10-1978

Lee-Hy Paving Corp. and Davis E. Clem v. O'Connor

Lewis F. Powell Jr.

Preliminary Memo

October 27, 1978 Conference
List 3, Sheet 2

No. 78-410

LEE-MY PAVING CORP.

v.

O'CONNOR

Timely

Cert to CA 2
(Friendly, Gurfein & Meskill)
Federal/Civil

Please see Preliminary Memo in No. 78-268, Gillespie v. Schwartz, October 27, 1978 Conference (List 3, Sheet 2).

Two responses have been filed.

10/13/78 Spaeth

CA 2 Opinion in Petition

ME

I'm not sure of this →

Beyond the absence of a conflict, there are two reasons for denying certiorari. First, the second circuit here most likely was correct in its ruling. As the preliminary memorandum states, this is in effect New York's judicial equivalent to the direct action statute approved by this Court in Watson v. Employer's Liability Assurance Corp., 348 U.S. 66 (1954). Thus, the true party in interest is the insurance company that is contractually obligated to defend the suit and that will have to pay if it loses. The "minimum contacts" necessary for due process, therefore, are those between the insurance company and the State--not between the named defendant and the State.

Second, insofar as the named defendant has any due process difficulties with New York's jurisdiction over him, these will arise only if the "direct action" of Miniciello fails to operate properly. Thus, for example, the defendant's home State might grant collateral estoppel effect to the New York judgment in a subsequent in personam suit for some liability not covered by the defendant's insurance policy. If this were to occur, however, the Court could review the question on appeal from the later judgment.

Accordingly, I would deny certiorari.

October 27, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19..
Announced ....., 19.

No. 78-410

LEE-BY PAVING CORP.

v.

O'CONNOR

Same vote as 78-268

	HOLD FOR	CERT		JURISDICTIONAL STATEMENT			MERITS	MOTION		ARGUED	NOT VOTING
		G	D	N	POST	DIS	REV	AFF	G	D	
Burger, Ch. J.											
Brennan, J.											
Stewart, J.											
White, J.											
Marshall, J.											
Blackmun, J.											
Powell, J.											
Rehnquist, J.											
Stevens, J.											

lfp/ss 10/28/78

No. 78-410 Lee-Hy v. O'Connor

MR. JUSTICE POWELL, dissenting.

Respondents' decedent, a New York resident, was killed in an accident near Richmond, Virginia, when he was struck by a vehicle owned by petitioner Lee-Hy Paving Corp. and operated by petitioner, Clem, an employee of Lee-Hy. Respondent, administratrix of her husband's estate, instituted this suit in the District Court for the Eastern District of New York, claiming damages for the personal injuries to and wrongful death of her husband. Petitioner, Lee-Hy, carried public liability insurance with Royal-Globe Insurance Co. and Continental Casualty Co., both doing business in New York but neither having its principal place of business located there. Upon filing her complaint, respondent sought ~~an order~~ and obtained an order permitting under New York law to attach the contractual obligations of the insurance companies to defend and indemnify Lee-Hy. ~~The requested attachment order was granted by~~ The Distric Court, ~~which thereafter~~ denied petitioner's motion to vacate the attachment and dismiss

ramifications in the ~~vast~~ specious arena of personal injury litigation. It raises a ~~serious and troublesome issues of~~ question as to the fundamental fairness ~~as to~~ of allowing persons ~~quasi in rems~~ to be sued in states remote from their places of residence and the scenes of accidents. ~~And~~ Moreover, it seems to me that the rationale of our recent decision in Shaffer v. Heitner, 433 U.S. 186 (1977) at least casts doubt on the correctness of the decision of the Court of Appeals. I therefore would grant certiorari and set the case for argument.

