

6-1-1978

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Recommended Citation

Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 Iowa L. Rev. 1031 (1978).
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Judicial Jurisdiction and Choice of Law: The Consequences of *Shaffer v. Heitner*

Robert Allen Sedler*

A recurrent theme in the conflict of laws is the relationship between judicial jurisdiction and choice of law.¹ Although perhaps analytically distinct, judicial jurisdiction and choice of law are interrelated both doctrinally and pragmatically. In the doctrinal sense, the same considerations that make it constitutional for a court to exercise judicial jurisdiction in a particular case may also make it constitutional for that court to apply its own substantive law to resolve the issues presented in that case. In the pragmatic sense, courts that are committed to a policy-centered approach to choice of law, as the clear majority of American state courts are, tend to apply their own law whenever they have a real interest in doing so, and sometimes even when they do not have such an interest. Consequently, the result in many conflicts cases in practice will depend on the state in which suit is brought, and thus on which state or states may be able to exercise jurisdiction in that case.² Since the decision in *Shaffer v. Heitner*³ may markedly influence the development of the law of judicial jurisdiction in this country, it is proper as well to consider its choice-of-law implications, resulting from the relationship between judicial jurisdiction and choice of law.

There may be circumstances in which the forum constitutionally can exercise judicial jurisdiction, but cannot constitutionally apply its own substantive law or is not likely to do so; these are circumstances in which the exercise of judicial jurisdiction is based on the defendant's *personal* connection with the forum. These circumstances would include the exercise of judicial jurisdiction based on the defendant's domicile or residence in the forum, consent to suit in the forum, or—in the case of a foreign corpora-

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1. In the view of the late Albert Ehrenzweig, judicial jurisdiction and choice of law were two facets of the same problem, and this view was reflected in his "proper law in a proper forum" approach. See generally Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965). The approach is summarized in R. CRAMTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS* 301-06 (2d ed. 1975).

2. See generally the discussion in Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation,* 25 U.C.L.A. L. REV. 181, 227-33 (1977).

3. 433 U.S. 186 (1977).

tion—the carrying on of substantial and continuous business activity in the forum so as to make it reasonable that the corporation be required to defend nonforum-related claims there. On the other hand, when the basis for the exercise of judicial jurisdiction is the connection between the *underlying transaction* and a state, and the state's resulting interest in providing a forum for persons to litigate claims arising from that transaction, the same factors making it reasonable—and hence constitutional—for that state to exercise judicial jurisdiction also make it reasonable for that state to apply its own substantive law to resolve those claims. In other words, judicial jurisdiction and choice of law are related *doctrinally* in that whenever the forum constitutionally may exercise judicial jurisdiction under a long-arm act it may also constitutionally apply its own substantive law. For example, if a forum state can exercise long-arm jurisdiction over an out-of-state manufacturer in a products liability case, it can also constitutionally hold that manufacturer to the forum state's standard of liability and is likely to do so.⁴

The converse of this proposition has not been assumed to follow. The fact that a state's substantive law constitutionally could be applied in a given case does not, without more, make constitutional the exercise of jurisdiction in that case over a nonresident defendant under the state's long-arm act. The Supreme Court made this point in *Hanson v. Denckla*,⁵ and reiterated it in *Shaffer* when it held that apart from the matter of quasi in rem jurisdiction, Delaware could not, as the state of incorporation, exercise long-arm jurisdiction over the non-resident directors for the alleged breach of their fiduciary duties that occurred in other states.⁶ The plaintiff in *Shaffer* argued that Delaware, as the state of incorporation, had an interest in resolving controversies involving the breach of fiduciary duties by nonresident directors.⁷ The Court took the position that this interest related only to the application of Delaware substantive law and did not justify the exercise of long-arm act jurisdiction since the directors "simply had nothing to do with the State of Delaware."⁸ Justice Brennan, dissenting in part, characterized the Court's holding in this regard as an "advisory opinion" because Delaware had no statute authorizing the exercise of long-arm jurisdiction over nonresident directors for breach of their fiduciary duties.⁹ Contending that the inquiries as to the constitutionality of the exercise of jurisdiction under a long-arm act and the constitutionality of

4. As to the exercise of long-arm act jurisdiction in product liability cases, see, for example, *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 907, 458 P.2d 57, 67, 80 Cal. Rptr. 113, 123 (1969). There are very few modern cases involving choice of law in products liability, and this may be because once the forum has decided to exercise jurisdiction under its long-arm act in a products liability case, the application of its own law is foreordained, so that the choice-of-law question is, in effect, subsumed in the adjudication of the jurisdictional question.

