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Automobile Liability Insurance in Nebraska—An Asset or Liability for the Out-of-State Defendant?

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Comment

AUTOMOBILE LIABILITY INSURANCE IN NEBRASKA—AN ASSET OR LIABILITY FOR THE OUT-OF-STATE DEFENDANT?

The ever increasing use of the automobile by the American public has caused a corresponding increase in the amount of litigation resulting from this use.[1] When this litigation involves a traffic accident occurring outside the jurisdiction of the state courts where the plaintiff brings suit, particular problems arise. If the court can obtain *in personam* jurisdiction over the defendant either by finding him in the state[2] or by a voluntary appearance[3] these problems can be partially alleviated.[4] In the majority of the cases, however, this will not be possible and the plaintiff will either have to seek a forum where he can obtain personal jurisdiction over the defendant,[5] or obtain *in rem* or *quasi in rem*[6] jurisdiction over an asset the defendant may have in the jurisdiction where the plaintiff is situated.

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[1] It has been estimated that the cost to the nation of motor vehicle accidents in 1967 was approximately $10.7 billion. This figure includes wage losses, medical expenses, insurance administration costs, and property damage in motor vehicle accidents. The deaths caused by traffic accidents in 1967 alone were 53,100. *Hearings on H.R. 17134 Before the Subcomm. on Roads of the House Comm. on Public Works*, 90th Cong., 2nd Sess., at 542, 546 (1968).

[2] Adair County Bank v. Forrey, 74 Neb. 811, 105 N.W. 714 (1905).

[3] Dennick v. Central R.R. of N.J., 103 U.S. 11 (1880); Reed v. Mott, 2 Neb. (Unof.) 450, 89 N.W. 277 (1902).

[4] Obtaining necessary witnesses, concurrent suits pending in the other jurisdiction, and increased costs of the litigation are a few of the problems with which the court will still be faced.

[5] This may be a jurisdiction where the defendant can be personally served, such as his place of domicile or the place of the accident if the state has a long arm statute.

[6] "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong....

There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claim asserted. [T]hey differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." Freeman v. Alderson, 119 U.S. 185, 187-88 (1886). *See generally* Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913).

One possible method of obtaining jurisdiction over a nonresident defendant for an out-of-state accident is to use the defendant's automobile liability policy alleging it to be an asset. If the insurance company is doing business in the plaintiff's state this "asset" may then be asserted as establishing the basis of a *quasi in rem* proceeding, thus allowing the plaintiff the convenience of his home forum.[7] This comment will examine the feasibility of obtaining this method of jurisdiction in Nebraska; (1) by using the policy of insurance to establish an administration proceeding in those cases where the defendant is deceased, and (2) by garnishing the insurance policy as an asset of the defendant in all other applicable cases.[8]

I. THE ESTABLISHMENT OF AN ADMINISTRATION PROCEEDING

The Nebraska Supreme Court recently faced the issue of whether a liability insurance policy created an asset in this state subject to administration when the accident occurred *outside* the state, and the defendant was otherwise unreachable by service of process.[9]

In *Calkins v. Witt*,[10] the administrator of a deceased Nebraska resident who died in a Kansas traffic accident brought an action for the appointment of an administrator of the defendant who was also killed in the accident. Since the defendant was not a resident of Nebraska, the appointment of the administrator was dependent upon the establishment of a property right of the defendant in property located in the state.[11] A California-issued liability insurance policy was asserted to be the asset needed for granting the letters of ad-

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[7] The convenience of the home forum for the plaintiff primarily involves that of expense. There may be other conveniences depending on the theory of conflict of law the state applies and the tendency of the courts to allow large jury awards. Thus, the plaintiff who can obtain *quasi in rem* jurisdiction over the defendant can "forum shop" to a certain degree.

[8] This comment is based on the assumption that the accident occurred outside of the jurisdiction of the Nebraska courts and the insurance company is "doing business" in the state. If the accident occurred within Nebraska, jurisdiction is now easily obtained by using the Nebraska Long Arm Statute that took effect in October of 1967. NEB. REV. STAT. § 25-536 (Supp. 1967).

