, it was now necessary to review the contacts among the defendant, the forum, and the litigation, and not just the contacts between the forum and the property.[82]

The practical effect of the *Shaffer* decision was negligible because in most in rem actions the property is sufficiently related to the litigation to satisfy the due process, minimum contacts test. However, the Court noted, "[f]or the type of quasi in rem action typified by *Harris v. Balk* . . . accepting the proposed analysis would result in a significant change."[83] In *Harris* the property was totally unrelated to the plaintiff's claim and therefore the mere presence of the property in the forum would not support the exercise of jurisdiction.[84]

D. Confusion After Shaffer

Prior to *Shaffer,* the vast majority of states rejected the *Seider* doctrine.[85] Only one other state, Minnesota, fully

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81. *See* notes 6-16 and accompanying text, *supra.* One of the original reasons for treating the presence of property as a sufficient basis for jurisdiction was to prevent wrongdoers from avoiding payment of their obligations by simply leaving the state. "This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the state because of an effort to avoid the owner's obligations." *Id.* at 210. Also, the assumption that the debtor can avoid payment by moving to another state is no longer valid in light of *International Shoe*'s broadening of personal jurisdiction. *Id.*

82. 433 U.S. at 208-09.

83. *Id.* at 208.

84. *Id.*

85. Tessier v. State Farm Mut. Ins. Co., 458 F.2d 1299 (1st Cir. 1972); Kirchman v. Mikula, 443 F.2d 816 (5th Cir. 1971) *followed in* Junt v. Fireman's Fund Ins. Co., 345 So. 2d 1235 (La. App. 1977); Robinson v. O.F. Shearer & Sons, Inc., 429 F.2d 83 (3d Cir. 1970) *followed in* Jardine v. Donnelly, 413 Pa. 474, 198 A.2d 513 (1964); Barber-Greene Co. v. Walco Nat. Corp., 428 F. Supp. 567 (D. Del. 1977); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Javorek v. Superior Court of Monterey County, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976)(overruling an earlier decision supporting *Seider*); Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973); State *ex rel.* Government Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo. App. 1970); 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); De Rentiis v. Lewis, 106 R.I. 240, 258 A.2d 464 (1969); Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1968); Housely v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967); Werner v. Werner, 84 Wash. 2d 360, 526 P.2d 370 (1975).

adopted *Seider*-type actions,[86] while New Hampshire partially adopted it, limiting its application to those situations where the defendant also came from a state adopting *Seider*.[87] Also, most commentators had severely criticized *Seider*,[88] while only a few had lent it their support.[89] Therefore, in view of this abundance of criticism and in light of *Shaffer*, it might have seemed that *Seider* was finally dead. New Hampshire quickly drew this conclusion and found *Seider* overruled by *Shaffer*.[90] However, in Minnesota, and especially in New York, *Shaffer* only created more confusion.

Shortly after *Shaffer* was decided, several New York courts held *Seider* to be overruled either on the ground that *Seider*-type actions simply could not meet the requirements of the due process, minimum contacts test,[91] or on the ground that *Shaffer*, in explicitly overruling *Harris*,[92] had implicitly

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86. Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973). *See also* Adkins v. Northfield Foundry & Machine Co., 393 F. Supp. 1079 (D. Minn. 1974), where an action was not found available to nonresident plaintiffs.

87. Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973). *See also* Robitaille v. Orciuch, 382 F. Supp. 977 (D.N.H. 1974) where the court refused to extend *Seider* to homeowner's insurance policies because an insurance company does not anticipate out-of-state accidents to arise under such policies. Here the defendant was also from a state not accepting the *Seider* doctrine. Ahern v. Hough, 116 N.H. 302, 358 A.2d 394 (1976) adopted a two-pronged test: (1) the exercise of jurisdiction must be reasonable from the standpoint of New Hampshire's interest in the litigation, and (2) it must be consistent with the principles of fair play and substantial justice. *Followed in* Camire v. Scieszka, 116 N.H. 281, 358 A.2d 397 (1976).

88. *See* Reese, *The Expanding Scope of Jurisdiction Over Non-residents—New York Goes Wild*, 35 INS. COUNSEL L.J. 118 (1968); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075 (1968); Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?* 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725.

89. *See* Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U.L. REV. 33 (1978); Note, *The Constitutionality of* Seider v. Roth *After* Shaffer v. Heitner, 78 COLUM. L. REV. 409 (1978). For a discussion of *Shaffer*'s effect on *Seider*, *see* Shaffer v. Heitner: *New Constitutional Question Concerning* Seider v. Roth, 6 HOFSTRA L. REV. 393 (1978); Bernstein, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?* 25 VILL. L. REV. 38 (1980).

90. Rocca v. Kenney, 117 N.H. 1057, 381 A.2d 330 (1977); Pono v. Brock, 408 A.2d 419 (N.H. 1979).

91. Kennedy v. Deroker, 91 Misc. 2d 648, 398 N.Y.S.2d 628 (1977); Attanasio v. Ferre, 93 Misc. 2d 661, 401 N.Y.S.2d 685 (1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 400 N.Y.S.2d 478 (1977).

