ATTACHMENT OF LIABILITY INSURANCE POLICIES: WHAT REMAINS OF THE SEIDER DOCTRINE AFTER SEVEN YEARS OF CONFLICT

I. INTRODUCTION

A person bringing an action to recover damages for personal injuries suffered in an automobile accident must sue in a forum which has jurisdiction over the defendant. This jurisdictional requirement may determine whether the plaintiff brings his action in personam or in quasi in rem. If the defendant is subject to personal jurisdiction, that is, if he has sufficient contacts with the forum state,[1] the plaintiff may bring his action "in personam." This would result in a determination of the personal rights and obligations of the parties,[2] and whether or not the defendant appears and presents a defense, he may be subject to a judgment for any amount that is found warranted.[3]

If personal jurisdiction cannot be obtained, a "quasi in rem" action may be brought by attaching property, or the res, of the defendant within the forum state.[4] If the plaintiff is successful in his litigation, his claim can be satisfied out of that property. In the event that the defendant makes no appearance, the recovery is limited to the value of the property.[5] While some jurisdictions allow the defendant to make a "limited" appearance to defend the attached property,[6] others do not grant this privilege, and a defendant appearing to defend is considered to have appeared generally and is thereby subject to in personam liability. In the latter case, recovery is not limited to the value of the attached property, and the defendant must either default or defend and subject himself to the danger of a larger recovery.[7]

Quasi in rem actions frequently raise disputes over whether the thing sought to be attached is really property which can provide a basis for attachment. The dispute becomes particularly keen when the thing is an

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[1] International Shoe Co. v. Washington, 326 U.S. 310 (1945); 311 U.S. 457 (1940).

[2] Pennoyer v. Neff, 95 U.S. 714, 727 (1877); *see* S. TEX. L.J. 59 (1968).

[3] *E.g.*, FED. R. CIV. P. 54(c); Kirby v. Holman, 238 Iowa 355, 25 N.W.2d 664 (1947); Hutchison v. Manchester St. Ry., 73 N.H. 271, 60 A. 1011 (1905).

[4] Courts of the state where the property is deemed to have a situs have the power to adjudicate claims sought to be satisfied out of property. Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U. L. REV. 1075, 1077 (1968) [hereinafter cited as Stein].

[5] Pennoyer v. Neff, 95 U.S. 714 (1877); 10 S. TEX. L.J. 59, 61-62 (1968). For an explanation of the relatively rare in rem action, see Note, *Minichiello v. Rosenberg: Garnishment of Intangibles—In Search of a Rationale*, 64 NW. U.L. REV. 407, 409 n.14 (1969) [hereinafter cited as *In Search of a Rationale*]; RESTATEMENT (SECOND) CONFLICTS OF LAWS, Introductory note to Ch. 3 (1971).

[6] Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (6th Cir. 1922); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N. E. 500 (1916).

[7] United States v. Balanovski, 236 F.2d 298 (2d Cir. 1956).

intangible, such as a debt.[8] Whether the thing sought to be attached was really property (and therefore attachable) and whether the purported property was actually located within the forum state were issues in the controversial New York case, *Seider v. Roth*,[9] in which the property was the defendant's rights under an insurance policy. This note will trace the development of *Seider* in New York, analyze the criticisms of the *Seider* doctrine, and survey the treatment of insurance policy attachment by other states.

II. SEIDER AND THE LAW OF NEW YORK

Desiring to bring suit in their home state of New York after being injured in an automobile accident in Vermont, the plaintiffs in *Seider* attempted to obtain quasi in rem jurisdiction over the defendant, a Canadian citizen. Since the defendant did not possess any tangible property in New York, the plaintiffs attached his liability insurance policy which was issued in Canada by a company that was also doing business in New York. The plaintiffs contended that the insurance company's obligation to defend and indemnify the defendant was an attachable debt within the state. Affirming a lower court's refusal to dismiss the order of attachment, the Court of Appeals of New York held that as soon as the accident occurred, the insurer's contractual obligation with the insured became an attachable debt under New York law.[10]

The court of appeals viewed the obligation of the insurer as a fixed debt as soon as the accident occurred and rejected the argument that the plaintiff was seeking to levy upon a limited, conditional obligation not absolutely payable at present or in the future. The court pointed to the obligation of the insurance company to investigate the accident and to pay medical expenses and found that these duties were fixed even if suit were never brought. Therefore the obligations under the policy were not contingent and were attachable.[11]

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[8] A debt is subject to attachment. Harris v. Balk, 198 U.S. 215 (1905). Furthermore, a debt may have its "situs" in several forums. 198 U.S. at 222; Western Union Tel. v. Pennsylvania, 368 U.S. 71 (1961).

[9] 17 N.Y.2d 111, 216 N.E. 2d 312, 269 N.Y.S.2d 99 (1966).

[10] N.Y. CIV. PRAC. LAW R. [hereinafter cited NYCPLR] § 5201(a) (McKinney 1963) provides:

> A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

NYCPLR § 6202 provides:

> Any debt or property against which a money judgment may be enforced as provided in Section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in Section 5201 . . .

[11] For the view that *Seider* created an exception to New York law and in reality allows a

In writing the *Seider* opinion, Chief Judge Desmond relied heavily on a prior New York case, *Matter of Riggle's Estate*,[12] which arose out of an automobile accident in Wyoming. The plaintiff was a citizen of New York, and the defendant was a resident of Illinois. The defendant died after he was personally served with process, and the plaintiff then moved to have an ancillary administrator appointed for the defendant's liability insurance policy (his only property in New York). This appointment would enable her to continue the action in New York. The court granted the motion and stated that the policy made the decedent's estate a creditor and the insurer a debtor, sufficient to confer jurisdiction in New York for this appointment.[13] The insurance policy was property for purposes of administration. Judge Desmond in *Seider* noted that even the dissent in *Riggle* agreed that the company's obligation to defend and indemnify was a debt.[14]

New York does not have a direct action statute permitting suit against the insurer,[15] and the court in *Seider* answered charges that it was judicially creating such a right by stating the insurer had agreed to defend its insured wherever jurisdiction was obtained over him, attachment of the insurer's obligation supported quasi in rem jurisdiction, and therefore the insurer was required to defend. The debt or obligation of the insurer existed in New York because the insurance company was present there.[16] Further, in what may be the key to the solution of the *Seider* dilemma,[17] the court found no policy reasons which militated against requiring the insurance company to defend in New York even though the accident occurred elsewhere. But the *Seider* decision did not discuss any policy reasons for or against allowing suit by a *non-resident*, nor did it expressly limit such attachment actions to New York residents.

In a vigorous dissent,[18] Judge Burke systematically rejected the reasoning and conclusions reached by the majority. He argued that there was nothing to attach in New York because the "debt" was only a promise to defend and indemnify *if* a suit was begun and *if* damages were awarded. He believed that this contingency fell within the New York statute which allows attachment only of debts past due or certain to become due; there-

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contingent obligation to be attached, see Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 658 (1967).

[12] 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

[13] SUR. CT. PRO. ACT § 208 (McKinney 1967) provides that for the purpose of conferring jurisdiction upon the Surrogate Court, a debt owed to a deceased by a state resident is deemed personal property.

[14] 17 N.Y.2d at 114, 216 N.E.2d at 314, 269 N.Y.S.2d at 102.

[15] Direct action statutes permit suits directly against the insurance company rather than against the actual tortfeasor. Watson v. Employers Liab. Corp., 348 U.S. 66, 68 (1954).

[16] 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

[17] See text following note 56.

[18] 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (Burke, J., dissenting).

fore, a debt subject to any contingency was not attachable. Judge Burke also objected to the circular reasoning of the majority because the court was allowing attachment of an obligation to obtain jurisdiction that was not attachable until jurisdiction had been obtained. He argued that suit must have been validly commenced before there was an obligation to defend and that prior to suit no debt existed.[19] Judge Burke distinguished *Riggle* because the defendant there had been personally served before his death; therefore jurisdiction had been obtained and the insurer's obligation, at least to defend, was fixed and no longer contingent. Additionally, Judge Burke sought to distinguish the estate cases relied upon by the majority because they were decided under administration statutes, and he further argued that attachment for purposes of jurisdiction required a different standard than that used to determine whether there was property for purposes of appointing an administrator.[20] Finally, Judge Burke dismissed the statement that any of the insurer's obligations to investigate and make medical payments accrued immediately; he noted that the "duty" to investigate is discretionary, not absolute, and that medical payments not only have no relation to the third-party liability of the insurer, but also are contingent upon proof of injury.

Seider v. Roth[21] was the first American decision to declare the automobile liability policy of an out-of-state defendant attachable as a debt, thus allowing quasi in rem jurisdiction.[22] The decision has survived seven years of intense criticism,[23] including demands for full reconsideration of the decision;[24] however subsequent New York decisions applying *Seider* have established the limitations and clarifications which were essential for survival. With these limitations, *Seider* has been adopted in California and Minnesota.

In *Jones v. McNeil*[25] a New York court permitted resident-plaintiffs to attach the insurance policy of a California resident who allegedly injured the plaintiffs in New Mexico. The insurance company was doing business in New York, and the court found, as in *Seider*, that the obligations of

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[19] *Id.*

[20] Judge Burke stated: "In the estate administration cases, where personal service on the defendant was not made, the promise even though admittedly contingent in nature was deemed sufficient property to constitute estate because no rights were determined by such appointment." *Id.* at 116-17, 216 N.E.2d at 316, 269 N.Y.S.2d at 104.

[21] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[22] Stein, *supra* note 13, at 1078. *Seider*-type actions are not limited to automobile insurance policies. For example, malpractice insurance policies would also be attachable if the other factors necessary to a *Seider*-type action are present. *E.g.*, Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973).

[23] For a discussion of the *Seider* doctrine, see Stein, *supra* note 12; *In Search of a Rationale, supra* note 10; Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

[24] *E.g.*, Comment, *Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction*, 16 BUFFALO L. REV. 769, 780 (1967).

[25] 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. 1966).

the insurer were fixed and attachable. The court found no due process violations since the property attached was within the forum state and the defendant was notified by a reasonable method and had an opportunity to be heard.[26] The court also rejected the defendant's commerce clause challenge to jurisdiction, reasoning that attachment is not precluded merely because the insurance company was engaged in interstate commerce.[27] Yet many of the questions unanswered by *Seider*, for example, the fear that if a defendant appeared to defend he might be subjected to personal jurisdiction, the danger of default in case the defendant decided not to risk personal jurisdiction, and other constitutional problems, remained to be solved by future cases.

