CIVIL PROCEDURE—ATTACHMENT—JURISDICTION OVER NONRESIDENTS OBTAINED BY ATTACHING INSURANCE PROCEEDS IS INVALID—*State ex rel. Government Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (St. Louis, Mo. Ct. App. 1970); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970).

On April 5, 1968 Louise Taussig, a resident of Missouri, was entering her son's parked car in Newport, Rhode Island when Jerome D. Slack, a Rhode Island resident, collided with it. Mrs. Taussig instituted an action against Slack in the Circuit Court of St. Louis County on April 16, 1969 to recover for her personal injuries. Based on an affidavit as to Slack's nonresidency in Missouri, an attachment and summons was issued to the Sheriff of Cole County, Missouri commanding him to summon as garnishee Government Employees Insurance Company of Washington, D.C., a foreign corporation authorized to do business in Missouri.

Prior to the accident the relator, Government Employees, had issued a liability policy to Slack. The policy was of the usual form, obligating the insurer to defend the insured and indemnify him for successful claims against him. On May 16, 1969 the defendant Slack, appearing specially, filed a motion to dissolve, vacate and quash the attachment and summons by virtue of which the plaintiff was attempting to obtain jurisdiction, contending that the method of attachment was repugnant to the Constitution of the United States and the constitution, statutes and common law of Missouri. On July 15, 1969 Lasky, the respondent judge, entered an order denying the defendant's motion. Thereafter, the relator filed a petition for a writ of prohibition and a preliminary rule was issued granting it. The Missouri courts later made this rule permanent.[1]

In a similar attachment action, Carolyn G. Howard sought to recover damages for personal injuries sustained when she was allegedly struck by the propeller of an aircraft at an airport in South Carolina. Donald L. Allen, the defendant and alleged operator of the aircraft, was a resident of Ohio. Unable to obtain personal service of process upon the defendant in South Carolina, the plaintiff caused a warrant of attachment to issue, directing the seizure of the applicable limits of liability and the duty to defend contained in the policy issued by American Motorists Insurance Company to the defendant.

The defendant appeared specially for the purpose of objecting

1 State *ex rel.* Government Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (St. Louis, Mo. Ct. App. 1970).

to the jurisdiction of the court, and moved to quash service of the summons and to vacate the warrant of attachment. In support of his motion, he filed affidavits to the effect that he was a lifelong resident of Ohio, never owned property in South Carolina, and never conducted business with the American Motorists Insurance Company in South Carolina. His motions were granted by the lower court and the plaintiff appealed. The Supreme Court of South Carolina held that the duty to defend and limits of liability contained in the liability insurance policy do not constitute a debt which is subject to attachment so as to confer jurisdiction.[2]

The term jurisdiction may be used in several senses, but in its general and ordinary use it is the power lawfully conferred on the court to entertain a suit, consider the merits, and render a binding decision thereon.[3] Regardless of the type of jurisdiction involved—in personam, in rem, or quasi-in-rem[4]—three essential components must exist so that a court may invoke its jurisdiction. The court must be empowered to act by the sovereign,[5] it must have subject matter jurisdiction and it must give proper notice to the parties.[6]

The most common method of obtaining jurisdiction, the in personam method, is effectuated by personal service on a defendant

2 Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1970).

3 *See* General Inv. Co. v. N.Y. Central R.R., 271 U.S. 228, 230 (1926) (bill in equity by a minority stockholder against a railroad company where the court ruled that the suit arose under the laws of the United States and was within the jurisdiction of the federal district court, and differentiated between jurisdiction and the lack of merit or capacity to sue).

4 An in personam action decides the rights between the adversary parties. An in rem action determines the status of a particular res as "against the whole world," irrespective of the parties involved in the litigation. And, in a quasi-in-rem proceeding, the res is used to obtain personal jurisdiction, and the satisfaction of the judgment is limited to the value of the attached res. Comment, *Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction*, 16 BUFFALO L. REV. 769, 770 (1967). *See also* Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 948-49 (1960).

5 A court's power is derived constitutionally; *see, e.g.*, U.S. CONST. art. III, § 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

See also N.J. CONST. art. VI, §§ 1-7; N.Y. CONST. art. VI, §§ 1-37.

