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Seider v. Roth: An Attachment of an Insurer's Obligation to Defend

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SEIDER v. ROTH: ATTACHMENT OF AN INSURER'S OBLIGATION TO DEFEND

In *Seider v. Roth*[1] the New York Court of Appeals recently held that a resident plaintiff could obtain quasi in rem jurisdiction over a non-resident motorist by levying upon his automobile liability insurance policy. The policy was issued outside of the state to a non-resident motorist by a foreign insurance company authorized to do business in New York. This Note will examine and evaluate the reasoning of the court's decision. In addition, it will discuss possible difficulties which may be encountered in administering such a unique theory of law. Finally, it will suggest theoretical applications for analogous reasoning in other jurisdictions.

Norman and Rona Seider, husband and wife, were residents of New York. They were injured in an automobile accident on a Vermont highway, allegedly through the negligence of Andre Lemiux, a Canadian citizen. Marie Roth was the driver of a third automobile involved in the collision.

Lemiux had been issued an automobile liability policy in Quebec through the Quebec branch of the Hartford Accident and Indemnity Company, a foreign corporation licensed to do business in New York. This policy was in full force and effect on the day Lemiux, Seider, and Roth collided.

The Seiders' wished to institute a negligence action in New York against Lemiux. They attempted to obtain jurisdiction for this action by procuring an order of attachment against Lemiux's in-state property. An order was obtained from the Supreme Court of Nassau County, directing the sheriff to levy upon the contractual obligation of the Hartford Accident and Indemnity Company to defend and indemnify Lemiux. This obligation was contained in Lemiux's automobile insurance policy. The company was personally served with the order of attachment in New York and Lemiux was personally given a copy of the attachment order and served with a summons and complaint in Canada. Lemiux moved to vacate the attachment and to vacate the service of the summons and complaint on the grounds of lack of jurisdiction. Specifically, he alleged that the contractual obligation was not subject to attachment. The supreme court denied Lemiux's motion. The appellate division,[2] one judge dissenting,[3] affirmed the order of the lower court.

The New York Court of Appeals, in a four-to-three decision,[4]

1. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966).
2. 23 App. Div.2d 787, 258 N.Y.S.2d 795 (1965).
3. *Id.* at 788, 258 N.Y.S.2d at 796.
4. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 103, 216 N.E.2d 312, 315 (1966).

held the insurance policy attachable. The court stated that since the policy created an absolute obligation on the insurer to defend and indemnify the insured upon the occurrence of the accident, the policy must be construed as a "debt" owing to the insured by the insurance company. Under New York law[5] a debt is subject to attachment. Although the policy was issued in Canada to a Canadian motorist by a foreign insurance company and the accident occurred in Vermont, the fact that the insurance company was licensed to do business in New York made it subject to personal service in the state. By attaching the "debt" through personal service of the insurer, jurisdiction was obtained for the negligence suit.

To facilitate the understanding of the subject case and its analysis, a discussion of certain principles of the law of attachment is necessary. Basically, attachment is a provisional remedy[6] for the collection of a debt or money judgment,[7] proceeding by a seizure under legal process of the debtor's property.[8] It is an involuntary taking of the debtor's property within the jurisdiction of the court prior to any adjudication of the rights of the parties.[9] An attachment can perform two distinct functions.[10] It can be used to establish jurisdiction for the court when personal jurisdiction over the person of the defendant cannot be secured; or it can be used to provide security for the satisfaction of the judgment which the plaintiff may be awarded as a result of the principal action. The attachment may be used for either or both purposes.[11]

5. N.Y. CIV. PRAC. LAW §§ 6202, 5201. Section 6202 provides in part: Any debt of property against which a money judgment may be enforced as provided for in Section 5201 is subject to attachment. . . .

Section 5201 reads as follows:

(a) Debt against which a money judgment may be enforced. 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.

(b) Property against which a money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. . . .

6. Zeiberg v. Robosonics, Inc., 43 Misc.2d 134, 250 N.Y.S.2d 368 (Sup. Ct. 1964).

7. Godbout v. Irwin, 272 App. Div. 1020, 73 N.Y.S.2d 565 (1947).

8. Reich v. Spiegel, 208 Misc. 225, 140 N.Y.S.2d 722 (Sup. Ct. 1955).

9. *Ibid.*; see also Elliot v. Great Atlantic & Pacific Tea Co., 11 Misc. 2d 133, 171 N.Y.S.2d 217 (N.Y. City. Ct. 1957).

10. Zeiberg v. Robosonics, Inc., 43 Misc.2d 134, 250 N.Y.S.2d 368 (Sup. Ct. 1964); Elliot v. Great Atlantic & Pacific Tea Co., 11 Misc.2d 133, 171 N.Y.S.2d 217 (N.Y. City Ct. 1957).

