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State Adjudicatory Jurisdiction over Nonresident Defendants

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STATE ADJUDICATORY JURISDICTION OVER NONRESIDENT DEFENDANTS

"We recognize that [the minimum contacts standard] . . . is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' "[1]

I. INTRODUCTION

In an attempt to clarify the confusion that existed among the highest courts of several states concerning the extent to which a state may assert jurisdiction over a nonresident defendant, the United States Supreme Court recently decided the cases of *World-Wide Volkswagen Corp.* v. *Woodson*[2] and *Rush* v. *Savchuk*.[3] The Court reversed both the Oklahoma Supreme Court and the Minnesota Supreme Court, finding that the states' assertion of jurisdiction exceeded the limits permitted by the due process clause of the fourteenth amendment to the United States Constitution.[4]

In *World-Wide Volkswagen Corp. v. Woodson*, the issue before the Court was whether the fourteenth amendment's due process clause allows a state court to assert in personam jurisdiction over a nonresident automobile retailer and its distributor on the basis that it was foreseeable that the automobiles they sold and distributed would be used in the forum state.[5]

In *Rush v. Savchuk*, the issue presented to the Court was "whether a state may constitutionally exercise quasi in rem jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the state to defend and indemnify him in connection with the suit."[6]

This comment will determine, in light of these two recent decisions, the due process limitation on a state court's power to assert juris-

1. Kulko v. California Superior Court, 436 U.S. 84, 92 (1978) (quoting Estin v. Estin, 334 U.S. 541, 545 (1948)).
2. 100 S.Ct. 559 (1980).
3. 100 S.Ct. 571 (1980).
4. World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559, 568 (1980); Rush v. Savchuk, 100 S.Ct. 559, 568 (1980); Rush v. Savchuk, 100 S.Ct. 571, 580 (1980).
5. 100 S.Ct. at 562.
6. 100 S.Ct. at 574.

diction. To make this determination, the evolution of the due process limitation on jurisdiction will be examined. This examination will focus on the cases that have adopted the foreseeability concept as a basis for in personam jurisdiction and on those cases concerning quasi in rem jurisdiction that have relied on the principles set down in *Seider v. Roth*.[7] Following this examination, consideration will be given to a line of Supreme Court cases from which three tests for determining jurisdiction have emerged. These are the relationship or nexus test, the fair warning test, and the convenience test. These three tests will then be used to analyze the *World-Wide Volkswagon* and *Rush* cases.

II. FACTS

A. *The* World-Wide *Case*

The Robinsons purchased a new automobile from Seaway Volkswagen in New York. The next year, Mrs. Robinson, while driving through Oklahoma en route from New York to Arizona, was struck from behind. Mrs. Robinson and her children were seriously injured in the collision when the gasoline tank of their automobile ruptured, causing a fire in the passenger compartment.

Products liability actions were filed in Oklahoma by the Robinsons who joined as defendants the automobile's manufacturer, its importer, its retail dealer, and its regional distributor (World-Wide Volkswagen Corporation). At trial, World-Wide made a special appearance, claiming that Oklahoma's assertion of jurisdiction was in violation of the due process clause of the fourteenth amendment. The trial court rejected World-Wide's claim. World-Wide then petitioned the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of prohibition[8] restraining the trial judge from exercising jurisdiction over World-Wide. The Oklahoma Supreme Court denied the writ, holding that the exercise of in personam jurisdiction was author-

7. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

8. The writ of prohibition is a prerogative writ of ancient origin, and should be used with caution and forbearance for the furtherance of justice, and for securing order and regularity in and among inferior tribunals, where there is no other adequate remedy. It is an extraordinary judicial writ, issuing out of a court of superior jurisdiction, and directed to an inferior tribunal, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested.

Hirsh v. Twyford, 40 Okla. 220, 223, 139 P. 313, 315 (1913). The authority for issuing the writ of prohibition is found in the Oklahoma Constitution. OKLA. CONST. art. 7, § 4.

ized by its long-arm statute.[9] The court found that the trial court's assertion of jurisdiction comported with constitutional due process limitations, owing to the mobile characteristics of the automobile and the fact that the petitioners could have foreseen that their acts or omissions outside Oklahoma might cause tortious injury within Oklahoma.[10]

B. *The* Rush *Case*

Two Indiana residents were involved in a single-car accident in Indiana. The driver of the car was Rush. Savchuk, a passenger, was injured in the accident. Shortly after the accident, Savchuk moved to Minnesota and later commenced an action against Rush in a Minnesota state court. The car involved was insured by State Farm Mutual Automobile Insurance Company (State Farm) under a liability policy issued in Indiana. State Farm did business in all fifty states. Savchuk, pursuant to a Minnesota garnishment statute, attempted to obtain quasi in rem jurisdiction over Rush by garnishing State Farm's obligation under the insurance policy. State Farm denied owing any debt to Rush and claimed, therefore, that there was nothing to attach for quasi in rem jurisdiction. Rush and State Farm moved to dismiss the complaint owing to a lack of jurisdiction. The trial court denied the motion. On appeal, the Minnesota Supreme Court, while expressly stating that Rush did not have the requisite minimum contacts to justify in personam jurisdiction,[11] affirmed the trial court decision. The court held:

> [A]n automobile insurance company's obligation to defend and indemnify its insured is a res subject to prejudgment garnishment for the purpose of obtaining quasi in rem jurisdiction when the incident giving rise to the action occurs outside

9. World-Wide Volkswagen v. Woodson, 585 P.2d 351, 353, 355 (Okla. 1978). The Oklahoma long-arm statute provides as follows:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he . . . derives substantial revenue from goods used or consumed or services rendered, in this state . . . .

OKLA. STAT. tit. 12, § 1701.03(a)(4) (1971).

10. "[T]he product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma . . . . The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma."

585 P.2d at 354.

11. Savchuk v. Rush, 311 Minn. 480, __, 245 N.W.2d 624, 629 (1976).

the State of Minnesota but the plaintiff in the action is a resident of Minnesota.[12]

Further, the Minnesota Supreme Court found that quasi in rem jurisdiction was constitutionally permissible because Rush was given proper notice of the suit, his liability was limited to his insurance policy coverage, and the application of the garnishment statute was limited to a Minnesota resident.[13] In addition, the court believed the minimum contacts standard was satisfied for quasi in rem jurisdiction because State Farm was doing business in Minnesota and because of Minnesota's interest in protecting its residents by providing them with a forum in which to litigate their claims.[14]

Rush appealed the decision of the Minnesota Supreme Court to the United States Supreme Court which vacated the judgment and remanded the case for further consideration.[15] On remand, the Minnesota Supreme Court considered the standards laid down by *Shaffer v. Heitner*,[16] and held that the exercise of quasi in rem jurisdiction via garnishment of a motor vehicle insurer's obligation to a nonresident insured was consistent with the due process standards delineated in *Shaffer*.[17] This decision was appealed to the United States Supreme Court and reversed.[18]

III. Evolution of the Due Process Limitation on State Court Jurisdiction

Bases for state court jurisdiction have been historically categorized as in personam, quasi in rem, or in rem.[19] A court's assertion of jurisdiction based on its authority over the defendant's person is in personam; the court possesses the authority to impose a personal obligation on the defendant in favor of the plaintiff.[20] If, however, the court's jurisdiction is based on property within its territory, this juris-

