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In 1966, the New York Court of Appeals, in the landmark decision of *Seider v. Roth*,[1] for the first time allowed attachment of the obligations arising from an automobile liability policy.[2] The plaintiffs, husband and wife, were injured in Vermont by a Canadian driver. The Canadian was insured in Canada by a Connecticut insurer doing business in New York. The plaintiffs, both New York residents, sued the Canadian driver in New York for personal injuries sustained, gaining quasi in rem jurisdiction by attaching as a debt his insurance company's obligation to defend and contingently indemnify him. The court held that, since the insurance company did business in New York, the debt existed in New York and was therefore subject to attachment in that state.[3]

Since New York courts have refused to apply certain foreign wrongful death[4] and guest motorist statute[5] damage limitations, *Seider* has been criticized as an invitation to forum shopping.[6] New York's failure to recognize limited appearances[7] has also prompted critics of the decision to label its result a denial of due process.[8] If the

1. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

2. The New York court in prior attachment cases had conceded that an insurance company's obligation to defend and contingently indemnify was a debt under New York law. *See, e.g.,* Fishman v. Sanders, 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (2d Dep't 1962), *attachment vacated on other grounds,* 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S. 2d 380 (1965).

3. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The court in *Seider* upheld the attachment under section 5201 and section 6202 of the New York Civil Practice Law & Rules which provide in part:

> § 5201(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.
>
> § 6202 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 . . . .

4. *See, e.g.,* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In Pearson v. Northeast Airlines, Inc., 199 F. Supp. 539 (S.D.N.Y. 1961), *aff'd,* 309 F.2d 553 (2d Cir. 1962), *cert. denied,* 372 U.S. 912 (1963), the court refused to apply a Massachusetts wrongful death statute limiting recovery to $15,000.

5. *See, e.g.,* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) where the court refused to apply the Ontario guest motorist statute in an action involving a New York resident.

6. *See, e.g.,* LaBrum, *The Fruits of* Babcock *and* Seider: *Injustice, Uncertainty and Forum Shopping,* 54 A.B.A.J. 747 (1968).

7. *See, e.g.,* Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968); N.Y. Civ. Prac. R. 320(c).

8. *See, e.g.,* 43 St. John's L. Rev. 58 (1968); 19 Stan. L. Rev. 654 (1967).

out-of-state defendant's insurance company appears on his behalf to defend, in personam jurisdiction would be acquired over the insured.[9] Should the defendant fail to appear, the rendering of a default judgment on the attachment would leave the insurance company with no opportunity to defend the action on its merits. As a result the insurance company and its client could often be placed in mutually antagonistic positions: the insured might not want the insurance company to appear and defend on the merits lest a subsequent in personam judgment exceed the maximum coverage of the policy; the insurance company, on the other hand, might not wish to lose its economic interest in the litigation without an opportunity to argue the merits of the case.

Seider was upheld in *Simpson v. Loehmann*[10] (New York resident injured in Connecticut by a resident of that state) where the court recognized the due process argument,[11] but denied its applicability on the grounds that the *Seider* court was not attempting to enlarge the area of in personam jurisdiction, and that, even if the defendant appeared, the judgment could not exceed the value of the attached res, *i.e.*, the face value of the policy.[12]

In February, 1968, the United States District Court for the Southern District of New York held, in *Podolsky v. Devinney*,[13] that *Seider*-type attachments of liability insurance obligations were unconstitutional as violating due process. The defendant in *Podolsky* had removed the case from the Supreme Court of Bronx County to the federal district court on diversity grounds.[14] Since *Seider*-type actions by definition involve diversity, defendants, in cases where the plaintiff alleges damages of $10,000 or more, may remove to a federal court.[15] In deciding the case, Judge Croake noted

9. N.Y. Civ. Prac. R. 320(c) provides: "When appearance confers personal jurisdiction, in certain actions. In a case specified in section 314 where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted by motion or in the answer as provided in rule 3211, *unless the defendant* proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." (Emphasis added.)

For the effect of Rule 320(c) see H. Wachtell, New York Practice Under the CPLR 48-49 (1966): "It is obvious that the acquisition of *in rem* or *quasi in rem* jurisdiction in many cases thus serves as a potent leverage device; unless the defendant is willing to suffer a default judgment on the *in rem* or *quasi in rem* claim, he has no alternative but to appear and confer jurisdiction for the *in personam* claim as well." This effect was modified by *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). Modification is continued in proposed changes to Rule 320(c) which would provide that in all cases where jurisdiction is based solely on a levy on defendant's property pursuant to an order of attachment, defendant's appearance would not be equivalent to personal service upon him. Judicial Conference of the State of New York, Report to the 1969 Legislature 51 (1969) [hereinafter Judicial Conference Report]. Pursuant to N.Y. Judiciary Law § 229(3), unless disapproved by the legislature, this proposed change will become effective on September 1, 1969.