Constitutional problems in *Seider*-type attachments were presented in *Lefcourt v. Sea Crest Hotel and Motor Inn, Inc.*[28] In a Massachusetts accident, a New York resident was injured by an employee-driven, employer-owned truck insured by a company doing business in New York; however neither the employer nor the employee were subject to the personal jurisdiction of a New York court. The court allowed attachment of the defendant's liability policy and relied on the *Seider* view that the insurer's obligation was not contingent because it was ascertainable at least to the extent of medical payments. The court determined that such attachment was not a denial of equal protection because the out-of-state defendant was treated no differently than a New York defendant: both had to submit to in personam jurisdiction under New York Civil Practice Law and Rules § 320(c) in order to defend on the merits. The court acknowledged a further difficulty that existed with these *Seider*-type suits: since New York procedure did not permit a limited appearance, the defendant was likely to stay out of New York and thus subject the insurer to default without an adequate chance to defend.[29] The court was able to avoid ruling upon this possible due process violation because the only issue actually presented was whether the defenses should be stricken. The defendants also had contended that the court did not have personal jurisdiction over them, that recovery could only be satisfied out of the property attached, and that the attachment would deprive the defendant of due process of

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[26] *Id.* at 530, 273 N.Y.S.2d at 521. The court cited Olberding v. Illinois Central Ry., 346 U.S. 338 (1953). In that federal diversity action, the Court found that the great potential for injury and the mobility of the population required that the injured person have redress, and the defendant need only be provided with a fair opportunity to defend. This method was reasonable and due process standards were met.

[27] 51 Misc. 2d at 530, 293 N.Y.S.2d at 522. The court concluded that commerce was not unduly hampered. For a discussion of the commerce clause aspects of the *Seider* doctrine, see Stein, *supra* note 12, at 1087.

[28] 54 Misc. 2d 376, 282 N.Y.S.2d 896 (Sup. Ct. 1967).

[29] If the defendant were to appear and defend on the merits, he could face judgment in excess of the policy limits because he would be subject to in personam jurisdiction. For criticism of *Seider* before it was limited by other cases, see Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

law because he would have to default to avoid personal jurisdiction and this likelihood could deprive him of a defense conducted by the insurer. The court, while not resolving these issues, did recognize the obvious disadvantages to the defendant and benefits to the plaintiff, who was given "a lever for obtaining personal jurisdiction over absent or non-resident defendants."[30]

Unhappiness with *Seider*[31] led to a reconsideration in 1967 by the New York court of appeals. One particular complaint had been that apparently a non-New York resident could come to the state to sue quasi in rem, and since New York had a history of high recoveries,[32] a defendant answering the merits might be personally liable to the extent the judgment exceeded his policy limits. This problem, along with criticism of the resolution of the contingency aspects of insurance policies and difficulties in determining the value of the policy attached, led to widespread belief that *Seider* was unconstitutional.[33] However, in *Simpson v. Loehmann*,[34] the *Seider* doctrine was clarified and upheld.

Plaintiffs in *Simpson* were an infant and her father, residents of New York, who alleged that a Connecticut defendant's negligence had caused the infant to be injured by a boat propeller in Connecticut waters. The plaintiffs attached in New York the defendant's liability policy issued in Connecticut by a company doing business in New York. The defendant contended that the attachment violated due process, imposed an undue burden on interstate commerce, and impaired the obligation of the insurance contract. The court felt that the decision turned on whether the obligation of the insurer to defend and indemnify enabled New York to exercise quasi in rem jurisdiction, and it concluded:

> It was our opinion when we decided [*Seider*], and it still is, that jurisdiction in rem was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. And we perceive no denial of due process since the presence of that debt in this State—contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him.[35]

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[30] Lefcourt v. Sea Crest Hotel & Motor Inn, Inc., 54 Misc. 2d 376, 383, 282 N.Y.S.2d 896, 903 (1967).

[31] See articles cited note 23 *supra.*

[32] Simpson v. Loehmann, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967) *reargument denied*, 21 N.Y.2d 990, 238 N..E2d 319, 290 N.Y.S.2d 914 (1968) (New York is a ". . . mecca for those seeking high verdicts in personal injury cases") (Breitel, J., concurring).

[33] For representative commentary on *Seider's* possible unconstitutionality, see Stein, *supra* note 4; *In Search of a Rationale*, *supra* note 5.

[34] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

[35] 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (citation omitted).

It is especially significant that the court went on to declare that recovery was limited to the value of the asset attached—the face value of the policy.

Judge Fuld, writing for the majority, offered policy reasons for upholding *Seider*. He noted that the historical limitations and rigid tests for in personam and in rem jurisdiction were "giving way to a more realistic and reasonable evaluation of the respective rights [of the parties] in terms of fairness."[36] In reality, the insurer was in full control of the defense; it selected the attorney, decided settlements, and made procedural decisions. The state had sufficient relation to the controversy when the insurer was being regulated by the state and the plaintiff was a New York resident (this reference to the New York residency requirement was later found essential to *Seider*-type actions). Fairness and public policy were not violated if insurance policy attachment was permitted. But the majority recognized that some problems inherent in *Seider* were not yet solved. The court recommended that the Law Revision Committee and the Advisory Committee of the Judicial Conference conduct studies into the impact of such quasi in rem jurisdiction, but stated that until such studies could establish the relationship of quasi in rem jurisdiction and the rule of *forum non conveniens*, *Seider* would stand.[37]

Judge Keating concurred in *Simpson*, for it was his belief that since there were sufficient state interests present to support a direct action law if one were authorized by the legislature, there were also sufficient interests to sustain a *Seider*-type attachment. Since the insurance company was present and was the real party in interest, there were sufficient contacts with New York to grant jurisdiction.[38]

Simpson, however, was not a strong mandate for the continuance of the *Seider* rule in New York. Significantly, *Seider* was upheld because Judge Breitel, a new appointee to the court, voted to continue such attachment although he felt that *Seider* was wrong and that the insurance policy was contingent and not intended to be reached by the attachment statute. Worse yet, he feared New York, already a "mecca for those seeking high verdicts in personal injury cases,"[39] would be subject to a proliferation of suits since practically any plaintiff could come to New York and sue by attachment simply because most insurance companies have offices in New York. Judge Breitel was more concerned with the court's stability than with one "tolerable error." The votes of Judge Breitel and Judge Bergan, who concurred in Breitel's opinion, were decisive in upholding *Seider*. Had they voted with the two dissenters, *Seider* would have been overruled.

Judge Brietel's fear of high recoveries by non-residents seems somewhat

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[36] *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

[37] *Id.* at 312, 234 N.E.2d at 672-73, 287 N.Y.S.2d at 638.

[38] *Id.* at 313-14, 234 N.E.2d at 673, 287 N.Y.S.2d at 639.

[39] *Id.* at 316, 234 N.E.2d at 675, 287 N.Y.S.2d. at 641.

unfounded since *Simpson* allows recovery only to the face value of the policy. Plaintiffs would know that their potential recovery could be lower than if they sued in personam in another jurisdiction. Limiting the recovery could actually deter New York residents from suing in their home state, because by bringing an action elsewhere there is at least a possibility of a higher recovery. This deterrent effect might be negligible, however, because in most cases an extremely solvent defendant will have more than sufficient insurance coverage, such that an in personam action would be unnecessary to recovery of a large amount. Conversely, a defendant with only modest coverage would be unlikely to have sufficient personal assets to make collectible a judgment in excess of his insurance limits. But a significant shortcoming of the first *Simpson* opinion is its failure to specifically state that non-resident plaintiffs could not avail themselves of the *Seider* procedure, although this is implicit in the majority opinion. Not until its denial of reargument did the court make this limitation explicit.[40]

In a very thorough dissent to the first *Simpson* opinion,[41] Judge Burke cast his doubts upon the *Seider* doctrine; he believed not only that was there was no attachable debt, but that *Seider* did not comply with the modern trend toward de-emphasizing the value of quasi in rem actions. Additionally, he considered *Seider* untenable because the mere presence of the insurer in the state was not sufficient to meet the jurisdictional requirements of *Watson v. Employers Liability Corp.*[42] In *Watson* the United States Supreme Court held that when an accident occurs within a state, there is sufficient state interest in seeing that the plaintiff is compensated for his injuries to justify a statute permitting suit directly against the insurance company, and the Court indicated that a plaintiff could sue an insurer directly if it had issued a policy within the forum state to the person who allegedly caused the injury. Judge Burk believed that these contacts with the state were necessary to allow the state to alter the nature of the insurance contract and were not specifically met in *Simpson*. He also believed that it was unfair to provide plaintiffs with venue at their convenience without any regard for the convenience of defendants or the presence of witnesses within the jurisdiction. This unfairness, along with a lack of contacts with the forum state, appeared to Judge Burke to render the *Seider* doctrine unconstitutional.

Judge Burke's feeling that *Seider* would generally create unfair results was manifested in *Victor v. Lyon Associates, Inc.*[43] In *Victor*, as in *Seider* and *Simpson*, the plaintiff was a New York resident and the defendant's liability carrier was doing business in New York. The defendant here was

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[40] Simpson v. Loehmann, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

[41] 21 N.Y.2d at 317, 234 N.E.2d at 676, 287 N.Y.S.2d at 642-43. (Burke, J., dissenting).

[42] 348 U.S. 66 (1954). In *Watson*, the Court upheld Louisiana's direct action statute.

[43] 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), *appeal dismissed sub nom.*, Hanover Ins. Co. v. Victor, 393 U.S. 7, *rehearing denied*, 393 U.S. 671 (1968).

a Maryland corporation which did not conduct business in New York, and the claim arose from an accident which had occurred in South Viet Nam.[44] Attachment of the insurance policy in New York was permitted. There are few contacts with New York, and there would be hardship in transferring witnesses to the forum state. But despite these difficulties and regardless of intense criticism of *Victor*,[45] it is incorrect to say that it is the *Seider* doctrine which causes an unfair result. If, for example, the defendant had owned real estate in New York, the attachment would have been permitted although witnesses and possibly other parties would still have had to travel the great distance to New York. The nature of quasi in rem jurisdiction itself produces this arguably inequitable outcome. Whatever the type of "property" attached, the inconveniences remain.

For a time it appeared that defendants objecting to attachment of their insurance policies could gain relief by removing the case to a federal district court.[46] In *Podolsky v. Devinney*,[47] decided by the Federal District Court for the Southern District of New York, a New York plaintiff attached the policy of a New Jersey defendant after an accident in New Jersey. The defendant removed the case to the federal court, where the insurance company complained that since New York does not allow a limited appearance,[48] the insurance company would be subject to possible default judgment and thereby lose its property without any chance to defend because the insured (the named defendant) might not authorize the insurer to appear on his behalf. The court vacated the attachment and held it to be unconstitutional.

