

10-1-1979

Recent Developments in Securing Jurisdiction over Foreign Firms and Individuals

Dennis O. Lynch

University of Miami School of Law, dlynch@law.miami.edu

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Dennis O. Lynch, *Recent Developments in Securing Jurisdiction over Foreign Firms and Individuals*, 11 U. Miami Inter-Am. L. Rev. 375 (1979)

Available at: <http://repository.law.miami.edu/umialr/vol11/iss2/10>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Recent Developments in Securing Jurisdiction Over Foreign Firms and Individuals

DENNIS O. LYNCH*

I. INTRODUCTION

This morning I would like to discuss the process for obtaining jurisdiction over nonresidents, with particular emphasis on foreign firms and foreign individuals. The primary focus will be on recent developments in the law of jurisdiction. These developments do not necessarily involve either foreign corporations or foreign individuals, but they have important implications for obtaining jurisdiction over foreign companies. The most important recent case is *Shaffer v. Heitner*,¹ in examining its implications, I will draw on a series of recent cases involving foreign companies.

Prior to discussing the Supreme Court's opinion in *Shaffer*, I would like to describe briefly the framework courts have used to determine jurisdictional issues during the past hundred years. This will provide a basis for discussing *Shaffer* and for understanding the way the case alters the prior doctrine.

There will also be a few references to recent Florida decisions interpreting the state's long-arm statutes and to the way Florida law may be influenced by the Supreme Court's opinion in *Shaffer*.

II. THE HISTORICAL BACKGROUND: ONE HUNDRED YEARS OF *PENNOYER V. NEFF*

A. *The Power Theory*

The structure of the law of jurisdiction in the United States was basically established by *Pennoyer v. Neff* in 1877,² and implicitly

* Professor, University of Miami School of Law; B.A., 1965, Oregon; J.D., 1969, Harvard; LL.M., 1973, Yale; Law and Modernization Resident Fellow, Yale, 1972-74; Program Advisor in Law and Urban Affairs, Ford Foundation, Bogota, Colombia, 1969-72.

1. 433 U.S. 186 (1977). For scholarly comment on *Shaffer* see Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U.L. REV. 102 (1978); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33 (1978); Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U.L. REV. 126 (1978); Note, *If the (International) Shoe Fits—Subsequent Interpretation of Shaffer v. Heitner*, 10 RUT.-CAM. 175 (1978); 1978 WIS. L. REV. 533.

2. 95 U.S. 714 (1877).

overruled by the Supreme Court one hundred years later in a footnote in *Shaffer*.³ The conceptual framework Justice Field set forth in *Pennoyer* has been referred to as both the power theory of jurisdiction and as the concept of territoriality.⁴ Justice Field created three different categories of jurisdiction. The first category, *in personam* jurisdiction, enables a plaintiff to obtain a judgment which can be satisfied out of defendant's general assets. *In rem* jurisdiction, the second category, is somewhat distinct. This form of jurisdiction limits the court's power to the adjudication of rights over property which is within the territorial jurisdiction of the court. The third category, *quasi in rem* jurisdiction, has created the most confusion; it is the subject of the Supreme Court's opinion in *Shaffer*.

In *Pennoyer*, the Supreme Court established two types of *quasi in rem* jurisdiction: Type A and Type B, for purposes of this discussion. In Type A, the court is not adjudicating the rights of everyone to specific property, but rather the rights of particular individuals. One example is a mortgage foreclosure, where a plaintiff is exercising his right under a mortgage contract to adjudicate plaintiff's and defendant's interest in real property. Other examples include the partitioning of land, liens, rights in a trust, or rights based on claims somewhat independent of, but related to, particular property.

The second type of *quasi in rem* jurisdiction, Type B, is based on a distinct concept which has been the source of the confusion. In Type B, the cause of action bears no relationship to the attached property. For example, Able sues Doe on a contract. Doe has no contacts with the jurisdiction in which Able files the action, except for a bank account. The contract was entered into elsewhere, and the cause of action arose elsewhere; consequently, the court does not have *in personam* jurisdiction over Doe. Nevertheless, under Type B jurisdiction, Able can garnish the bank account and sue Doe on the unrelated contract claim up to the value of the garnished property.

It is the capacity of a court to obtain jurisdiction over a nonresident defendant through the Type B procedure which the *Shaffer* opinion appears to overrule. I say "appears to overrule" because the concept of power over property within a jurisdiction and over the owner up to the value of that property is deeply embedded in the law of jurisdiction, and the concept may persist, even though the

3. 433 U.S. at 212 n.39.

4. See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

Supreme Court says that it no longer exists. In fact, there may be good justification for the continued use of Type B jurisdiction in a limited number of situations, particularly when one is dealing with foreign companies.