11. Elliot v. Great Atlantic & Pacific Tea Co., 11 Misc.2d 133, 171 N.Y.S.2d 217 (N.Y. City Ct. 1957).

The jurisdictional aspect of the remedy permits a plaintiff to obtain quasi in rem jurisdiction over a non-resident defendant by levying on his local property[12] and then serving him either personally[13] or by publication.[14] If the defendant appears subsequent to a jurisdictional attachment to contest the proceedings on the merits and the attachment is not necessary for security purposes it may be vacated.[15] If it appears the plaintiff will encounter difficulty in collecting a possible judgment unless the property of the defendant were securely impounded, the attachment will be upheld.[16] The appearance of the defendant to dispute the jurisdiction of the court that issued the attachment order will not confer personal jurisdiction on the case.[17] The defendant may move to vacate the attachment, and, if successful, he can follow with a motion to dismiss for lack of jurisdiction.[18] Since the jurisdiction which was predicated on the attachment would be absent, the case would terminate.

Since attachment is a statutory remedy in derogation of the common law, courts construe such statutes strictly against those who seek to invoke them.[19] In support of strict construction of attachment law is the courts' deep concern for the rights of the defendant. Because the remedy is extraordinary in that it permits seizure of the defendant's property even though the defendant may have no opportunity to be heard or to have his rights adjudicated, the courts tend to use the power of attachment sparingly.[20]

The question of issuing an attachment is generally left to the discretion of the trial court. The issuance of the remedy is not a matter of right but is a matter to be weighed and decided upon by the court.[21] Among the factors the court considers to determine the status of an attachment order are the need for either the jurisdictional or security functions of the order in the plaintiff's case, the value and nature of the defendant's property proposed to be attached, and the extent and validity of the plaintiff's original cause of action.

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12. Lennox v. Brady, 101 N.Y.S.2d 22 (Sup Ct. 1950).
13. N.Y. Civ. Prac. Law § 314(3).
14. N.Y. Civ. Prac. Law § 315.
15. N.Y. Civ. Prac. Law § 6223.
16. Zeiberg v. Robosonics, Inc., 43 Misc.2d 134, 250 N.Y.S.2d 368 (Sup. Ct. 1964).
17. N.Y Civ. Prac. Law § 320(c).
18. N.Y. Civ. Prac. Law § 3211(a)(9).
19. Penoyar v. Kelsey, 150 N.Y. 77, 44 N.E. 788 (1896); In 37-01 31st St. Corp. v. Young, 200 Misc. 501, 106 N.Y.S2d 449 (Sup. Ct. 1951) it was said, "Attachment is a harsh remedy and must be construed strictly in favor of those against whom it is employed." *Id.* at 502, 106 N.Y.S.2d at 450.
20. Elliot v. Great Atlantic & Pacific Tea Co., 11 Misc. 133, 171 N.Y.S. 2d 217 (N.Y. City Ct. 1957); Reich v. Spiegel, 208 Misc. 225, 140 N.Y.S.2d 722 (Sup. Ct. 1955).
21. Elliot v. Great Atlantic & Pacific Tea Co., 11 Misc. 133, 171 N.Y.S. 2d 217 (N.Y. City Ct. 1957).

New York law authorizes a court to grant an order of attachment when the defendant is "not a resident or domiciliary of the state."[22] The mechanics of a foreign attachment involve the court directing the sheriff, in accordance with the plaintiff's request, to levy upon the non-resident defendant's property within the state. If this property is in the possession or custody of a third person (the garnishee)[23] residing in the state, the order and levy may be served upon him.

Case law serves to further refine the statutory principles of attachment. Since the landmark United States Supreme Court decision *Pennoyer v. Neff*,[24] it has been held fundamental that any property within the state belonging to a non-resident defendant may be seized pursuant to an order of attachment, and property so levied upon is deemed to constitute a "res" within the state. The court is then permitted to adjudicate whether the plaintiff's cause of action is valid and should be satisfied out of the attached property. The court's jurisdiction in such a case is quasi in rem and is limited to the property attached. If this property is insufficient to satisfy the judgment for the plaintiff, the court is unable to award a judgment for the balance against the defendant himself unless personal jurisdiction had been obtained. The court issuing the order of attachment must have actual or constructive jurisdiction over the property intended to be levied upon.[25]

A further requirement announced by the statute and confirmed by the cases is that a contingency will not support attachment. This rule of certainty is most applicable to debts as shown in CPLR 5201(A)[26] which permits only debts that are past due or yet to become due certainly or upon demand of the judgment debtor, to be subject to attachment. This point was aptly made in *Herrman and Grace v. City of New York*[27] which declared an indebtedness not attachable unless it was absolutely payable at present or in the future and not dependent upon a contingency.[28]

In order to fully appreciate the extent of the power of attachment a clear concept of "debt" is meaningful in understanding what may be the subject of a plaintiff's levy. The statutes offer no exact guidelines. New York Debtor-Creditor law defines debt as "any legal liability whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."[29] As previously mentioned, debt for attachment purposes cannot be contingent.

