A DELAWARE PHOENIX: THE FALL OF SEQUESTRATION AND THE ENACTMENT OF A DIRECTOR SERVICE STATUTE

By Rodman Ward, Jr.*

This article discusses the new Delaware statute providing substituted service of process in Delaware on directors of Delaware corporations in light of the two recent cases which treat the constitutionality of the Delaware writ of sequestration. The prevalence of incorporation in Delaware makes these events important to corporate practitioners.

I. SEQUESTRATION

Professor Ernest L. Folk, in his comprehensive work on the Delaware General Corporation Law, included a forty-five page appendix which dealt exhaustively with Delaware sequestration, both in law and practice. His introduction described the general function of sequestration:

For many years Delaware has had a unique procedural system, the effect of which is to center litigation involving Delaware corporations in the Delaware courts, and in particular, the Court of Chancery. Since a Delaware corporation itself is

---


4. Id. at 565 app. I.
normally amenable to court process within the state, the major
function of sequestration is to subject the corporation's nonresi-
dent directors, officers, and stockholders to the jurisdiction of the
Delaware courts. This system is applicable even though the
corporation does all of its business outside of Delaware, and
even though all of its directors and officers are nonresidents of
Delaware.\(^5\)

A plaintiff traditionally applies for a writ of sequestration at the
same time he files his complaint.\(^6\) In the petition for sequestration,
the plaintiff asks the trial court to appoint a special court officer (the
sequestrator) to seize a prospective defendant's assets found in
Delaware. The statute and supporting rule require that the
prospective defendant receive, post-seizure, advertised and mailed
personal notice.\(^7\) Special appearances are permitted to vacate or
"quash" the writ or to reduce the amount of property seized.\(^8\) If the
defendant enters a general appearance within a stated time, the
seizure is, in most cases, dissolved and the case proceeds on the
merits.\(^9\) If the defendant should fail to make a timely appearance, a
default is usually entered and the plaintiff, after an inquisition,
recovers his damages against the proceeds of the sale of the seized
property.\(^10\)

Sequestration process is not restricted to, nor does the statute or
rule refer to corporate litigation. On the face of the statute, any
person, resident anywhere, can have his Delaware property
sequestered and face compulsion to respond to a Delaware court on
any cause of action. As Folk points out, however, sequestration had
special utility in corporate litigation.\(^11\) Delaware law provided that

5. Id. at 569. See also, Folk & Moyer, Sequestration in Delaware: A Constitu-

6. The Delaware trial court system retains the historical division between law
(the Superior Court) and equity (the Court of Chancery). DEL. CODE ANN. tit. 10,
§§ 341, 541 (1974). Sequestration is available in Chancery and is authorized by DEL.
pursuant to DEL. CODE ANN. tit. 10, §§ 3506, 3507 (1974) and DEL. SUPER. CT. R. 4(b)
is essentially the same process in the Superior Court. In turn, FED. CIV. P. 4(e) makes
both sequestration and foreign attachment available to plaintiffs in the Delaware
federal district court. Since, for purposes of this article, there are no significant
distinctions between sequestration and foreign attachment, I shall refer to the entire
procedure, generally, as "sequestration." Both procedures survive Shaffer, but their
use must satisfy the constitutional standards it defines.

8. DEL. CH. CT. R. 12(b)(6); Schwartz v. Miner, 36 Del. Ch. 481, 133 A.2d 599 (Ch.
1957).
10. Id.
11. E. FOLK, supra note 3, at 570.
the situs of a share of stock in a Delaware corporation, regardless of
the actual location of the stockholder or the stock certificate, is in
Delaware. When the Uniform Commercial Code was passed, Delaware
law on the situs of securities was retained. Thus, sequestration made a
Delaware corporation's stockholders' property subject to seizure in
Delaware and the stockholders, themselves, subject to compulsion to
appear and defend. Since directors and officers usually own substantial
stock interests in their corporations, until very recently the appropriate
defendants in corporate litigation could usually be gathered before the
Delaware trial court.

The sequestration process was frequently used and the resulting
litigation produced some of the landmark cases in the development
of modern corporation law.

II. THE SHAFFER AND GREGG CASES

Recitation of its terms and sweep suggests that sequestration is
overly broad in its reach. Not only does the statute, on its face,
permit plaintiffs to lever nonresidents into personal appearance
based on a seizure of property totally unrelated to the claim to be
litigated; but, adding insult to injury, such property is frequently
subject to seizure due to a legal fiction abandoned in every other
state but Delaware.

