Spring 2017

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Roger Williams University Law Review

Volume 22
Issue 2 *Marine Law Symposium Vol. 22: No. 2 (Spring 2017)*
Article 6

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I. INTRODUCTION

Whether originating at sea in the form of refuse from merchant vessels and cruise liners, discarded nets from fishing vessels, disintegrating fiberglass vessel hulls, or from land in the form of discarded consumer packaging, as much of this Symposium has demonstrated, pollution is a problem. It is a problem the United States cannot possibly hope to solve on its own. Nonetheless, given the importance of private actions in helping to clean up U.S. territorial waters, a fair question is what activists may be able to do through private litigation to help clean up the high seas. The task appears daunting. Many of the sources of pollution are large vessels on the high seas, while producers and users of the materials that form the debris may often be based on land. Whether on the high seas or land, many of the producers or the ultimate users of the materials that form marine debris will often have no physical connection to the United States and will not have had any reason to know, much less intend, for their products or actions to have any effect on the United States. Accordingly, under the "minimum contacts" theory of personal jurisdiction there is no basis for bringing those parties into U.S. courts to regulate their conduct.[1] As this Article will demonstrate, however, federal procedure in maritime cases allows for the assertion of jurisdiction over parties who are subject to

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1. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

maritime claims and are not subject to personal jurisdiction in the United States so long as the party over whom jurisdiction is asserted has any form of personal property in a judicial district of the United States.[2] Rule B of the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Actions provides for something many law students and practitioners who recall first-year civil procedure will assume to have vanished: quasi in rem jurisdiction over defendants in cases within the admiralty jurisdiction of the district courts.[3] Parties responsible for marine pollution may be understood to have committed maritime torts, and victims of those torts have a claim within the admiralty jurisdiction of the federal courts. To the extent the responsible parties have personal property in the United States, Rule B would allow a federal district court to assert jurisdiction over those parties.[4] While not a panacea, Rule B could be an important tool in regulating marine pollution by foreign parties.

II. MARINE DEBRIS

A. *A Very Brief Description*

Marine debris comes in all forms and has numerous sources. The forms vary in size, from containers and their contents washed overboard to merchant vessels and microscopic particles of plastic and fiberglass. Its immediate sources may be maritime, merchant vessels losing cargo overboard to heavy weather or cruise ships disposing of passenger and crew-generated trash and waste. Alternatively, the sources can be land-based, including consumers who throw away non-biodegradable trash, such as plastic bags or six-pack holders. This paper does not, and cannot, attempt to fully describe the production and use of plastic bags, six-pack holders, and other sources of marine pollution. This could be done; however, it is beyond my expertise to do so.

B. *Marine Debris Effects*

Whatever its source, marine debris does a number of damaging things. It is harmful to marine life, including fish.

2. *See* FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B. (2009).
3. *Id.*
4. *Id.*

Larger forms, such as nets, plastic bags, and six-pack rings, can choke and trap animals. Smaller forms can be ingested, affecting the health of the animals and affecting other animals further up the food chain, including human beings. In addition, it can threaten navigation by fouling propellers, rudders, and other equipment, or sometimes vessel hulls. The damage can occur anywhere on the high seas, in territorial water, or ashore. The place where the damage occurs may be where the plastic or other debris was manufactured, marketed, or used; some other state; or not within a state at all but rather on the high seas. Clearly then, the manufacturer may neither be located, doing business in, or targeting activities in the place where the damage is done. This presents problems for exercising jurisdiction over manufacturers, marketers, and users of materials that turn up as marine debris in the United States or on the high seas.

III. THE PROBLEM OF PERSONAL JURISDICTION

A. *Background: The Requirement of Geographic Power*

One of the problems of any type of enforcement action is that before a money judgment or order can issue against a party, the issuing court must have jurisdiction over that party. Since the decision in *Pennoyer v. Neff,*[5] a state's assertion of jurisdiction over a party has been subject to the limits of the Due Process Clause of the Fourteenth Amendment.[6] Under *Pennoyer*'s formulation of the requirements of due process, which lasted until the 1940s, there were only three bases for a court's assertion of jurisdiction: presence, consent, and presence of property.[7] A party had to be present in a state, consent to suit in the state, or have property within the state at the commencement of the action.[8] According to the *Pennoyer* Court, the Due Process Clause did not permit a state to reach outside of its borders to assert jurisdiction over a party.[9]

With an increasingly mobile domestic economy, the *Pennoyer* formulation proved to be increasingly problematic as the twentieth century progressed. Courts developed fictions implying

5. 95 U.S. 714 (1877).
6. U.S. CONST. amend. XIV, § 1; *Pennoyer,* 95 U.S. at 733.
7. *Pennoyer,* 95 U.S. at 724–25.
8. *Id.*
9. *Id.* at 722.

consent[10] and expanded the notion of corporate presence.[11] Whatever the merits of these approaches, *Pennoyer* would not make it past the first half of the twentieth century.