22. N.Y. CIV. PRAC. LAW § 6201(1).
23. N.Y. CIV. PRAC. LAW § 105(h).
24. 95 U.S. 714 (1877).
25. Salm v. Krieg, 182 Misc. 721, 49 N.Y.S.2d 694 (Columbia County Ct. 1944).
26. N.Y. CIV. PRAC. LAW § 5201(a), see note 5 *supra* for precise language of statute.
27. 130 App. Div. 531, 114 N.Y.S. 1107 (1910).
28. *Id.* at 535, 114 N.Y.S. at 1110.
29. N.Y. DEBT. & CRED. LAW § 270.

Aside from this "certainty" restriction, a broad interpretation of the term seems applicable. "That which one person is bound to pay another or to perform for his benefit"[30] seems a particularly proper definition of "debt" to use in attachment statute controversies.

The *Seider* case is a unique addition to the present law of attachment in New York. It is the first case in any jurisdiction to hold an insurer's contractual obligation under an automobile liability policy to be subject to attachment and thus form the basis for quasi in rem jurisdiction over a non-resident defendant. A few New York cases have suggested this conclusion, but have never directly decided the issue. Since *Seider* presents a novel point of law, the court's reasoning does bear note.

The lower court,[31] in ruling Hartford's policy attachable as a debt owing to Lemiux within the state, relied heavily upon *Fishman v. Sanders*.[32] *Fishman*, like *Seider*, was an automobile negligence action basing jurisdiction on the attachment of the defendant's interest in his automobile liability insurance policy. The insurer was a foreign corporation doing business in New York. The lower court vacated the plaintiff's attachment of the contractual obligation of the policy on the grounds that the defendant's interest in the policy was purely *contingent* and not attachable. In affirming that decision the Appellate Division specifically declared the lower court's basis for vacation of the attachment was erroneous and further stated: "It is our opinion that respondent's contractual obligation to defend and indemnify defendant is a debt or cause of action capable of being attached within the purview of section 916 of the Civil Practice Act.[33] The attachment in *Fishman* was vacated, however, for failure of the sheriff and the plaintiff to perfect the levy.[34]

Fishman may be distinguished to some extent from *Seider* on its facts. That the defendant was a resident, although not avail-

30. See Caldouino v. Scala, 14 Misc.2d 891, 892, 180 N.Y.S.2d 65, 67-68 (Sup. Ct. 1958).

31. 23 App. Div.2d 787, 258 N.Y.S.2d 795 (1965).

32. 18 App. Div.2d 689, 235 N.Y.S.2d 861 (1962).

33. *Id.* at 689, 235 N.Y.S.2d at 862.

34 A faulty levy not the object of attachment caused dismissal of the action. The applicable statutes for *Fishman* (CPA 916) and *Seider* (CPLR 6202) are similar. CPLR 6202 eliminates the lengthy provisions enumerating the debts and property subject to the provisional remedy of attachment formerly found in sections 912 through 916 of the Civil Practice Act by the simple expedient of incorporating the definitions in CPLR 5201 of debts and property subject to the enforcement of a money judgment.

> The combined effect of CPLR 5201 and CPLR 6202 is to eliminate the need for preserving thousands of words in the Civil Practice Act that dealt with the question of what property and debts were subject to attachment. . . . [T]here has been no substantial change in prior law. . . . This uniformity is particularly desirable since it enables any property or debt attached by the plaintiff at the outset of an action to be used to satisfy any money judgment that may be awarded him.

7 WEINSTEIN, KORN, MILLER, N.Y. CIVIL PRACTICE 6201.01 (1965).

able for service of process,[35] and that the accident occurred in New York seem to present a stronger argument for jurisdiction in contrast to *Seider*. These differences, however, may be passed over since both cases must face the immediate barrier of the attachability of the policy.[36]

The only other decision concerning attachment of an insurer's obligation is *Stines v. Hertz Corp.*[37] Here the court affirmed the reversal of the lower court's holding which permitted the attachment of a non-resident defendant's insurance policy. The plaintiff was injured in an auto accident out of state and sought to bring a negligence suit in New York. The reversal and subsequent dismissal of both the attachment and the negligence action was not based on the inability to attach the policy, but solely on the failure of the pleading to establish a prima facie cause of action. It may be suggested that if the policy was not subject to attachment, the court would have assigned that reason for the reversal. Had this been the opinion of the court there could have been no reason to allow the plaintiff to amend his complaint since amendments could not create the power to attach where it did not exist.