These weaknesses were not secret and, over the years, many
defendants unsuccessfully attacked the constitutionality of the
process. Recently, however, two such challenges were successful.
The determinative challenge culminated in the U. S. Supreme Court
in Shaffer v. Heitner. Before Shaffer was decided, another attack, U.
S. Industries, Inc. v. Gregg, had reached a consistent result in the
Third Circuit.

A. Shaffer v. Heitner

The Shaffer case was a stockholder derivative suit involving
serious charges against officials of Greyhound Corporation ("Grey-

1975).
16. 540 F.2d at 143.
17. See, e.g., Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972); Cantor v. Sachs, 18
Del. Ch. 359, 162 A. 73 (Ch. 1952); Breeze v. Hughes Tool Co., 41 Del. Ch. 128, 189 A.2d
428 (1963); cf. Ownbey v. Morgan, 256 U.S. 94 (1921) (sustaining the constitutionality
of an earlier version of Delaware foreign attachment).
hound”). The plaintiff Arnold Heitner, as custodian for his son, was a Greyhound stockholder. He brought his suit in the Delaware Court of Chancery (“Chancery”) in the right of his corporation. Greyhound is chartered in Delaware, has its corporate headquarters in Arizona and operates throughout the United States. The complaint alleged that twenty-eight present and former officers and directors of Greyhound and its wholly owned subsidiary, Greyhound Lines, violated their fiduciary duties to the corporation and its stockholders by committing certain wrongful acts which caused Greyhound and Greyhound Lines to suffer judgments slightly in excess of $13,000,000 and a fine for criminal contempt of $600,000. At least some of the activities which led to the adverse court action and the $13,000,000 judgment took place in Oregon. The contempt fine was levied by a federal district court in Illinois.

Heitner sought jurisdiction over the individual defendants by the sequestration of their Greyhound stock. The individual defendants appeared specially and moved to quash the writ alleging that sequestration denied them due process of law, that their property was not capable of seizure in Delaware and that they did not have sufficient contacts with Delaware to sustain the jurisdiction of its courts.

The motion to quash was adjudicated in Chancery\(^\text{19}\) and on an appeal in the Delaware Supreme Court.\(^\text{20}\) Both courts sustained the writ.\(^\text{21}\) After noting probable jurisdiction,\(^\text{22}\) the U. S. Supreme Court reversed the Delaware Supreme Court because the defendants, whose property had been sequestered, had not had sufficient contacts with Delaware to sustain the jurisdiction of its courts. Delaware’s assertion of jurisdiction, based solely on the statutory presence of the defendants’ property in Delaware, violated the Due Process Clause.\(^\text{23}\)

In its reversal, the Supreme Court stated that a state court’s jurisdiction over persons’ interests in property located in the state is subject to the same standards of fairness and substantial justice as

21. Id. at 229, 348 F. Supp. at 1020. The analysis went as follows:
(1) Delaware can and has provided that a Delaware corporation’s stock is considered to be present in Delaware. (2) A court may exercise jurisdiction over property within its control regardless of other contacts. (3) Until the defendant appears, the court's jurisdiction is limited to the application of the Delaware property to the plaintiff's claim. (4) Upon the defendant's appearance, personal jurisdiction is based on consent.
23. 97 S. Ct. at 2387.
govern jurisdiction over the person. The Sequestration of Delaware property to compel the appearance of a nonresident property owner who, like the individual defendants, had no legally cognizable contacts with Delaware did not meet those standards. The Court recognized the argument that Delaware, as creator of the obligations owed by officers and directors to a domestic corporation, had an interest in defining and enforcing those obligations, but found that the argument was not applicable to the sequestration statute which had no such limitation or discernible focus. "Delaware law," the Court wrote,

bases jurisdiction not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors, ... the authorizing statute evinces no specific concern with such actions. Sequestration can be used in any suit against a nonresident ... and reaches corporate fiduciaries only if they happen to own interests in a Delaware corporation, or other property in the State.