B. *Minimum Contacts*

1. The Expansion of Jurisdictions Over Persons

In *International Shoe Company v. Washington*,[12] the Supreme Court reformulated the requirements for a court to exercise jurisdiction over a party. The Court considered Washington's efforts to collect tax owed by International Shoe, which had a sales force in Washington, but did not have a corporate presence there.[13] Upholding Washington's assertion of jurisdiction, the Court concluded that a state could assert jurisdiction over a non-present defendant if there were minimum contacts among the defendant, the forum state, and the cause of action to "satisfy traditional notions of fair play and substantial justice."[14]

Following *International Shoe*, there have been many similar cases that should be familiar to the first-year law student. While the jurisprudence is far from a model of clarity, it is possible to present, for the purposes of this Article, a concise summary of the current state of the law.

International Shoe gave rise to viewing the law of personal jurisdiction as two categories, general and specific.[15] A court has general jurisdiction over a party when it may assert jurisdiction over any claim against a party, whether or not related to the party's activities in the forum's location.[16] For a natural person to be subject to the general jurisdiction of a court, she must have actual physical presence,[17] or residence in the forum state.[18] The basis of general jurisdiction over a corporation may be the corporation's place of incorporation or, in the words of the

10. *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).
11. *See* Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 589 (1914).
12. 326 U.S. 310 (1945).
13. *Id.* at 313.
14. *Id.* at 316.
15. Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014) (citing *Int'l Shoe*, 326 U.S. at 318).
16. *Id.*
17. Burnham v. Super. Ct. of Cal., Cty. of Marin, 495 U.S. 604, 619 (1990).
18. *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

Supreme Court, where it is "at home," usually its principle place of business.[19]

A court may assert specific jurisdiction over a party when the court has jurisdiction over a particular claim against that party.[20] For a party not present in a state, there must be a sufficient relationship among the defendant, the claim, and the state to provide the minimum contacts necessary to satisfy the requirements of "substantial justice and fair play."[21] In order to do this, the defendant must have intentionally availed itself of the jurisdiction of the forum, such as intentionally sending a product into the forum jurisdiction that causes harm.[22] On the other hand, if the product is neither intentionally nor knowingly sent into the forum, either because it was sold through a different legal entity, or because it was incorporated into another product made by a third party before it was sent into the jurisdiction, the fact that the product may have caused harm in the forum will not be sufficient to subject its manufacturer to jurisdiction.[23] Thus,

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19. *See Daimler*, 134 S. Ct. at 754 (internal citations omitted). This is a fairly major change in understanding from the late twentieth century. Following *International Shoe*, some courts interpreted nearly any act of doing business within a state as sufficient to subject the party to the state's general jurisdiction. *See, e.g.*, Mackensworth v. Am. Trading Transp. Co., 367 F. Supp. 373, 376 (1973) (considering a motion to dismiss for want of personal jurisdiction, where plaintiff's claim of jurisdiction was based on the single voyage of a merchant vessel to the forum state, and concluding, "[a]nd so we now must look to the facts to see if due process is met by sufficient 'minimum contacts.' The visit of defendant's ship is not yet very old, and so we feel constrained to hold that under traditional notions of substantial justice and fair play defendant's constitutional argument does not carry the day") (footnotes omitted).

20. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing within jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.").

21. *See* Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) ("The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation.") (internal quotations omitted).

22. *See* Polar Electro Oy v. Suunto Oy, 829 F.3d 1343, 1350 (Fed. Cir. 2016) ("[Defendant] purposefully shipped at least ninety-four [of its] products to Delaware retailers, fully expecting that its products would then be sold in Delaware as a result of its activities."); Brown v. Bottling Group, LLC, 159 F. Supp. 3d 1308, 1314 (M.D. Fla. 2016) ("[and Defendant] manufactured products in anticipation of sales in Florida, [defendant] used an exclusive U.S. distributor to complete shipment of products to Florida.").

23. *See J. McIntyre,* 564 U.S. at 886.

where an English company made a metal shredder that it marketed to the United States through a separate distributor, and the shredder harmed a metal worker in New Jersey, the New Jersey court (as opposed to the United States as a federal entity) could not assert jurisdiction over the manufacturer.[24]

2. Jurisdiction Based on Property

While *International Shoe* and its progeny expanded the jurisdiction of states to parties outside of their territorial boundaries, it is widely understood to have reduced the scope of jurisdiction over property within a state's territorial boundaries.[25] While the *Pennoyer* Court established that presence of property in a state was grounds for that state to assert jurisdiction over an absent party up to the amount of the value of the property,[26] in *Shaffer v. Heitner*[27] the Court announced that the use of property within a state to assert jurisdiction over a person outside the state would be subject to the same "minimum contacts" analysis as when a state attempts to exercise jurisdiction directly over a person.[28]

Thus, while the presence of property within a state may provide security of a claim—a court may attach the assets of a defendant before trial to secure any eventual judgment—the common understanding of *Shaffer* is that a court cannot use the presence of property within a state to secure jurisdiction over a defendant whom the Due Process Clause would otherwise place outside of the court's jurisdiction.[29]

C. *Jurisdiction Over Parties Responsible for Marine Debris*

Given the state of the law of personal jurisdiction, it would seem impossible to bring suit against many parties responsible for marine debris that affect U.S. citizens, either on the high seas or

24. *See id.* at 886–87.