Neither *Fishman* or *Stines* presented the question of attachability of an insurer's obligation; both cases were decided on other issues. *Seider* presented this question directly. The *Seider* opinion ignored the above two cases. It examined the defendant's insurance policy,[38] compared it with the attachment laws, cited analogous

35. N.Y. CIV. PRAC. LAW § 6201. This statute provides the grounds for issuing an order of attachment. In enumerating what defendants are subject to attachment the statute includes both the non-resident and the resident who avoids service of summons by either hiding within the state or leaving the state altogether.

36. In Seider v. Roth, 23 App. Div.2d 787, 258 N.Y.S.2d 795 (1965), the dissent, *Id.* at 788, 258 N.Y.S.2d at 796, stated that the principle set forth in *Fishman* was erroneous dictum. Although both briefs analyzed *Fishman* the court of appeals declined any consideration of the case.

37. 42 Misc. 443, 248 N.Y.S.2d 242, *rev'd*, 22 App. Div.2d 823, 254 N.Y.S. 2d 903 (1964), *aff'd*, 16 N.Y.S.2d 605, 261 N.Y.S.2d 59 (1965).

38. The Hartford insurance policy issued to Lemius was in customary form. Under its "Insuring Agreements" the insurer obligated himself to (A) defend and indemnify the insured against any claims of third parties, (B) reimburse the insured for certain medical payments, and (C) protect the insured under certain circumstances from loss or damage to the insured's automobile. In addition the policy provided for a number of "Additional Agreements:"

> 2. Upon receipt of notice of loss or damage caused to persons or property, to serve any person insured by this policy by such investigation thereof, or by such negotiations with the claimant, or by such settlement of any resulting claims, as may be deemed expedient by the Insurer; and
> 3. To defend in the name and on the behalf of any person insured by this policy and at the cost of the Insurer any civil action which may at any time be brought against such person on account of such loss or damage to person or property; and
> 4. To pay all costs, taxed against any person insured by this policy in any civil action defended by the Insurer and any interest ac-

precedent and allowed the plaintiffs' levy to stand. The majority reasoned that all the provisions of Lemiux's insurance were executory until certain conditions were met. The condition designated to mature the insurer's obligation to defend and indemnify[39] was merely the happening of the accident. When the accident occurred the duty to the insured arose and this duty constituted a "debt" within the meaning of the attachment law.[40] Further, the obligations to investigate[41] and to pay medical expenses[42] could also be considered "debts," after notification of the accident was given the insurer. Since an accident did occur and the insurer was notified, Hartford was indebted to Lemiux. The court, therefore, concluded that the indebtedness was a valid subject for attachment.

In construing the word "debt" in the context of the attachment law, the greater part of the majority opinion was devoted to applying the concept of this word as used in *Matter of Riggle's Estate*.[43] In *Riggle*, the plaintiff, a New Yorker, sued defendant Riggle, a non-resident, for negligent driving in an out-of-state accident. The plaintiff initiated suit in New York by obtaining personal service of the defendant. The insurance company which issued Riggle's automobile policy appeared and defended the suit. Riggle died while the suit was pending. In order to continue the suit the plaintiff moved to have an ancillary administrator appointed in New York. The only property claimed to belong to Riggle's estate in the state was the insurer's obligation to defend Riggle in the accident case. Section 47 of the Surrogate's Court Act provides that for the purposes of conferring jurisdiction upon a Surrogate's Court a "debt" owing to a decedent by a resident of the state is regarded as personal property.[44] The court in *Riggle* stated:

> An insurance policy is not a specialty, like a bond, promissory note, or other negotiable instrument, and it is held that this liability insurance policy, even though no judgment has yet been obtained against Riggle or his estate, constituted Riggle as a creditor and the insurance carrier as a debtor within the broad meaning of this provision for

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cruing as from the date of the action upon that part of the judgment which is within the limits of the Insurer's liability; and

5. In case the injury be to a person, to reimburse any person insured by this policy for outlay for such medical aid as may be immediately necessary at the time of such injury.

39. It should be noted that the duty to defend and to indemnify is treated as a single obligation, not as two separate obligations. The difficulty in this point of view will be discussed later.

40. N.Y. CIV. PRAC. LAW §§ 6202, 5201.

41. See note 38(A), *supra*.

42. See note 38(5), *supra*.

43. 18 Misc.2d 988, 188 N.Y.S.2d 622 (1959), *aff'd* 11 App. Div. 51, 205 N.Y.S.2d 19 (1960), *aff'd*, 11 N.Y.2d 73, 226 N.Y.S.2d 416, 181 N.E.2d 436 (1962).