B. U. S. Industries v. Gregg

The Gregg case, unlike Shaffer, involved no alleged internal corporate mismanagement. The plaintiff, U. S. Industries, Inc. ("USI"), originally sued Gregg in Chancery alleging fraud and breach of contract in connection with Gregg's sale of his Florida construction companies to USI. USI sought to compel Gregg's appearance by the sequestration of the USI stock (by then pledged as collateral) which Gregg had received for the sale of his companies. Federal diversity jurisdiction permitted Gregg to remove the case to the Delaware federal district court which sustained the sequestration against Gregg's motion to quash. Gregg then refused to appear and a default was entered against him.

On appeal from the default, the Third Circuit Court of Appeals reversed the District Court. The Court of Appeals found that Florida law, which controlled the question of Gregg's interest in the

24. Id. at 2584-85.
25. "Although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State and the litigation, the presence of the property alone would not support the jurisdiction." Id. at 2587.
26. Id. at 2585 (citations omitted).
28. 540 F.2d 142 (3rd Cir. 1976).
pledged stock, gave Gregg an interest which, under Delaware law, was subject to seizure. By applying a minimum contacts standard, the Court found that, in the absence of any other connection with Delaware, Gregg's interest in his USI stock in Delaware was an insufficient contact to support Delaware's assertion of jurisdiction. A petition for certiorari in the Gregg case, pending at the time of the Shaffer decision, has been dismissed.

III. THE POST-SHAFFER DILEMMA

A. Narrowing Federal Jurisdiction over Internal Corporate Governance

In view of sequestration's infirmities, the results in Shaffer and Gregg came as no great surprise. However, the setting in which the cases occurred made their effect significant in the area of the private litigation of stockholder and corporate rights. For several years before Shaffer, the Supreme Court had stressed the paramount role of state law in internal corporate governance. For example, in Cort v. Ash, Justice Brennan wrote:

Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

And in Santa Fe Industries, Inc. v. Green, decided only days before Shaffer, the Court emphasized the disclosure aspects of the securities laws and remitted a plaintiff who objected to the fairness of the terms of a Delaware cash merger to his appraisal remedy in Chancery. Most of the federal litigation in the area of corporate misfeasance had rested its jurisdictional base on rights of action implied from the federal securities laws. Cort and Green may be seen as part of a series of corporate and securities cases which limit the role

29. Id. at 155-56.
31. See, e.g., Folk & Moyer, supra note 5, at 756, passim.
32. 422 U.S. 66, 84 (1975).
33. 97 S. Ct. 1292 (1977).
34. Id. at 1303.
35. See, e.g., Green v. Santa Fe Indus., Inc., 533 F.2d 1283 (2nd Cir. 1976), rev'd, Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292 (1977) was the high water mark. See also, Fleischer, Federal Corporation Law: An Assessment, 78 Harv. L. Rev. 1146 (1965); Fleischer, Federal Regulation of Internal Corporate Affairs, 29 Bus. Law. 179
of federal law and broaden that of state law. Limitations on federal private rights of action and standing have been defined and strict standards of proof emphasized. The result of these cases, and perhaps their purpose as well, has been to pare back sharply the recent luxurious growth of private federal litigation in the corporate area.

B. Obtaining Jurisdiction in the State Court

As applied to Delaware corporations, the effect of these recent Supreme Court cases when coupled with the result in Shaffer was to remit the Delaware stockholders to a state forum and simultaneously, to take away the only effective method many of such prospective plaintiffs had to gather the necessary defendants together to respond to their suit.

In a stockholder's derivative action or class action, for example, the stockholder must obtain jurisdiction over both the responsible corporate officials and the corporation which is the subject of the suit. The corporation is, by definition, subject to the jurisdiction of the courts of (a) its state of incorporation and, if different, (b) the state of its principal place of business, as well. For pure ease of service, the state of incorporation is the preferable forum. In contrast to the practical problem of determining where the principal place of business actually is, the identity and address of the registered agent of each corporation is readily available on public file in the state of incorporation. As to those few companies that, contrary to law, have no registered agent, service on a designated public official is effective.


37. Sequestration was no less useful to the corporation, itself, when it wished to bring faithless fiduciaries to justice, or to third parties who had been wronged by a corporation and its officers and directors.

38. The definition of "principal place of business" was one of the "more obvious interpretative problems of the statutory language" in N.Y. BUS. CORP. LAW ch. 4, §1601(a) (New York Security Takeover Disclosure Act). See Proposed Regulation 1601(a)-3 and commentary thereto, furnished by an ad hoc group drawn from various interested committees of the New York State Bar Association and the Association of the Bar of the City of New York attached to a letter to Orestes J. Mihaly, Esquire, Assistant Attorney General of New York State, from Charles M. Nathan, Esquire, dated September 24, 1976.