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[44] Under the traditional view, when an accident occurs in a foreign country a plaintiff can acquire personal jurisdiction over an individual defendant in the state of his domicile and over a corporation in the state of its incorporation or in any state in which it is doing business. Stein, *supra* note 4, at 1116 n.281.

[45] Professor Stein states:

> Utilizing the doctrines of fairness and reasonableness and focusing upon the nexus between the forum, on the one hand, and the parties and the underlying transaction on the other, one may conclude that the New York courts lacked jurisdiction. . . . Aside from the plaintiff's domicile in the state and the fortuitous presence of the insurer there, various factors . . . militate against jurisdiction in New York. The intangible policy obligations were not in that state by the voluntary choice of the insured; other forums existed in which the controversy could have been fully adjudicated; it was likely that the law of another state would have been applicable; and New York's assumption of jurisdiction may have created a risk of multiple liability. The availability of evidence and the expectations of the parties as to the place of suit also pointed to jurisdictions other than New York. Moreover, New York and the defendant's "property" therein had no connection with the transaction or occurrence which gave rise to the suit.

Id. at 1116-17.

[46] Removal based on diversity of citizenship is provided for in 28 U.S.C. § 1441(a) (1970):

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district and division embracing the place where such action is pending.

[47] 281 F. Supp. 488 (S.D.N.Y. 1968).

[48] NYCPLR § 320 (McKinney 1972).

As a basis for its decision, the court first decided that insurance policies were not simple debts as in *Harris v. Balk*.[49] It noted that the "situs" of the res (insurance policy) was not only New York, but also any other state where the company did business. In contrast, *Harris* had established that the situs of the debt is wherever the debtor happens to be, and thus it can exist in only one place at a time. Under *Seider*, the same debt could be located in different states simultaneously if other states were to permit insurance policy attachment.[50] Second the court emphasized the contingent aspect of insurance policies; the duty to defend does not arise until jurisdiction is obtained, and the obligation to indemnify does not arise until a judgment is entered. This was the same point emphasized by Judge Burke in his *Seider* dissent. The court also noted that the obligation to defend was in reality an important right of the insurance company and was essential to enable the company to protect its financial interests. This "debt," by the court's interpretation, was more a benefit to the insurer than an obligation to the insured. Finally the *Podolsky* opinion expressed the fear that attachment could deprive the insurance company of its property without any showing of liability of the defendant—the defendant would not appear and default would be granted. And if the insured did appear, he could be subject to a judgment exceeding the policy limits,[51] since special appearances were not permitted in New York. The overall effect was to force the insured to submit to personal jurisdiction when no basis for such jurisdiction existed, and this seemed to the court to violate due process of law.[52]

Podolsky was decided after the first *Simpson v. Loehmann* decision. But two months after *Podolsky*, the Court of Appeals of New York in a *per curiam* opinion denying reargument of *Simpson*[53] emphasized that, contrary to the *Podolsky* interpretation of *Seider*, there could be no re-

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[49] 198 U.S. 215 (1905).

[50] In *Podolsky*, the court stated:

> The concept of *quasi in rem* jurisdiction is based on the physical power of the state with regard to the *res* or thing attached. As such it must be recognized that the authority of any tribunal is necessarily restricted by the territorial limits of the State in which it is functioning.

281 F. Supp. at 493-94 (citations omitted).

[51] The court seemed to disregard the *Simpson* limitation that recovery may not exceed the policy limits.

[52] The court stated:

> It is settled that at the present state of development in American law an attempt to obtain in personam jurisdiction over the present defendants would not comport with due process even if the New York statutes purported to allow it. That conclusion follows from the fact that the only nexus this litigation has with New York is the plaintiff's residence.

281 F. Supp. at 496. The court also cited *Victor* as an example where factors including witnesses and hospitalization make another forum the one with the sufficient minimum contacts required by due process to serve notions of fair play and substantial justice. *Id.*

[53] 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

covery in excess of the policy amount even if the defendant personally defended on the merits.

Barker v. Smith,[54] was a diversity action resulting from an accident in Michigan between a New York plaintiff and a Michigan corporate defendant insured by a company doing business in New York. The plaintiff had received medical treatment in New York. The court held that New York law applied and that the policy was an attachable debt. With respect to claimed constitutional violations, the court found nothing that forces a state ". . . to subordinate its own principles to those of the state where the contract was executed and the accident occurred."[55] Citing *Watson v. Employers Liability Corp.*,[56] the court reasoned that the New York resident had enough interest in the defendant's insurance policy to "warrant the remedies afforded by [the policy]." Since the plaintiff's medical expenses were to be compensated by the defendant's policy, and the company was doing business in New York, there were enough "activities relating to the contract" in New York to provide a basis for treating the obligation of the insurance company as an attachable debt. New York's interest in protecting and possibly having to provide free medical care for its citizens was another factor influencing the result. Furthermore, the state's attachment procedure was not as drastic as it might appear since the insurer would control the litigation wherever the action was brought, and any hardships could be surmounted by a motion for a change of venue pursuant to 28 U.S.C. § 1404.[57] Finally the court noted that *Podolsky* was not determinative of *Barker* because of the second *Simpson* opinion, although some constitutional questions remained to be solved.[58] Thus the *Barker* decision, while not completely answering all the objections to *Seider*, at least clarified the doctrine and indicated that *Podolsky* would not be followed.

Shortly after *Barker*, the *Seider* doctrine received grudging support by

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[54] 290 F. Supp. 709 (S.D.N.Y. 1968).

[55] *Id.* at 713.

[56] 348 U.S. 66 (1954).

[57] 28 U.S.C. § 1404(a) (1970) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[58] The court said:

> There remains the risk that the insured . . . might, contrary to its obligations under the policy, refuse assistance to the insurer (Mutual). In such event, unless recovery were denied on the ground that the insured had failed to comply with the policy's terms, a default judgment might be entered entitling the plaintiff . . . to recover from Mutual even though the issue of liability was never litigated and the policy entitled Mutual to assert the insured's default as against it. Such a consequence would work a far greater hardship on Mutual than would adoption of a direct action statute permitting it to litigate the question of liability.

290 F. Supp. at 714-15 (citations omitted). *See* Note, *Direct-Action Statutes: Their Operational and Conflicts-of-Laws Problems*, 74 HARV. L. REV. 357, 365-66 (1960).

a federal district court in *Jarvick v. Magic Mountain Corp.*[59] The facts were typically *Seider* and involved a Vermont defendant. Judge McLean believed that *Simpson* had changed New York law sufficiently to eliminate any due process violations and, therefore, the *Seider* rule was not so clearly wrong as to excuse the court from following it. The court then granted the defendant's motion to transfer the action to Vermont, where the defendant had agreed (perhaps unnecessarily) to appear generally.[60]

Perhaps the most conclusive affirmation of the *Seider* doctrine came from the Second Circuit in a 1968 case, *Minichiello v. Rosenberg*.[61] Defendant Rosenberg, a Pennsylvania resident who allegedly caused an accident in Pennsylvania had sought dismissal of the attachment in New York of his insurance policy. His insurer was doing business in New York and the plaintiff was a New York resident. Judge Friendly read *Simpson v. Loehmann*[62] to sanction a judicially created direct action against the insurer by attachment. He reasoned that if the New York legislature could constitutionally create a direct action for a New York resident injured in another state, then the *Seider* rule would be tenable. After examining *Watson v. Employer's Liability Corp.*[63] and noting the policy reasons for permitting a plaintiff to sue in his home state,[64] he concluded that the

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[59] 290 F. Supp. 998 (S.D.N.Y. 1968).

[60] Transfer of a diversity action begun by a *Seider*-type attachment, as in *Jarvick*, presents an interesting problem. Could the court transfer an action under 28 U.S.C. § 1404(a) (1970) even though the defendant did not agree to appear generally? And if so, what form would that action take? A transfer is proper only to a forum where the action could have been brought, Hoffman v. Blaski, 363 U.S. 335 (1960), and since the plaintiff could not bring an attachment action against an insurance policy in any state but New York, transfer would be improper if the quasi in rem action was to be maintained. Of course, an in personam action could have been brought in certain other forums. But a defendant cannot accomplish transfer by waiving the § 1404(a) restriction that the action, if not possible initially in that forum, could not be transferred there. *Id.* Would it be improper to transfer a quasi in rem action in a New York federal court to another federal court as an in personam action? Probably not, as long as it was transferred to a district where personal jurisdiction was obtainable, because the right to sue in the other forum need not be an unqualified right. The appropriateness of an action in personam in another jurisdiction would be sufficient to allow transfer there, for the plaintiff could not object to the transfer by saying that he would not have personally served the defendant there. *But cf.* Van Dusen v. Barrack, 376 U.S. 612 (1964).

However, the defendant might prefer not to seek transfer because he is assured that in New York he will not be subject to liability in excess of his policy coverage. Yet as a result the case would be tried in New York even though New York was the least convenient forum. But if transfer is routinely sought and allowed, the attachment procedure would be rendered useless (except perhaps to toll the statute of limitations), and the procedural steps would be needlessly increased. Note that if plaintiff's *Seider*-type actions are always transferred, then the procedure would exist in name only, and such actions would cease. In the meantime, plaintiffs who were not aware that the transfer out of New York was becoming automatic would be burdened with transfer procedures.

[61] 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844, *rehearing denied*, 396 U.S. 949 (1969).

[62] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

[63] 348 U.S. 66 (1954).

[64] A policy consideration is that the injury may require treatment in hospitals of the plaintiff's state, which might mean state aid. In *Minichiello* the court noted the trend away

United States Supreme Court would uphold a New York statute allowing a direct action against insurance companies doing business in New York by residents of that state as well as by persons injured there.[65]

However, Judge Friendly reasoned that even if a direct action *statute* would be constitutional, *Seider* could still fail because it involved both a non-resident insured as a defendant *and* the insurance company, whereas the typical direct action statute permitted suit against the insurance company without making the actual tortfeasor a party to the action. But since the insurer was the true defendant in either situation, the difference was not considered critical. As a more significant problem, he questioned the constitutionality of a direct action where the state was neither the plaintiff's residence nor the place of injury. He concluded that since the insurance company is present in New York, recovery is restricted to the policy limits, and the remedy is reserved for New York residents, there are no due process violations.[66] Finally, Judge Friendly noted that even if recovery was limited to the policy value, the problem might remain whether the New York judgment would have collateral estoppel effect in other forums, although it probably would not.[67] No state could give collateral estoppel effect to a *Seider* judgment because the insurer, not the insured, would control the defense; the procedure, after all, was a direct action against the insurer. The non-resident defendant would not have full opportunity to defend in the sense required for collateral estoppel.