6 *See* Spencer v. Gypsy Oil Co., 142 F.2d 935 (10th Cir. 1944) (court held that jurisdiction of subject matter necessary to a valid judgment includes power to determine, with binding effect, every justiciable issue involved). Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (petition by a trust company for a judicial settlement of account; court held that notice by publication was sufficient for beneficiaries whose interests or addresses were unknown, but that such notice to known persons whose whereabouts were known was insufficient).

physically present within the state in which the action is brought.[7] However, this physical presence foundation of jurisdiction has been expanded, in the interest of justice and fairness to the plaintiff, to include other situations. For instance, if the defendant is "doing business,"[8] or is involved in an automobile accident,[9] or has some other special contact with the forum state,[10] he will be subject to that court's jurisdiction provided he has been given proper notice of the action against him.[11] The leading case in this area is *International Shoe Co. v. Washington*,[12] which held that a defendant with certain "minimum contacts" with the forum state will be subject to a court's jurisdiction if maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[13]

A state may also exercise jurisdiction in its in rem or quasi-in-rem forms if it has attachment power over a particular res.[14] Attach-

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7 *See* McDonald v. Mabee, 243 U.S. 90 (1917) (in a suit upon a promissory note, begun by publication when the defendant was domiciled in Texas but had left the state with the intent to establish a home elsewhere, the Court held that defendant was a nonresident and that personal service of process was required); Pennoyer v. Neff, 95 U.S. 714 (1877) (action for the recovery of a tract of land, Court held a personal judgment not valid against a nonresident who was served by publication and who did not appear to defend).

8 *See* Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (the Court upheld an Iowa statute which provided for service of process in any action arising out of the operation of a business office maintained there on any agent or clerk employed there).

9 *See* Hess v. Pawloski, 274 U.S. 352 (1927) (Court held valid a Massachusetts statute declaring the use of the state's highways by a nonresident the equivalent to an appointment by him of the Registrar of Motor Vehicles as his attorney upon whom process may be served).

10 *See* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) (the Court held that where parties to a contract agree in advance to permit notice to be served on nonresident defendant, jurisdiction is properly obtained); McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (Court held that jurisdiction based on a California statute, which subjects foreign corporations to suit in California on insurance contracts with residents of that state even though such corporations cannot be served personally, was valid); Milliken v. Meyer, 311 U.S. 457 (1940) (Court held that the authority of a state over one of its domiciliaries is not terminated by his temporary absence).

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

12 326 U.S. 310 (1945) (Court held that the activities within the state by the defendant's salesman, including exhibiting samples of merchandise and soliciting orders from prospective buyers to be accepted or rejected at a point outside the state, constituted "doing business" and thereby made the defendant amenable to service of process).

13 *Id.* at 316, *quoting from* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

14 Harris v. Balk, 198 U.S. 215 (1905) (a citizen of North Carolina who owed money to another citizen of that state was, while temporarily in Maryland, garnisheed by a creditor of the man to whom he owed the money). *See also* cases cited note 7 *supra*; Comment, 16 BUFFALO L. REV. 769, *supra* note 4, at 770-71 (brief discussion of attachment of res—corporeal and incorporeal).

ment is a proceeding for seizure of property, or ordinary debts, and it is tantamount to an involuntary dispossession of the defendant prior to any adjudication of the plaintiff's rights.[15] If the res is an intangible, the state has jurisdiction over it provided it has jurisdiction over the debtor.[16]

The courts in *Lasky* and *Howard* were asked to decide whether a contractual obligation to defend and indemnify constituted an attachable debt, so as to confer quasi-in-rem jurisdiction in a state whose only contact with the defendant is that his insurer does business there. It is a relatively new question and only New York has held that such a contractual obligation is attachable. The New York rule was first applied in *Seider v. Roth*,[17] a case similar to *Lasky* and *Howard*.[18]

The majority in *Seider* reasoned that as soon as the accident occurred, a contractual obligation was imposed on the insurance company which should be considered a debt within the meaning of the applicable New York statutes:

