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INTRODUCTION

Jerry distributes sports memorabilia from his residence in South Carolina to dealers throughout the United States. Jerry also regularly invests in real property, recently acquiring some very expensive real estate in downtown Charlotte, North Carolina. More recently, Jerry contracted to sell to Claudia—a North Carolina memorabilia dealer, and regular customer of Jerry's—thousands of dollars worth of sports collectibles. Unfortunately, a few days after their agreement, Jerry repudiates by informing Claudia that he will be unable to ship such a large quantity of goods. As a result, Claudia is forced to cover by purchasing substitute memorabilia costing an additional $60,000. Consequently, Claudia brings an action against Jerry to recover her losses.

Beth, Claudia's attorney, is aware that Jerry recently acquired real property in North Carolina and advises Claudia that she will seek an order attaching Jerry's property when she files the action with the court. Beth tells Claudia that, by attaching the property, a North Carolina court can obtain jurisdiction to hear the action and that any judgment awarded in her favor can be satisfied by selling the property. Beth understands that Jerry has sufficient contacts with North Carolina to allow a court to bind him personally, but she thinks that attaching another person's property is much more exciting. Claudia is amenable to the idea because she is still mad at Jerry for breaching their contract and thinks that placing a lien on the property will cause Jerry to have a few sleepless nights.

Accordingly, contemporaneous with filing the suit, Beth seeks an order attaching Jerry's property in Charlotte. The order of attachment is issued and she drives to Charlotte and files the order with the clerk of court. The clerk promptly adds the order to the lis pendens docket. The next day, Beth causes the sheriff to endorse the order of attachment and deliver a certificate of levy to the clerk of court. Upon receipt of the certificate and docketing of the levy, the lien attached and relates back to the filing of the notice of lis pendens. Thirty days after the order of attachment issued, Jerry is served with process. It is then that he learns that his property has been attached and that a lien

has been placed on the property. Jerry is very confused and upset because he did not have any notice of the attachment or any way to object to it. As a result of this temporary deprivation of his property rights, Jerry has more than just a few sleepless nights.

Prejudgment statutes, like the one Claudia utilized to attach Jerry's property, have always presented due process concerns. The Due Process Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[1] This Clause has been interpreted to have both substantive and procedural components.[2] Substantively, the Due Process Clause restricts the government's actions, regardless of the procedures used.[3] One such due process restriction is that a court must obtain jurisdiction over an action before it can enter a judgment against a person.[4] On the other hand, procedural due process ensures that a party, whose rights are going to be affected, is given notice and

1. U.S. CONST. amend. XIV.

2. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("Although a literal reading of the Clause might suggest that it governs only the procedures [of a state,] . . . the Clause has been understood to contain a substantive component as well . . . ."); Powell v. Alabama, 287 U.S. 45, 68 (1932) ("It never has been doubted by this [C]ourt, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."). The Author will discuss both components throughout this Comment. To avoid confusion, the Author will use the term "due process" to refer to substantive due process. The Author will use the term "procedural due process" when referring to the procedural component.

3. Daniels v. Williams, 474 U.S. 327, 331 (1986).

4. Pennoyer v. Neff, 95 U.S. 714, 715 (1877) (syllabus) ("The term, 'due process of law,' when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance."), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977). See also Stephen Goldstein, Federalism and Substantive Due Process: A Comparative and Historical Perspective on *International Shoe* and Its Progeny, 28 U.C. DAVIS L. REV. 965 (1995) (noting that International Shoe Co. v. Washington clearly relied on notions of substantive due process in creating constitutional standards for personal jurisdiction); Charles Rhodes, Liberty, Substantive Due Process, and Personal Jurisdiction, 82 TUL. L. REV. 567 (2007) (discussing the relationship between constitutional limitations on personal jurisdiction and substantive due process).

an opportunity to be heard.[5] Thus, procedurally, due process "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and [an] opportunity for [a] hearing appropriate to the nature of the case."[6]

Prejudgment statutes primarily raise concerns with regard to the procedural aspect of due process. These statutes allow a plaintiff to seek attachment of a defendant's property in order for a court to obtain quasi in rem jurisdiction[7] in the state in which the property is located.[8] However, an order of attachment can be issued regardless of whether the defendant has been given notice that there is a pending lawsuit against him. In fact, under North Carolina's prejudgment statutes,[9] a defendant may not receive notice of the pending principal action and ancillary attachment until thirty days after a lien has

5. Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of [procedural] due process . . . is the opportunity to be heard." (citation omitted)).

6. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The Supreme Court has allowed exceptions to this general rule on a few occasions. With respect to prejudgment statutes, the Court has stated that there must be "'extraordinary situations' [to] justify postponing notice and opportunity for a hearing." Fuentes v. Shevin, 407 U.S. 67, 90 (1972) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). The instances where the Court has found "extraordinary situations" will be discussed below. *See infra* notes 65-69 and accompanying text.

7. It is important to note the differences between in personam, in rem, and quasi in rem jurisdiction. *See* 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 1-1 (3rd ed. 1998). If a court has in personam jurisdiction (jurisdiction over the person), the court has the power to obligate a party to comply with its orders and the power to bind the party. *Id.* In rem jurisdiction, on the other hand, is power over property within the state where the court is located and is limited to suits determining ownership of property, as against all other persons in the world. *Id.* Quasi in rem jurisdiction is separated into two types of actions. The first type is similar to an action in rem, in that it is a suit to settle claims in property, except that the court looks at the claims of particular persons, not the claims of all other persons. *Id.* In the second type of action, a plaintiff does not have a preexisting interest in specific property, but a personal claim against the defendant and the court uses its power over property located in the state to acquire quasi in rem jurisdiction. *Id.* This jurisdiction is obtained by attaching the defendant's property and a judgment in favor of the plaintiff can be executed against the attached property. *Id.* The second type of quasi in rem jurisdiction is discussed in this Comment.

8. Prejudgment statutes also allow a plaintiff to attach a defendant's property to enable the property to be secured from destruction or disposal prior to a lawsuit. In North Carolina, attachment is allowed to both obtain jurisdiction and secure property. *See* N.C. GEN. STAT. § 1-440.3 (2007). However, this Comment will primarily focus on the attachment of property to obtain jurisdiction.

9. *See id.* §§ 1-440.1 to .46.

attached to the defendant's property.[10] Moreover, the defendant is not provided an opportunity for a hearing prior to his property being attached.[11] Thus, by allowing attachment of property without notice or a prior hearing, prejudgment statutes must be carefully scrutinized to ensure that they comport with procedural due process.

Accordingly, this Comment will analyze the constitutionality of North Carolina's prejudgment statutes. Part I will take a brief look at the history of prejudgment statutes and the "power" doctrine articulated by the United States Supreme Court in *Pennoyer v. Neff*.[12] Part II will discuss the impact of subsequent Supreme Court cases. This Part will be divided into two subsections. The first will address cases that shaped our nation's jurisdictional law and, most importantly, affected the necessity of quasi in rem jurisdiction. The second will address cases that impacted the analytical process for evaluating prejudgment statutes as they relate to procedural due process concerns. Finally, Part III will indicate that several portions of North Carolina's prejudgment statute are unconstitutional. This determination will be based on a comparison between the necessity of attaching property to obtain quasi in rem jurisdiction in a state that allows for the broad exercise of in personam jurisdiction and the importance of providing the protections afforded under the Due Process Clause.

I. HISTORY OF PREJUDGMENT STATUTES AND *PENNOYER V. NEFF*

A. *Brief History of Prejudgment Statutes in Early America*

The attachment of a debtor's property to satisfy the claims of his creditors is an ancient proceeding, which some have linked back to early Roman law.[13] There is no doubt, however, that attachment pro-

10. In North Carolina, service of summons can be made up to 30 days after the issuance of the order of attachment. *Id.* § 1-440.7. Once the order of attachment has been issued, the attachment lien will attach as soon as the plaintiff files the order with the clerk of court of the county in which the property being attached is located, *id.* § 1-440.33, the plaintiff causes the sheriff to endorse the order and deliver a certificate of levy to the clerk of court, *id.* § 1-440.17, and the clerk indexes and dockets the levy, *id.* § 1-440.33. Once attached, the lien relates back to the date on which the order was initially filed with the clerk of court. *Id.*

11. If the plaintiff files an affidavit under section 1-440.11 of the North Carolina General Statutes and furnishes the required bond under section 1-440.10, the "court shall issue an order of attachment." *Id.* § 1-440.12.

12. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

13. CHARLES D. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES § 1 (7th ed. 1891).

ceedings existed in England as early as 1482.[14] It was the custom of London that a "creditor might attach money or goods of the defendant . . . by proceedings in the mayor's court or in the sheriff's court."[15] This custom developed out of necessity to provide a remedy for "collecting debts due from nonresident or absconding debtors."[16] Thus, when a default judgment was entered against a debtor because he failed to appear before the court, the creditor could satisfy the judgment by having the sheriff sell any attached property. However, as the custom developed into common law, it was changed significantly. The most obvious change was the requirement of notice to the defendant, either actual or constructive, although such notice could be given after the debtor's property had been attached.[17]

These common law principles were brought over to America by the colonists.[18] The idea of attaching a debtor's property flourished in early America, where the division of the country into sovereign states, with inhabitants easily able to travel from state to state, made attachment proceedings almost a necessity.[19] With most of the country still unexplored wilderness, debtors could simply flee, leaving their property behind, to ensure that their creditors had no way of compelling their appearance in court.[20] With states enacting prejudgment or attachment laws, a debtor's property was subject to attachment, thus giving a court quasi in rem jurisdiction over the action and providing creditors a forum to prosecute their claims.[21]

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14. Charles Drake finds the first evidence of attachment of property in the ancient records of the Chancery Courts of England, in 22 Edward IV. *Id.* This yearbook was recorded in 1482-1483. *See* Y.B. 22 Edw. 4 (1482-1483), *reprinted in* 2 STATUTES OF THE REALM 468 (1377-1504).