When I speak of "territoriality," I mean the assumption underlying the *Pennoyer* opinion that a state or a sovereign had no power to go beyond its territorial boundaries. This was at the heart of Justice Field's opinion. The concept assumes that the courts of a sovereign can only obtain service of process and jurisdiction over individuals or corporations physically located within the sovereign's territorial boundaries.⁵

The expansion of commerce and interstate travel caused the idea of territorial limitations on jurisdiction to break down quickly. The first changes came through the use of such "legal fictions" as an automobile driver's "implied consent" to be served with process in automobile accident cases where the defendant was an out-of-state driver. If a person drives into State X and uses State X's highways, state legislation instructs the court to assume the driver has consented to be sued in State X by anyone he has harmed while driving on the highway, although he never gave actual consent.⁶

Eventually the Supreme Court cut through such legal fictions in *International Shoe Co. v. State of Washington*,⁷ and formulated a new test for determining a state's power to exercise *in personam* jurisdiction. In *International Shoe*, a cause of action was brought against a corporation to recover payments due an unemployment compensation fund. The company had no actual business outlet in the State of Washington, but it did have employees in the state who solicited orders to be transmitted to the company's main office in a second state.

The Court dispensed with the question of whether the corporation was "present" in a territorial sense in the State of Washington. Instead, the Supreme Court said the central question was whether it was fair, given the extent of the corporation's contacts with Washington, to force the corporation to litigate the State's claims in a Washington state court.⁸ What has developed from *International Shoe* is a "minimum contacts" test as a way of asking whether it is

5. 95 U.S. at 727.

6. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

7. 326 U.S. 310 (1945).

8. *Id.* at 320.

fair, under our system of federalism and the due process clause, to require a particular defendant to litigate a cause of action in a specific state.

The concepts of *in rem* and *quasi in rem* jurisdiction continued parallel to this "minimum contacts" framework even though the assumptions underlying the theories were contradictory. The height of the power theory of jurisdiction was *Harris v. Balk*,⁹ a case that has baffled law students for years. Harris owed Balk \$180; both were residents of North Carolina. Harris went to Maryland where Epstein lived. Epstein claimed Balk owed him \$344. When Harris came to Baltimore, Epstein, in order to collect Balk's debt, garnished the debt from Harris to Balk. The court never asked whether Balk had any relationship with the State of Maryland or whether it was fair to force Balk to litigate in Maryland the claim that Balk owed Epstein money.

Instead, the Court focused on the situs of the debt and held that a debt can be garnished wherever the debtor can be found in the sense of being subject to suit by his creditor. The intangible debt was regarded as property subject to attachment. If plaintiff could demonstrate that the defendant, who had no relationship with the jurisdiction, was a creditor of the person served with the garnishment and that defendant owed plaintiff money, then plaintiff could collect from the garnishee. This was permissible even though the defendant may have had no contact with the jurisdiction other than the presence of his creditor.

The Supreme Court never asked whether the procedure was fair to Balk; it simply found that because his debtor, Harris, was present within the jurisdiction of Maryland, a Maryland court could assert jurisdiction over Balk. *Harris v. Balk* represents the height of the power theory because it is based on presence alone; a court has the power to adjudicate the rights to any particular piece of property, even an intangible such as a debt, once it is within the state's territory.

Under the minimum contacts or fairness test of *International Shoe*, presence is just one of the factors a court should consider to determine whether it is fair to assert *in personam* jurisdiction over a defendant. There is also the question of whether the defendant's particular contacts with the jurisdiction are related to the plaintiff's cause

9. 198 U.S. 215 (1905).

of action.¹⁰ Another factor is the nexus between the state's governmental interests in providing a forum for particular claims or in regulating the actions of nonresidents and the plaintiff's cause of action.¹¹

The classical case in which the state's interest in providing a forum overcame the defendant's lack of contact with the forum was *McGee v. International Life Insurance Co.*¹² In *McGee*, the defendant insurance company's contacts with the forum state, California, consisted of *one* letter offering to reinsure a particular person who resided in California. When the insured died, plaintiff brought suit in California to collect under the policy. Although the insurance company had not solicited or done business in California, except for issuing the insurance policy which was the subject matter of the litigation, the company's contacts were found to be sufficient. The Court held that California had jurisdiction over the defendant because of the relationship created by California's manifest interest in providing a forum for an in-state plaintiff to collect insurance proceeds, when the out-of-state insurer refuses to pay.¹³

The requisite relationship between the defendant and the forum state necessary for *in personam* jurisdiction was clarified further by the Supreme Court in *Hanson v. Denckla*.¹⁴ In this case, the executor of an estate being probated in Florida petitioned the court to exercise jurisdiction over the administrator of a Delaware trust. The trust was first established by the decedent when she was living in Pennsylvania. The Supreme Court held that the Florida court had no jurisdiction over the Delaware trustee because the trust company never made a "purposive act" to submit itself to Florida's jurisdiction.¹⁵ Although the decedent had exercised the power of appointment under the trust in Florida, and although the beneficiaries were located in Florida, the Delaware trustee had made no purposive act toward Florida.

The Supreme Court was slowly eroding the power theory of jurisdiction through this line of *in personam* cases, but "power" or

10. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

11. See *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

12. *Id.*

13. *Id.* at 223. The State's manifest interest was in protecting its residents who would be unable to afford the costs of litigating their claims out of state and in providing a forum in which the witnesses would be residing.

14. 357 U.S. 235 (1958).

15. *Id.* at 253.

"territoriality" still remained the conceptual basis for *in rem* and *quasi in rem* jurisdiction. Contradictions between the "fairness" test for *in personam* jurisdiction and the "presence" test as a basis for *quasi in rem* jurisdiction were apparent, but the Supreme Court avoided dealing with the conflict until *Shaffer*.

