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FORUM JURIDICUM

THE FIRST TWO YEARS AFTER *SHAFFER* V. *HEITNER*

*John R. Leathers**

When I first read the advance sheets on *Shaffer v. Heitner*¹ in the summer of 1977, my life as a Civil Procedure teacher flashed before my eyes. I could vividly remember all the happy moments experienced while teaching the subject—students terrified by *Pennoyer v. Neff*,² devastated by *Harris v. Balk*.³ How could I ever replace those wonderful times with the modern, virtually colorless logic of *Shaffer*? In a state of grief and panic, I did the only thing any self-respecting law teacher would do—I wrote a law review article⁴ about *Shaffer* and considered its effects on my existing casebook and notes. A cursory examination of the law review treatment of *Shaffer* indicates that other procedure teachers decided to pursue the same course. In a way, *Shaffer* was like the death of an old family member who had suffered long enough to make other family members miserable. Everyone working in the procedure area knew that *Harris* and the philosophy of *Pennoyer* were overdue for extinction, but it was still a shock when it really happened.

During the past two years, it has been possible to accommodate the curriculum to *Shaffer* with virtually no changes other than its addition. *Pennoyer* must still be taught, since its holding that the due process clause⁵ sets the limits of state adjudicatory authority is still perfectly sound. Even *Harris* remains to illustrate the workings of *quasi in rem* jurisdiction, although use of such jurisdiction on similar fact patterns is clearly disallowed by *Shaffer*.⁶ All of that is easy enough for those who must fit *Shaffer* into the law school curriculum. However, the question which seemed open was how those practicing law were accommodating *Shaffer*. I found one law review

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1. 433 U.S. 186 (1977).
2. 95 U.S. 714 (1877).
3. 198 U.S. 215 (1905).
4. Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 Ky. L.J. 1 (1977).
5. U.S. CONST. amend. XIV.
6. 433 U.S. at 208.

article⁷ surveying some post-*Shaffer* case law; but it did not touch on some of the areas which interested me, so I decided to explore a bit further. This article is a compilation of what my research turned up in the fall of 1979.

What follows is a survey of the cases touching on the problems raised by *Shaffer* during the first two years after the decision. The survey is broken down into the areas which seem to have arisen most frequently. Before beginning the analysis, I would like to make some general observations.

The most surprising aspect of the post-*Shaffer* cases is *what is not there*. Any case important enough to engender so much discussion and such a torrent of literature in scholarly circles would be expected to produce a similar amount of case law from the lower courts. That simply is not true of *Shaffer*. For the most part, lower courts are not having the difficulty with *Shaffer* that scholars have had. Scholars may argue that the lower courts are unable to grasp the many subtle nuances of *Shaffer*. In my view, it is the courts which are dealing well with the problems and the scholars who have made too much of the case. The one thing which clearly emerges from the case law subsequent to *Shaffer* is that *quasi in rem* jurisdiction survives in a variety of situations. Since there is no way to compare the number of pre-*Shaffer* attachments with the number of post-*Shaffer* attachments, it is not possible to tell from this survey what quantitative effect *Shaffer* has had. From a scholarly view *Shaffer* may seem most important because it overrules *Harris*, but I doubt that there has been much practical impairment. It has been my unscientific observation over the years that practicing lawyers seldom used the *Harris* procedure, even when faced with fact patterns in which the procedure would have been helpful. In part I suspect the neglect of the *Harris* procedure has been caused by the failure of most lawyers while students really to understand *Harris*, resulting in their avoidance of the technique after entering practice. Despite this, I believe that even after *Shaffer*, *quasi in rem* jurisdiction remains an important tool to those who can use it.

Part IV of the *Shaffer* opinion concluded that the exercise of jurisdiction by Delaware (regardless of how labeled) was violative of due process.⁸ As I discussed at length in a previous article,⁹ that conclusion could only be justified on one of two grounds: (1) Either Delaware lacked minimum contacts to exercise constitutionally *in*

7. Riesenfeld, *Shaffer v. Heitner: Holding, Implications, Forebodings*, 30 HAST. L.J. 1183 (1979).

8. 433 U.S. at 216.