15. Ownbey v. Morgan, 256 U.S. 94, 104 (1921).

16. *Id.* at 105.

17. *See* DRAKE, *supra* note 13, § 4 ("[I]t was declared by Lord Mansfield, that the very essence of the custom is that the defendant shall not have notice."). Under common law attachment, along with notice, the plaintiff was also required to post a bond and give special reasons for the necessity of attaching the property. *Id.*

18. *Id.* § 3.

19. *Id.*

20. Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1066 (1990). Creditors could not compel these fleeing debtors to appear in court due to the fact that there could be no personal service of summons inside the state. *Id.* This is a result of the "power" doctrine. *See infra* notes 23-29 and accompanying text.

21. Mushlin, *supra* note 20, at 1066.

B. Pennoyer v. Neff–*the "Power" Doctrine*

The importance and necessity of attaching property in order to obtain quasi in rem jurisdiction in early America was due, in most part, to the "power" doctrine, articulated by the Supreme Court in *Pennoyer v. Neff*.[22] Under this doctrine, a state, through its court system, could only exercise jurisdiction over persons or property within its own boundaries and, thus, under the "power" of the state.[23] Accordingly, a state court could not exercise in personam jurisdiction over a nonresident who had not been served with process while inside the state unless he had consented to jurisdiction.[24] Justice Fields, writing

22. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977). In this case, a judgment of default was entered in an Oregon court against Neff, a nonresident of Oregon, even though he was not personally served with process. *Id.* at 719-20. Instead, there was constructive service of summons by publication in the local newspaper. *Id.* Neff's property located in Oregon was sold to satisfy the judgment and eventually came into the hands of Pennoyer. *Id.* The question before the Court was the validity of the judgment. Since Neff had not been personally served in Oregon or consented to in personam jurisdiction, the lower court lacked jurisdiction to enter the default judgment. *Id.* at 733-34. In addition, since the lower court did not attach the property before entering judgment, the court had not obtained quasi in rem jurisdiction. *Id.*

23. Although *Pennoyer* is best known for announcing the "power" doctrine, this principle had been identified well before the case was decided. *See* Boswell's Lessee v. Otis, 50 U.S. 336, 342 (1850) ("[A] court of chancery cannot take jurisdiction of a person without personal service made on him within the jurisdiction of the court; but provide[d] that, where land lies within the jurisdiction of the court, it may be acted upon, and the title to it settled . . . though one of the parties be a non-resident . . . ."); Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced . . . . Where he is not within such territory, . . . process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, . . . [but] only to bind him to the extent of such property . . . ."); Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. 1786) ("It appears by the pleadings, that the defendant was an inhabitant of the state of Connecticut, and was not within the jurisdiction of the . . . county of Berkshire, [Massachusetts] at the time of the pretended service of the writ; therefore, the court had no legal jurisdiction of the cause . . . ."); Kilburn v. Woodworth, 5 Johns. 37, 37 (N.Y. Sup. Ct. 1809) (per curiam) ("The defendant was not a resident of *Massachusetts*, when the suit was commenced; his domicile was in [New York], and being in person here, and not within the jurisdiction of the court of *Massachusetts*, he was not, and could not have been served with process. The attachment of . . . his property could not bind him; it could only bind the goods attached, as a proceeding *in rem* . . . ."); *see also* Joseph P. Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 668 n. 2 (1975).

24. *See Pennoyer*, 95 U.S at 733-34 ("[F]or any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law

for the majority in *Pennoyer*, acknowledged, however, that this restriction on in personam jurisdiction severely limited the ways in which a citizen of a state could recover on his claims against a nonresident debtor or, for that matter, a fleeing debtor.[25] As such, the Court recognized that property of a debtor located inside a state was nevertheless within the power of the state courts and, thus, could be attached at the commencement of an action to obtain quasi in rem jurisdiction, even when in personam jurisdiction could not be exercised.[26] Therefore, approval by the Court of attachment proceedings and quasi in rem jurisdiction "constituted a partial escape from the strictures of the territorial theory of jurisdiction."[27]

As such, attachment proceedings, enabling a court to obtain quasi in rem jurisdiction over a nonresident defendant, played a very important role in early American jurisprudence. Under the "power" doctrine, due process required that a defendant be personally served with process within a state before in personam jurisdiction could be exercised over him.[28] However, this requirement was eliminated when a state was exercising its power over property within its boundaries to satisfy the claims of a plaintiff.[29] No longer could nonresidents or fleeing debtors avoid their liabilities by leaving a state and dodging personal service. As long as the debtor had property within the state, it could be attached and a judgment, rendered in favor of the plaintiff, could be executed against the attached property.

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would require appearance or personal service [in-state] before the defendant could be personally bound by any judgment rendered.'").

25. *Id.* at 723 ("Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.").

26. *Id.* at 733.

27. Zammit, *supra* note 23, at 670. The "power" doctrine was also referred to as the territorial theory because if a person or property was not within the territory of the state, then a court did not have the power to exercise jurisdiction over that person or property.

28. *See Pennoyer*, 95 U.S. at 734.

29. *Id.* at 733. Service by publication was enough to satisfy due process when a state was exercising its power over property to obtain quasi in rem jurisdiction. *Id.* Thus, a plaintiff did not have to make any effort to give a property owner personal notice that his property was being attached.

II. SUBSEQUENT SUPREME COURT CASES

A. *Cases Affecting the Necessity of Quasi In Rem Jurisdiction*

The power of the "power" doctrine slowly began to weaken by the early 1900s. Court approval of motorist's consent statutes[30] and statutes allowing foreign corporations doing business in a state to be served with process[31] stretched the limits of the *Pennoyer* holding.[32] In 1945, the Court's decision in *International Shoe Co. v. Washington*[33] forever changed jurisdictional law by expanding in personam jurisdiction far beyond the limits of the "power" doctrine. Although *International Shoe* substantially changed the law with respect to in personam jurisdiction, there still remained the question of what affect its holding would have on *Pennoyer*'s approval of attachment jurisdiction.[34] This question was finally answered in *Shaffer v. Heitner*,[35] where the Court held that the same analysis applied to the exercise of both in personam and quasi in rem jurisdiction.[36]

1. International Shoe Co. v. Washington

The holding in *International Shoe* dramatically increased the power of states to exercise in personam jurisdiction over nonresidents.[37] The Court held that:

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30. Hess v. Pawloski, 274 U.S. 352 (1927) (finding that a state may imply that a nonresident driver using its highways has appointed a state official as his agent on whom process may be served).

31. *See* Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 589 (1914) ("[T]he presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state . . . ."); St. Clair v. Cox, 106 U.S. 350 (1882) (deciding that states could expressly state or imply a condition that a foreign corporation doing business in a state must accept service of process on its agents within the state).

32. *See* Zammit, *supra* note 23, at 673.

33. 326 U.S. 310 (1945). This case will be discussed below. *See infra* notes 38-41 and accompanying text.

34. *See* Mushlin, *supra* note 20, at 1070-73 (finding that most courts continued to use quasi in rem jurisdiction after *International Shoe* in the same way permitted by the *Pennoyer* holding, although most of the critics argued that the use of attachment to obtain quasi in rem jurisdiction over nonresidents was, in most cases, unfair).

35. 433 U.S. 186 (1977). This case will be discussed below. *See infra* notes 42-50 and accompanying text.

36. *Shaffer*, 433 U.S. at 212.

37. *Int'l Shoe*, 326 U.S. at 316. The International Shoe Company had several salesmen that were located within the state of Washington, but kept no office or merchandise there. *Id.* at 313-14. International Shoe challenged Washington's attempt to exercise in personam jurisdiction over the foreign corporation. *Id.* at 313.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[38]

This holding switched the focus from the power of the state over the defendant's person and property to the relationship between the two, particularly the amount of contacts the defendant had with the state.

Thus, if a nonresident defendant had minimum contacts with a state, measured by assessing the "quality and nature of the activity [in the state] in relation to the fair and orderly administration of the law[,]" a court in that state could bind the defendant personally.[39] This expansive view of in personam jurisdiction led to the enactment of long-arm statutes in every state in the country.[40] These statutes allowed states to take advantage of the *International Shoe* holding and reach further to obtain jurisdiction over persons not within their geographical boundaries.[41]

2. Shaffer v. Heitner

The question of what remained of the *Pennoyer* holding after *International Shoe* was finally answered in *Shaffer v. Heitner*.[42] The

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The question before the Court was whether International Shoe, by its activities within the state, had made itself amenable to proceedings in courts of that state. *Id.* at 311.

38. *Id.* at 316 (citation omitted). This rule will be referred to as the "minimum contacts" test.

39. *Id.* at 319.

