Seider Viable Notwithstanding Shaffer v. Heitner

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In the landmark decision of Seider v. Roth, the Court of Appeals held that, where a liability insurance policy is issued by an insurer doing business in New York, quasi-in-rem jurisdiction over a nonresident insured may be obtained by attaching the insurer’s obligation to defend and indemnify. Using a Seider attachment as a basis for jurisdiction, a New York plaintiff injured with-

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226 Support for the Seider doctrine initially was found in the Supreme Court’s decision in Harris v. Balk, 198 U.S. 215 (1905), wherein it was held that a plaintiff may acquire quasi-in-rem jurisdiction over an obligee by garnishing a debt “located” within the state. Since the situs of the debt follows the obligor, an attachment may be made wherever the obligor may be found, provided that the obligor “could himself be sued by his creditor in that state.” Id. at 222. See generally Carpenter, Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation, 31 HARV. L. REV. 905 (1918). Thus, before an insurer’s obligation to defend and indemnify may be attached under Seider, the plaintiff must be able to obtain in personam jurisdiction over the insurer. The “doing business” standard, a predicate for obtaining in personam jurisdiction, should be sufficient for this purpose. See Bryant v. Finnish Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); CPLR 301 (1972).

227 An adjudication quasi-in-rem serves to determine the interests of certain individuals in specific property. In Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court characterized quasi-in-rem proceedings as follows:

The judgment is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

Id. at 246 n.12. Since Seider jurisdiction involves the attachment of property that is not the subject matter of the litigation, it may be viewed as a derivative of the latter category.

228 In Seider, two New York residents were injured in an automobile accident in Vermont. The allegedly negligent defendant was a Canadian resident whose insurance company was doing business in New York. 17 N.Y.2d at 112, 216 N.E.2d at 313, 269 N.Y.S.2d at 100. The Seider Court held that, notwithstanding the conditional nature of the obligation, the insurance company’s duty under the insurance policy to defend and indemnify the defendant constituted a debt under CPLR 5201 and was subject to attachment pursuant to CPLR 6202. Id. at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101; see In re Estate of Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962); note 326 supra.

out the state may bring suit in New York against the nonresident insured and recover up to the face amount of the insurance policy.\textsuperscript{330} Criticized since its inception,\textsuperscript{331} the \textit{Seider} doctrine appeared to be in jeopardy when the Supreme Court held, in \textit{Shaffer v. Heitner},\textsuperscript{332} that quasi-in-rem jurisdiction may not be constitutionally exercised over a nonresident unless he has certain “minimum contacts” with


\textsuperscript{331} Throughout its 12-year history, commentators and jurists have expressed discomfort with the \textit{Seider} doctrine. See, e.g., \textit{Seider v. Roth—Dead or Alive?}, N.Y.L.J., Dec. 9, 1977, at 24, cols. 3, 4. Moreover, it has been suggested that precluding nonresidents from utilizing \textit{Seider} may be violative of the Equal Protection Clause of the Constitution. Donawitz v. Danek, 42 N.Y.2d 138, 144-45, 366 N.E.2d 253, 257-58, 397 N.Y.S.2d 592, 596-97 (1977) (Jasen, J., concurring).

Thus the mere existence of a contractual relationship between the defendant and an insurer doing business in the state seemed insufficient under *Shaffer* to justify the assertion of jurisdiction over a nonresident.\(^{34}\)

\(^{33}\) *Id.* at 207. In *Shaffer*, a nonresident of Delaware brought a shareholders derivative suit in a Delaware state court against a Delaware corporation and several of its officers for an alleged breach of corporate duties. *Id.* at 190. In an attempt to bring the individual nonresident defendants within its jurisdiction, the Delaware court granted the plaintiff's motion for sequestration of approximately 82,000 shares of corporate stock owned by the defendants. *Id.* at 192. This ruling was consistent with [Del. Code Ann. tit. 8, § 169 (1975)], which makes Delaware the situs of all stock issued by Delaware corporations. The Supreme Court, however, vacated the sequestration order, finding that the mere presence of personal property within a state was an insufficient basis for the assertion of jurisdiction over a nonresident. 433 U.S. at 209. Applying the "minimum contacts" test enunciated in *International Shoe v. Washington*, 326 U.S. 310 (1945), the Court concluded that due process would be offended if Delaware were permitted directly to exercise jurisdiction over the individual defendants. 433 U.S. at 216-17. Similarly, the *Shaffer* Court reasoned that it would be unconstitutional to subject the defendant to Delaware jurisdiction indirectly through the use of the attachment procedure. *Id.* at 209.