Many directors may not be physically present in either the state of incorporation or the state of the principal place of business. A corporation need not be large to have directors drawn from several states. In larger companies, director residence in more than one jurisdiction would appear to be more the rule than the exception. Although the principal place of business may well be the residence of several directors, obtaining service on the remainder on their occasional visits to the corporate headquarters is simply a matter of "catch as catch can," and once suit is brought directors may well be wary of process servers.

A tort long-arm statute, where such a statute exists, is not a totally satisfactory solution.\(^{41}\) Determination of the "situs" of the wrong sought to be redressed will require either a grouping of contacts or the determination of the law of the place of the wrong.\(^{42}\) Acts sought to be redressed in corporate derivative or class litigation are frequently committed in several jurisdictions and their impact frequently involves a number of jurisdictions, as well. If a tort long-arm statute exists, a plaintiff's efforts to use it may well create a battleground for the type of preliminary skirmishing, so debilitating to plaintiffs, expensive to defendants, and wasteful of the courts' time, that plagued sequestration.

Since sequestration was an accretive survival from the past, there was much to be deplored about its forms and effect. To lawyers accustomed to notice pleading, the petition and related papers were

\(^{41}\) Such statutes, where they exist, are usually quite general and typically grant to state courts jurisdiction over such persons where a cause of action arises "from the commission of a tortious act within this state." See, e.g., HAW. REV. STAT. § 643-71 and COLO. REV. STAT. ANN. § 13-1-124 (1973). Most such statutes are based on the Uniform Interstate and International Procedure Act 1.03(a).

\(^{42}\) Some states have adopted choice of law rules based on a grouping of contacts. Some, such as Delaware, retain the concept of the law of the place of the commission of the tort. Friday v. Smoot, 58 Del. 488, 211 A.2d 594 (1965). Presumably, the determination of where a tort is committed for purposes of jurisdiction is no less difficult a question. Folk & Moyer, supra note 5, at 795-96, commented:

More seriously, if Delaware has no procedure to focus litigation in its state and federal courts, many claims, especially those involving breach of duty and other wrongdoing, will never be litigated. Derivative litigation in states other than Delaware is often severely hampered by restrictions that are usually more constraining than those that Delaware law imposes. Gaining jurisdiction over individual directors, officers, and control shareholders, often residing in different states or abroad, can be so burdensome that, if the merits of a case are ever reached, it is only after great delay and expense — factors that discourage all but the hardiest from pursuing well-helled wrongdoers who are often entitled to draw on corporate treasuries for all of their legal expenses. This is true whether the litigation is brought in a state or a federal court. Indeed, in the latter the difficulties are compounded by the special federal requirements that the citizenship of the parties be completely diverse.
prolix and convoluted, required “magic words,” and were subject to strict construction against the pleader. Although mailed notice was also made, advertised notice was required in a Delaware newspaper. Only the most underoccupied of persons could have read the advertised notice, which, by definition, no nonresident garnishee would ever see. Resting on an “everyone’s out of step but Johnny” view of the situs of corporate stock, the attachment invited inter-jurisdictional disputes over seized securities. Persons whose stock was suddenly possessed by “the sequestrator,” a shadowy, unpronounceable figure, often half a continent away, were angered and perplexed by the seizure. Particularly during the writ’s last death struggle, many persons were seriously prejudiced, not knowing whether to fight the attachment or wait for the slow resolution of the constitutional battle. A fight was expensive and duplicated existing challenges. To “wait and see” left a derivative defendant’s stock subject to a lien that required at least three sets of lawyers and one judge to undo even for the permitted quid pro quo exchange of security. Lastly, many lawyers believed that the writ was less than totally efficient at doing what was intended. Stock in nominee name, though attachable, was hard to find. Not all directors owned any stock or stock in sufficient quantities to make appearance desirable. If the director had pledged his stock, the pledgee could appear and have the writ quashed. Sequestration in its final days was a balancing act on an infirm base that frequently worked hardship on plaintiffs and defendants alike.

Sequestration survived so long because it served an important purpose. When the chartering state defines the obligations created by its laws, the benefits obtained are experience, expertise and uniformity. It would be difficult to exaggerate the importance of such factors to those who must live by legal rules.