92. *See* notes 83-84 and accompanying text, *supra*.

overruled *Seider*.[93] After these first few cases, however, New York changed course.[94]

In *O'Connor v. Lee-Hy Paving Corporation*, the Court of Appeals for the Second Circuit directly reviewed and refuted the arguments made by the lower New York courts which had declared *Seider* dead.[95] First, the court distinguished *Harris* on the ground that Balk, the garnishee in *Harris*, was only transitorily in the forum state whereas here the insurer was regularly doing business in New York.[96] Also, in *Harris* the $180 debt could have been used for any purpose, whereas here the only purpose for insurance was to protect the insured from liability. Hence, "judgment for the plaintiff would not deprive a defendant of anything substantial that would have been otherwise useful to him."[97] Second, the court read *Shaffer* to be a liberating opinion, not a restricting one: "The overriding teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions."[98] The court thus returned to the "realistic" approach adopted in *Simpson v. Loehmann*, which recognized that the insurer controlled the defense.[99] This approach, along with the new trend toward making defendants come to the plaintiff, provided a sufficient basis for

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93. Katz v. Umansky, 92 Misc. 2d 285, 399 N.Y.S.2d 412 (1977); Torres v. Towmotor Division of Caterpillar, Inc., 457 F. Supp. 460 (E.D.N.Y. 1977).

94. Two cases had been decided in favor of *Seider* despite *Shaffer*: Fish v. Bamby Bakers, Inc., 76 F.R.D. 511 (N.D.N.Y. 1977) (*Seider* still good law but the plaintiff must be a resident of New York when the accident occurred); Rodriguez v. Wolfe, 93 Misc. 2d 364, 401 N.Y.S.2d 442 (1978).

95. 579 F.2d 194 (2d Cir. 1978). *See generally* 52 TEMP. L.Q. 366 (1979); 28 DRAKE L. REV. 736 (1978-79); 12 AKRON L. REV. 331 (1978).

96. 579 F.2d at 198.

97. *Id.* at 199. This argument proves too much. The Court, in distinguishing the *Harris* debt, brings into question *Seider*'s holding that insurance policy obligations can be labelled a "debt." Such an argument is interesting in light of the fact that judges and commentators prior to *Shaffer* had attempted to overrule *Seider* on the ground that the "ordinary debt" discussed in *Harris* was distinguishable from that represented by *Seider*. *See* notes 39-41 and accompanying text, *supra*.

98. 579 F.2d at 200.

99. *Id.* *See* notes 31-33 and accompanying text, *supra*, for discussion of *Simpson*. *See also* Alford v. McGraw, 61 A.D.2d 504, 402 N.Y.S.2d 499 (1978), where the insurer's handling of the defense provided sufficient contacts under *Shaffer*. *See also* Lee-Hy Paving Corp. v. O'Connor, 439 U.S. 1034, *denying cert. to* 579 F.2d 194 (1978), where Justice Powell, dissenting, noted that any reference to an insured as a "nominal defendant" in the name of "reality" disregarded many of the true realities which bear upon such defendants even though they have insurance. *Id.* at 1037-38.

upholding *Seider*-type actions.[100]

Shortly after *O'Connor*, the New York Court of Appeals in *Baden v. Staples*[101] upheld *Seider* upon similar grounds: "The gist of the analysis is that the primary risks and burdens of defending a *Seider*-type action rest on the insurer, who does business in New York, and over whom even personal jurisdiction may, of course, be obtained."[102] Subsequently, the New York courts fell into line in support of *Seider*.[103]

II. *Rush v. Savchuk*

A. *Facts*

Rush v. Savchuk involved a typical *Seider* factual situation. In January of 1972, Savchuk, an Indiana resident, was injured in a single-car accident while riding as a passenger in a car driven by Rush, also an Indiana resident.[104] The accident occurred in Indiana.[105] The car was owned by Rush's father and insured by appellant, State Farm Mutual Automobile Insurance Company, under a policy issued in Indiana.[106] In June of 1973, Savchuk moved to Minnesota and on May 28, 1974, commenced suit against Rush in the state courts of Minnesota by serving a garnishee summons on State Farm.[107] This summons treated State Farm's contract of insurance as garnishable property, which, in turn, established quasi in rem jurisdiction in Minnesota pursuant to Minnesota Statute § 571.41.[108] In Indiana, Rush was given notice through service of

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100. 579 F.2d at 200-01. The court also noted that none of the earlier anticipated problems created by *Seider* had ever occurred. *Id.* at 202.

101. 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978).

102. *Id.* at 891, 383 N.E.2d at 111, 410 N.Y.S.2d at 809.

103. Sanders v. Wiltemp Corp., 465 F. Supp. 71 (S.D.N.Y. 1979); Holzsager v. Valley Hosp., 482 F. Supp. 629 (S.D.N.Y. 1979); Knapp v. Barron, 83 F.R.D. 75 (S.D.N.Y. 1979); Kalman v. Neuman, 71 A.D.2d 906, 420 N.Y.S.2d 287 (1979); Curran v. Essex Island Marina, Inc., 70 A.D.2d 857, 418 N.Y.S.2d 47 (1979); Manufacturers Hanover Trust Co. v. Farber, 99 Misc. 2d 1001, 417 N.Y.S.2d 406 (1979); D'Agostino v. Watt, 67 A.D.2d 762, 412 N.Y.S.2d 793 (1979); Erneta v. Princeton Hospital, 66 A.D.2d 669, 411 N.Y.S.2d 13 (1978).

104. Savchuk v. Rush, 309 Minn. 310, ___, 245 N.W.2d 624, 626 (1976) [hereinafter referred to as *Savchuk I*].

105. *Id.*

106. *Id.* Rush was an additional insured under his father's State Farm insurance policy.

107. *Id.*

108. The statute cited by the Minnesota Supreme Court, 309 Minn. 310, ___, 245 N.W.2d 624, 627 n.1 (1976) contained the 1976 Amendments. The 1974 MINN. STAT.

a copy of the summons, the complaint, and the garnishee summons.[109] The complaint alleged negligence and sought $125,000 in damages.[110]

In response, State Farm disclosed that nothing was due and owing to Rush.[111] Savchuk then moved pursuant to Minnesota Statute § 571.51 for permission to file a supplemental complaint naming State Farm as a party defendant.[112] Rush and State Farm responded by moving to dismiss for lack of jurisdiction over the defendant; Rush had no personal contacts with Minnesota that would support in personam jurisdiction and State Farm was an Illinois corporation that did business in all fifty states.[113] The trial court denied the motion to dismiss and granted the motion for leave to file a supplemental complaint.[114] Rush and State Farm appealed.

