COMMENTS

Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness

The study of long-arm1 and quasi in rem2 jurisdiction has occupied the attention of many commentators in recent years.3 These

1. The term "long-arm jurisdiction" refers to the personal jurisdiction that a court may exert over a nonresident defendant even though he is not personally served with process within the state. See ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE & FEDERAL COURTS 75-79 (Official Draft 1969).

2. The term "quasi in rem jurisdiction" refers to the jurisdiction that a court may exert over a defendant which is based on attachment or garnishment procedures and which enables the court to adjudicate the merits of an in personam claim. Absent in personam jurisdiction, however, the plaintiff in a quasi in rem action may recover only the amount of the property that was the basis for the assertion of jurisdiction. F. JAMES, JR., CIVIL PROCEDURE 630-34 (1965).

commentators have generally sought to clarify the limitations on the
deexercise of jurisdiction that are imposed on the courts by the due

Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966); Weis-
mans, Georgia Long-Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction, 4 Ga. St. B.J. 13 (1967); Woods, The Uniform Long-Arm Act in Ar-
ment, Minimum Contacts Confused and Reconfused—Variations on a Theme by Interna-
tional Shoe—Or, Is This Trip Necessary?, 7 San Diego L. Rev. 304 (1970); Comment, The "Long-Arm" Statute: Wyoming Expands Jurisdiction of the State Courts over Non-
Residents, 4 Land & Water L. Rev. 235 (1969); Comment, Search for the Most Con-
venient Federal Forum: Three Solutions to the Problem of Multidistrict Litigation, 64 Nw. U. L. Rev. 188 (1969); Comment, Jurisdiction over Foreign Corporations in Penn-
sylvania: A Time for Change, 31 U. Pitt. L. Rev. 81 (1969); Comment, Personal Juris-
diction over Nonresident Individuals: A Long-Term Statute Proposed for California, 9 Santa Clara Law. 315 (1969); Comment, Oregon "Long-Arm" Statute: Two Recent Cases, 5 Williamette L.J. 389 (1969); Comment, Jurisdiction in Rem and the Attach-
ment of Intangibles: Erosion of the Power Theory, 1968 Duke L.J. 725; Comment, The Erie Rule and Long-Arm Statutes, 52 Marq. L. Rev. 116 (1968); Comment, Jurisdic-
tion—Long-Arm Statute—Doing Business—Commission of Tort, 8 Nat. Res. J. 148 (1968);
Comment, Podolksy v. Destinney and the Garnishment of Intangibles: A Chip off the Old Balk, 54 Va. L. Rev. 1425 (1968); Comment, Attachment of "Obligations"—A New Chap-
er in Long-Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Comment, Consti-
tutional Limitations to Long-Arm Jurisdiction in Newspaper Libel Cases, 54 U. Cinn. L. Rev. 436 (1967); Comment, Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word, 67 Colum. L. Rev. 542 (1967); Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550 (1967); Comments, How Minimum Is "Minimum Contact"? An Examination of "Long Arm" Jurisdiction, 9 S. Tex. L. Rev. 104 (1967); Comment, Personal Jurisdiction over Non-
Residents—The Louisiana "Long-Arm" Statute, 40 Tul. L. Rev. 266 (1966); Comment, Personal Jurisdiction over Non-Residents: Some Statutory Developments, 7 Wm. & Mary L. Rev. 146 (1966); Comment, Jurisdiction over Non-Resident Manufacturers in New York: The Long-Arm Amputated, 7 B.C. Ind. & Com. L. Rev. 135 (1965); Comment, Transacting Business as Jurisdictional Basis—A Survey of New York Case Law, 14 Buffalo L. Rev. 925 (1965); Comment, Tortious Act as a Basis for Jurisdiction in Products Liability Cases, 33 Fordham L. Rev. 671 (1965); Comment, In Personam Juris-
diction over Nonresident Manufacturers in Product Liability Cases, 63 Mich. L. Rev. 1928 (1965); Comment, Jurisdiction Under "Long-Arm" Statute over Breach of War-
ranty Actions, 22 Wash. & Lee L. Rev. 152 (1965); Comment, Jurisdiction over Non-
Residents—The Washington "Long-Arm" Statute, 38 Wash. L. Rev. 560 (1963); Devel-
process clause of the fourteenth amendment. While their studies have produced various well-refined analyses upon which several courts have placed great reliance, the refinements provided by these analyses present their own dangers. An examination of cases decided in recent years indicates that some courts, which have been preoccupied with applying these sophisticated approaches, have overlooked some relatively obvious considerations that should have been determinative of the jurisdictional issues involved. As a result, excessive time has been spent considering the jurisdictional issue, even though that issue is a preliminary matter and, as such, should not be the subject of extensive litigation. Furthermore, such unwarranted concern with the niceties of jurisdictional theory creates debatable issues and hence invites time-consuming appeals.


4. Although it might once have been questioned whether the due process clause should be the basis for the determination of the limitations on long-arm jurisdiction (see notes 8-24 infra and accompanying text), there is now little doubt that this is the proper standard. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. 714, 733 (1877); SEC v. Myers, 285 F. Supp. 743, 748-50 (D. Md. 1968) (due process clause of fifth amendment); Kurland, supra note 3, at 572-73, 585.


the confusion surrounding the question of jurisdictional limitations. It is suggested that such confusion is the natural result of the prevailing concern of courts with the extreme limits of permissible jurisdiction, and that this confusion has so clouded the basic issues that erroneous results have been reached in more routine cases that do not even approach those limits—the "easy" cases. Cases decided in the past few years indicate that these erroneous results occur most often in three areas. Following a brief examination of the body of law and theory applicable to jurisdiction over nonresidents, each of those areas will be examined in some detail. While it is not suggested that these are the only areas in which confusion has led courts to overlook basic considerations, they are representative of the problems and do serve to expose a dangerous trend in the determination of jurisdictional limits.

I. BRIEF HISTORY OF LONG-ARM JURISDICTION

A. The Early Doctrine

The power to exercise jurisdiction over a defendant who cannot be found within the territorial limits of the forum state is meaningless unless a judgment obtained there can be enforced in a state in which the defendant can be found. It would therefore be appropriate to determine the legitimacy of the assertion of jurisdiction over a nonresident defendant by reference to the enforceability of that decision elsewhere. This approach appears to be consistent with the jurisdictional allocation embodied in the full faith and credit clause of the Constitution, which requires each state to recognize the judicial decisions of its sister states. As early as 1850, in the case of D'Arcy v. Ketchum, the Supreme Court held that this requirement embraces only those decisions rendered by a court having jurisdiction over the defendant. Thus, the interrelationship under the full faith and credit clause between the proper assertion of jurisdiction and the interstate recognition of judgments rendered thereunder reflects the concept that "the limits of jurisdiction are to be set ... by ... principles relating to the need for reciprocal restraints on sovereignty in order to effect a harmony in the administration of justice among the several states."
The judicial analysis of constitutional limits on jurisdiction, however, has not been developed under full faith and credit principles; rather, it has proceeded under the principles of the due process clause of the fourteenth amendment. The current limits on jurisdiction might be considerably more stringent if the courts had looked to the full faith and credit clause for guidance, since the expansion in the permissive limits on jurisdiction that has taken place under the due process approach may be at least partly attributable to the generally expansive view that the Supreme Court has taken of the due process clause. On the other hand, regardless of which constitutional provision was applied, the same Justices would have decided the same cases and probably would have reached the same conclusions. Full faith and credit limitations on in personam jurisdiction might therefore have been identical to those that currently prevail under the due process clause. In this respect, it is revealing that in the first case applying the due process clause to jurisdiction, *Pennoyer v. Neff*, the Supreme Court arrived at a test identical to that announced in *D'Arcy*.

Despite these possible similarities in the ultimate results reached under the two approaches, reference to the full faith and credit clause for jurisdictional standards would have provided a different emphasis from that which now prevails under due process analysis. When a court's determination of jurisdiction depends on whether the defendant has been deprived of due process, the emphasis of that court will tend toward an examination of what is required by the concept of "fundamental fairness" toward the defendant. In contrast, if the jurisdictional determination were based on the full faith and credit clause, primary attention would be placed upon the enforceability of the ultimate decision elsewhere. The latter ap-
proach probably provides a more appropriate focus for a court's attention, since proceedings by a court in order to reach a judgment that cannot be enforced would serve no purpose. Moreover, attention focused on this consideration would probably lead to greater judicial restraint—a virtue noticeably lacking in some cases—because a court might consider its own unwillingness to enforce foreign judgments in similar cases before asserting jurisdiction over a foreign defendant.

Although the full faith and credit clause may be preferable as a basis for jurisdictional determinations, a return to it is unlikely. In the classic decision of *Pennoyer v. Neff*, the Court equated, for jurisdictional purposes, the full faith and credit clause with the due process clause by holding that due process required "service of process within the state of [the defendant's] voluntary appearance" before in personam jurisdiction could be asserted. However, while the language of *Pennoyer* is virtually identical to that of *D'Arcy*, the *Pennoyer* decision had the effect of making due process the primary consideration in jurisdictional inquiries. Thus, after *Pennoyer* the question whether the judgment of a sister state would have to be enforced turned completely on the question whether the sister state's courts had complied with due process requirements.

As the nation grew, and the number and importance of interstate transactions increased, it became clear that the traditionally exclusive means of attaching jurisdiction—service of process within the state and voluntary appearance—were too restrictive. As a result, exceptions to the rule were eventually developed for cases in which the plaintiff's state could claim an urgent interest. For example, in *Hess v. Pavloski* the Supreme Court held that one who brought

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19. See, e.g., St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966): "[T]he limits of state jurisdiction as set out in the statute fall well within the scope of due process, this does not restrict the courts and prohibit them from extending their jurisdiction to the limits of due process . . . ."

20. See Aucoin v. Hanson, 207 S.2d 834, 840 (La. Ct. App. 1968) (Judge Hood, dissenting): "If the rule applied by the majority in this case is finally held to be the correct one, then I think we will have to face the fact that a rule similar to the one which we apply here may also be applied by courts of other states. We will have to recognize and enforce judgments rendered by courts of other states against absent Louisiana residents . . . ."

21. 95 U.S. 714 (1877). For a thorough analysis of the case, see Hazard, supra note 3, at 245-81.

22. "The great importance of *Pennoyer v. Neff* is that it identified the test under the Full Faith and Credit Clause with the test under the Due Process Clause . . . ." Kurland, supra note 3, at 585. See also von Mehren & Trautman, supra note 5, at 1128. However, it appears that in a limited number of cases—primarily involving divorce—a decision may comply with due process requirements yet not be entitled to full faith and credit. See Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Case of the Somewhere Wife*, 67 COLUM. L. REV. 1363 (1967).

23. 95 U.S. at 733.

24. See note 10 supra.

25. 274 U.S. 852 (1927).
a dangerous instrument, such as an automobile, into a state could be said to have consented to the appointment of that state's secretary of state as his agent for service of process. In *Henry L. Doherty & Company v. Goodman*, the Court, recognizing the special interest of a state in regulating the sale of securities, held that the defendant, who had sent an agent into Iowa to sell securities, could be said to have consented to service of process on him through that agent. However, such exceptions were limited, and the constitutionality of extending them further was in serious doubt. As late as 1935 one prominent authority indicated that a general statute that provided that doing acts within a state would indicate consent to the jurisdiction of that state's courts "even as to causes of action arising out of the doing of the acts . . . would be unconstitutional . . . ."