[9] The Nebraska Supreme Court had previously decided that a liability policy was an asset subject to administration when the accident occurred *within* the state. Cox v. Kresovich, 168 Neb. 673, 97 N.W.2d 239 (1959). At that time Nebraska did not have a long arm statute. Jurisdiction in the Nebraska courts, therefore, was dependent upon finding an asset in this state even though the accident occurred in Nebraska.

[10] 183 Neb. 178, 159 N.W.2d 199 (1968).

[11] NEB. REV. STAT. § 30-314 (Reissue 1964).

ministration. The insurance company was doing business in Nebraska and reachable by process. The court applied the reasoning of *Cox v. Kresovich*[12] that a "contractual assumption of prospective liability of the decedent insured was an asset of the deceased during his lifetime and of his estate on his death"[13] thereby reaching the conclusion that the granting of the administration was proper because the insurance policy did create an asset in the state.

The creation in Nebraska of an asset arising from a foreign-issued policy of liability insurance to a nonresident insured covering an accident occurring outside of the jurisdiction of the Nebraska courts is, however, left in doubt because the court "reversed solely on the procedural issue."[14] This procedural issue concerned the county court's finding that the deceased left an estate in the county. In holding the asset question to be final, thereby establishing an estate for which letters of administration could be issued, the supreme court stated:

> The county court had jurisdiction of the subject matter and determined the fact issue between the same parties. The order granting administration was an appealable order.... No appeal was taken. The appellees are now precluded by the rules of res judicata from relitigating the issue of the existence or absence of that fact. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies.... A court's jurisdiction of the subject matter may be raised directly or collaterally but here the matter of fact of the existence of an asset was litigated and the determination became final. To permit relitigation and redetermination would violate the first principles [of] res judicata and the necessity for finality in the litigation of fact issues.[15]

The Nebraska court prefaced this reversal stating "we have reached the issues presented on the merits,"[16] which indicates that the initial part of the opinion would have to be given more weight than ordinary dictum. If the assumption is correct that the *Calkins* case was decided on its merits, but reversed because of a procedural defect, the opinion should be examined as to its merits.

The court premises its holding on the belief that the situs of the tort claim and the issue of whether the deceased defendant has left assets in the state requiring the appointment of an administrator are not rationally connected. Supporting this belief, the court adds that "[a]n accident does not produce assets in a tort-feasor, but a contractual claim against a reachable insurer does."[17]

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[12] 168 Neb. 673, 97 N.W.2d 239 (1959).
[13] Calkins v. Witt, 183 Neb. 178, 179, 159 N.W.2d 199, 201 (1968).
[14] *Id.* at 182, 159 N.W.2d at 202.
[15] *Id.* at 183, 159 N.W.2d at 202.
[16] *Id.* at 182, 159 N.W.2d at 202.
[17] *Id.* at 181, 159 N.W.2d at 201.

An examination of the case authority used in the *Calkins* case[18] reveals that only one of the quoted cases, *In re Riggle's Estate*,[19] involved a situation where the state that granted the administration was not also the place of the accident.[20] The *Riggle's* case is distinguishable from *Calkins*. In *Riggle's*, the contract of insurance had been issued in the forum state. Personal service was also obtained on the defendant in the forum state where the administration proceedings were initiated before his death. While these cases do lend support to the *Kresovich* rationale, it does not follow that the same may be said about *Calkins*.

In *Kresovich* the accident happened in Nebraska, and the out-of-state plaintiff successfully petitioned for the letters of administration to be issued in Nebraska. In *Calkins*, on the other hand, the plaintiff did not choose to go to the place of the accident (Kansas) or the residence of the deceased (California), but instead sought to litigate the matter in his home state (Nebraska). The Nebraska Supreme Court did not feel these differences were significant and applied the *Kresovich* rationale to *Calkins*, upholding the appointment of an administrator.

The underlying assumption of *Calkins* is that an insurance policy is an asset of a deceased person sufficient to establish an administration proceeding. In *Kresovich* the court reasoned that the insurance policy was an asset of the insured at the time the contract was made "and remained such and followed him until his death, after which it became [the] estate of the insured in the jurisdiction where he came to his death."[21] The court in *Calkins* could not rely on this theory because the death did not occur in Nebraska. If the insurance policy in *Calkins* followed the defendant to his death it would not be an asset in Nebraska.