> [T]he policy casts on the insurer several obligations which accrue as soon as the insurer gets notice of an accident, and whether or not a suit is ever brought. For instance, under the "Insuring Agreements" and under "Additional Agreements" "No. 2", the insurer agrees upon receipt of notice of loss or damage to investigate and if expedient to negotiate or settle with the claimant. Furthermore, under "Section B" the insurer agrees to pay necessary medical and similar expenses of the insured and any other injured person.[19]

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15 Russell v. Fred G. Pohl Co., 7 N.J. 32, 39, 80 A.2d 191, 194 (1951) (in an action by plaintiff to attach a debtor's obligation to the defendant, court held that, by virtue of assignments by the defendant to a third party, the relation of debtor and creditor had ceased to exist and there was no property available to attach).

16 Comment, 16 BUFFALO L. REV. 769, *supra* note 4, at 771 n.26.

17 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), *aff'g* 23 App. Div. 2d 787, 258 N.Y.S.2d 795 (1965).

18 In *Seider*, two New York residents were injured in an automobile accident in Vermont, allegedly through the negligence of the defendant, and they sought to attach the contractual obligation of the defendant's insurer to defend and indemnify the defendant.

19 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The statutes under consideration are:

1) N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963): A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor . . . .
2) N.Y. CIV. PRAC. LAW § 6202 (McKinney 1963) provides in part: Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment.

The majority cited *In re* Estate of Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962), as its authority, but it may be distinguished because of the special nature of the proceeding. The court in *Riggle* relied upon Surrogate's Act 47, now encompassed in N.Y. SURR. CT. PROC. LAW § 208 (McKinney 1967): "For the purpose of conferring

In dissenting to the majority opinion, Justice Burke construed the insurance policy in such a manner that the contractual obligations were not attachable under the statute.[20] He reasoned that the obligations to defend and indemnify were not obligations "past due" and would not be "certain" until jurisdiction was properly obtained. The justice further criticized the circular reasoning of the majority: "The jurisdiction, they assert, is based upon a promise which evidently does not mature until there is jurisdiction."[21]

Seider and its sister case, *Simpson v. Loehmann*,[22] have met with substantial criticism in numerous commentaries.[23] While it is not impossible to point out some property right in the insured, there are so many concurrent problems, not considered by *Seider*, that it would appear wiser to leave the insurer's obligations unattachable.[24] For example, if the attachment were allowed, an appearance by the defendant could, in some jurisdictions, subject him to personal service and pos-

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jurisdiction upon the [surrogate] court: 1. A debt or a cause of action for wrongful death, in favor of a *non-domiciliary against a domiciliary*, is deemed personal property in the county where the domiciliary . . . resides." (emphasis added). Also, the case is distinguishable because there was in personam jurisdiction over the defendant at the time of attachment.

The court in *Seider* further relied on Fishman v. Sanders, 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (1962), *rev'd on other grounds*, 15 N.Y.2d 298, 258 N.Y.S.2d 380, 206 N.E.2d 326 (1965); Stines v. Hertz Corp., 42 Misc. 2d 443, 248 N.Y.S.2d 242 (Sup. Ct.), *rev'd on other grounds*, 22 App. Div. 2d 823, 254 N.Y.S.2d 903 (1964), *aff'd*, 16 N.Y.2d 605, 209 N.E.2d 105, 261 N.Y.S.2d 59 (1965); Baumgold Bros., Inc. v. Schwarzschild Bros., Inc., 276 App. Div. 158, 93 N.Y.S.2d 658 (1949). All are distinguishable, however, in that in personam jurisdiction existed over the insurer and insured.

20 N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963), quoted note 19 *supra*.

21 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103.

22 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rearg. denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). *See also* Alex v. Grande, 56 Misc. 2d 931, 290 N.Y.S.2d 303 (Sup. Ct. 1968); Powsner v. Mills, 56 Misc. 2d 411, 288 N.Y.S.2d 846 (Sup. Ct. 1968); Lefcourt v. Sea Crest Hotel & Motor Inn, Inc., 54 Misc. 2d 376, 282 N.Y.S.2d 896 (Sup. Ct. 1967); Jones v. McNeill, 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. 1966) (all followed *Seider* in allowing the attachment of insurance obligations).