9. Leathers, *supra* note 4, at 20.

personam jurisdiction or (2) *in personam* jurisdiction is constitutionally required in all cases. At the time I doubted that either was true, and lower court decisions since *Shaffer* bear out that conclusion. With respect to the ability of a state to exercise *in personam* jurisdiction over directors of a corporation created by the law of the state for damage to the corporation, I agree with Justice Brennan that such jurisdiction does exist.¹⁰ Since *Shaffer*, the court of appeals of North Carolina has upheld such jurisdiction over a non-resident director in a shareholders' derivative suit in *Swenson v. Thibaut*.¹¹ It thus appears that what was lacking in *Shaffer* could not have been minimum contacts between the defendants and the forum.

Lower court decisions since *Shaffer* also clearly show that the contention that *in personam* is the only form in which a state may constitutionally exercise jurisdiction is not true. In at least five cases, courts have struck down exercises of *quasi in rem* jurisdiction because the defendants lacked sufficient contacts with the forum to satisfy due process.¹² On the other hand, there are at least eight instances in which courts have upheld such exercises of jurisdiction on the grounds that the defendant did have sufficient contacts to satisfy the due process standards.¹³ This means that if the state has a long arm statute which will reach the facts in question and the defendant has sufficient contacts to satisfy due process, jurisdiction may be exercised either *quasi in rem* or *in personam*. The continued availability of *quasi in rem* is of particular importance in cases in which the state long arm statute is not sufficiently broad to reach the facts at hand, but the facts fall within the constitutional limits of due process. Illustrating such a use of *quasi in rem* jurisdiction are the cases of *Intermeat Inc. v. American Poultry Inc.*¹⁴ and *Drexel*

10. 433 U.S. at 222 (Brennan, J., concurring in part and dissenting in part).

11. 39 N.C. App. 77, 250 S.E.2d 279 (1978).

12. *Bank of America Nat'l Trust and Sav. v. GAC Properties Credit, Ltd.*, 389 A.2d 1304 (Del. Ch. 1978); *Majique Fashions Ltd. v. Warwick & Co. Ltd.*, 96 Misc. 2d 808, 409 N.Y.S.2d 581; *Nemestky v. Banque de Developpment de la Republique du Niger*, 64 A.D.2d 694, 407 N.Y.S.2d 556 (1978); *Balcon Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *C.O.W. Inc. v. Motor Vehicles Div., Oregon Dep't of Transp.*, 37 Or. App. 73, 586 P.2d 107 (1978).

13. *Intermeat Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. 1978); *Drexel Burnham Lambert, Inc. v. D'Angelo*, 453 F. Supp. 1294 (S.D.N.Y. 1978); *Marketing Showcase Inc. v. Alberto-Culver Co.*, 445 F. Supp. 755 (S.D.N.Y. 1978); *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977); *Louisville & Nashville R.R. v. Hasty*, 360 So. 2d 925 (Miss. 1978); *Majique Fashions Ltd. v. Warwick & Co. Ltd.*, 67 A.D.2d 321, 414 N.Y.S.2d 916 (1979); *Gro-Mar Public Relations Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978); *Oxman's Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

14. 575 F.2d 1017 (2d Cir. 1978).

Burnham Lambert, Inc. v. D'Angelo.¹⁵ The fact patterns in both cases fall within the constitutional limits of due process but outside the reach of state statutory long arm jurisdiction. This means the states could have constitutionally utilized *in personam* jurisdiction but instead used *quasi in rem* jurisdiction to supplement their long arm statutes. It is crucial to note that the proper focus in such cases is on whether the defendant has sufficient contacts with the forum to meet the constitutional test for *in personam* jurisdiction. This clearly seems to be what is required by *Shaffer*. Despite that, Judge Tenney in *Marketing Showcase Inc. v. Alberto-Culver Co.*¹⁶ focused erroneously on the defendant's having sufficient contact to activate the state long arm statute.¹⁷ Although the result reached by Judge Tenney was correct since the exercise of *quasi in rem* jurisdiction was upheld, this erroneous focus on the outer limit of such jurisdiction as statutory rather than constitutional will restrict its use. This will keep the state from exercising jurisdiction in excess of its long arm statute and will limit all exercises of jurisdiction to the state's statutory authorization. It appears that even after *Shaffer* the choice of which form its jurisdictional exercise should take is still up to the state so long as the constitutional limit of due process—minimum contacts—is not exceeded.