B. Savchuk I

In *Savchuk I,* the Minnesota Supreme Court was

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§ 571.41 read as follows:

Subd. 2. Garnishment shall be permitted before judgment in the following instances only:

(1) For the purpose of establishing quasi in rem jurisdiction

(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

(b) the defendant is a resident individual who has departed from the state, or cannot be found therein; or

(c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.

(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

109. *Id.* at ___, 245 N.W.2d at 626.

110. *Id.* Savchuk had been barred from commencing a similar suit in Indiana by the Indiana guest statute, IND. CODE §9-3-3-1. Also, this suit was filed after the two-year Indiana statute of limitations had run. 311 Minn. 480, ___ n.5, 272 N.W.2d 888, 891 n.5. Both of these Indiana laws presented conflict of laws questions including a question as to whether Indiana's contributory negligence law or Minnesota's comparative negligence law would apply. Neither the Minnesota Supreme Court nor the U.S. Supreme Court directly reviewed these issues. However, the Minnesota court hinted that these conflict of laws questions would not bar recovery. *Id.*

111. 309 Minn. 310, ___, 245 N.W.2d 624, 626 (1976). Disclosure was made pursuant to the existing MINN. STAT. § 571.49.

112. 309 Minn. at ___, 245 N.W.2d at 626.

113. *Id.* at ___, 245 N.W.2d at 626.

114. *Id.* at ___, 245 N.W.2d at 626-27.

presented with two issues.[115] The first issue was similar to the first line of argument developed in *Seider*.[116] State Farm argued that its obligations to defend and indemnify were contingent and therefore were not properly garnishable under Minnesota law.[117] Minnesota, like New York, dismissed this argument and stated that the Legislature's intent was "to specify a limited number of situations in which garnishment and quasi in rem jurisdiction would be available *before* judgment, regardless of whether the debt on which the garnishment was predicated was due absolutely."[118]

The second issue focused upon the requirements of due process: Assuming State Farm's policy obligations were garnishable under Minnesota law, did the Minnesota garnishment procedure conform to the constitutional requirements of due process?[119] To answer this question, the court applied a three-pronged test.

(1) Proper notice must be given to the defendant-insured,

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115. *Id.* at ___, 245 N.W.2d at 627.

116. *See* notes 35-39 and accompanying text, *supra*.

117. 309 Minn. at ___, 245 N.W.2d at 627. This argument was based upon a conflict between MINN. STAT. § 571.41(2) (note 108 *supra*), which outlines the situations in which garnishment is permitted, and MINN. STAT. § 571.43(1), which defines who may be garnished. MINN. STAT. § 571.43(1) reads as follows:

> No person or corporation shall be adjudged a garnishee by reason of:
>
> (1) Any money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency; . . . .

State Farm argued that its policy obligations were not "due absolutely" pursuant to the statute.

118. 309 Minn. at ___, 245 N.W.2d at 627. The court supported its conclusion with several reasons.

(1) Under § 571.41, the test was not whether the debt is due absolutely, but whether the garnishee "may be held to respond" for the claim. Hence, insofar as State Farm's *potential* liability was clearly established, § 571.41 applied. *Id.* at ___, 245 N.W.2d at 627.

(2) The court perceived an irreconcilable conflict between the statutory provisions. Therefore, because § 571.41 was more recent in origin and more specific in language, it was controlling over § 571.43. 309 Minn. at ___, 245 N.W.2d at 627. This rationale was based on MINN. STAT. § 645.26, which provides that, if a conflict exists between 2 statutes which cannot be resolved so as to give effect to both, then the most recent statute shall prevail. *Id.* at ___, 245 N.W.2d at 627.

(3) The court believed that § 571.41 gave effect to Minnesota's interest in providing a forum to its residents in its determination to extend its long-arm statute to the maximum limits consistent with due process. *Id.* at ___, 245 N.W.2d at 628.

See also Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

119. 309 Minn. at ___, 245 N.W.2d at 627.

> affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state.[120]

Here, notice had been properly given and the plaintiff was a resident at the commencement of the suit.[121] The second requirement, however, caused a problem because it conflicted with Rule 4.04(2) of the Minnesota Rules of Civil Procedure. Rule 4.04(2) was similar to New York Rule 320 insofar as it imposed personal jurisdiction over the defendant in the event he chose to defend his attached property.[122] However, the court simply held, as New York had in the rehearing of *Simpson v. Loehman*,[123] that Rule 4.04(2) would not apply to *Seider*-type cases.[124] Instead, recovery would be limited to the face amount of the policy regardless of whether the defendant chose to personally defend.[125]

In addition to this three-pronged test, the court noted that while the exercise of personal jurisdiction over defendant Rush would be improper, the exercise of quasi in rem jurisdiction was justified on the grounds that the insurer controls the defense, is present in the state, and is registered to do business and does business in the state.[126] Also, the state had a legitimate interest in providing a forum for its residents.[127] Finally, in response to the general criticism of *Seider*-type actions, the court concluded that modern convenient transportation made it easy for defendants to come long distances and

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120. *Id.* at ___, 245 N.W.2d at 628. *See also* Rintala v. Shoemaker, 262 F. Supp. 1044, 1054-56 (D. Minn. 1973).