40. *See* Mushlin, *supra* note 20, at 1069 ("By the early 1960s this [expansion of jurisdiction] culminated in every state having a long arm statute."); Zammit, *supra* note 23, at 674 (noting that after the *International Shoe* decision, the "states soon availed themselves of the 'minimum contacts' approach by enacting 'long-arm' statutes").

41. For an in-depth discussion of long-arm statutes, see CASAD & RICHMAN, *supra* note 7, §§ 4-1 to -9. North Carolina's long-arm statute was enacted in 1967. *See* N.C. GEN. STAT. § 1-75.4 (2007). The scope of this statute will be discussed below. *See infra* notes 118-28 and accompanying text.

42. 433 U.S. 186 (1977). In this case, a shareholder of a corporation filed a shareholder's derivative suit in Delaware against the corporation, as well as former and present officers and directors of the corporation. *Id.* at 189-90. The officers and directors were all nonresidents of Delaware and the shareholder filed a motion to sequester their Delaware property, which included stocks, options, and other corporate rights of the defendants. *Id.* at 190-91. Under Delaware's sequestration statute, which is modeled after attachment statutes, a defendant has the choice, after his property has been sequestered, of entering a general appearance and subjecting himself to in personam jurisdiction, or not appearing and suffering a default judgment. *Id.* at 195 n.12.

issue before the Supreme Court was whether the standard of minimum contacts set forth in *International Shoe* should be held to govern both actions in personam and in rem.[43] The Court answered this question in the affirmative, holding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[44] In addition, the Court found that the mere presence of property in a state, by itself, was not enough to meet the minimum contacts standard.[45] Thus, after *Shaffer*, in order for a court to obtain quasi in rem jurisdiction by attaching property, a defendant must have sufficient contacts with the state, apart from his property located inside the state, to satisfy the minimum contacts test of *International Shoe*.[46]

The importance and necessity of attaching property to obtain quasi in rem jurisdiction was greatly diminished by the holding in *Shaffer*.[47] With the expansion of in personam jurisdiction, quasi in rem jurisdiction was unnecessary, in most cases, to bring nonresident and fleeing debtors under the power of the court.[48] If a nonresident defendant has contacts with a state sufficient to allow a court to exercise in personam jurisdiction, "the coexisting possibility of [quasi in

43. *Id.* at 206 ("It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*.").

44. *Id.* at 212. With this holding, *Pennoyer v. Neff* was overruled and with it, the remnants of the "power" doctrine. *Id.* at 212 n.39.

45. *Id.* at 213 (finding that the defendants' Delaware property did not "provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over" the defendants).

46. *Id.*

47. *See* Mushlin, *supra* note 20, at 1078 ("*Shaffer* confirmed the demise of [existing] rationales for quasi in rem jurisdiction . . . .").

48. *See id.* Mushlin recognizes that the ability of a court exercising in personam jurisdiction can be limited by a state's long-arm statute. *Id.* at 1090. If a nonresident defendant has sufficient contacts to meet the standard set forth in *International Shoe*, but is not covered by a state's long-arm statute, then the state cannot hear an action in personam concerning the defendant. New York has used this gap between the constitutional requirements of due process and a state's long-arm statute as an avenue for justifying attachment jurisdiction after *Shaffer*. *Id.* at 1089-98 (discussing several decisions from New York where courts have allowed the attachment of property to obtain jurisdiction in cases where in personam jurisdiction could have been exercised but for the long-arm statute). However, Mushlin finds that this "new" use of quasi in rem jurisdiction is probably unconstitutional. *Id.* at 1105-11. Other commentators have argued that the use of quasi in rem jurisdiction in such a circumstance would be constitutional. *See, e.g.*, Holly S. Haskew, Comment, Schaffer, Burnham, *and New York's Continuing Use of QIR-2 Jurisdiction: A Resurrection of the Power Theory*, 45 EMORY L.J. 239 (1996).

rem] jurisdiction is at best superfluous."[49] However, the Court in *Shaffer* found it unnecessary to answer the question of whether the attachment of property, as a method of obtaining jurisdiction, violated procedural due process.[50] Accordingly, the following section will address this question.

B. *Cases Evaluating the Attachment of Property for Violations of Procedural Due Process*

Prejudgment statutes allow property to be attached without giving the owner of the property notice of the attachment or a prior hearing.[51] As such, courts have questioned the validity of these statutes. From 1969 to 1975, the Supreme Court had a chance to assess prejudgment statutes in several cases where challengers argued that the statutes were unconstitutional because they violated procedural due process.[52] However, since its decision in *Shaffer*, the Court has analyzed the validity of such statutes in only one case, *Connecticut v. Doehr*.[53] These decisions will be considered below, with the first four discussed briefly and the last, *Doehr*, discussed in more detail since it provides the most recent test for analyzing prejudgment statutes.

1. Sniadach v. Family Finance Corp. of Bay View

In *Sniadach v. Family Finance Corp. of Bay View*, the petitioner alleged that a Wisconsin garnishment procedure violated procedural due process by allowing the respondent to seize her wages without notice and an opportunity to be heard.[54] The Court acknowledged that such a procedure might "meet the requirements of [procedural]

49. Zammit, *supra* note 23, at 676.

50. *Shaffer*, 433 U.S. at 189 (finding it unnecessary to address the appellant's contention that Delaware's sequestration statute violated procedural due process because the Court decided that it violated substantive due process by allowing plaintiffs to attach property without a finding of minimum contacts).

51. In North Carolina, all that a plaintiff must do to attach property is post a bond, N.C. GEN. STAT. § 1-440.10 (2007), state the reasons for attaching the property in an affidavit, *id.* § 1-440.11, and, of course, file the principal suit, the summons of which can be sent well after the issuance of the writ of attachment, *id.* § 1-440.7.

52. N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969). Although these cases did not involve the attachment of property to obtain jurisdiction, which is the focus of this Comment, they are helpful in setting up an analytical model to assess the constitutional validity of prejudgment statutes.

53. 501 U.S. 1 (1991).

54. *Sniadach*, 395 U.S. at 338.

due process in extraordinary situations."[55] However, the Court held that this case was not such an extraordinary situation.[56] The petitioner was a resident of Wisconsin and in personam jurisdiction could have easily been obtained.[57] Thus, the Court concluded that the Wisconsin statute providing for the garnishment of wages was unconstitutional.[58]

2. Fuentes v. Shevin

In *Fuentes v. Shevin*,[59] the Supreme Court reviewed the constitutionality of the replevin statutes of Florida and Pennsylvania.[60] Both statutes allowed for the seizure of a person's property, merely by an ex parte application and the posting of a security bond, without the need for notice to the possessor of the property or the right to a prior hearing.[61] The Court began its analysis by noting that it was "fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[62] Thus, the question before the Court was whether the statutes had provided notice and a hearing at a meaningful time;[63] in other words, whether procedural due process required notice and the opportunity for a hearing prior to the seizure of property. The Court decided that the requirements of each statute, calling for the plaintiff to post a bond and make a conclusory allegation that he was entitled to the property,

55. *Id.* at 339. The Court cited several past decisions for this proposition, including *Ownbey v. Morgan*, 256 U.S. 94 (1921), which will be briefly discussed below. *See infra* notes 157-67 and accompanying text.

56. *Sniadach*, 395 U.S. at 339.

57. *Id.*

58. *Id.* at 342 ("[A]bsent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of [procedural] due process." (citation omitted)).

59. 407 U.S. 67 (1972).

60. *Id.* at 69. At common law, replevin was an action by a person, with a preexisting interest in property, to have it returned after it had been wrongfully taken or distrained. *Id.* at 78-79. Most of the appellants in the case bought property under installment sales contracts, which gave them possession, but title was retained by the seller. *Id.* at 71. When the appellants defaulted on their contracts, the sellers sought writs of replevin in order to repossess the property. *Id.* at 70-72.

61. *Id.* at 69-70. Under both statutes, the defendant, the possessor of the property, could post a bond to reclaim the property. *Id.* at 75-78. Under the Florida statue, the defendant did eventually have the opportunity to be heard, at the action of repossession required to be filed by the plaintiff in order to obtain the writ, while under the Pennsylvania statue, the defendant did not have any opportunity to be heard unless he filed a lawsuit himself. *Id.*

62. *Id.* at 80 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

63. *Id.*

were hardly a proper substitute for notice and a hearing prior to the seizure.[64]

The Court did note, however, that there were "extraordinary situations where some valid governmental interest is at stake that justifies postponing [notice and a] hearing until after the event."[65] The Court identified three factors that were always present in extraordinary situations: the seizure of property was directly necessary to serve an important governmental or public interest, there was a special need for prompt action, and the government had strict control over the action.[66] One extraordinary situation identified was the attachment of property to obtain quasi in rem jurisdiction in state court, which the Court acknowledged was "clearly a most basic and important public interest."[67] Looking at the facts of the case, however, the Court decided that, unlike a statute allowing for attachment of property to obtain jurisdiction, the replevin statutes did not serve an important public interest—rather they only furthered private gain.[68] Thus, the Court decided that no extraordinary situation existed and held that the replevin statutes violated procedural due process.[69]

3. Mitchell v. W. T. Grant Co.

In *Mitchell v. W. T. Grant Co.*, the Supreme Court did not employ the same reasoning that it had in *Fuentes*, where notice and a prior hearing were necessary in the absence of exceptional circumstances, to analyze Louisiana's sequestration statute.[70] Instead, a balancing test was adopted, which analyzed the conflicting interests of the creditor

64. *Id.* at 81-83 ("[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.").