If the lower courts have rejected, as I believe they have, both of the possible bases on which the final holding in *Shaffer* could have been justified, then a strange result is seen. The opinion of Justice Brennan, despite having been both a concurring opinion and a dissenting opinion, emerges from the case as controlling. That development is not particularly offensive, since he had no quarrel with the majority regarding the requirement that all exercises of jurisdiction be bounded by the due process standards previously applied only to *in personam* jurisdiction. Indeed, lower court opinions are encouraging, since Justice Brennan's treatment of the facts in *Shaffer* made more sense than the majority's. All of this, however, must be small comfort to the plaintiffs in *Shaffer* who had their action ordered dismissed by the Supreme Court. Subsequent case law in the lower courts indicates a unanimous feeling that the *Shaffer* dismissal was incorrect despite the case's laudable philosophical position. At least the error of that dismissal has caused no similar mistakes in subsequent litigation in the lower courts, so far as I was able to discover.

It is also clear that attachment has survived in the lower courts for non-jurisdictional purposes. I once feared that courts might not

15. 453 F. Supp. 1294 (S.D.N.Y. 1978).

16. 445 F. Supp. 755 (S.D.N.Y. 1978).

17. *Id.* at 759.

carefully consider the jurisdictional nature of the attachment in *Shaffer* and that attachments for other purposes might be impaired. Subsequent developments have shown that fear to be ill-founded. In *Carolina Power and Light Co. v. Uranex*,¹⁸ an attachment was upheld pending the outcome of litigation *in personam* in a proper forum elsewhere. That approach was rejected by Judge Tenney's second opinion in *Marketing Showcase Inc. v. Alberto-Culver Co.*¹⁹ The case began as a *quasi in rem* action; after *Shaffer* was decided it was allowed to continue as an *in personam* action. This is the only case which arguably could indicate that *quasi in rem* jurisdiction has been totally displaced by *in personam* jurisdiction. It arguably supports such a premise because the court did not allow the case to go forward *quasi in rem* despite the existence of long arm jurisdiction. Disallowing *quasi in rem* in the first proceeding was followed in the second by the dissolving of the attachment. The attachment was not even allowed to continue while the *in personam* litigation was proceeding in that very court. Dissolving the attachment was as erroneous as the initial conversion of the action from *quasi in rem* to *in personam*. It cannot be said that the concept of attachment for security purposes pending litigation is unknown in our legal system. Although many cases have questioned the procedure by which such attachment may take place and although the Supreme Court has placed restrictions on such procedures,²⁰ not one of those cases has ever questioned the basic premise that attachment for security purposes is allowable under proper procedures. Attachment for security pending litigation in a proper forum does not raise the same sort of hostage-holding image as attachment for jurisdictional purposes in cases like *United States Industries, Inc. v. Gregg*.²¹ In seeking the attachment, the plaintiff is in no way seeking to compel the defendant to litigate in an improper forum to save his property; the plaintiff merely seeks to have property against which execution can be had in the event a recovery is ordered by the proper forum. The control of *Shaffer* over *quasi in rem* jurisdiction has absolutely nothing to do with these security attachments, which by definition are not made for jurisdictional purposes. Even if *Shaffer* has some sort of bearing, it could at most be said that any attachment must meet some type of fundamental fairness test. I see nothing fundamentally unfair about such an attachment pending litigation *in*

18. 451 F. Supp. 1044 (N.D. Cal. 1977).

19. 457 F. Supp. 1004 (S.D.N.Y. 1978).

20. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

21. 540 F.2d 142 (3d Cir. 1976).

personam in a proper forum and suggest that the history of the Supreme Court's treatment of replevin indicates that this conclusion is correct.

Lower courts have also had no trouble concluding that the restrictions of *Shaffer* have no applicability to attachment as used to execute upon judgments. This is not surprising in view of *Shaffer's* clarity on that point.²² As far as the lower courts are concerned, it makes no difference whether the prior judgment sought to be executed upon was rendered by a court of a sister state or of a foreign country. Of course, the execution of any of these judgments can be resisted upon any of the grounds normally allowed for collateral attack of judgments. If there is no ground for collateral attack, then nothing in *Shaffer* should be read as restricting attachment for execution purposes. The absence of grounds for a collateral attack means such judgments have been rendered in a manner consistent with due process. Since *Shaffer* was designed to prevent attachments in fact patterns violative of due process, it should not hamper execution of a judgment which has been rendered consistently with due process.