25. *See* Conn v. Zakharov, 667 F.3d 705, 719 (6th Cir. 2012) ("The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.") (citation omitted).

26. *See* Pennoyer v. Neff, 95 U.S. 714, 724–25 (1877).

27. 433 U.S. 186 (1977).

28. *See id.* at 207–09, 212–13.

29. *See, e.g.*, Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction,* 58 ME. L. REV. 474, 479–81 (2006).

in U.S. waters. Many of those parties will have no presence in the United States. They will have neither incorporation nor a principle place of business in a state. Even if the damage the debris causes is felt within U.S. waters, it is doubtful that any parties causing it will have directed their actions toward the United States. While many foreign actors may have assets in the United States, in the form of bank accounts, securities, or accounts payable, under *Shaffer,* unless the actors themselves are present in the United States or have directed their actions there, that property could not be used to drag them into a U.S. court.[30] Under federal maritime law, however, the property of a foreign corporation could be used to do just that. Whatever the correct interpretation of *Shaffer*, or indeed, whether it is still good law aside, both long before and long after *Shaffer*, federal admiralty practice has allowed plaintiffs to assert jurisdiction over absent defendants on the basis of presence of the absent defendant's property.[31] The requirements for asserting jurisdiction based on the presence of a defendant's property are currently set out in Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Because Rule B has survived *Shaffer,* and because it provides a basis for asserting jurisdiction over maritime claims, it may serve as a tool in asserting U.S. jurisdiction over some foreign parties responsible for marine debris.

IV. MARITIME ATTACHMENT: JURISDICTION OVER PARTIES NOT SUBJECT TO SERVICE OF PROCESS

A. *Rule B*

Attachment of property to obtain jurisdiction over an absent party has been part of maritime practice since before the foundation of the Republic.[32] It was first codified in the Admiralty

30. *See Shaffer*, 433 U.S. at 209.

31. *See, e.g.*, Blueye Nav., Inc. v. Oltenia Nav., Inc., 1995 WL 66654, at *1, *3 (S.D.N.Y. Feb. 17, 1995) ("The rule is a formal recognition of the common law principle that attachment of a defendant's property was often the only way to gain jurisdiction over an admiralty or maritime defendant.").

32. *See* Atkins v. The Disintegrating Co., 85 U.S. 272, 303 (1874) (stating that "[t]he use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty . . . has prevailed during a period extending as far back as the authentic history of those tribunals can be traced").

Rules promulgated by the Supreme Court in 1844.[33] In 1966, when admiralty cases, now subsumed with in "one form of civil action"[34] came to be governed by the Federal Rules of Civil Procedure, the Supreme Court made maritime attachment part of the Supplemental Rules. Rule B provides, in pertinent part:

> If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.[35]

The requirement that a defendant not be found in a district has been interpreted to mean that the defendant either not be subject to, or available for, service of process within the district.[36] Thus, Rule B not only allows for process when a defendant is not subject to service under the Due Process Clause, but, to a large extent, the ability to take advantage of the Rule depends on the defendant's absence. How a completely absent defendant, against whom the plaintiff has a maritime claim, can be brought into a district with no relation to the claim is interesting considering *Shaffer*.

B. *Survival Post*-Shaffer

As mentioned above, from the time it was handed down until the present, *Shaffer* has been generally understood to have put an end to quasi in rem jurisdiction where the res, the property that is being attached, has nothing to do with the claim for which jurisdiction is being asserted—what the *Shaffer* Court called quasi in rem type II jurisdiction.[37] Nonetheless, whatever the proper understanding of *Shaffer,* Rule B has provided a robust example of the survival of quasi in rem jurisdiction type II to the present day. It is beyond the scope of this Symposium, or the interest of many of its participants, to discuss whether or not Rule B has a sound

33. *See* Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 438 (2d Cir. 2006).
34. FED. R. CIV. P. 1.
35. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B(1)(a).
36. *See Stoli Shipping*, 460 F.3d at 434.
37. *See Shaffer*, 433 U.S. at 209 n.17.

theoretical basis, but it should suffice to note that no federal court of appeals to have considered the issue has found that Rule B violates the Due Process Clause;[38] that for a time during the previous decade, three decades after *Shaffer,* Rule B provided the basis for nearly a third of the civil docket of the Southern District of New York;[39] and Rule B continues to provide a basis for jurisdiction in maritime actions brought in federal courts.[40] Rule B is not going away and may be of use in combating marine debris.