5. 357 U.S. 235, 254 (1958).

6. 433 U.S. at 216.

7. *Id.* at 215-16.

8. *Id.* at 216.

9. *Id.* at 220-21.

the application of a state's substantive law "are often closely related and to a substantial degree depend on similar considerations,"¹⁰ Justice Brennan concluded that, "[a]t the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy."¹¹

The problem in a case like *Shaffer*, of course, is that while the corporation, like so many others, was incorporated in Delaware, its principal place of business was elsewhere, and it conducted no activities in Delaware. If the directors "simply had nothing to do with the State of Delaware,"¹² then it is difficult to see how Delaware had any interest in applying its substantive law to determine their liability for the alleged breach of their fiduciary duties.¹³ On the other hand, if Delaware is deemed to have such an interest solely by virtue of the incorporation in Delaware,¹⁴ then it is equally difficult to see why Delaware has any less of an interest in adjudicating claims arising out of the alleged breach of fiduciary duties in its courts, and why, since the defendants voluntarily assumed the directorship of a Delaware corporation, there would be any unfairness in requiring them to defend such claims in the Delaware courts.¹⁵

It is submitted here that the constitutional dimensions of the exercise of long-arm act jurisdiction and the application of the forum's substantive law should be fully co-extensive: when the connection between a party's activities and a state are such that the state constitutionally can exercise jurisdiction over that party under its long-arm act, the state constitutionally can apply its own substantive law to determine the liability of that party; but if the connection between the party's activities and the state are not such that the state can subject the party to suit in its courts over claims arising from those activities, the state's substantive law cannot be applied to deter-

10. *Id.* at 224-25 (quoting *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting)).

11. *Id.* at 225.

12. *Id.* at 216.

13. *Cf.* *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (As a matter of due process, Texas could not apply its law invalidating contractual limitations periods to a contract of risk insurance entered into by a Texas insured and a Mexican insurer covering the insured's tug only while being operated in Mexican waters.)

14. I would question whether Delaware has such an interest. *But cf.* *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586, 609 (1947) (As a matter of full faith and credit, the law of the state of incorporation had to determine the validity of a contractual limitation period contained in an insurance policy issued by a fraternal benefit association.)

15. For constitutional purposes a state's law may be applied to resolve a dispute under an interest and fairness test; that is, the state has an interest in having its law applied on the point in issue and the application of its law not fundamentally unfair to the other party, *see* *Clay v. Sun Ins. Co.*, 377 U.S. 179, 181 (1964), or totally apart from any interest, the state has sufficient factual contacts with the transaction so that it is reasonable for its law to be applied on the basis of those contacts. *See* *Carroll v. Lanza*, 349 U.S. 408, 412 (1955). It is only when the application of the state's law cannot be sustained either under an interest and fairness test or on the basis of its factual contacts with the transaction, as in *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930), that the application of its law is unconstitutional. The present status of constitutional limitations on choice of law is discussed generally in R. CRAMTON & R. SEDLER, *THE SUM AND SUBSTANCE OF CONFLICT OF LAWS* § 13.1000 (1977).

mine the liability of the party on those claims either. It may have been that in *Shaffer*, which arose in a jurisdictional context, the Court was saying that incorporation in a state, without more, when all of the corporation's activities are conducted elsewhere, does not give the state any interest in hearing and determining claims involving the liability of corporate directors for an alleged breach of fiduciary duty. Should the same question arise in a choice-of-law context,¹⁶ the Court might hold that the application of the law of the state of incorporation when the directors "simply had nothing to do with [that state]"¹⁷ was violative of due process as well.¹⁸

The preceding discussion has addressed the doctrinal interrelationship of judicial jurisdiction and choice of law. Judicial jurisdiction and choice of law are also related pragmatically. Despite the contention of many academic commentators that the forum should not always apply its own law in the case of what Currie calls a "true conflict,"¹⁹ in practice most policy-centered courts do just that.²⁰ Whenever those courts see a real interest in applying domestic law in order to implement the policy reflected in that law, they are likely to do so, assuming of course that the application of that law will not be fundamentally unfair to the other party, as it usually is not.²¹ In addition, there is a tendency on the part of some courts to apply their own "better law" even when a real interest in doing so is less apparent.²² This means that pragmatically the substantive result will often depend on where suit can be brought, which in turn depends on which state or states can exercise judicial jurisdiction in the case.