**B. International Shoe and the Modern Doctrine**

Against this background, the Supreme Court decided five cases over a span of thirteen years that cumulatively had the effect of virtually overruling the *Pennoyer* test for determining the legitimacy of in personam jurisdiction. In the first of these cases, *International Shoe Company v. Washington*, the Court held that "due process requires only that . . . [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " Five years later, in 1950, the Court held in *Travelers Health Association v. Virginia* that the solicitation within a state of new members by a nonprofit organization through the unpaid services of existing members satisfied this minimum-contacts test. In 1957, the decision in *McGee v. International Life Insurance Company* extended the minimum-contacts theory even further. The Court held in that case that the sale of a single life insurance policy within California was a sufficient contact for the California courts to assert jurisdiction in an action by the beneficiary against the insurer. This

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28. *But see* Hartsoog v. Robinson, 115 Ga. App. 824, 156 S.E.2d 141 (1967), in which a Georgia court apparently followed the *Pennoyer* test in holding that service of process within the state was essential unless the defendant could be said to have impliedly given his consent to the assertion of jurisdiction over him.
30. 326 U.S. at 316. In SEC v. Myers, 285 F. Supp. 743, 748-50 (D. Md. 1968), the court held that this test also applies to the due process clause of the fifth amendment.
32. 335 U.S. 220 (1948).
33. The facts of *McGee* have led casebook authors to wonder whether there would be sufficient contacts if the insured had lived elsewhere and moved to California after taking out the policy. See, e.g., R. CRAMTON & D. CURRIE, CONFLICT OF LAWS 468 (1968).
conclusion was reached even though the defendant had not originally issued the policy but had purchased it from the prior insurer.34

Meanwhile, in 1952, the Court had provided an alternative to the minimum-contacts test by its holding in *Perkins v. Benguet Consolidated Mining Company*35 that jurisdiction could be asserted against a nonresident defendant even though the cause of action did not arise out of the defendant's activities within the state, provided the defendant had "substantial," as opposed to "minimum," contacts.36 Some authors have suggested that *Perkins* does not provide sound authority for the application of the lesser standard embodied in a substantial-contacts test, since the peculiar facts of that case distinguish it significantly from the usual jurisdictional dispute.37 In *Perkins*, although the defendant's center of activities was in the Philippine Islands, the wartime occupation by the Japanese prevented litigation in that forum. Since, of the forums available to the plaintiff, Ohio was the one with which the defendant had the most significant contacts, the action was brought there. The case might, therefore, merely stand for the rather obvious proposition that the best available forum is constitutionally acceptable. However, nothing in the opinion suggests this approach, and the greater weight of authority appears to support the view that "substantial contacts" are sufficient for jurisdiction even if the cause of action did not arise out of those contacts.38

Thus, as a result of these four decisions, the due process requirements for the assertion of in personam jurisdiction had become considerably less stringent than those which existed under the old *Pennnoyer* rule. In 1958 the Court made it clear, however, that due process limitations had not completely disappeared, by holding, in

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34. 355 U.S. at 221.
36. The Court indicated that the assertion of jurisdiction was by no means required. Judicial restraint might indicate that constitutionally permissible jurisdiction should not be exercised. 342 U.S. at 445-46.
Hanson v. Denckla, 39 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." 40 While this decision indicated that restraints exist as "a consequence of the territorial limitations on the power of the respective states," 41 it did not precisely define those restraints. The case has therefore caused a considerable amount of confusion among the courts. 42

One court limited the application of the Hanson decision to cases in which the cause of action did not arise out of the defendant's acts within the forum state. 43 Another interpreted it as requiring a voluntary association in addition to minimum contacts. 44 While the latter interpretation seems justified in view of the "purposeful act" language in Hanson, it is probably wrong. This "voluntary association" approach is certainly contrary to the rationale of several cases that have upheld jurisdiction over suppliers of goods that have had harmful effects within the forum state. 45 The fact that the defendants in such cases had not voluntarily associated themselves with the forum states suggests that Hanson might most properly be characterized as requiring some purposeful act by the defendant and an association with the state resulting from that act, rather than voluntary and knowing association with the state.

Perhaps the clearest example of the confusion that followed Hanson can be found in the Arizona case of Phillips v. Anchor Hocking Glass Corporation. 46 In the process of remanding the case before it to the trial court for a further determination of facts, the Arizona supreme court declared that Hanson could not be literally construed. The court reasoned that requiring a purposeful act of the defendant would involve an intolerable revitalization of the implied-consent test which had existed prior to International Shoe. The court also felt that because a negligent act is by definition not purposeful, it would be inappropriate to apply the Hanson purposeful-act doctrine to defendants in negligence actions. 47 However, as in the cases dis-

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40. 357 U.S. at 253.
41. 357 U.S. at 251.
42. One authority described Chief Justice Warren's opinion in Hanson as having "reached the fair result ... by a line of analysis that ... is impossible to follow ... ." Hazard, supra note 3, at 244.
47. 100 Ariz. at 256, 413 P.2d at 735.
cussed above\textsuperscript{48} in which voluntary association was required, the \textit{Phillips} court placed undue emphasis upon finding some relationship between the act that gives rise to the claim and the act that provides the requisite nexus between the defendant and the forum. Since \textit{Hanson v. Denckla} requires only "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state,"\textsuperscript{49} it is clear that the act that provides the nexus between the defendant and the forum need not be the same act upon which the cause of action is based. Hence, the fact that misconduct is negligent rather than intentional should not affect a determination of jurisdiction under \textit{Hanson}.

These cases are indicative of the confusion that has engulfed the courts as they have attempted to determine the constitutional limits on their power to adjudicate.\textsuperscript{50} Another symptom of this confusion

\textsuperscript{48} See notes 43-44 \textit{supra} and accompanying text.

\textsuperscript{49} 357 U.S. at 253.

\textsuperscript{50} The limitations on the exercise of jurisdiction are derived from state statutes as well as from the Constitution. \textit{See generally Developments in the Law—State-Court Jurisdiction, 73 HARV. L. REV. 909, 998-1017 (1960). But see note 19 \textit{supra}.}

The Rhode Island legislature has authorized its courts to exercise jurisdiction "in every case not contrary to the provisions of the Constitution or laws of the United States," R.I. GEN. LAWS ANN. § 9-5-33 (1969). Similarly, a recent amendment to the California Code of Civil Procedure enables California courts to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." \textit{CAL. CIV. CODE} § 410.10 (West Supp. 1970). While most state statutes indicate some greater limitation, many have been interpreted as providing for jurisdiction whenever constitutionally permissible. See, e.g., \textit{San Juan Hotel Corp. v. LeBowitz}, 277 F. Supp. 28 (D.P.R. 1967), and \textit{Executive Air Services, Inc. v. Beech Aircraft Corp.}, 224 F. Supp. 415 (D.P.R. 1966) (both applying \textit{R. P. LAWS ANN. app. II, R. 4.7 (Supp. 1965), as amended}, \textit{9 P.R. LAWS ANN. tit. 32, app. II, R. 4.7 (1965)}); \textit{Grobark v. Addo Mach. Co.}, 16 Ill. 2d 426, 188 N.E.2d 73 (1959), and \textit{Nelson v. Miller}, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (both applying \textit{ILL. REV. STAT. ch. 110, §§ 16, 17 (1955), as amended, ILL. REV. STAT. ch. 110, §§ 16, 17 (1965)}). In such states it is perhaps not surprising to find significant expansions in the interpretation of statutory definitions in order that jurisdiction might be asserted. Thus, a "tortious act" has been held to mean any act that may result in the collection of damages from the actor, \textit{Poindexter v. Willis}, 87 Ill. App. 2d 213, 217-18, 231 N.E.2d 1, 3 (1967), and the breach of a contract has been held to be a tort in itself, \textit{Coletti v. Ovatine Food Prods.}, 274 F. Supp. 719, 721-23 (D.P.R. 1967).


The standards prescribed in the \textit{Uniform Interstate & International Procedure Act} § 1.03 provide a potential for uniformity in the determination of statutory limits:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

(1) transacting any business in this state;

(2) contracting to supply services or things in this state;

(3) causing tortious injury by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods sold or consumed or services rendered, in this state; or
may be seen in apparently inconsistent decisions involving the mass media: one court has held that the producer of a national television show is subject to jurisdiction wherever that program is broadcast, while another has held that a syndicated columnist is not subject to jurisdiction wherever her column is published. Moreover, a court’s concern with the permissible reach of the long-arm statute may so overwhelmingly dominate its thinking that it will fail to consider properly other jurisdictional issues. For example, in a case involving the reach of the Oregon long-arm statute, neither the district court nor the Court of Appeals for the Ninth Circuit paid significant attention to the fact that the defendant was probably not amenable to suit in the federal courts regardless of the propriety of applying the long-arm.

In reaction to this confusion, dissenting opinions have been written in two recent state court cases expressing complete dissatisfaction with the permissive jurisdictional standards applied by the respective majority opinions to nonresident defendants. Both of these dissents recognize the inherent danger to a coordinated system of state courts in the unwarranted extension of long-arm jurisdiction. Both also express a desire to approach the question by reference to the full faith and credit clause. In the language of Justice O’Connell of the Supreme Court of Oregon, “a state must test its jurisdiction in each case by putting itself in the position of a sister state called upon to enforce a judgment sought by the plaintiff.”


53. Portland Paramount Corp. v. Twentieth Century-Fox Film Corp., 258 F. Supp. 962 (D. Ore. 1966), rev’d, 398 F.2d 654 (9th Cir. 1967). The district court held that the defendant, Elizabeth Taylor, had committed a tortious act within Oregon if she deliberately had given a bad performance in a motion picture that she knew would be distributed in Oregon. 258 F. Supp. at 966. It was stipulated in the case that Miss Taylor was a citizen of the United States but not of any one state, 258 F. Supp. at 963-64 n.2, a fact that should have made her citizenship nondiverse with any plaintiff and thereby rendered her not amenable to federal diversity jurisdiction. See Twentieth-Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 914 (S.D.N.Y. 1966).
55. See notes 8-20 supra and accompanying text.
theless, while such a reversion to the full faith and credit clause might reduce the confusion surrounding the jurisdictional question, it is unlikely that such a reversion is possible, and it is at least questionable whether it would accomplish the desired objectives of coordination and judicial restraint.57

C. The Search for a Standard

At least part of the confusion surrounding the limitations on jurisdiction must be attributed to the lack of a more definitive test than "fair play" that may be applied to the hard cases that approach the fringes of permissible jurisdiction. Response to this need for a more precise test has not been entirely lacking. Indeed, since the standard that evolves from analysis depends largely on the focus of the analyst, it should not be surprising that at least five different approaches have been advanced.