Although many of the constitutional objections against *Seider*-type attachments had been answered, a dissenting opinion in *Minichiello*[68] evidenced the strong feeling that *Seider* was nevertheless wrong. Judge Anderson emphasized that many policy reasons work against suits in the plaintiff's state. For example, accident deterrence goals and medical treatment factors would be related to the state of the injury, not New York. Significantly, Judge Anderson read *Watson* to say that a prerequisite to a valid direct action law is the occurrence of the *injury* in the plaintiff's state. Where the plaintiff is allowed to sue in his own state, all the conveniences accrue to him, and none to the defendant. Judge Anderson thought it particularly unfair to require a defendant who had not committed a tort in New York to go there to defend. This was especially true when the plaintiff was in the defendant's state at the time of the injury. Judge Anderson indicated that convenience of the forum was the

from bias toward the defendant in obtaining personal jurisdiction and recognized that more frequently the defendant is required to go to the plaintiff's state if there is a sufficient basis for requiring it. 410 F.2d at 110.

[65] For a discussion of direct action statutes, see Note, *Direct-Action Statutes: Their Operational and Conflicts-of-Laws Problems*, 74 HARV. L. REV. 357 (1960).

[66] 410 F.2d at 113.

[67] The court recognized that the due process clause prevents a state from giving a quasi in rem judgment collateral estoppel effect. *Id.* at 112.

[68] *Id.* at 113 (Anderson, J., dissenting).

primary consideration. The fortuitous presence of the defendant's insurance company within the plaintiff's state carried little weight in that determination. Thus under a true direct action statute as viewed by Judge Anderson, the *Seider* result would not be reached because an action had to be brought in the state where the accident occurred. The *Seider* variation of a direct action statute was unreasonable and parochial. In retaliation other states might adopt the rule and the result would be a contest between states seeking to protect their own citizens. In Judge Anderson's opinion, the *Seider* process was unconstitutional.[69]

After reconsideration of *Minichiello* en banc, the Second Circuit adhered to its prior affirmation of *Seider*.[70] Relying on *Harris v. Balk*,[71] the court rejected the contention that the burden on non-resident defendants was too great. Seider meant only that ". . . liability policies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objectives for which they were procured."[72] Further, protection against an inconvenient forum was provided by the possibility of transfer of venue. The fact that such transfer might not always be permitted would prove that there were other factors relevant to convenience besides the place of the injury. Yet the *Minichiello* court indicated that problems with *Seider* still remained, especially in cases involving multiple claims. *Seider* could produce unconstitutional results if it was applied to give preference to one claimant in a multiple claim situation when, with other claims, the amount sought would exceed policy limits. The court suggested that before other states adopt the *Seider* rule, they should examine all the potential difficulties.[73]

After *Minichiello* it was fairly well settled that *Seider* was constitutional because there were sufficient contacts with the forum, suits were limited to residents of New York, and recovery was limited to the policy amount.[74] But in 1970 *Seider* was expanded to encompass suit by a non-

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[69] *Id.* at 117.

[70] *Id.* at 118.

[71] 198 U.S. 215 (1905).

[72] 410 F.2d at 118.

[73] The court seems to be warning other states that *Seider* may not be worth the trouble. Yet in a multiple claimant situation, a defendant will almost always face a possible judgment exceeding his policy coverage. At least the *Seider* defendant in New York will not be personally liable there no matter how many claimants there are. As to possible prejudice against the claimants, the first to attach would acquire jurisdiction to recover through the insurance policy. In any multiple claimant-quasi in rem action there is possibility of prejudice to other creditors; it is not a result peculiar to *Seider*-type actions.

[74] *See* Ferrall v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir. 1969), *cert. denied*, 396 U.S. 840 (1970); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (Sup. Ct. 1968). In *Farrell*, New York administrators of a non-resident decedent's estate were not permitted to use the *Seider* attachment procedure. The *Seider* doctrine, which protects New York citizens, was found to be inapplicable to administrators not representing a resident-decreased.

resident plaintiff. In *McHugh v. Paley*,[75] a case with exceptional circumstances, the plaintiff was a Massachusetts resident injured in the Bahamas, allegedly by the negligence of a defendant-employee who was an English citizen residing in the Bahamas. The employer-defendant was a New York resident, and suit was initiated by personal service on him. Subsequently the insurance policy covering the employer and his employee was attached. This was done to acquire jurisdiction over the non-resident defendant-employee because otherwise the resident defendant, who was not the actual tortfeasor, would be greatly hindered in his defense. New York could not assert in personam jurisdiction over the non-resident defendant. The court found that the *Seider* rule that the claimant must be a New York resident need not be strictly applied because the non-resident defendant was the agent of the New York defendant, and that quasi in rem jurisdiction over the employee was properly obtained. The court did not deny that it was applying a broad view of *Seider* but justified its view on "logic, reason, and the human equation."[76] A narrow construction of *Seider* would have resulted in injustice since it was necessary that the actual tortfeasor be a party, and to send the action to the Bahamas would be impractical since the plaintiff was a welfare recipient confined to a Massachusetts hospital.

The court viewed the *Seider* rule as settled and apparently out of danger:

> The court is aware that in adopting this enlightened interpretation of the law, the principle of Seider v. Roth may be expanded. However, to truly administer justice in the exceptional circumstances at hand, the court should not be limited by a rigid, circumscribed and narrow application of the old Seider rule to a new situation.[77]

The "old" *Seider* rule had been criticized as perhaps allowing such expansion. For a rule already resting on the outer fringes of due process, an expansion makes the procedure even more questionable. The courts upholding *Seider* had repeatedly emphasized that the stated limits were essential to its validity. It is strange that the court in *McHugh* felt so free to expand a rule which had such tenuous acceptance and which was the subject of almost as much dissent as approval.

The problem in *McHugh* may be stated thus: Does an out-of-state plaintiff, by achieving in personam jurisdiction over a *resident*-defendant, thereby achieve the power to attach that defendant's insurance policy in order to obtain quasi in rem jurisidiction over a *non-resident* who is also covered by that policy because of his agency status? Once personal jurisdiction is established (or even before) there seems to be no reason why

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[75] 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. 1970).

[76] *Id.* at 1095, 314 N.Y.S.2d at 212.

[77] *Id.*, 314 N.Y.S.2d at 213.

a *New York* defendant's insurance policy could not be attached in New York by a non-resident plaintiff; the objection to the *Seider* rule that it is unfair to require a person to come to New York to defend an action by a non-resident solely because his insurance company does business there is inapplicable if the defendant is already a New York resident. Therefore, such attachment is proper, and the incidental (though intended) effect of achieving jurisdiction over a defendant-employee who is a non-resident should not be objectionable. Just as in other *Seider*-type actions, the non-resident defendant must travel to New York to defend. The requisite nexus with New York is provided through the defendant-employer's insurance policy; the insurer is the real defendant.

The court in *McHugh* decided that since the New York defendant's potential liability was created by virtue of the non-resident's actions, the connection was sufficient to avoid dismissal. But it stated that if the action by attachment was against the non-resident defendant alone, dismissal would be required.[78] One commentator has approved this result:

> In view of these peculiar facts [that it was practically impossible for the plaintiff to sue anywhere but New York] New York probably had sufficient interest in the case to avoid constitutional problems, in particular since the 1969 amendment to Rule 320 of the Civil Practice Law and Rules enable [*sic*] the defendant to defend the case on the merits without subjecting himself to in personam jurisdiction.[79]

Thus, within relatively clear boundaries, *Seider v. Roth* continues to be law in New York. Its recurring theme is that the insurance company is the real party in interest.

III. Is Something Wrong With Seider?

The *Seider* doctrine is still very much open to discussion. Not only is there continuing criticism of it in New York, but there is widespread dissatisfaction with it throughout the legal profession and in other states.[80]

A. Sufficient State Interest and Due Process

Many of the problems with *Seider* involve constitutional issues. One serious question, recognized by both the majority and dissent in *Minichiello v. Rosenberg*,[81] is whether the forum state has enough "interest" in the insurance relationship to enable it to exercise jurisdiction.[82] Disadvantages to the defendant may overshadow New York's interest in protecting its resident-plaintiffs. For example a non-resident defendant might have to

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[78] *Id.*, 314 N.Y.S.2d at 212.

[79] Herzog, *Conflicts of Laws*, 22 Syr. L. Rev. 363 (1971).

[80] See articles cited note 23 *supra.*

[81] 410 F.2d 106 (2d Cir. 1968).

[82] Stein, *supra* note 4, at 1107.

travel a great distance and suffer financial hardship to defend in New York. Quite simply, the plaintiff is given an extra forum, whereby he may use the procedural benefits of his home state.[83] It has been argued that this increase in the number of forums in which the plaintiff may sue could undermine the process by which insurers calculate their premiums, because the calculations are based on average recoveries in selected jurisdictions where the insurer can expect to defend.[84] However, as long as only three states have allowed insurance policy attachment, the number of cases using that procedure would probably be so small as to be statistically insignificant. And if many states permit such attachment, it would not be difficult for insurance companies to adjust their calculations to accommodate the increased number of potential forums.

Direct action statutes have been upheld where due process standards, measured by the sufficiency of the state's interest, were met. The insurance company must have enough contacts with the state, the accident, and the parties, to subject it to the state policies which in reality rewrite the insurance contract.[85] The *Seider* line of cases has been recognized as providing a limited direct action against the insurance company because the insured is, in reality, only a conduit named as a defendant in order to provide a conceptual basis for reaching the insurer.[86]

In determining the presence of sufficient state interest to allow this contractual alteration, a court may permissibly apply standards less stringent than those for in personam jurisdiction, since traditionally quasi in rem jurisdiction is an alternative, limited remedy when in personam jurisdiction cannot be obtained.[87] But there is an additional question whether a state can alter a contract made outside the state to permit a quasi in rem "direct action" without first meeting the *Watson* requirement that the accident must have occurred within the state seeking to alter the contract.[88]

In *Watson* the Court found that Louisiana's interest in protecting persons injured in the state justified a direct action against the insurer rather

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[83] *Id.* at 1106.