Since the historical roots of *in rem* jurisdiction are in the area of admiralty law, it is not surprising that lower federal courts have recently struggled with the issue of the effect of *Shaffer* on the use of *in rem* jurisdiction in admiralty practice. Two cases²³ have taken the absolute position that *Shaffer* has nothing to do with attachments under the admiralty practice of the federal courts.²⁴ On the surface, that is an attractive argument. *Shaffer*, by its nature, placed a restriction on the power states could exercise under the due process clause of the fourteenth amendment. That *holding* is not binding on federal practice in admiralty since the fourteenth amendment by its clear terms does not apply to the federal government. However, this is not to say that *Shaffer* has no bearing at all on attachments in admiralty practice. *Shaffer* does more than articulate the effect of the fourteenth amendment on attachments. It also rejects the philosophical ideas of *Harris* concerning indirect effects versus direct effects and substitutes in its place a realistic analysis of connections with the forum by the person whose property has been attached. That new philosophy seems applicable whether the authority being exercised has its roots in state power (*Shaffer*) or in

22. 433 U.S. at 210-11 n.36.

23. *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 459 F. Supp. 1242 (S.D.N.Y. 1978); *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978).

24. Rule B of the Admiralty Rules authorizes such attachments.

federal power (admiralty). The federal system has a due process restriction placed on it just as the state system does, although the source of that restriction is the fifth amendment rather than the fourteenth. Therefore, any attachment in admiralty ought to be subject to the same minimum contacts analysis as attachment under state law.

While the two situations should be subject to the same sort of analysis, there will be significant differences in the focus of that analysis. Attachment in *Shaffer* cases depends on minimum contacts between the defendant and the forum state. Attachment in admiralty cases depends on minimum contacts between the defendant and the United States. This was the approach taken by the federal district court in *Engineering Equipment Co. v. S.S. Selene*.²⁵ It is not proper to rest the outcome of such analysis on the authorization for attachment in Admiralty Rule B. No one would argue that such authorization could stand against the contrary mandate of the fifth amendment. At the same time, it would be inappropriate to make the validity of such a federally authorized procedure depend on whether a defendant had minimum contacts with any particular state. The admiralty forum exercises jurisdiction not on behalf of a state but in order to effectuate national policies. The exercise of that jurisdiction should be measured against minimum contacts with the nation rather than with any one state.

One surprising area of *Shaffer*-related difficulty encountered by the lower courts is divorce. Over the years the Supreme Court has had difficulty characterizing the exact nature of divorce jurisdiction.²⁶ As discussed at length in *Williams v. North Carolina*,²⁷ there are some aspects of a divorce proceeding which resemble an *in personam* proceeding and others that seem more nearly *in rem* or *quasi in rem*. However the proceeding is characterized, it seemed long since settled by *Williams* that a state which was the domicile of one of the parties to a marriage had the ability to dissolve the marriage without having jurisdiction over the absent spouse. Of course, any difficulty in this area caused by *Shaffer* must occur in the *ex parte* setting, since such problems cannot be envisioned where both parties are subject to the jurisdiction of the court. The interests articulated in *Williams* of the domicile in dissolving the marriage seem clearly sufficient to survive any reading of *Shaffer*. The results in lower courts since *Shaffer* indicate that this conclusion is correct, but at least two courts have thought the issue sufficiently

25. 446 F. Supp. 706 (S.D.N.Y. 1978).

26. See *Williams v. North Carolina*, 317 U.S. 287 (1942).

27. 317 U.S. 287 (1942).

doubtful to take some time dealing with it. Interestingly, those two courts took very different approaches to justify the continued availability of *ex parte* divorce. The Missouri Court of Appeals in deciding *In re Marriage of Breen*²⁸ characterized *ex parte* divorce proceedings as either *in rem* or *quasi in rem*. The court did not explain what effect *Shaffer* has if the proceeding is so characterized, but the holding in favor of jurisdiction clearly indicates that no change in the traditional position was made.