B. Pre-Shaffer Jurisdiction in Florida

Prior to examining *Shaffer*, however, a brief reference to the Florida jurisdictional statutes is appropriate. The long-arm statute Florida enacted in 1973¹⁶ incorporated the language of Florida's prior "doing business" statute.¹⁷ This led the Florida courts to follow the state courts' earlier decisions under the "doing business" section in determining the amount of business a foreign corporation, not licensed to do business in Florida, must engage in before being subject to suit in Florida. Due process would permit Florida to extend its "doing business" long-arm statute much further than Florida has by statute.¹⁸

By comparison, the wording in Florida's single act statute, which is now included as part of Florida Statutes section 48.193, is extremely broad. The statute no longer requires that a nonresident defendant derive substantial revenue from Florida in order to be subject to suit in Florida for the commission of a wrongful act outside of the state which has an impact within the state.¹⁹ The statute provides for jurisdiction over any defendant engaged in solicitation or service activities within the state when these activities result in an injury to persons or property within the state; the statute also provides for jurisdiction when the defendant sells goods to be used or consumed within the ordinary course of commerce when such use or consumption results in an injury in the state.²⁰ This new language is much

16. FLA. STAT. § 48.193 (1977).

17. FLA. STAT. § 48.181 (1969).

18. See *Youngblood v. Citrus Assoc. of New York Cotton Exch., Inc.*, 276 So.2d 505 (4th Dist. Ct. App. 1973).

19. FLA. STAT. § 48.193 (1977).

20. FLA. STAT. § 48.193(1)(f) provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

(f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:

broad than the prior section concerned with acts committed outside the state with an impact in Florida.²¹ As a result, the series of cases interpreting this section have been decided on constitutional, as well as statutory grounds.

In the first case, *Dunn v. Upjohn Co.*,²² a nonresident pharmacist was sued by the administratrix of a Florida resident's estate. The decedent had owned and operated a store in the pharmacist's state, Georgia, and allegedly died in Florida as a result of taking a drug prescribed by the defendant. Although the decedent consumed the drug in Florida and the drug was the kind of good that could move in interstate commerce, the court found no personal jurisdiction over the nonresident pharmacist. The court said that to hold otherwise would violate due process because there was no purposive act by the pharmacist. Moreover, a contrary result would mean that the pharmacist could be subject to suit throughout the nation if he had reason to believe a client was a nonresident and if the client's home state had a long-arm statute similar to that of Florida.²³

There are also good economic reasons for not exercising personal jurisdiction over the pharmacist in *Dunn*. The costs of requiring a local pharmacist to defend in an action wherever a purchaser consumes the drug and becomes ill would increase his costs of doing business. In the case of the manufacturer of a drug who sells his product on an interstate basis, these costs should be viewed as part of the expense of doing business and be reflected in the price of the drug. In a sense, all potential plaintiffs pay slightly more for the drug for the privilege of being able to sue in their home jurisdiction if they become ill. This makes sense if potential plaintiffs are widely scattered throughout the country. In the case of the local pharmacist, however, the situation is distinct. Most purchasers will be local, and it would make little sense to force them to pay more for drugs so the infrequent nonresident purchaser can sue in the purchaser's home state. This type of analysis helps to clarify the underlying considerations where a market transaction is involved and the costs of

1. The defendant was engaged in solicitation or service activities within this state which resulted in such injury; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use or consumption resulted in the injury.

21. FLA. STAT. § 48.081 (1967).

22. 350 So.2d 127 (1st Dist. Ct. App. 1977).

23. *Id.* at 129.

potential litigation can be reflected in the price of a good. Most courts rarely address such issues directly, but they are often implicit in the court's reasoning.

The second example, *Jack Picard Dodge, Inc. v. Yarbrough*,²⁴ is also typical. In *Dodge*, a car was repaired in North Carolina and was driven to Florida and resold there. A Florida resident was injured due to an allegedly defective repair. When the Florida resident sued the manufacturer and local Dodge dealer, the local dealer attempted to implead the North Carolina company that made the repairs. The court held that the North Carolina company simply repaired the car, and that such acts did not mean the North Carolina dealer purposefully availed itself of the privilege of doing business in Florida. The court felt that interpreting the Florida statute to hold the North Carolina company within the personal jurisdiction of a Florida court would violate due process.²⁵

The most surprising decision, however, is *Harlo Products Corp. v. J.I. Case Co.*,²⁶ where suit was brought against a forklift manufacturer for injuries sustained because of a defect in one of the forklifts. Although it was alleged that the manufacturer actually had a number of forklifts being used in Florida, the court did not exercise jurisdiction over the company because the company did not purposefully avail itself of the privilege of doing business in Florida.²⁷ In this case, the type of economic analysis I applied to *Dunn* would seem to favor jurisdiction.

All three of these cases, but particularly *Harlo*, illustrate the conservative approach of the Florida courts in the interpretation of Florida's long-arm statutes.

III. SHAFFER V. HEITNER

This brings us to the Supreme Court's opinion in *Shaffer*, and its implications for the minimum contacts test and for the *quasi in rem* approach to obtaining jurisdiction over nonresidents. The facts of *Shaffer* are important to an understanding of the case since it is possible to interpret the holding in either a narrow or a broad sense, depending upon the side one is arguing.

24. 352 So.2d 130 (1st Dist. Ct. App. 1977).