65. *Id.* at 82 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

66. *Id.* at 91.

67. *Id.* at 91 n.23. The Court relied on *Ownbey v. Morgan*, 256 U.S. 94 (1921), for this proposition. The accuracy of this reliance will be discussed below. *See infra* notes 157-67 and accompanying text.

68. *Fuentes*, 407 U.S. at 92.

69. *Id.* at 96-97.

70. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). In this case, Grant sold Mitchell several household goods, but retained a vendor's lien on the goods in case Mitchell did not continue to make payments. *Id.* at 601-02. When Mitchell failed to pay the entire purchase price for the goods, Grant petitioned for a writ of sequestration and this petition was granted by a Louisiana court, whereupon the goods were taken into possession of the state. *Id.* at 602.

and the debtor.[71] The Court first noted that both parties had a present interest in the seized property—in that the debtor had the right to possession of the goods subject to the vendor's lien held by the creditor—and, thus, "[r]esolution of the due process question [had to] take [into] account not only . . . the interests of the buyer of the property but those of the seller as well."[72] The Court decided that the interests of a creditor with a vendor's lien were adequately protected by allowing the property to be sequestered and by requiring the buyer to post a bond in order to recover the goods prior to any hearing.[73]

With respect to the debtor's side of the balancing test, the Court decided that there were sufficient procedural safeguards in place to protect the debtor's interests, protections not present in *Fuentes*.[74] The Louisiana sequestration statute required that a creditor state specific facts in an affidavit clearly showing why the property should be sequestered.[75] In addition, the affidavit had to be made to a judge[76] and the creditor had to post a bond before the writ could be issued.[77] After the property had been sequestered, the debtor was entitled to an immediate hearing where the creditor had to prove the grounds stated in the affidavit.[78] With all of these procedural safeguards, the Court decided that the Louisiana procedure "protect[ed] the debtor's interest in every conceivable way, [besides] allowing him to have the property to start with," and, thus, the Court held that the procedure did not violate procedural due process.[79]

71. *Id.* at 604. Sequestration statues, similar to prejudgment or attachment statutes, allow property to be seized simply upon an ex parte application, without notice or a prior hearing to the property owner. *Id.* at 606.

72. *Id.* at 604.

73. *Id.* at 607-09.

74. *Id.* at 615-18.

75. *Id.* at 605. In *Fuentes*, the creditor only had to make conclusory allegations stating that he was entitled to the property. *Id.* at 615-17.

76. *Id.* at 606. In *Fuentes*, the writ of replevin was issued by a clerk of the court instead of a judge. *Id.* at 615.

77. *Id.* at 606. A bond requirement was also present in *Fuentes*.

78. *Id.* The right to an immediate hearing was not present in *Fuentes*. *Id.* at 615-16. In addition to an immediate hearing, the Louisiana statute allowed the debtor to post a bond to reclaim the seized property, similar to the statutes in *Fuentes*. *Id.* at 607.

79. *Id.* at 618-20.

4. North Georgia Finishing, Inc. v. Di-Chem, Inc.

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[80] the Court used the same balancing test employed in *Mitchell*, but in this case, decided that there were not adequate safeguards in place to protect the debtor's interests.[81] Specifically, the Georgia garnishment statute in question was very similar to those invalidated in *Fuentes* and had none of the "saving characteristics" identified by the Court in *Mitchell*.[82] In order for the writ to be issued, the creditor only had to post a bond and file an affidavit that contained conclusory allegations, not specific facts.[83] Additionally, the writ could be issued by the clerk of court, without any participation by a judge.[84] After the writ was issued, the debtor did not have the right to an immediate hearing, but could only post a bond to reclaim the property.[85] Thus, since the Georgia statute lacked the saving characteristics recognized in *Mitchell*, the Court held that it violated procedural due process.[86]

5. Connecticut v. Doehr

Connecticut v. Doehr[87] is the only Supreme Court case assessing the validity of prejudgment statutes since *Shaffer*. Although the case does not involve the attachment of property to obtain quasi in rem jurisdiction, its opinion serves as the current test for analyzing prejudgment statutes with regard to violations of procedural due process. In *Doehr*, the petitioner, contemporaneous with filing a civil action for assault and battery against the respondent, submitted an application for a writ of attachment seeking to attach the respondent's real property.[88] Under Connecticut's prejudgment statute, real property could be attached if a plaintiff submitted an affidavit stating that there was probable cause to believe that his claim was valid.[89] There was no

80. N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). The petitioner, in this case, challenged a Georgia wage garnishment statute that allowed his wages to be garnished without notice or a prior hearing. *Id.* at 604.

81. *Id.* at 607-08.

82. *Id.* at 607. The saving characteristics recognized by the Court were: an affidavit requiring specific facts and allegations; participation by a judicial officer; and a right to an immediate post-deprivation hearing. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 608.

87. 501 U.S. 1 (1991).

88. *Id.* at 5. The civil action did not involve the respondent's real property, and the plaintiff did not have a preexisting interest in the defendant's real property. *Id.*

89. *Id.*

requirement that the plaintiff post a bond before the writ was issued.[90] Shortly after the writ attaching the respondent's property was issued, the respondent filed suit in federal court alleging that the prejudgment attachment violated procedural due process in that it provided no notice or hearing prior to the deprivation of his property.[91]

The question before the Court was "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment."[92] To answer this question, the Court modified its test from *Mathews v. Elderigde*, a threefold inquiry used by the Court to determine what process is due when the government seeks to deprive a person of his property on its own initiative.[93] Thus, by modifying the *Mathews* test, the Court, in *Doehr*, announced a new test to analyze prejudgment statutes under procedural due process, which read:

> [T]he relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.[94]

The first inquiry in this test is a consideration of the interest that will be affected by the prejudgment attachment.[95] Stated another way, a court must determine whether the property attached is sufficient to necessitate protection under the Constitution. This prong will always weigh against the validity of a prejudgment statute when a person's property, real or personal, has been attached. The Court stated that

90. *Id.* at 6.

91. *Id.* The district court upheld the prejudgment statute, but the Second Circuit reversed on appeal, holding that the statute violated procedural due process. *Id.* at 7-8.

92. *Id.* at 9.

93. Mathews v. Elderidge, 424 U.S. 319 (1976). The third prong of the *Mathews* test looks at "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. This prong had to be modified in *Doehr*, because with prejudgment statutes, the dispute is between private parties and not an individual and the government. *Doehr*, 501 U.S. at 10-11.

94. *Doehr*, 501 U.S. at 10-11. For purposes of this Comment, this test will be referred to as the "modified *Mathews* test."

95. *Id.*

"our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."[96]

The second inquiry in the modified *Mathews* test examines the risk of erroneous deprivation and the value of additional safeguards.[97] The Court decided that there was a substantial risk of erroneous deprivation under Connecticut's prejudgment statute.[98] Like the garnishment statute in *North Georgia*, the statute failed to have the saving characteristics recognized by the Court in *Mitchell*.[99] First, a writ of attachment would be issued if the plaintiff made only conclusory statements alleging that there was probable cause to believe that his claim was valid.[100] Second, the plaintiff was not required to post a bond before the writ was issued.[101] Lastly, unlike in *Mitchell*, the plaintiff did not have a preexisting interest in the property.[102] Connecticut's prejudgment statute did allow for an immediate hearing after the attachment of the property and a double damages action if the initial suit was brought without probable cause, but the Court found that these safeguards, alone, "would not cure the temporary deprivation that an earlier hearing might have prevented."[103]

The third inquiry in the modified *Mathews* test considers the interests of the party seeking the order of attachment.[104] The Court decided that the petitioner's interests were too minimal to allow prejudgment attachment of the respondent's property.[105] The petitioner did not have a preexisting interest in the property at the time the attachment was sought.[106] In addition, the petitioner did not allege that the respondent was about to transfer or encumber the property, which the Court noted would be "an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected."[107] Without a preexisting interest in the property or exigent

96. *Id.* at 12.
97. *Id.*
98. *Id.*
99. *Id.* at 12-15.
100. *Id.* at 13-14.
101. *Id.* at 15.
102. *Id.*
103. *Id.* at 14-15.
104. *Id.* at 16.
105. *Id.*
106. *Id.*
107. *Id.* Three of the cases discussed above had previously identified this as an exigent or exceptional circumstance that would justify postponing notice or a hearing. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 609 (1974); Fuentes v. Shevin, 407 U.S.

circumstances, the Court decided that the petitioner's interest did not justify the attachment of the respondent's property.[108]

Weighing each of the three inquiries of the modified *Mathews* test against each other, the Court held that the Connecticut statute violated procedural due process.[109] The first inquiry revealed that an important property interest, one protected by the Constitution, had been attached. Under the second inquiry, the Court determined that the statute lacked sufficient procedural safeguards and, thus, the risk of erroneous deprivation was substantial. Finally, the Court decided that the petitioner's interests in attaching the property were minimal, since he did not claim to have a preexisting interest in the property or allege that any exigent circumstances existed.