121. The notice requirement (1) was established in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and adopted in Rintala v. Shoemaker, 362 F. Supp. 1044, 1054 (D. Minn. 1973). The residency requirement (3) was discussed and adopted in Rintala v. Shoemaker, 362 F. Supp. 1044, 1055-56 (D. Minn. 1973), which, in turn, adopted it from the per curiam opinion in the rehearing of Simpson v. Loehman, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

122. Rule 4.04 states: "When quasi in rem jurisdiction has been obtained, a party defending such action thereby submits personally to the jurisdiction of the court." Minn. Stat. Ann. Rule 4.04 (West).

123. 21 N.Y.2d 990, 990-91, 238 N.E.2d 319, 320, 290 N.Y.S.2d 914, 915-16 (1968).

124. 309 Minn. at ___, 245 N.W.2d at 628-29. *See also* Rintala v. Shoemaker, 362 F. Supp. at 1055.

125. 309 Minn. at ___, 245 N.W.2d at 629.

126. *Id.* at ___, 245 N.W.2d at 629.

127. *Id.*

that any hardship arising out of potential second suits was no more likely here than in other quasi in rem actions.[128]

Thus, *Savchuk I* presented no new arguments in favor of the *Seider* doctrine.[129] The court primarily reiterated the arguments set forth in *Rintala v. Shoemaker*[130] which, in introducing the *Seider* doctrine to Minnesota, had relied upon the arguments used by the New York courts.[131]

C. Savchuk II

Savchuk I was decided in September of 1976. Three days after its decision in *Shaffer*, the U.S. Supreme Court vacated and remanded *Savchuk I* in light of *Shaffer*'s new due process requirements.[132] Thus, in *Savchuk II*, the Minnesota Supreme Court was forced to leave the mechanical analysis it had employed in *Savchuk I*. It was asked to confront a more fundamental issue required under *Shaffer*: Did the defendant have certain minimum contacts with the forum such that the maintenance of a suit in Minnesota would not offend traditional notions of fair play and substantial justice? The Minnesota Court failed to address this question.[133]

In *Savchuk II*, the Minnesota Supreme Court briefly outlined the holding in *Shaffer*, noted the confusion it had caused in New York, and distinguished it from *Savchuk*.[134] The court found that the procedure employed to obtain quasi in rem jurisdiction in *Shaffer* could be used in any kind of suit, whereas the Minnesota garnishment procedure utilized

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128. *Id.* at ___, 245 N.W.2d at 630.

129. The dissent criticized the majority's adoption of a doctrine which had been severely criticized and overwhelmingly rejected by other states. *Id.* at ___, 245 N.W.2d at 631-32. In particular, the dissent pointed out that Savchuk was a resident of Indiana when the accident occurred and only subsequently became a Minnesota resident. To allow jurisdiction in such a situation, claimed the dissent, was clearly to permit forum shopping. *Id.* at ___, 245 N.W.2d at 633.

130. 362 F. Supp. 1044 (D. Minn. 1973).

131. *Savchuk I* was the first treatment by a state court in Minnesota of the *Seider* doctrine. The doctrine had arisen tangentially once before in Holman v. General Ins. Co. of America, 304 Minn. 312, 317 n.5, 231 N.W.2d 81, 84 n.5 (1975), but there, the court declined to review it.

132. Rush v. Savchuk, 433 U.S. 902 (1977).

133. Savchuk v. Rush, 311 Minn. 480, 272 N.W.2d 888 (Minn. 1978) [hereinafter referred to as *Savchuk II*].

134. *Id.* at ___, 272 N.W.2d at 889-91.

here could not.[135] Under Minnesota Statutes § 571.41, subdivision 2(2), the garnished insurance contract had to be related to the plaintiff's cause of action, and in this regard, State Farm's policy had no real independent value or significance apart from such accident litigation.[136] The property sequestered in *Shaffer*, on the other hand, was totally unrelated to the plaintiff's cause of action.[137]

The court turned next to the "practical relationship between the insurer and the nominal defendant."[138] *Seider*-type procedures, the court noted, protected the insured from liability beyond the policy limits and at the same time provided anonymity for the insurer.[139] Also, the possible abuse of forum shopping was minimized by limiting this procedure to residents, with the doctrine of forum non conveniens always available to any overburdened defendant.[140] The court then concluded with the following:

> We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite "contacts, ties or relations" to those defending parties as to of-

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135. *Id.* at ___, 272 N.W.2d at 891. *Shaffer* dealt with Delaware's general sequestration statute, DEL. CODE ANN. tit. 10, § 366 (1975). *See* note 108 *supra* for a copy of Minnesota's garnishment statute.

136. 311 Minn. at ___, 272 N.W.2d at 892. For support, the court cited O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978). *See* note 97 and accompanying text, *supra*.

137. 311 Minn. at ___, 272 N.W.2d at 892, quoting Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977). In *Shaffer*, the Court found that the directors of the defendant corporation "simply had nothing to do with the State of Delaware," for jurisdictional purposes, despite the fact that the corporation had been incorporated under the laws of Delaware. 433 U.S. 186, 216. Hence, it is questionable (at least in this author's mind) whether the conclusion in *Shaffer*, that Delaware did not have jurisdiction to sequester the stock of the defendants, logically follows from the legal reasoning used by the Court. By voluntarily becoming directors of a corporation which had incorporated in Delaware specifically to take advantage of Delaware's liberal incorporation laws, the defendants, in accordance with *Hanson v. Denckla*, had purposely availed themselves of the privilege of conducting activities within the forum, and the defendant's property—stock in the defendant corporations—was sufficiently related to the litigation to satisfy due process.

138. 311 Minn. ___, 272 N.W.2d at 892.

139. *Id.*

140. *Id.* at ___, 272 N.W.2d at 893. For a discussion of the doctrine of forum non conveniens, *see Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1008-13 (1960); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075, 1130-35 (1968).