C. *Requirements of Rule B*

As a substantive matter, in addition to requiring that a defendant not be "found within the district" where the action is brought when the complaint is filed, Rule B requires that property be in the hands of a garnishee in the district; and that the case be brought in federal district court as a maritime case.[41] It will be useful to go through each of these requirements in turn.

1. The Defendant Must Be "Not Found" Within the District

As set out above,[42] the requirement of the defendant not being found within the district at the time the action is commenced means either that the defendant is not subject to service of process within the district *or* that they cannot be found for service of process.[43]

The Federal Rules of Civil Procedure in general make service of process by a federal district court dependent on the ability of a court of general jurisdiction in the state where the district court is sitting.[44] So, if there are not constitutionally sufficient contacts between the state in which the district is sitting and the defendant for general jurisdiction (contacts sufficient to make the defendant "at home" in the state) or specific jurisdiction (sufficient

38. *See, e.g.*, Williamson v. Recovery Ltd. P'ship, 542 F.3d 43, 50–51 (2d Cir. 2008); Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V., 249 F.3d 413, 419 n.2 (5th Cir. 2001); Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 960 (1st Cir. 1984); Teyseer Cement Co. v. Halla Mar. Corp., 794 F.2d 472, 473 n.1 (9th Cir. 1986).

39. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B(1)(a).

40. *Id.*

41. *Id.*

42. *See supra* notes 35–41 and accompanying text.

43. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B(1)(a).

44. FED. R. CIV. P. 1.

contacts among a defendant, the forum, and the claim along with defendant's purposeful availment of the forum state) a defendant will not be subject to service in and will not "be found" in a district in which the state is located.[45] Moreover, even were a defendant to be subject to service, if the plaintiff, after due diligence cannot find the defendant within the district to properly effect service of process, then the defendant would be "not found" in the district.[46]

2. Personal Property in the Hands of a Garnishee

As set out in Rule B itself, the property subject to attachment can be any sort of personal property, tangible or intangible.[47] It could be, as is typical of maritime practice, a vessel or cargo owned by the defendant, but it could be, and often is, intangible property such as accounts receivable, securities, or bank accounts.[48] The Rule B actions that formed so much of the Southern District of New York's business in the previous decade were based on the seizure of electronic fund transfers (ETFs) as they passed through the Southern District of New York.[49] While the Second Circuit eventually brought a halt to the Rule B attachments of ETFs, it was not because the transfers were not property capable of being attached. According to the Second Circuit, while the funds were between the transferor bank and the transferee bank, they were the property of neither the party making nor the party receiving the transfer. Thus, an action brought against either the transferor or the transferee would not justify the attachment of the funds between the transferor and transferee banks.[50]

3. An Action Brought Within the Admiralty Jurisdiction

Rule B does not mention the requirement of admiralty jurisdiction;[51] however, by the terms of Rule A of the Supplemental Rules, the supplemental rules are applicable in

45. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B(1)(a).
46. *Id.*
47. *Id.*
48. *See* Novoship (UK) Ltd. v. Ruperti, 567 F. Supp. 2d 501, 505 (S.D.N.Y. 2008) (stating that, "[i]t is difficult to imagine words more broadly inclusive than tangible or intangible") (citation omitted).
49. *See id.*
50. *See* Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 72 (2d Cir. 2009).
51. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. B.

"forfeiture action . . . under federal statute"; "statutory condemnation proceedings"; and "the procedure in admiralty and maritime claims within the meaning of Rule 9(h)."[52] This Article will not bother considering the remote possibility of a party responsible for marine debris being subject to either a statutory forfeiture action or a condemnation procedure. Marine debris claims may well come within the admiralty and maritime jurisdiction.

a. *Location*

"[C]ases of admiralty and maritime Jurisdiction" are one of the nine categories of cases or controversies brought within the judicial power of the United States by Article III of the Constitution,[53] and Congress has given the district courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction."[54] From very early on, it was understood that whether a tort claim came with the admiralty jurisdiction depended on location,[55] and by the end of the nineteenth century it was established that the location was the high seas or internal waters navigable in interstate commerce.[56] In 1948, to bring all claims resulting from an allision of a vessel with land-based structures within the admiralty jurisdiction, Congress extended the admiralty jurisdiction to injuries on land "caused by a vessel in navigable water."[57]

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52. FED. R. CIV. P. SUPP. ADMIRALTY AND MARITIME CLAIMS R. A(1)(A)–(C).
53. U.S. CONST. art. III, § 2, cl. 1.
54. 28 U.S.C.A. § 1333(1) (Westlaw through Pub. L. No. 114-327).
55. *See* DeLovio v. Boit, 7 F. Cas. 418, 440 (C.C.D. Mass. 1815).
56. *See* Jackson v. The Magnolia, 61 U.S. 296, 336 (1857).
57. Admiralty Extension Act, Pub. L. No. 695, 62 Stat. 496 (1948) (codified as amended at 46 U.S.C. § 30101(a) (2012)). The problem that Congress was addressing was caused by different ways in which the common law of most States and admiralty law treated fault on the part of the tort victim. At common law, the general rule was that any contributory negligence by the plaintiff barred the recovery. Maritime law, generally applicable to maritime actions, had a system of equally divided damages. Where a vessel hit a bridge causing damage to the bridge, on land, and to the vessel, on a navigable water, the vessel owner's claim against the bridge owner (perhaps for failing to post the appropriate lights on the structure) would not have been barred by the vessel owner's fault (perhaps having the vessel going at an unsafe speed) but would be subject to the rule of divided damages. The bridge owner's claim against the vessel owner, because it would have been governed by common law, would have been barred by any negligence on the bridge owner's part. The Admiralty Extension Act brought