12. *Id.* at __, 245 N.W.2d at 628.
13. *Id.* at __, 245 N.W.2d at 629.
14. *Id.*
15. Rush v. Savchuk, 433 U.S. 902 (1977). The Court stated that the decision on remand was to be made according to the standards set forth in Shaffer v. Heitner, 433 U.S. 186 (1977).
16. 433 U.S. 186 (1977).
17. Savchuk v. Rush, 311 Minn. 480, __, 272 N.W.2d 888, 889 (1978).
18. 100 S.Ct. 571 (1980).
19. Restatement (Second) of Conflict of Laws, Introductory Note at 102-03 (1969).
20. Shaffer v. Heitner, 433 U.S. 186, 199 (1977); Hanson v. Denckla, 357 U.S. 235, 246 (1958); Restatement of Judgments, Introductory Note at 5-6 (1942); Restatement (Second) of Conflict of Laws, Introductory Note at 103 (1969).

diction is characterized as either in rem or quasi in rem.[21]

Judgment in an in rem case or a quasi in rem case is limited to the property providing the basis of jurisdiction.[22] There is seldom any agreement on the distinction to be made between in rem and quasi in rem.[23] If liberally construed, however, an in rem judgment may be viewed as one affecting the defendant's interest in the designated property.[24] A quasi in rem judgment would not seek to affect the defendant's interest in the property, but would seek to enforce a personal judgment against the defendant by applying the property to satisfy the claim.[25]

In order to determine whether the assertion of a forum's jurisdiction is permissible, two inquiries must be made: a determination of whether assertion of jurisdiction is authorized by the law of the forum, and if so, whether such exercise of jurisdiction is permitted by the fourteenth amendment's due process clause.[26]

A. *The Development of In Personam Jurisdiction*

In 1877, the United States Supreme Court, in *Pennoyer v. Neff*,[27] found that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established."[28] A state's primary basis for in personam jurisdiction, therefore, was a defendant's physical presence within that state.

The first abrogation of the territoriality principle came with the expanding use of the automobile. States desiring to protect their citizens from nonresident motorists enacted nonresident motorist statutes.[29] These statutes, through the use of a legal fiction, provided that anyone who operated a motor vehicle within a state consented to that

21. 433 U.S. at 199; 357 U.S. at 246; RESTATEMENT OF JUDGMENTS, Introductory Note at 6-7 (1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note at 103-04 (1969).

22. Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

23. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 312 (1950).

24. 433 U.S. at 199 n.17; 357 U.S. at 246 n.12.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note at 104 (1969). *See* 433 U.S. at 199 n.17; 357 U.S. at 246 n.12.

26. Broadway v. Webb, 473 F. Supp. 379, 380 (D.S.C. 1978); Gagner v. Parsons & Whittemore, Inc., 450 F. Supp. 1093, 1096 (E.D. Pa. 1978); Jackson v. Bishop College, 359 So. 2d 704, 705 (La. Ct. App. 1978); Good Hope Indus., Inc. v. Ryder Scott Co., __ Mass. __, __, 389 N.E.2d 76, 79 (1979). Howells v. McKibben, __ Minn. __, __, 281 N.W.2d 154, 155-56 (1979); Hawkins v. Sommers, 39 N.C. App. 617, __, 251 S.E.2d 640, 643 (1979); World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 352-53 (Okla. 1978).

27. 95 U.S. 714 (1877).

28. *Id.* at 720.

29. *See, e.g.*, OKLA. STAT. tit. 47, § 391 (1971).

state's jurisdiction.[30] In 1927, the United States Supreme Court, in *Hess v. Pawloski*,[31] upheld the use of nonresident motorist statutes. *Hess* opened the door for adoption of nonresident motorist statutes by virtually every state.[32]

The next expansion of in personam jurisdiction over nonresident defendants came in 1945, in *International Shoe Co. v. Washington*,[33] where the Supreme Court said:

> Historically the jurisdiction of courts to render judgments in personam is grounded on their de facto power over the defendant's person . . . . But now . . . 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."[34]

International Shoe established the minimum contacts test as the contemporary constitutional standard for in personam jurisdiction over nonresident defendants. What constituted minimum contacts was to be determined by a defendant's "contacts, ties, or relations" with the forum state.[35]

In *McGee v. International Life Insurance Co.*,[36] the Supreme Court apparently extended the minimum contacts concept to the constitutionally permissible limit. There, a California state court asserted in personam jurisdiction over a nonresident Texas corporation. The court found the requisite minimum contacts owing to a single insurance contract entered into between the plaintiff, a California resident, and the Texas corporation. The Supreme Court noted that the trend of expanding the permissible scope of state court jurisdiction over nonresident defendants was attributable to the transformation of our national economy.

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30. The fiction used by the various states was that the nonresident motorist by use of the forum state's highways appointed the Secretary of State as his agent to accept process. Therefore, because the motorist's agent could be personally served within the forum state, then the forum state could assert in personam jurisdiction over the nonresident driver. *See* Shaffer v. Heitner, 433 U.S. 186, 202 (1977).

31. 274 U.S. 352 (1927).

32. *E.g.*, CAL. VEH. CODE § 17453 (West 1971); ILL. ANN. STAT. ch. 95½, § 10-301 (Smith-Hurd Cum. Supp. 1979); MINN. STAT. ANN. § 170.55 (West Cum. Supp. 1980); N.Y. VEH. & TRAF. LAW § 253 (McKinney 1970 & Cum. Supp. 1979-1980).

33. 326 U.S. 310 (1945).

34. *Id.* at 316.

35. *Id.* at 319.

36. 355 U.S. 220 (1957).

> Today many commercial transactions touch two or more states and may involve parties separated by full continents. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.[37]

Furthermore, the Court indicated that in considering whether the maintenance of the suit offends "traditional notions of fair play and substantial justice," the interest of the forum state in providing "effective means of redress for its residents" is a factor to be considered in appropriate cases.[38]

Perhaps fearing that the floodgates had been opened, the Court issued a warning in *Hanson v. Denckla*.[39] The Court pointed out that the change of in personam requirements from the rigid *Pennoyer* territorial principle to the minimum contacts standard of *International Shoe* did not reflect a trend toward the eventual demise of all limitations on the state court's assertion of in personam jurisdiction.[40] "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states."[41]

Making clear that the due process limitation on state courts exercising jurisdiction was not an outdated concept, the *Hanson* Court superimposed on the minimum contacts standard the notion that the unilateral activity of the plaintiff did not satisfy the due process standard.[42] The Court stated that "it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[43] The forum state cannot acquire in personam jurisdiction "by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."[44]

37. *Id.* at 222-23.
38. *Id.* at 223.
39. 357 U.S. 235 (1958).
40. *Id.* at 251.
41. *Id.*
42. *Id.* at 253.
43. *Id.* (emphasis added).
44. *Id.* at 254.

The state legislatures, in an effort to protect their citizens, enacted long-arm statutes[45] that attempted to identify what constituted minimum contacts so as to make their assertion of in personam jurisdiction consistent with the outer limits of due process. Many state long-arm statutes authorize exercising in personam jurisdiction over a nonresident defendant as to a cause of action arising from an act or omission occurring outside the forum and culminating within the forum.[46] Assertion of in personam jurisdiction via these long-arm provisions has been held to be consistent with the minimum contacts standard if the nonresident defendant had reason to foresee that his activity outside the forum state would cause effects within the forum state.[47]

45. Long-arm statutes give state courts authority to assert in personam jurisdiction over a nonresident defendant so long as it is consistent with the due process clause of the fourteenth amendment. *See* Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 52 (1978).