Instead, the court relied on the theory that "the insurance company should be required to respond in [the] forum where its contractual risk reaches and where it does business."[22] The court felt that the policy involved protects Nebraska residents no matter where the accident occurs.

This may be true if the policy is issued to the Nebraska resident, but in the *Calkins* case the policy was issued to a nonresident. The risk the insurance company contracted for was the liability that the

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[18] The court cites *In re* Estate of Gardinier, 40 N.J. 261, 191 A.2d 294 (1963).

[19] 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

[20] *In re* Estate of Gardinier, 40 N.J. 261, 267-68 n.1, 191 A.2d 294, 297-98 n.1 (1963).

[21] Cox v. Kresovich, 168 Neb. 673, 680, 97 N.W.2d 239, 244 (1959).

[22] Calkins v. Witt, 183 Neb. 178, 181, 159 N.W.2d 199, 202 (1968).

insured might incur, not the damage to the plaintiff (the Nebraska resident). The court misconstrues the fundamental characteristic of the liability policy, *i.e.*, to protect against liability. The contractual risk only reaches as far as the defendant "reached" and this did not include the state of Nebraska. An insurance company has no obligation to pay until the liability of the insured is established. To interpret the policy in the manner of the Nebraska court is to make it a third party beneficiary contract.

The misunderstanding of the risks covered by a liability policy leads the court to assume that the due process clause of the United States Constitution was not violated, stating:

> Within the meaning of due process it is recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the "state action may have repercussions beyond state lines."[23]

The court's statement is an accurate picture of the due process clause where the policies protect *its* residents against risk. This picture does not fit the framework of the *Calkins* case because, as already stated, the risk protected was not that of the Nebraska resident but that of the insured. As will be examined, *infra*, the Nebraska court, by enlarging the insurer's obligation lawfully created in another state, may have deprived the insurer of due process.[24] In any event, the due process issue cannot be dismissed as easily as the court has done in *Calkins*.

As previously noted, defendant's counsel did not preserve the asset question so that the supreme court did not have to decide that issue on appeal. In a future case where the asset question must be decided by the supreme court, a more logical approach to the problem could be taken by holding that the insurer's obligation to defend the insured creates an asset subject to administration in this state upon the defendant's death. Even this approach is subject to a serious flaw.

To call a policy of insurance an asset in Nebraska on the sole grounds that the insurer "does business" in Nebraska is to conclude that the same insurance policy is an asset in every other state where the insurance company does business. In a case where multiple plaintiffs are involved, this could result in administration proceedings in several states all involving a single policy. If there is still

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[23] *Id.*, citing Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[24] *See, e.g.*, Hartford Ind. Co. v. Delta Co., 292 U.S. 143, 150 (1934) (holding a state could not change the insurer's obligation to pay where the contract was validly created in one state if the interests of the forum are not substantial without violating due process of law).

the need to use a policy of insurance as an asset to obtain jurisdiction, even though Nebraska now has a long-arm statute,[25] it should be limited to those cases where the accident occurred in the state.

In a *Calkins* situation, a plaintiff who ultimately recovers will be limited to the amount of the policy, because the defendant did not have the "minimum contacts" required to obtain *in personam* jurisdiction over the decedent's estate.[26] In a sense this becomes a *quasi in rem* proceeding adjudicating no other assets of the deceased defendant except the policy of insurance. If this *quasi in rem* procedure is effective in Nebraska in the case of a decedent's estate, such as the *Calkins* case, the logical extension is to apply the procedure to a case where the defendant was not killed and *in personam* jurisdiction cannot be obtained.

The theory of the plaintiff would be to garnish the insurance policy as a "debt owed" under the *Harris v. Balk*[27] rationale that a creditor can garnish any assets of his debtor that he can find in his jurisdiction. To make this transition, the "asset" of the *Calkins* case must be collectable under the Nebraska garnishment statutes.[28] The New York courts have adopted this method of garnishment. An examination of the New York test should now be considered.