> fend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision.[141]

Again the defendants appealed to the United States Supreme Court.

D. Rush v. Savchuk

It should not have been difficult to foresee the course taken by the United States Supreme Court in *Rush v. Savchuk*.[142] The Minnesota court had done little more than pay lip service to the *Shaffer* requirement that jurisdictional inquiries focus upon the relationship among the defendant, the forum and the litigation.[143] Nowhere in its opinion had the Minnesota court directly reviewed the insured's relation to the forum or to the litigation. Instead, the court attempted to satisfy the *Shaffer* requirement by considering the "defending parties" as a single entity. The practical result of the court's approach was the assertion of jurisdiction over the insured based solely upon his insurer's activities.[144] The *Rush* Court held, however, that *each* defendant must meet *International Shoe*'s minimum contacts requirement.[145] The mere fact that State Farm transacted business in Minnesota created no contacts between Rush and the forum, and clearly created no basis for saying that the defendant had purposefully availed himself of the privileges of conducting activities in Minnesota, thus subjecting himself to its laws.[146]

Similarly, there were no significant contacts between the

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141. 311 Minn. at ___, 272 N.W.2d at 893.

142. 444 U.S. 320 (1980).

143. Shaffer v. Heitner, 433 U.S. at 204.

144. Rush v. Savchuk, 444 U.S. at 331-32.

145. *Id.* at 332.

146. *Id.* at 328-29. The language comes from Hanson v. Denckla, 357 U.S. 235 (1958). *See* note 33 *supra*. In *Hanson*, the United States Supreme Court found that for a state to exercise jurisdiction over a nonresident defendant, "[i]t is essential in each case that there be some act by which the defendant *purposely avails* itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 253 (emphasis added). In the companion case to *Rush*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the Court also relied heavily upon this language from *Hanson*.

litigation and the forum.[147] The subject of the litigation was the alleged negligence of Rush and not the validity or construction of the insurance policy. Consequently, the policy obligations, deemed a garnishable debt by the Minnesota court, established no tie between the litigation and the forum.[148] The fact that the policy may have been purchased precisely for protection in the event of such litigation was of no consequence.

The Supreme Court went on to analyze the legal fictions underlying the *Seider* doctrine.

> The legal fiction that assigns a situs to a debt, for garnishment purposes, wherever the debtor is found is combined with the legal fiction that a corporation is "present," for jurisdictional purposes, wherever it does business to yield the conclusion that the obligation to defend and indemnify is located in the forum for purposes of the garnishment statute.[149]

The Court found that this fictitious presence, without more, did not establish a sufficient contact between the forum and the insured.[150]

Finally, the Court held that the *Seider* doctrine was not the equivalent of a direct action against an insurer.[151] When the *Seider* doctrine is applied, the forum's "ability to exert its power over the [insured] is analytically prerequisite to the insurer's entry into the case as a garnishee."[152] Therefore, if due process forbids assertion of jurisdiction over the insured based upon garnishment of the policy obligations, it also forbids bringing the garnishee insurer into the action.[153]

Justice Brennan dissented on the grounds that *Interna-*

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147. 444 U.S. 329.
148. *Id.*
149. *Id.* at 328.
150. *Id.* at 329.
151. *Id.* at 330.
152. *Id.* at 330-31.
153. *Id.* at 331. Justice Stevens, dissenting in *Rush*, had a contrary opinion:

> In this kind of case, the Minnesota statute authorizing jurisdiction is correctly characterized as the "functional equivalent" of a so-called direct-action statute. . . . As so understood, it makes no difference whether the insurance company is sued in its own name or, as Minnesota law provides, in the guise of a suit against the individual defendant.

Id. at 333-34.

tional Shoe did not rely on a mechanical contacts test.[154] "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[155] The existence of contacts between the defendant and the forum, therefore, is simply *one* way of determining fairness and reasonableness.[156] Other considerations include the interests of the forum state, the interests of other parties, and the actual burden placed on the defendant.[157] Due process, contended Justice Brennan, did not require that the trial be held in the forum with which the defendant had the "best contacts."[158]

Based upon the foregoing factors, Justice Brennan found that Minnesota had an overriding interest in regulating insurance companies in the state and in providing a forum for its residents.[159] However, as the majority pointed out, there was nothing truly regulatory about the *Rush* action; State Farm Insurance Company had done nothing wrong. Neither the conduct of State Farm's business nor the interpretation or construction of the policy it had issued were in question.[160]

Justice Brennan also found that the financial burdens placed upon the defendant in *Rush* were relatively slight compared to those the plaintiff might face if forced to suit in another forum.[161] However, this argument, that the party with the most money should be required to carry the heavier financial burden of the lawsuit, is simply unjust. Moreover, Justice Brennan's view fails to recognize that not only the defendant, but also the witnesses, the treating physicians, the investigating police officers and much of the evidence surrounding the accident were located in Indiana. The substantial financial and practical burdens involved in litigating such a claim in a foreign forum would appear to outweigh any ex-

154. Justice Brennan dissenting in the companion case, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980).

155. International Shoe Co. v. Washington, 326 U.S. at 319.

156. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 300.

157. *Id.*

158. *Id.* at 301.

159. *Id.* at 302.

160. Rush v. Savchuk, 444 U.S. at 329.

161. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 303-04.

pense the plaintiff might incur if he selected Indiana counsel, and thus was forced to travel to Indiana once for a deposition and again for trial.[162]

Finally, Justice Brennan argued that by purchasing an insurance policy from a national company like State Farm, Rush had availed himself of benefits he might receive by reason of State Farm having an office and agent in Minnesota. One such benefit was State Farm's ability to commence and conduct an action, on behalf of Rush, in Minnesota against a Minnesota resident.[163] This, however, is no real benefit. Any insurance company, national or otherwise, may commence an action in the forum where the defendant resides. The only real benefits of which Rush may have purposefully availed himself in selecting a national company were lower premiums and better coverage than perhaps were available from a smaller company.