[84] Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation,* 67 COLUM. L. REV. 550, 556 (1967). Normally, the company would expect suit in one of two places—the place of the accident or the defendant's domicile. Personal service wherever the defendant can be found is also possible. Nevertheless, *Seider* does widen the range of forums. *See* NYCPLR § 302(a)(2) (McKinney 1972); Millikan v. Meyer, 311 U.S. 457, 464 (1940); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1137 (1966).

[85] Insurance policies generally require judgment to be entered against the defendant before the company may be sued for payment. Watson v. Employers Liab. Corp., 348 U.S. 66, 68 (1954).

[86] Minichiello v. Rosenberg, 410 F.2d 106, 109 (2d Cir. 1968).

[87] Pennoyer v. Neff, 95 U.S. 714 (1877). *But cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957).

[88] *See In Search of a Rationale, supra* note 5, at 417-18; WISC. STAT. ANN. § 260.11 (Supp 1968); LA. REV. STAT. ANN. § 22: 655 (West 1959).

than suit against the actual tortfeasor who might be a great distance from Louisiana and who could not be served within the state.[89] In *Seider* the plaintiff was not injured in New York, so one important factor necessary for a direct action in *Watson* is not present. Also, Louisiana was protecting not only its own residents but anyone injured in the state. New York, through the *Seider* doctrine, protects only its residents injured outside the state unless extraordinary circumstances as in *McHugh* are present. Nevertheless, a New York resident could return to his home state for treatment, which would help to support an analogous argument; in such situations New York's interest that its citizens receive proper medical care is similar to the interest protected in *Watson*.[90] *Minichiello*, for example, concluded that New York as well as the state where the injury occurred had an interest in seeing that the plaintiff received adequate care without the necessity of the state's paying for it.

If the only due process requirement is the state interest of ensuring that its residents are compensated by insurance companies to avoid public expense, then the *Seider* process creates no more due process problems than does the typical direct action statute. This self-interest requirement would also justify prohibiting non-residents from using a *Seider*-type procedure: the accident did not occur within the forum state, and more likely than not the state would not have to pay a non-resident's bills.

But there is more to the *Watson* standard. A significant characteristic of *Seider*-type actions distinguishes them from the Louisiana experience. In Louisiana there is no need to consider whether the defendant-insurance company is "doing business" within the state because jurisdiction is based upon the tortious act being committed there. However in *Seider*-type actions the presence of the defendant's insurer, the only basis for jurisdiction, is wholly fortuitous. The question that must be answered is whether there is any constitutional distinction between permitting an action against an insurance company which is sued because its insured allegedly committed a tort within the state and permitting a quasi in rem action against an insurer because it does business in the plaintiff's state although the alleged tort occurred elsewhere.

Because there are less stringent standards for quasi in rem actions, New York is probably correct in concluding that its interest in protecting residents, complemented by the presence of the insurance company subject to state regulation, provides a substantial and continuing relation to the controversy sufficient to satisfy due process requirements for quasi in rem

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[89] The corporation from which the harmful product was purchased could not be sued in Louisiana because it had no agent to accept process there. Some long-arm statutes do not reach a foreign corporation whose defective product caused injury in a state where the company conducted no business.

[90] This is exactly what happened in Barker v. Smith, 290 F. Supp. 709 (S.D.N.Y. 1968), where the plaintiff was injured in Michigan, but returned to New York for treatment.

jurisdiction.[91] Long-arm statutes protect persons injured in New York;[92] *Seider*-type attachment protects New York citizens injured away from their state.

Ironically, a state's desire to protect its resident-plaintiffs by declaring that an insurance policy obligation is not contingent after an accident has occurred could create an unintended result. It has been suggested that if, for example, a New York plaintiff sued a non-resident defendant in the state where the tort was committed, achieving personal jurisdiction, the insurance obligation of the defendant would become an attachable debt in New York when the suit was begun. Then, before a personal judgment could be rendered the policy could be attached in New York by a *creditor* of the defendant, and the proceeds could be paid to this creditor. When the New York tort victim obtained judgment against the defendant, the proceeds would no longer be available to the victim.[93] But this creditor attachment seems unlikely, especially since the amount of payable policy proceeds would not be known until the tort judgment was entered.

Also, as the cases have pointed out, insurance companies are placed in a difficult position. Although the defendant could not be liable in excess of the policy coverage, the great distance which he might have to travel could discourage his appearance. The insurer is thereby subject to possible hardship in its defense, although default need not occur since the insurer could defend alone, assuming permission from the insured to do so either is not required or is granted. However, the insurer could also disclaim liability by alleging lack of cooperation by the actual tortfeasor,[94] even though the defendant's refusal to cooperate might be justified by the very reason that personal jurisdiction could not be had over him, due to a lack of sufficient contacts with the forum state, and that requiring him to appear would be a hardship.[95] It is difficult to understand how it fairly serves state policy to subject insurance companies and individuals to such problems, despite benefits to its own citizens.

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[91] *See* Minichiello v. Rosenberg, 410 F.2d 106, 110 (2d Cir. 1968); Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967).

[92] *See* NYCPLR § 302(a) (McKinney 1972).

[93] A general creditor would have priority under NYCPLR § 5234(b) (McKinney 1963) if the attachment was made prior to judgment against the insured. Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 658-59 (1967).

[94] Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 556 (1967). This problem was thought to have been solved by *Simpson*; because the defendant cannot be held personally liable and recovery is limited to the policy limits, there is less reason for a defendant to fear coming to New York. However, it must be recognized that the possibility of lengthy travel alone would deter the defendant from appearing.

[95] *See In Search of a Rationale, supra* note 5, at 416.

B. Seider and the Contingent Liability Problem

Fundamental to *Seider* and liability insurance attachment was the determination not only that the policy is a debt within the statute permitting attachment, but also that the debt is fixed and not dependent upon a contingency.[96] New York's conclusion was that once the accident occurred, the duty to defend and the obligations to pay medical expenses and to investigate were fixed. At that point the insurer's obligation was no longer considered conditional.

Disagreement as to valuation continues to complicate this contingency issue, even though the question was directly faced in *Simpson v. Loehmann*: the policy limit is the value of the obligation attached. Before *Simpson*, scholars indicated that the only "debt" was the obligation to defend, and it would be reasonable to consider the cost of the defense as the only recoverable amount because only the obligation to defend was fixed prior to judgment. If a default judgment were entered, this amount would be difficult to determine where no defense was made.[97] Where the attachment was made and judgment entered for the plaintiff, the insurer could contend that there was no longer an obligation to indemnify.[98] This unlikely result is at least arguable because these is authority[99] that where a debt is partly unconditional (absolute duty to defend) and partly conditional (duty to indemnify only if liability is found), only the unconditional party may be attached.[100] As a further complication, although there is no real dispute that the obligation to pay initial medical payments to the defendant is fixed, the obligation to investigate is discretionary and not a money debt. Regardless, New York established that there was sufficient basis for attachment because the contractual obligation to defend and indemnify was a debt,[101] even if indemnity was found not to be necessary.

New York's characterization of the policy obligation as a non-contingent debt is not untenable. The insurance company's obligation to defend does not really depend upon the existence of jurisdiction over the parties. It requires only that an action be brought by filing a complaint. The

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[96] Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[97] In Stein, *supra* note 4, at 1125, Professor Stein states:

> One solution might be to award the probable attorney's fees for the defense; however, this would create further difficulties in determining such factors as the probable length of the trial, the cost to procure attendance of parties and witnesses. . . . Alternatively, the amount of policy premiums might be used for satisfaction, but this . . . fails to consider that the premium purchases coverage and does not reflect in any respect the actual value of the obligation to defend.

[98] *Id.* at 1126.

[99] *See* Herman & Grace v. City of New York, 130 App. Div. 531, 114 N.Y.S. 1107 (Sup. Ct. 1909), *aff'd mem.*, 119 N.Y. 600, 93 N.E. 376 (1910); *cf.* Sheehy v. Madison Square Garden Corp., 266 N.Y. 44, 193 N.E. 633 (1934).

[100] Comment, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 657 (1967).

[101] Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

obligation to pay for any liability exists from the time of the accident. A debtor-creditor relationship has been established, and the litigation will determine whether the insurer must indemnify. Since there is an obligation (even if unfixed in amount), the other problems can be settled in litigation.[102] As a further argument, it has been suggested that after the accident has occurred the obligation to the insured might be assignable, whereas before the accident it would not. Since the insurer undertakes a given risk with an individual, assignment prior to an accident is not proper. However, after the accident, which the insurer had bargained would not happen, the insurer's obligation to the insured has become a chose in action, which has the characteristics of attachable property. Assignment no longer interferes with the personal relationship and the assumed risk.[103] This result seems highly inprobable, however, because the value of the obligation is still uncertain until litigation determines the amount to which the injured plaintiff is entitled. And assignment would interfere with the personal relationship between the defendant and his insurance company. Only the right to payment would be assignable.

Another argument which supports the New York view is that other states have recognized that for purposes of ancillary administration an insurer's obligation to defend and indemnify is a debt. The objective of such administration is to allow the plaintiff to commence or continue his action after the original defendant's death, and to provide a forum where he may do so.[104] This would be true even when the intended defendant dies before being personally served. When a jury can determine the policy value, the policy is an existing and present debt. Fire and burglary policies have been found attachable on this theory.[105] However, the *Seider* line of cases provides a plaintiff with a new forum, whereas the ancillary administration cases only substitute defendants in a suit which could have been brought initially only in the jurisdiction where ancillary administration was sought.[106] In *Riggle*, as explained in the *Seider* dissent,[107] jurisdiction had been obtained over the defendant before death. This meant there was property in New York because the obligation to defend had

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[102] 51 MINN. L. REV. 158, 160-62 (1966). *See* Fishman v. Sanders, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965) (dictum); Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 77 N.E.2d 131 (1948); 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1962); Note, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966). *But see* Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1970).

[103] 51 MINN. L. REV. 158, 163 (1966).

[104] *See* Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606 (1940); Liberty v. Kinney 242 Iowa 656, 47 N.W.2d 835 (1951); Gordon v. Shea, 300 Mass. 95, 14 N.E.2d 105 (1938); Robinson v. Carroll, 87 N.H. 114, 174 A. 772 (1934). New York relied principally upon Matter of Riggle's Estate, 11 N.Y.2d 73, 181 N.E. 436, 226 N.Y.S.2d 416 (1962).

[105] 51 MINN. L. REV. 158, 160 (1966).

[106] Stein, *supra* note 4, at 411.