25. See *id.* at 132-33.

26. 360 So.2d 1328 (1st Dist. Ct. App. 1978).

27. *Id.* at 1330.

Shaffer was a derivative action against a Delaware corporation's directors and officers and its California subsidiary. The principal headquarters of the Delaware corporation were in Arizona, and the company had no contacts with Delaware, other than being incorporated there. The action was filed against the corporation's subsidiary and twenty-eight directors and officers. It was not alleged that any of the individual directors or officers had attended meetings in Delaware or had conducted any corporate business in Delaware. The cause of action grew out of antitrust violations which took place in Oregon where the company had been sued for violations of the antitrust laws. The subsequent derivative action was for breach of fiduciary duty by the defendants who engaged in the antitrust violations.

The plaintiff had no way of obtaining *in personam* jurisdiction over the individual defendants in Delaware because they had no contacts with the state. Therefore, plaintiff served defendants in accordance with a Delaware statute which provides that the situs of the ownership of stock in a Delaware corporation is the State of Delaware.²⁸ The plaintiff sequestered and placed stop orders on approximately 82,000 shares of stock owned by the various directors of the Delaware corporation.²⁹ Plaintiff's cause of action, breach of fiduciary duty toward the corporation, was unrelated to the ownership of the stock making it a *quasi in rem* form of jurisdiction.

Although there was a relationship in this case between the cause of action and the corporation, the statute could be read to allow a plaintiff to attach the stock of a Delaware corporation owned by any nonresident and to sue the nonresident in Delaware irrespective of any relationship between the cause of action and the corporation. For example, the suit might be based on a totally independent commercial transaction. In addition, the statute required a defendant to make a general appearance in order to litigate the case on the merits in the Delaware court.³⁰ The directors appeared in court, and made motions to dismiss on two grounds. First, citing *International Shoe*, defendants argued that they had no minimum contacts with Delaware and that to require them to respond to this claim in Delaware violated their due process rights. Second, they claimed that the form in which the stock had been sequestered or attached violated their procedural due process rights under the *Sniadach*³¹ line of cases.

28. See 8 DEL. CODE ANN. § 169 (1975).

29. See 10 DEL. CODE ANN. § 366 (1975).

30. DEL. CT. C.P.R. 12(b) (1975).

31. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). See *North Georgia*

Sniadach requires the procedural due process rights of notice and an opportunity to be heard prior to the seizure of one's property. Where it is feared that the property may be removed from the jurisdiction, due process mandates both the filing of an affidavit to that effect, which is reviewed by a judge, and an immediate post-seizure hearing.³² The Delaware procedures for sequestering stock arguably violated this standard.³³ The real issue in *Shaffer*, at this point, was whether the line of cases concerned with procedural due process in the context of an attachment prior to a hearing to preserve the security of a subsequent judgment on the merits³⁴ would be applied to a sequestration for the purpose of obtaining jurisdiction over a non-resident.³⁵

This procedural due process issue was the major question addressed by the Delaware courts,³⁶ and it was generally thought that the Supreme Court granted certiorari to decide this issue in light of the procedural due process cases. Instead, the Court started out by stating that the real question was whether *quasi in rem* jurisdiction still made sense for causes of action unrelated to the attached property.

Justice Marshall, who wrote the opinion for the Court, began his analysis by examining the principal justification for *quasi in rem* jurisdiction: fear that the defendant may attempt to avoid payment of an obligation by removing his assets to a jurisdiction where he is not subject to *in personam* jurisdiction. Marshall identified two responses to this justification for *quasi in rem* jurisdiction. First, he reasoned that the issue of jurisdiction is distinct from the problem of security in the sense that property can be attached as security for a potential judgment without the cause of action being litigated in the court where the property is located. The court can decide to attach the goods and to hold them pending the outcome of litigation without also adjudicating the dispute between the parties.

This distinction is important for post-*Shaffer* cases if the defendant has property in a particular jurisdiction where he lacks sufficient

Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

32. See Mitchell v. W.T. Grant Co., 416 U.S. at 616-18.

33. Fuentes v. Shevin, 407 U.S. 67 (1972).

34. *Id.* at 91 n.23, citing Ownbey v. Morgan, 256 U.S. 94 (1921).

35. See Sands v. Lefcourt Realty Corp., 17 A.2d 365 (Del. 1955) (The object of service is to compel general appearance).

36. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).

contacts to be sued. *Shaffer* suggests a plaintiff may be able to tie up the property to secure a potential judgment before the defendant is able to remove the property from the jurisdiction.

Marshall's second response to this justification for *quasi in rem* jurisdiction was the full faith and credit clause. This constitutional provision assures the validity of the judgment in any state where defendant moves his property so there is no reason to compel a defendant to litigate in an inconvenient forum simply because he owns property located there.