One relatively mechanical test that has emerged from the cases calls for an assessment of the number of contacts that the defendant has had with the forum state and a determination whether these contacts are sufficient to justify the assertion of jurisdiction. This approach raises the question of what is "sufficient,"58 and embroils the courts in a meaningless battle of numbers in an effort to ascertain how many contacts were made and to determine how many are needed. An illustrative case is Buckley v. New York Times Company,59 in which the Court of Appeals for the Fifth Circuit held that the New York Times had insufficient contacts with Louisiana on which to base the assertion of jurisdiction by a federal district court in that state. The majority found that the Times' only connections with the state were "the sending of less than a thousandth of one per cent... of its newspapers to subscribers and independent distributors in Louisiana; the occasional solicitation of advertising (... less than one thousandth of one per cent... ) by travelling representatives... and the occasional sending of staff reporters to Louisiana on special assignments..."60 Judge Brown, on the other hand, dissented because he felt that sufficient contacts had been established by

57. See text accompanying notes 15 & 21-24 supra.
58. One authority has set up the following guidelines:
If there are substantial contacts with the state, ... and if the cause of action arises of [sic] the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of these contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction. If there is a minimum of contacts and the cause of action does not arise out of the contacts, there will normally be no basis of jurisdiction, since it is difficult to establish the factors necessary to meet the fair and reasonable test.

2 J. Moore, FEDERAL PRACTICE ¶ 4.25[5], at 1173 (2d ed. 1967). Of course, this test leaves open the question of what constitutes "minimum" and "substantial."

59. 338 F.2d 470 (5th Cir. 1964).
60. 338 F.2d at 473-74.
the paper's "[a]verage circulation[,] [which] in 1962 for the daily Times was 991 and for its celebrated Sunday edition, 1784." As Buckley therefore demonstrates, the sufficient-contacts test, relying as it does on arbitrary numerical comparison, is capable of neither simple nor uniform application.

A second standard that has been utilized by some courts involves applying factors that have been treated in the various Supreme Court cases as either essential to or deserving of great weight in the determination whether a court may assert jurisdiction over a nonresident. Under this approach, three factors must coincide in order for a state court to properly attach in personam jurisdiction: (1) the defendant must purposefully have done some act within the state; 62 (2) the cause of action must arise from or be connected with that act; 63 and (3) the assertion of jurisdiction must not offend traditional standards of fair play. The primary fault with this approach is that it is unnecessarily restrictive—while a court may be assured that it does have jurisdiction if these three factors coincide, jurisdiction may also exist when they do not. For example, although the second factor was not present in the Perkins case, jurisdiction was properly recognized because of the substantial contacts existing between the defendant and the forum state. The three-pronged test does have the virtue of easy application, but that positive factor is outweighed by its restrictiveness.

A third standard that has developed in the case law can be traced to the Illinois supreme court's decision in Gray v. American Radiator & Standard Sanitary Corporation. This standard, which in a sense reverts to the "fair play" doctrine first developed in International Shoe, has been followed in a number of decisions. Essential to this standard is the requirement that the act giving rise to the claim and the defendant's contact with the forum be not an appropriate matter of concern in assessing the validity of an assertion of jurisdiction.

61. 338 F.2d at 475.
64. See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Tyee Constr. Co. v. Dullen Steel Prods., Inc., 62 Wash. 2d 106, 115-16, 381 P.2d 245, 251 (1963). Accord, Sun-X Intl. Co. v. Witt, 413 S.W.2d 761 (Tex. Civ. App. 1967). In Byham v. National Cibo House Corp., 265 N.C. 50, 56-57, 143 S.E.2d 225, 231-32 (1965), the court, after listing both those factors essential and those deserving weight (without differentiating), added the following factors: the extent of assurance of actual notice to the defendant, the interests of the state in protecting its residents, the availability of courts in the foreign forum, the inconvenience to the nonresident, the availability of witnesses, the amount of the claim involved, and the limitations of the state statute. It would appear that, except for the last, these factors are merely components of the fair-play standard.
65. See text accompanying note 36 supra.
66. See also text accompanying notes 45-47 supra, suggesting that a nexus between the act giving rise to a claim and the defendant's contact with the forum is not an appropriate matter of concern in assessing the validity of an assertion of jurisdiction.
68. See text accompanying notes 29-30 supra.
69. See, e.g., Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967); Keckler v.
tially, it is grounded on the concept that when a defendant undertakes an act that is such that he should expect the courts of another state to assert jurisdiction over him, such jurisdiction may constitutionally be asserted. In Gray the defendant’s contacts with Illinois, the forum state, were slight. It manufactured a valve in Ohio that was installed by another manufacturer in a water heater in Pennsylvania, and the heater was then sold to the plaintiff in Illinois. The heater exploded in Illinois, allegedly as a result of a defect in the valve, and injured the plaintiff. The Illinois supreme court held that Illinois could assert jurisdiction over the Ohio defendant because, “[a]s a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.” This emphasis on what the defendant should have expected goes beyond the scope of the “purposeful act” view taken by the Supreme Court in Hanson v. Denckla, and generally should produce desirable results. Putting an article into commerce is certainly a purposeful act that results in some relationship between the manufacturer and the state in which that product is used. Concern for the defendant’s expectation ensures that fair play, the essence of jurisdictional due process, will not be ignored. It will usually be equitable to expect one who makes interstate sales of an article to be prepared to defend wherever that article is used.

However, this approach is not necessarily applicable to every case in which interstate commerce is involved. For example, in a recent Michigan case, Dornbos v. Kroger, it was held that jurisdiction could be asserted over an Indiana defendant who had transported goods from Illinois to Tennessee on behalf of the plaintiff. The plaintiff had his fish shipped from Michigan to Chicago, and the defendant then transported the fish to Tennessee. The defendant had no agents, business, or property in Michigan; had not solicited business there; and was licensed by the Interstate Commerce Commission to enter only four states—none of which was Michigan. Under these circumstances the defendant could in no way have been charged with an expectation of having to defend against an action in Michigan. The assertion of jurisdiction over this defendant represented a blind extension—or more properly, a misinterpretation—of Gray that


70. 22 Ill. 2d at 442, 176 N.E.2d. at 766.
went far beyond what fair play would have permitted, and that therefore should not have been tolerated. Thus, the Gray analysis is an acceptable method of determining whether a court possesses jurisdiction when it is used to gauge a defendant's expectations, but not when it is applied as a blanket rule covering all interstate transactions.

The standards advanced have not been developed by the courts alone. Professors von Mehren and Trautman have proposed a fourth standard, which may be referred to as a geographical-extent analysis. This approach is based on the premise that the court system currently favors defendants since the plaintiff who has a cause of action against a foreign defendant normally must go to that defendant's home state in order to obtain a remedy. This preference is appropriate in the usual case, because a court cannot enforce its judgment unless it has jurisdiction over the defendant or his property. Bringing an action in the defendant's state also produces judicial efficiency because it eliminates the need for an additional enforcement proceeding. However, under the analysis proposed by Professors von Mehren and Trautman, this traditional preference for the defendant would be reversed when the equities of a given case indicate that the plaintiff should be favored. In deciding whether the equities of a particular case require reversal of the usual preference, two factors should be determinative: (1) the defendant's expectations, and (2) the geographical extent of the respective activities of each party. Thus, the plaintiff's state should be able to exercise jurisdiction in an action against a defendant who quite clearly should have expected the exercise of jurisdiction by the plaintiff's state, or in an action by a localized plaintiff against a multistate defendant.

The application of the expectation analysis was discussed above in the context of the Gray case. The application of the second factor advanced by these authors, that the geographical extent of the parties' activities should be an essential jurisdictional criterion, is illustrated by the circumstances typically surrounding an action brought by an individual plaintiff against a defendant, such as an insurance company, that is engaged in widespread multistate activities. It is suggested that the "extensive multistate activity" of such a defendant, when contrasted with the typically localized economic and legal existence of an individual plaintiff, should produce a

74. See Jack O'Donnell Chevrolet, Inc. v. Shankles, 276 F. Supp. 998, 1004 (N.D. Ill. 1967), in which the court refused to hold that a bank should be subject to jurisdiction wherever its checks are circulated.
76. See text preceding note 8 supra.
77. von Mehren & Trautman, supra note 75, at 1167-69.
78. See notes 67-74 supra and accompanying text.
preference for the assumption of jurisdiction by the plaintiff's home state. The burden thus placed on the defendant by requiring it to litigate in a foreign forum would not be considered to be an unfair incident of its widespread operations, while the localized plaintiff would be relieved of the burden of going to the defendant's headquarters in another state to obtain recompense for injuries received at home.

Although this approach does not appear to have been explicitly adopted by any courts to date, its general tenets have been followed at least implicitly in *Golden Belt Manufacturing Company v. Janler Plastic Mold Corporation*, a contract case brought by a North Carolina corporation against an Illinois corporation in a federal district court in North Carolina. The court determined that although jurisdiction might properly have been asserted if the plaintiff had been an individual, it was not proper to assert jurisdiction when the plaintiff was a corporation since "'[t]he hardship in conducting the suit in a foreign forum is as great on one party as it is on the other.'" Thus, while the court found no basis for disturbing the traditional preference for the defendant in this particular case, it displayed a willingness to look to the geographical extent of the activities of each party and the resulting hardships imposed by requiring foreign litigation, in determining the propriety of attaching jurisdiction.

This approach to the determination of the permissible limits of jurisdiction stresses the relevance of convenience and mobility to the concept of fair play. Certainly, these standards are justified by the Supreme Court decisions, since one of the very reasons for the abandonment of the *Pennoyer* standards was that "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." However, this analysis has been accurately criticized as not going far enough in considering interests of the parties other than the defendant's expectations and the geographic extent of the activities of both parties. Thus, complete reliance on this standard would not seem to be appropriate.

A fifth concept—related to the geographical-extent analysis, but carrying its underlying rationale further—is based upon a complete analysis of the interests of the parties and of the court in having a

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83. *Carrington & Martin, Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 245-46 (1967). *Cf. Foster, Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts, 47 F.R.D. 75, 88-89 n.47 (1969), suggesting that the relative extent of the parties' multistate activities is not an appropriate test for determining amenability, but that such considerations are more properly handled by use of the doctrine of forum non conveniens, stays of further proceedings, and venue transfers.*
given case decided within a given state.\textsuperscript{84} In its most sophisticated form, this approach asserts that a court should attempt to balance all of the interests involved in a case rather than concentrating solely on whether there are sufficient contacts between the forum and the controversy. The required quantum of contacts should then vary proportionately with the benefits and inversely with the costs involved in the exercise of jurisdictional power in a given case.\textsuperscript{85} An example of this type of approach can be found in \textit{Curtis Publishing Company v. Birdsong}.\textsuperscript{86} In that case, the Court of Appeals for the Fifth Circuit held that even though the defendant's contacts with the forum state might have been jurisdictionally sufficient in an isolated sense, they should not have been considered sufficient when both parties were nonresidents of the forum state and when the events giving rise to the cause of action were not peculiar to that state.\textsuperscript{87} The plaintiff in \textit{Birdsong} was a Mississippi highway patrolman, the defendant was a Pennsylvania corporation, and the libel action was brought in Alabama. To have sustained the Alabama court's jurisdiction would have required the conclusion that jurisdiction could be sustained in any state in the Union, a conclusion that would clearly encourage the distasteful practice of forum shopping. The court of appeals thus held that this detrimental aspect overrode the technical propriety of asserting jurisdiction.