II. THE SEIDER DOCTRINE

In *Seider v. Roth*[29] the plaintiffs brought suit in New York alleging injuries caused by an accident in Vermont. The defendant was a resident of Canada and not subject to *in personam* jurisdiction in New York. The plaintiff had attachment papers served in New York on defendant's insurance company alleging the contractual obligation of the insurance company to defend and indemnify as a debt attachable under the New York statutes.[30] The New York court accepted this theory reasoning that the duty of the insurer to defend any place where jurisdiction is obtained over the insured was a debt owed the insured by the insurer, according to prior New York case law,[31] and subject to attachment. This "bootstrap situa-

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25 NEB. REV. STAT. § 25-536 (Supp. 1967). The fact Nebraska did not have a long arm statute may have influenced the Nebraska court in *Kresovich*. Without a finding of an "asset" in this state in the *Kresovich* case the plaintiff would have been without a remedy.

26 *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (holding one contact with the forum sufficient to sustain jurisdiction); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

27 198 U.S. 215 (1905).

28 NEB. REV. STAT. §§ 25-1001, -1010 (Reissue 1964).

29 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

30 N.Y. CIV. PRAC. LAW §§ 5201, 6202.

31 *In re* Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

tion"[32] has been criticized by various sources[33] but the holding was affirmed by the New York court in a later case.[34] While various New York statutes initially posed constitutional problems of denying the defendant his property without the opportunity to be heard,[35] the court of appeals adopted a limited appearance by the defendant that by-passed these objections.[36] The United States Court of Appeals for the Second Circuit has approved this method of jurisdiction, ruling that due process was not violated.[37]

The *Seider* doctrine has been compared to direct action statutes[38] which some states have adopted.[39] The constitutionality of these statutes has been upheld by the United States Supreme Court in *Watson v. Employers Liability Assur. Corp.*[40] The *Watson* case involved the Louisiana direct action statute[41] which allowed injured persons to bring direct actions against liability insurance companies that have issued policies covering liabilities of the alleged negligent party. The plaintiff in the *Watson* case was allegedly injured by a home permanent manufactured by a corporation which was not subject to service of process in Louisiana. The Supreme Court in upholding the Louisiana statute felt:

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[32] Sieder v. Roth, 17 N.Y.2d 111, 115, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 103 (1966) (Burke, J., dissenting opinion).

[33] Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968); La Brum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747 (1968); Comment, 67 COLUM. L. REV. 550 (1967); Comment, 19 STAN. L. REV. 654 (1967).

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

[35] Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968).

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

[37] Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *petition for cert. filed*, 37 U.S.L.W. 3487 (U.S. June 17, 1969) (No. 1461, 1968 Term; renumbered No. 177, 1969 Term) (The question posed to the Supreme Court is: May a nonresident who has no personal contacts within New York and who purchases and receives an automobile policy outside New York, consistent with due process, be subjected to suit in New York for an out-of-state accident solely because his insurer has an office in New York and plaintiff is a resident thereof?). The Supreme Court has dismissed a petition for certiorari based on a claim that the *Seider* doctrine interferes with interstate commerce "for want of a federal question." Hanover Ins. Co. v. Victor, 393 U.S. 7 (1968).

[38] Note, 51 MINN. L. REV. 158 (1966).

[39] LA. REV. STAT. § 22:655 (Supp. 1969); R.I. GEN. LAWS ANN. § 27-7-1 (1956); WIS. STAT. § 260.11 (Supp. 1969). *See also* P.R. LAWS ANN. tit. 26, §§ 2001, 2003 (Supp. 1957).

[40] 348 U.S. 66 (1954).

[41] LA. REV. STAT. § 22:655 (Supp. 1969), *formerly*, § 22:655 (1958).

> Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them.... Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases.... What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there.[42]

The court's concern with the fact that the accident occurred in Louisiana should be considered in light of the *Seider* doctrine which is usually applied where the accident and the resulting medical expenses occur in another state. The main interest of the plaintiff's home state in this situation is the resulting medical expenses the plaintiff may suffer at home. When compared with the interest of the state where the accident occurred, this would appear to be slight in the great majority of cases. Where the state's interest in a contractual relationship is slight, the state may not impose a greater contractual obligation on the parties than what was agreed upon and validly executed by the parties in another state. To do so would violate the federal due process clause.[43] The ultimate question of the constitutionality of *Seider*, therefore, appears to rest on the issue of whether a state has a sufficient legitimate interest in altering a valid contract of insurance based solely on the ground that the plaintiff is a resident of the state.[44] The question should now be considered whether *Seider* is adaptable to a garnishment proceeding in Nebraska.