46. For example, in U. S. Indus., Inc. v. Gregg, 540 F.2d 142, 146 (3d Cir. 1976), the Court of Appeals held that Florida law governed the nature of the plaintiff’s interest in the seized stock and Delaware law governed the question of situs. See also, Folk & Moyer, supra note 5, at 797.
47. In most cases the common sense of the practitioners involved made the process fairly simple.
Sequestration not only permitted access to Chancery, a court of experience and specialized competence, but also assisted the consistent development of a decisional law which could be relied on to avoid the burden of litigation in any forum, no matter how competent or fair that forum might be.\(^{51}\)

50. Milton Freeman, Esquire of the Washington, D.C., Bar expressed this view pungently:

My experience as just a lawyer walking into courtrooms is that when I go into a courtroom in Delaware, I meet a judge who knows about corporate law, who understands what I am talking about, and whether I like the decision or not, it is intelligent and responsive to the arguments I have made. I think they have got a judicial system that is for corporate purposes and considerations absolutely first-rate in its training.

When I walk into a federal court someplace else, I do not know what is going to happen. Let me give you an example of what happened in Cleveland [Moore v. GreatAmerica Corp., 274 F. Supp. 490 (N.D. Ohio 1967)]. One of our clients decided they had a little too much money, and they wanted to buy control of a Cleveland corporation, the stock of which was selling at $20 a share in the market. The client thought it would be nice if they offered $30 a share, and immediately a lawsuit was brought by the local Cleveland judge who said that this was a violation of law. This was before the Williams Act. The judge said that the idea of paying shareholders $30 in borrowed money would have to be very offensive to the stockholders and that they would not want to have borrowed money. Consequently, he enjoined the offer. Then a shareholder who had 20,000 shares said to us, “Look, I know that Judge Connell in the District Court is trying to protect me, but I have $6 million worth of stock at present values. If your client wants to give me $9 million, will you please prevent Judge Connell from protecting me?”

The court obliged him.

In the federal court, when we have represented managements, in every case we have been able with the aid of the federal courts to beat off the attackers. When we have represented somebody who is attacking, it seems that in almost every case, the federal courts were able to see to it that the managements stayed in power.

Symposium on Federal and State Roles in Establishing Standards of Conduct for Corporate Management, 31 BUS. L. 863, 1176 (1976). And as Folk and Moyer noted:

The Delaware courts have had long experience in construing its corporation law, which, although often revised, has remained sufficiently constant over a long period of time so that the crucial statutory clauses and phrases have acquired an interpretative gloss. The competence of Delaware courts in applying corporation law and their sensitivity to corporate needs, while often touted as a reason for Delaware incorporation, is more than mere puffing. The decisions exhibit excellent judicial craftsmanship. Given the fundamental premises of the Delaware corporation law, the cases effect a satisfactory balance of interests involved in corporation litigation. Abandoning a litigation-centering procedure would tend to disperse and confuse this body of law.

Folk & Moyer, supra note 5, at 795.


Apart from the Nader Group, the unfavorable views are generally found in the teaching profession; favorable views more typically emanate from practitioners.
Sequestration also supported Delaware's strong interests in formulating laws to protect stockholders in its corporations and affording a forum in which they could be enforced. For example, Justice Brennan, concurring and dissenting in *Shaffer*, identified three specific and interrelated Delaware public policies applicable to stockholder derivative litigation: (a) restitution to a local corporation victimized by misconduct, (b) regulatory interest, and (c) a forum to supervise and oversee the affairs of an entity created by Delaware law.52

The result in *Shaffer*, however correct it may have been, left Delaware, its corporations and their stockholders no effective procedure to satisfy these policies and interests.

52. Justice Brennan in *Shaffer* wrote:

[The chartering State has an unusually powerful interest in insure the availability of a convenient forum for litigating claims involving a possible multiplicity of defendant fiduciaries and for vindicating the State's substantive policies regarding the management of its domestic corporations. I believe that our cases fairly establish that the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action.