\(^{34}\) In overruling *Harris v. Balk*, 198 U.S. 215 (1905), the *Shaffer* Court stated: It would not be fruitful for us to re-examine the facts of cases decided on the rationales of Pennoyer and Harris to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled. 433 U.S. at 212 n.39.


Notwithstanding the apparent effect of Shaffer, many lower courts in New York continued to recognize the constitutionality of Seider.335 Several courts adopted the position that a Seider attachment is distinguishable from the typical quasi-in-rem action, in which the property serving as the jurisdictional predicate is completely unrelated to the underlying cause of action.336 Although after Shaffer such actions appeared untenable, Seider, it was reasoned, remained unaffected because the contractual obligation arises out of the same set of facts as those underlying the cause of action.337 Concluding that the Shaffer rationale left Seider intact, those courts also emphasized that Seider jurisdiction cannot result in a diminution of the nonresident’s personal assets.338

At least one federal court has concluded that Seider cannot withstand the sweeping language of the Shaffer decision. See Torres v. Towmotor, Inc., No. 77-1810 (E.D.N.Y. Nov. 18, 1977). Rejecting the direct action argument, the Torres court observed that, while Seider has only the “effect” of a direct action against the insurer, “the defendant remains the focus of the minimal contacts examination.” Slip. op. at 24-25. The Torres court concluded that Seider cannot withstand Shaffer analysis at the initial stage of inquiry where jurisdiction over the nonresident defendant must be established. Id. at 24-26. Seider’s weakness was described in Torres as follows:

Harris was the seed from which Seider evolved and it provided the roots through which Seider was nourished. Thus, since the seed has been pulled out and its roots have been severed from the fertile field of legal precedent by Shaffer, Seider’s viability has been quashed. The continued existence and use of the Seider procedure after the Shaffer decision would be diametrically opposed to the fundamental guarantee of due process.

Id. at 36.

335 See note 15 infra.


337 See note 336 supra. The argument that the obligation which provides the jurisdictional predicate in Seider is closely related to the cause of action, represents an attempt to preserve the Seider doctrine in the face of quasi-in-rem cases where the attached property “is completely unrelated to the plaintiff’s cause of action.” Shaffer v. Heitner, 483 U.S. 186, 209 (1978). This contention has been criticized, however, as a “boot strap” approach to acquiring jurisdiction. McLaughlin, supra note 329, at 24, col. 1. Dean McLaughlin notes that the insurer’s obligation under the attached policy is inchoate and therefore does not become “property” until an action has been commenced against the insured. Since no action can be validly commenced until adequate jurisdiction is obtained over the insured, in Dean McLaughlin’s view, “[t]he major analytical flaw . . . of Seider” is its circularity. Id.

338 See Alford v. McGaw, 61 App. Div. 2d 504, 509, 402 N.Y.S.2d 499, 503 (4th Dep’t 1978). See also O’Connor v. Lee-Hy Packing Corp., 579 F.2d 194, 200 (2d Cir.), cert. denied, 47 U.S.L.W. 3386 (Dec. 5, 1978). The contention that an adjudication pursuant to a Seider attachment does not affect the personal assets of the insured seems to ignore some of the valid interests which the insured has in the action. Under most liability policies, for example, the insured is required to cooperate in the defense of the action. Thus, while the insured cannot be held personally liable in a Seider action, he faces the prospect of losing time and money
A more satisfactory approach was taken by some authorities who considered Seider as in effect a judicially created right of direct action against the tortfeasor's insurer. Under this approach, the tortfeasor is deemed a nominal defendant in the action, with the insurer viewed as the real party in interest. Thus, as long as the insurer has the requisite contacts with New York, Shaffer would not bar the assertion of jurisdiction. This reasoning has been resisted by the Court of Appeals, however, because direct actions against insurers are expressly precluded by statute in New York.