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[42] Watson v. Employers Liability Assur. Corp., 348 U.S. 66, 72-73 (1954).

[43] Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930). *See also* Hartford Acci. & Indem. Co. v. Delta & Pine Lane Co., 292 U.S. 143 (1934).

[44] If *Seider* was based on *in rem* or *quasi in rem* jurisdiction assuming the insurance policy is property in the state, an appellate court decision appears to have limited this holding where the plaintiff is not a New York resident. Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (1968). In the *Vaage* case a Norwegian brought suit against North Carolina defendants for a North Carolina accident. The court dismissed the suit on the doctrine of *forum non conveniens* since the North Carolina courts were open to this entirely foreign litigation. *See also* Minichiello v. Rosenberg, note 37 *supra*, at 110, where the court doubts whether *Seider* could be constitutionally applied where the state was neither the place of injury nor the plaintiff's residence, and Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir. 1969), where the court held that New York administrators of estates of nonresidents could not attach liability policies of defendants who were not subject to *in personam* jurisdiction in New York, although insurers did business in New York.

III. SEIDER AND NEBRASKA GARNISHMENT

Calkins v. Witt has laid the framework for the possible adoption of the *Seider* rule in Nebraska.[45] This framework rests, however, on an unstable foundation of statutory and case law concerning attachment and garnishment. The Nebraska statutes on attachment and garnishment[46] are more restrictive than those of New York.[47] The New York statute allows the garnishment of any property which could be assigned or transferred regardless of whether it is vested. The same is true of debts, which are past due or which are yet to become due, certainly or upon demand. The Nebraska statute is not as explicit, stating only that a plaintiff can have an attachment against the property of the defendant if, among other things, he is a nonresident of the state. Standing alone the statute could be interpreted to include contingent as well as certain debts, thus falling under the *Seider* holding. But court interpretations of the statutes do not allow this freedom.

The first obstacle faced in trying to apply *Seider* to a garnishment proceeding in Nebraska is the tendency of the court to refuse garnishment where the debt is contingent. In *Salyers Auto Co. v. DeVore*,[48] the Nebraska court looked to *Pennoyer v. Neff*[49] and decided that in a garnishment proceeding involving an out-of-state defendant the jurisdiction of the court "would be limited in cases of attachment based solely on the ground of nonresidence to what was actually levied upon at the time for service of process."[50] The claims involved in *Salyers* were dependent upon collection of money from third persons, not upon a liability insurance policy as in the *Seider* situation. But the rationale is the same—a creditor has nothing to levy upon if the debtor's claim is only contingent.

The *Pennoyer* rule may have been relaxed by the United States Supreme Court's decision in *International Shoe Co. v. Washington*,[51] since the contact necessary for jurisdiction over the defendant is

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45 This framework, however, is subject to the qualification that a liability policy covering an accident occurring out of the state is an asset in Nebraska of the deceased non-resident. As mentioned in Part II, this question was not before the Nebraska Supreme Court since no direct appeal was taken from the county court's finding that the policy was an asset.

46 NEB. REV. STAT. §§ 25-1001, -1010 (Reissue 1964).

47 N.Y. CIV. PRAC. LAW § 5201.

48 116 Neb. 317, 217 N.W. 94 (1927).

49 95 U.S. 714 (1877).

50 Salyers Auto Co. v. DeVore, 116 Neb. 317, 324, 217 N.W. 94, 97 (1927).

51 326 U.S. 310 (1945).

not as great.[52] The holding in *Salyers*, however, does not appear to be affected since, subsequent to *International Shoe*, *Salyers* was followed by the Nebraska court.[53] Since any garnishment of a liability insurance policy would have to be based on the contingent claims of the insured against the insurer, a major obstacle to a *Seider* argument would appear.