In this instance, Delaware can point to at least three interrelated public policies that are furthered by its assertion of jurisdiction. First, the State has a substantial interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct, even if the managerial decisions occurred outside the State. The importance of this general state interest in assuring restitution for its own residents previously found expression in cases that went outside the then-prevailing due process framework to authorize state-court jurisdiction over nonresident motorists who injure others within the State. More recently, it has led States to seek and to acquire jurisdiction over nonresident tortfeasors whose purely out-of-state activities produce domestic consequences. Second, state courts have legitimately read their jurisdiction expansively when a cause of action centers in an area in which the forum state possesses a manifest regulatory interest . . . that the conduct of corporate fiduciaries is just such a matter in which the policies and interests of the domestic forum are paramount. Finally, a State like Delaware has a recognized interest in affording a convenient forum for supervising and overseeing the affairs of an entity that is purely the creation of that State's law. For example, even following our decision in *International Shoe*, New York courts were permitted to exercise complete judicial authority over nonresident beneficiaries of a trust created under state law, even though, unlike appellants here, the beneficiaries personally entered into no association whatsoever with New York. . . . I, of course, am not suggesting that Delaware's varied interests would justify its acceptance of jurisdiction over any transaction touching upon the affairs of its domestic corporations. But a derivative action which raises allegations of abuses of the basic management of an institution whose existence is created by the State and whose powers and duties are defined by state law fundamentally implicates the public policies of that forum.

tit. 10, § 3114

A. The Provisions of the Statute

The Delaware Legislature acted promptly to fill the gap. On July 7, 1977, the Governor of Delaware signed a bill which enacted a statute authorizing substituted service on directors and other fiduciaries of Delaware corporations in cases arising out of such fiduciaries’ acts in that capacity. The statute, an appendix to this article, contains the following significant limitations and protections:

1. Effective Date. Such service can be made only for causes of action arising after September 1, 1977.

2. Persons Subject to Service. Only a nonresident “director, trustee or member of the governing body” (hereafter collectively “director”) of a Delaware corporation elected or appointed after September 1, 1977, or who serves in such capacity after June 30, 1978, is subject to substituted service.

3. Causes of Action. A director may be served only if he is a necessary or proper party in a suit by or on behalf of his corporation.


The purpose and intent of this legislation is to fill a void in enforcement and interpretation of Delaware corporation laws created by the decision of the United States Supreme Court on June 24, 1977, in Shaffer v. Heitner. In that case the court struck down 10 Del. C. § 366 which until now has frequently been the only means whereby nonresident corporate directors of Delaware Corporations could be brought before the courts of this State to answer for their conduct in managing the affairs of the corporation. Indeed, under 10 Del. C. § 366, the Courts of this State often provided the only forum where nonresident corporate directors of Delaware corporations from different states could be joined in the same law suit for such purposes. The Supreme Court did note that Delaware’s interest in regulating the affairs of corporations governed by Delaware law could be promoted by enactment of a statute subjecting nonresident corporate directors to the jurisdiction of the Delaware courts.

Delaware has a substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them. In promoting that interest, it is essential that Delaware afford a convenient and available forum for supervising the affairs of Delaware corporations and the conduct of directors of Delaware corporations. This legislation is designed to accomplish that objective. The legislation is modeled after similar statutes in Connecticut, North Carolina and South Carolina, which were cited as examples by the Supreme Court in the Heitner case and in Michigan.

54. S. 341 §§ 2, 4.
or if he is charged with a violation of his duty in his capacity as a director.\(^{56}\)

4. **Notice.** Service must be made on the registered agent of the corporation in Delaware, or, if there is none, on the Secretary of State. In addition, the clerk of the court must mail the summons and complaint to the director’s corporation’s principal place of business and to the director’s last known address.\(^{57}\)

5. **Consent.** Acceptance of election as a director after September 1, 1977, or service as a director after June 30, 1978, acts as consent to such service.\(^{58}\)

The statute plows no new ground. Alaska,\(^{59}\) Connecticut,\(^{60}\) Indiana,\(^{61}\) Maine,\(^{61a}\) Michigan,\(^{62}\) Montana,\(^{63}\) North Carolina,\(^{64}\) North Dakota,\(^{65}\) South Carolina,\(^{66}\) South Dakota,\(^{67}\) and Wisconsin\(^{68}\) have statutes and/or rules of court which make fiduciaries of domestic corporations subject to suit in their courts; some of which have existed for many years. All such statutes or rules except that of Connecticut take the form of simple declarations of amenability to service.\(^{69}\) The Connecticut statute, by contrast, specifically recites that election or service as a director acts as consent to the jurisdiction of the Connecticut courts.