44. N.Y. SURR. CT. ACT § 47.

this purpose.[45]

The majority in *Seider* cited abundant precedents from other jurisdictions which had reached the same conclusion as Riggle in allowing the liability insurance policies under which accidents had occurred to be classed as property in issuing ancillary letters. The *Seider* court approved the reasoning in *Riggle* and its application to attachment cases. To further buttress its position, the majority also cited the *Riggle* dissent's concession that the insurer's obligation to defend and contingently indemnify was a *debt.*[46] By integrating the conclusion that the insurer's post-accident obligation to defend and indemnify was a certain debt, within the statutory attachment law, the *Seider* court held for the plaintiffs.

Opposing the majority's legal conclusion, the dissent in *Seider* insisted that the insurer's promise was contingent and would not become certain until jurisdiction over the insured was properly obtained. The obligation to defend, itself, does not arise until a valid action is commenced against the insured, which necessitates a basis of jurisdiction. "This is a bootstrap situation."[47] Until a negligence suit is started against the insured, the insurer owes no debt to the insured. Since no debt is due, the insured possesses only a contingent right. By statute[48] such rights are not attachable. Thus, concluded the dissent, no property existed in the state on which a levy could apply.

The additional promises of the insurer, to investigate and to make certain medical payments, were argued by the minority not to be subject to attachment. They urged that the obligation to investigate was merely discretionary on the part of the insurer due to the practical impossibility of processing the voluminous number of accident reports. The promise of medical payments was stated as a separate agreement occurring under "Insuring Agreement B"[49] and had no relation to the third-party liability agreement under which the plaintiffs claimed. The medical payment agreement, like the collision agreement,[50] was independent of the obligation to defend and indemnify. Even if the medical obligation were available for attachment, it too was contingent upon acceptable proof of injury and, therefore, not within the statute.

The dissent rejected the analogy of estate and attachment cases posed by the majority. It claimed that the property definition of the estate cases encompassed contingent debts whereas the attachment law specifically excluded them. In distinguishing *Riggle*,

45. Matter of Riggle's Estate, 11 N.Y.2d 73, 76, 226 N.Y.S.2d 416, 417, 181 N.E.2d 436, 438 (1962).

46. *Id.* at 79, 226 N.Y.S.2d at 420, 181 N.E.2d at 439.

47. Seider v. Roth, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 103, 216 N.E.2d 312, 314 (1966).

48. N.Y. CIV. PRAC. LAW § 5201(1).

49. See note 38, *supra.*

50. See note 38, *supra.*

attention was directed to the fact that prior to his death, Riggle had submitted to in personam jurisdiction of the court and his insurance company had assumed the defense of the action. The duty to defend, therefore, was *certain* and would be a debt within either the surrogate's or attachment statutes. This they contended was not the case in *Seider*.[51]

A cogent point in an examination of the *Seider* decision is that the plaintiffs' attachment was directed solely at the duty of the insurer to defend and indemnify the insured. Although one could possibly construe a property right from other items of the insurance contract, such as the insured's right to collect for damage done to his automobile resulting from the accident or reimbursement for personal injuries sustained by him, these must be excluded from consideration due to the narrowness of the plaintiffs' attachment order. It would seem that the majority did not adhere to the pleadings and erroneously included the medical repayment agreement in its designation of attachable property rights.

Upon inspection of the language of the insurance policy, it appears that the insurer's promise to investigate is discretionary. The dissent reached this conclusion from a business practicality theory. It is submitted that a better approach is to emphasize the fact that the clause enumerates three alternatives[52] which the insurer may *employ if expedient* for him to do so. A discretionary power is contingent upon the will of the holder of the power and such a contingency will not support attachment.

Two cases which support the majority opinion are *Baumgold Bros., Inc. v. Schwarzchild Bros., Inc.*[53] and *Ackerman v. Tobin.*[54]

51. The third point of controversy in the opinions of *Seider* concerned the existence of a direct action against the insurer. The dissent asserted that by basing jurisdiction for the negligence action on the contingent debt of the insurance obligation and then serving the insurer as garnishee, the effect was a direct suit against the company. The direct suit, it was contended, was not authorized by New York law and should be condemned as a matter of public policy. The majority acknowledged this argument to some extent but stated that the insurer had to defend the suit in New York, not because a debt owing to the insured was attached, but because the insurance contract provided that the insurer was to defend any suit where jurisdiction was obtained. The majority concluded its opinion by citing *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 256 N.Y.S.2d 577, 204 N.E.2d 622 (1965), to illustrate that New York was not adverse to permitting direct suits against insurers. *Oltarsh* held that a statute of a foreign jurisdiction authorizing a direct suit against a liability insurance company is not violative of any fundamental public policy of New York. This case was decided on conflict of laws principles concerning the enforcement of a foreign statute. In *Seider* no foreign law was involved. It seems that in a domestic action with the tort occurring outside the state, *Oltarsh* would not be authority for allowing an injured party to sue the tortfeasors insurer directly.