Nowhere is the pragmatic relationship between judicial jurisdiction and choice of law more clear than when a plaintiff, who is a resident of a state whose law allows recovery on the facts of the case, is injured by a defendant from a state whose law does not allow recovery—which in terms of interest analysis necessarily presents a true conflict²³—and the accident occurs in the defendant's home state. If suit is brought in the defendant's home state, that state will apply its law, denying recovery.²⁴ But it has been possible in a number of cases for the suit to be brought in the plaintiff's

16. This would occur only if another state would apply the law of the state of incorporation to determine the director's liability, which is not too likely. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309. (1971).

17. 433 U.S. at 216.

18. In my view, this result would be required by *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

19. See the listing of methodologies that include means for the resolution of true conflicts other than by the application of the forum's own law in Sedler, *supra* note 2, at 217-18.

20. See *id.* at 227-33.

21. *Id.*

22. *Id.* at 226-27.

23. This is because the social and economic consequences of allowing or denying recovery will be felt in the parties' home states: the plaintiff's home state is interested in applying its law allowing recovery in order to protect the accident victim or the victim's beneficiaries, while the defendant's home state is interested in applying its law to protect the defendant and the insurer.

24. See *Satchwill v. Vollrath Co.*, 293 F. Supp. 533, 534, 537 (E.D. Wis. 1968); *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 590, 325 A.2d 778, 778-79 (1974).

home state, and in most of those cases, the courts of that state have applied domestic law, allowing recovery.²⁵ It will be helpful to look at the bases for the exercise of jurisdiction in some of these cases and to consider how these jurisdictional bases would be affected by *Shaffer*.

When the case involves a question of guest-host immunity, there invariably will have been a prior relationship between the plaintiff and the nominal defendant—the “ungrateful hitchhiker” has yet to make an appearance in an actual conflicts case—and the nominal defendant is likely to want the plaintiff to be able to recover against the insurer. It is precisely to avoid such collusion, we are told by the insurance companies, that guest statutes are necessary. So long as judicial jurisdiction could be exercised on the basis of personal service within a state, the parties could arrange for service on the nominal defendant in the plaintiff’s home state. This is what happened in *Cipolla v. Shaposka*,²⁶ where the nominal defendant was served with process in Pennsylvania while he and the plaintiff were playing golf together. Although, ironically, the Pennsylvania court applied Delaware law to deny recovery,²⁷ other courts have applied the law of the forum in similar situations.²⁸ In any event, since abandonment of the “power” rationale of judicial jurisdiction in *Shaffer* presumably renders unconstitutional the exercise of jurisdiction on the basis of personal service within a state, the *Cipolla*-type method of getting the case before the courts of the plaintiff’s home state probably is now foreclosed.

*Foster v. Leggett*²⁹ can be fruitfully compared to *Cipolla* and similar cases. In *Foster*, the nominal defendant was domiciled on the Ohio side of a Kentucky-Ohio functional, socio-economic and mobility area, but worked on the Kentucky side and stayed an average of two nights a week in a rented room there. The trip, which resulted in an accident in Ohio, killing the Kentucky passenger, began in Kentucky and was to terminate there.³⁰ Suit was brought in Kentucky, with jurisdiction being obtained on the basis of personal service. On the issue of guest-host immunity, the Kentucky court applied Kentucky law and allowed recovery.³¹

Could Kentucky constitutionally exercise jurisdiction in this case after *Shaffer* under the “minimum contacts and fundamental fairness” test? Two reasons suggest that it could. First, the defendant himself had sufficient “minimum contacts” with Kentucky, since he worked there and for at least

25. See *Rosenthal v. Warren*, 475 F.2d 438, 439 (2d Cir. 1973); *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972); *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 493-94, 221 N.W.2d 665, 669 (1974).

26. 439 Pa. 563, 267 A.2d 854 (1970).

27. *Id.* at 566-68, 267 A.2d at 856-57; see Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 402-12 (1971).

28. See *Bennett v. Macy*, 324 F. Supp. 409, 410-11 (W.D. Ky. 1971); *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972); *Schneider v. Nichols*, 280 Minn. 139, 140-41, 146, 158 N.W.2d 254, 255-56, 259 (1968).

29. 484 S.W.2d 827 (Ky. 1972).

30. *Id.* at 827-28.