The petitioners, ~~the~~ defendants in this negligence suit instituted in New York, are residents of Virginia. The accident occurred there, and it is conceded that neither ~~of~~ petitioners has any contacts ~~or relations~~ in or with the state of New York. Yet, on a theory of quasi in rem jurisdiction ~~supporting~~ derived from the attachment, petitioners have been subjected to personal jurisdiction - with the risk of substantial personal liability - in New York. Under the rationale of the Circuit Court's decision, it would have

Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966), and applied in the federal courts of the Second Circuit in Minichiello v. Rosenberg, 410 F.2d 106 (1968). In Seider jurisdiction was predicated on the fiction that the insurance company's obligation to indemnify the policyholder was a "debt" that the plaintiff in a negligence suit could attach as a "res". In Minichiello, ~~an opinion written by Judge Friendly~~, the Court reasoned that the New York Court of Appeals in Seider had created judicially a direct action statute similar to that passed by the Louisiana legislature and held to be constitutional in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). In that case, the statute in question allowed an injured person ~~action~~ to sue directly ~~against~~ a liability insurance company that had issued a policy agreeing to pay, up to designated limits, the established claims of persons injured by the insured. But the Louisiana statute was limited to torts committed within that State, a fact ~~that loomed large~~ emphasized in the Court's decision. It was reasoned

and scene of the tort are readily accessible to the trier of fact. Finally, concern was expressed that residents of Louisiana would not obtain jurisdiction over foreign tortfeasors if they could not do so in Louisiana.

In Minichiello the Court of Appeals recognized that the judicially created direct action in New York advanced this theory of jurisdiction substantially beyond that of the Louisiana statute, but nevertheless concluded that quasi in rem jurisdiction existed. It emphasized New York's interest in protecting its residents and providing them with a ready means of suing foreign tortfeasors, which was sufficient to satisfy due process requirements.

In this case, the Court of Appeals for the Second Circuit declined to reconsider its holding in Minichiello on the ground, strongly urged by petitioners, that the Seider doctrine had been undermined by Shafer v. Heitner, supra. The Court of Appeals viewed the "overriding teaching of Shafer" as requiring

thought to be true even though concededly it may be more expensive, and therefore more costly to the insurers, to defend a litigation several hundred miles away from the site of the accident, the residence of the defendants and the location of witnesses. In reaching a similar conclusion with respect to whether suit in New York would be "unfair to the nominal defendants" (the petitioners here), the court thought it ironical that they should complain because they "will not pay the judgment, nor manage the defense". The court did note that no "other state could constitutionally give collateral estoppel effect to a Seider judgment".

Although I would agree that no such collateral estoppel should be allowed, the view expressed by the Court of Appeals is dictum that may or may not be followed in other jurisdictions.

As to other possible adverse consequences, the Court did say that it was not foreclosing the possibility of a denial of due process in circumstances not presented in this case.

I find the decision of the Court of Appeals disturbing. The reference to petitioners as "nominal defendants" disregards many of the "realities" that bear upon whether alleged tortfeasors, sued in a remote jurisdiction, are denied the fairness required by the Due Process Clause. It is novel doctrine, at least for me, to refer to the parties defendant in a negligence case as being only the "nominal" parties in interest where they happen to have liability insurance. In this case, for example, petitioners were summoned to appear in the New York court and participate in the defense of the suit in essentially the same manner as if it had been brought in Virginia. They are required to do this 300 miles from their residences and places of business,

in a remote forum also are not ~~inconsequential~~ insubstantial. It is routine procedure for the judge and jury to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local geography where this is relevant. In short, all of the considerations applicable to forum non conveniens - a doctrine based on fairness - cut against any general application of the Seider doctrine.

~~More fundamentally perhaps~~, In addition, there is the ever-present possibility of a second suit in the jurisdiction where the accident occurred. The opinion of the Court of Appeals seems to assume, by its reference to petitioners as nominal defendants, that the only real parties in interest are the insurance companies. ~~To be sure,~~ A judgment in the New York case cannot exceed the amount indemnified by the policies of insurance. But damage suit judgments, especially in recent years, often exceed insured limits. In this case, for example, if respondent wins a judgment that exhausts the will be

~~many instances~~ the hazards of a second trial may exceed those of the first. ~~Whatever seldom totally~~ ~~in precisely the same manner, and petitioners could be put the hazard of a second jury verdict and judgment. Whether these concerns materialize or not, the~~ fact that petitioners could be subjected to this sort of injustice - being required to undergo two trials rather than one - raises for me serious questions of ~~fundamental~~ fairness.

X X X

Note to David: When you edit and revise this draft, please provide some footnotes - including a strong citation to Judge Anderson's dissent in Minichiello.