46. The long-arm statutes that authorize such exercise of jurisdiction vary from state to state. *See, e.g,* S.D. COMP. LAWS ANN. § 15-7-2(2) (1968), which authorizes in personam jurisdiction over any person who causes tortious injury within the state by a tortious act done outside the state. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(4), requires, in addition to causing the tortious injury within the forum state by a tortious act done outside the state, that the defendant "regularly does or solicits business, or engages in any other persistent course of conduct; or derives substantial revenue from goods used or consumed or services rendered, in this state.". ILL. ANN. STAT. Ch. 110, § 17 (Smith-Hurd 1968), authorizes in personam jurisdiction if there is a "commission of a tortious act within this state." This provision, however, has been construed to allow Illinois courts to assert in personam jurisdiction if a tortious act is done outside the state but causes injury within Illinois. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761, 763 (1961).

See also N.C. GEN. STAT. § 55-145(a)(3) (1975), which subjects nonresident corporations to suit in North Carolina as to any cause of action arising

> out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers.

47. Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818, 822 (4th Cir. 1972); Alliance Clothing, Ltd. v. Denver, 187 Colo. 400, __, 532 P.2d 351, 353-54 (1975); Boykin v. Lindenkranar, 252 So. 2d 467, 470 (La. Ct. App. 1971); Harper v. Rolf Brauchli, Inc., 71 Mich. App. 263, __, 247 N.W. 2d 375, 378 (1976); Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, __, 315 N.Y.S.2d 51, 55 (Sup. Ct., 1970); Winston Indus., Inc. v. District Court, 560 P.2d 572, 574 (Okla. 1977); Fields v. Volkswagen of Am., Inc. 555 P.2d 48, 53 (Okla. 1976); McCrory Corp. v. Girard Rubber Corp., 225 Pa. Super. Ct. 45, __, 307 A.2d 435, 437-38 (1973); Omstead v. Braden Heaters, Inc., 5 Wash. App. 258, __, 487 P.2d 234, 242 (1971); Fields v. Peyer, 75 Wis. 2d 644, __, 250 N.W.2d 311, 316 (1977).

For later cases see notes 126-31 *infra* and accompanying text. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Reporter's Note at 161-62 (1971). *But see* Granite States Volkswagen, Inc. v. Denver, 177 Colo. 42, __, 492 P.2d 624, 625 (1972). Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, __, 438 P.2d 128, 134 (1968); Pellegrini v. Sachs & Sons, 522 P.2d 704, 707 (Utah 1974). Oliver v. American Motors Corp., 70 Wash. 2d 875, __, 425 P.2d 647, 655-56 (1967). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971), which states,

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from

The concept of foreseeability as providing a basis for in personam jurisdiction has most frequently arisen in products liability cases. If the manufacturer of an alleged defective product could reasonably foresee that its product would be purchased or used in the forum state, and such product is purchased or used in the forum state, then the nonresident manufacturer may be subject to the in personam jurisdiction of the forum state.[48] Such an assertion of jurisdiction has been upheld even when the record failed to disclose whether the nonresident manu-

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these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

For a collection of cases see Annot., 19 A.L.R.3d 13, 119 (1968).

48. In the often cited case of Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the defendant manufactured a safety valve in Ohio and later sold the valve to American Radiator and Standard Sanitary Corporation. It was then attached to a water heater in Pennsylvania and sold to a customer in Illinois. This customer was injured by the explosion of the water heater which was allegedly caused by the negligent construction of the safety valve by the Ohio manufacturer.

Although the Illinois statute provided that the tortious act must have been committed in Illinois, ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1968), the court interpreted it as authorizing jurisdiction over a nonresident defendant when his tortious act outside Illinois caused injury in Illinois. 22 Ill. 2d at __, 176 N.E.2d at 763. Feeling that it was reasonable to infer that the manufacturer's commercial transactions resulted in substantial use and consumption of the product in Illinois, the court found the assertion of jurisdiction to be consistent with the minimum contacts test. *Id.* at __, 176 N.E.2d at 766.

The holding in *Gray* was interpreted by the Arizona Supreme Court in the case of Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), to mean "that a nonresident defendant is amenable to personal jurisdiction where his defective product causes injury within the forum though he did not intentionally put his product there, unless he, the defendant, proves that the presence of his product in the forum was an unforeseeable event." *Id.* at __, 413 P.2d at 736.

In Metal-Matic, Inc. v. Eighth Judicial Dist. Court, 82 Nev. 263, 415 P.2d 617 (1966), the action resulted from a drowning alledgedly caused by a defective boat railing which was manufactured and assembled in Minnesota by the Metal-Matic Corporation. The court, pursuant to Nevada's long-arm statute, NEV. REV. STAT. § 14.080 (1973), held Metal-Matic subject to Nevada's jurisdiction. The court's basis for asserting in personam jurisdiction was that where it is reasonably foreseeable that a manufacturer's product will enter the stream of commerce, then the manufacturer can be sued in any state where its product has allegedly caused an injury. This will be true notwithstanding "how many hands have touched the product from its production to the time or place of the injury. Whether it be labeled a minimal contact . . . or a one act tort, the effect is the same, *i.e.*, jurisdiction in the forum state attaches." 82 Nev. at __, 415 P.2d at 619.

In Winston Indus., Inc. v. District Court, 560 P.2d 572 (Okla. 1977), the Oklahoma Supreme Court adopted the concept of foreseeability as the standard for determining in personam jurisdiction over a nonresident defendant. An action was brought in Oklahoma against a manufacturer for damages resulting from an allegedly defective mobile home. The manufacturer's principle place of business was in Alabama. It was noted that the manufacturer had no business, employees, or manufacturing facilities in Oklahoma. The mobile home was originally purchased out of state and subsequently purchased secondhand in Oklahoma by the plaintiff. The court first determined that the foreign manufacturer did not have the requisite "minimum contacts" required for the assertion of in personam jurisdiction. *Id.* at 573. It further found, however, that in personam jurisdiction could be properly exercised over the foreign manufacturer on the basis that it was reasonably foreseeable that its product would enter the stream of interstate commerce, and ultimately be used in Oklahoma. *Id.* at 574.

facturer had any other contacts with the forum other than the isolated occurrence that provided jurisdiction.[49] Courts have found it irrelevant "how many hands have touched the product from its production to the time or place of the injury. The result will be the same even if the product was purchased from an independent middleman or someone other than the nonresident manufacturer who shipped the product into the forum state."[50]

The foreseeability concept as the basis for in personam jurisdiction has also been expanded to everyone in the chain of distribution. That is, if the importer, distributor, or retailer could reasonably foresee at the time of introducing the product into the stream of interstate commerce that it would be purchased or used in the forum state by a consumer, then that state could assert in personam jurisdiction over him.[51]

B. *The Development of Quasi In Rem Jurisdiction*

The *Pennoyer* principles of territoriality were the constitutional standard not only for in personam jurisdiction, but also for quasi in rem and in rem jurisdiction.[52] These principles made it extremely difficult to obtain jurisdiction over a nonresident defendant within the forum where the plaintiff resides. Since, however, the state where property was located was considered to have exclusive jurisdiction over that property, a resident plaintiff could obtain jurisdiction over the nonresident defendant by attaching the nonresident's property located in the forum state.[53]

Intangible property, as well as tangible property, has been found to be sufficient to support jurisdiction. This idea was first recognized by the United States Supreme Court in *Harris v. Balk*,[54] which represented the high water mark of state court assertion of quasi in rem jurisdiction. By using intangible property, a debt, as a basis for asserting

49. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, __, 176 N.E.2d 761, 766 (1961).

50. *Id.* at __, 176 N.E.2d at 766; 82 Nev. at __, 415 P.2d at 619.

51. Fields v. Volkswagen of Am., Inc., 555 P.2d 48 (Okla. 1976).

52. The principles delineated by the Court in *Pennoyer* were that every state possessed exclusive jurisdiction and sovereignty over persons and property within its territory and no state possessed authority to exercise direct jurisdiction over persons or property outside its territory. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

53. *See* Shaffer v. Heitner, 433 U.S. 186, 200 (1977).