10. 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).
11. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636.
12. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636-37.
13. 281 F. Supp. 488 (S.D.N.Y. 1968).
14. Pursuant to 28 U.S.C. § 1441(a) (1964).
15. 28 U.S.C. § 1332 (1964).

the seemingly clear language of the Civil Practice Law & Rules (CPLR) Rule 320(c), under which, if an insured appeared to defend on the merits, he would subject himself to full in personam jurisdiction and attendant personal liability for any judgment in excess of the policy limits. He concluded that: "Here, the amount of the debt is not fixed and may be greatly influenced by the defendants' choice of appearance or nonappearance. It is this dilemma, operating to coerce the defendant into an otherwise unattainable submission to personal jurisdiction, which amounts to a denial of fair play and substantial justice . . . . On balance, then, the mere characterization of an automobile liability insurance policy as a debt without more is not sufficient to satisfy due process."[16]

Two months after *Podolsky,* the New York Court of Appeals denied a motion for reargument in the *Simpson* case.[17] In its per curiam opinion, the court dismissed the above argument as failing to take account of its own earlier statement that the *Seider* doctrine did not " 'expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached . . . .' "[18] No judgment following a *Seider* levy, therefore, could exceed the face value of the attached policy, even though the defendant appeared and proceeded with the defense on the merits.

Armed with this unexpected construction of CPLR Section 320(c), the District Court for the Southern District of New York entertained one more assault on *Seider v. Roth. Barker v. Smith*[19] involved a defendant who, after removal to the federal court, moved to vacate the attachment, relying on *Podolsky.* The court reconsidered the due process questions raised in *Podolsky* and distinguished the cases on two grounds: since the plaintiff demonstrated that medical expense, pain and suffering, compensible under the terms of the policy had been incurred after the plaintiff returned to New York, a "legitimate basis" for attaching the policy existed;[20] and since the Court of Appeals, in denying a rehearing in *Simpson,* had effectively reaffirmed that any judgment must be limited to the face value of the policy, it removed the principal ground relied upon by Judge Croake for finding such attachments violative of due process.[21]

In *Minichiello v. Rosenberg,*[22] the United States Court of Appeals for the Second Circuit was also called upon to determine the validity of the *Seider* attachment procedure. The court sustained its constitutionality by equating the attachment to a judicially created direct action statute against the insurer, a concept which has been upheld by the Supreme Court in *Watson v. Employers Liability Assurance Corp.*[23] The dissent in *Minichiello* would consider *Watson* inapplicable on its facts, since the Louisiana direct action statute involved in that case applied only to accidents or

16. Podolsky v. Devinney, 281 F. Supp. 488, 497 (S.D.N.Y. 1968).
17. Simpson v. Loehmann, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).
18. *Id.* at 990, 238 N.E.2d at 320, 290 N.Y.S.2d at 915-16.
19. 290 F. Supp. 709 (S.D.N.Y. 1968).
20. *Id.* at 713.
21. *Id.* at 714.
22. No. 32534 (2d Cir., Dec. 12, 1968), *aff'd on rehearing,* (April 2, 1969).
23. 348 U.S. 66 (1954).

injuries occurring in Louisiana. In the opinion of Judge Anderson, the constitutional justification for a state's policy of protecting its own citizens injured by nonresidents within its borders is sounder than that of a state's providing its citizens with a local forum regardless of other local contacts: "It is one thing to require a resident of Alaska to make trips to New York to respond to an action arising out of an accident with a resident of New York in New York state to which the Alaskan had gone, and quite another to make him do so for an accident which occurred in Alaska when the New Yorker elected to go to Alaska and use its highways."[24]

Despite the apparent willingness of both state and federal tribunals to uphold the *Seider* attachment, the constitutional thrust of its opponents' arguments may still be given at least limited effect. Judge Mansfield, discussing in *Barker* whether the *Seider* procedure was an unduly harsh remedy, noted that: "inconvenience or hardship to the parties or their witnesses resulting from their having to litigate here rather than in Michigan or elsewhere may be alleviated by way of a motion for a change of venue pursuant to 28 U.S.C. § 1404."[25] Thus, while a motion for a change of venue is discretionary, this court would apparently favor a motion for a change of venue to the state where the tort occurred.

This device was also recognized by the Court of Appeals in reaffirming, en banc,[26] its decision in *Minichiello*. In that court's opinion, "[e]ither the district of the defendant's residence or that of the accident, or both, [would] qualify for transfer."[27] In fact, such a motion for a change of venue (to the state where the accident occurred), was granted by the District Court for the Southern District of New York a week after *Barker* in *Jarvik v. Magic Mountain Corp.*[28]