52. The three alternatives were to investigate, to negotiate, or to settle. See note 38(2), *supra*.

53. 276 App. Div. 158, 93 N.Y.S.2d 658 (1949), *aff'd*, 203 N.Y. 628, 97 N.E.2d 357 (1949).

In *Baumgold* the plaintiff delivered goods to the defendant, a non-resident, who agreed to bear liability for their loss from any cause. The goods were stolen. The defendant held an insurance policy, issued by a foreign insurer licensed to do business in New York, which covered loss of property. The value of the policy was less than the value of the property stolen. The plaintiff obtained a warrant of attachment on the defendant's interest in the policy and levied it upon the insurer. The insurer claimed no debt existed under the law,[55] as the defendant had not furnished proof of loss although he had forwarded notice of the claim. The appellate division ruled that a debt did exist, stating: "There is a distinction between the right to sue and the right to attach or levy on a chose in action. A present right to collect the debt is not always necessary to support a levy. . . ."[56]

Ackerman presented a similar situation. This case determined the attachment rights of a New York creditor in unpaid policy proceeds for the defendant's stolen property. The court remarked that it was a general rule "that a claim for loss under an insurance policy is unquestionably subject to garnishment, and where the policy does not stipulate to the contrary, such a claim accrues, and is subject to garnishment immediately upon the occurrence of the loss."[57]

These cases tend to affirm the reasoning in *Seider* in that they substantiate the propositions that an insurer's duty accrues upon the happening of the events stated in the policy and that the insured's interest in that matured obligation is subject to levy. Several problems, however, arise in adapting these cases to *Seider*. First, it is unclear what property right the defendant Lemiux had in his own insurance policy. Second, property loss claims are more readily recognized as initiating the insurer's obligation to pay the loss to the insured, than are injury claims without initiated suits to commence the insurer's duty to defend the insured. Third, the policy in *Seider* limits the accrual of the duty to defend to any civil action *brought* against the insured.

In dealing with the first problem, it is well established that a creditor can have no better right to property of the debtor than the debtor himself.[58] In *Anthony v. Wood*[59] an attachment was held to reach and become a lien upon only such debts as the debtor had by legal title and could recover by an action at law. *Grand Union Co. v. General Accident, Fire and Life Assurance*

54. 22 F.2d 541 (8th Cir. 1927).
55. N.Y. CIVIL PRACTICE ACT § 916(3)&(4).
56. 276 App. Div. at 160, 93 N.Y.S.2d at 659.
57. 22 F.2d at 543.
58. 38 C.J.S. *Garnishment* § 176 (1943).
59. 96 N.Y. 180, 67 How. Pr. 424 (1884).

Corporation[60] ruled that a plaintiff-insured could recover damages for the defendant-insurer's breach of duty to defend any suit against the insured when the insurer refused to defend a complaint served on the plaintiff. A similar result was reached in *Goldberg v. Lumberman's Mutual Casualty Co.*,[61] wherein the court recognized:

> So far as concerns the obligation of the insurer to defend the question is not whether the injured party can maintain a cause of action against the insured but whether he can state facts which bring the injury within the coverage. In short, the policy protects the insured not only against injuries for which there is unquestioned liability but also against law suits on their face within the compass of the risk against which insurance was taken. . . .[62]

It is submitted that Lemiux had no cause of action against Hartford for breach of duty to defend because no suit had been instituted against Lemiux. Because there was no property right which Lemiux could enforce by legal action against Hartford, there existed only a *contingent* "debt." Since Lemiux could not enforce the debt, the Seiders could not enforce the debt. Thus, the insurer's obligation could not be attached.

Inseparable from all three problems raised in *Seider* is the issue of jurisdiction. This issue is the crux in determining the status of the "debt" attached by the plaintiffs. An insurer's provision in a liability policy obligating the insurer to go to the defense of the insured is an absolute duty, but one that does not arise until suit against the insured has actually been commenced.[63] To commence a suit one need only properly serve the proposed defendant or his substitute with a valid summons.[64] If the service is invalid or the summons itself is defective, the suit will be terminated. To constitute a valid summons, the court of issuance must have jurisdiction either over the defendant or his property.[65] Thus in *Seider*, if the dissent is correct, and it is submitted that it is, the court did not have jurisdiction in the case because the defendant was not personally served within the state and he possessed no property within the state which would validate the order of attachment. The defendant's property within the state, his interest in his insurer's obligation to defend him, did not become certain until the court had a basis for jurisdiction to commence the negligence suit. The plaintiffs tried to attach the insurer's contractual obligation in order to establish jurisdiction. The attachment should not have been

60. 254 App. Div. 274, 4 N.Y.S.2d 704 (1938), *aff'd*, 279 N.Y. 638, 18 N.E.2d 38 (1938).
61. 297 N.Y. 148, 77 N.E.2d 131 (1948).
62. *Id.* at 154, 77 N.E.2d at 133.
63. 3 RICHARDS, INSURANCE § 421 (5th ed. 1952).
64. N.Y. CIV. PRAC. LAW § 304.
65. N.Y. CIV. PRAC. LAW § 301.

sustained since the insurer's policy promises were contingent until suit was commenced.