54. 198 U.S. 215 (1905). *Harris* involved a Maryland resident, Epstein, who had a claim against Balk, a North Carolina resident. Harris, also a North Carolina resident, owed money to Balk. While Harris was temporarily in Maryland, Epstein garnished Harris' debt to Balk to satisfy his claim against Balk. The United States Supreme Court held that the situs of the debt "clings and accompanies" the debtor wherever he goes. *Id.* at 222.

jurisdiction, courts were able to establish a legal mechanism that provided residents, who were unable to obtain in personam jurisdiction over a nonresident defendant, with a procedure for obtaining quasi in rem jurisdiction over that nonresident defendant.[55]

This mechanism was first established in the case of *Seider v. Roth*.[56] In *Seider*, the court based its jurisdiction on a contractual obligation owed to the nonresident by his insurer.[57] The insurer was licensed to do business in the forum state. Therefore, finding that the insurer was present in the forum and that the obligation followed the obligor, the court was able to assert quasi in rem jurisdiction.[58]

The rationale of *Seider* withstood a constitutional challenge in the case of *Stimpson v. Loehmann*.[59] The *Stimpson* court, relying explicitly on *Harris v. Balk*, found no denial of due process by adhering to the *Seider* holding. It predicated its decision on a "realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness."[60] The court stated:

> Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's at-

55. Seider v. Roth, 17 N.Y.2d 111, 112, 216 N.E.2d 312, 313, 269 N.Y.S.2d 99, 100 (1966). *See generally* Annot., 33 A.L.R.3d 992, 996 (1970).

56. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

57. The plaintiffs, New York residents, unable to obtain in personam jurisdiction over the nonresident defendant, instituted a quasi in rem proceeding by attaching the nonresident's automobile insurance policy. The New York Court of Appeals concluded that the jurisdiction was properly acquired via the attachment procedure. The court reasoned that as soon as the accident occurred there was imposed on the insurer a contractual obligation which would be considered a debt owing to the insured. *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

58. *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102. Judge Burke's dissent in *Seider* stated:

> [T]he plaintiffs indulge in circular ratiocination. The jurisdiction, they assert, is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue.

Id. at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103.

See also Reese, *The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild*, 35 INS. COUNSEL J. 118 (1968); N.Y. CIV. PRAC. LAW § 5201 (McKinney 1978) (Seigel, Supplementary Practice Commentary); Comment, *Garnishment of Intangibles: Contingent Obligations and Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

59. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). The fact situation was similar to that in *Seider* in that the plaintiff was unable to obtain in personam jurisdiction over the nonresident defendant and, therefore, resorted to quasi in rem jurisdiction in accordance with the *Seider* doctrine. *Id.* at 308, 234 N.E.2d at 670, 287 N.Y.S.2d at 634. *See* note, *The Constitutionality of* Seider v. Roth *After* Shaffer v. Heitner, 78 COLUM. L. REV. 409, 409 n.4 (1978). "In personam jurisdiction would, of course, be preferable to *Seider* jurisdiction, since a judgment based on full in personam jurisdiction would not be limited by the amount of the policy." *Id.*

60. 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

> torneys; 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.[61]

Fearful of the possible repercussions presented by *Seider*,[62] Judge Friendly, writing for the United States Court of Appeals for the Second Circuit, in *Minichiello v. Rosenberg*,[63] resorted to a different rationale that allowed for the same favorable result for the plaintiffs. Judge Friendly construed *Seider* to be the equivalent of a "judicially created direct action statute.[64] The insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer."[65]

On rehearing en banc, the *Minichiello* court focused on whether the obligation of a nonresident insured to defend a tort action in New York, simply because his insurance company does business in New York, was unconstitutionally burdensome.[66] In finding that it was not, the court reasoned that the judicially created direct action statute protected the nonresident insured far more than that required by *Harris v. Balk*.[67] It felt that the nonresident defendant had only a slight interest in the litigation and was only a nominal defendant.[68]

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61. *Id.* (citations omitted).

62. In *Stimpson* the court reaffirmed its earlier holding in *Seider*. Of the six judges, Judges Burke and Scileppi dissented and from this Judges Breitel and Bergan concurred solely on the basis of stare decisis. Judge Breitel's opinion, with which Judge Bergan concurred, stated:

> I concur but only on contraint of *Seider* v. *Roth* so recently decided by this court. Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

Id. at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640. The decision in *Seider* received extremely "poor press from the commentators." Minichiello v. Rosenberg, 410 F.2d 106, 108 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

63. 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

64. A direct action statute allows "injured parties to bring direct actions against liability insurance companies that have issued policies contracting to pay liabilities imposed on persons who inflict injury." Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 67 (1954) (direct action statute held constitutional). *See generally* S. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4861-66 (1962).

65. 410 F.2d at 109. Judge Friendly limited the use of the judicially created direct action statute to New York residents who had been injured in an out of state accident. *Id.* at 110.

66. *Id.* at 118.

67. *Id. See generally* Rosenberg, *One Procedure Genie Too Many or Putting* Seider *Back into its Bottle*, 71 COLUM. L. REV. 660, 665-67 (1971).

68. The reasoning of the court was that in *Harris v. Balk*:

> Balk had to decide whether to hire a Maryland lawyer to protect his interest in the $180

In summary, *Harris v. Balk* established the foundation for a series of cases, initiated by *Seider v. Roth*, which provided forum residents with a device for obtaining quasi in rem jurisdiction when asserting in personam jurisdiction was not possible. Jurisdiction was obtained by attaching the defendant insurer's contractual obligation to defend and indemnify the insured.

Two distinct points were focused upon to rationalize asserting jurisdiction: first, the presence of the nonresident defendant's property in the forum, resulting in a true quasi in rem proceeding; second, the presence of the nonresident defendant's insurer within the forum, resulting in a judicially created direct action statute.

C. Shaffer v. Heitner: *A Uniform Constitutional Standard for All Types of Jurisdiction.*

Shaffer v. Heitner[69], decided in 1977, broke nearly two decades of silence by the Court concerning the due process limitation on jurisdiction. The issue before the Court was whether a state court could assert quasi in rem jurisdiction solely on the basis of the presence of stock within the forum, absent other ties among the defendants, the forum, and the litigation, without violating the due process clause of the fourteenth amendment.[70] Before addressing this issue, the Court examined the historical development of the various types of jurisdiction.[71] The Court noted that the development of the constitutional standard for in personam jurisdiction, from the *Pennoyer* territoriality principle to the *International Shoe* minimum contacts principle, had not been duplicated in the area of quasi in rem and in rem jurisdiction.[72] Thus, the Court believed that traditional notions of fair play and substantial justice were being offended by the perpetuation of the territorial principle as the constitutional standard for asserting quasi in rem or in rem jurisdiction.[73] In light of this, the Court felt that the validity of a court's

> debt Harris owed him. [Further], [t]he Maryland judgment deprived Balk of money he could have used for whatever purpose he willed. [In contrast, the insured defendants], are entitled to have lawyers in New York furnished by their insurers without expense [and] a *Seider* judgment would mean simply that liability policies, on which [insured] appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.