Proponents of this standard would also consider the nature of the harm involved to be relevant, both in the sense of the nature of the injury complained of by the plaintiff and in the sense of the danger of harm involved in subjecting a particular defendant to the jurisdiction of a distant forum. They suggest that the exercise of long-arm jurisdiction is more appropriate when the plaintiff has suffered bodily harm than when the injury is economic.\textsuperscript{88} Similarly, they would agree with the determination of the Court of Appeals for the Fifth Circuit in \textit{New York Times Company v. Connor}\textsuperscript{89} that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."\textsuperscript{90}

In evaluating the various approaches to the formulation of a


\textsuperscript{85} Carrington & Martin, \textit{supra} note 83, at 230.

\textsuperscript{86} 360 F.2d 344 (5th Cir. 1966).

\textsuperscript{87} See also \textit{Ventling v. Kraft}, 83 S.D. 465, 477, 161 N.W.2d 29, 35 (1968) (Judge Biegelmeier, concurring): "Because jurisdiction of one transaction may be asserted by several states, courts must exercise caution in applying this expanded doctrine."

\textsuperscript{88} Carrington & Martin, \textit{supra} note 83, at 232.

\textsuperscript{89} 365 F.2d 567 (5th Cir. 1966).

\textsuperscript{90} 385 F.2d at 572. See also \textit{Note, First Amendment's Role in Determining Place of Trial in Libel Actions}, 66 \textit{Mich. L. Rev.} 542, 550-52 (1968), approving of this decision.
more definite standard to determine borderline cases, it appears that
the first two standards examined above serve little purpose. The nu-
merical-contacts test provides at best a superficial analysis and results
in a meaningless battle of numbers. The second, which indiscrimi-
nately applies three factors deemed to be essential or critical in vari-
ous Supreme Court decisions, is unnecessarily restrictive. The other
standards that have been developed are all useful but to some extent
conflict with one another. The expectation analysis of Gray does not
necessarily bear any relation to the relative interests of the parties,
and it does not in itself indicate any distinction in the quantum of
contacts required for different kinds of injury, although some recent
interpretations have superimposed such considerations. 91 A substan-
tial conflict exists between the interest analysis and the geographical-
extent analysis. The latter approach suggests that jurisdiction should
be asserted in cases such as Connor and even Birdsong in which a
defendant has engaged in wide multistate activities, while the former
—which takes into account the relative interests of the parties, in-
cluding first amendment considerations—clearly rejects the assertion
of jurisdiction in both of those cases. 92 Although the interest analysis,
unlike the geographical-extent or expectation analyses, appears to
take all relevant factors into consideration, the nature of its balanc-
ing approach greatly hinders predictability. Thus, even though each
of the five analyses seems to recognize and take proper account of fac-
tors relevant to the determination of jurisdictional limits, the facts
that each contains certain inherent limitations on its usefulness, and
that there exists a certain degree of conflict among them, combine to
preclude their use as definitive standards.

Moreover, since the various analyses do conflict somewhat, and
since their application may require a relatively high degree of so-
plication, concern with these analyses has led some courts to over-
look relatively obvious considerations. It is necessary to recall that
the fundamental standard behind the exercise of jurisdiction is still
fair play under the due process clause of the fourteenth amendment.
Confusion resulting from concern with highly sophisticated analyses
should not, but may, lead to obfuscation of this basic point. The
jurisdictional issue is a preliminary one and should be determined
with a minimum of complex analysis. Although cases will arise that
require extensive analysis and a precise determination of jurisdic-
tional limits—such as those involving first amendment freedoms or
a minimum of contacts—confusion surrounding the permissible
limits of jurisdiction should not, in the usual case, be allowed to
result in a blindness toward the fundamental considerations of fair-

1965), indicating approval of the expectation analysis in a case involving personal in-
1967), rejecting such an approach in a case involving economic injury.

92. Carrington & Martin, supra note 83, at 245-46.
ness. When such blindness does occur, there will be needless delay and litigation. The fair-play standard itself indicates that the issue of jurisdiction should be resolved quickly when possible, because it is not fair play for the plaintiff to be subjected to the expense of delay unless a legitimate purpose is served. Furthermore, no interest of the courts, nor any defensible interest of the defendant, is served by extensive litigation over jurisdiction. In the unusual case, such as Birdsong or Connor, extensive jurisdictional litigation may be unavoidable. Considerations relevant to those cases, however, should not be allowed to obscure vision in the ordinary case.

II. APPLICATIONS OF THE MODERN DOCTRINE

Attempts at highly sophisticated jurisdictional analysis have caused courts in recent years to reach erroneous results in three groups of cases that would have been capable of easy analysis in terms of fair play. Each of these groups will be examined as illustrative of the generally unsatisfactory decisions that have been reached when courts have become caught in their own jurisdictional fog.

A. Lesser Included Claims

One group of cases in which excessive concern with the hard case—one that approaches the extreme limits of jurisdiction—seems to have led to unwarranted difficulty in deciding the easy case—one that falls well within the permissible limits of jurisdiction—involves what may be referred to as lesser included claims. When a court has jurisdiction over a defendant with regard to one of the plaintiff's claims, and the plaintiff has other claims that may be properly joined and that will not impose any additional burden on the defense, there should be no concern with whether jurisdiction may constitutionally be asserted over these lesser included claims. Jurisdiction should be asserted with reference to the particular fact situation, not with reference to the plaintiff's claims considered in isolation.

This problem is well illustrated by Fayette v. Volkswagen of America, Incorporated, a case in which the plaintiff alleged that he had suffered injuries as a result of a defective seat in an automobile that he had purchased. The action was brought in Tennessee, although the car had been purchased elsewhere. The court held that

93. See also Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967). The court in that case determined that while a newspaper is primarily local and should not be subjected to jurisdiction in a distant forum in a libel action because of the danger to freedom of the press, a national magazine is not primarily a local concern and should therefore be prepared to defend wherever it is circulated. 383 F.2d at 590, 594.

94. Generally, claims are properly joined when there is a "sufficient legal similarity" between them. F. James, Jr., Civil Procedure § 10.2, at 446-49 (1965). For the rules relating to joinder in the federal courts, see Fed. R. Civ. P. 18.

it possessed jurisdiction over the claims of misrepresentation, breach of warranty with privity, and breach of warranty without privity. However, the court also held that it could not assert jurisdiction over the claim arising from the sale of a defective chattel since the sale had not taken place in Tennessee; nor would it accept jurisdiction over the claim of negligent manufacture since the car was not manufactured within the state. This division of claims, and the consequent assertion of jurisdiction only over some of them, appears to have been inappropriate, because the facts at issue in defending against the misrepresentation and breach-of-warranty charges were likely to have included all of those at issue in defending against the sale-of-a-defective-chattel charge. The claim for negligent manufacture, however, may have involved different factual proofs; if so, the court properly denied jurisdiction over that claim. But since the court failed to consider whether such additional proof was involved, its conclusion that jurisdiction could not be asserted appears to have been reached by an unsound approach. For so long as the same factual issues are involved in deciding both claims—so that no additional factual burden is placed on the defendant—a court that has asserted jurisdiction over the primary claim has no compelling reason to refuse to assert jurisdiction over the lesser included claim.

The considerations that lead to this conclusion are similar to those that have given rise to the doctrine of pendent jurisdiction in the federal courts. Under that doctrine, a federal court may assert jurisdiction over a nonfederal claim whenever "[t]he state and federal claims . . . derive from a common nucleus of operative fact." This doctrine is calculated to promote judicial efficiency; similarly, the efficient dispensation of justice would be greatly enhanced by the assertion of jurisdiction over lesser included claims. But this interest in efficiency is not the only factor supporting this result; the basic doctrine of fair play also demands it. It is hardly unfair to require a defendant to respond to all of a plaintiff's claims when the burden of his defense is not thereby increased. On the other hand, it clearly would be unreasonable and unnecessary to require a plaintiff who has fully litigated a claim in one forum to relitigate in another forum—and thus double his expense in terms of time and money—a

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96. 273 F. Supp. at 329.
99. The question whether additional proof would be required for the additional claims was not discussed in the opinion. It would seem that a sale would have to be proven before any warranty could be found, and that the defectiveness of the chattel would probably have to be proven before a breach of warranty or a misrepresentation could be established.
101. Id. at 84.
lesser claim that arose from the same factual transaction as did the first claim.

Usually, jurisdiction should be asserted only over those claims that are truly lesser and truly included. However, the existence of jurisdiction over the defendant with regard to one claim is also relevant to the question of the extent to which jurisdiction may be asserted over other claims that cannot be classified as lesser included. The interest of a court in taking a whole case and the interest of the plaintiff in having all of his claims adjudicated in one proceeding suggest that if a defendant must appear to defend one claim, the quantum of contacts required to assert jurisdiction over other non-included claims should be less than would otherwise be the case. For example, assume that in Fayette the defense to the charge of negligent manufacture would have required no more than a demonstration of the manner in which seats were installed in the defendant's automobiles. While it might have been unfair to require that the defendant come to Tennessee to defend against this claim alone, it might not have been unfair to impose this additional burden on him when he was already in the state defending against the other claims. This conclusion is strengthened if it appears that the plaintiff would otherwise have to travel to the defendant's principal place of business and initiate additional proceedings in order to obtain complete vindication of his rights. Thus, the fairness of adding to the burden of the defense must be compared with the fairness of requiring the plaintiff to bring another action elsewhere; the jurisdictional question is not one which can be answered by an isolated examination of each claim.

Determining the validity of asserting jurisdiction over lesser included claims requires little analytical effort. Similarly, consideration of the propriety of asserting jurisdiction over other related claims does not require extensive analysis by the court. The facts necessary for these appraisals should appear in the pleadings, and, when necessary, interrogatories could be utilized. Certainly the analysis that these considerations would require is less extensive than that which must be made if each claim is considered in isolation. By focusing on the total fact situation involved, rather than on individual claims, the analysis is simplified and the underlying objective of guaranteeing fundamental fairness is accomplished. In this manner, judicial efficiency is furthered and the relative interests of the parties are recognized.

102. Lesser included claims include those that may be properly joined and that impose no additional burden on the defense. See text accompanying note 94 supra.
103. It may be argued that the court's assertion of jurisdiction over the defendant with respect to the first claim is itself a significant contact that may be counted.
B. Contract Claims

The choice of law applicable to an interstate-contract dispute generally will depend on such considerations as the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domiciles or places of business of the parties involved.\textsuperscript{105} Such considerations also may be relevant to the assertion of jurisdiction over an interstate-contract dispute. However, the jurisdictional question should generally be independent of the choice-of-law question. Fairness to the defendant does not require that the forum that asserts jurisdiction apply its own law.\textsuperscript{106}

Nonetheless, a number of courts have applied these choice-of-law considerations to the jurisdictional determination,\textsuperscript{107} possibly because they are looking for factors that provide a definite standard by which to judge jurisdiction, or possibly because they have confused the two issues and thereby unwittingly transferred the choice-of-law approach to the jurisdictional question. Whatever the reason, such an approach to jurisdictional determinations is undesirable. Blind adherence to choice-of-law principles results in a failure to give proper consideration to what should be the crucial factor in resolving any jurisdictional issue—the fundamental matter of fair play.