In its conclusion, the Supreme Court aptly focused upon the underlying fallacy of the *Seider* doctrine.

> The justifications offered in support of *Seider* jurisdiction share a common characteristic: they shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation. The insurer's contacts with the forum are attributed to the defendant because the policy was taken out in anticipation of such litigation. The State's interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action. . . . In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.[164]

Such an approach, the Court concluded, was forbidden by

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162. If the claim were litigated in Minnesota, either all the witnesses would have to travel to Minnesota for their depositions and for trial, or all the Minnesota counsel would have to travel to Indiana for depositions. In addition, one may assume that the plaintiff's attorney would make at least one trip to Indiana to view the scene of the accident and the vehicles involved. He might even wish to have an expert—presumably a Minnesota expert with whom he is familiar—travel to Indiana to view the accident scene and the vehicles. These expenses clearly outweigh any expenses the plaintiff might incur if he sued in Indiana.

163. *Id.* at 304.

164. Rush v. Savchuk, 444 U.S. at 332.

International Shoe and its progeny.

III. The Aftermath of *Rush*

The immediate effect of *Rush* appears clear: the *Seider* doctrine is finally dead.[165] This may be viewed by some as a giant step backward in the jurisprudential march toward a "realistic" approach to state court jurisdiction. However, the *Rush* decision is actually a logical extension of *International Shoe, Shaffer,* and the minimum contacts, due process standard. This conclusion may be difficult for some to accept, primarily because the minimum contacts test, often praised for its expansion of in personam jurisdiction, was employed in *Rush* to constrict the scope of in rem and quasi in rem jurisdiction. Supporters of the "realistic" approach are thus faced with the realization that their arch enemy, *Pennoyer,* was really an ally with respect to its broad, albeit rigid, application of in rem and quasi in rem jurisdiction.[166]

A second, less obvious, result of the *Rush* decision, may be its effect on direct action statutes. The *Seider* doctrine was, in many respects, the functional equivalent of a direct action statute.[167] The only differences were that (1) it was created by judicial decree rather than by legislative enactment, and (2) it voided any "no action" clause in the policy and thus made the insurer joinable as a defendant. The question created by *Rush* therefore is whether a statute which authorized a direct action against an insurer in a *Seider*-type situation is constitutional.

It should be noted from the outset that the constitutionality of direct action statutes should not depend upon any distinction between judicial acts and legislative acts.[168] The Wis-

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165. Insofar as the Court in *Rush* neither discussed nor relied upon the fact that Rush became a Minnesota resident *after* the accident, any subsequent attempt to distinguish *Rush* on such a basis would be unpersuasive. Such an argument was made prior to *Rush* in O'Connor v. Lee-Hy Paving Corp., 579 F.2d at 199 n.6, and in the dissents in *Savchuk I,* 309 Minn. at ___, 245 N.W.2d at 633, and in *Savchuk II,* 311 Minn. at ___, 272 N.W.2d at 895.

166. *See generally* Comment, *Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory,* 1968 Duke L.J. 725.

167. *See* notes 59-60 and accompanying text, *supra.*

168. At least one author has found the tests for determining legislative and judicial jurisdiction to be similar but not identical. *The Constitutionality of* Seider v. Roth *After* Shaffer v. Heitner, 78 Colum. L. Rev. 409 (1978).

> In assessing both judicial and legislative jurisdiction, a court will inquire into the contacts between the state and the occurrence sought to be governed by

consin Supreme Court, for instance, has held that when the elements of the Wisconsin long-arm statute are met, the requirements of due process are also satisfied.[169] The statute is simply a codification of case law and therefore serves as a "legislative pronouncement" that due process has been satisfied.[170] The Wisconsin court has also recognized that while the legislature may constrict the exercise of jurisdiction, it cannot expand jurisdiction beyond the constitutional limits of due process.[171] Thus, the satisfaction of the statutory elements is not conclusive proof that due process is satisfied; a defendant always maintains the right to rebut the statutory presumption of constitutionality.[172] The fact that jurisdiction is defined by a legislative act, therefore, has no effect on the minimum con-

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the state and determine whether those contacts are sufficient to render "reasonable" the state's exertion of power, be it judicial or legislative, over that occurrence. The emphasis, however, can be markedly different. With respect to legislative jurisdiction, the inquiry will often center on whether the *state* has a reasonable regulatory interest in the occurrence and whether the public policy expressed by its rule can be advanced by application of its rule. With respect to judicial jurisdiction, the focus has traditionally been on fairness to the defendant to protect him from oppression by the plaintiff, who normally controls choice of forum.

Id. at 414 n.36 (citations omitted). This rationale is based on an overly technical reading of *Shaffer, Hanson* and *Watson.* However, according to *Shaffer,* the focal point must always be on the relationship among the defendant, the forum, and the litigation. Therefore, regardless of whether the basis for jurisdiction arises from a legislative act or a judicial decree, the court must view the state's regulatory interest *and* the burdens placed on the defendant. The "emphasis" should not be different. This interpretation is best exemplified by *Rush* itself, where the Court systematically dealt first with the defendant's contacts with the forum, 444 U.S. at 327-28, and then with the forum's interest in the litigation. *Id.* at 329. *See* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300, 336-37 (1970).