410 F.2d at 118.

69. 433 U.S. 186 (1977).
70. *Id.* at 189.
71. *Id.* at 196-206.
72. *Id.* at 205.
73. *Id.* at 212.

assertion of jurisdiction, regardless of the basis for that assertion, should be determined by the minimum contacts test as elucidated in *International Shoe* and its progeny.[74]

The Court noted that uniformly applying the minimum contacts test would not, in all likelihood, affect in rem jurisdiction, where the property itself is the object of the controversy,[75] or quasi in rem jurisdiction, where the property is related to the plaintiff's cause of action.[76] The Court found, however, that when the property is neither the subject matter of the litigation, nor related to the plaintiff's cause of action, its only purpose being to provide a basis for asserting jurisdiction, then jurisdiction would be denied under the minimum contacts test.[77]

> [A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.[78]

The effect of *Shaffer* is to provide a uniform standard for all assertions of state court jurisdiction.[79] The uniform test will be the minimum contacts test as outlined by *International Shoe* and its progeny. When "the only role played by the property is to provide the basis for bringing the defendant into court,"[80] then the nonresident property owner must have sufficient contacts with the forum state to meet the minimum contacts standard.

In addition to expanding the minimum contacts standard, the *Shaffer* opinion indicated what would be required in order to satisfy that standard. The Court focused its attention on the relationship "among the defendant, the forum, and the litigation"[81] to determine

74. *Id.* at 206.

75. *Id.* at 207-08; Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 616-22 (1977). *See* notes 21-24 *supra* and accompanying text. 433 U.S. at 208.

76. *See* note 26 *supra* and accompanying text.

77. 433 U.S. at 208-09.

78. *Id.* at 209.

79. "We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212; *See generally* Recent Case, *Constitutional Law-Courts-All State Court Jurisdiction Governed by "Minimum Contacts,"* 54 N.D.L. REV. 260 (1977); Notes, *Civil Procedure—A Single Theory of State Court Jurisdiction: "Minimum Contacts,"* 52 TUL. L. REV. 171 (1977); Note, Shaffer v. Heitner: *The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 WASH. & LEE L. REV. 131 (1978).

80. 433 U.S. at 209.

81. *Id.* at 204.

whether the exercise of state court jurisdiction was consistent with due process. This inquiry may be contrasted with the test espoused in *International Shoe* which spoke only of the defendants "contacts, ties or relations" with the forum state.[82]

The Court in *Shaffer* also resurrected the *Hanson* requirement that a defendant must purposefully avail himself of the benefits and protection of the forum state.[83] In doing so, Justice Marshall, author of the majority opinion, identified the rationale behind the *Hanson* test. A defendant who purposely avails himself of the benefits and protections of the forum state, should anticipate being required to appear before that distant forum.[84] Justice Stevens, in his concurring opinion in *Shaffer*, was in accord with Justice Marshall's reasoning in requiring the nonresident to have "fair warning" that his activities with the foreign state may subject his person to the foreign state's jurisdiction.[85]

In the following year, the United States Supreme Court, in the case of *Kulko v. Superior Court*,[86] again emphasized that the nonresident defendant must have purposefully availed himself of the privileges of the forum state so that he could reasonably have anticipated the State's jurisdiction.[87] The *Kulko* Court found an essential inquiry in determining whether the maintenance of a suit offends traditional notions of fair play and substantial justice to be "whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State."[88]

D. *Post* Shaffer

1. Foreseeability as a Basis for In Personam Jurisdiction

The effect of *Shaffer* and *Kulko* on in personam jurisdiction was to clarify the minimum contacts standard of *International Shoe*.[89] To satisfy this standard, the Court emphasized the need for the forum state to

82. 326 U.S. at 319.
83. 433 U.S. at 215-16.
84. *See id.* at 216.
85. The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks.

Id. at 218 (Stevens, J., concurring).
86. 436 U.S. 84 (1978).
87. *Id.* at 97-98.
88. *Id.* at 92.
89. *See* note 106 *supra* and accompanying text.

establish a sufficient relationship among the defendant, the forum, and the litigation.[90] Due process does not contemplate that a state court may assert jurisdiction over a nonresident defendant when that defendant has no contacts, ties, or relations with the forum state.[91]

Despite the emphasis on minimum contacts, some state courts continued to assert in personam jurisdiction over nonresident defendants on the basis that the defendant could have reasonably foreseen that his tortious activity outside the state might produce injury within the forum state.[92] This idea of foreseeability has been interpreted by courts as being the equivalent of, or the alternative to, the minimum contacts standard.[93]

Cases applying the foreseeability concept have been primarily limited to lawsuits arising from a defective product which is highly mobile, such as an airplane or an automobile.[94] These cases stand for the proposition that sellers of a transient product must defend a lawsuit in any state where the product has caused an injury. The reasoning is that, owing to the product's mobility, it was reasonably foreseeable that the product might be purchased or used in the particular state where the injury occurred.

2. The Constitutionality of *Seider* Jurisdiction After *Shaffer*

After *Shaffer* had delineated a uniform test for all state court assertions of jurisdiction, it seemed evident to those who opposed the reasoning of *Seider*, either as a quasi in rem proceeding or as a direct

90. 433 U.S. at 204.

91. *Id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

92. Executive Jet Sales, Inc. v. Jet Am., Inc., 148 Ga. App. 475, 252 S.E.2d 54 (1978); Braband v. Beech Aircraft Corp., 51 Ill. App. 3d 196, 367 N.E.2d 118 (1977); Sybron Corp. v. Wetzel, 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978); World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978).

93. *See, e.g.*, Sybron Corp. v. Wetzel, 46 N.Y.2d 197, 206, 385 N.E.2d 1055, 1059, 413 N.Y.S.2d 127, 132 (1978); World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 353 (Okla. 1978) (statute which authorized jurisdiction has been interpreted as conferring jurisdiction to the outer limits permitted by due process).

94. In Braband v. Beech Aircraft Corp., 51 Ill. App. 3d 296, 367 N.E.2d 118 (1977), the Illinois Appellate Court said, "It is not offensive to 'traditional notions of fair play and substantial justice' to say to the manufacturer of a transient product such as an airplane that it must defend the lawsuit in a reasonably foreseeable place." *Id.* at __, 367 N.E.2d at 123. In Executive Jet Sales, Inc. v. Jet Am., Inc., 148 Ga. App. 475, 252 S.E.2d 54 (1978), the Georgia Court of Appeals held that an Ohio-based "repair station," engaged in the maintenance, inspection, and repair of jet aircraft, was subject to its jurisdiction owing to "the character and extent of the services [Executive Jet Sales] performed, the nature of the aircraft which it maintained and the qualities and locations of its customers . . . ." *Id.* at __, 252 S.E.2d at 55. Because of these factors the court found that "it was reasonably foreseeable that [Executive Jet Sales'] negligence would have tortious consequences in Georgia." *Id.*

action proceeding, that it would no longer withstand a constitutional challenge.[95] Courts which considered *Seider* jurisdiction subsequent to *Shaffer* have split, however, over its implications. Several courts have held that such jurisdiction is precluded by *Shaffer*, while others have found that such jurisdiction is in accord with due process.

This split is a result of the two different theories advanced in support of *Seider*. Courts viewing *Seider* jurisdiction as a quasi in rem proceeding have found such a jurisdictional assertion to be unconstitutional in light of *Shaffer*.[96] The relationship between the defendant and the forum is not sufficient, the only ties being that the defendant's insurer does business within the forum state. This is not sufficient to satisfy the minimum contacts test of *International Shoe*.