31. *Id.* at 829.

part of the week lived there.³² Prior to *Shaffer*, when judicial jurisdiction could be exercised solely on the basis of personal service within a state, it was not necessary to consider whether a defendant who was brought before a court on this basis had any other "contacts" with the state. *Shaffer* makes this kind of consideration necessary.³³ It is clearly consistent with the "minimum contacts and fundamental fairness" test of *Shaffer* to hold that a person can be subject to judicial jurisdiction in a state where that person resides for part of the time—even though he is not domiciled there—and/or where that person carries on regular activities, such as employment.³⁴ A state wishing to exercise jurisdiction on this basis may have to amend its jurisdictional statutes to authorize specifically the exercise of such jurisdiction, but there can be no doubt that the state may constitutionally do so. Second, the transaction giving rise to the harm had substantial factual connections with Kentucky, since the trip originated in and was to terminate in Kentucky.³⁵ Again, under the "minimum contacts and fundamental fairness" test, Kentucky could require an Ohio resident to defend a lawsuit resulting from a trip that originated in Kentucky and was to terminate there, in which a Kentucky resident was fatally injured, notwithstanding that the accident itself occurred in Ohio.³⁶ Existing tort long-arm acts may or may not be interpreted as authorizing the exercise of jurisdiction on this basis, but if they are so interpreted or amended, the exercise of such jurisdiction is fully constitutional. In a case like *Foster v. Leggett*, then, judicial jurisdiction could be exercised by the Kentucky courts after *Shaffer*, and the same factors making it constitutional for Kentucky to exercise judicial jurisdiction would also make it constitutional under an "interest and fairness" test for Kentucky to apply its own substantive law.

Another example of a jurisdictional basis allowing a state court to exercise jurisdiction over and apply its law against a nonresident defendant is presented by *Rosenthal v. Warren*,³⁷ where the transaction giving rise to the harm had no factual connections with the forum. There a New York resident died on the operating table in Massachusetts, allegedly due to the negligence of a Massachusetts physician and a Massachusetts hospital. Jurisdiction was exercised by a New York federal court over the Massachusetts physician by attaching, in accordance with the procedures authorized by the New York Court of Appeals in *Seider v. Roth*,³⁸ the obligation of the malpractice insurer, which did business in New York, to

32. *Id.* at 828.

33. 433 U.S. at 212.

34. The analogy can be drawn to a foreign corporation, or nonresident individual, that carries on substantial business activity in that state so as to make it reasonable that it be required to defend non-forum-related claims there. *See, e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-49 (1952).

35. 484 S.W.2d at 828.

36. *See, e.g., Cornelison v. Chaney*, 16 Cal. 3d 143, 149, 152, 545 P.2d 264, 267-68, 269, 127 Cal. Rptr. 352, 355-56, 357 (1976).

37. 475 F.2d 438 (2d Cir. 1973).

38. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

defend and indemnify the defendant.³⁹ Massachusetts law limited the amount recoverable for wrongful death, while New York law did not, and the Second Circuit, under an "interest and fairness" test, held that New York law applied.⁴⁰ New York obviously had a real interest in applying its law allowing unlimited recovery in favor of the beneficiaries of a New York decedent, and the application of New York law produced no unfairness to the insurer, since the insurance policy did not distinguish between liability for personal injuries and liability for wrongful death, and the insurer could contemplate being held to liability in excess of the Massachusetts limitation.⁴¹

Is the exercise of *Seider*-type jurisdiction constitutional after *Shaffer*? Assuming that the statute on which the New York Court of Appeals relied in *Seider* properly can be interpreted as a judicially-created direct action statute,⁴² as the Second Circuit did in *Minichiello v. Rosenberg*,⁴³ the question may be posed as follows: Can a state constitutionally require that an insurance company carrying on "substantial activity" in that state defend suits brought there by forum residents who have been injured by one of the company's insureds in another state?⁴⁴ It is submitted here that a state constitutionally can do so after *Shaffer*, and, going further, that the same considerations that justify subjecting the insurer to suit in the forum in these circumstances also justify the application of the forum's substantive law.

In situations such as those in *Rosenthal* and *Seider*, the insurance company "purposefully avails itself of the privilege of conducting activities within the forum state," according to the Court in *Hanson v. Denckla* and

39. 475 F.2d at 440.

40. *Id.* at 446.

41. *See id.* at 444-45.