23 *See, e.g.*, Reese, *The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild*, 35 INS. COUNSEL J. 118 (1968); Comment, 16 BUFFALO L. REV. 769, *supra* note 4; Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Comment, *Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108 (1968); Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654 (1967).

See also Housley v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967) (does not mention *Seider* but case refused to allow a similar attachment); DeRentiis v. Lewis, — R.I. —, 258 A.2d 464 (1969) (rejects *Seider* but distinguishes itself on differences between Rhode Island and New York attachment statutes).

24 Siegel, *Supplementary Practice Commentary* at 68, N.Y. CIV. PRAC. LAW § 5201 (McKinney Supp. 1970-71).

sible liability for a judgment in excess of the insurer's obligations.[25] Or, if the attachment were allowed and the defendant did not appear, he would violate the cooperation clause, thus nullifying the insurer's duty to defend.[26] Or, if the attachment were allowed and the defendant did not appear, any judgment awarded to the plaintiff, notwithstanding a cooperation violation, would be unenforceable.[27]

It is apparent that cases where the defendant is not in the forum state, because of the inherent problems involved with quasi-in-rem jurisdiction, would best be handled in an alternative manner. Two such methods utilized have been substituted service of process and direct action, both of which involve in personam jurisdiction. Substituted service utilizes service of process on the insurer as the agent and acts as notice to the named defendant. Direct action would allow the injured party to bring an action against the insurer as a real party in interest without first obtaining a judgment against the insured.

Courts in New York and New Jersey have held that substituted service upon the insured's carrier is a valid method of obtaining service of process over the insured. This method received initial consideration in a series of New York cases, the most influential being *Dob-*

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25 This reasoning was the basis for the federal court decision in Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968), which held that attachment of the insurer's obligations in a nonresident defendant's policy is unconstitutional. *Podolsky* distinguished Harris v. Balk, 198 U.S. 215 (1905), the leading case in debt attachment. In *Podolsky* the amount of debt was not fixed, as it was in *Harris*, and it could have been influenced by the defendant's choice of appearance. This would in effect have coerced the defendant to submit to personal jurisdiction and would have been a denial of fair play and substantial justice. The court based its decision on N.Y. CIV. PRAC. LAW § 320(c) (McKinney 1963), by virtue of which appearance in defense of the action submits a defendant to personal jurisdiction in New York.

However, the New York courts avoided *Podolsky*'s appearance objection by holding in the *Simpson* reargument, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), that a limited appearance is permitted in a nonresident defendant case, notwithstanding § 320(c). The court circumvented the *Podolsky* rule by restricting the value of any judgment to the policy limit, making it impossible for the defendant to be personally liable.

26 The insurer is bound to defend the insured against suits alleging facts and circumstances covered by the policy, even though such suits are groundless, false, or fraudulent. *See* 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4682 (2d ed. 1962). *See also* Ebert v. Balter, 83 N.J. Super. 545, 200 A.2d 532 (Cty. Ct. 1964); Spezio v. Travelers Ins. Co., 30 App. Div. 2d 762, 292 N.Y.S.2d 4, *aff'd*, 30 App. Div. 2d 777, 292 N.Y.S.2d 5 (1968).

However, the insured is under an obligation to cooperate with the insurer in the preparation of his defense. A breach of the cooperation clause by the insured will operate to relieve the insurer of liability under the policy. *See* 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4772 (2d ed. 1962).

27 The property attached was the insurer's obligation to defend; that is the only thing that the judgment is good against. It is impossible to measure this obligation. *See* Siegel, *Supplementary Practice Commentary* at 69, N.Y. CIV. PRAC. LAW § 5201 (McKinney Supp. 1970-71).

kin v. Chapman, Sellars v. Raye, and *Keller v. Rappoport.*[28] The court in *Keller* held that this mode of service was authorized by statute[29] and did not violate constitutional due process.