Seeking a change of forum by removing to federal court and then moving for change of venue can become a complicated and time consuming process, and is only available where the $10,000 jurisdictional requirement has been met. Proposed CPLR Section 327,[29] relating to the doctrine of forum non conveniens would provide defendants with a much more direct route. This doctrine is not presently defined in the CPLR[30] or in any other New York statute. The interests and conveniences of all the parties, the witnesses and the court are factors to be weighed by the court in the exercise of the doctrine. One rule has emerged from the case law defining forum non conveniens, this being that no matter what the circumstances may be, the doctrine is inapplicable whenever the plaintiff is a New York resident.[31] Such a policy obviously lessens whatever utility the doctrine might have for out-of-state defendants faced with litigating *Seider* attachments. Under the proposed CPLR Section 327, however, the

24. Minichiello v. Rosenberg, No. 32534 at 596 (Dec. 12, 1968), *aff'd on rehearing,* (2d Cir., April 2, 1969) (Anderson, J. dissenting).
25. Barker v. Smith, 290 F. Supp. 709, 714 (S.D.N.Y. 1968).
26. Minichiello v. Rosenberg, No. 32534 (April 2, 1969).
27. *Id.* at 1755.
28. 290 F. Supp. 998 (S.D.N.Y. 1968).
29. JUDICIAL CONFERENCE REPORT, *supra* note 9, at 62.
30. Motions to dismiss on the ground of forum non conveniens are generally now made under N.Y. CIV. PRAC. R. 3211(a)2 (1963).
31. *See* Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923).

domicile or residence in New York of any party would not preclude the court from staying or dismissing the action when the court finds that "in the interest of substantial justice the action should be heard in another forum."[32]

Assuming the availability of motions for change of venue under the federal rules, and dismissals on the basis of inconvenient forum under the CPLR, what practical advantages or disadvantages remain for plaintiffs who institute *Seider* attachments? Following the granting of a motion for change of venue in the federal system, in addition to the possibility of litigating in an inconvenient or impractical forum, the plaintiff may be burdened with the disabilty of having judgment limited to the face value of the insurance policy. It is well settled that when a change of venue is granted, the court in the new jurisdiction must apply the same law as would have been applied had the case been heard in the jurisdiction where the case originated.[33] So, once the change of venue is granted, the plaintiff desiring to pursue his claim finds that (1) he must appear in the jurisdiction wherein the tort occurred; (2) the law of the jurisdiction where the tort occurred is determinative of the issue of negligence;[34] (3) New York law limiting the judgment to the face value of the policy has transferred with the case. Had the plaintiff originally instituted the suit in the new jurisdiction, points one and two above would still apply, but he normally would not have a limit on the amount of the judgment he could obtain. If, however, the jurisdiction wherein the tort occurred statutorily limits recovery to an amount less than the face value of the policy, the plaintiff might still wish to avail himself of a *Seider*-type attachment. For example, Massachusetts limits recovery in wrongful death actions against certain common carriers to $50,000,[35] but New York has no such limitation. Since New York courts refuse to give effect to certain statutory wrongful death limitations enacted by other jurisdictions[36] a New York plaintiff might be encouraged to bring a *Seider*-type action in a wrongful death case arising out of an accident in Massachusetts where the policy exceeded $50,000. Even if a change of venue was ordered, in applying New York law the court would have to allow recovery up to the full amount of the attached policy.

The practical considerations of *Seider* attachments within the state court system vary somewhat from those involved in federal situations. Where removal to federal courts is available, these considerations, of course, are the same. Not so, however, in those cases where federal jurisdiction is unavailable, either through lack of diversity, or of the $10,000 jurisdictional amount. Under present law, the unavailability to defendants in *Seider* cases of the doctrine of forum non conveniens assures New York plaintiffs of an absolute right to sue in New York, regardless of circumstances making suit elsewhere more convenient and equitable to all the other parties concerned.

32. JUDICIAL CONFERENCE REPORT, *supra* note 9, at 66.
33. *See, e.g.*, Van Dusen v. Barrack, 376 U.S. 612 (1964).
34. *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956). *But see* Maryland v. Capital Airlines, Inc., 280 F. Supp. 648 (S.D.N.Y. 1964).
35. MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1969).
36. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Pearson v. Northeast Airlines, Inc., 199 F. Supp. 539 (S.D.N.Y. 1961), *aff'd*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

Consequently, application of New York law is guaranteed, even where the plaintiff assigns the case to a resident for precisely such a purpose.[37] In these cases, where federal jurisdiction is not available, *Seider* remains an invitation to forum shopping.

Fundamental fairness to out-of-state defendants, as well as practical realizations as to the likely proliferation of cases coming before New York courts dictates a strong need for the passage of proposed CPLR Section 327. Much is to be said for the desirability, whenever possible, of equal treatment for litigants within the state and federal court systems. The frequency of those cases coming before federal courts sitting in New York which could far better be tried elsewhere will be diminished by the likelihood of an order for a change of venue. A similar deterrent within the state court system, in the form of broader application of forum non conveniens, hopefully would also discourage institution in New York of those extreme cases whose due process legality has up to now been so vigorously questioned.

37. *See, e.g.,* Wagner v. Braunsberg, 5 App. Div. 2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958).