[107] 17 N.Y.2d at 116, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (Burke, J., dissenting).

vested, and the appointment of an ancillary administrator only provided a substituted defendant for that property. Nevertheless, it is a logical extension of the estate administration cases that a liability policy is truly property.

C. *Res Judicata and Multiple Liability*

Generally, a judgment that will not protect a defendant from double liability is void. In a *Seider*-type attachment action, if the plaintiff wins on the merits and recovers to the extent of the defendant's insurance policy, then the insurer's obligation is satisfied. If the plaintiff were then to initiate proceedings against the defendant in another state where personal jurisdiction could be obtained, the defendant would be forced to defend without the benefit of his insurance policy. Although a judgment quasi in rem is conclusive as to all interests in the attached property, such judgment does not preclude another action.[108]

The question then becomes whether it is unfair or perhaps unconstitutional to subject a defendant to quasi in rem jurisdiction through attachment of his insurance policy, and then to in personam jurisdiction without the benefit of this policy. There is a potential for harassment of a defendant, as well as for multiplicity of actions, which is inconsistent with modern jurisdictional considerations of fair play and finality. Inconvenience is also an important factor in determining whether due process standards are met.[109] At the very least, the plaintiff's bargaining power in the first action would be increased,[110] and conceivably the plaintiff could force a settlement in excess of the policy limits by threatening to sue in personam in another state; the effect would be the same as a personal judgment even though there are not enough contacts with the forum state to permit in personam jurisdiction. The insurer would be obligated to advise the defendant that it might be to his advantage to settle part of the claim out of his own pocket rather than be subject to a larger recovery later.

Nevertheless, factors that influence the plaintiff in choosing to sue in his home state and to utilize quasi in rem procedure would usually deter the plaintiff from later suing elsewhere. If the plaintiff sues in his home state because of his own convenience and is satisfied that the policy limits will cover his claim, then he has no reason to sue elsewhere. In many cases his recovery may even be less than the insurance limits. The plaintiff will want to avoid multiplicity of suits, and if he prefers to sue in personam

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[108] *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 834 (1952); Stein, *supra* note 4, at 1115.

[109] Stein, *supra* note 4, at 1115.

[110] *Cf.* State Gov't Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo. Ct. App. 1970).

it would be to his advantage to do so initially. Further, the statute of limitations may run before the plaintiff could commence another action.[111]

Despite these possibilities, the *Seider* defendant is really in no worse position than any other defendant in a quasi in rem action. There is always the possibility of a later suit elsewhere. A defendant's loss of insurance protection after the first suit, while a hardship, is not a constitutional problem as long as the forum state has sufficient state contacts to allow the attachment which in effect alters the insurance contract.[112] Besides, any defendant may be subjected to recovery in excess of his policy. The *Seider* defendant loses only the benefit of having his insurance company lawyer represent him if there are subsequent suits. Again, his position is similar to that of a defendant whose *real* property is attached in a personal injury action. In such a case, the defendant's insurer would only be obligated to defend until judgments against him equalled the policy limits.

Finally a quasi in rem action does not have res judicata effect in another state, so the defendant will be able to relitigate his liability and may even successfully defend.[113] Although the plaintiff may sue several times because a quasi in rem recovery does not merge his cause of action, the defendant may have any later judgments against him reduced by the amount of the prior recovery.[114]

IV. The Impact of Seider on Other States

Despite fears that other states would rush to adopt the *Seider* rule to protect their own citizens, or perhaps enact retaliatory laws to impose conditions on suits against their citizens in New York,[115] only two other states have approved the *Seider* rule. No other state permitted a *Seider*-type action until 1973, seven years after the doctrine was first announced. A large number of states faced with the question whether insurance policies are debts have concluded that they are contingent and unattachable. Policy reasons as well have provided a basis for rejecting *Seider*. An analysis of the decisions in other states demonstrates why the *Seider* rule has not gained extensive approval.

A. Other States and the Contingent Liability Problem

The federal district court in Vermont refused to adopt the *Seider* prin-

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111 Siegal, Supplementary Practice Commentary to NYCPLR § 5201 (McKinney Supp. 1972).

112 See text following note 64 *supra.*

113 Minichiello v. Rosenberg, 410 F.2d 106, 112 (2d Cir. 1968) (plaintiff should not be allowed to use collateral estoppel against defendant in later action); *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 834 (1952).

114 Siegal, Supplement Practice Commentary to NYCPLR § 5201 (McKinney Supp. 1972).

115 Minichiello v. Rosenberg, 410 F.2d 106, 117 (2d Cir. 1968) (Anderson, J., dissenting).

ciple in *Ricker v. Lajoie*.[116] An accident occurred in Vermont, involving a New Hampshire resident insured by a company doing business in Vermont. The facts differ from *Seider*, however, in that the accident occurred in the plaintiff's state and the defendant, not the plaintiff, was arguing than an insurance policy was attachable. The defendant had left the state after the accident, and the statute of limitations would have run if he had attachable property in Vermont. The plaintiff contended that the defendant's insurance policy was not property subject to attachment, and that therefore the plaintiff could sue because the statute had been tolled by the defendant's absence from Vermont.[117] The court, stating that the dissent in *Seider* was more persuasive than the majority, ruled that the insurance policy was not property subject to attachment, and therefore the statute of limitations had not run. Reasoning that the statutory prohibition against attaching a contingent debt referred to whether or not there was a debt, rather than whether there was liability, the court found that there was not yet an obligation or debt free from any contingency. The insurance policy could not be attached because the insurer might have a defense (lack of cooperation or failure to notify) which would prevent liability. The test for property was whether the property would yield to the creditor a substantial benefit. This insurance policy might yield no benefit if, for example, the company's defenses against its insured were valid. Thus, there was no present, certain debt, but only an obligation contingent on actions yet to be taken.

New York did not use this "substantial benefit" test in deciding the contingency question. Instead, in New York the value of the obligation is its stated coverage, not the value of the defense, even though only the obligation to defend is fixed at the time of the accident.[118] The valuable indemnity protection depends upon a finding of liability, and New York found this insufficient to make the debt contingent. The two views differ, then, in that the Vermont federal court looked for ascertainable benefits at the time of the attachment, whereas New York viewed the obligation as fixed for attachment purposes when the accident occurs. In the latter state, the condition that the plaintiff may not recover until he has proven negligence goes to the merits and has no bearing on whether the insurer's obligations are contingent.

South Carolina rejected the *Seider* doctrine by viewing the "debt," even

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[116] 314 F. Supp. 401 (D. Vt. 1970).

[117] 12 VT. STAT. ANN. § 552 (1973) provides:

> [I]f a person is absent from and resides out of the state after a cause of action accrues against him and before the statute has run, and he has no known property within the state which can by common process of law be attached, the time of his absence shall not be taken as a part of the time limited for the commencement of the action.

[118] Seider v. Roth, 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

if fixed, to be contingent in value. In *Howard v. Allen*,[119] the plaintiff was struck by an airplane propeller on the ground in South Carolina. The defendant (operator of the plane) was an Ohio resident. An attempt to attach the defendant's liability policy in South Carolina was unsuccessful because the court found that the insurer owed the defendant nothing until liability was determined. Even if liability was found, the insurer's obligation was still dependent upon whether or not the defendant had complied with the insurance policy contract:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained. Even then, if the insurer's obligations to defend and indemnify are fully performed, there is nothing of economic value to which the insured may make claim, receive or assign.[120]

Analyzing the policy obligations from the viewpoint of the attaching creditor, the court in *Howard* concluded that there was no attachable debt because an attaching creditor acquires no greater right in the property than the defendant had when the attachment was made. Property was not attachable as a debt to the defendant if he had not yet acquired a possessory interest that would allow him to dispose of it. There was no debt for a fixed amount, and only if the insurance company had breached its contract with the defendant or if judgment had been rendered would the insured have an interest in the contractual obligation that would allow him to dispose of his interest.[121] The result in *Howard* was particularly detrimental to the plaintiff, since by the time she brought suit in Ohio, the statute of limitations had run.[122]

By New York's analysis, the fact that the liability may not develop does not make the debt contingent (and unassignable) because by its view there is a fixed obligation; valuation of this obligation will be decided later as in many assignments. But South Carolina concluded from the same situation that until liability is proven there is no assignable (and hence attachable) obligation. The significant difference is that New York does not consider the uncertain liability to have any bearing on whether the obligation is fixed. In contrast, South Carolina concluded that without definite liability the whole obligation is contingent; it is the money value which is the true subject of the attachment.

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[119] 254 S.C. 455, 176 S.E.2d 127 (1970).

[120] *Id.* at 460-61, 176 S.E.2d at 129.

[121] *Id.* at 462, 176 S.E.2d at 130.

[122] Howard v. Allen, 30 Ohio St. 2d 130, 283 N.E.2d 167, *appeal denied*, 409 U.S. 908 (1972).

Missouri expressly rejected the *Seider* doctrine in *State Government Employees Insurance Co. v. Lasky*.[123] A Missouri plaintiff sought to attach the insurance policy of a Rhode Island defendant to recover for damages in an accident which occurred in Rhode Island. The insurance company was authorized to do business in Missouri. The court held that the obligation of the insurance company to defend was not a debt, and not subject to attachment. Relying upon the dissent in *Seider* and critical commentaries, the court found that under Missouri law a debt must not depend on any contingency to be attachable; the test was that the indebtedness must be absolutely due as a money demand. Damages would not be ascertainable in a *Seider* attachment until judgment was rendered. The obligation to defend if suit was properly brought was not due as a money demand, and the obligation to indemnify would mature only if a judgment was entered. The court concluded: "It would be difficult to imagine a so-called indebtedness more contingent and speculative than an action for personal injuries resulting from the alleged negligence of a defendant."[124]

Under the Missouri requirement that the debt must be absolutely due as a money demand, the court's conclusion that there was no such debt is unescapable. Even if the obligation to defend is considered fixed at the time of the accident (which it is not in Missouri) there still would be no money absolutely due, and hence no attachment possible. Only when liability was established would there be a sum certain. New York does not use the Missouri standard, and the *Seider* doctrine is incompatible with such a requirement. In New York only a fixed contractual obligation to defend and possibly indemnify is required for attachment.[125]

In Utah, the contingent aspects of auto liability policies were emphasized by the state supreme court, which declined to adopt insurance policy attachment in *Housely v. Anaconda Co.*[126] The defendant Cox, while operating a vehicle owned by the Anaconda Company, injured the plaintiff in an accident in Utah. Cox left for Maryland and could not be personally served with process. Because the plaintiffs alleged a separate cause of action against Cox, they decided to assert quasi in rem jurisdiction over him by attaching the insurance policy covering the vehicle which he was driving. A summons was served on Cox and a writ of garnishment was served upon the insurance company in Maryland; the other defendant, Anaconda Co. was served personally. The court held that the summons on Cox was properly quashed by the lower court; at the time of the attachment the insurance company was not indebted to Cox because any rights

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[123] 454 S.W.2d 942 (Mo. Ct. App. 1970).