Assuming a court could distinguish *Salyers* on the ground that the holding applied only to contingent claims for collection of money from third persons, the plaintiff's counsel would then have to prove that at the time of garnishment the defendant had a "legal demand" due from the garnishee. In *Chicago, B & Q R.R. Co. v. Van Cleave*,[54] the plaintiff tried to garnish the wages of the defendant owed by the garnishee. In reversing the lower court, the Nebraska Supreme Court observed:

> A person is not liable as garnishee unless it affirmatively appears that at the time of the garnishment the defendant had a cause of action against him for the recovery of a legal demand due, or to become due by the efflux of time.[55]

Since the defendant, at best, would have no rights against the insurance company until he was served with a summons, there would be no grounds for garnishment. If the defendant did have a right such as medical payments or collision coverage, the plaintiff could garnish the amount owed. This generally would be a small amount so as not to be worthwhile and in most cases the insurance company will have already paid the amount due. The basic reasoning behind holding a legal obligation necessary for garnishment is the feeling that the plaintiff's (creditor) claims can rise no higher than that of the defendant (debtor) when dealing with the garnishee. The rule has been followed extensively in Nebraska[56] and is consistent with the idea that since garnishment is a statutory remedy, a litigant seeking such relief must find his authority in the statute.[57]

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[52] *See* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of the State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

[53] Certain-teed Products Corp. v. Carlisle, 156 Neb. 185, 55 N.W.2d 489 (1952).

[54] 52 Neb. 67, 71 N.W. 971 (1897).

[55] *Id.* at 70, 71 N.W. at 972.

[56] Certain-teed Products Corp v. Carlisle, 156 Neb. 185, 55 N.W.2d 489 (1952); Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951); Royal Tire Service v. George W. Bell Co., 139 Neb. 238, 297 N.W. 88 (1941); Cahn v. Carpless Co., 61 Neb. 512, 85 N.W. 538 (1901).

[57] Pupkes v. Sailors, 183 Neb. 784, 164 N.W.2d 441 (1969); Hinds State Bank v. Loffler, 113 Neb. 110, 202 N.W. 465 (1925).

If the plaintiff successfully steers his way past these problems, the insurance company may still have the last word. A simple clause in the insurance contract to the effect that the contract is payable to the defendant only in the state where the accident occurred or where the defendant resides would cause the policy to be garnish free in Nebraska.[58] Nebraska follows the rule that a debtor can only be garnished in a state where the debt is payable. *Bullard v. Chaffee*[59] held this to be the settled rule of the state subject to change by the legislature alone. Even without an expressed clause in the insurance contract, defense counsel could argue the reasonable expectations of the parties would be that the insurance company would only have to pay in those states where the defendant could be subjected to *in personam* jurisdiction thereby complying with this exception to garnishment proceedings.

The problems encountered with the existing garnishment statutes could be successfully met with either legislative or judicial workmanship. Thus, the ultimate question becomes whether a *Seider* doctrine is desirable in Nebraska.

IV. DESIRABILITY OF SEIDER IN NEBRASKA

The obvious advantage of a *Seider* method of jurisdiction is to allow the plaintiff the opportunity to litigate an accident, occurring in a foreign jurisdiction, in his home forum. The *Seider* rationale is not needed when the accident occurs in Nebraska, however, because of the long-arm statute.[60] Use of this statute will enable the plaintiff to obtain personal jurisdiction over the defendant. *Seider*, on the other hand, proceeds only along *quasi in rem* lines.

In the normal case, the insurance will probably cover all the damages incurred, but there is no reason to limit the plaintiff's jurisdiction unnecessarily. In a situation where counsel is tempted to use a *Seider* argument in order to allow the plaintiff to litigate "at home," the statute of limitations should always be kept in mind. By the time the litigation reaches the supreme court, the statute may have run, and if the court rejects the argument, it will be too late to file a petition under the long-arm statute or in a state where jurisdiction was easily obtainable.

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[58] For an example of a proposed clause in a policy of insurance to avoid jurisdiction in those states where the defendant is not subject to personal service *see* La Brum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747, 751 (1968).

[59] 61 Neb. 83, 84 N.W. 604 (1900).

[60] NEB. REV. STAT. § 25-536 (Supp. 1967).