If in sum, the judicially created Sanda doctrine ~~can not~~ ~~warrant presuming~~ raises serious questions of due process. It hardly seems consonant with the standards of fairness embodied in

1st DRAFT

SUPREME COURT OF THE UNITED STATES

LEE-HY PAVING CORP. AND DAVIS E. CLEM *v.* MARGUERITE T. O'CONNOR, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-109. Decided November —, 1978

MR. JUSTICE POWELL, dissenting.

This case presents the question whether the Due Process Clause permits a tort plaintiff to obtain jurisdiction in New York over a defendant whose sole contact with the State arises from the defendant's contract for indemnity with a company that does business in New York. The case presents an issue of considerable importance with troublesome ramifications in the spacious arena of personal injury litigation. Moreover, it seems to me that the rationale of our recent decision in *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), is at odds with the decision of the Court of Appeals here. I therefore would grant certiorari and set the case for argument.

The petitioners are residents of Virginia. While working for petitioner Lee-Hy Paving Corp. (Lee-Hy) in Virginia, the respondent's decedent (a New York resident) was killed when Lee-Hy's grader, operated by petitioner Clem, struck him near Richmond, Va. The respondent instituted this suit in the District Court for the Eastern District of New York as executrix for her husband's estate, claiming damages for the wrongful death of her husband. In order to obtain jurisdiction over the petitioners, who are connected in no other connection to New York, the respondent sought and obtained under New York law an order attaching the contractual obligations of two nonparty companies doing business in New York to defend and indemnify Lee-Hy. The District Court denied petitioner's motion to vacate the attachment and dismiss the suit. Acknowledging that there was a "substantial ground for difference of opinion" on the question

of law and that the issue was an important one, the District Court certified an appeal to the Court of Appeals under 28 U. S. C. § 1292 (b).

The Second Circuit affirmed.[6] The court based its ruling on the theory of *quasi in rem* jurisdiction adopted by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). In *Seider*, personal jurisdiction was predicated on the fiction that the insurance company's obligation to indemnify the policyholder was a "debt" that the plaintiff in a negligence suit could attach as a "res." In *Minichiello* v. *Rosenberg*, 410 F. 2d 106 (1968), the Second Circuit affirmed the constitutionality of *Seider* jurisdiction, reasoning that the New York Court of Appeals had created judicially a direct action law similar to the Louisiana statute held constitutional in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954). The *Minichiello* court recognized that the *Seider* doctrine differed in one important respect from the Louisiana direct action statute of *Watson*: Under *Seider* there was no requirement that the tort for which redress was sought have occurred in the State asserting jurisdiction. Despite the Court's emphasis in *Watson* on the location of the tort, the Second Circuit in *Minichiello* ruled that New York's interest in protecting its residents and providing them with a ready means of suing foreign tortfeasors was sufficient to justify *Seider* jurisdiction under the Due Process Clause.[7]

---

[6] The Court of Appeals decided this case along with two others with respect to which certiorari is sought: [illegible] v. Schwartz, No. 78-268, and *Boston Hospital for Women* v. *Schwartz*, No. 78-461. In each of these cases, residents of other States were sued in New York for torts occurring outside of New York. The sole basis for jurisdiction in each is the insurance policy of the defendant issued by a company doing business in New York.

[7] In his persuasive dissent in *Minichiello*, Judge Anderson argued that *Watson* was based primarily on a State's strong interest in having jurisdiction with respect to actions which arise within the State's borders. See *Minichiello*, 410 F. 2d, at 113-117. Thus, Judge Anderson concluded that the state asserting jurisdiction of the state where the accident occurred

In the case at bar, the petitioners unsuccessfully urged reconsideration of *Minichiello* on the ground that the *Seider* doctrine had been undermined by *Shaffer v. Heitner, supra.* The Court of Appeals viewed the "overriding teaching of *Shaffer*" as requiring courts to look to the "realities" of the asserted grounds for jurisdiction. As far as the insurance companies were concerned, the court found no unfairness in their being subject to the jurisdiction of New York courts, as they do business in New York. The court thought that this was true even though often it is more expensive (and therefore more costly to insurers) to defend a lawsuit brought several hundred miles from the site of the accident, the residence of the defendants and the location of the witnesses. The court reached a similar conclusion concerning the fairness of a suit brought in New York against "the nominal defendants," the petitioners herein. The court thought it ironical that they should complain even though they "will not pay the judgment, nor manage the defense."[3]