Note that Marshall's second response is not applicable to a case involving a foreign defendant; there is no full faith and credit clause which can be used to compel a foreign jurisdiction to recognize a judgment in the same sense. Of course, there may be a principle of comity based on a treaty which provides that the foreign jurisdiction will give effect to a judgment rendered in the United States. Marshall's main point, however, was that since these concerns over satisfying a judgment can be dealt with by looking at the issue of security independent of jurisdiction in light of the facts of each particular case, we should apply the same fairness standards that we use in normal *in personam* jurisdiction to *quasi in rem* actions. Thus, in the Type B *quasi in rem* action, where the attached property is unrelated to the underlying cause of action, the question should be whether it is fair to compel a defendant to submit to a court's jurisdiction given his contacts with the forum. In fact, Marshall seemed to say that the minimum contacts analysis should be applied to all causes of action, including true *in rem*.³⁷

In the case of any true *in rem* action, the minimum contacts test will be satisfied easily anyway. Ownership of property that is presently in the jurisdiction, particularly real property, would normally constitute a minimum contact sufficient to adjudicate rights related to the property. It is reasonable for people to expect a court to adjudicate rights to real property located within the court's jurisdiction. The more serious problem will be those few cases where Marshall's reasoning is inappropriate, but the breadth of the opinion suggests *quasi in rem* jurisdiction will not be valid.

After the Court's rather sweeping conclusion that the minimum contacts analysis applies to all assertions of state court jurisdiction, it anticlimactically stated in a footnote that insofar as *Pennoyer* and

37. 433 U.S. at 212.

Harris v. Balk were inconsistent with this view, they were overruled.³⁸ The end of one hundred years of the power theory of jurisdiction was relegated to a footnote.

After the general discussion of the law of jurisdiction, the Court faced the problem of applying the minimum contacts analysis to the particular case at hand. Marshall used the *Hanson v. Denckla* purposive act test and found that there was no purposive act by the directors of the Delaware corporation to submit themselves to the general jurisdiction of Delaware.³⁹ As a basis for minimum contacts, plaintiff pointed to the following: (a) defendants had accepted a directorship in the corporation; (b) the state had the power to regulate the corporation and to hold its directors to their fiduciary duties; and (c) the directors gained benefits in terms of the particular types of loans they could obtain from the corporation, as well as other advantages under Delaware law for directors of Delaware corporations. Nevertheless, Marshall found no purposive act. He acknowledged that Delaware could probably enact a specific statute for the purpose of obtaining jurisdiction over the director of a Delaware corporation for causes of action growing out of his actions as a director, but it would have to be a specific statute expressing the state's interest in such causes of action.⁴⁰

The opinion seems to suggest that if a state has a strong policy reason for exercising jurisdiction over a nonresident with few or no contacts, the state should enact a specific statute expressing the state's interest in providing a forum for particular types of claims.⁴¹ The statute must express a state interest which overcomes the lack of a defendant-forum nexus. In other words, specific legislation is needed to demonstrate the nexus among the government's interest, the particular forum, and plaintiff's cause of action. It may no longer be enough to merely have a broad statute providing for jurisdiction to the limits permitted by the due process clause.⁴²

In a dissenting opinion, Brennan questioned Marshall's analysis of the minimum contacts issue. Although he agreed with the majority

38. *Id.* at 212 n.39.

39. *Id.* at 216.

40. *Id.* Some states have enacted statutes which treat the acceptance of a directorship as consent to State court jurisdiction. See, e.g., CONN. GEN. STAT. REV. § 33-322 (1976); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE ANN. § 33-5-70 (1977).

41. See, e.g., DEL. CODE ANN. tit. 10, § 3114 (1977).

42. California's statute lacks this specificity. See WEST'S ANN. C.C.P. § 410.10 (1973) which provides that, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

that *quasi in rem* jurisdiction should be overruled, he found a sufficient nexus between the nonresident board of directors and the forum state to sustain *in personam* jurisdiction.⁴³ To add to the confusion, two other justices wrote opinions. Powell was hesitant to formulate such a sweeping holding because of the difficulty of anticipating the kinds of cases which may arise. In addition, he explicitly reserved judgment on the question of whether *quasi in rem* jurisdiction should still be allowed for the attachment of real property as the basis for adjudicating an unrelated cause of action.⁴⁴ In a similar opinion, Stevens stated that he recognized the difficulty of anticipating the full implications of the decision, and would, therefore, narrow the decision to the facts of the particular case.⁴⁵

IV. THE IMPLICATIONS OF *SHAFFER V. HEITNER*

First, transitory presence as the basis for jurisdiction is probably gone. As you know from the theory of power over territory, it was assumed a court could obtain jurisdiction over a defendant physically present within the court's territory. Even if the defendant was only there long enough to be served, the court had *in personam* jurisdiction. When the minimum contacts test is applied independently of the power theory, simply traveling through a state will not necessarily constitute a sufficient minimum contact. The central question will be whether it is fair to force the defendant to submit to the court's jurisdiction given the extent of his contacts and the state's interest in providing plaintiff with a forum. His presence will be one factor within the broader fairness test.

Second, there is the problem of how to secure a judgment when defendant has property, particularly a debt, in a jurisdiction where he lacks minimum contacts and the property may be removed prior to judgment if it is not attached. For example, assume your client has entered into a contract with a European firm calling for performance in Europe. If there is a breach, your client may wish to avoid suing in the European jurisdiction. In looking for a United States forum, you find a California company owes the European defendant a debt on an unrelated transaction. With *quasi in rem* jurisdiction, you could go to California, attach the debt, and sue defendant on your contract in a California court. What do you do now?

43. 433 U.S. at 219 (Brennan, J., concurring in part and dissenting in part).

44. *Id.* at 217 (Powell, J., concurring).

45. *Id.* at 219 (Stevens, J., concurring).