> [A]ttempts to locate the defendant were . . . unsuccessful. The plaintiff then applied to the Supreme Court, Nassau County, for an ex parte order under paragraph 4 of CPLR 308. The court determined that service on the defendant under paragraphs 1, 2 and 3 of 308 was impracticable and, acting pursuant to paragraph 4, directed that service be made (1) by mailing a copy of the summons and complaint to the defendant's last known address in New York (in Long Beach) and (2) by delivering copies thereof to the insurance carrier.[30]

In affirming the issuance of the court order Justice Fuld quoted from *Mullane v. Central Hanover Bank & Trust Co.*:[31] "[I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . . ."[32] He also designated four factors to be used as a guideline for proper substituted service on the insurer: (1) the plaintiff's need, (2) the public interest, (3) the reasonableness of plaintiff's efforts to inform defendant and (4) the availability of other safeguards for defendant's interest.[33]

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28 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968) (these three cases were consolidated and treated in one opinion by Chief Judge Fuld. *Keller v. Rappoport* involved service on defendant's insurance carrier, and *Dobkin* and *Sellars* involved service on the Motor Vehicle Accident Indemnification Corporation and the Secretary of State. The decision will hereafter be referred to as *Keller v. Rappoport*). *See also* Lerman v. Church, 54 Misc. 2d 402, 282 N.Y.S.2d 622 (Sup. Ct. 1967).

29 N.Y. CIV. PRAC. LAW § 308 (McKinney 1963):

> Personal service upon a natural person shall be made:
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> 1. by delivering the summons within the state to the person to be served; or
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> 2. except in matrimonial actions, by delivering the summons within the state to the agent for service designated under rule 318 of the person to be served; or
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> 3. where service under paragraph one cannot be made with due diligence, by mailing the summons to the person to be served at his last known residence and either affixing the summons to the door of his place of business, dwelling house or usual place of abode within the state or delivering the summons within the state to a person of suitable age and discretion at the place of business, dwelling house or usual place of abode of the person to be served and proof of such service shall be filed with the clerk of the court designated in the summons and service is complete ten days thereafter; or
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> 4. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraph one, two or three of this section.

30 21 N.Y.2d at 497, 236 N.E.2d at 454, 289 N.Y.S.2d at 166.

31 339 U.S. 306 (1950).

32 *Id.* at 317, *quoted at* 21 N.Y.2d at 503, 236 N.E.2d at 458, 289 N.Y.S.2d at 171.

33 21 N.Y.2d at 503, 236 N.E.2d at 458, 289 N.Y.S.2d at 172.

New Jersey adopted the method of substituted personal service in *Rudikoff v. Byrne*.[34] There the plaintiff attempted to serve process on the defendant under the New Jersey nonresident motorists statute.[35] However, the defendant had moved without informing the New York Department of Motor Vehicles as required by law in that state,[36] and the plaintiff thereafter served defendant's insurance carrier. The court held that substituted service would be permitted if it were " 'authorized by the law * * * of the state wherein service is effected', within the meaning of . . . *R.R. 4:4-4(j).*"[37] The court then pointed out that such service was authorized in New York by *Keller* and consequently was valid in New Jersey provided R.R. 4:4-4(j) and R.R. 4:4-5(a) were complied with.[38]

Rudikoff was followed by *Ledbetter v. Schnur*,[39] a case very similar on its facts. The court in *Ledbetter* distinguished *Rudikoff*, however: "Rudikoff . . . clearly holds that service was allowed because New York law was followed."[40] The court in *Ledbetter* sought to establish a substituted service rule in New Jersey which was not dependent on the law of the defendant's state. Judge Owens in *Ledbetter*, pursuant to this ideal, stated: "It is recognized that there should be some provision in the rules to authorize this type of service."[41] The judge then noted that the New York statute utilized in *Keller* is relatively the same as R.

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34 101 N.J. Super. 29, 242 A.2d 880 (L. Div. 1968).