If the case is subject to federal jurisdiction the defendant may be able to nullify the advantages gained by the plaintiff who imposes the *Seider* rationale by removing the litigation to federal court. This results because:

> Once in federal court, [actions of the *Seider* type] become subject to the salutary provision of 28 U.S.C. § 1404 (a) that "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." Either the district of the defendant's residence or that of the accident, or both, will qualify for transfer.[61]

Since a proceeding under the *Seider* theory is *quasi in rem*, any judgment the plaintiff may obtain will be limited to the amount of the insurance policy.[62] If the plaintiff's judgment is in excess of the policy limits, the plaintiff will have to proceed against the defendant for the remainder of the claim in another jurisdiction where the defendant can be personally served. It is doubtful whether the plaintiff could use the prior judgment as a basis of collateral estoppel or res judicata since the defendant has not had his day in court.[63] This may not be a worthy consideration in some cases due to the lack of assets, apart from the insurance policy, of some defendants.

In those cases where the policy limits are insufficient to compensate for the plaintiff's damages and the defendants do have additional assets, a *Seider* litigation will force the plaintiff to try two lawsuits instead of one: one in the plaintiff's forum adjudicating the policy of insurance, and the other in a forum where the defendant can be personally served for the remainder of the damages. On the other hand, the plaintiff could be estopped from instigating a second suit against the defendant if he loses the suit in his home forum on its merits.[64] The doctrines of res judicata and collateral estoppel, then, do not appear to help the plaintiff who wishes to stay in his home forum, especially when the possibility of a judgment over the policy limits may occur.

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[61] Minichiello v. Rosenberg, 410 F.2d 106, 119 (2nd Cir. 1968). *See also* Farrell v. Piedmont Aviation, Inc., 295 F. Supp. 228 (S.D.N.Y. 1968), *aff'd*, Farrell v. Wyatt, 408 F.2d 662 (2nd Cir. 1969); Jarvik v. Magic Mountain Corp., 290 F. Supp. 998 (S.D.N.Y. 1968).

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

[63] *See generally*, 1968 Supplementary Practice Commentary to N.Y. CIV. PRAC. LAW § 5201; Note, 47 NEB. L. REV. 640 (1968).

[64] Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939); note 63 *supra*.

A further difficulty inherent in the *Seider* doctrine is the ease of extinguishing the garnished asset of the defendant (the insurance policy) merely by failing to meet the conditions precedent found in every policy of insurance.[65] Primary among these is the obligation of the defendant to cooperate with the insurer in litigating the suit. If the insurance company can show a breach of the duty to cooperate on the part of the defendant, the policy will be ineffectual and the plaintiff will lose jurisdiction. If *in personam* jurisdiction is obtained, the plaintiff will not lose his cause of action against the defendant in the event of the defendant's breach of one of the conditions precedent, even though his chance of collection of a judgment may be greatly diminished. It should be noted, however, that an insurance company in Nebraska has the burden to show not only non-cooperation but that the non-cooperation led to the detriment or prejudice of the insurer.[66]

In *Pupkes v. Sailors*,[67] the Nebraska Supreme Court refused to allow the insurance company to avoid payment to the judgment creditor of its insured for injuries caused in an accident. The court held the fact the defendant did not show up for the trial was not prejudicial per se to the insurer. The court felt "[r]egardless of the nature of the breach, there must be a showing of detriment or prejudice to the insurer."[68] Assuming prejudice can be shown on the part of the insurance company, a plaintiff by use of a *Seider* rationale may force the defendant to breach the cooperation clause because the defendant may not be willing to come to the plaintiff's forum to litigate the matter. The use of interrogatories and depositions may ease this burden on the defendant, but there is still the possibility of collusion between the insurer and the insured to delay the plaintiff in hopes of a settlement. While a breach of the terms of the policy by the defendant will not affect the defendant's ultimate liability in another forum, the chance of recovery of any judgment the plaintiff may eventually obtain will be greatly diminished.

Finally, a state, before adopting its own *Seider* doctrine, should consider the cost involved. An insurance company that has to defend an action removed from the place of the accident will have

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[65] The condition precedent found in most policies that the insured must notify the company when sued would not be a problem in this type of garnishment proceeding since the insurance company is the one that is notified first.

[66] Pupkes v. Sailors, 183 Neb. 784, 164 N.W.2d 441 (1969); Iowa Mut. Ins. Co. v. Meckna, 180 Neb. 516, 144 N.W.2d 73 (1966); M.F.A. Mutual Ins. Co. v. Sailors, 180 Neb. 201, 141 N.W.2d 846 (1966).