A. *The Post-Shaffer Decisions*

*California Power & Light Co. v. Uranex*⁴⁶ is a good example of the problems a plaintiff faces in this situation. A North Carolina public utility ordered uranium concentrates from Uranex, a French company engaged in marketing uranium internationally. When the price of uranium increased markedly in the world market, Uranex wanted to renegotiate the contract and the North Carolina utility was afraid that even an arbitration award would be difficult to enforce unless the utility could attach assets of Uranex in the United States. Before arbitration was initiated, the utility attached an unrelated, eighty-five million dollar debt that a California company owed Uranex. This presented a relatively straightforward case of *quasi in rem* jurisdiction, but then *Shaffer* was decided, and suddenly defendant had a basis for challenging the jurisdiction of the California court. The debt bore no relationship to the utility's claim against Uranex for breach of contract.

The court in *Uranex* relied on Marshall's distinction between the problems of securing a judgment and obtaining jurisdiction and held that although there was no jurisdiction over the European company, the debt was present in California. The court decided to attach the debt pending the parties' adjudication of their dispute in a forum where plaintiff could obtain *in personam* jurisdiction.⁴⁷

California had no jurisdiction over the defendant, but the court was willing to give plaintiff thirty days to initiate an action in a state where *in personam* jurisdiction could be satisfied. This meant that plaintiff had to file an action in a New York court, which would subsequently be stayed pending arbitration, because the California attachment could not be sustained simply on the initiation of informal arbitration proceedings in New York.⁴⁸ However, the California court would hold the assets pending the outcome of litigation, which in this case meant that the New York court would stay its proceedings pending arbitration and then issue an order enforcing the arbitrator's award if needed.

Omni Aircraft,⁴⁹ another recent decision, was decided to the contrary. Omni contracted to buy Lear jets from a Spanish company.

46. 451 F. Supp. 1044 (N.D. Cal. 1977).

47. *Id.* at 1049.

48. *Id.*

49. *Omni Aircraft Sales, Inc. v. Actividades Aereas Aragones*, No. 77-669 (D. Ariz. Nov. 15, 1977).

The agreement was entered into in France and Spain and was to be performed in Switzerland. Problems arose, and it appeared that Omni Aircraft would have to sue the Spanish company. The difficulty for Omni was whether it could attach property of the Spanish company in the United States and obtain jurisdiction. As it turned out, the Spanish company had a Lear jet engine in Arizona being repaired, so Omni tried to attach the jet engine.

Omni argued that the federal district court in Arizona had jurisdiction to adjudicate the parties' rights under the contract to purchase Lear jets because the defendant had committed a purposive act by sending the jet engine to Arizona. The court disagreed with Omni's contention. Relying on *Shaffer*, the court held that the contract was unrelated to the jet engine in Arizona, and that defendant had no minimum contacts with the forum state. Had the dispute been related to the jet engine, the court would have exercised jurisdiction, but here defendant's purposive act and the property were unrelated to plaintiff's claim. The court distinguished *Uranex* by saying that the eighty-five million dollar debt in California had a greater nexus with California than the nexus created by the mere sending of a jet engine for repairs to Arizona.

It is very difficult to decide what the real distinction is between the two cases because the court in *Omni* does not deal extensively with the *Uranex* decision. The *Omni* case is also an unpublished opinion so it may not have much impact.⁵⁰

A third recent case interpreting *Shaffer* is *Feder v. Turkish Airlines*.⁵¹ A wrongful death action was filed in New York as a result of a plane crash near Istanbul. The plaintiff initially tried to establish *in personam* jurisdiction based upon the foreign company's "doing business" within the criteria set out by the New York statute.⁵² The plaintiffs were unable to sustain this jurisdictional allegation, but in the process of investigating the company's business contacts in New York, the plaintiff found that the defendant had a one hundred thousand dollar account in the Chase Manhattan Bank. The plaintiffs attached the bank account as a basis for jurisdiction.

Following *Shaffer*, the court found that the cause of action was unrelated to the bank account which was used to pay for airplane

50. The plaintiff was able to either reach a settlement or renegotiate its contract with the defendant, so that there was no adjudication on the merits.

51. 441 F. Supp. 1273 (S.D.N.Y. 1977).

52. See N.Y. CIV. PRAC. LAW & R. § 301 (McKinney 1972 & Supp. 1979).

parts purchased in the United States. However, the court did not limit its application of the minimum contacts test to the defendant's acts related to the cause of action. Instead, the court applied a minimum contacts analysis to the bank account, and found that it was a purposive act by the defendant to place money in a bank account in New York. Therefore, the court concluded, it was not unfair to hold the defendant to litigation in New York, at least up to the value of the bank account.⁵³

The *Feder* analysis may not be consistent with *Shaffer*, but it reflects another line of New York cases that grew out of *quasi in rem* jurisdiction, beginning with *Seider v. Roth*.⁵⁴ Under *Seider*, a New York plaintiff may attach a debt of an insurance company to an insured even though the insured has no relationship with the State of New York. In other words, assume there is an accident in Vermont involving "A," a New York resident, and "B," who has never set foot in New York. "B" is insured by a company with a main office in New York, so "A" attaches the contingent debt owed by the insurance company to "B." The debt is contingent on the court finding that "B" negligently caused the accident. Of course the insurance company actually defends so the result is a judicially-created direct action statute.