169. Wisconsin, in Zerbel v. H. L. Federman & Co., 48 Wis. 2d 54, 179 N.W.2d 872 (1970), adopted an analytical framework for determining personal jurisdiction. This framework included a separate analysis for determining whether the jurisdictional contacts, which satisfied the statute, were also sufficient to satisfy due process. This additional analysis was later found to be unnecessary, if the statutory elements were satisfied. Afram v. Balfour Machine, Inc., 63 Wis. 2d 702, 713, 218 N.W.2d 288, 294 (1974), *followed in* Fields v. Playboy Club of Lake Geneva, Inc., 75 Wis. 2d 644, 654, 250 N.W.2d 311, 316 (1977).

170. Fields v. Playboy Club of Lake Geneva, Inc., 75 Wis. 2d at 654, 250 N.W.2d at 316.

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

172. Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 577, 235 N.W.2d 446, 454 (1975). Rebuttal is effected through the use of *Zerbel's* due process analysis.

tacts, due process standard formulated in *International Shoe.*[173] However, direct action statutes are set apart from the *Seider* doctrine insofar as such statutes declare void any "no action" clause in the policy and thereby subject the insurer to joinder as a party defendant.

As observed by the Court in *Rush,* jurisdiction over the insured was a prerequisite to the exercise of jurisdiction over the insurer.[174] Because the insurer was not a named defendant, its contacts with the forum were irrelevant in establishing jurisdiction.[175] However, if the "no action" clause were voided by means of a direct action statute, the insurer's contacts with the forum state would become highly relevant in determining the court's jurisdiction and would render the exercise of jurisdiction over the insurer constitutionally acceptable.[176] The remaining question, therefore, is whether a state can make an insurer directly liable for an insured tortfeasor's acts by simply enacting a direct action statute. Clearly, a direct action statute, in order to pass constitutional muster, would have to satisfy the requirements of due process. But what standard is to be used to test the validity of the statute: the minimum contacts test developed through *International Shoe* and its progeny, the legitimate governmental interest test articulated in *Watson,* or both?

In the *Watson* case, the issue was whether the forum state could hold an insurer directly liable for the acts of its insured, by means of a direct action statute, despite the existence of a "no action" clause in the policy.[177] The issue was not whether the forum could properly exercise jurisdiction over the insurer. Had jurisdiction been the issue, the Court would presumably have applied the minimum contacts standard created nine years earlier in *International Shoe. Watson,* therefore, suggests that both due process tests are involved in evaluating

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173. *See generally* WIS. STAT. ANN. § 801.05 Revision Notes—1959 (West). *See also* Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300 (1970), for an expansive listing (3 pages) of articles written on long-arm statutes and quasi in rem jurisdiction, at 300 n.3.

174. 444 U.S. at 330-31.

175. *Id.*

176. The Court noted that the insurer's contacts with the forum would support the forum's exercise of in personam jurisdiction over the insurer "even for an unrelated cause of action." *Id.* at 330.

177. *See* notes 52-58 and accompanying text, *supra.*

a direct action statute. First, *Watson*'s legitimate governmental interest test must be applied to determine whether the insurer may be held directly liable for its insured's acts in the face of a "no action" clause and therefore made a party defendant. Second, *International Shoe*'s minimum contacts test must be applied to determine whether the forum may properly exercise jurisdiction over the insurer once it has been made a party.

In applying these two tests to a statute authorizing direct actions in *Seider*-type situations, several problems arise. First, *Watson* did not discuss *all* the legitimate interests a forum might have to support the creation of a direct action statute. It is not entirely clear, therefore, whether a state would have sufficient legitimate interests in *Seider*-type situations to enact such a direct action statute.[178] In this regard, the second line of argument, discussed above,[179] is helpful in evaluating the pros and cons of such a statute.

According to the proponents of the argument,[180] the same considerations stated in *Watson* to sustain Louisiana's direct action statute would apply to a direct action statute covering *Seider*-type situations. The forum has a legitimate interest in protecting the rights of its residents wherever they are injured, especially in view of the fact that the forum may subsequently be required to provide medical care and/or disability coverage for its injured residents.[181] In addition, the defen-

178. Some commentators are unsure as to whether a direct action statute may only apply to accidents within the forum: *See* Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U.L. REV. 1075, 1100-04 (1968); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 559 (1967); Note, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 655 (1967); Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 336 (1970). Other commentators believe that a direct action statute could constitutionally allow *Seider*-type situations: Zammitt, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15, 21 (1978); 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. 323, 354-57 (1978); Comment, *Quasi In Rem on the Heels of* Shaffer v. Heitner: *If* International Shoe *Fits*, 46 FORDHAM L. REV. 459, 485 (1977); *Jurisdiction—Quasi In Rem:* Seider v. Roth *to* Turner v. Evers—*Wrong Means to the Right End*, 11 SAN DIEGO L. REV. 504 (1974).

179. *See* note 51 and accompanying text, *supra*.

180. *See* notes 59-60 and accompanying text, *supra*.

181. The Supreme Court has found these considerations to be very relevant in

dant insurer has a real interest in avoiding liability under the policy and therefore conducts the defense, hires the attorneys, and controls settlement. The forum, in turn, has a legitimate interest in allowing the plaintiff to proceed directly against the insurer. According to the opponents,[182] the forum does not have a sufficient legitimate interest in the insurance relationship, created outside the forum between a nonresident tortfeasor and the insurer, to make the insurer directly liable on the basis of the insurance contract. In addition, *Watson* required that the forum have a more direct relation to the accident giving rise to the litigation.

Thus, based upon *Watson,* it is at least arguable that a state could constitutionally enact a direct action statute which would make an insurer directly liable in *Seider*-type situations. The question still remains, however, whether the forum would be able to exercise jurisdiction over this defendant insurer. Here, *International Shoe*'s minimum contacts test applies.