\textit{Crescent Corporation v. Martin}\textsuperscript{108} provides a good illustration. In that case the plaintiff, an Oklahoma resident, entered into an employment contract with the defendant, a Delaware corporation with its principal place of business in New York. The plaintiff was to serve as a consultant to the defendant by attending and reporting at two meetings of defendant’s board of directors a year. Although the Supreme Court of Oklahoma held that jurisdiction could not be asserted over the defendant in Oklahoma, it indicated that a contrary result might be reached if the plaintiff could amend his pleadings to show either that the contract had been made or accepted in Oklahoma, or was to be performed there.\textsuperscript{109} It is difficult to understand why, in this and similar cases,\textsuperscript{110} a factor such as the place of accepting the contract should be determinative of jurisdiction.

\textsuperscript{105} \textit{Restatement (Second) of Conflict of Laws} § 188 (Proposed Official Draft, pt. 2, 1968). To some extent these considerations are also relevant to the evaluation of the interests of the parties to an action on a contract. \textit{See Developments in the Law—State-Court Jurisdiction}, supra note 84, at 926-28.

\textsuperscript{106} \textit{See Hanson v. Denckla}, 357 U.S. 235 (1958). It is, however, unlikely that an action would be brought in a forum without at least some choice-of-law considerations indicating that the law of that forum should apply.


\textsuperscript{108} 443 P.2d 111 (Okla. 1968).

\textsuperscript{109} 445 P.2d at 117.

A more appropriate analysis, and one considerably less complex, would result from the application of the Gray expectation analysis. Under that approach jurisdiction may be asserted by the state of residence of either party to an interstate contract. If an interstate contract is regarded as one involving interstate negotiations, or the anticipation of performance in a state other than that in which all the negotiations take place, it is not unreasonable to assume that one who signs such a contract expects or should expect to have to defend in the state of residence of the other party to the contract. More specifically, an employer who hires an Oklahoma resident should not be surprised if it becomes subject to a suit by that employee in an Oklahoma court.

The application of the expectation analysis is peculiarly appropriate to contract, as opposed to tort, cases. For while there is some element of fiction in the general idea that one who puts an article into the stream of commerce should expect to have to defend wherever that article is withdrawn from the stream, there is no such fiction in applying the expectation concept to a contract case in which the potential litigational forums are readily ascertainable at the time of making the contract. If either party finds the possibility of having to defend in another party's home forum particularly onerous, he is in a position to protect against this contingency by stipulations in the contract. If the forum of each party's residence is generally appropriate, there is no reason to invalidate a prior selection of one, and the courts appear willing to accept such a selection. For example, in National Equipment Rental, Limited v. Szukhent, the Supreme Court enforced a stipulation in a leasing contract that had the effect of placing exclusive jurisdiction over disputes arising under the contract in the courts of the lessor's home state. An exception to such a rule might be appropriate in the case of contracts of adhesion, although the courts have traditionally


111. See notes 67-74 supra and accompanying text.

112. However, Gray should not be applied in every case in which interstate commerce is involved. See text accompanying notes 72-74 supra.


115. But see von Mehren & Trautman, supra note 75, at 1188-99.


117. See also Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); R. Cramton & D. Cuske, Conflict of Laws 468, 512-13 (1968). But see Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).

118. A contract of adhesion typically is the result of a disparity in the relative bargaining power of the parties to a contract, allowing the stronger party to impose his
validated such contracts, at least those negotiated at arm's length.\textsuperscript{119} At any event, concern with the adhesion contract should not prevent acceptance of the general proposition that parties may stipulate the forum of their choice.

\textit{Seilon, Incorporated v. Brema S.p.A.},\textsuperscript{120} decided by a federal district court sitting in Ohio, is typical of the cases that have refused to give effect to the parties’ jurisdictional stipulations. Plaintiff, a Delaware corporation with its principal place of business in Ohio, entered into a contract with defendant, an Italian individual. The defendant then incorporated his business in Italy, and the old contract was replaced with a new one. The court was unable to determine whether the new contract had been accepted in Ohio or in Italy. Under the contract, the plaintiff was to design a factory to be built in Italy, and was to train some of the defendant’s employees. The parties stipulated that Italian courts were to have jurisdiction over any disagreements that arose under the contract. After the defendant allegedly breached the contract, the plaintiff brought an action against him in Ohio. Without specifying any apparent basis for its decision,\textsuperscript{121} the court held that the stipulation was ineffective and that jurisdiction could be exercised in the Ohio forum. This

\begin{enumerate}
\item[119.] 6A A. Corbin, \textit{Contracts} § 1376 (1962). \textit{Szukhent} involved a contract in which farm equipment was leased to a farmer. In his dissent, Justice Black emphasized the unfairness arising from the consumer’s lack of bargaining power with regard to the standardized form clause. 375 U.S. at 325. The failure of the Court to adopt this view suggests that the enforcement of jurisdictional stipulation clauses in adhesion contracts does not involve due process problems. \textit{But cf.} Sun-X Intl. Co. v. Witt, 418 S.W.2d 761 (Tex. Civ. App. 1967).
\item[120.] 271 F. Supp. 516 (N.D. Ohio 1967).
\item[121.] The court gave no reasons and cited only Alcaro v. Jean Jordeau, Inc., 138 F.2d 767 (3d Cir. 1943), a case which bears no relation to the question whether a stipulation such as the one before the court in \textit{Seilon} is effective. \textit{Restatement (Second) of Conflict of Laws} § 80 (Proposed Official Draft, pt. 2, 1967) indicates that the \textit{Seilon} court was in error. This conclusion would appear to be especially true since the court was sitting in Ohio, which is one of the three states in the nation which recognizes cognovit clauses in contracts (the other two are Illinois and Pennsylvania). Hopson, \textit{Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit}, 29 U. Chi. L. Rev. 111, 131 (1961). If a court is willing to recognize a cognovit clause, by which a judgment against a party is confessed in the contract, it should surely be willing to recognize a jurisdictional stipulation.
\end{enumerate}
decision does not comport with considerations of fair play. There was no indication in the opinion that the contract was in any manner adhesive; indeed, if either party held the upper hand in the negotiations, it would appear to have been the plaintiff. Once the plaintiff corporation willingly bargained away any right it might have had to an Ohio forum, it was neither fair to the defendant, nor did it correspond with defendant's expectations, to void that stipulation in the contract.

Although never desirable, a poorly decided opinion normally must be tolerated as an inevitable result of human error. However, when the Seilon court unjustifiably refused to recognize a jurisdictional stipulation in the contract, more than the interests of the actual parties involved were adversely affected. The decision in Seilon also struck at the premise that jurisdiction should be recognized in the state of residence of either party; thus, that decision may lead to a hesitancy on the part of courts to assert jurisdiction solely on the basis that one of the parties to an interstate contract resides in the forum state. The legitimacy of asserting jurisdiction under such circumstances depends upon the willingness of courts to enforce stipulations when they do appear. A party cannot logically be held subject to jurisdiction in one state on the ground that he did not stipulate otherwise unless a stipulation, when made, is given effect. However, it would be inappropriate to disregard the general proposition that a court may properly assert jurisdiction over a claim arising from an interstate contract when one of the parties is a resident of the forum state, merely because a rare court—such as the Seilon court—erroneously refuses to give effect to a jurisdictional-stipulation clause. As the Szukhent case demonstrates, such clauses should normally be enforced. Therefore, since a party to an interstate contract does have a means of protecting himself from being subjected to the jurisdiction of a foreign court, it would be fair play to permit the assertion of jurisdiction by a court of a state in which either party resides.

The Texas long-arm statute has adopted the concept that jurisdiction may be asserted by the state of residence of either party to a contract. In essence, that statute provides that the act of entering into an interstate contract with a Texas resident will constitute a sufficient basis for the assertion of jurisdiction by the Texas courts.

Although at least two non-Texas courts have found that provision unconstitutional, consideration of the defendant's expectations

122. See text accompanying notes 116-17 supra.

123. The statute provides that an individual or corporation “shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State...” Tex. Rev. Civ. Stat. Ann. art. 2031B, § 4 (1964).

indicates that those cases were wrongly decided. There is adequate case support to uphold the residency analysis suggested above. Language in *McGee v. International Life Insurance Company* suggests that the mere existence of a contract to which a resident of the forum state is a party provides a sufficient basis for the assertion of jurisdiction.\(^{125}\) Since a number of courts have upheld jurisdiction in cases involving similarly minimal contact between the defendant and the forum state,\(^{126}\) it would appear that the plaintiff's residency in the forum state provides a basis for the assertion of jurisdiction adequate to withstand constitutional objection.

Thus, it does not seem inappropriate to require that a party defend an action in the home forum of one with whom he has entered into an interstate contract. The courts of each state may be presumed to have an interest in protecting the interests of its residents, and the court system as a whole has an interest in the efficient dispensation of justice. Both of these interests are served by the rapid determination of the jurisdictional issue through reference to the contract itself. Should a party find the possibility of having to defend in a foreign forum onerous, he may protect himself by stipulation. When such stipulations are made—unless the provision is adhesive—it usually will not be fair play to subject a party to the jurisdiction of a forum that was not stipulated, because that party has every reason to expect that such jurisdiction will not be asserted, and his adversary has voluntarily encouraged this belief. Thus, by recognizing jurisdiction over interstate-contract disputes in the state of residence of either party—except when the parties voluntarily exclude either or both forums—the parties' expectations are effectuated, the jurisdictional matter is efficiently decided, and compliance with the standard of fair play is assured.

**C. Quasi in Rem Jurisdiction**

Commentators as well as courts have been plagued by the jurisdictional mystique. The recent controversy among courts and commentators over the exercise by New York courts of quasi in rem jurisdiction on the basis of insurance policies covering automobile accident liability provides another illustration of the general tendency to approach jurisdictional issues with overly complex analyses.

The controversy originated with the case of *Seider v. Roth*,\(^{127}\)

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125. "It is sufficient for purposes of due process that the suit was based on a contract which had substantial contacts with that state." 355 U.S. 220, 223 (1957).


which involved a Vermont automobile accident between a New York plaintiff and a Canadian defendant. The defendant's insurer was a Connecticut corporation that did business in New York. The New York Court of Appeals held that the New York courts could attach the policy as a debt owed to the defendant,\(^128\) and thereby acquire quasi in rem jurisdiction.\(^129\) This case and those that have followed it have been soundly condemned by the commentators.\(^130\) However, those criticisms have not dealt with or resolved the fundamental problems inherent in the Seider doctrine.