It is suggested that the attempt to adapt the reasoning of *Riggle* to *Seider* should have been unsuccessful. The cases cited by the majority in *Seider* as an authority for allowing the insurer's obligations to his insured to constitute property for estate administration bear out this contention. *Furst v. Brady*[66] allowed the promise of an insurer, even though not yet due, to be considered property within the statute governing the appointment of administrators. *Robinson v. Carroll*[67] echoed this practice.[68] *In re Estate of Klipple*,[69] a case not cited by the majority but thoroughly in accord with the above cases, viewed the insurance obligation as property for appointing an administrator even though both parties conceded the policy was a *contingent debt*.

When compared with the attachment standard of debt of CPLR section 5201(1), these cases readily indicate the existence of two quite different criteria. *Riggle*, however, is distinguishable[70] from the other estate cases cited. It assigns the *duty to defend* as the debt to establish property within the state while the other cases dwell on the *right of indemnity* to establish this property. It must be conceded that the right of exoneration is contingent upon a judgment and, therefore, is not attachable. If, as the majority in *Seider* contend, there is an immediately accruing obligation owing to the insured, *i.e.*, the duty to defend, the contingency of the indemnity portion should not preclude its attachment. This theory may be questioned, because in *Riggle* suit had properly been initiated by personal service on the defendant before his death. Thus, the obligation to defend had accrued and established the basis for appointment of an ancillary administrator and jurisdiction for the continued suit.

Several hypothetical extensions of *Seider* will show the ad-

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66. 375 Ill. 425, 31 N.E.2d 606 (1940).

67. 87 N.H. 114, 174 Atl. 772 (1934).

68. Although performance of the promise claimed as estate is not yet due and will not be until its conditions are fulfilled, it is an obligation of a contractual nature. It is in the estate, in the statutory meaning, if owed to the decedent when he died. The event had taken place on account of which he was entitled to protection if certain things were done. The claim which was then his is no different, to constitute part of his estate, than an unmatured note. If the promise may not be presently enforced, it has present value. The conditions to which the promise is subject and which bar action on it until their fulfillment do not make it any less an existing obligation. *Id.* at 117, 174 Atl. at 775.

69. 101 So.2d 924 (Fla. App. 1958).

70. *In re* Estate of Gardiner, 40 N.J. 261, 191 A.2d 294 (1963), states that in all estate cases examined concerning the appointment of ancillary administrators except in *Matter of Riggle*, the state which granted the administrator was the place of the accident and in most cases was also the place of residence of the claimant. *Id.* at 269, 191 A.2d 299.

ministrative difficulties in effectuating the court's holding.[71] What would the result be, if in a factual situation similar to *Seider*, the plaintiff's attachment was granted, the defendant did not appear, and the court awarded the plaintiff a default judgment on the negligence claim? How would the judgment be enforced? According to law[72] only that property which is attached can serve to satisfy the judgment. If only the obligation to defend is held to be the basis of the attachment, a valuation problem exists of measuring the duty in dollars and cents. One remedy would be to award the probable attorney's fee for the defense.[73] This solution, however, creates further difficulties in determining such factors as the probable length of the trial and the amount of time and effort of the attorney, were the trial on the merits. *In re Riggle's Will*[74] suggests, alternatively, that the premiums of the policy, although inadequate, might be used for satisfaction.

A more difficult valuation question is encountered if, as *Seider* inferred, both the obligations to defend and to indemnify are the basis for attachment. To say that pecuniary measurement of the duty to indemnify would be difficult is an understatement:

> The obligation to indemnify implies a valid in personam judgment against the insured. The insurance policy itself makes that clear. Where is that judgment here? Where was the in personam jurisdiction? The only jurisdiction was in rem, and it was based upon an obligation which itself does not accrue until there is jurisdiction. This is a bootstrap situation. The obligation to indemnify is supposed to supply the jurisdiction to render the judgment which determines the obligation to indemnify. Is the value of the obligation to indemnify the full measure of what the defendant would have had to pay if there were in personam jurisdiction of the defendant and if the issues were clear and if the plaintiff won against the defendant? Is the negligence action in which defendant defaulted now to be tried, without the defendant, in some kind of collateral proceeding brought in furtherance of the enforcement of the judgment?[75]

Even if a judgment is awarded and the plaintiff attempts to satisfy it from the attached property, in most instances his satisfaction will not be complete. If the plaintiff desires to be fully compensated he must start a second suit where he can obtain in personam jurisdiction. The second suit poses the collateral problem of the insurer's future liability. The insurer cannot be made to pay that which he has already paid.[76] By paying the judgment