Those courts which viewed *Seider* jurisdiction as a judicially created direct action statute have found it to comport with the requirements of due process.[97] Courts taking this view have felt that since the full force of the judgment rests on the insurer,[98] then the minimum contacts standard should be applied to it and not the insured.[99]

> *Seider v. Roth* [is] sui generis in the field of jurisdiction. [It] cannot be pigeon-holed as in rem or in personam. . . .[I]n

95. N.Y. CIV. PRAC. LAW § 5201 (McKinney 1978) (Seigel Supplementary Practice Commentary); *see* Reese, Shaffer v. Heitner: *Implications for the Doctrine of* Seider v. Roth, 63 IOWA L. REV. 1023 (1978); Note, Shaffer v. Heitner: *The Death of* Seider v. Roth?, 29 SYRACUSE L. REV. 961 (1978); Note, Shaffer v. Heitner *and The Seider Doctrine*, 39 U. PITT. L. REV. 747 (1978). *Cf.* 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 (1978) (would hold *Seider* jurisdiction as a quasi in rem proceeding unconstitutional, but would uphold the constitutionality of *Seider* jurisdiction as a direct action suit); Comment *The Constitutionality of the Seider Practice after* Shaffer v. Heitner, 49 U. COLO. L. REV. 321 (1978) (would hold *Seider* as a quasi in rem proceeding unconstitutional and uphold *Seider* as a direct action suit). *But see* Note, *The Constitutionality of* Seider v. Roth *after* Shaffer v. Heitner, 78 COLUM. L. REV. 409 (1978) (would uphold Seider jurisdiction either as quasi in rem or as a direct action suit on the basis that the legal interests of the nonresident insured are not significantly affected).

96. Attanasio v. Ferre, 93 Misc. 2d 661, 401 N.Y.S.2d 685 (Sup. Ct., 1977); Wallace v. Target Stores, Inc., 92 Misc. 2d 454, __, 400 N.Y.S.2d 478, 481-82 (Sup. Ct., 1977); Katz v. Umansky, 92 Misc. 2d 285, __, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977). *See* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 196 n.2 (2d. Cir. 1978), for a list of those cases that have either upheld *Seider* jurisdiction or held *Seider* jurisdiction unconstitutional.

97. O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d. Cir. 1978); Savchuk v. Rush, 311 Minn. 480, 272 N.W.2d 888 (1978); Baden v. Staples, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978); Afford v. McGaw, 61 App. Div. 2d 504, 402 N.Y.S.2d 499 (1978).

98. Judge Friendly, writing for the majority in O'Connor v. Lee-Hy Paving Corp., 579 F.2d at 200, thought that "[t]he overriding teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions." *Id.* For this reason he found that, in reality, the insurer controls the litigation and is the real party in interest in the action. *See also* Savchuk v. Rush, 311 Minn. 480, __, 272 N.W.2d 888, 892 (1978).

99. *See* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 200-01 (2d Cir. 1978).

> real terms [it is] in personam so far as the insurer is concerned. For the named defendant, the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant . . . What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.[100]

Since the insurer is doing business within the forum state, the minimum contacts standard would be met.

Courts which have upheld *Seider* jurisdiction have found it necessary to distinguish *Harris v. Balk*, it being expressly overruled in *Shaffer*.[101] The distinction relied upon is that in *Harris* the property had no relationship with the litigation, whereas in cases using *Seider* jurisdiction the property had no independent significance or value apart from the litigation.[102] The activity giving rise to the litigation created the property which provided the basis for the court's jurisdiction.

IV. MINIMUM CONTACTS STANDARD: THREE TESTS

Having examined the development of the due process limitations on state court jurisdiction, it is evident that the standards articulated in *International Shoe* are not definable with any great precision. In examining *International Shoe* and its progeny, three tests emerge which

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100. *Id.* at 200 (citing Judge Cooling's statement in O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994, 1002 (E.D.N.Y. 1977)).

101. *See* note 97 *supra* and accompanying text.

102. Savchuk v. Rush, 311 Minn. 480, __, 272 N.W.2d 888, 892, & n.6 (1978). "[T]he insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and is therefore related to plaintiff's cause of action." *Id.* at __, 272 N.W.2d at 892 n.6. The reasoning of the court was based on O'Conner v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978). In *O'Connor* the court, in light of the holding in *Shaffer*, differentiated *Seider*-type cases from *Harris*-type cases on the basis that *Seider* does not sanction the type of quasi in rem action typified by *Harris* v. *Balk*, that is, where the property which serves as the basis for asserting jurisdiction is completely unrelated to the plaintiff's cause action. *Id.* at 199.

> [A] [*Seider*] judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability and in appropriate cases to allow the plaintiff to recover from the insurer. . . . What we said in *Minichiello*, supra, nine years ago apropos of *Harris* v. *Balk* remains just as true today.

Id. *See* Note, *Civil Procedure: In Rem Jurisdiction—Attachment of Insurance Debts—State Statutes*, O'Connor v. Lee-Hy Paving Corp., *579 F.2d 194 (2d Cir. 1978)*, 12 AKRON L. REV. 331, 336-37 (1978); Note, *The Constitutionality of* Seider v. Roth *After* Shaffer v. Heitner, 78 COLUM. L. REV. 409, 425 (1978); Note, *Seider II—Just when You Thought it Was Safe to Get in an Out-of-State Accident with a New York Resident: A Comment on* O'Conner v. Lee-Hy Paving Corp., 4 DEL. J. Corp. L. 479, 488-89 (1979); Note, *Civil Procedure—Jurisdiction—Constitutionality of Attachment of Liability Insurance Policies to Obtain Quasi In Rem Jurisdiction After* Shaffer v. Heitner, 27 KAN. L. REV. 491, 494 (1979).

are used to determine if a state court's assertion of jurisdiction is consistent with the minimum contacts standard. These three tests may be labeled the nexus test, the fair warning test, and the convenience test.[103] If any of these tests is not satisfied, then a state may not assert jurisdiction over a nonresident defendant.

To satisfy the nexus test a state court must establish a sufficient relationship among the defendant, the forum, and the litigation.[104] In addition, it is necessary that in every case the defendant's activity in the forum state be such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[105]

The fair warning test is satisfied when a nonresident defendant purposely avails himself of the privilege of conducting activities within the forum state.[106] By purposefully availing himself of the forum state's benefits, the defendant should reasonably anticipate being haled before that state's courts.[107] This reasonable anticipation provides the nonresident with fair warning that a lawsuit is possible.[108] Finally, a state may consider a number of factors in determining whether it is a convenient forum,[109] including its own interest in providing an effective means of redress for its own residents.[110]

By employing the minimum contacts standard's three tests as a tool for analyzing the Court's recent opinions in *World-Wide* and *Rush*, the current status of state court jurisdiction may be determined.

A. *The Impact of* World-Wide Volkswagen

After *World-Wide*, the constitutional standard to be applied to assertions of state court jurisdiction is still the concept of minimum con-

103. *See* Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *And A Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 862, 905 (1978).

104. *See* note 81 *supra* and accompanying text.

105. 326 U.S. at 316. *See* note 33 *supra* and accompanying text.

106. *See* note 42 *supra* and accompanying text.

107. *See* note 117 *supra* and accompanying text.

108. *See* note 85 *supra* and accompanying text.

109. Professor Woods has identified several "fairness factors" that have been considered by state courts. These include the relative aggressiveness of the parties, the relative economic burden of prosecuting or defending the action, the importance of the governmental interest to be vindicated, the convenience of the forum relative to the litigational efficiency, the necessity of litigation in the chosen forum, the availability of alternative forums, and the impact of the forum's choice of law rule. Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *And* Kulko *And A Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 891 (1978).