The basic flaw in the Seider analysis involves the failure of the New York courts and federal courts in the Second Circuit to recognize fully that the limitations on quasi in rem jurisdiction are—or at least should be—identical to those on long-arm in personam jurisdiction.\(^131\) While the commentators generally have indicated a recognition of this problem,\(^132\) most have failed to give it sufficient emphasis.\(^133\) Rather, the criticisms of the doctrine have centered on such limited issues as whether due process is violated when a limited appearance is not made available to an insured whose policy has been attached;\(^134\) whether the Seider doctrine, construed as a judicially created direct-action statute, is constitutional;\(^135\) and whether it is appropriate for such a statute to be judicially created.\(^136\) The courts

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\(^128\) See Harris v. Balk, 198 U.S. 215 (1905), in which the Supreme Court held that garnishment proceedings could be instituted wherever the garnishee could be served with process.

\(^129\) See note 2 supra.


\(^131\) See notes 174-200 infra and accompanying text.

\(^132\) See, e.g., Comment, 67 Colum. L. Rev. 550, supra note 130, at 559; Note, 53 Cornell L. Rev. 1108, supra note 130, at 1116-18; Note, 19 Stan. L. Rev. 654, supra note 130, at 654-55.

\(^133\) One article, Comment, Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory, 1968 Duke L.J. 725, did assert that the major difficulty with the Seider doctrine is the unjustifiable dichotomy between the Pennoyer principles apparently applicable to in rem and quasi in rem jurisdiction and the International Shoe principles applicable to in personam jurisdiction. See also Note, Jurisdiction in New York: A Proposed Reform, 69 Colum. L. Rev. 1412 (1969), proposing that New York abolish quasi in rem jurisdiction concomitantly with an expansion of the permissible bases for attaching in personam jurisdiction.

\(^134\) See Comment, 54 Va. L. Rev. 1426, supra note 130, at 1494-98.


\(^136\) See Note, 53 Cornell L. Rev. 1108, supra note 130, at 1118-21.
have met the thrust of these criticisms, holding that a limited appearance is available,137 that the Seider doctrine is the equivalent of a direct-action statute,138 and that as such it is constitutional.139 But although the arguments that have been raised against the doctrine have largely been met, the fundamental flaw remains uncorrected.

A close reading of the Seider case indicates that the debt that was found to be attachable was the insurer's obligation to defend the insured rather than the obligation to indemnify him.140 The difficulty with attaching the insurer's obligation to indemnify is clear; the obligation does not arise until after jurisdiction has been asserted and a judgment has been rendered.141 To attach this obligation as a basis for jurisdiction therefore involves an indefensible bootstrap argument.142 Attachment of the obligation to defend, on the other hand, easily may be justified because the insurer's obligation arises as soon as the complaint is filed, even if the defense consists merely of a motion to dismiss for want of jurisdiction.143 But attachment of this obligation meets with a practical difficulty. Should the defendant fail to appear, and thereby have a default judgment rendered


139. Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968).

140. 17 N.Y.2d at 115-14, 216 N.E.2d at 314-15, 269 N.Y.S.2d at 101-02. The court indicated that the insurance policy "requires Hartford, among other things, to defend . . . in any automobile negligence action and, if judgment be rendered . . . to indemnify . . . . Thus as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a 'debt . . . .'" 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. This language indicates that the obligation arising immediately is that of defense. Furthermore, the court relied exclusively on In re Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962), and referred to that case as involving " 'the personal obligation of an indemnity insurance carrier to defend . . . .' " 17 N.Y.2d at 114, 216 N.E.2d at 314, 269 N.Y.S.2d at 102. Since the Seider court made no reference to any indemnification obligation in Riggle, and concluded that "the law question in this case [has] been decided by Riggle," 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102, the basis for the attachment must have been the obligation to defend. Nonetheless, most commentators appear to believe that the Seider court upheld attachment of the obligation to indemnify as well as the obligation to defend. See Stein, supra note 130, at 1079; Comment, 1968 Duke L.J. 725, supra note 135, at 745; Note, 53 CORNELL L. REV. 1108, supra note 130, at 1108; Note, 19 STEAN. L. REV. 654, supra note 130, at 654. But see Comment, 67 COLUM. L. REV. 550, supra note 130, at 552.

141. However, it has been suggested that there is New York precedent for the view that the right to indemnification vests upon the occurrence of an accident subject to divestment in the event that the insured is not found liable. Comment, 1968 Duke L.J. 725, supra note 135, at 745 n.83. The court in Seider placed no reliance on any such precedent.


143. But see Podolsky v. Devinney, 281 F. Supp. 488, 494 (S.D.N.Y. 1968), and Seider v. Roth, 17 N.Y.2d 111, 115, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 103 (1966) (Judge Burke, dissenting), both of which assert that even the obligation to defend cannot arise until jurisdiction has been validly obtained.
against him, it is virtually impossible to determine the value of the res from which the plaintiff is entitled to collect his judgment.\textsuperscript{144} If the defendant does appear, it was thought until recently that he would be subject to in personam jurisdiction.\textsuperscript{145} However, the New York Court of Appeals has held, in \textit{Simpson v. Loehman},\textsuperscript{146} that an appearance to defend on the merits does not subject the defendant to liability in excess of the attached debt. Therefore, a proper application of \textit{Seider} would limit the recovery to the insurer's obligation to defend, which would have little value once the case has been argued.\textsuperscript{147}

Perhaps in recognition of this problem, some New York courts, after originally basing these quasi in rem proceedings on the existence of the obligation to defend, have now eliminated reference to this obligation to defend when describing the attached debt.\textsuperscript{148} In \textit{Simpson v. Loehman}\textsuperscript{149} three separate opinions were written by members of the "majority." Chief Judge Fuld referred to the "insurer's obligation" without specifying whether that involved the obligation to defend or to indemnify.\textsuperscript{160} Judge Keating recognized the \textit{Seider} doctrine as a judicially created direct-action statute that enabled the plaintiff to sue the insurance company directly.\textsuperscript{181} Judge

\begin{footnotesize}
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\item \textsuperscript{144} When personal jurisdiction over the defendant has not been obtained, recovery under a judgment quasi in rem is limited to the property—or res—attached and cannot be satisfied out of any other property. F. JAMES, JR., \textit{CIVIL PROCEDURE} \S 12.7, at 631 (1965). Note, however, that a valuation of the attached res may be forced in New York by a motion to replace the attached property with a bond of equal value. N. Y. \textit{CIV. PRAC. LAW} \S 6222 (McKinney 1966). \textit{See Note, 53 CORNELL L. REV.} 1108, \textit{supra} note 130, at 1111.
\item \textit{But cf.} 4 C. WRIGHT & A. MILLER, \textit{FEDERAL PRACTICE & PROCEDURE} \S 1071, at 277 (1969), in which it is stated that "the size of the debt in the auto insurance situation depends entirely upon the results of the litigation itself... [B]y appearing defendant well may be able to hold the liability down." These authors apparently assume that the value of the attached res is equal to the amount of the judgment.
\item \textsuperscript{146} 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). \textit{See text accompanying notes 103-64 infra. But see Minichello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968), rehearing en banc, 410 F.2d 117 (2d Cir.), cert. denied, 396 U.S. 844 (1969), for the suggestion that the New York judgment could subject a defendant to liability in excess of the attached debt in a second forum that might deem the New York judgment effective as a collateral estoppel on the merits but not on the amount of recovery. In noting that such a result could be reached by some state court, Judge Friendly, writing for the majority, stated that "we think it clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a \textit{Seider} judgment..." 410 F.2d at 112.
\item \textsuperscript{147} \textit{See concurring opinion of Judge Breitel, Simpson v. Loehmann, 21 N.Y.2d 305, 315, 234 N.E.2d 669, 674, 287 N.Y.S.2d 633, 941 (1967), as discussed in note 152 infra.}
\item \textsuperscript{148} \textit{See note 154 infra.}
\item \textsuperscript{150} 21 N.Y.2d at 307-12, 234 N.E.2d at 670-73, 287 N.Y.S.2d at 634-38.
\item \textsuperscript{151} 21 N.Y.2d at 312-14, 234 N.E.2d at 673-74, 287 N.Y.S.2d at 638-40 (Judge Keating, concurring).
\end{itemize}
\end{footnotesize}
Breitel, concurring only because he felt it inappropriate to overturn Seider without a more persuasive basis that a change in the court’s personnel, referred to the “contingent liability to defend and indemnify.” 152

Seider and Simpson are the only two decisions by the New York Court of Appeals dealing with the attachment of insurance policy obligations. 153 The lower New York courts and the federal courts have consistently referred to Seider attachments in general terms without specifying whether the obligation to defend or to indemnify was involved. 154 It has, however, become clear that the courts regard the obligation to indemnify as at least a part of the attached debt. 155

152. 21 N.Y.2d at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 641 (Judge Breitel, concurring).

Judge Breitel also commented that “if the insurer’s obligation to defend is fully performed, there is nothing of economic value to which the insured may make claim, receive or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.” 21 N.Y.2d at 315, 234 N.E.2d at 674-75, 287 N.Y.S.2d at 641. This statement implies, perhaps, a theory that the obligation to defend is initially attached, that as the trial continues the value of the obligation diminishes, and that at the moment when the trial ends the obligation to defend loses all value and is replaced by the obligation to indemnify—assuming there is a decision for the plaintiff. Although interesting, such a theory is not satisfactory. Since the case relates only to the plaintiff’s claim on the obligation to defend, the indemnification obligation could not be attached without another attachment proceeding. The litigated action, which concerned only the defense obligation, would provide no basis for the attachment of the larger obligation to indemnify.


154. The courts have referred to the attached res as the “insurer’s obligations to defend and indemnify,” Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 815 (2d Cir. 1969); “defendant’s interests in liability insurance policies,” Minichiello v. Rosenberg, 410 F.2d 106, 107 (2d Cir. 1968), reharing en banc, 410 F.2d 117 (2d Cir.), cert. denied, 396 U.S. 844 (1969); the “obligation ... to defend the suit and indemnify,” Jarvis v. Magic Mountain Corp., 290 F. Supp. 998, 999 (S.D.N.Y. 1968); the “obligation ... to defend and indemnify,” Vaage v. Lewis, 29 App. Div. 2d 315, 316, 288 N.Y.S.2d 521, 522 (1968); the “obligation ... to indemnify,” Fowser v. Mills, 56 Misc. 2d 411, 288 N.Y.S.2d 846, 847 (Sup. Ct., Spec. Term 1968); the “obligation to defend and indemnify,” Brun v. George W. Brown, Inc., 56 Misc. 2d 577, 579, 259 N.Y.S.2d 722, 724 (Sup. Ct., Spec. Term 1968); “a contract of insurance,” Alex v. Grande, 56 Misc. 2d, 931, 932, 290 N.Y.S.2d 303, 304 (Sup. Ct., Spec. Term 1968). None of these cases contain any further discussion of the attached res. Only two other reported cases have dealt with the Seider doctrine. In Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968), the court found the doctrine unconstitutional (see text accompanying notes 156-58 infra) and discussed the attached res, but indicated difficulty in determining which obligation was sought to be attached. 281 F. Supp. at 494-97, 499. In Lefcourt v. Seacrest Hotel & Motor Inn, 54 Misc. 2d 376, 383, 282 N.Y.S.2d 896, 904 (Sup. Ct., Spec. Term 1970), the court’s language was more explicit, but no more enlightening, than the language in other cases involving the Seider doctrine: “[T]he ‘debt’ seized includes the carrier’s obligation to investigate, to defend and to indemnify.” See also Cenkner v. Shafer, 61 Misc. 2d 807, 806 N.Y.S.2d 65 (Sup. Ct., Spec. Term 1970), in which the judge expressed some confusion in determining what res should be attached.