The *Seider* cases have been justified under a minimum contacts test by looking at the contacts of the insurance company with the particular jurisdiction rather than the defendant's contacts.⁵⁵ Although there is an obvious distinction between the *Feder* bank account and an insurance company doing business within a state, the analysis in *Feder* reflects a similar approach to the question of minimum contacts. New York appears to be willing to apply the minimum contacts analysis to the nexus between defendant and the property even if the cause of action is not related to the property and defendant has no other contacts with the state.

This suggests that for a time we may see a number of standards growing out of *Shaffer*. First, there may be distinct standards for the minimum contacts test when the court is dealing with a foreign company and the full faith and credit clause does not provide a basis for enforcing the judgment. In other words, if the defendant in *Feder*

53. 441 F. Supp. at 1278-79.

54. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

55. See *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1969), *cert. denied*, 396 U.S. 844 (1969). See also *Savchuk v. Rush*, 47 L.W. 2290 (Minn. Sup. Ct., Oct. 10, 1978).

was from Oregon, the analysis might have been different than in the case of a foreign defendant who may become judgment-proof by removing his property from the United States. When a Turkish company is involved and the assets could be quickly moved from New York to Turkey, the plaintiff does not know what will happen when he attempts to enforce the New York judgment in Turkey. The Turkish courts may approach the enforcement of judgments differently. Thus, a plaintiff must be prepared to argue the particular facts of his case in light of the doctrine commonly referred to as "jurisdiction by necessity."

The doctrine of "jurisdiction by necessity" applies where the plaintiff lacks an effective alternative forum. There are a number of cases which indicate that the courts will be more inclined to find jurisdiction on the basis of limited contacts if plaintiff has no meaningful alternative forum.⁵⁶ In the case of a foreign corporation, it can be argued that many foreign forums are, at a practical level, not real alternatives. Although a court will not want to say this overtly, plaintiff can still try to persuade the court by relying on cases such as *Feder*.

Another New York case which is of particular interest for people in Florida is *Intermeat, Inc. v. American Poultry, Inc.*⁵⁷ The defendant, an Ohio corporation, actually had considerable contacts with businesses in New York through the sales of meat to grocery stores, but these contacts did not satisfy New York's "doing business" statute.⁵⁸ As an alternative, plaintiff attached a debt owed to defendants by a New York purchaser. Plaintiff argued that although the attachment was under a *quasi in rem* statute, it did not render jurisdiction unconstitutional if there were adequate minimum contacts to satisfy due process. Thus, the issue became whether defendant's due process rights were violated by requiring the company to answer a cause of action where jurisdiction was obtained by attaching a debt which was unrelated to the underlying claim. The court agreed with the plaintiff and held that it was fair to require the Ohio defendant to come to New York and litigate, because the defendant was engaged in regular

56. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

57. 575 F.2d 1017 (2d Cir. 1978).

58. See N.Y. CIV. PRAC. LAW & R. § 301 (McKinney 1972 & Supp. 1979). This is similar to the situation in Florida where there were several contacts within the state but not enough to fall within the interpretation of what is necessary for purposes of doing business.

commerce with New York purchasers and because the defendant agreed in the sales contracts to arbitrate disputes in New York even though the company could not be served under the "doing business" long-arm statute.⁵⁹

The *Intermeat* decision presents an interesting option. It suggests that a *quasi in rem* statute can be used as a long-arm statute by attaching a particular debt or other property. This will only be a viable option when a state's long-arm statute does not reach the defendant because of the limited statutory language, but where "due process" would not be violated if the statutory authorization to serve process existed. In this case, the attachment of property and service of process under the *quasi in rem* statute provides the necessary legislative authorization.

B. Admiralty and Family Law

Two other areas in which *Shaffer* is fostering confusion are admiralty and family law. In the case of admiralty, Supplemental Rule B(1) of the Federal Rules of Civil Procedure provides that a defendant's vessel or other property can be attached to bring an unrelated cause of action if the defendant cannot be found within the district.⁶⁰ *Grand Bahama Petrol, Co., Ltd. v. Canadian Transportation Agencies, Ltd.*,⁶¹ was the first important admiralty case dealing with this rule after *Shaffer*. A Soviet flag vessel, chartered by a Canadian group, purchased fuel from the Grand Bahama Petroleum Company. When the Canadian group failed to pay the full purchase price, the plaintiff attached defendant's bank account in Seattle. The defendant's only contact with the State of Washington was the bank account, so in essence it was a *quasi in rem* form of jurisdiction. The claim was unrelated to the attached property and there were insufficient contacts to obtain *in personam* jurisdiction over the defendant.

The court dealt with the problem by concluding that *Shaffer* did not govern this situation since admiralty was a unique field of law with its own historical traditions and a distinct set of commercial

59. 575 F.2d at 1023.

60. FED. R. CIV. P. SUPP. B(1) provides in relevant part:

With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district.

61. 450 F. Supp. 447 (W.D. Wash. 1978).

relationships.⁶² To support this view, the court pointed to the autonomous nature of admiralty law and the existence of a *quasi in rem* theory of jurisdiction in admiralty prior to the United States Constitution.