110. *See* note 37 *supra* and accompanying text.

tacts.[111] The Court in *World-Wide* relied on the three tests advanced earlier in this comment in order to determine if the requisite minimum contacts were present. The Court found that the requirements of a sufficient nexus and fair warning were needed "to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[112] The convenience test "protects the defendant against the burdens of litigating in a distant or inconvenient forum."[113]

In determining whether there was a sufficient nexus between World-Wide and the Oklahoma forum, the Court rejected the Oklahoma Supreme Court's reasoning that, because an automobile is mobile by its very design and purpose, it was foreseeable that the Robinson's automobile would cause injury in Oklahoma.[114] The Court found that foreseeability alone was never sufficient to establish in personam jurisdiction.[115] The Court reasoned that if foreseeability provided a sufficient nexus, then "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."[116] Allowing such a result would be to condone the principle found in *Harris v. Balk* and expressly rejected in *Shaffer*.[117]

The Oklahoma Supreme Court also relied on the substantial reve-

111. 100 S.Ct. 559, 564 (1980).

112. *Id.*

113. *Id.* "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 567 (citations omitted).

114. World-Wide Volkswagen Corp. v. Woodson 585 P.2d 351, 354 (Okla. 1978).

115. 100 S.Ct. at 566. The Court drew an analogy between the foreseeability of use concept for in personam jurisdiction and that of a creditor's amenability to a quasi in rem action which travels with his debtor. The Court was unwilling to endorse the foreseeability of use concept since it was analogous to the principle held unconstitutional in *Shaffer*. *Id.* at 566-67. *See* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, (4th Cir. 1956), where Judge Sobeloff illustrated the foreseeability of use concept's burdens on interstate commerce.

> [L]et us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was "with the reasonable expectation that these goods are to be used or consumed in [the vendee's domicile] and are so used and consumed." It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states.

Id. at 507.

116. 100 S.Ct. at 566.

117. *Id.* at 566-67.

nues that it felt World-Wide derived from the forum.[118] This conclusion was inferred from three factors: the revenue earned on the sale of the car to the plaintiff; a realization that the purpose of the automobile was to travel; and, the fact that Oklahoma provides highways to allow this travel.[119] The Oklahoma court felt that the revenue generated by the forum was sufficient to provide the contacts necessary to assert in personam jurisdiction.[120]

Although skeptical of the inference drawn by the Oklahoma court, the Supreme Court nonetheless accepted it; but still found that it was not sufficient to provide the necessary nexus between the defendant and the forum.[121] The Court found that simply deriving revenues from an activity which in itself was not a sufficient contact would not provide the necessary nexus.[122]

The Court concluded that there was a total absence of contacts, ties, or relations with Oklahoma. The Court found that the "respondents [sought] to base jurisdiction on one, isolated occurrence and whatever inferences [could] be drawn therefrom: the fortuitous circumstances that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma."[123]

In applying the fair warning test the Court stated: "[W]hen a corporation 'purposely avails itself of the privilege of conducting activities within the forum State' it has clear notice that it is subject to suit there . . . ."[124] The Court reasoned that when a defendant purposely "delivers its product into the stream of interstate commerce with the *expectation* that they will be *purchased* by consumers in the forum State," then it does not offend due process for the forum state to assert its in personam jurisdiction over the defendant.[125]

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118. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978).

119. *Id.*

120. *Id.* at 355.

121. 100 S.Ct. at 566.

122. Financial benefits accruing to the defendant from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

Id. (citations omitted) (no emphasis added).

123. *Id.* at 564.

124. *Id.* at 567.

125. *Id.* (emphasis added). Therefore, decisions holding nonresident defendants subject to jurisdiction on the basis of foreseeability of purchase of their product within the forum have been found to withstand constitutional challenge. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *But see* Justice Brennan's dissenting opin-

On the other hand, if the nonresident defendant can merely reasonably foresee that at the time of introducing its product into the stream of interstate commerce it *might be used* in the forum state, then it does offend due process for the forum state to assert in personam jurisdiction over the nonresident defendant.[126] Although previously rejecting foreseeability as a basis for finding the nexus necessary to assert in personam jurisdiction, the Court did find it to be relevant in determining if the defendant had fair warning.[127]

In using foreseeability the Court shifted the focus from the likelihood that the product might find its way into the forum to the reasonable expectation that the defendant, owing to his activities within the forum, should anticipate being haled into the forum to defend a suit.[128] The distinction being made by the Court is clear. The "unilateral activity of those who claim some relationship with a nonresident defendant" does not provide the fair warning required by due process.[129] Only by purposely availing himself of the benefits of the forum state does a nonresident defendant receive the fair warning required by due process.

This is not to say that the benefits must be derived directly. In fact, an economic benefit received through a chain of distribution, though there may be many others through which that benefit flowed, is sufficient to provide the fair warning required.[130] The Court found no evidence that any of World-Wide's ultimate purchasers were residents of Oklahoma. Therefore, the unilateral activity of the Robinsons, who claimed a relationship with World-Wide, did not provide sufficient contacts to allow Oklahoma to assert jurisdiction.

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ion, where he could not reconcile the constitutional distinction "between a case involving goods which reach the distant state through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there." 100 S.Ct. at 584-85.

126. 100 S.Ct. at 567 (emphasis added). "It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere unilateral activity of these who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Id.*

127. "[F]oreseeability that is critical to due process analysis is not the mere likelihood that the product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.*

128. *Id.*

129. *Id.* (quoting from Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

130. "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 100 S. Ct. at 567.

A number of factors have been recognized by the Court as being relevant in applying the convenience test. In light of the purpose behind the convenience test, to protect the defendant from litigating in a distant or inconvenient forum, the primary concern is the burden placed on the nonresident defendant.[131] In addition to this primary concern, the Court has recognized as other relevant factors the forum's interest to adjudicate the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interest in obtaining the most efficient resolution of the controversy, and the interest of the states to further substantive social policies.[132] After identifying the relevant factors for consideration, the Court did not explore whether the defendants would actually have been inconvenienced by defending the suit in Oklahoma. Because the defendants did not have sufficient contacts, ties, or relations with the forum, it was not necessary to consider the convenience issue. The Court concluded:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[133]

In dissent, Justice Marshall, who wrote the opinions of the Court in *Shaffer*, *Kulko*, and *Rush*, showed concern that the majority in *World-Wide* had taken an unnecessarily narrow view of the defendant's contacts, ties, or relations with the forum state.[134] Marshall believed the nexus test was satisfied by the fact that the defendants chose "to become part of a nationwide, indeed a global, network for marketing and servicing automobiles."[135]

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131. The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there.". . . Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, *while always a primary concern*, will in an appropriate case be considered in light of other relevant factors . . . .

Id. at 564 (citations omitted) (emphasis added).

132. *Id.*

133. *Id.* at 565-66.

134. *Id.* at 568.

135. *Id.* at 569. Justice Marshall would agree with the majority and hold that the nexus test was not satisfied if he believed the defendant's only forum-related conduct was the isolated event of the automobile accident. He believed, however, that jurisdiction was premised on the "deliberate and purposeful actions of the defendants . . . to become part of a nationwide, indeed a global, network for marketing and servicing automobiles." *Id.*

Justice Marshall agreed with the majority that if a product was purchased in the forum state by a consumer, then that state could assert in personam jurisdiction over anyone in the chain of distribution.[136] He strongly disagreed, however, with the majority's position "that jurisdiction is necessarily lacking if the product enters the state not through the channels of distribution but in the course of its intended use by the consumer."[137] Owing to the unique characteristics of the automobile, Marshall would have held that the nonresident defendants purposefully availed themselves of the forum state's benefits and thereby should have reasonably anticipated being haled before the forum court if the product entered the forum either through channels of distribution or by the consumer's use of the product.[138] Although sympathizing with the majority's concern that persons should be able to structure their foreign activities so as not to be subject to suit in a distant forum, he believed that some activities, such as the automobile industry, by their very nature subject persons to the jurisdiction of multiple forums.[139]