b. *Nexus*

While the Admiralty Extension Act may have expanded the scope of the admiralty "to keep the odd case in" its jurisdiction, a quarter-century after its enactment the Supreme Court articulated restrictions on the jurisdiction "to keep the odd case out."[58] In a series of four cases,[59] the Court held that for a tort to come within the grant in 28 U.S.C. § 1333(1), in addition to taking place on navigable waters, it must a have connection with maritime activity, which is to be determined by looking at: (1) the "general features" of the tort to determine whether it has "'a potentially disruptive impact on maritime commerce,'" and (2) whether "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[60]

c. *Nexus on the High Seas*

All of the Supreme Court cases articulating the nexus requirement have involved actions on inland waters within the territory of the United States,[61] and the Court has left open the question of whether the nexus requirement applies to incidents on the high seas.[62] The high seas, however, unlike territorial waters

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both claims within the admiralty jurisdiction and the regime of divided damages. The law of admiralty has, as have many States, adopted a regime of comparative fault. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975).

58. Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 532 (1995).

59. *See id.* at 533–34 (discussing Sisson v. Ruby, 497 U.S. 358 (1990)); Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982); Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972).

60. *Id*. at 534 (quoting *Sisson*, 497 U.S. at 363–65, n.2).

61. *Grubart* involved pile-driving work in the Chicago River. 513 U.S. at 530. *Sisson* involved a fire aboard a yacht docked on the shores of Lake Michigan. 497 U.S. at 36. *Foremost* involved a collision between two pleasure boats on the Amite River in Louisiana. 457 U.S. at 670. *Executive Jet* involved a plane crash into Lake Erie just off the shore from Cleveland. 409 U.S. at 251.

62. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986) (noting the maritime nexus requirement that the wrong bears "a significant relationship to traditional maritime activities" has been applied to torts on navigable waters within the United States, but that the Court "need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas" as the ships in this case were clearly involved in maritime commerce, which is a "primary concern of admiralty

of the United States, have been viewed as a place where, as a general matter, the substantive law of the states does not apply.[63] Therefore, the Supreme Court has held that the Death on the High Seas Act,[64] which was enacted to give a claim for wrongful death at a time when maritime law did not provide a remedy, applies whether or not there is a maritime nexus involved in the death.[65] The question of federal interest impinging on state interests does not arise on the high seas as it would in state waters. Moreover, to the extent that admiralty law applies when admiralty jurisdiction is present, there would be difficulties in choosing an appropriate substantive law to apply to cases arising on the high seas were the cases not subject to the admiralty jurisdiction. For states, such as Virginia, that use *lex loci delicti* as the choice of law principle for tort cases,[66] if admiralty jurisdiction were not to apply on the high seas, then it would be hard to know which law to apply to a tort occurring there. Because state law may not apply on the high seas, a court—state or federal—must be able to look to maritime law for such cases, and admiralty jurisdiction must apply to cases occurring on the high seas.[67]

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law").

63. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 212, 214 (1986) (citations omitted).

64. Death on the High Seas Act, Pub. L. 109–304, 120 Stat. 1511, *amended by* 46 U.S.C. §§ 30301–308 (2012).

65. *See Offshore Logistics*, 477 U.S. at 219.

66. *See* Jones v. R.S. Jones Assoc., 431 S.E.2d 33, 34 (Va. 1993). Other states that use *lex loci* as the basis for choice of law are: Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina and South Carolina. *See* Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 213 (Ala. 2009); Convergys Corp. v. Keener, 582 S.E.2d 84, 86 (Ga. 2003); Aselco, Inc. v. Hartford Ins. Grp., 21 P.3d 1011, 1020 (Kan. Ct. App. 2001); Hauch v. Connor, 453 A.2d 1207, 1208 (Md. 1983); United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 775 P.2d 233, 234 (N.M. 1987); Gbye v. Gybe, 503 S.E.2d 434, 434 (N.C. Ct. App. 1998); Menezes v. WL Ross & Co., LLC, 744 S.E.2d 178, 182–83 n.2 (S.C. 2013).