I find the Court of Appeals' decision disturbing. Although the insurance companies' contact with New York is important in determining whether it is fair for the New York courts to assert their jurisdiction, our decision in *Watson* indicated that the difficulties of defending a negligence case far from the place of the injury should be taken into account under the Due Process Clause. See *Watson v. Employers Liability Assurance Corp.,* 348 U.S., at 72. Other trial difficulties are substantial. It is routine procedure for the judge and jury[4] to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions

---

qualify as the persons [illegible] the assertion of jurisdiction by the State of the plaintiff's residence. See [illegible], at 123 [illegible] dissenting).

[3] The court did note that [illegible] would [illegible] the [illegible] judgment." Although I agree that [illegible] ironical [illegible] doctrine that may or may not be followed in other jurisdictions.

[4] See E. Cleary, McCormick on Evidence § 216 (2d ed. 1972).

and geography. In short, many of the factors traditionally considered under the doctrine of *forum non conveniens*—itself a doctrine based on fairness—may also pertain to the fairness of a court hundreds of miles from the location of an accident exercising its jurisdiction over the parties to the resulting tort suit.[1]

Moreover, the Court of Appeals' reference to the petitioners as "criminal defendants" disregards many of the "realities" that bear upon whether an alleged tortfeasor, sued in a jurisdiction remote from his home and the location of the accident, is forced the fairness required by the Due Process Clause. It is novel doctrine, at least for me, to refer to the interest of defendants to negligence actions as "nominal" merely because they have insurance. In this case, for example, petitioners will be summoned to appear in a court in New York, and will be required to participate in the defense of the suit in essentially the same manner as if it had been brought in Virginia. They are required to do this 300 miles from their residences and place of business, confronted with all of the uncertainties caused by delays that often stretch a trial over several days or even weeks.

In addition to the problems posed for both the insurer and the insured by a litigation *located hundreds of miles from* the scene of the tort, there is the ever-present possibility of a second suit in the jurisdiction where the accident occurred. The opinion of the Court of Appeals seems to assume by its reference to petitioners as nominal defendants that the only real parties in interest are the insurance companies. To be sure, a judgment against the petitioners in the New York courts cannot exceed the amount of indemnification provided under the insurance policies. But judgments for tort damages, especially in recent years, often have exceeded insured limits. In this case, for example, if respondent wins a judgment that exhausts the obligation of the insurer, the respondent will be free to sue petitioners in Virginia where they would be forced to go through a second trial—possibly with-

[1] *See Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947).

out the benefit of lawyers supplied by the insurance companies. Moreover, as every litigation lawyer knows, the hazards of a second trial may exceed those of the first; witnesses seldom tell their story precisely the same way twice, and often new evidence is introduced. To say that the legal rights of insured defendants are not being adjudicated, despite their substantial role in the defense of the suit and despite the potential loss of their right to the insurance company's legal representation, begs the question. To what extent must an individual be involved in the litigation before the fundamental fairness requirements of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), are applicable?

In sum, the judicially created *Seider* doctrine raises serious questions of due process. To me it does not appear consonant with the standards of fairness enunciated in *International Shoe* v. *Washington*, 326 U. S. 310 (1945), and strongly reiterated in *Shaffer* v. *Heitner*, *supra*. The issues presented are of concern to insurers and insureds in every State as well as to state legislators responsible for the fairness of long-arm statutes. The case merits plenary consideration by this Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 21, 1978

Re: 78-410 - Lee-Hy Paving Co. v. O'Connor

Dear Lewis:

I repeat my agreement with what you say in your November 14 circulation because it fully supports a grant of cert. I would hope it will stimulate a fourth vote. I see no utility in anything less.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

November 22, 1978

Court .....

Argued ...., 19...

Submitted .... 19...

Voted on ...., 19...

Assigned ...., 19...

Announced ...., 19...

No. 78-41(

LEE-HY PAVING CORP.

vs.

O'CONNOR

Relisted for Mr. Justice Powell.

Relist
for
LFP.