42. Professor Vernon has argued cogently that it cannot properly be interpreted as a direct action statute because of its "in rem genesis," and further that *Seider* was based on a forum-plaintiff nexus, while *Shaffer* requires forum-defendant and forum-litigation contacts. He concludes, therefore, that the exercise of *Seider* jurisdiction is unconstitutional after *Shaffer*. Vernon, *State Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997, 1017-19 (1978). In *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977), decided just ten days before *Shaffer*, the New York Court of Appeals expressly stated that the holding in *Seider* "in effect established, by the judicial fiat, a 'direct action' against the insurer." *Id.* at 142, 366 N.E.2d at 255, 397 N.Y.S.2d at 595. The Court then reasoned that since the legislature did not take any action to overturn *Seider* jurisdiction, "it must be concluded that they are satisfied with it." *Id.*, 366 N.E.2d at 256, 397 N.Y.S.2d at 595. Had *Shaffer* been decided before *Donawitz*, the New York Court of Appeals could have considered the constitutionality of *Seider* jurisdiction in light of *Shaffer*, but since in *Donawitz*, it held that *Seider* jurisdiction would not be exercised in favor of the nonresident plaintiff, there was no reason for it to reopen *Donawitz* after *Shaffer*. Two lower court New York decisions have held that *Seider* jurisdiction does not survive *Shaffer*, *Katz v. Umansky*, 92 Misc.2d 285, 291, 399 N.Y.S.2d 412, 416 (Sup. Ct. 1977) and *Kennedy v. Deroker*, 91 Misc.2d 648, 649-50, 398 N.Y.S.2d 628, 629-30 (Sup. Ct. 1977), but the Second Circuit has disagreed, holding that the exercise of *Seider* jurisdiction is fully constitutional after *Shaffer*. *O'Connor v. Lee-Hy Paving Corp.*, 47 U.S.L.W. 2007 (2d Cir. July 4, 1978).

43. 410 F.2d 106, 111-12 (2d Cir.) *cert. denied*, 396 U.S. 844 (1969).

44. These points have been developed more fully in Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 405-07 (1971).

again in *Shaffer*.⁴⁵ Recognizing, as a number of courts are finally beginning to do, that accident litigation is in reality a suit between the plaintiff and the defendant's liability insurer,⁴⁶ there is no logical or functional difference between requiring a foreign corporation carrying on substantial activity in a state to defend, in that state's courts, suits involving out-of-state claims, and requiring an insurer likewise carrying on substantial activity in a state to defend in that state's courts a suit arising from an out-of-state accident between one of its insureds and a resident plaintiff. The plaintiff's home state has a real interest in providing a forum for the plaintiff, regardless of where the accident occurred, since the social and economic consequences of the accident will be felt in that state. And the insurer who carries on substantial activity in the forum cannot be heard to complain that it is "fundamentally unfair" to subject it to suit in the forum's courts.⁴⁷

The same considerations that make it constitutional—and, it is submitted, proper—to subject the insurer to suit in a state's courts in these circumstances also to make it constitutional and proper for that state to apply its own law to determine the insurer's substantive liability. Again, under the "interest and fairness" test, plaintiff's home state has a real interest in applying its law to allow recovery; moreover, the application of its law is not unfair to the insurer, whose rates are based on the loss experience of many insureds, which is affected peripherally, if at all, by the tort law of any particular state. As Professor Weintraub has reminded us, "to talk of 'surprising' the insurer is very likely to be talking nonsense."⁴⁸ To the extent, then, that suit can be brought against the insurer in the plaintiff's home state, either under a direct action statute or a judicially-created one, as in *Seider*, the plaintiff residing in a state whose law allows recovery is likely to prevail notwithstanding that the defendant is from a state whose law does not allow recovery, and the accident occurred in that state.

If this analysis is correct, *Shaffer* will not have significant choice-of-law implications; that is, it will not alter in any substantial way the existing doctrinal and pragmatic relationship between judicial jurisdiction and choice of law. *Shaffer* may, however, stimulate some rethinking about that relationship, both doctrinally and pragmatically. As stated previously, the Court's opinion is troubling in intimating that while Delaware could not constitutionally subject the nonresident directors to long-arm jurisdiction for acts committed elsewhere that allegedly were in violation of their fiduciary duties, Delaware law could be applied to determine the directors' liability for those acts.⁴⁹ Just as the same considerations that make it constitutional for a state to exercise long-arm act jurisdiction also make it

45. 357 U.S. at 253; 433 U.S. at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).