III. Analysis of North Carolina's Prejudgment Statute

North Carolina's prejudgment statutes were enacted in 1947, two years after the Supreme Court's decision in *International Shoe*, but prior to its decision in *Shaffer*.[110] As such, the exercise of quasi in rem jurisdiction was still governed by the principles set forth in *Pennoyer*, which allowed attachment as a form of relief from the strict requirements of the "power" doctrine.[111] This is evident from the grounds for attachment provided for in the prejudgment attachment statute.[112] Section 1-440.3 provides,

> In those actions in which attachment may be had under the provisions of [section] 1-440.2, an order of attachment may be issued when the defendant is
>
> (1) A nonresident, or
> (2) A foreign corporation, or
> (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or

67, 90-92 (1972); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 339 (1969).

108. *Doehr*, 501 U.S. at 16. This inquiry also looks at the government's ancillary interest in providing the attachment remedy. *Id.* However, the Court found that the government's interest in providing the remedy for the petitioner could not be any greater than the interests that the petitioner had in the attachment. *Id.* Since the petitioner's interests were minimal, so too were the government's. *Id.*

109. *Id.* at 24.

110. *See* N.C. Gen. Stat. § 1-440.3 (2007); Shaffer v. Heitner, 433 U.S. 186 (1977); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

111. Pennoyer v. Neff, 95 U.S. 714 (1877).

112. N.C. Gen. Stat. § 1-440.3.

(4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
   a. Has departed, or is about to depart, from the State, or
   b. Keeps himself concealed therein, or
(5) A person or domestic corporation which, with intent to defraud his or its creditors,
   a. Has removed, or is about to remove, property from this State, or
   b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.[113]

The first four grounds for attachment are clearly based on the antiquated principles of *Pennoyer*, permitting attachment of property to acquire quasi in rem jurisdiction when in personam jurisdiction cannot be obtained. For example, the statute provides that when a domestic corporation cannot be served inside the state[114] or a resident of the state is "dodging" service[115]—both circumstances precluding the exercise of in personam jurisdiction under *Pennoyer*—a plaintiff is afforded some relief by creating a method of obtaining jurisdiction.[116] The fifth ground for attachment, on the other hand, does not merely provide a basis for obtaining quasi in rem jurisdiction. It allows a plaintiff to attach the defendant's property to secure the property and prevent its destruction or disposal prior to a lawsuit.[117]

In order to determine whether North Carolina's prejudgment attachment statute violates procedural due process, each ground for attachment must be analyzed separately to see if it passes constitutional muster. To facilitate this analysis, North Carolina's long-arm statute will be briefly discussed to determine its scope with respect to the limits of due process set forth in *International Shoe*. Next, the three-pronged modified *Mathews* test will be applied to the statute, taking into consideration the scope of the long-arm statute and its affect on each ground for attachment.

A. *In Personam Jurisdiction in North Carolina: The Long-Arm Statute*

The Supreme Court of North Carolina has held that a court in North Carolina must make a "two-fold determination" before exercising in personam jurisdiction over a defendant: first, the court must determine whether the long-arm statute permits the court to exercise

113. *Id.*
114. *See id.* § 1-440.3(3).
115. *See id.* § 1-440.3(4).
116. *Id.* § 1-440.3.
117. *See id.* § 1-440.3(5).

such jurisdiction, and, if so, the court must determine whether the exercise of jurisdiction would violate due process.[118] Therefore, before a court turns to its "minimum contacts" analysis under *International Shoe*, it must determine whether the legislature has authorized the exercise of in personam jurisdiction according to the facts of the particular case.

North Carolina's long-arm statute is section 1-75.4 of the North Carolina General Statutes.[119] The statute lists twelve specifically defined circumstances in which a North Carolina court can exercise in personam jurisdiction over a defendant.[120] Thus, to satisfy the first inquiry in the "two-fold determination," a court must find that the defendant's contacts with the state are such that they fit within one of the specifically defined circumstances in the statute. Although it would seem that the specificity of the long-arm statute would serve to limit the state's power to exercise in personam jurisdiction, North Carolina courts have interpreted the statute as a "legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause."[121] This interpretation

118. Dillon v. Numismatic Funding Corp., 231 S.E.2d 629, 630 (N.C. 1977). The second determination is, of course, whether such an exercise of jurisdiction will violate due process. *Id.*

119. *See* N.C. GEN. STAT. § 1-75.4 (2007).

120. The twelve different circumstances are: (1) local presence or status within the state; (2) where jurisdiction is conferred by another statute; (3) local act or omission that has resulted in an injury; (4) local injury arising from an act or omission occurring outside the state; (5) actions arising from local services, goods or contracts; (6) actions arising out of local property; (7) deficiency judgments on local foreclosures; (8) defendant is a director or officer of a domestic corporation; (9) actions arising from taxes levied by the state; (10) actions arising from local insurance contracts; (11) personal representatives of a decedent who would be subject to jurisdiction if living; and (12) actions arising from marital relationships where either party lives locally. *Id.*

121. Sparrow v. Goodman, 376 F. Supp. 1268, 1270 (W.D.N.C. 1974) (quoting First-Citizens Bank & Trust Co. v. McDaniel, 197 S.E.2d 556, 558 (N.C. Ct. App. 1973)). *See also Dillon*, 231 S.E.2d at 630 ("[I]t is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process."); Chadbourn, Inc. v. Katz, 208 S.E.2d 676, 679 (N.C. 1974) ("State legislatures have responded to these expanding notions of due process with 'long-arm' legislation designed to . . . make available to the courts of their states the full jurisdictional powers permissible under due process. . . . [T]he North Carolina General Statutes reflect this national approach to personal jurisdiction.").

has resulted in the long-arm statute being "liberally construed in favor of finding personal jurisdiction."[122]

While each circumstance defined in the long-arm statute has been liberally construed, section 1-75.4(1)(d) has received the broadest interpretation.[123] This subsection allows for the exercise of jurisdiction over any defendant who is "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise."[124] The Supreme Court of North Carolina, in *Dillon v. Numismatic Funding Corp.*, stated that, by the enactment of section 1-75.4(1)(d), the legislature "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process."[125]

Referencing this statement in *Dillon*, courts throughout the state have continuously utilized section 1-75.4(1)(d) to find statutory authorization for the exercise of in personam jurisdiction.[126] In fact, many courts have concluded that, in light of the broad interpretation of this particular subsection, statutory authority to exercise in personam jurisdiction impliedly follows a finding of minimum contacts, and have, therefore, skipped the initial determination of whether the long-arm statute applies.[127] Accordingly, the established law in North

122. Telerant Leasing Corp. v. Equity Assocs. Inc., 245 S.E.2d 229, 233 (N.C. Ct. App. 1978) (quoting Dillon v. Numismatic Funding Corp., 225 S.E.2d 137, 140 (N.C. Ct. App. 1976), *rev'd on other grounds*, 231 S.E.2d 629 (N.C. 1977)).

123. N.C. GEN. STAT. § 1-75.4(1)(d).

124. *Id.* Although the language "substantial activity" has been liberally construed, the Supreme Court of North Carolina has stated that the statute requires that the defendant have some "activity" in the state. Skinner v. Preferred Credit, 638 S.E.2d 203 (N.C. 2006). However, it seems apparent that minimum contacts with the state are enough to satisfy the substantial activity requirement.

125. *Dillon*, 231 S.E.2d at 630-31 ("[Section] 1-75.4(1)(d) . . . statutorily[ ] grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process.").

126. *See, e.g.*, A.R. Haire, Inc. v. St. Denis, 625 S.E.2d 894, 899 (N.C. Ct. App. 2006); Guy M. Turner, Inc. v. Commercial Plant Relocators, Inc., No. COA01-597, 2002 WL 857429, at *3 (N.C. Ct. App. May 7, 2002); Bruggeman v. Meditrust Acquisition Co., 532 S.E.2d 215, 218 (N.C. Ct. App. 2000); Bullard v. USAir, Inc., 443 S.E.2d 80, 82 (N.C. Ct. App. 1994); Mabry v. Fuller-Shuwayer Co., 273 S.E.2d 509, 511 (N.C. Ct. App. 1981); H. V. Allen Co., Inc. v. Quip-Matic, Inc., 266 S.E.2d 768, 770 (N.C. Ct. App. 1980); Paris v. Garner Commercial Disposal, Inc., 253 S.E.2d 29, 34 (N.C. Ct. App. 1979).

127. *See* Murphy v. Glafenhein, 431 S.E.2d 241, 244 (N.C. Ct. App. 1993) ("[W]hen personal jurisdiction is alleged to exist pursuant to Section 1-75.4(1)(d), the question of statutory authorization collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process." (second alteration in original) (citation and internal quotation marks

Carolina presumes statutory authorization to exercise in personam jurisdiction.[128]

B. *Analyzing North Carolina's Prejudgment Attachment Statute Under the Modified* Mathews *Test*

The constitutionality of North Carolina's prejudgment attachment statute has not been examined since the United States Supreme Court's decisions in *Shaffer* and *Doehr*.[129] The statute was held to be constitutional in *Hutchinson v. Bank of North Carolina*,[130] but this decision was in 1975, when the prevailing test under procedural due process was whether the statutes contained the saving characteristics of *Mitchell*. Accordingly, North Carolina's prejudgment attachment statute must be re-evaluated in light of the new modified *Mathews* test. The *Hutchinson* decision, however, will be discussed because its analysis is helpful in examining the second inquiry in the modified *Mathews* test.