[67] 183 Neb. 784, 164 N.W.2d 441 (1969).

[68] *Id.* at 788-89, 164 N.W.2d at 444.

to bear certain costs it would not normally face. Witnesses, investigating police officers, and the defendant, will have to be transported and supported during the trial. The insurance company may choose not to pay these expenses but then it is faced with the problem of obtaining an adequate defense in the litigation. In any event, expenses will soar, resulting eventually in higher insurance rates for the public in general. The plaintiff's expenses will increase also. Witnesses will have to be brought to the forum and other expenses will occur in prosecuting the suit. If the plaintiff's jurisdiction typically awards larger judgments than the accident forum, this may offset the additional expense.[69] In such a state, however, adoption of the *Seider* doctrine will increase the number of cases on the dockets, unless other states adopt a similar method of jurisdiction. Since there does not appear to be such a movement[70] a *Seider* state would not only have the accident litigation involving *Seider* rationale, but also cases where the accident occurred in the state. This increase in the court load could cost the citizens of the state substantially more than that saved by those few citizens who could benefit from the *Seider* rule—the plaintiffs who are able to litigate in their home forum.

These points should be carefully considered by the courts and the legislature before any move toward adopting the principles of the *Seider* case is instigated.

V. CONCLUSION

A plaintiff usually desires to use the courts of his own state for the sake of convenience and expediency. This may be particularly true when the litigation involves an out-of-state accident with a nonresident driver. This desire cannot violate constitutional principles, however. To obtain *in personam* jurisdiction over the defendant, whether alive or dead:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[71]

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[69] *See* Simpson v. Loehmann, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967) (Breitel, J., concurring opinion).

[70] Cases not following the rationale that an insurance policy covering liability is garnishable are Farmers Mutual Auto. Ins. Co. v. Noel, 211 F. Supp. 216 (W.D. Mo. 1962) (dictum); Jordon v. Shelby Mutual Ins. Co., 175 So. 2d 233 (Fla. Ct. App. 1965); Burch v. Wargo, 1 Mich. App. 365, 136 N.W.2d 750 (1965) (dictum), *rev'd on other grounds*, 378 Mich. 200, 144 N.W.2d 342 (1966); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967); Gray v. Houck, 167 Tenn. 233, 68 S.W.2d 117 (1934).

[71] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

This "purposeful act" of a deceased defendant cannot be found in the state court's appointment of an administrator.

Even though *in personam* jurisdiction cannot be obtained over the out-of-state defendant, without a voluntary appearance or being served in the state, the plaintiff can still proceed to acquire *in rem* or *quasi in rem* jurisdiction if an asset of the defendant can be found in the state. A contract of insurance to cover liability of the defendant appears to be an asset that has the potential of allowing a plaintiff to acquire this jurisdiction.

In a forecast of future events under the *Seider* rationale, that a liability insurance policy is an asset sufficient to establish *quasi in rem* jurisdiction over an out-of-state defendant, it has been observed:

> If its constitutionality is upheld, it is quite likely that all fifty states will be compelled to enact like measures. As a result each party will commence suit as quickly as possible in an endeavor to have the litigation in the state where he resides. It would also appear to be a natural and logical consequence of the approval of the *Seider* procedure that retaliatory laws will be adopted by other states to impose certain conditions upon residents from *Seider*-procedure states to protect the states' own residents from being subject to the jurisdiction of the foreign state. This is likely to impose a serious burden on interstate travel and commerce. It is also reasonably certain that the adoption of this procedure will work a substantial increase in the cost of insurance, which is not in the public interest.[72]

Watson v. Employers Liability Assur. Corp.[73] established that a state has sufficient interest in a contract of liability insurance to force an insurer to answer and defend in a state where the plaintiff resides and was injured even though the defendant is not subject to *in personam* jurisdiction. The question left unanswered by the court is whether the state in which the plaintiff resides has "sufficient interest" when the injuries occurred in another state. On this answer rests the validity of the rationale of both *Calkins v. Witt* and *Seider v. Roth.*

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[72] Minichiello v. Rosenberg, 410 F.2d 106, 117 (2nd Cir. 1968) (Anderson, J., dissenting opinion).

[73] 348 U.S. 66 (1954).