67. *See* Robinson v. United States, 730 F.Supp. 551, 556 (S.D.N.Y. 1990) (concluding that a claim that an allegedly defective product caused harm on the high seas was subject to the federal admiralty jurisdiction, and stating that the "*Executive Jet* 'nexus' or 'status' analysis is appropriate only in that borderline case where the fortuitous application of an admiralty situs would oust state jurisdiction and rules of law. The case at bar involves a tort occurring on the high seas, governed by theories of liability explicitly made a part of the general maritime law . . . .").

d. *Nexus in Admiralty Extension Act Cases*

As noted above,[68] Congress expanded the scope of admiralty jurisdiction in 1948 to provide: "The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."[69] Arguably, this is a self-contained grant of jurisdiction, which depends only on the presence of (1) a vessel, (2) on navigable waters, (3) causing injury or damage, (4) to persons or property. Under this reading of the Admiralty Extension Act, the nexus requirement that the Supreme Court deemed essential to the grant of jurisdiction over "any case of admiralty or maritime jurisdiction" in accordance with 28 U.S.C. § 1333(1)[70] is simply immaterial to cases under the Admiralty Extension Act. On the other hand, it is possible to read the Admiralty Extension Act as only *extending* the jurisdiction granted in 28 U.S.C. § 1333(1), in which case the element that the vessel on navigable waters causes damage or injury would need to have some potential to disrupt maritime commerce along with a substantial relationship to traditional maritime activity.[71]

The question of whether cases brought in federal court need the necessary maritime nexus has generated a split among various federal district courts and courts of appeals,[72] and this

68. *See supra* note 57 and accompanying text.
69. 46 U.S.C.A § 30101(a) (Westlaw through Pub. L. No. 114-327).
70. *See supra* Part IV.C.3.b.
71. *See supra* notes 60–61 and accompanying text.
72. *Compare* Tagliere v. Harrah's Ill. Corp., 445 F.3d 1012, 1014, 1015 (7th Cir. 2006) (stating that the Admiralty Extension Act's "purpose was merely to make clear that accidents caused by boats on navigable waters are within the admiralty jurisdiction even if the damage caused by the accident was to something on the land[,]" and, when this "clear and simple jurisdictional test" is met, then the maritime nexus test is not needed) (citation omitted); St. Hilaire Moye v. Henderson, 496 F.2d 973, 977, 978–89 (8th Cir. 1974) (stating that the "strict locality test for admiralty [was] extensively altered [by *Executive Jet*,]" and now admiralty jurisdiction depends on "whether the accident arose out of a 'traditional maritime activity'") (citation omitted); *In re* RQM, LLC, No. 10 CV 5520, slip op. 129 at *6 (N.D. Ill. July 26, 2011) (stating that "[t]he Seventh Circuit has held that the location test remains the only jurisdictional test when the tort in question occurs on a boat") (citation omitted); *compare* N. Assur. Co. of Am. v. Allied Mason Contractors, Inc., Civ. Action No. 10 C 2197, slip op. 17 at *4 (N.D. Ill. June 17, 2010) (citation omitted), *with* Crotwell v. Hockman-Lewis Ltd., 734 F.2d 767, 768 (11th Cir. 1984) (stating that "[w]e have held that the

Article will not attempt to resolve the issue. It is worth noting, however, that while the issue is unresolved in many U.S. Courts of Appeals, the western Great Lakes within the territory of the Seventh and Eighth Circuits[73] applies the Admiralty Extension Act as a free-standing grant of jurisdiction. Along the Gulf Coast states as well as the Atlantic coast of Florida and Georgia—the territory of the Fifth and Eleventh Circuits[74]—parties must show that their claim arises from an incident with a potential to disrupt maritime commerce and there is a significant relationship to traditional maritime activity.

V. THE APPLICATION OF RULE B TO PARTIES RESPONSIBLE FOR MARINE DEBRIS

For parties responsible for marine debris who are not in the United States, two aspects of Rule B are fairly straightforward. First, if a party responsible for marine debris, for example the manufacturer of non-degradable plastic bags or the owner of a fleet of fishing vessels that abandons its nets, is neither incorporated nor has its principle place of business in any state, it will not be subject to service of process in any federal district. Accordingly, if there is a claim within the admiralty jurisdiction against the party and the party has *any* personal property, tangible or intangible, in *any* district, that property could be attached to obtain jurisdiction over and secure a judgment against the party. One possible example might be a manufacturer of non-degradable plastic bags incorporated and with its principle place

application of [the Admiralty Extension Act] is limited by the principles . . . which provide that admiralty jurisdiction requires that the wrong bear a significant relationship to traditional maritime activity") (citation omitted); Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132, 1136 (5th Cir. 1981) (concluding that the Admiralty Extension Act "was not intended to . . . relieve [claimants] from jurisdictional constraints unrelated to locality . . . imposed on general maritime tort claimants. Accordingly, we find claims under [the Act] to be subject to the maritime relationship rule of *Executive Jet*") (citation and internal quotation marks omitted); *In re* Christopher Columbus, LLC, Civ. Action No. 14-214 at *17–18 (E.D. Pa. Mar. 30, 2016) (stating "it is difficult to meaningfully reconcile the *Grubart* Court's acknowledgement that there is no categorical rule establishing that there is admiralty jurisdiction over 'every tort involving a vessel on navigable waters' with the type of categorical rule that Judge Posner interpreted the [Admiralty Extension Act] as embodying") (citation omitted).