155. In Simpson v. Lochman, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), the New York Court of Appeals, in denying a motion for reargument, held that an appearance to defend on the merits would not subject the nonresident defendant to
although the propriety of such an attachment has never been directly confronted.

In Podolsky v. Devinney, the United States District Court for the Southern District of New York, with considerable support from the commentators, declared the Seider doctrine unconstitutional, largely because the defendant was not allowed to make a special appearance with liability limited to the amount of the attached obligation. Shortly after the Podolsky decision, a lower New York court specifically held that a Seider defendant could not make a limited appearance and rejected the Podolsky finding of unconstitutionality. The New York Court of Appeals then handed down the second Simpson decision, which created a right to a limited appearance to complement its judicially created direct-action statute. Shortly after this change in the doctrine, a New York federal district court held that the constitutional infirmity had been cured. More recently, the doctrine has been recognized by the Court of Appeals for the Second Circuit as a judicially created direct-action statute that complies with constitutional requirements.

liability in excess of the face value of the attached policy. Unless the attached “debt” is the obligation to indemnify, there is no basis for the choice of this amount as the limit on liability.

157. See, e.g., Stein, supra note 130; Comment, 67 COLUM. L. REV. 550, supra note 130; Comment, 1968 DUKE L.J. 725, supra note 133; Comment, 54 VA. L. REV. 1428, supra note 130; Note, 53 CORNELL L. REV. 1108, supra note 130; Note, 19 STAN. L. REV. 654, supra note 130.
158. The court specifically reserved decision on whether the Seider doctrine would be constitutional if a limited appearance were available to a defendant. 281 F. Supp. at 498 n.26.
159. Alex v. Grande, 56 Misc. 2d 931, 290 N.Y.S.2d 303 (Sup. Ct., Spec. Term 1968). The date of the decision indicates that, in fact, the decision on the reargument of Simpson (see note 155 supra) was handed down before this case was decided. However, the court in Alex gave no indication that it was aware of the second Simpson decision.
160. See note 155 supra.
161. Simpson v. Loehmann, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). The court indicated that a limited appearance had always been available in such cases. If this was true—and neither Seider nor the first Simpson decision indicated that it was—the cases and commentators had universally failed to so recognize. See cases cited in note 154 and commentaries cited in note 157 supra. See also Varady v. Margolis, 303 F. Supp. 25, 28 (S.D.N.Y. 1968), referring to the “miraculous” opinion denying reargument in Simpson.
163. See note 155 supra.
164. Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), rehearing en banc, 410 F.2d 117 (2d Cir.), cert. denied, 396 U.S. 844 (1969). Some commentators have argued that a direct-action statute must be limited to accidents occurring within the state in order to be constitutional. See, e.g., Stein, supra note 130, at 1100-04; Note, 19 STAN. L. REV. 654, supra note 130, at 655. This matter is unclear, because the only reported decisions construing such statutes involve statutes that are by their terms limited to such accidents. See, e.g., Watson v. Employers Liability Assurance Corp., Ltd., 348 U.S. 66 (1954), such a concern with one element of direct-action statutes is inappropriate. See text accompanying note 202 infra.
It is submitted that the Seider doctrine is fundamentally un­sound, whether or not a limited appearance is available to the in­sured. Even if a direct-action statute of this type is constitutional, the creation of such a statute should be a legislative rather than judicial task. Not only has its judicial creation resulted in difficulties of a constitutional dimension in the original failure to pro­vide for a limited appearance, but the development of such a doctrine through the decisional process leads to confusion as the lower courts attempt to apply a statute which has not yet been completely formulated. This latter infirmity is characteristic of all court-made law to some degree, but is especially offensive when the doctrine is created by a divided court, and when a large number of fundamental questions are left unanswered. Of the seven judges deciding Simpson, four disapproved of the Seider decision. It is predictable that the lower courts will experience difficulty in applying a doctrine of which a majority of the highest court in the state disapproves. The application of the Seider doctrine is further com­plicated by the variety of unresolved issues involved. It has not yet been finally determined whether the plaintiff must be domiciled in New York in order to take advantage of the Seider doctrine, whether a direct-action statute must relate only to accidents occurring within the forum state in order to be constitutional, or whether—and to what extent—res judicata principles apply to a decision under Seider. The court system should not be burdened

165. See note 164 supra; Comment, 67 COLUM. L. REV. 550, supra note 130, at 559.
166. See Comment, 53 CORNELL L. REV. 1100, supra note 130, at 1118-21.
167. See note 161 supra.
168. See, e.g., Powsner v. Mills, 56 Misc. 2d 411, 288 N.Y.S.2d 846 (Sup. Ct., Spec. Term 1968), in which the court indicated that it was unable precisely to identify the attached res.
169. Judge Bergen concurred in Judge Breitel's concurring opinion, which was quite hostile to the doctrine itself. See note 152 supra and accompanying text. Judge Scileppi concurred in Judge Burke's dissent. 21 N.Y.2d at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 642.
170. Res judicata principles should apply to all issues in a Seider judgment unless the plaintiff fails to recover the full amount of his claim, in which case there should be no application of such principles. If the plaintiff has recovered all that he has claimed, he obviously should not be permitted to bring another action in the defendant's home state. But if the full amount of his claim has not been recovered, the plaintiff may not have been fully recompensed for his injury, and the defense—having been conducted by the insurer whose stake in the litigation is limited—may not have been as vigorous as it would have been if the insurer had been threatened with unlimited liability. To apply res judicata principles under these circumstances would therefore be unjustified. See, e.g., R. Cramton & D. Currie, CONFLICT OF LAWS 566: "[J]udgments resulting from in rem or quasi in rem proceedings have a limited effect: the plaintiff's cause of action is not merged, but his claim is reduced by the amount of the property that has been applied to its payment." These authors further point out that "a default judgment has a merger effect but generally not a collateral estoppel effect . . . ." Id. at 567. See also
with such a maze of unanswered questions without a legislative authorization that would probably provide a basis for decision until the applicable constitutional requirements are clarified by the United States Supreme Court. As Chief Judge Fuld himself observed, the matter is more appropriately one for the legislature. \(^{173}\)

Of far greater significance than the impropriety of judicial establishment of such a doctrine is a matter that cannot be completely resolved by legislative action. The analysis of the *Seider* doctrine is subject to precisely the same infirmity as analysis of any other quasi in rem proceeding. For while these analyses typically employ standards that are independent of personal-jurisdiction standards, there is no reason why the limitations on quasi in rem jurisdiction should be any less stringent than those on in personam jurisdiction.

This infirmity may best be seen in the questionable decision in *Wilcox v. Richmond, Fredericksburg & Potomac Railroad Company*. \(^{174}\) In that case, the United States District Court for the Southern District of New York held that quasi in rem jurisdiction could validly be asserted by the attachment of debts owed to the defendant in New York, even though the same court had earlier held that the New York long-arm statute could not reach that defendant. \(^{175}\) The

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174. 270 F. Supp. 454 (S.D.N.Y. 1967). There may be some vitality to the argument that quasi in rem proceedings place an unconstitutional burden on interstate commerce. In *International Shoe*, the Court stated that the argument was not applicable in that case because Congress specifically had authorized the burden imposed by the State of Washington through the collection of unemployment compensation charges. 326 U.S. 310, 315 (1945). In *Wilcox* the court extended this rationale, holding that no argument could be made that a burden on commerce was created because quasi in rem jurisdiction was expressly granted to the federal courts by Fed. R. Civ. P. 4(e), and that the rules were passed with congressional consent under 28 U.S.C. § 2072 (1964). This reasoning is not persuasive, because there is a clear difference between specific authorization, as in *International Shoe*, and the passage of rules with blanket consent from Congress.

There may well be a difference between long-arm jurisdiction and quasi in rem jurisdiction on the issue of permissible burdens on commerce, particularly when quasi in rem jurisdiction is asserted under circumstances that would make in personam jurisdiction impossible. Compare A. Ehrenzweig, CONFLICT OF LAWS 101 (1962) with id. at 118. See also Atchison, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101 (1924); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 903, 986-87 (1960). Stein, supra note 130, at 1087-88, suggests that the procedure may be unconstitutional under the commerce clause, but that the question is a difficult one and “need not be decided if the preferable stance of unconstitutionality on due process grounds is taken.” Id. at 1093.

danger in decisions such as this and Seider is, as one author noted some years ago, that the plaintiff who must resort to quasi in rem proceedings is seeking to compel an appearance by... a defendant who, so far as appears, has inadequate contact with the state to make him fairly answerable to a claim there, or who is not of a class of defendants the legislature has seen fit to subject to the judgments of its courts.176

In addition to this inconsistency and inequity, the development of quasi in rem jurisdiction under the Seider doctrine has complied with none of the standards that have been suggested as applicable to the assertion of in personam jurisdiction. It favors the plaintiff without regard to the extent of the defendant's activities within the state, even when it is apparent that either the state in which the accident occurred or the state of the defendant's residence would be a more appropriate forum in terms of efficiency and minimization of litigation.177 The Seider doctrine also subjects the defendant to jurisdiction when it cannot reasonably be said that he should have expected to be subjected to jurisdiction,178 and when it cannot be said that he has committed any purposeful act within the forum state.179 The exercise of long-arm jurisdiction in such a case is inappropriate and should be unconstitutional under Hanson v. Denckla.180 Under such circumstances the exercise of quasi in rem jurisdiction should also be unconstitutional.181

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177. See text accompanying notes 75-90 supra. The state of the accident should be preferred, because it may be assumed that witnesses will be more readily available there, and that the law of that state probably will be determinative of liability. Should the action be brought in the defendant's home state, the courts of that state are in a position to decline jurisdiction through the doctrine of forum non conveniens, should they determine that the interests of the parties are not best served by the use of that forum. See Southern Ry. v. Mayfield, 340 U.S. 1 (1950); Developments in the Law-State-Court Jurisdiction, supra note 174, at 1008-13.

Litigation would be minimized either in the courts of the state in which the accident occurred or in which the defendant resides, since in both forums the defendant's appearance would be general and there would be no possibility of a need to bring an additional action to obtain a full vindication of plaintiff's right. See note 172 supra.