In a subsequent admiralty case, another federal district court treated the issue similarly.⁶³ The judge cited the *Grand Bahama* case and concluded that power and territoriality should be retained as the cornerstone of jurisdiction in admiralty.⁶⁴ It is questionable whether this trend can continue in the face of *Shaffer*, but the courts are approaching the problem from the concept of an autonomous body of admiralty law. Of course even if the *Shaffer* mode of analysis is applied, a court might uphold jurisdiction based upon the attachment of property unrelated to the cause of action by concluding this procedure is "fair" in the case of admiralty. If there is an established tradition that this type of procedure is necessary and expected in the context of commercial transactions related to shipping, then it may not be "unfair."

Shaffer is also causing complications in the field of family law. Assume a wife lives with her child in Nebraska and that her husband moves to Indiana. The wife has no contacts with Indiana, but the husband, who is residing there, brings divorce proceedings in Indiana. The wife responds that she has no minimum contacts with Indiana and that it is unfair to adjudicate the divorce in Indiana.

The traditional judicial response to such facts is that the *res* of the marriage is where either spouse is located and that the Indiana court can dissolve the marriage.⁶⁵ Questions such as alimony, child custody, and child support are *in personam* decrees which may require minimum contacts, but historically a dissolution of the marriage only required the presence of one spouse. If minimum contacts are to be applied to all *in rem* forms of jurisdiction, can the marriage still be dissolved? Courts have responded that it can, because this is the established tradition in family law.⁶⁶

*Carr v. Carr*⁶⁷ is a recent family law case which illustrates the problems with this view given *Shaffer*. There were two women who

62. See *id.* at 453-56.

63. See *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 459 F. Supp. 1242 (S.D.N.Y. 1978).

64. 459 F. Supp. at 1249.

65. See *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

66. 367 N.E.2d at 1134.

67. 60 App.Div.2d 63, 400 N.Y.S.2d 105 (1977).

claimed to be the wife of the deceased, one in New York and one in California. Both women wanted his federal pension. The one in New York had been divorced by the deceased in Honduras. She challenged the validity of the divorce and asked a New York court to declare her as the lawful surviving spouse of the decedent. The wife in California, who had married the decedent subsequent to his divorce from the first wife, had no contacts with New York and sought to dismiss the action. The court denied the motion to dismiss for lack of jurisdiction. The court reasoned that if the husband were alive, the New York courts could dissolve the marriage *res* in New York and that there was no reason that New York should lose its power to determine a domiciliary's marriage status simply because her spouse was now deceased.⁶⁸ The court simply ignored the impact of its decree on the rights of a nonresident who had no contacts with New York. Given *Shaffer*, the court's analysis must be questioned.

The Supreme Court's opinion in *Kulko v. Superior Court*,⁶⁹ also supports the view that traditional concepts of jurisdiction in the field of family law may be changing. In *Kulko*, the husband was in New York and had custody of the children under an agreement executed in New York. One of the children decided that she wanted to live with her mother who had remarried and was living in California. The husband voluntarily sent the child to California, and, subsequently, the wife wanted additional child support. The mother brought suit in California to increase the child support payments. She argued that California could exercise jurisdiction over the nonresident defendant because he voluntarily sent the child to California and the child was living in California and receiving the benefits of California law. If something happened to the child, California, under its laws, would be responsible for the child's welfare. The California Supreme Court upheld jurisdiction⁷⁰ and the United States Supreme Court reversed.⁷¹

It can be argued that the Supreme Court reversed because the plaintiff had an alternative; she could have brought her action in California under the Uniform Child Support Act.⁷² This statute provides for the automatic transfer and subsequent adjudication of her case in New York without her retaining a New York attorney or going to New York. The procedure, however, would raise the problem of

68. 60 App. Div. 2d at 66, 400 N.Y.S.2d at 109.

69. 436 U.S. 84 (1978).

70. 19 Cal. 3d 514, 138 Cal. Rptr. 586, 564 P.2d 353 (1977) (en banc).

71. 436 U.S. 84 (1978).

72. See WEST'S ANN. C.C.P. § 1650 (1973).

whether New York or California law would apply. A California court adjudicating the case would have applied California law, but under the Uniform Act's procedure, a New York court would be free to apply New York law.⁷³ In this sense, the Uniform Act is not totally responsive to plaintiff's needs or to California's interest in protecting the welfare of a child located in California. The case is also important for the Court's views on the defendant-forum nexus, in the sense of a purposive act which was necessary to exercise *in personam* jurisdiction. The policy reasons for requiring substantial contacts in family law cases are strong. Without the minimum contacts requirement, fathers may be deterred from acquiescing to a child's decision to live with a parent in another state for fear of being sued for child support in that state. The court did not want the parent who was giving up the child to worry about defending a child custody suit or support action in an inconvenient forum.

V. CONCLUSION

The cases we have discussed today involve a wide variety of legal fields including family law, admiralty, corporate law, and jurisdiction over foreign defendants in commercial situations. These cases suggest that the courts may begin developing concepts of jurisdiction which are peculiar to each area of the law. With the demise of the power or territoriality theory, the minimum contacts framework will be more tied to the particular facts of each case and to a concept of what is fair, given the parties' expectations and the substantive policies underlying the field of law being litigated. Jurisdiction may lose some of its internal consistency as a body of law, but in the end, it may come closer to being fair to the parties and to reinforcing the policies embodied in substantive legal rules.

73. 436 U.S. at 99.