Again there are two sides to this issue. On the one hand, an argument can easily be made that, insofar as the insurer is doing business in the forum and controls the litigation, it is clearly subject to the forum's jurisdiction.[183] On the other hand, insofar as *Shaffer* requires that the relation among the defendant, the forum, *and the litigation* be the focal point for determining jurisdiction,[184] a direct action against the insurer in *Seider*-type situations may be unconstitutional.

Assuming that the negligence of the insured is the sole issue in the lawsuit, the fact that the insurer does business in the forum provides no contact which has a reasonable relation *to the litigation.*[185] Neither the defendant's business activities in the forum, nor the provisions of its insurance policies are at issue. Also, the forum has no reasonable relation *to the litigation* because the claim arose from an out-of-state accident which involves the negligence of a nonresident tortfeasor who

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determining which law a forum should apply. Crider v. Zurich Insurance Co., 380 U.S. 39 (1965).

182. *See* notes 61-62 & 67-69 and accompanying text, *supra.*

183. This argument was suggested by *Rush* itself, 444 U.S. at 330.

184. Shaffer v. Heitner, 433 U.S. at 204, *followed in* Rush v. Savchuk, 444 U.S. at 327.

185. *Compare with* the Court's reasoning in Rush v. Savchuk, 444 U.S. at 329.

has no contacts with the forum.[186] This analysis rests upon the belief that the plaintiff under a direct action statute, like under *Seider,* is really pursuing the insurance policy *res* and not the insurance company itself. The fact that the insurer does business in the forum, therefore, remains completely unrelated to the plaintiff's cause of action which has as its central issue the insured's negligence.

The above analysis reveals that a direct action statute covering *Seider*-type situations may be constitutional. In fact, one court has already found it unnecessary to resort to the legal fictions of the *Seider* doctrine. In *Kirchen v. Orth,*[187] the Federal District Court for the Eastern District of Wisconsin held that, despite the inapplicability of Wisconsin's direct action statute,[188] an action was maintainable against the tortfeasor's insurer in a *Seider*-type situation.[189] In so finding, the court noted the insurer's real interest in the litigation[190] and Wisconsin's interest in facilitating the recovery of its injured residents regardless of where the accident occurred.[191] Finally, in review of the *Seider* doctrine, the court concluded,

> While the result and intent of the *Seider* court commends itself to this court, we do not believe it necessary to resort to legal fictions of "quasi-in-rem" jurisdiction and the problems inherent in doing indirectly that which ought to be done directly. The same result is obtained without resorting to additional legal fictions and ancient doctrines of quasi-in-rem jurisdiction by precluding the assertion of the no-action clause.[192]

IV. CONCLUSION

Rush v. Savchuk has thus ended the *Seider* doctrine and

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186. *Compare with* the Court's reasoning in Rush v. Savchuk, 444 U.S. at 327-28. *See* note 147 and accompanying text, *supra.*

187. Kirchen v. Orth, 390 F. Supp. 313 (E.D. Wis. 1975).

188. Wisconsin's direct action statute made the insurer a proper party defendant only if (1) the policy were delivered or issued in the state, or (2) the accident, injury or negligence occurred in the state. WIS. STAT. § 260.11(1) (1973).

189. 390 F. Supp. at 318. Due to the conduct of the insurer in negotiating a settlement with the plaintiff in Wisconsin, the court held that equity estopped the insurer from asserting its no-action clause when it later found out that Wisconsin lacked jurisdiction over the insured.

190. *Id.*

191. *Id.* at 319.

192. *Id.* at 320.

its use of quasi in rem jurisdiction to proceed directly against a tortfeasor's insurer. However, it remains to be seen whether a state can exercise jurisdiction in *Seider*-type situations through the enactment of a direct action statute.[193] The possibility that such a statute might be permissible reveals that the legitimate governmental interest test of *Watson* needs to be re-evaluated and better coordinated with *International Shoe*'s minimum contacts test. Clearly, traditional notions of fair play and substantial justice are offended when the standard of due process is applied to two identical factual situations, but produces two distinct results simply because in one situation the tortfeasor is the named defendant, and in the other, the tortfeasor's insurer is the named defendant.

JOHN R. ORTON

UNIFORM COMMERCIAL CODE — Articles 3 and 4 — Bank Required to Disburse Funds After Final Payment. *Northwestern National Insurance Co. v. Midland National Bank,* 96 Wis. 2d 155, 292 N.W.2d 591 (1980).

I. INTRODUCTION

The check collection procedure,[1] followed by banks in Wisconsin, is controlled by Article 4 of the Uniform Commercial Code,[2] which applies to items[3] in the course of bank collec-

193. *See* Rosenberg, *One Procedural Genie Too Many OR Putting* Seider *Back Into Its Bottle,* 71 COLUM. L. REV. 660 (1971), where the author discusses a proposed direct action statute for New York which has since been rejected.

1. For a detailed description of the check collection process, *see* Leary, *Check Handling under Article 4 of the Uniform Commercial Code,* 49 MARQ. L. REV. 331 (1965); *and,* Malcolm, *How Bank Collection Works — Article 4 of the Uniform Commercial Code,* 11 HOW. L. J. 71 (1965).

2. WIS. STAT. §§ 404.101 to 404.504 (1971). WIS. STAT. §§ 404.101 to 404.504, and §§ 403.101 to 403.806, correspond to Uniform Commercial Code §§ 4-101 to 4-504, and 3-101 to 3-806, respectively. Hereinafter, citations will be made to the U.C.C. section. Note, however, that the requirements of Article 4 may be superseded or modified by agreement, Federal Reserve Regulations, or clearinghouse rules. U.C.C. § 4-103.

3. U.C.C. § 4-104(1)(g) defines "item" as "any instrument for payment of money even though it is not negotiable but does not include money."