A more reasoned opinion on this issue was given by the Indiana Court of Appeals in deciding *In re Marriage of Rinderknecht*.²⁹ The court recognized that after *Shaffer* all exercises of jurisdiction must be measured against the minimum contacts test of due process. It concluded that the residency of one of the parties was a sufficient contact. In characterizing the proceeding as *in rem*, the court took the position that a dissolution petition was a claim arising from the *res* (the marriage) and that the presence of one party to the marriage made the *res* present within the jurisdiction of the court. It seems, however, that the better solution to the entire problem would simply be to ignore it. From cases like *Shaffer* and *Mullane v. Central Hanover Bank & Trust Co.*,³⁰ I conclude that the label attached to a jurisdictional exercise is meaningless. Instead of making *Shaffer* the test for determining the jurisdictional power of the state to grant an *ex parte* divorce, the better solution would be to look upon *Williams* as setting the jurisdictional ability for such cases. Given the fundamental state interests in such proceedings identified by *Williams*, such an exercise of jurisdiction would not be affected by *Shaffer*. *Williams* was not based on the sort of conceptual fictions which characterized *Harris*. The realistic analysis of *Williams* is in line with *Shaffer* in refusing to base jurisdiction on a label of some sort or on whether the absent spouse has minimum contacts. It would be better to look on the *ex parte* divorce as a proceeding *sui generis* authorized by *Williams* due to the practical necessities of providing a forum for divorce when the defendant spouse is absent and unavailable. If it helps to think of this as a case of jurisdiction by necessity, then that is possible; but it adds nothing. Simply, jurisdictional authority comes from *Williams*, and it would take a clear indication in *Shaffer* that any change has been made in that authority. I see nothing in *Shaffer* to so indicate.

Although *Williams* may furnish the jurisdictional authority for *ex parte* divorces, states have no authority to determine property

28. 560 S.W.2d 358 (Mo. App. 1977).

29. 367 N.E.2d 1128 (Ind. App. 1977).

30. 339 U.S. 306 (1950).

disputes in such cases. Indeed, the cases make it quite clear that to settle the property disputes of the parties, the court must have *in personam* jurisdiction over the defendant.³¹ Under prior views of *quasi in rem* jurisdiction, it was possible for a forum hearing an *ex parte* divorce also to make a division of property subject to the attachment jurisdiction of the forum. Lower courts are now beginning to struggle with the effect *Shaffer* has on that use of *quasi in rem* jurisdiction. Missouri has taken the position that in such divorce proceedings there is *quasi in rem* jurisdiction to determine the rights of both parties to property located within the forum.³² The logical justification for such jurisdiction is Type One *quasi in rem* jurisdiction, which was said in *Shaffer* to be unaffected by the new restrictions.³³ To reach that conclusion, the claim being asserted must arise from the property. In that event, the state would have sufficient contacts to adjudicate the rights of the absent party in the property. The question remaining is whether the claim in the divorce proceeding regarding property does in fact arise from the property. The Missouri Court of Appeals in *Chenowith v. Chenowith*³⁴ took the position that when an absent spouse acquires property within the state, he is purposefully availing himself of the protection of the forum. That ruling echoing *Hanson v. Denckla*³⁵ was used to conclude that the absent spouse was sufficiently connected to the state to allow jurisdiction to settle the conflicting claims to the marital property. The simpler justification would have been to say that the claim the resident spouse had against the property arose in a manner more related to the attached property than did the type of unconnected *Harris*-claim condemned in *Shaffer*.³⁶ While the claim is not as directly related to the property as a damage claim arising from injuries suffered on the property or as a specific performance suit on a sales contract, it seems that the conflicting claims of the spouses are sufficiently connected to the property itself to justify jurisdiction. This is certainly true regarding property acquired by joint efforts during the marriage. The connection as to property separately owned prior to marriage or separately acquired during the marriage is more tenuous. In those circumstances the resident spouse would probably be trying to enforce

31. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948).

32. *Chenowith v. Chenowith*, 575 S.W.2d 871 (Mo. App. 1978); *In re Marriage of Breen*, 560 S.W.2d 358 (Mo. App. 1977).

33. 433 U.S. at 208.

34. 575 S.W.2d 871 (Mo. App. 1978).

35. 357 U.S. 235 (1958).

36. This is the conclusion reached by North Carolina in *Holt v. Holt*, 41 N.C. App. 344, 352, 255 S.E.2d 407, 412 (1979).

an unadjudicated support, alimony, or maintenance obligation through non-marital property. Since such an obligation cannot be adjudicated without *in personam* jurisdiction, neither can it be adjudicated through a jurisdictional attachment on separate property. Missouri did not face this particular problem, since the property involved was marital property.