1. *Inquiry #1—the Interest Affected by the Attachment*

The first inquiry in the modified *Mathews* test seeks to determine whether the interest affected by the attachment would be afforded constitutional protection. If the interest is constitutionally protected, then this factor weighs against the attachment of the property. According to

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omitted)); Kaplan Sch. Supply Corp. v. Henry Wurst, Inc., 289 S.E.2d 607, 609 (N.C. Ct. App. 1982) ("Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion thereof comports with due process.").

128. *See* Gen. Latex & Chem. Corp. (of N.C.) v. Phoenix Med. Tech., Inc., 765 F. Supp. 1246, 1249 n.1 (W.D.N.C. 1991) ("Thus, given the liberal construction of the North Carolina long-arm statute, the prevailing law in North Carolina presumes the existence of in personam jurisdiction.").

129. Immediately after the United States Supreme Court's decision in *Shaffer*, the North Carolina Court of Appeals applied its holding to part of North Carolina's long-arm statute in *Balcon v. Sadler*, 244 S.E.2d 164 (N.C. Ct. App. 1978). Under one subsection of the long-arm statute, section 1-75.8(4), a North Carolina court could exercise quasi in rem jurisdiction over an action if the defendant had property in the state that had been attached, *id.* The court concluded that this subsection was unconstitutional since it allowed for the exercise of jurisdiction merely from a showing that the defendant owned property in the state, which was in direct contravention with *Shaffer*'s requirement of minimum contacts. *Balcon*, 244 S.E.2d at 167. The court found, however, that quasi in rem jurisdiction could still be exercised over nonresidents under the next subsection, section 1-75.8(4), which extends quasi in rem jurisdiction to any action in which it may be constitutionally exercised, *id.*

130. Hutchinson v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

section 1-440.4 of North Carolina's prejudgment statutes, all of a defendant's property located in the state is subject to attachment.[131] The term property, under the statute, has been interpreted by the Supreme Court of North Carolina to include any type of property interest, no matter whether it is "real or personal, tangible or intangible."[132] In addition, the United States Supreme Court has construed the Due Process Clause broadly to protect "any significant property interest."[133] These significant property interests include mere temporary invasions of property rights and, as such, state attachment procedures must be subject to the strict limitations of procedural due process.[134] Since North Carolina's prejudgment statutes allow for the attachment of significant property interests—which are clearly protected under the Constitution—this inquiry would weigh against the constitutionality of the attachment statute.

2. *Inquiry #2—the Risk of Erroneous Deprivation Based on the Safeguards in Place*

The second inquiry of the modified *Mathews* test analyzes the risk of erroneous deprivation by looking at the safeguards the state has put in place to protect the person whose property is being attached. The United States Supreme Court has looked to the "saving characteristics" that it identified in *Mitchell* to determine whether there are sufficient safeguards in place. In evaluating North Carolina's prejudgment attachment statute, the North Carolina Supreme Court's decision in *Hutchinson v. Bank of North Carolina* will be relied upon because it analyzed North Carolina's statutes under the *Mitchell* balancing test.[135]

The issue before the court in *Hutchinson* was whether North Carolina's prejudgment statutes contained any or all of the saving characteristics found in *Mitchell*.[136] The state court first acknowledged that the statutes required that a plaintiff articulate specific allegations and grounds in an affidavit before a writ of attachment could be issued, a requirement that the court decided "involve[d] a stronger showing"

131. N.C. GEN. STAT. § 1-440.4 (2007).

132. Newberry v. Meadows Fertilizer Co., 166 S.E. 79, 82 (N.C. 1932) ("[A]ll property in this state, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of [the prejudgment statute], is liable to attachment.").

133. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

134. Connecticut v. Doehr, 501 U.S. 1, 12 (1991).

135. *Hutchinson*, 392 F. Supp. 888.

136. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

than the Louisiana statute analyzed in *Mitchell*.[137] Moreover, the court noted that a plaintiff was required to post a bond in order for the writ to be issued,[138] and if such a writ was issued, the defendant was entitled to an immediate post-deprivation hearing to determine the validity of the attachment.[139]

The court did identify one issue that made it question whether all of the saving characteristics of *Mitchell* were present. Under North Carolina law, a writ of attachment can be issued by a judge or the *clerk of court*.[140] This lack of judicial supervision was one of the main factors that the United States Supreme Court focused on in *North Georgia* to hold Georgia's garnishment statute unconstitutional.[141] The court in *Hutchinson*, however, determined that this aspect of the prejudgment statutes did not render them unconstitutional.[142]

Looking at the present law and practice in North Carolina, the court found it "abundantly clear that the Clerk of Superior Court is a judicial officer and not a mere administrative functionary."[143] This statement was further supported, the court concluded, by the fact that the clerk of court was authorized by the legislature to hear a motion for the dissolution of the writ of attachment, an adversarial hearing.[144] By establishing that the clerk of court was a judicial officer for the purpose of issuing and dissolving a writ of attachment, the court satisfied the last of the saving characteristics of *Mitchell*.[145] Thus, the court

137. *Hutchinson*, 392 F. Supp. at 895-96. *See* N.C. GEN. STAT. § 1-440.11 (2007) (requiring that a plaintiff in every case to state by affidavit that he has commenced or is about to commence an action, the nature of the action, and the specific grounds for the attachment of the property).

138. *Hutchinson*, 392 F. Supp. at 897. *See* N.C. GEN. STAT. § 1-440.10 (requiring the plaintiff to furnish a bond in an amount deemed necessary by the court to ensure reasonable protection of the defendant).

139. *Hutchinson*, 392 F. Supp. at 897. *See* N.C. GEN. STAT. § 1-440.36 (allowing the defendant to move for dissolution of the order of attachment at any time before final judgment in the principal action).

140. *See* N.C. GEN. STAT. § 1-440.5.

141. *See supra* notes 80-86 and accompanying text.

142. *Hutchinson*, 392 F. Supp. at 896-97.

143. *Id.* at 896. The court cited several other North Carolina statutes in which the clerk of court is granted judicial powers. *See* N.C. GEN. STAT. § 1-474(a) (empowering the clerk of court to order the seizure of property and defining this power as a "judicial act [that] may be appealed"); N.C. GEN. STAT. § 7A-40 (2007) (acknowledging that the clerk of court, in exercising the judicial power conferred upon him in certain situations, is a judicial officer of the Superior Court Division).

144. *Hutchinson*, 392 F. Supp. at 896. *See* N.C. GEN. STAT. § 1-440.36.

145. *Hutchinson*, 392 F. Supp. at 897.

held that North Carolina's prejudgment statute did not violate procedural due process.[146]

Accordingly, the North Carolina prejudgment statutes arguably have all of the saving characteristics of *Mitchell*: the plaintiff must submit an affidavit stating specific allegations and grounds for attachment of the property[147] to a judicial officer,[148] post a bond,[149] and the defendant has the right to an immediate post-deprivation hearing to assess the validity of the attachment.[150] Because of these procedural safeguards, the risk of erroneous deprivation is reduced significantly. Accordingly, this inquiry weighs towards the constitutionality of the attachment statute.

3. *Inquiry #3–the Plaintiff's Interests in Attaching the Property*

The third inquiry in the modified *Mathews* test evaluates the interests of the person seeking the writ of attachment. If this person's interests are minimal, this inquiry would weigh against the constitutionality of North Carolina's prejudgment attachment statute. The Supreme Court has identified two instances in which a plaintiff would have an interest in seeking attachment of property such that this inquiry would weigh in favor of the constitutionality of an attachment statute: when the plaintiff has a preexisting interest in the property and when exigent circumstances exist.[151] The following analysis assumes that the plaintiff seeking attachment does not have a preexisting interest in the property–the typical scenario in jurisdictional attachment cases.[152] Thus, in order for the plaintiff to have a sufficient interest, it must be shown that exigent circumstances exist.

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146. *Id.* at 899. The court also determined that there was no need to find that the plaintiff had a preexisting interest in the property that he was seeking to attach. *Id.* at 898. The court decided that, although *Mitchell* emphasized the plaintiff's preexisting interest, the United States Supreme Court in *North Georgia* did not discuss this factor, finding the garnishment statute unconstitutional due to other factors. *Id.*

147. N.C. GEN. STAT. § 1-440.11.

148. *Id.* § 1-440.5. The court, in *Hutchinson*, found that in North Carolina the clerk of court is a judicial officer. *Hutchinson*, 392 F. Supp. at 896-97. The Author of this Comment would agree that, in the exercise of issuing an order of attachment, the clerk of court is given judicial powers by the legislature. *See* N.C. GEN. STAT. § 7A-40 (stating that the clerk of court, in exercising the judicial power conferred upon him in certain situations, is a judicial officer of the Superior Court Division).

149. N.C. GEN. STAT. § 1-440.10.

150. *Id.* § 1-440.36.

151. Connecticut v. Doehr, 501 U.S. 1, 16-18 (1991).

152. *See* Zammit, *supra* note 23, at 679 ("In the typical case of jurisdictional attachment, the attaching plaintiff has no preexisting interest in the seized property

The first four grounds for attachment under North Carolina's prejudgment attachment statute allow for property to be attached in order for a court to obtain quasi in rem jurisdiction over a defendant.[153] More specifically, they provide for attachment when the defendant is a nonresident, a foreign corporation, or a resident or domestic corporation that is avoiding personal service of summons.[154] While each of these grounds must be analyzed separately, they do raise a common issue: whether the attachment of property merely to obtain quasi in rem jurisdiction constitutes an exigent circumstance.