35 N.J. STAT. ANN. §§ 39:7-1 *et seq.* (1961).

36 N.Y. VEH. & TRAF. LAW § 501(g) (McKinney 1970).

37 101 N.J. Super. at 36, 242 A.2d at 884. R.R. 4:4-4(j) stated:

> Whenever it shall appear . . . that, after diligent inquiry and effort, an individual cannot be served in this State under any of the preceding paragraphs of this rule, then, consistent with due process of law, service may be made by mailing . . . a copy of the summons and complaint to the individual addressed to his dwelling house or usual place of abode. Where service is . . . not effected . . . or if for any reason delivery cannot be made, then service may be made outside the State as provided in Rule 4:4-5(a) upon any person upon whom *service is authorized by the law of this State or of the state wherein service is effected.* (emphasis added).

R.R. 4:4-4(j) is now R. 4:4-4(e), which is to the same effect. R.R. 4:4-5(a) provided that, when service is made in another state, it may be done:

> [I]n the same manner as if service were made within the State, except that service shall be made by . . . [an official having authority in the jurisdiction wherein the service is made].

R.R. 4:4-5(a) is now R. 4:4-5(a), which is to the same effect.

38 101 N.J. Super. at 42, 242 A.2d at 887-88.

39 107 N.J. Super. 479, 259 A.2d 237 (L. Div. 1969).

40 *Id.* at 481, 259 A.2d at 239.

41 *Id.* at 482, 259 A.2d at 239.

4:4-4(i)[42] of the New Jersey rules. The court allowed substituted service on an insurance carrier where the usual modes of service are *"either impossible or unduly oppressive upon plaintiff or where the defendant successfully evades service of process."*[43]

Practically speaking, substituted service offers little advantage over the attachment technique of *Seider* and *Simpson*. If the service is allowed and defendant fails to appear, then the insurance carrier could deny liability under the policy for failure to cooperate.[44]

Due to the shortcomings of the present situation, practical appraisal rather than "magical and medieval concepts of presence and power"[45] should be used to determine jurisdiction. Both *Howard* and *Lasky* express sympathy for the plaintiff but neither court was ready or able to overturn its respective state statutes without legislative support. As expressed in *Howard*,

> It may very well be that her [the plaintiff's] plight and that of others similarly situated deserves the serious consideration of the General Assembly, but this court is, of course, not empowered to legislate.[46]

It has been suggested that it would be in the interest of fair play and substantial justice to the involved parties and the public if direct actions were allowed in nonresident defendant cases.[47] A direct action

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[42] *Id.* at 483, 259 A.2d at 240. R. 4:4-4(i) reads as follows:

> If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.

[43] 107 N.J. Super. at 482, 259 A.2d at 239; *accord*, Young v. Bunny Bazaar, Inc., 107 N.J. Super. 320, 258 A.2d 158 (L. Div. 1969) (court held that where an automobile liability insurer for one nonresident defendant had knowledge of the accident, and plaintiff had made diligent effort to obtain service upon the nonresidents, service of summons on the insurer was valid). *Compare* Last v. Burns, 108 N.J. Super. 525, 261 A.2d 726 (L. Div. 1970) (motion to make substituted service upon Unsatisfied Claim and Judgment Fund in lieu of service upon defendants personally; court held that the Fund was not authorized to accept substituted personal service on known but absent defendants) *with* Feuchtbaum v. Constantini, 110 N.J. Super. 515, 266 A.2d 168 (L. Div. 1970) (motion for an order permitting the plaintiffs to serve the defendants by substituted service upon the Uninsured Motorists Fund because the defendants were avoiding service held, contrary to *Last v. Burns*, to be implicitly authorized by R. 4:4-4(i)).

[44] *See* note 26 *supra*.

[45] Simpson v. Loehmann, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

[46] 254 S.C. at 460, 176, S.E.2d at 130.

[47] Siegel, *Supplementary Practice Commentary* at 51, N.Y. CIV. PRAC. LAW § 5201 (McKinney Supp. 1970).