One of the issues left open by *Shaffer* was whether a *Harris* attachment might still be allowed in a case in which the defendant lacked minimum contacts with the forum but in which no other forum was available to the plaintiff.³⁷ For the fact pattern in which the plaintiff is a resident of the forum, the position that such an attachment is valid was taken in *Louring v. Kuwait Bolder Shipping Co.*³⁸ In *Louring* a Connecticut resident was allowed to attach a debt owed by a Connecticut corporation to a Kuwait corporation lacking the minimum contacts with Connecticut necessary for the constitutional exercise of *in personam* jurisdiction. The district court in upholding the attachment acted on the assumption that the defendant was not constitutionally subject to *in personam* jurisdiction in any of the fifty states, yet at the same time the court indicated that the activities of the defendant had given it fair warning that it might be subject to suit *somewhere* in the United States.³⁹ These two positions are contradictory. It is difficult to tell from the spotty facts outlined by the court, but the conclusion that no other forum is available in the United States seems quite suspicious. The court at one point stated:

Even if the defendant could be more substantially "found" in another state, there is no unfairness in calling upon a foreign corporation to defend in Connecticut to the extent of a debt accruing in Connecticut. A Kuwait corporation cannot claim disadvantage in defending in Connecticut rather than some other state.⁴⁰

That statement must be incorrect. The thrust of that portion of the opinion is the exact philosophy rejected by every single member of the United States Supreme Court in *Shaffer*. These comments are not to take issue with the proposition that *Harris* attachments might still be valid in cases where no other forum is available, but simply to question the validity of the conclusion in *Louring* that no other forum was available. The observation of the district court about a connection between the defendant and the United States,

37. 433 U.S. at 211 n.37.

38. 455 F. Supp. 630 (D. Conn. 1977).

39. *Id.* at 633.

40. *Id.*

coupled with the language as to the defendant being "more substantially found," leads me to suspect that another forum may have been available in the United States. Having failed to drop the *Harris* philosophy as required by *Shaffer*, the district court did not search too hard for an alternate forum. However, I must admit that the facts are too skimpy to enable me to convert my suspicion into a conclusion. Even if no other forum is available in the United States, would that justify a *Harris* attachment or should the plaintiff be left to assert his claim *in personam* in a foreign country? It is not unknown for the federal courts to dismiss cases based on *forum non conveniens* when the only other available forum is in a foreign country.⁴¹ If a court may so decline to exercise its legitimate jurisdiction, how can jurisdiction seemingly as odious as a bare *Harris* attachment be justified on the grounds that without such an attachment the plaintiff will have to proceed in a foreign country? The position of *Shaffer* dealing with the "no other forum" problem ought to be taken literally. The district court in *Louring* seems to have taken "no other forum" to mean "no other forum in the United States." Taking the *Shaffer* language literally means that such cases would be limited to those in which no other forum was available anywhere, and *Harris* attachments would not be allowed in cases in which there is a foreign, but no other United States, forum available.

The total number of cases treating all these various aspects of *Shaffer* does not equal the number of cases dealing with the effect of *Shaffer* on the attachment technique embodied in *Seider v. Roth*.⁴² I will not undertake an extended discussion of the merits of the attachment of liability insurance by a forum in which the tortfeasor cannot constitutionally be subjected to *in personam* jurisdiction. It is sufficient to say that the technique has been very controversial since New York first began to use it. This has always seemed a tempest in a teapot, since so few states ever chose to use the procedure. As I previously noted elsewhere,⁴³ the constitutionality of the procedure was perceived to rest at least in part on the continued validity of *Harris*.⁴⁴

As predicted, lower courts since *Shaffer* have had to reevaluate *Seider*. Because the technique is used more in New York than in any other state, New York courts have borne the brunt of this litigation. The results of that New York litigation are very interesting. In the supreme court (New York's trial court) five cases have evaluated the continued validity of *Seider*. Interestingly, in four of those deci-

41. See, e.g., *Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960).

42. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966).

43. *Leathers*, *supra* note 4, at 31.