---

56. *Id.*


68. Wis. Stat. § 262.05(3) (1973).

69. The Indiana statute is typical:

34–2–2–1 [2–804a]. Service of Process: Process on nonresident of Corporations. — In all actions commenced in any court of general jurisdiction in the state of Indiana by or against any corporation incorporated under the laws of the state of Indiana, in which action one (1) or more of the directors of such corporation is a necessary or proper party and is a nonresident of the state of Indiana, service of summons upon such director for the purpose of obtaining jurisdiction of the person of such director in said action may be had and obtained by serving said summons on the resident agent of said corporation.

In every such case where service of process is had upon such resident agent of said corporation, he shall forward a copy of the process by registered mail to such person at his last known address. Any service had under this act shall be returnable in not less than thirty (30) days.
The Delaware statute was a refinement of the Connecticut statute. At the time of the 1967 corporation law revision, Professor Folk had urged the Connecticut statute as a model for Delaware.\(^70\) The Connecticut statute was cited as an example of such statutes by the Supreme Court in *Shaffer*\(^71\) and, like the South Carolina statute,\(^72\) it has passed constitutional muster in a reported decision.\(^73\)

B. The Statute and Minimum Contacts

Of course, §3114 has yet to be tested in the courts. The constitutional attack on sequestration as it applied to corporate litigation succeeded because the Supreme Court found that no minimum contacts existed between the defendant directors of Greyhound and Delaware. "Minimum contacts," as a concept, was introduced in the Supreme Court's opinion in *International Shoe Co. v. Washington.*\(^74\)

Before the *Shaffer* decision, some debate had existed as to whether the *International Shoe* concept of minimum contacts applied to state court jurisdiction based on seizure of property as recognized in the later part of the nineteenth century in *Pennoyer v. Neff.*\(^75\) The court in *Pennoyer* had actually held that Oregon lacked jurisdiction over the nonresident defendant because the plaintiff's claim was against the defendant personally and none of his property in Oregon had been seized. For the future, however, *Pennoyer's* significance lay in the Court's view that a state's jurisdiction over a nonconsenting defendant could be grounded either on personal service within the state or, to the extent of the value of that property, on the seizure of the defendant's property within the state. The requirement for adequate notice to the defendant in cases of seizure was expressed later.\(^76\) By inference from *Pennoyer,* courts which had sustained sequestration grounded their holdings on the assumption that once a defendant's property had been properly seized, personal

\(^{70}\) Folk & Moyer, *supra* note 5, at 798.

\(^{71}\) 97 S. Ct. at 2586 n.47.


\(^{74}\) 326 U.S. 310, 316 (1945). In *International Shoe,* the defendant corporations had employed eleven to thirteen resident salesmen to exhibit samples, rent showrooms, and solicit orders in the state of Washington. These continuous and systematic contacts, together with adequate notice, were held to be sufficient minimum contacts to support the exercise of the jurisdiction of the Washington state courts over the defendants.

\(^{75}\) 95 U.S. 714 (1877).

obligations could be determined and satisfied at least to the extent of the seized property. The decision to obtain release of the seized property by a general appearance was seen as a matter of consent to jurisdiction. In the first portion of Shaffer, the court resolved the debate over minimum contacts by applying the same contact requirements to state jurisdiction over all actions whether grounded on personal service or seizure of property. Once that resolution had been made, the question in Shaffer became whether the applicability of Delaware law to the directors' relationships with the corporation was, in itself, a sufficient contact to support Delaware jurisdiction.

In addressing this question, the majority opinion in Shaffer drew a distinction between choice of law and personal jurisdiction. The majority believed that Delaware law's applicability to directors obligations is simply a matter of choice of law and "does not demonstrate that appellants have purposefully availed[ed themselves] of the privilege of conducting activities within the forum state." In that connection, the court laid emphasis on the fact that "Delaware, unlike some states, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the state." The majority, then, appears to have viewed service as a director in a state which has enacted a director service statute either to constitute contact with the chartering state sufficient to support the jurisdiction of its courts or to constitute a voluntary subjection to the state's jurisdiction obviating the need for such contacts or, perhaps, both.