46. See the discussion in Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 399-401 (1971).

47. See *O'Connor v. Lee-Hy Paving Corp.*, 47 U.S.L.W. 2007 (2d Cir. July 4, 1978).

48. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 206 (1971).

49. 433 U.S. at 215.

constitutional for the state to apply its own substantive law to the transaction, when a state may *not* constitutionally exercise long-arm act jurisdiction over a nonresident party its substantive law should not be constitutionally applicable to determine the liability of the nonresident party either. Rethinking about the relationship between judicial jurisdiction and choice of law may lead to the conclusion that the constitutional test for a state's exercise of long-arm act jurisdiction and the application of its substantive law should be co-extensive. That test would be posited as follows: A state may subject a nonresident party to long-arm act jurisdiction and may apply its own law to determine the liability of that party when it has a real interest in doing so and when the exercise of such jurisdiction and the application of its law are not, in the circumstances presented, fundamentally unfair. Whether, under this test, the Court in *Shaffer* correctly held that the nonresident directors could not be subject to suit in Delaware under a long-arm act will not be explored at this time. Based on an initial impression, however, it seems reasonable to conclude that Delaware has no real interest in becoming involved with claims against directors of Delaware corporations that carry on no activity in that state.

The pragmatic relationship between judicial jurisdiction and choice of law, as we have seen, appears most frequently in tort cases in which the plaintiff's home state is interested in applying its law allowing recovery in favor of the plaintiff who has been injured elsewhere by a defendant from a state whose law does not allow recovery. Now that *Shaffer* mandates the "minimum contacts and fundamental fairness" approach to the exercise of judicial jurisdiction "across the board,"⁵⁰ states whose substantive tort law generally favors recovery may want to make sure that their jurisdictional law is congruent with that approach. One way to do this is simply to provide for the exercise of judicial jurisdiction in tort cases "within constitutional limits," as some long-arm acts, either expressly⁵¹ or as a matter of judicial interpretation,⁵² now do. Such provision will maximize the opportunity for resident plaintiffs to sue at home, which in turn likely will bring about application of the forum's law allowing recovery.

The legislatures of these states whose tort law favors recovery may also see the desirability of enacting direct action statutes, or their courts should consider judicially creating them.⁵³ Again, a direct action statute will not

50. *Id.* at 214-17.

51. In California, a rule of civil procedure 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." CAL. CIV. PROC. CODE § 410.10 (West Supp. 1976).

52. See *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 124-25, 448 P.2d 571, 573 (1968).

53. The Florida Supreme Court did so in a domestic context, holding that when the insured was subject to the court's jurisdiction, the insurer could be joined as well. *Shingleton v. Bussey*, 223 So. 2d 713, 715 (Fla. 1969). The legislature, however, disagreed and provided that the insurer could be joined as party defendant only when it claimed noncoverage. FLA. STAT. § 627.7262(1),(3) (1977). The Louisiana direct action statute, LA. REV. STAT. ANN. §22:655 (West Cum. Supp. 1978), authorizes suit against the insurer only if the accident occurred within the state, while the Wisconsin Statute, WIS. STAT. ANN. § 803.04(2)(a) (West

only enable resident plaintiffs to bring suit there against insurers doing business in the state for accidents occurring elsewhere, but will also result in the likely application of the forum's own law.

In summary, *Shaffer v. Heitner* appears certain to markedly influence the development of the law of judicial jurisdiction. Moreover, *Shaffer* may stimulate rethinking about the interrelationship between judicial jurisdiction and choice of law. The effects of the rethinking, as it is hoped this Article has demonstrated, may turn out to be very significant indeed.

1977), expressly provides that the insurer can be sued if the policy was issued or delivered in the state or the accident occurred within the state. To this extent, the direct action statute constitutes a functionally restrictive substantive rule, inapplicable to out-of-state accidents involving out-of-state vehicles, *see generally* Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 SO. CAL. L. REV. 27 (1976), and the courts of those states would not have the power to authorize a direct action against the insurer in that situation. *See Esteve v., Allstate Insurance Co.*, 351 So. 2d 117, 120 (La. 1977). The Minnesota statute authorizing *Seider* jurisdiction, MINN. STAT. § 571.41(2) (1976), is expressly premised on a quasi in rem basis, but there would seem to be no reason why, for constitutional purposes, it could not be reinterpreted as a direct action statute.