44. See *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968).

sions⁴⁵ courts took the position that *Seider* is invalidated by *Shaffer*; only one decision at that level held that *Seider* survives.⁴⁶ The two appellate division cases took the position that *Seider* survives.⁴⁷ Finally, the court of appeals took the position that *Seider* survives *Shaffer*.⁴⁸ A split of authority arose in the federal District Court for the Eastern District of New York, with one district judge holding that *Seider* survives,⁴⁹ while another district judge took the position that *Seider* was overruled by *Shaffer*.⁵⁰ The Court of Appeals for the Second Circuit held that *Shaffer* does not invalidate *Seider*.⁵¹ Thus, the two highest courts in New York, the New York Court of Appeals, and the second circuit agree that *Shaffer* does not invalidate *Seider*.

Outside New York, authorities are split. The New Hampshire Supreme Court held in *Rocca v. Kenney*⁵² that such attachments are no longer permitted due to the restrictions of *Shaffer*. A similar conclusion was reached by the Maryland Court of Appeals in *Belcher v. Government Employees Insurance Co.*⁵³ Minnesota was the only state to follow New York in allowing such attachment procedures to continue. The Minnesota Supreme Court upheld such an attachment in *Savchuk v. Rush*.⁵⁴ The *Savchuk* decision was particularly significant, since the case had been remanded to Minnesota by the United States Supreme Court for reconsideration in light of *Shaffer*.

The final chapter in the controversy has now been written by the United States Supreme Court in its decision in *Rush v. Savchuk*.⁵⁵ Reviewing the Minnesota Supreme Court decision upholding the validity of the attachment procedure,⁵⁶ the Supreme Court held that the *Seider* attachment violates the substantive due process requirements of *Shaffer*.⁵⁷ The Court's conclusion is interesting because it rejects the conclusion of the Minnesota Supreme

45. *Attanasio v. Ferre*, 401 N.Y.S.2d 685 (1977); *Wallace v. Target Store, Inc.*, 92 Misc. 2d 454, 40 N.Y.S.2d 478 (1977); *Katz v. Umansky*, 92 Misc. 2d 285, 399 N.Y.S.2d 412 (1977); *Kennedy v. Deroker*, 91 Misc. 2d 648, 398 N.Y.S.2d 628 (1977).

46. *Rodriguez v. Wolfe*, 93 Misc. 2d 364, 401 N.Y.S.2d 442 (1978).

47. *Ernetta v. Princeton Hospital*, 66 A.D.2d 669, 411 N.Y.S.2d 13 (1978); *Alford v. McGaw*, 61 A.D.2d 504, 402 N.Y.S.2d 499 (1978).

48. *Baden v. Staples*, 45 N.Y.2d 889, 410 N.Y.S.2d 808, 383 N.E.2d 110 (1978).

49. *O'Conner v. Lee-Hy Paving Corp.*, 437 F. Supp. 994 (E.D.N.Y. 1977).

50. *Torres v. Towmotor Div. of Caterpillar, Inc.*, 457 F. Supp. 460 (E.D.N.Y. 1977).

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

52. 381 A.2d 330 (N.H. 1977).

53. 387 A.2d 770 (Md. App. 1978).

54. 272 N.W.2d 888 (Minn. 1978).

55. 100 S. Ct. 571 (1980).

56. 272 N.W.2d 888 (Minn. 1978).

57. 100 S. Ct. at 579.

Court that such an attachment is the functional equivalent of a direct action against the insurer. The first basis of the rejection is questionable at best. The Court noted that:

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.⁵⁸

This analytical approach to the problem elevates form over substance. If the overall effect is no more than to create a direct action against the insurer, it is difficult to see any constitutional difficulty simply because the internal steps in arriving at that end are inconsistent. If it is the state's position, as was the Minnesota position in *Rush*, that a direct action has been created, it is impossible to ascertain what authority the Supreme Court has to second-guess the methodology so long as the end result is permissible. It is crucial to note that at no point in the decision does the Court even hint that a state could not allow a direct action against a non-resident's insurer in an action by a resident plaintiff on a claim arising outside the forum. As long as that possibility remains, as Mr. Justice Stevens indicates that it does,⁵⁹ and the majority fails to question that proposition, the decision of whether to implement that state power through judicial or legislative methods seems to be within state control. The part of the Court's decision in *Rush* that is at least arguable is that portion which questions whether a *Seider* attachment really is only the functional equivalent of a direct action.