[124] *Id.* at 950.

[125] Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). For an analysis of *Lasky* and arguments against adopting the *Seider* procedure in Missouri, see 36 MO. L. REV. 272 (1971).

[126] 19 Utah 2d 124, 427 P.2d 390 (1967).

that the plaintiff might have under the attachment were contingent upon a judment against Cox. The plaintiff's attempted attachment was considered to be levied upon an unliquidated tort claim against an insurer. It was not a chose in action held by the insured against the insurer.[127] The court did not mention *Seider* in its opinion.

New York did not consider it necessary that the insured have a chose in action before his insurance policy could be attached. It was enough that the insured had been in an accident. But in Utah, even if there was a breach of the insurance contract by the insurer, the insured's rights against the company were not attachable under the applicable statute.[128] This runs counter to the view in *Howard* that there would be a debt attachable by the plaintiff if the insurer breached its contract with its insured, because that would provide him with a cause of action against the company.[129] In Utah, only a fixed amount due to the defendant could have been attached. In this sense Utah's requirements for attachment are similar to Missouri's and more strict than South Carolina's.

Massachusetts law, as interpreted by a federal court of appeals also does not allow *Seider*-type attachment. In *Tessier v. State Farm Mutual Insurance Co.*,[130] the court refused to allow attachment of a deceased Arizona resident's insurance policy by a Massachusetts resident injured in Georgia. None of the states involved had a direct action statute. The plaintiff argued that by utilizing attachment he was merely avoiding the formality of obtaining appointment of an ancillary administrator of the insured tortfeasor. The court rejected this contention because the claims had not yet matured, liability was a condition precedent to finding an asset within the state, and an ancillary administrator could not have been appointed. However, the court did qualify its statements that the "debt" was contingent by saying that if the policy had been issued in Massachusetts, or if the defendant was a resident thereof, then the policy could be considered an asset within the state. The basis for this reasoning was *Gordon v. Shea*,[131] a prior Massachusetts case which held that the right of indemnity under an automobile insurance policy was estate property which would permit granting of ancillary administration for a non-resident decedent. The

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127 The court relied upon Paul v. Kirkendall, 6 Utah 2d 256, 311 P.2d 376 (1957). In that case, the alleged negligence of an insurance company to settle, which thus subjected the insured to judgment in excess of the policy limits, was found not to be an attachable chose in action because of a statute excluding it.

128 UTAH R. CIV. PRO. 64D(n) provides:

> Every garnishee shall be allowed to retain or deduct out of the property, effects or credits of the defendant in his hands all demands against the plaintiff and against the defendant of which he could have availed himself if he had not been served as garnishee, whether the same are at the time due or not . . . including unliquidated damages for the wrongs and injuries . . . .

129 Howard v. Allen, 254 S.C. 455, 462, 176 S.E.2d 127, 130 (1970).

130 458 F.2d 1299 (1st Cir. 1972).

131 300 Mass. 95, 14 N.E. 2d 105 (1938).

court in *Tessier* decided that the meaning of "estate" was very limited, and the standards for whether a policy was an estate for administration purposes would differ from those for attachment purposes.[132] Therefore, the court read *Seider* as holding contrary to *Gordon v. Shea*.[133] The court's view is similar to that of South Carolina, Utah, and Missouri in that the "debt" under the policy was deemed contingent.

The Oklahoma supreme court rejected *Seider* in *Johnson v. Farmers Alliance Mutual Insurance Co.*[134] According to the court, Oklahoma law simply did not allow attachment when there was no amount absolutely due beyond any contingency. The court "in good conscience" could not reconcile the *Seider* theory with state law.

B. *State Reaction to Other Problems in Seider*

Although *Seider* has been found unacceptable to most of the other states which have considered the problem, not all rejected insurance policy attachment because of the contingent aspects of the "debt." Policy reasons and differing statutory interpretations have also been used to limit *Seider's* applicability.

Rhode Island found the *Seider* doctrine unacceptable because its statutory scheme for attachment of property differed from that of New York. In *De Rentis v. Lewis*,[135] the plaintiffs sued for personal injuries arising out of an accident in Connecticut allegedly caused by the negligence of the defendant's daughter. The plaintiffs, Rhode Island residents, sought to obtain quasi in rem jurisdiction by attaching the defendant's liability insurance policy—a standard *Seider*-type situation. In addition to claiming that the insurance contract was attachable property within Rhode Island (the company was doing business there), the plaintiffs also asserted that the combination of the contractual relationship and the fact that the insurer did business with the state was sufficient to permit in personam jurisdiction over the out-of-state defendant under the state long arm statute.[136] While acknowledging the argument of the defendants that *Seider* is of questionable authority even in New York, and that as yet no other state had fol-

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[132] 458 F.2d at 1300.

[133] 300 Mass. 95, 14 N.E.2d 105 (1938).

[134] 499 P.2d 1387 (Okla. 1972).

[135] 258 A.2d 464 (R.I. 1969).

[136] R.I. GEN. L. § 9-5-33 (1969) provides:

> Every foreign corporation, every individual not a resident of this state . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals . . . amenable to suit in Rhode Island.

R.I. GEN. L. § 10-5-7 (1969) provides:

> Whenever a writ of attachment can be issued by any court, it may command the attachment of the goods and chattels of the defendant and his real estate and his personal estate in the hands or possession of any person.

lowed it, the court found it unnecessary to consider the policies underlying *Seider*. It held that under Rhode Island law the policy was not attachable; New York's definition of attachable property, particularly as construed in *Riggle*, differed from the Rhode Island interpretation. Furthermore, in response to the plaintiff's claim of personal jurisdiction, the court said that the necessary minimum contacts were not present. The court did not consider the limitation which in New York was considered crucial to upholding *Seider*—that by proceeding quasi in rem there could be no personal jurisdiction and thus no judgment in excess of the policy limits.

Whether Rhode Island law had permitted suit against the insurer by attachment or not, the plaintiff's claim of personal jurisdiction could not have been upheld. It would not be in accordance with constitutional doctrines to permit personal jurisdiction over the insured on the ground that his insurance company met the minimum contacts test. The existence of an attachable debt owed by a corporation present in the state does not provide a sufficient basis for asserting that a judgment in excess of that debt may be entered against the individual to whom that debt is owed. Only quasi in rem liability may be imposed by the *Seider* doctrine. This concept is crucial, and whatever other reasons may exist for adopting or rejecting *Seider*, the procedure should not be allowed without this limitation. The existence of a debt for quasi in rem purposes and the presence of a corporation for in personam jurisdiction are separate concepts. Otherwise, the result has the effect of a long arm statute, asserting personal jurisdiction not because the defendant committed a tort within the state, but because his insurance company owes him a "debt" there. Limited liability is the *sine qua non* of the *Seider* doctrine.

Louisiana rejected *Seider* despite its statute which permits direct actions against insurance companies. In *Kirchman v. Mikula*,[137] the court refused to permit a Louisiana resident injured in New Jersey to attach the New Jersey defendant's liability insurance policy in Louisiana. While noting that *Seider* had been rejected by other states because the policy obligations might not be converted into a money debt, the court found it unnecessary to follow that approach in Louisiana. The state's direct action statute was available for persons injured within the state or for those who sue upon an insurance policy written or delivered within the state. Therefore the court concluded that the legislature had not intended to extend a direct action to residents injured in another state by a non-resident covered by a policy issued out-of-state. The Fifth Circuit had reached the same conclusion in a case previously filed by the same plaintiff.[138]

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[137] 258 So. 2d 701 (La. App. 1972).

[138] Kirchman v. Mikula, 443 F.2d 816 (5th Cir. 1971).

C. Expansion of Seider to California and Minnesota

California judicially adopted *Seider* in *Turner v. Evers*,[139] a 1973 case; this was the first decision outside New York to follow rather than reject *Seider*. *Turner* did not involve an automobile accident, but rather arose out of breach of contract and negligence claims due to allegedly faulty repairs performed in the state of Washington upon an automobile belonging to California residents. The vehicle had become inoperative shortly after it was serviced, and the plaintiffs sought to recover damages in California by attaching the liability insurance policy of the Washington service station operator. His insurer was doing business in California. The municipal court granted the motion to quash, but the appellate court reversed.

The *Turner* court relied heavily upon *Seider* in permitting insurance policy attachment in California. *Seider* was constitutional, and since the California Code of Civil Procedure[140] authorized the state to exercise jurisdiction on any basis not inconsistent with the state or federal constitutions, the process was permissible in the state. But the court adopted a new reading of *Seider*; although it held that attachment is proper when there is an obligation to indemnify and only a possibility of judgment against the insured, it emphasized that *Seider* did not require that the policy obligations be debts as distinguished from other property.[141] The defendant had argued (as have practically all *Seider*-type defendants) that the validity of the attachment depended upon whether the insurer's obligations were a debt, but Judge Goldberg said that this argument was not on point. The California statutes did not limit attachment to debts, but extended it to all *property* of nonresident defendants.[142] Property had been broadly defined to include an insurer's obligation to defend and indemnify in a California estate case[143] (California's counterpart to *Riggle*), and since the right of a nonresident decedent against his insurer was sufficient property to confer probate jurisdiction, it was also property sufficient for attachment by a plaintiff. The court indicated that *Seider* did not require that there be a debt, but only that there be property. The statement in *Seider* that " 'as soon as the accident occurred there was imposed . . . a contractual obligation which should be considered a "debt" . . . ' " did not mean that an actual debt must be found.[144] Since the insurer's obligations were property there was no need to determine whether they created a debt as well.

The court's analysis partially resembles the *Seider* court's treatment of *Riggle*, but some of the *Turner* court's language implies that insurance pol-

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139 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973).

140 CAL. CODE CIV. PRO. § 410.10 (West 1973).

141 31 Cal. App. 3d Supp. at 19, 107 Cal. Rptr. at 395.

142 *Id.* at 20, 107, Cal. Rptr. at 396.