73. *See* 28 U.S.C.A. § 41 (Westlaw through Pub. L. No. 114-327).

74. *See id.*

of business in China (Company A). Assume that Company A has a relationship with a company in Chicago (Company B) for some other products not including the non-degradable plastic bags, perhaps plastic packaging. If a claim within the admiralty jurisdiction could be brought against Company A, the plaintiff in the action could attach the payments owed by Company B to Company A in the Northern District of Illinois.[75] The second, more difficult question that needs to be answered is whether there is a maritime claim against the responsible party.

A. *A Claim for Causing Marine Debris*

The Supreme Court has recognized that products liability, under negligence and strict liability theories, is part of maritime law.[76] Accordingly, a party who makes or distributes a product that unreasonably causes harm to another through marine debris may be held liable for the damage caused.[77] Similarly, while there are statutes covering marine pollution,[78] marine pollution has also been recognized as a tort.[79] In either case of producing or dumping the products that turn into marine debris, it may be hard to identify the appropriate defender.

For producer and distributor defendants, it may be possible, however, for plaintiffs to proceed on a market share theory of liability, attaching liability to responsible parties in proportion to their share of the market of the products that cause marine debris. To be sure, while products liability law has been well established in federal admiralty law, the same cannot be said for market share liability.[80] The Fifth Circuit has rejected the theory for maritime torts,[81] and whether any court outside that circuit

75. *See* 28 U.S.C.A. § 93(a) (Westlaw through Pub. L. No. 114-327) (defining the geographic extent of the Northern District of Illinois).

76. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986).

77. *Id.* at 864–65.

78. 33 U.S.C.A. § 1952 (Westlaw through Pub. L. No. 114-327) (This is a federal law known as the NOAA Marine Debris Program.).

79. *In re* Exxon Valdez, 767 F. Supp. 1509, 1517 (D. Alaska 1991) (holding that the oil spill in this case was a maritime tort subject to maritime admiralty jurisdiction).

80. *See In re* Great Lakes Dredge and Dock Co. LLC, 624 F.3d 201, 214 (5th Cir. 2010); Stark v. Armstrong World Indus. Inc., 21 Fed. Appx. 371, n.4 (6th Cir. 2001) (noting that "[t]he plaintiff ha[d] provided no authority for an admiralty action to proceed under a market-share liability theory").

81. *In re* Bertucci Contracting Co. LLC, 712 F.3d 245, 247 (5th Cir. 2013)

could be persuaded to adopt it is far from certain. On the other hand, to the extent that fishermen would be the plaintiffs in cases against those responsible for marine debris, it is possible that the special solicitude shown by maritime law to fishermen[82] could persuade a court to adopt the theory.[83]

B. *Damages – Fishermen Again*

Assuming a proper defendant, or group of defendants, can be identified, a plaintiff in a maritime tort action, as in any other, needs to be able to plead and prove damages. In the case of marine debris, especially debris on the high seas, the damages are likely to be purely economic, without actual physical damage. The debris may reduce the value of the waters where it is found as recreational destinations; it may be able to be shown that fewer people would want to dive, sail, motor, or simply look at waters with lots of debris in them or in waters where the marine life may have been reduced or altered as a result of debris. Nevertheless, apart from the occasional instance of fouled rudders and propellers, there may not be many instances of a plaintiff's property being damaged by marine debris. Certainly this is true in the case of microplastics. However harmful they may be to marine life, it is hard to imagine microplastics causing any provable physical harm to a vessel, or its rigging, spars, and gear. As a general matter, this presents a problem to stating a maritime claim, as U.S. maritime law has long refused to grant damages for purely economic loss in tort claims.[84] The one exception to this has been fishermen, to whom some courts have shown a special solicitude, who have been allowed to collect damages from

("It is unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a proprietary interest in a maritime negligence suit.").

82. *See* Yarmouth Sea Prods. Ltd. v. Scully, 131 F.3d 389, 395 (4th Cir. 1997); Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).

83. *But cf.* Louisiana Crawfish Producers Ass'n–West v. Associated Elec. & Gas. Services, Ltd., No. 6:10–cv–348, 2011 WL 938766, at *6 (W.D. La. Feb. 25, 2011) (considering claims by crawfish producers and agreeing with the defendants, "that maritime law does not provide for enterprise or group liability"); Louisiana Crawfish Producers Ass'n W. v. Assoc. Elec. & Gas Ins. Servs. Ltd., No. CIV.A. 10-348, 2011 WL 947137 (W.D. La. Mar. 16, 2011). To be sure crawfish producers, who raise crawfish in large inland ponds, are arguably distinguishable from fishermen who go out onto the navigable waters and the high seas.

84. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309–10 (1927).

polluters in the absence of physical damage.[85] Accordingly, if they can identify a proper group of defendants and can prove damage to their incomes as a result of marine debris, fishermen may be able to bring an action against parties responsible for marine debris. In order to take advantage of Rule B, that action will need to come within the admiralty and maritime jurisdiction of the district courts.[86]

C. *An Admiralty or Maritime Claim*

As set out above,[87] the Supreme Court has held that for a tort to come within the admiralty jurisdiction of the district courts, at least in cases within the interior coastal waters of the United States, the tort must satisfy the requirements of location and nexus.[88]

1. Location

To the extent that causing marine debris may constitute a tort, demonstrating location for the tort would be trivial. The debris is in the ocean whether coastal or in the high seas, and this is where the wrong is consummated. Whether from land-based run off or from a vessel, the marine debris will satisfy the location test.

2. Nexus

For a plaintiff suing a party responsible for marine pollution, demonstrating nexus, especially the "significant relationship to traditional maritime activity,"[89] may be problematic. For plaintiffs, the most ready way of meeting the burden would be to convince a court that it need not be born. A plaintiff could do this by succeeding in the either or both the arguments that (1) because the marine debris causing the damage were on the high seas, the nexus test does not apply;[90] or (2) the nexus test does not apply because the complaint focuses on wrongdoing from a vessel on

85. *See Scully,* 131 F.3d at 389; *Oppen,* 501 F.2d at 558.
86. 28 U.S.C.A. § 1333 (Westlaw through Pub. L. No. 114-327).
87. *See supra* note 59 and accompanying text.
88. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986).
89. *See supra* note 72 and accompanying text.
90. *See id.*

navigable water, and is within the arguably self-contained jurisdictional grant of the Admiralty Extension Act.[91] Meeting the burden of showing a maritime nexus would, in some cases, prove problematic.

a. *Potential to Disrupt Maritime Commerce*

The first branch of the nexus test—that tortious activity have a potential to disrupt maritime commerce,[92]—seems like it should be fairly easily satisfied in most cases of marine debris. Commercial fishing and all forms of recreation are significant aspects of maritime commerce. To the extent that marine debris can interfere with fishing and recreation, it has the potential to disrupt maritime commerce. Indeed, courts have been willing to accept marine pollution from vessels as well within the admiralty jurisdiction as the pollution has the potential to disrupt maritime commerce.[93] It is the vessel, not the pollutants themselves, that can provide the "significant relation to traditional maritime activity."[94] How claims relating to marine pollution, including marine debris, could come within the admiralty jurisdiction, where the material ending up in the water is produced and discharged on land could be problematic.

b. *Significant Relation to Traditional Maritime Activity*

Where a vessel is transiting navigable waters and discharges marine debris, there is an obvious relation to traditional maritime activity. The carriage of cargo in and the discharge of waste by vessels are as old as maritime commerce. However, where a product is made on land, with the intent that it be used on land, and is then distributed to and is discarded by a land-bound user, it is difficult to describe what the producer or distributor has done in producing or distributing marine debris, as related to traditional maritime activity in any significant way. I think it is fair to say that in such instances, the tortious activity of the producers and distributors would not meet the nexus test. However, this failure

91. *See id.*
92. Quinn v. St. Charles Gaming Co., 815 So. 2d 963, 966 (La. Ct. App. 2002).
93. *See In re* Exxon Valdez, 767 F. Supp. 1509, 1512 (D. Alaska 1991).
94. Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 352 (5th Cir. 1999).

only accentuates why the nexus test is inappropriate for torts on the high seas.

If marine debris from products originally produced and distributed on land causes damage on the high seas, it is the general maritime law that should determine the liability for such damage; that is, the general maritime law administered by courts, state or federal, to cases that fall within the admiralty jurisdiction.[95] As noted above, under the traditional *lex loci* choice of law rules,[96] which a significant number of states still use, the general maritime law is the only law that could apply to such incidents.

CONCLUSION

Rule B, used to attach the personal property of, and obtain jurisdiction over, absent defendants in maritime cases, could be a useful tool in imposing liability on parties responsible for marine debris. It is not, however, a panacea. There will be problems in identifying defendants and proving damages. In addition, for the marine debris produced from landward run-off there may be significant jurisdictional barriers. While I have argued that activity causing damage on the high seas should not be subject to a maritime-nexus analysis in determining admiralty jurisdiction, the issue is not decided, and courts may be reluctant to bring activity far from land that was never directed at the sea within the admiralty jurisdiction.

Still, if Rule B were used to bring parties responsible for marine debris into federal district court, it could be highly effective. Rule B would give a court both jurisdiction over a responsible party and security for any judgment that might be secured.

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95. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65 (1986) (explaining that, "[w]ith admiralty jurisdiction comes the application of substantive admiralty law . . . . Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules") (citations omitted).

96. BLACK'S LAW DICTIONARY 1051 (10th ed. 2014) (defining *lex loci* as "[t]he law of the place; local law").