In *Fuentes*, the Supreme Court recognized that there were a few exceptional circumstances that justified postponing notice and a hearing, and in each situation, the seizure of property must have been necessary to secure an important public interest.[155] One of the exceptional circumstances identified was the attachment of property to obtain quasi in rem jurisdiction, which the Court noted was "a most basic and important public interest."[156] The Court relied on *Ownbey v. Morgan*[157] for this principle, a case which was decided in 1921, well before the Court's decisions in *International Shoe* and *Shaffer*. In subsequent decisions, the Supreme Court continued to cite to *Ownbey* for the proposition that the attachment of property in order to obtain quasi in rem jurisdiction constituted an exigent circumstance.[158] Prior to the Court's decision in *Shaffer*, this reliance seemed perfectly justified. At the time *Ownbey* was decided, the "power" doctrine controlled jurisdictional law. As a result, the ability to attach property located in a state in order to obtain jurisdiction over a nonresident defendant was of the utmost importance. Under the "power" doctrine, attachment of property was absolutely necessary to protect the impor-

. . . ."). Thus, the focus of this analysis will be on the second type of quasi in rem jurisdiction. *See* discussion *supra* note 7.

153. N.C. GEN. STAT. § 1-440.3(1)-(4).

154. *Id.*

155. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972). The Court also recognized two other factors that were always present for a finding of exigent circumstances. *Id. See supra* text accompanying note 68.

156. *Fuentes*, 407 U.S. at 91 n.23.

157. 256 U.S. 94 (1921). The question before the Court was whether conditioning the opportunity for a hearing on the owner of attached property posting a security bail comported with the requirements of the Due Process Clause. *Id.* at 102-03. The Court concluded that such a condition was essential to convert a quasi in rem action into an action in personam, especially in light of the "power" doctrine of *Pennoyer*, and thus did not violate the Due Process Clause. *Id.* at 110-12.

158. *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (1975) (Powell, J., concurring); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 n.13 (1974); Mitchell v. W. T. Grant Co., 416 U.S. 600, 613 (1974).

tant public interest in adjudicating creditor's claims over nonresident or fleeing debtors that could not be personally served with process in-state. Even after *International Shoe* introduced its minimum contacts test for establishing in personam jurisdiction,[159] the attachment of property still seemed necessary in order to obtain jurisdiction over defendants that did not have sufficient contacts with a state.

The Supreme Court's holding in *Shaffer*, however, placed in personam and quasi in rem jurisdiction on the same footing by requiring that the minimum contacts test be satisfied in order to exercise jurisdiction in either form.[160] Therefore, according to constitutional requirements and ignoring a state's long-arm statute, if quasi in rem jurisdiction could be exercised over a defendant, so could in personam jurisdiction.[161] Thus, *Shaffer*'s holding brought into question the Court's earlier reliance on *Ownbey*. In fact, the *Shaffer* Court expressly addressed that reliance stating that "[w]e do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause."[162] In light of *Shaffer*, one must ask the following question: what important public interest is served by attaching property, without notice or a prior hearing to the property owner, solely to obtain quasi in rem jurisdiction when in personam jurisdiction is available to the courts? The answer is clear. When in personam jurisdiction is available, there is no interest that would justify postponing notice and a hearing.[163] If an important public interest is not secured by the attachment of property, then one of the factors required for a finding of exigent circumstances is not satisfied.

Looking at the third inquiry of the modified *Mathews* test directly, one can ask: what interest does a plaintiff have in attaching the defendant's property when a state court can exercise in personam jurisdiction over the defendant? Except in those situations where a plaintiff is seeking attachment to secure property from disposal or destruction under the fifth ground for attachment,[164] the only reason for the plain-

159. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). *See supra* notes 37-41 and accompanying text.

160. Shaffer v. Heitner, 433 U.S. 186 (1977).

161. *See supra* notes 42-50 and accompanying text.

162. *Shaffer*, 433 U.S. at 194 n.10. *See also* Zammit, *supra* note 23, at 680 (arguing that, prior to the Court's decision in *Shaffer*, reliance on *Ownbey* was misplaced).

163. *See* Zammit, *supra* note 23, at 680-81 (arguing that attachment was not an important public interest when the "public interest in adjudicating a particular controversy [could] be fully secured through the exercise of in personam jurisdiction").

164. *See* N.C. GEN. STAT. § 1-440.3(5) (2007).

tiff to attach property, alleging one of the first four grounds for attachment, is to obtain quasi in rem jurisdiction. Since a post-*Shaffer* plaintiff must show that a defendant has minimum contacts with a state before in personam or quasi in rem jurisdiction can be constitutionally exercised,[165] the only potential scenario in which a plaintiff would have any interest in attaching property is if, under the specific circumstances of the case, the North Carolina long-arm statute[166] restricted the court's power to exercise in personam jurisdiction over a defendant. In such cases, a plaintiff would be unable to obtain a judgment against a defendant in North Carolina unless the attachment of property, giving a state court quasi in rem jurisdiction, was permitted.

Accordingly, each of the grounds for attachment will be analyzed below to determine whether a plaintiff, seeking attachment under each ground, has a sufficient interest to support the attachment. If, for each of the first four grounds for attachment, in personam jurisdiction can be exercised under the long-arm statute, then the plaintiff's interest in attaching the property would be de minimis. On the other hand, if the long-arm statute does not authorize the exercise of in personam jurisdiction over the defendant, the plaintiff's interest in attaching the property to obtain quasi in rem jurisdiction would be substantial.[167] In such circumstances, the earlier justifications for allowing the attachment of property under the "power" doctrine would still be applicable. Thus, where a state court cannot obtain in personam jurisdiction over a defendant due to statutory restrictions, the important public interest in providing a means by which a plaintiff can secure a judgment against a nonresident defendant would create an exigent circumstance allowing for attachment of the property.

a. The First Ground for Attachment–Section 1-440.3(1)

The first ground for attachment provides that "an order of attachment may be issued when the defendant is . . . [a] nonresident."[168] Thus, in order to assess the plaintiff's interest in seeking attachment, one must determine whether North Carolina's long-arm statute restricts the power of state courts to exercise in personam jurisdiction

165. *Shaffer*, 433 U.S. at 212.

166. N.C. GEN. STAT. § 1-75.4 (2007).

167. *Contra* Mushlin, *supra* note 20, at 1104-16 (arguing that attachment of property to obtain quasi in rem jurisdiction, even in this circumstance, is probably unconstitutional). *But see* Haskew, *supra* note 48, at 266-78 (arguing that Mushlin's analysis is incorrect and that quasi in rem jurisdiction should be available to the courts when a state's long-arm statute limits the exercise of in personam jurisdiction).

168. N.C. GEN. STAT. § 1-440.3(1).

over a nonresident. The liberal interpretation of North Carolina's long-arm statute, as discussed earlier, clearly extends the power of a court to exercise in personam jurisdiction over a nonresident defendant to the limits of due process. Accordingly, if a plaintiff can establish that the defendant has minimum contacts with North Carolina, a state court will have the power to render a personal judgment against the defendant. With this power over a nonresident defendant available, the plaintiff's interest in attaching the defendant's property to obtain jurisdiction would be nonexistent. Therefore, the first ground for attachment weighs in favor of finding the attachment statute unconstitutional.

b. The Second Ground for Attachment–Section 1-440.3(2)

The second ground for attachment provides that "an order of attachment may be issued when the defendant is . . . [a] foreign corporation."[169] The broad interpretation of North Carolina's long-arm statute which applies to nonresident defendants is also applicable to foreign corporations.[170] Therefore, regardless of whether the statute is conferring jurisdiction over a nonresident or a foreign corporation, it is liberally construed to grant state courts the power to exercise in personam jurisdiction to the limits of due process. Accordingly, once a plaintiff can establish that a foreign corporation has minimum contacts with North Carolina, giving a court the power to exercise in personam jurisdiction, his interest in attaching the corporation's property to obtain jurisdiction would be de minimis. As such, the second ground for attachment weighs in favor of finding the attachment statute unconstitutional.

c. The Third Ground for Attachment–Section 1-440.3(3)

The third ground for attachment provides that "an order of attachment may be issued when the defendant is . . . [a] domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence."[171] North Carolina's long-arm statute expressly provides for the exercise of jurisdiction over a "party who when service of process is made . . . [i]s a domestic corpora-

169. *Id.* § 1-440.3(2). For purposes of the statute, a foreign corporation refers not only to an international corporation but also to a corporation that is incorporated in a state other than North Carolina.

170. *See* Bruggeman v. Meditrust Acquisition Co., 532 S.E.2d 215, 218 (N.C. Ct. App. 2000) (applying section 1-75.4(1)(d) to find statutory authorization to exercise in personam jurisdiction over a defendant corporation).