143 Keck v. Superior Court, 3 Civil 13521 (Super. Ct., Nov. 14, 1972).

144 31 Cal. App. 3d Supp. at 19, 107 Cal. Rptr. at 396.

icy obligations can be deemed property without an initial finding that they are non-contingent obligations. Such a finding was crucial in *Seider*, but in *Turner* the court discussed the non-contingency of the obligations to defend and indemnify as only an additional reason why California law was similar to New York, thus making attachment possible. Yet the court noted that the California rule was that a debt uncertain and contingent could not be attached. If the court was abandoning the *Seider* requirement that there be a fixed debt and relying only upon the estate concept of property, it is unclear why the contingent aspects of insurance policy obligations were even relevant. Such an analysis is important only to determination of a debt, and if there was no need to find a debt, the fact that certain policy obligations were fixed would not amount to an additional reason for allowing attachment. Since *Seider* expressly states that the contractual obligations were debts within New York law,[145] the *Turner* court may have inadvertently recognized the it is essential that an unconditional obligation be found before the policy can be attached as property, despite statements to the contrary.

It may be an incorrect reading of *Seider* to state that no debt must be found; the New York cases imply that while property is attachable, an insurance policy is attachable only because it is a debt which is certain. Property and debt are distinguishable when attachment of either is sought. The whole question in *Seider* was "whether [the insurer's] contractual obligation to defendant is a debt or cause of action such as may be attached."[146] The New York statute even provides: "Any debt or property . . . is subject to attachment."[147] And regardless of the label, even California implies that a contingency may prevent attachment.[148]

Nevertheless, *Turner* could provide the foundation for wider acceptance of insurance policy attachment. Not only does the process have the approval of the two largest states, but *Turner* could be interpreted to enable states to fit attachment of insurance obligations within their own statutory schemes more easily than the *Seider* "debt" analysis permits. *Turner's* reliance on the estate property concept indicates that whether or not a state could find the policy obligations to be an absolute debt, if the state deems the duty of defense and indemnification to be property for estate purposes, the obligation could also be property for purposes of attachment. But this is an oversimplification of the *Seider* rationale. An unconditional obligation should be found, whether termed property or debt. States will still be forced to struggle with the contingent liability aspects of insurance obligations in the search for some res which can be attached within particular

[145] 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. *Accord,* Simpson v. Loehman, 21 N.Y.2d 305, 310, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 636 (1967).

[146] 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

[147] NYCPLR § 6202.

[148] 31 Cal. App. 3d Supp. at 21, 107 Cal. Rptr. at 397.

state law. But by broadening the inquiry into a search for property rather than looking solely for a debt, which is fixed and therefore attachable, the California court has provided the basis for an alternate analysis of insurance policy attachment.

Minnesota is the most recent state in which *Seider*-type attachment was successfully attempted. In August, 1973, the Minnesota federal district court held in *Rintala v. Shoemaker*[149] that a Minnesota resident properly obtained quasi in rem jurisdiction over a Michigan defendant by attaching his insurance policy. The insurer was doing business in Minnesota, and the plaintiff was suing for wrongful death arising out of a Florida automobile accident.

Jurisdiction was proper, although contingent obligations could not be attached, because a recent state statute[150] provided that garnishment was proper before judgment when an insurance policy was the subject and the insurer might be found liable. This statute overcame the contingent debt problem for which the *Seider* doctrine was frequently criticized. But on the basis of *Minichiello v. Rosenberg*[151] the court placed restrictions on the process not provided in the statute. Proper notice to the defendant was required, recovery must be limited to the value of the policy, and the person seeking attachment must be a Minnesota resident. The defendant was entitled to limited liability even though Minnesota law did not provide for a limited appearance in quasi in rem cases.

Attachment in Minnesota is therefore permissible as long as the judicially developed safeguards developed in New York are applied. Because of the statute permitting insurance policy attachment, no strained construction of either debt or property was necessary. The court did cite *Turner*, but did not discuss the California interpretation of *Seider*. Such discussion would have been unnecessary due to statutory declaration.

V. SEIDER CAN SURVIVE

New York, California, and Minnesota have demonstrated that courts are more or less free, depending upon their own state law interpretations, to conclude that liability insurance obligations are not contingent and are therefore attachable. Quasi in rem jurisdiction, limited to the stated policy

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[149] 362 F. Supp. 1044 (D. Minn. 1973).

[150] MINN. STAT. ANN. § 571.41 (Subd. 2) (West 1969), provides:

> Subd. 2 Garnishment shall be permitted before judgment in the following instances only:
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> (1) For the purpose of establishing quasi in rem jurisdiction [when] . . .
>
> . . .
>
> (c) the defendant is a nonresident individual . . . .
>
> (2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

[151] 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844, *rehearing denied*, 396 U.S. 949 (1969).

value, would then be permissible. If, however, a state court should decide that the insurer's obligation is not contingent, the state must decide whether public policy reasons warrant, and constitutional requirements allow, *Seider*-type attachments.

A constitutional basis for the attachment may be found in the state's interest in protecting its citizens and avoiding the necessity of caring for them at public expense. This, coupled with the state's control over an insurer doing business in the state and the fact that the insurance company is the real defendant, provides the requisite minimal contacts with the state. These contracts are close enough to the traditional requirement that there must be property located within the forum state, such that the state exercises power and control over it, to permit quasi in rem jurisdiction.

Res judicata questions created when a plaintiff attempts a second suit in another state are answered by the recognition that a quasi in rem judgment is valid only as to the property attached and is not res judicata either for or against the defendant. Although there might be hardships to a defendant against whom the plaintiff brings additional suits, it is important to realize that this possibility has always existed with quasi in rem actions. The defendant is as adequately protected in *Seider* cases as in other quasi in rem actions. The plaintiff could derive no benefit from the prior judgment, unless he regards it as beneficial that the defendant might no longer have an insurance company to defend him. That would be unfortunate, but it does not violate due process: any quasi in rem action could cause such a result. And since it would be possible and often more profitable for a plaintiff to initiate an in personam action in the state of the accident or in the defendant's state, the plaintiff normally would have little incentive to use the *Seider* procedure at all. The plaintiff should at least be aware that possible multiplicity of actions and statute of limitations dangers make in personam alternatives more desirable unless the convenience of his home state forum outweighs the other factors.

The multiple attachment problem, although highly speculative, requires a solution. Courts should limit attachment of liability insurance policies to plaintiffs suing for injuries arising out of occurrences covered by the policy. The insured should not be deprived of his policy benefits because of attachment by a contract creditor after the accident but before the plaintiff injured in the action has initiated a quasi in rem action. The policy can be of little value to a contract creditor until liability covered by the policy has been established. Only if the litigation subsequent and pursuant to the attachment determines that the defendant-insured is liable and hence protected by the policy obligation to indemnify should attachment be allowed. This would preclude attachment by creditors who were not involved with the occurrence that caused the policy obligation to become a "debt." If the public policy reason for permitting the attachment is

to protect an injured resident, who without the insurance payment might need state financed care, then this limitation is in compliance with the intention of the *Seider* doctrine. The critical requirement must be that the litigation between the parties to the attachment will determine whether or not the defendant is liable for the alleged acts which created the insurer's obligation to defend. The action used as a basis for the attachment must be one within the contemplation of the insurance policy; the policy obligations may be considered a debt only with respect to persons who would be covered by an in personam action against the insured. Since the insurer would not be required to indemnify a defendant found to owe a contract debt, the contract creditor could not attach the defendant-insured's insurance policy.

If a state decides that it wishes to provide another forum in which its residents may sue quasi in rem, there is little reason to prohibit it from doing so if due process standards are met and other safeguards provided. The emphasis should be on the bearing which the local contacts have on the demands of justice and fairness.[152] If every state were to create *Seider*-type procedures, a defendant would simply be subjected to suit in an extra forum if the defendants insurer was doing business in the plaintiff's state, but potential liability would be limited. Long arm statutes provided more. If a court, in its discretion, finds too much inconvenience for the defendant, the action could be dismissed and then transferred under the state's *forum non conveniens* rule. If the state has no such rule (and the suit is not in federal court) then the action should be permitted because it has already been determined that the policy reasons for allowing such suit are founded on constitutional principles.[153] Since there is no due process violation, the absence of discretionary power to transfer the action does not make the *Seider* procedure unconstitutional. Further, dismissal on *forum non conveniens* grounds would defeat the purpose of the *Seider* system; the plaintiff would be deprived of the quasi in rem action which the state has decided he has a right to maintain. Therefore, a *forum non conveniens* dismissal should only be granted in exceptional circumstances.[154] The policy decision, upheld by constitutional standards, has

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152 *In Search of a Rationale*, *supra* note 5, at 422.

153 *See* Minichiello v. Rosenberg, 410 F.2d 106, 110 (1968). *But see In Search of a Rationale*, supra note 5, at 419-21.

154 *Contra*, Stein, *supra* note 4, at 1133-34. Professor Stein urges an expansion of *forum non conveniens* rules to deter *Seider*-type actions. This deterrent effect would undoubtedly result, but the point is that New York, California, and Minnesota consider such actions desirable insofar as the state's legitimate concerns justify expanding quasi in rem jurisdiction. It would be anomolous for a state to provide its residents with a *Seider* alternative and then do everything possible to discourage them from using it. If the state interest in allowing New York plaintiffs to sue in their own state is sufficient, then there is no due process problem if the defendant does have to defend in that state. His inconvenience is outweighed by countervailing forces. The courts should not frustrate state policy by too liberally granting *forum non conveniens* dismissals. A case by case inquiry into the convenience of the parties would be burdensome,

been made to provide another forum. Due process has been satisfied. Justice is deemed to be provided by the attachment procedure, and the choice as to which forum will exercise jurisdiction should normally remain with the plaintiff, not the court. The outrage expressed by a distant defendant who must travel to defend in a state where he may never have been is rather hollow when compared to the injustice to a party injured by that defendant's negligence who must forego recovery because he is unable to travel to the state of the accident or the defendant's residence to sue. *Seider* and its supporting cases represent an extension of the quasi in rem attachment procedure. They also signify a necessary redefinition of rights and liabilities arising under attachment proceedings, as well as recognition of the true position of insurance companies. This clarification helps to justify the attachment process permitted against liability insurance policies and makes it a worthwhile extension of quasi in rem jurisdiction. But it is unfortunate that such a momentous and complex redefinition was initiated, and is now slowly being solved, by the courts rather than the legislatures.

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and should not be undertaken. The presumption must be that the *Seider*-type action will stand, and only in exceptional circumstances should dismissal be granted. Naturally critics of *Seider* urge wide use of the *forum non conveniens* doctrine. But if the *Seider* procedure implements sound state policy, as the courts say that it does, then the New York residents should almost always be allowed to maintain their action in their home state.