71. Siegel, *Supplementary Commentary to CPLR 5201*, 7B McKinney's Cons. Laws of N.Y.
72. N.Y. Civ. Prac. Law § 6202.
73. Siegel, *op. cit. supra* note 71, at 11.
74. 18 Misc.2d 988, 188 N.Y.S.2d 622 (Sup. Ct. 1961).
75. Siegel, *op. cit. supra* note 71, at 12.
76. N.Y. Civ. Prac. Law § 6204.

the insurer is relieved of the duty to defend the insured. That relief is extended to the second suit. Once rid of the obligation to defend, the insurer can correctly argue that he must be relieved also of the indemnity obligation since, under the policy, the obligations are interdependent.[77] The insurer contracts for control of litigation and if that control is lost the insurer does not want to assume the burden of indemnity.

New problems arise if the facts are altered so that the plaintiff is not the injured party but a separate creditor attempting to attach the defendant's property. It is clear that if the accident had not occurred prior to the plaintiff's attachment of the insurance policy, the contractual obligation would be contingent and not subject to attachment. But had the accident occurred after the attachment the insurer's debt would be certain and attachable. If in the last hypothetical situation both the creditor-plaintiff and the injured party wished to attach the debt, complex problems of creditor's rights would further entangle a decision. Even in situations where the defendant appears to dispute the merits and submits to in personam jurisdiction, alleviating the problem of in rem enforcement, difficulties can arise.[78] These manifold problems apparently were not considered in deciding *Seider*.

The holding in *Seider* establishes a new and unique proposition of law. It extends the concept of attachable property and creates jurisdictional elements in situations where none previously existed. Because of this uniqueness little analogy can be drawn to other jurisdictions. Practically every jurisdiction has some statutory remedy, whether called trustee process, garnishment, foreign attachment or merely attachment as in New York, which permits a creditor to enforce a judgment against property of the debtor within the issuing court's jurisdiction. In Vermont, Illinois, Massachusetts and Connecticut the holding in *Seider* could possibly be applied. These states' laws concur with New York's in permitting attachment to afford relief in tort actions[79] where the subject of the levy is a non-contingent debt[80] owed to the defendant by the garnishee. In other states, such as California, the *Seider* rule would not aid an injured plaintiff since garnishment is not permitted in aid of any tort claim.[81] In Pennsylvania the law permits foreign attachment to be used to enforce tort actions, but the tort must

77. See note 38(4), *supra*, which indicates the interdependence of the two obligations. See also note 39, *supra*.

78. Siegel, *op. cit. supra* note 71, at 11-13.

79. VT. STAT. ANN. tit. 12, § 3012 (Supp. 1965). ILL. STAT. ANN. ch. 11, § 1 (Supp. 1965). MASS. GEN. LAWS ANN. Ch. 246, § 1 (Supp. 1965). CONN. GEN. STAT. ANN. § 52-329 (Supp. 1965).

80. VT. STAT. ANN. tit. 12, § 3018 (Supp. 1965). ILL. STAT. ANN. ch. 11, § 21 (Supp. 1965). MASS. GEN. LAWS ANN. Ch. 246, § 24 (Supp. 1965). CONN. GEN. STAT. ANN. § 52-329 (Supp. 1965).

81. CAL. CIV. PROC. § 537.

have occurred in the state.[82] If the accident occurred in the state wherein the suit was brought, the levy of attachment would then be of little use to the plaintiff for purposes of conferring jurisdiction, since the occurrence of the accident in the state would afford a basis for in personam jurisdiction.[83]

CONCLUSION

It is suggested that the result reached by the New York court in *Seider* is unsound. The reasoning of the decision seems tenuous. The technical property rights of defense, indemnity, and investigation designated as debts owing to the defendant are actually contingent obligations and not within the statutory definition of attachable debts. Although a property right in favor of the defendant does exist at the happening of the accident and notification of the insurer, this right is not matured until a valid suit is instituted. Any matured and demandable property right, no matter how insignificant, may be attached. It is submitted that the insurer's obligation does not arise until a suit is initiated. Therefore, that obligation cannot serve as a basis for jurisdiction to bring the suit.

Practical considerations also lead to the conclusion that *Seider* was incorrectly decided. The fact that the establishment of in rem jurisdiction via the attachment might neither have compelled the defendant to appear nor been satisfactory to the plaintiff in collecting his judgment—indeed, might even have injured him by relieving the defendant's insurer of his indemnity liability inuring to the defendant—should have restrained the majority from their liberal approach and extension of the law. The holding in *Seider* appears to vary from established precedent by allowing a liberal interpretation of attachment and should be overruled.

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82. PA. STAT. ANN. tit. 12, § 2861, Rule 1252 (Supp. 1965).
83. PA. STAT. ANN. tit. 75, § 2001 (1960).