> In the case of the distributor, in particular, the probability that some of the cars it sells will be driven in every one of the contiguous States must amount to a virtual certainty. This knowledge should alert a reasonable businessman to the likelihood that a defect in the product might manifest itself in the forum State—not because of some unpredictable, aberrant, unilateral action by a single buyer, but in the normal course of the operation of the vehicles for their intended purpose.[140]

Justice Brennan, believing the standards set forth by the majority were obsolete,[141] wrote a dissenting opinion. Rather than inquiring into the defendant's contacts, ties, or relations with the forum state, Brennan felt that "[t]he essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.' "[142] Brennan suggests that the only reason

136. *Id.*
137. *Id.*
138. "[T]he intended use of the automobile is precisely as a means of traveling from one place to another. In such a case, it is highly artificial to restrict the concept of the 'stream of commerce' to the chain of distribution from the manufacturer to the ultimate consumer." *Id.* at 570.
139. *Id.*
140. *Id.* at 569.
141. World-Wide Volkswagen v. Woodson, 100 S. Ct. 580, 581 (1980). (Justice Brennan wrote one dissenting opinion covering both *World-Wide Volkswagen v. Woodson* and *Rush v. Savchuk*).
142. *Id.* (quoting from International Shoe Co. v. Washington, 362 U.S. 310, 316 (1945).

for inquiring into the existence of the defendant's contacts is to give some content to the determination of whether the maintenance of the suit is reasonable and fair.[143] The Constitution, he argued, does not require the trial to be held in the forum with the best contacts with the nonresident defendant. It only requires that the forum have some contacts with the defendant.[144]

Brennan, while suggesting that the constitutional standard should be that of a convenience test, "would still require the plaintiff to demonstrate sufficient contacts among the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial."[145]

B. *The Impact of* Rush

The only relationship the United States Supreme Court found among Rush, Minnesota, and the tort action was the fact that Rush's insurance company, State Farm, did business in Minnesota. The Court did not think this provided a sufficient nexus for asserting jurisdiction.[146] In light of this, the Court rejected *Seider*, pointing out that it had held in *Shaffer* that the mere presence of property in the forum state that is unrelated to a plaintiff's cause of action does not establish a sufficient relationship between the nonresident property owner, the state, and the litigation to support the assertion of jurisdiction.[147] Because the property relied upon by the Minnesota court to provide the basis for jurisdiction was not the subject matter of the case, nor related to the *Savchuk* tort action, the Court held the assertion of quasi in rem jurisdiction to be unconstitutional.[148]

The Court also rejected the idea that viewing *Seider* as a direct action proceeding was sufficient to provide the necessary nexus. It

143. Justice Brennan noted that the Court in *International Shoe* "declined to establish a mechanical test based on the quantum of contacts between a State and the defendant. . . . The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness." *Id.*

144. *Id.* at 582.

145. *Id.* at 587.

146. Rush v. Savchuk, 100 S.Ct. 571, 577-78 (1980).

147. *Id.*

148. The Court stated:

> The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

Id. at 578.

thought this approach was not the equivalent of a direct action against the insurer because a court must first be able to obtain jurisdiction over the nominal defendant, the insured. The Court found it conceptually impossible for the forum to obtain jurisdiction over the insurer.[149] In many respects this reasoning by the Court ignores the practical effects of a *Seider* direct action proceeding.[150] The Court was not willing to ignore the question of jurisdiction over the nonresident defendant. This may be attributed to its unwillingness to accept the lower court's reasoning that the insured had only a slight interest in the litigation and, therefore, it was not unfair to make him a nominal defendant in order to obtain jurisdiction over the insurer.[151]

The lower court also attempted to establish the necessary nexus by attributing to Rush those interests which Minnesota has in providing a forum for its residents and joining them with State Farm's contacts. Rather than focusing on the relationship among the defendant, the forum, and the litigation as the minimum contacts standard requires, the Minnesota Supreme Court would make its inquiry based on the relationship "among the plaintiff, the forum, the insurer, and the litigation."[152]

The United States Supreme Court noted that such a shift in inquiry would result in asserting jurisdiction over a nonresident insured on the basis of the insurer's activities within the forum, the state's interest in providing a forum for its residents, and the plaintiff's contacts with the forum. Asserting jurisdiction over a nonresident insured who has no contacts, ties, or relations with the forum is "plainly unconstitutional."[153]

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149. The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action.

Id.

150. *See* notes 98-101 *supra* and accompanying text. *See also* Justice Brennan's dissenting opinion, 100 S.Ct. at 583.

151. The Court said: "Because the party with forum contacts can only be reached through the out of state party, the question of jurisdiction over the nonresident cannot be ignored. Moreover, the assumption that the defendant has no real stake in the litigation is far from self-evident." Rush v. Savchuk, 100 S.Ct. 571, 579 (1980) (footnotes omitted). The Court identified a noneconomic factor that may have great importance to a defendant. The cause of action may cause people to question a defendant's integrity and competence and therefore affect his professional standing. Also, the defendant might have a substantial economic stake if "multiple plaintiffs sued in different states for an aggregate amount in excess of the policy limits, or if a successful claim would affect the policyholder's insurability." *Id.* at 579 n.20.

152. *Id.* at 579.

153. *Id.*

Since the assertion of jurisdiction by the Minnesota court did not satisfy the nexus test of the minimum contacts standard, the Court did not need to address the fair warning test or the convenience test. Nevertheless, in passing, the Court did conclude that Rush, by simply having bought insurance in Indiana, had not engaged in any purposeful activity related to Minnesota such that he could have fair warning of being haled before a Minnesota Court.[154]

Justice Brennan, in his dissenting opinion, again asserted the essential inquiry to be "whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.' "[155] The factors Justice Brennan would consider in determining the fairness and reasonableness of the exercise of state court jurisdiction are the various interests in proceeding with the action in the forum, the actual burden imposed on a nonresident defendant to defend the suit in the distant forum, and the existence of the defendant's contacts, so long as there were some.[156] In considering these factors Justice Brennan arrived at a two part test. "If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest . . . should have no constitutional excuse not to appear."[157] In applying this test Justice Brennan concluded that Rush should be required to defend in Minnesota. Minnesota had an interest in providing a forum for its residents and in regulating the activities of insurance companies doing business in the State; and the burden on Rush was slight as he was simply a nominal defendant.[158]

V. CONCLUSION

World-Wide Volkswagen and *Rush* leave intact the minimum contacts test as the constitutional standard to be applied in determining the propriety of a state court's assertion of jurisdiction. The cases are im-

154. *Id.* at 577-78. The Court found that State Farm's decision to do business in Minnesota or in the other 49 states was of no concern to Rush. "He had no control over that decision, and it is unlikely that he would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move." *Id.* at 577.

155. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 581. *See* note 144 *supra* and accompanying text.

156. *Id.* at 581.

157. Id. at 587 (citation omitted). Justice Brennan believed that by forcing the defendant to show some real injury to a constitutionally protected interest, it would "strip the defendant of an unjustified veto power over" which forum had jurisdiction over him. *Id.*

158. *Id.* at 582-83.

portant, however, in that the Court articulated the important factors that must be present for the minimum contacts standard to be met. This should alleviate a great deal of the confusion that has developed from *International Shoe* and its progeny.

In order for the minimum contacts test to be met there must be: 1) a sufficient relationship amongst the defendant, the forum, and the litigation; 2) a purposeful availment by the defendant of the benefits of the forum, such that he has fair warning of the possibility of being haled before the forum's courts; and 3) no unreasonable inconvenience to the defendant in being forced to defend the suit in the forum state. The absence of any of these factors defeats the state assertion of jurisdiction.

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