78. 97 S. Ct. at 2586 quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958). Justice Stevens in Shaffer was particularly concerned that persons over whom a state intended to acquire jurisdiction receive notice of both the particular controversy and also that their local activities might subject them to suit. 97 S. Ct. at 2587 (Stevens, J., concurring).
79. 97 S. Ct. at 2586. Justice Brennan's dissent illuminates somewhat this portion of the majority opinion. Justice Brennan concurred in the majority's requirement for minimum contacts in applications of state jurisdiction. Since Delaware based the constitutional justification of sequestration on a bare exercise of jurisdiction over property irrespective of personal contacts, he, too, found it constitutionally defective. If, however, the Delaware courts were to redefine the basis of constitutionality to rest of the state's interests in the regulation of its corporations and their officials, Justice Brennan believed that such interests would as a general rule be sufficient to sustain state court jurisdiction. The consent statute called for by the majority was not, to him, an essential element:

Nor would I view as controlling or even especially meaningful Delaware's failure to exact from appellants their consent to be sued. . . . Once we have rejected the jurisdictional framework created in Pennoyer v. Neff, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, express or implied.

97 S. Ct. at 2592.
Under either analysis, §3114 adds to the office of director of a Delaware corporation the element of "purposeful availment" to Delaware jurisdiction the Court found missing in Shaffer and appears to satisfy the jurisdictional requirements defined by the Court.

C. §3114 and Notice

The new statute is replete with methods for effective notice to the prospective defendant and seems unlikely to be faulted on that score. The effectiveness of the statute was postponed to permit a general dissemination of its terms. Though the statute was adopted in early July of 1977, the effective date was deferred until the following September 1, 1977, and even then no individual may be served unless he has been elected or appointed a director after September 1, 1977 or continued to serve after July 30, 1978. The statute applies only to causes of action accruing after September 1, 1977.

While wisely omitting formula newspaper advertisements required in sequestration, the statute requires notice to the defendant of the specific case to be given to the corporation at its registered agent's office and at its principal place of business and by registered mail to the last known address of the prospective defendant. Time to answer is measured from the mailed notice and the trial court is granted authority to order such continuances "as may be necessary to afford such director . . . reasonable opportunity to defend. . . ."\(^80\)

Conclusion

In response to the comments of the U. S. Supreme Court in Shaffer, Delaware has joined the rank of states which permit substituted service on nonresident directors of domestic corporations in causes of action arising out of the performance of their duties to the corporation. The antique and ailing sequestration process has been swept away by the judgment of the Supreme Court. The Act of the Delaware Legislature which followed promptly thereafter seeks to retain the better effects of sequestration and at the same time protect the rights of defendants.

\(^80\) Del. Code Ann. tit. 10 §3114(c).
APPENDIX

§ 3114. Service of Process on Non-resident Directors, Trustees or Members of the Governing Body of Delaware Corporations

(a) Every non-resident of this State who after September 1, 1977 accepts election or appointment as a director, trustee or member of the governing body of a corporation organized under the laws of this State or who after June 30, 1978 serves in such capacity and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes his residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director, trustee or member is a necessary or proper party, or in any action or proceeding against such director, trustee or member for violation of his duty in such capacity, whether or not he continues to serve as such director, trustee or member at the time suit is commenced. Such acceptance or service as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

(b) Service of process shall be effected by serving the registered agent (or, if there is none, the Secretary of State) with one copy of such process in the manner provided by law for service of writs of summons. In addition, the Prothonotary or the Register in Chancery of the Court in which the civil action or proceeding is pending shall, within seven (7) days of such service, deposit in the United States mails, by registered mail, postage prepaid, true and attested copies of the process, together with a statement that service is being made pursuant to this Section, addressed to such director, trustee or member at the corporation's principal place of business and at his residence address as the same appears on the records of the Secretary of State, or, if no such residence address appears, at his address last known to the party desiring to make such service.

(c) In any action in which any such director, trustee or member has been served with process as hereinabove provided, the time in which a defendant shall be required to appear and file a responsive pleading shall be computed from the date of mailing by the
Prothonotary or the Register in Chancery as provided in Subsection (b); however, the court in which such action has been commenced may order such continuance or continuances as may be necessary to afford such director, trustee or member reasonable opportunity to defend the action.

(d) Nothing herein contained limits or affects the right to serve process in any other manner now or hereafter provided by law. This Section is an extension of and not a limitation upon the right otherwise existing of service of legal process upon non-residents.

(e) The Court of Chancery and the Superior Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof and such other rules which may be necessary to implement the provisions of this Section and are not inconsistent with this Section.