171. N.C. GEN. STAT. § 1-440.3(3).

tion."[172] Service of process, of course, can be served upon a domestic corporation regardless of whether a president, vice president, secretary, or treasurer can be found in North Carolina.[173] Once such service of process is made, in personam jurisdiction over a domestic corporation will always be available to the courts. Thus, the third ground for attachment weighs in favor of finding the attachment statute unconstitutional.

d. The Fourth Ground for Attachment–Section 1-440.3(4)

The fourth ground for attachment provides that "an order of attachment may be issued when the defendant is . . . [a] resident of the State who, with intent to defraud his creditors or to avoid service of summons, . . . [h]as departed, or is about to depart, from the State, or . . . [k]eeps himself concealed therein."[174] Unlike with domestic corporations, the long-arm statute does not expressly provide for the exercise of in personam jurisdiction over residents of the state. Section 1-75.4(1)(b) does allow for the exercise of jurisdiction over a person domiciled within the state,[175] but the terms "residence" and "domicile" are not interchangeable. Residence refers to a "person's actual place of abode, whether permanent or temporary," whereas a person is domiciled in a place if it is his residence and he "inten[ds] to make. . . [his] residence a home."[176] Thus, while most residents of North Carolina are also domiciled in the state, not all residents will be covered by that particular subsection.

However, in personam jurisdiction over residents of the state, whose place of domicile is located elsewhere, can still be exercised under section 1-75.4(1)(d).[177] Since this section has been interpreted as giving state courts full jurisdictional powers, a North Carolina court will be authorized to exercise in personam jurisdiction over any resi-

172. N.C. GEN. STAT. § 1-75.4(1)(c) (2007).

173. Service of process upon a domestic corporation can be made in several ways, besides personally serving an officer or director of the corporation. These include: leaving a copy of the summons and complaint in the office of the corporation's officer or director with the person who is in charge of the office; delivering a copy of the summons and complaint to an agent authorized to receive service of process; mailing a copy of the summons and the complaint to the corporation's officer, director, or authorized agent; or depositing the summons and complaint with a designated delivery service to be delivered to the officer, director, or authorized agent. N.C. R. CIV. P. 4(j)(6).

174. N.C. GEN. STAT. § 1-440.3(4).

175. N.C. GEN. STAT. § 1-75.4(1)(b).

176. Vinson Realty Co. v. Honig, 362 S.E.2d 602, 603 (N.C. Ct. App. 1987).

177. N.C. GEN. STAT. § 1-75.4(1)(d).

dent, although not domiciled in the state, that has minimum contacts with the state. If the defendant is subject to in personam jurisdiction,[178] the plaintiff's interest in attaching a defendant's property to obtain jurisdiction, similar to the other three grounds for attachment, is nonexistent. Thus, the fourth ground for attachment weighs in favor of finding the attachment statute unconstitutional.

e. The Fifth Ground for Attachment–Section 1-440.3(5)

The fifth ground for attachment provides that "an order of attachment may be issued when the defendant . . . with intent to defraud his creditors or its creditors . . . [h]as removed or is about to remove, property from this State, or . . . [h]as assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property."[179] As indicated above, this ground for attachment does not merely provide a basis for obtaining quasi in rem jurisdiction. Rather, it allows a plaintiff to attach the defendant's property to secure it against destruction or disposal prior to a lawsuit. The Supreme Court has held that this ground constitutes an exigent circumstance.[180] In *Doehr*, the Court stated that exigent circumstances would exist when a plaintiff alleged that the defendant was "about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment."[181] Thus, a plaintiff seeking attachment under the fifth ground would have an interest sufficient to allow prejudgment attachment of property. Accordingly, this ground for attachment weighs in favor of finding the attachment statute constitutional.

178. Although the resident may hide or leave the state to avoid personal service of summons, North Carolina's Rules of Civil Procedure allow for the resident to be served in other ways. For example, a plaintiff can: leave a copy of the summons and complaint at the defendant's house or usual place of abode with someone of suitable age; deliver a copy of the summons and complaint to an agent authorized to receive service for the defendant; mail a copy of the summons and complaint; or use a designated delivery service to deliver a copy of the summons and complaint. N.C. R. CIV. P. 4(j)(6). In addition, if the defendant is unable to be served by these methods of service, he may be served by publication. *Id.* at R. 4(j1) ("A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service . . . may be served by publication.").

179. N.C. GEN. STAT. § 1-440.3(5) (applying only when the defendant is a person or domestic corporation).

180. *See* Connecticut v. Doehr, 501 U.S. 1, 16 (1991).

181. *Id.*

4. Balancing the Three Inquiries

The modified *Mathews* test requires a balancing of each of its three inquiries, and, "[b]y weighing these concerns, courts can determine whether a State has met the 'fundamental requirement[s] of [procedural] due process.'"[182] Under the first inquiry, it is clear that the defendant has a substantial interest in the attached property. Therefore, this inquiry weighs in favor of finding North Carolina's prejudgment attachment statute unconstitutional. However, under the second inquiry, the prejudgment statutes provide sufficient procedural safeguards—which reduce the risk of erroneous deprivation. Accordingly, this inquiry favors a finding of constitutionality.

The third inquiry turns on the determination of whether the plaintiff has a sufficient interest in seeking attachment of the property. The fifth ground for attachment provides for attachment when exigent circumstances exist. As such, this inquiry would weigh in favor of finding the attachment statute constitutional. Given the fact that North Carolina's statutes also provides sufficient safeguards, a proper balancing of all three inquiries leads to the conclusion that the attachment of property under the fifth ground would not violate procedural due process.

However, the first four grounds for attachment merely provide a means for obtaining quasi in rem jurisdiction. Since North Carolina's long-arm statute has been construed so liberally, a plaintiff's interest in seeking attachment under these grounds is de minimus or nonexistent. Accordingly, the third inquiry would militate toward finding the attachment statute unconstitutional. Since the plaintiff has no interest in attaching the property, and the defendant has a substantial interest in preventing such attachment, a court should conclude that attachment under any of the first four grounds would violate procedural due process. The procedural safeguards provided by the statute, although reducing the risk of erroneous deprivation significantly, do not reduce the risk completely. Even with only a slight risk, there is no reason to take a chance on erroneous deprivation when in personam jurisdiction can easily be obtained over a defendant. Accordingly attachment under these grounds is unconstitutional.

C. Proposal for a Constitutional Statute

In order for the attachment of property to be constitutional, a state's prejudgment statutes must contain adequate procedural safe-

182. City of Los Angeles v. David, 538 U.S. 715, 717 (2003) (per curiam) (quoting Mathews v. Elderidge, 424 U.S. 319, 333 (1976)).

guards to protect the defendant's interests in his property and the plaintiff must have a sufficient interest in seeking the attachment.[183] North Carolina's prejudgment statutes provide adequate procedural safeguards, but do not limit the grounds for attachment to those instances when a plaintiff would have a sufficient interest in attaching the defendant's property: either when the plaintiff has a preexisting interest in the property or when exigent circumstances exist. Thus, section 1-440.3 of North Carolina's prejudgment statute, enumerating the grounds for attachment, must be amended to read,

> § *1-440.3. Grounds for attachment.* In those actions in which attachment may be had under these statutes, an order of attachment may be issued when:
>
> (1) The person seeking the order has a preexisting interest in the property to be attached, or
>
> (2) The defendant is a person or a domestic corporation which, with the intent to defraud his or its creditors:
>
> a. Has removed, or is about to remove, property from this state, or
>
> b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.[184]

Of course, additional grounds could be included if they are found to constitute exigent circumstances.

CONCLUSION

By allowing attachment of a defendant's property without requiring notice and a prior hearing, prejudgment statutes raise serious procedural due process concerns. However, prejudgment attachment of property is not completely unconstitutional. *Connecticut v. Doehr* made clear that a prejudgment statute can survive judicial scrutiny so long as a balancing of the modified *Mathews* inquiries weighs in favor of the attachment.[185] Since the first inquiry always weighs against the attachment of property, it appears that a constitutional statute must provide both substantial procedural safeguards to protect the defendant and grounds for attachment in which the plaintiff has a sufficient interest in attaching the defendant's property.

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183. These are the most important factors of the modified *Mathews* test since the first factor, the defendant's interest in the property, will always weigh against attachment. Thus, a state must ensure that both of these factors weigh towards the constitutionality of its prejudgment statutes.

184. This second ground for attachment is an exact replication of the fifth ground under the current statute, section 1-440.3(4), which constitutes an exigent circumstance.

185. *Doehr*, 501 U.S. at 10-11. *See supra* note 94 and accompanying text.

In *Schaffer v. Heitner*, the Supreme Court greatly diminished the importance and necessity of quasi in rem jurisdiction by holding that any assertion of jurisdiction by a state court must comport with the requirements of *International Shoe Co. v. Washington*.[186] By requiring both in personam and quasi in rem jurisdiction to meet the same constitutional standard, the cases in which a plaintiff would have a sufficient interest in attaching property to merely obtain quasi in rem jurisdiction have been severely limited, if not completely eliminated. It seems clear, however, that when in personam jurisdiction over a defendant can be acquired, the plaintiff's interest in attaching property in order to obtain jurisdiction is nonexistent. Therefore, under this circumstance, the attachment of property, without providing notice or an opportunity for a hearing to the defendant, violates procedural due process. Since the first four grounds for attachment under North Carolina's prejudgment attachment statute are limited to this circumstance,[187] the attachment of property under these grounds would violate procedural due process.

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186. Shaffer v. Heitner, 433 U.S. 186, 212 (1977). *See supra* notes 42-50 and accompanying text.

187. N.C. GEN. STAT. § 1-440.3(1)-(4) (2007).