In considering the problem of potential adverse effects of such an attachment on the tortfeasor "defendant," the Court accepted the premise that such an action would limit liability to the policy limits and that the defendant would suffer no personal liability. It might be added, although the Court did not so note, that fact findings in the attachment trial would not be given collateral estoppel or res judicata effects against the nonresident "defendant."⁶⁰ Despite this, the Court found that, as a practical matter, a defendant might suffer some effects from such actions. In malpractice actions commenced by attachment, the Court said the action would cast doubt upon the defendant's integrity, competence, and professional standing.⁶¹ What

58. *Id.* at 578.

59. 100 S. Ct. at 580 (Stevens, J., dissenting).

60. These limitations are discussed in *Minichiello v. Rosenberg*, 410 F.2d 106, 110-112 (2d Cir. 1968). See also *Rush v. Savchuk*, 272 N.W.2d at 892; *Simpson v. Loehmann*, 21 N.Y.2d 990, 234 N.E.2d 669 (1967).

61. 100 S. Ct. at 579 n.20.

this possibility has to do with the constitutionality of an attachment in an automobile accident case is not readily apparent. The Court further noted that a defendant's insurability might be affected by such an attachment proceeding or, in cases of attachments in more than one state, multiple plaintiffs might claim in excess of policy limits.⁶² The idea of claims in excess of limits is a fanciful objection. If the policy limit is \$10,000 and judgments of that amount are given in a dozen different states in favor of a dozen different plaintiffs, not a single one of those recoveries could ever be executed against the tortfeasor defendant. Even if the Court assumed that the real objection is that, when sued *in personam*, the defendant will no longer have any protection, the objection still is invalid. Surely the Court would not deny that the defendant would be entitled to offset against the judgment in the *in personam* action any amount already recovered by the plaintiff *quasi in rem*. I simply do not see how the Court can conclude that the defendant has substantial economic interest in such attachment litigation. As for the insurability argument, one could equally theorize that insurability would be affected by the victim's merely filing a claim with the insurer prior to the filing of any litigation. There is nothing to support the Court's conclusion but the bare assertion that filing suit may affect insurability. I see nothing in the Court's analysis to justify its conclusion that the interests of the defendant are not de minimis. My feelings about the interest of the defendant tortfeasor are shared by Justices Brennan and Stevens in their dissent written by Mr. Justice Stevens.⁶³

It seems the Court is clearly correct in concluding that the form of *quasi in rem* involved in *Rush* is that type in which the claim does not arise from the property itself.⁶⁴ As noted previously, I reject any such analytical approach and would simply characterize the attachment as a direct action. The Court is also correct in rejecting any temptation to say that the insurer's contacts with the forum can be used as contacts for the exercise of *in personam* jurisdiction over the insured tortfeasor.⁶⁵ In considering the possibility of *in personam* jurisdiction over the insured, it is worth noting that the Court adheres to the "power" line of cases on *in personam* jurisdiction in requiring contacts with the defendant rather than focusing on the plaintiff or the claim.⁶⁶

62. *Id.*

63. 100 S. Ct. at 580 (Stevens, J., dissenting).

64. 100 S. Ct. at 578.

65. *Id.*

66. This line includes *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). The Court further adhered to that emphasis in *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980), which was decided the same day as *Rush*.

My differences with the Court concerning the use of *Seider* attachments after *Shaffer* could be expanded greatly beyond the above treatment, but I suspect the whole thing is not worth the effort. The Court is right because it is final, if I might borrow a phrase. Since the use of *Seider* was always such a small minority position, the effects of the holding in *Rush* will not be widespread. At least this loose end, which caused the bulk of the cases dealing with *Shaffer*, has now been settled.

On the whole, it appears that the lower courts are having less trouble with the United States Supreme Court decision in *Shaffer* than might have been predicted. It also seems that the portions of *Shaffer* which originally caused me some misgivings are simply being ignored by the lower courts. The holding in *Shaffer* could have been justified only by a preference for *in personam* jurisdiction being exercised in all instances or by a conclusion against state control over corporate directors. It is clear from the subsequent lower court decisions that neither is being followed. What is left of *Shaffer* is its philosophy, which was set forth better in the concurring and dissenting opinion of Justice Brennan than in the majority opinion. All jurisdictional exercises must now meet the basic fairness test of due process—that is the bottom line of *Shaffer*. It was a philosophy long coming to attachments. Maybe it is not really so surprising that courts are applying the standard without serious difficulty. Perhaps the ease of acceptance indicates just how overdue the change really was.