178. See text accompanying notes 67-74 supra.
181. The Supreme Court has begun to question the constitutional propriety of quasi in rem jurisdiction over intangible obligations. See, e.g., Western Union Tel. Co. v. Pennsylvania, 358 U.S. 71 (1961). Even the district court in Wilcox (see notes 174-75 supra and accompanying text), in upholding quasi in rem jurisdiction, conceded that [i]t may be that some unfairness inheres in the notion that a mere attachment can provide a basis for jurisdiction over a cause of action unrelated to the property seized. This is particularly true where, as here, it has been judicially determined that jurisdiction cannot be obtained over the person of the defendant. 270 F. Supp. 454, 458 (S.D.N.Y. 1967). Further support for the unconstitutional lack of
The basis of quasi in rem jurisdiction may best be examined by reference to Pennoyer v. Neff.\textsuperscript{182} Under the Pennoyer doctrine, in rem and in personam jurisdiction were subject to the same limitations; those limitations were fundamentally based on the power of the state to adjudicate controversies relating to whomever or whatever might be found within its borders.\textsuperscript{183} Quasi in rem jurisdiction is a hybrid of in rem in personam jurisdiction,\textsuperscript{184} and therein lies the difficulty; for while in personam jurisdictional limitations have changed considerably since Pennoyer,\textsuperscript{185} in rem limitations have not. Thus, the limitations on the hybrid are difficult to ascertain by reference to original authority.

The classic quasi in rem case is Harris v. Balk,\textsuperscript{186} in which the Supreme Court determined that a debt may be attached wherever the defendant's debtor may be found. Because this case preceded International Shoe by forty years, its continuing vitality as valid authority for determining the limitations on quasi in rem jurisdiction is questionable.\textsuperscript{187} In any event, the essential constitutional approaches of the two cases are not irreconcilable. In Harris, the Court determined that the garnished debtor could only claim the garnishment as a defense to an action by the defendant creditor if he had given that creditor notice of the garnishment proceedings, because "[f]air dealing requires this."\textsuperscript{188} The language used is strikingly similar to that of International Shoe and may be read as an indication that the fair-play concept should apply to both types of jurisdiction. Furthermore, it has been suggested that the more recent case of Hanson v. Denckla\textsuperscript{189} may fairly be read as implying that Harris, if still valid, applies only to "ordinary debts"\textsuperscript{190} and not to such

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\textsuperscript{182} 95 U.S. 714 (1877). See notes 14-23 supra and accompanying text.
\textsuperscript{183} 95 U.S. at 723, 726; Comment, 1968 Duke L.J. 725, supra note 133, at 729-34.
\textsuperscript{184} See note 2 supra.
\textsuperscript{185} See notes 28-50 supra and accompanying text.
\textsuperscript{186} 198 U.S. 215 (1905).
\textsuperscript{187} It has been suggested that Harris no longer serves any purpose and should be overruled. Comment, 54 Va. L. Rev. 1426, supra note 130, at 1441-43.
\textsuperscript{188} 198 U.S. at 227.
\textsuperscript{189} 357 U.S. 235 (1958).
\textsuperscript{190} Harris v. Balk, 198 U.S. 215, 223 (1905).
plex debts as those represented by insurance policies. Indeed, the Harris Court itself stated that "we speak of ordinary debts, such as the one in this case"—a simple debt of a sum certain by one individual to another.

The appropriateness of this fair-play approach to quasi in rem jurisdictional disputes is further substantiated by the New York courts' tacit recognition that they must be wary of due process limitations when applying the Seider doctrine. For example, one lower court dismissed an action in which the plaintiff was not a New York resident, holding that this dismissal was required on the independent grounds that the doctrine of forum non conveniens suggested it and that due process limitations demanded it. Moreover, in the first Simpson decision, Chief Judge Fuld explicitly considered due process limitations in the International Shoe sense, and thus concluded that the Seider doctrine could only be applied on behalf of New York plaintiffs. Although Judge Breitel indicated disagreement with that conclusion, the United States Court of Appeals for the Second Circuit has not only accepted Chief Judge Fuld's views but has gone even further in analyzing the attachment of insurance policies in terms of fair play. In Farrell v. Piedmont Aviation, Incorporated, that court held that jurisdiction could not be sustained over nonresident defendants by attachment of their insurance policies even though the plaintiffs were residents of New York. Because the plaintiffs were merely administrators of the estates of decedents who

191. Stein, supra note 130, at 1107-08, 1112-13.
192. 198 U.S. at 223.
194. The doctrine of forum non conveniens asserts that a court should dismiss a suit, even though that court possesses jurisdiction over the parties, if another forum exists that is so much more convenient for the parties and the courts that the plaintiff's privilege of choosing his forum is outweighed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947). For a discussion of the doctrine, see Developments in the Law-State Court Jurisdiction, supra note 174, at 1008-13. The use of the forum non conveniens doctrine is subject to considerations similar to those which are determinative of the jurisdictional issue itself. See Travelers Health Assn. v. Virginia, 359 U.S. 643, 648-49 (1959); Kurland, The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review, 25 U. Chi. L. Rev. 559, 596-602 (1958).
197. "[It] will be the rare plaintiff who cannot invoke the jurisdiction of the New York courts ..." 21 N.Y.2d at 310, 234 N.E.2d at 673, 287 N.Y.S.2d at 641 (Judge Breitel, concurring).
199. 411 F.2d 812 (2d Cir. 1969).
had not resided in New York, the court stated that a "constitutional doubt arises from New York's lack of meaningful contact with the claim."200

Thus, whether by requiring that a plaintiff be a resident of the forum, or by requiring that the state have a "meaningful contact" with the claim, the courts in New York have displayed a preoccupation with finding some connection between the forum and the underlying controversy. This concern reflects an implicit recognition of the applicability of constitutional limitations on the exercise of in personam jurisdiction to the exercise of quasi in rem jurisdiction under the Seider doctrine. Since due process limitations on in personam jurisdiction are applicable to quasi in rem proceedings, fair play should be the ultimate test for quasi in rem jurisdiction.

Analogies to direct-action statutes, the justification for the Seider doctrine used by the Court of Appeals for the Second Circuit,201 does not remove the doctrine from scrutiny under principles of fair play. In analyzing the constitutionality of such a statute, many commentators have expressed a concern whether it is constitutionally required that a direct-action statute apply only to accidents occurring within the forum state.202 Such concern with only one element of the problem is inappropriate. Rather, the concern should be whether the statute complies with the fair-play requirements of due process. The Supreme Court, in upholding the constitutionality of Louisiana's direct-action statute in Watson v. Employers Liability Assurance Corporation, Limited203 indicated the importance of such an examination. The Court placed a great deal of reliance on Louisiana's interest in "safe-guarding the rights of persons injured there."204 This emphasis represents an application of the concept that due process requirements demand that there be some rational interconnection between the forum and the underlying controversy. In other words, it is implicitly recognized that before the direct-action statute may be constitutionally applied, it must be shown that there is such a relationship between the state and alleged wrongdoing that it would not be unfair to require the defendant to defend his actions there. The application of these considerations in the area of

200. 411 F.2d at 817.
202. See, e.g., Stein, supra note 130, at 1100-04; Comment, 67 Colum. L. Rev. 550, supra note 130, at 559; Note, 19 Stan. L. Rev. 654, supra note 130, at 655.
204. 348 U.S. at 73. The impropriety of placing emphasis on the location of the accident may be recognized by considering an accident in California between two Louisiana residents with Louisiana insurers. Although the accident occurred outside Louisiana, there should be no constitutional objection to the application of a Louisiana direct-action statute by the Louisiana courts.
direct-action statutes is essentially identical to their application in the area of in personam jurisdiction. The Seider doctrine, even considered as a direct-action statute, must therefore be analyzed in terms of fair play and, so analyzed, cannot stand. For example, it is doubtful whether principles of fair play would allow a New York court to assert jurisdiction over a Hawaii resident simply because a New Yorker traveled to Hawaii and there became involved in an accident with him. The fact that the Hawaiian had been issued an insurance policy in Hawaii by a New York company does not make such jurisdiction any fairer, since the Hawaiian would have done no act by which he would have availed himself "of the privilege of conducting activities within the forum State" or by which he should expect to be subjected to New York jurisdiction.

The very cases that have construed the Seider doctrine, whether by requiring some connection between the forum and the underlying controversy or by analogizing to direct-action statutes implicitly recognize that the due process limitations of International Shoe apply to such quasi in rem proceedings. Sound analysis demands this conclusion. When Harris v. Balk was decided, the Pennoyer rule permitted jurisdiction over the individual to be obtained only by service of process within the state or by a voluntary appearance. It was therefore proper to assist the plaintiff and provide him with a forum if he could find a debtor of his adversary within the state. Indeed, Harris may be regarded as merely one of the exceptions to the Pennoyer rule, which developed from dissatisfaction with the restrictions of that rule. The need for such exceptions having disappeared with the implementation of methods for greatly expanding the reach of personal jurisdiction, it would seem to be appropriate to eliminate the Harris exception itself. It is certainly inappropriate to follow the Seider approach, which expands the reach of that anachronistic rule.

Under the due process clause a defendant may not have his personal rights adjudicated unless it is fair to require his presence before

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206. See text accompanying notes 67-71 supra.
207. See notes 194-200 supra and accompanying text.
208. See notes 201-05 supra and accompanying text.
209. See text accompanying note 23 supra.
210. Carrington, supra note 176, at 305-06. See also notes 25-40 supra and accompanying text.
212. In discussing the advisability of making attachment and garnishment available to the federal courts through what is now Fed. R. Crt. P. 4(3), one commentator referred to the lack of such bases for jurisdiction in the federal courts as "an anomalous exception to an anachronistic rule." Carrington, supra note 176, at 306.
the adjudicative body. There is no sound defense for the apparent view of the New York courts that such fairness is not required if, completely by chance, a defendant has chosen an insurer who does business in New York. A defendant's constitutional right to fair play should not vary with the locus of the activities of his insurance company. Similarly, just as the validity of attachment of jurisdiction under the Seider doctrine should not be determined by blind reference to the location of the defendant's insurance company, the propriety of attaching other forms of quasi in rem jurisdiction should not be dependent solely upon the location of a res owned by the defendant, but should also be made subject to fundamental considerations of fairness. Only when these considerations of fair play are made an integral part of the jurisdictional analyses are the requirements of due process consistently met.

III. Conclusion

A standard such as fair play will necessarily be difficult to apply in some cases. It has been suggested that such a standard is undesirable as a constitutional guide because it subjects the rights of parties to the subjective judgments of judges. Nonetheless, fair play is the standard by which the limitations on a court's jurisdiction currently must be judged.

As a result of the indeterminate nature of the standard, various commentators have limited their efforts to an examination of the considerations relevant to determining the outer limits of jurisdiction. Such examinations are valuable and necessary when the extreme case, which tests those limits, is under consideration. However, those commentaries should not cloud the basic issue and thereby interfere with the jurisdictional determination in cases that fall well within permissible limits. The focus of the courts, in the first instance, must be on the question of fair play. It is only when that question cannot be answered easily that other considerations become relevant to the analysis.

This fair-play standard should be applied to both in personam and quasi in rem proceedings. An exception may be tolerated in the usual in rem action, because a state does have an interest in determining the rights to property within its borders. That interest, however, is inapplicable to quasi in rem actions. To subject an individual to jurisdiction, whether directly by in personam proceedings or indirectly through quasi in rem proceedings, is to deny him due process of law unless he has committed some act making it fair to require that he defend in that state.