	HOLD FOR	CERT. G	CERT. D	CERT. N	JURISDICTIONAL STATEMENT Post	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	SUMM.	NOT VOTED
Burger, Ch. J													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

P.1

28 NOV 1978

FILE COPY

PLEASE RETURN TO FILE

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

LEE-HY PAVING CORP. AND DAVIS E. CLEM v. MARGUERITE T. O'CONNOR ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-409. Decided December —, 1978

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

This case presents the question whether the Due Process Clause permits a tort plaintiff to obtain jurisdiction in New York over a defendant whose sole contact with the State arises from the defendant's contract for indemnity with a company that does business in New York.[1] The case presents an issue of considerable importance, with troublesome ramifications in the spacious arena of personal injury litigation. Moreover, it seems to me that the rationale of our recent decision in *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), is at odds with the decision of the Court of Appeals here. I therefore would grant certiorari and set the case for argument.

The petitioners are residents of Virginia. While working for petitioner Lee-Hy Paving Corp. (Lee-Hy) in Virginia, the respondent's decedent (a New York resident) was killed when Lee-Hy's grader, operated by petitioner Clem, struck him near Richmond, Va. The respondent instituted this suit in the District Court for the Eastern District of New

---

[1] Along with *Lee-Hy Paving Corp.* v. *O'Connor*, the Court of Appeals decided two other cases with respect to which certiorari is sought: *Gillespie* v. *Schwartz*, No. 78-268, and *Boston Hospital for Women* v. *Schwartz*, No. 78-917. In each of these cases, residents of other States were sued in New York for torts occurring outside of New York. The sole basis for jurisdiction in each is the insurance policy of the defendant, issued by a company doing business in New York. Although I write only with respect to *Lee-Hy Paving Corp.* v. *O'Connor*, the reasons stated in my opinion here would support the granting of certiorari in all three cases.

York as executrix for her husband's estate claiming damages for the wrongful death of her husband. In order to obtain jurisdiction over the petitioners, who are conceded to have no other connection to New York, the respondent sought and obtained under New York law an order attaching the contractual obligations of two insurance companies doing business in New York to defend and indemnify Lee-Hy. The District Court denied petitioner's motion to vacate the attachment and dismiss the suit. Acknowledging that there was a "substantial ground for difference of opinion" on the question of law, and that the issue was an important one, the District Court certified an appeal to the Court of Appeals under 28 U. S. C. § 1292 (b).

The Second Circuit affirmed. The court based its ruling on the theory of *quasi in rem* jurisdiction adopted by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). In *Seider*, personal jurisdiction was predicated on the fiction that the insurance company's obligation to indemnify the policyholder was a "debt" that the plaintiff in a negligence suit could attach as a "res." In *Minichiello* v. *Rosenberg*, 410 F. 2d 106 (1968), the Second Circuit affirmed the constitutionality of *Seider* jurisdiction, reasoning that the New York Court of Appeals had created judicially a direct action law similar to the Louisiana statute held constitutional in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954). The *Minichiello* court recognized that the *Seider* doctrine differed in one important respect from the Louisiana direct action statute of *Watson*: Under *Seider* there was no requirement that the tort for which redress was sought have occurred in the State asserting jurisdiction. Despite the Court's emphasis in *Watson* on the location of the tort, the Second Circuit in *Minichiello* ruled that New York's interest in protecting its residents and providing them with a ready means of suing foreign tortfeasors was sufficient to justify *Seider* jurisdiction under the Due Process Clause.*

* In his persuasive dissent in *Minichiello*, Judge Anderson argued that

In the case at bar, the petitioners unsuccessfully urged reconsideration of *Minichiello* on the ground that the *Seider* doctrine had been undermined by *Shaffer* v. *Heitner*, *supra*. The Court of Appeals viewed the "overriding teaching of *Shaffer*" as requiring courts to look to the "realities" of the asserted grounds for jurisdiction. As far as the insurance companies were concerned, the court found no unfairness in their being subject to the jurisdiction of New York courts, as they do business in New York. The court thought that this was true even though often it is more expensive (and therefore more costly to insurers) to defend a lawsuit brought several hundred miles from the site of the accident, the residence of the defendants, and the location of the witnesses. The court reached a similar conclusion concerning the fairness of a suit brought in New York against "the nominal defendants" (the petitioners here). The court thought it ironical that they should complain even though they "will not pay the judgment, nor manage the defense."[3]