LA. REV. STAT. § 22:655 (1950), providing for a direct action, states in pertinent part:

> The injured person . . . shall have a right of direct action against the insurer

would allow an injured plaintiff to institute a suit against the carrier without first recovering a judgment against the insured. A direct action could be accomplished in either of two ways: 1) insurance companies could be required to consent to direct actions; or 2) the legislators could amend present statutes to allow direct actions in nonresident defendant situations.[48] Safeguards, it is submitted, could be instituted to protect a defendant from a gross abuse of a direct action statute. For instance, such an abuse would arise if a California plaintiff instituted a suit in his home state against the insurer of a New Jersey defendant and forced the carrier to defend an action which arose in Florida. This would place an unfair burden on the insurer in the preparation of its defense because of the great distance between the accident state and the forum state. The doctrine of *forum non conveniens* could help provide adequate protection for the defendant while securing a fair disposition of the plaintiff's claim. Determinative factors of *forum non conveniens* are:

> [R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; cost of obtaining attendance of witnesses; possibility of a view, if appropriate; and all other practical problems that would make the trial of a case easy, expeditious and inexpensive. In appraising the factors of public interest, it is also appropriate to give some consideration to the relative state of trial calendar congestion in the districts involved.[49]

Also, the doctrines of "substantial interest" or *lex loci delicti* will be applied, regardless of the state in which the action is instituted,[50] and will further help to protect the defendant.

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within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido.

See also Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954) (Court held the Louisiana direct action statute constitutional).

48 Comment, 53 CORNELL L. REV. 1108, *supra* note 23, at 1120.

49 United States v. General Motors Corp., 183 F. Supp. 858, 860 (S.D.N.Y. 1960).

50 The choice of law in tort cases, depending on the jurisdiction, is governed by either of two theories, the *lex loci delicti* doctrine or "substantial interest" doctrine. The former rule calls for the application of the law of the state where the wrong occurred. In applying the substantial interest doctrine, the court determines the applicable law based upon the interest of the litigants and the states involved. The court measures a multitude of factors subjectively and the state which holds the greatest interest in the controversy will have its laws applied to the case. Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Pfau v. Trent Alum. Co., 106 N.J. Super. 324, 255 A.2d 792 (App. Div. 1969), *rev'd*, 55 N.J. 511, 263 A.2d 129 (1970); Mullane v. Stavola, 101 N.J. Super. 184, 243 A.2d 842 (L. Div. 1968); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

A direct action statute offers no practical advantage over substituted service because of the constant threat of violation of the cooperation clause by the insured. The purpose of a cooperation clause is to protect the insurer's interest and prevent collusion between the insured and the injured person.[51]

> The design of the [cooperation] provision in question was not only to obviate the risk of a covinous or collusive combination between the assured and the injured third party, but also to restrain the assured from voluntary action materially prejudicial to the insurer's contractual rights, especially in the exercise of its exclusive function to defend claims made under the policy.[52]

This principle has historically involved the situation where jurisdiction has been obtained over the insured and he is asked to cooperate with the insurer in the preparation of his defense. However, in a nonresident defendant situation, an injured party cannot gain service of process over the insured and wants to force the insurer to defend when there is a distinct possibility that a violation of the cooperation clause will occur. A default by the insured could seriously prejudice the insurer if he were forced to defend without the cooperation of the insured. On the other hand, if the insurer were allowed to disclaim liability because of a cooperation clause violation, the plaintiff would have no available remedy, unless he could locate and serve the defendant, which he would have presumably already discovered to be impossible.

Two methods of handling the situation have been suggested: 1) force the insurer to defend notwithstanding cooperation clause violations; or 2) grant the defendant immunity from imposition of personal liability over the policy limits so that he will be encouraged to appear.[53] The first would be impractical because of the obvious prejudicial effect on the insurer. The second method, however, has distinct advantages; it would allow a trial on the merits with the defendant being present, and it would allow the plaintiff a recovery to the extent of the policy limits, thereby mitigating his losses. Regardless of the approach taken by the legislature, action is required to provide more modern and realistic protection for a plaintiff in a nonresident situation.

Steven P. Russo

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51 Kindervater v. Motorists Cas. Ins. Co., 120 N.J.L. 373, 199 A. 606 (Ct. Err. & App. 1938).

52 *Id.* at 376, 199 A. at 608.

53 Comment, 53 CORNELL L. REV. 1108, *supra* note 23, at 1120.