I find the Court of Appeals' decision disturbing. Although the insurance companies' contact with New York is important in determining whether it is fair for the New York courts to assert their jurisdiction, our decision in *Watson* indicated that the difficulties of defending a negligence case far from the place of the injury should be taken into account under the Due Process Clause. See *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S., at 72. Often those difficulties are substantial. It is routine procedure for the judge and jury[4]

Watson was based primarily on a State's strong interest in having jurisdiction with respect to tortious activity within the State's borders. See *Minichiello*, 440 F. 2d, at 113–114. Thus, Judge Anderson concluded that "statutes asserting jurisdiction of the state where the accident occurred could, in due process, withstand the assertion of jurisdiction by the state of the plaintiff's residence does not." *Id.*, at 116 (footnote omitted).

[3] The court did note that no "other state could constitutionally give collateral estoppel effect to a *Seider* judgment." Although I agree that no such effect should be allowed, the court's opinion in this regard is dictum that may or may not be followed in other jurisdictions.

[4] See E. Cleary, McCormick on Evidence § 216 (2d Ed. 1972)

to view the scene of the accident often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography. In short, many of the factors traditionally considered under the doctrine of *forum non conveniens*—itself a doctrine based on fairness—may also pertain to the fairness of a court hundreds of miles from the location of an accident exercising its jurisdiction over the parties to the resulting tort suit.[4]

Moreover, the Court of Appeals' reference to the petitioners as "nominal defendants" disregards many of the "realities" that bear upon whether an alleged tortfeasor, sued in a jurisdiction remote from his home and the location of the accident, is denied the fairness required by the Due Process Clause. It is novel doctrine, at least for me, to refer to the interest of defendants to negligence actions as "nominal" merely because they have insurance. In this case, for example, petitioners will be summoned to appear in a court in New York, and will be required to participate in the defense of the suit in essentially the same manner as if it had been brought in Virginia. They are required to do this 300 miles from their residences and place of business, confronted with all of the uncertainties caused by delays that often stretch a trial over several days or even weeks.

In addition to the problems posed for both the insurer and the insured by a litigation located hundreds of miles from the scene of the tort, there is the ever-present possibility of a second suit in the jurisdiction where the accident occurred. The opinion of the Court of Appeals seems to assume, by its reference to petitioners as nominal defendants, that the only real parties in interest are the insurance companies. To be sure, a judgment against the petitioners in the New York courts cannot exceed the amount of indemnification provided under the insurance policies. But judgments for civil damages, especially in recent years, often have exceeded insured limits. In this case, for example, if respondent wins a judg-

[4] See *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 507–509 (1947).

ment that exhausts the obligation of the insurers, the respondent will be free to sue petitioners in Virginia where they would be forced to go through a second trial—possibly without the benefit of lawyers supplied by the insurance companies. Moreover, as every litigation lawyer knows, the hazards of a second trial may exceed those of the first; witnesses seldom tell their story precisely the same way twice, and after new evidence is introduced. To say that the legal rights of insured defendants are not being adjudicated, despite their substantial role in the defense of the suit and despite the potential loss of their right to the insurance company's legal representation, begs the question: To what extent must an individual be involved in the litigation before the fundamental fairness requirements of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), are applicable?

In sum, the judicially created *Seider* doctrine raises serious questions of due process. To me it does not appear consonant with the standards of fairness enunciated in *International Shoe v. Washington*, 326 U. S. 310 (1945), and strongly reiterated in *Shaffer v. Heitner*, *supra*. The issues presented are of concern to insurers and insureds in every State, as well as to state legislators responsible for the fairness of long-arm statutes. The case merits plenary consideration by this Court.

December 1, 1978

Court .....
Argued ..... , 19..
Submitted ..... 19...

Voted on ..... , 19...
Assigned ..... 19 ..
Announced ..... , 19...

No 78-410

LEE-HY PAVING CORP.

vs.

O'CONNOR

Relisted for Mr. Justice Powell.

Order List

	HOLD FOR	CERT G	CERT D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT PROB	JURISDICTIONAL STATEMENT SUM	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													