The direct action theory as an explanation of Seider first appeared more than 10 years prior to the Shaffer decision. See Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967). As the Court stated in Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 167, 255 N.E.2d 503, 507, 278 N.Y.S.2d 793, 799 (1967): "The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action [only] in order to protect the insurance company against overly sympathetic juries."

In Seider, the Court of Appeals indicated its reluctance to characterize Seider as a direct action when it stated:

It is said by affirmation here we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmation will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured. Jurisdiction is properly acquired . . . since the policy obligation is a debt owed to the defendant by the insurer.


N.Y. INS. LAW § 167(7) (McKinney 1966) provides that an action may be maintained against the insurer only where the injured plaintiff has obtained a judgment against the insured. This statute was enacted to prevent the excessively high damage awards that might result if juries were aware that an insurer rather than an individual would be satisfying the judgment. See Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 167, 225 N.E.2d 503, 507, 278 N.Y.S.2d 793, 799 (1967); Leotta v. Plessinger, 8 N.Y.2d 449, 461, 171 N.E.2d 454, 460, 209 N.Y.S.2d 304, 312 (1960); Morton v. Maryland Cas. Co., 1 App. Div. 2d 116, 123-27, 148 N.Y.S.2d 524, 530-33 (2d Dep't 1955). These public policy considerations, however, do
The two basic approaches to the question of Seider's constitutionality were considered in Alford v. McGaw, a recent fourth department decision. Utilizing both lines of reasoning in support of its holding, the Alford court concluded that the exercise of jurisd-

not necessarily eliminate the possibility that Seider is justifiable as a judicially created direct action. As noted by Chief Judge Fuld:

Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation . . . . Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.


It should be noted, however, that several years ago, the legislature attempted to enact a direct action statute, but the measure was vetoed as a result of drafting difficulties. Sixteenth Ann. Rep. N.Y. Jud. Conference 264 (1971); see Gov. Veto Mess. (1973), reprinted in [1973] N.Y. Legis. Ann. 949.


61 App. Div. 2d 504, 402 N.Y.S.2d 499 (4th Dep't 1978). In Alford, a father and his infant son, both residents of New York, brought a negligence action against the defendant, an Ontario resident, for injuries sustained by the infant plaintiff in an automobile accident which occurred in Ontario. Id. at 505, 402 N.Y.S.2d at 500. Since the defendant had no actual contacts with New York, the plaintiffs had to utilize the Seider doctrine to obtain jurisdiction. Id., 402 N.Y.S.2d at 500-01.

311 There is some support for the proposition that, whether Seider is viewed as a traditional quasi-in rem action or a judicially-created direct action, the ultimate determination should be the same. See Restatement (Second) of Judgments (Tent. Draft No. 5, 1978). Evaluating Seider, the Restatement observes:

The jurisdictional question would seem to be the same for both "direct action" and attachment jurisdiction. If the circumstances that the plaintiff is a resident of state X and the insurance company is doing business there are sufficient to sustain in personam jurisdiction for a "direct action" against the insurer, they should also be sufficient to sustain attachment jurisdiction against the insurer, and vice versa.

Id. §§ 84-86 (emphasis added). Such an analysis of Seider jurisdiction is misleading, however, since it places the focus solely on the insurer and disregards the need to demonstrate a jurisdictional nexus between the tortfeasor and the forum state.
diction over a nonresident defendant does not offend the constitutional principles enunciated in *Shaffer*. The court stressed that the "insurer plays the critical role" and "bears the major risk" of the litigation. Moreover, in the *Alford* court's view, the relationship between the insurer's contractual obligation and the plaintiff's underlying cause of action was sufficient to establish the requisite "minimum contacts" among the "defendant, the State and the litigation . . . ." Recognizing that its holding had "overtones" of a direct action against the insurer, the appellate division nevertheless found that such an "effect" did not preclude a "full consideration of the insurer's role in the litigation . . . where the insurer's anonymity will be preserved throughout the proceedings."

Since *Alford* was decided, the Court of Appeals has resolved the question of *Seider*’s continuing viability after *Shaffer*. In *Baden v. Staples*, the Court of Appeals focused on the policy considerations

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346 61 App. Div. 2d at 507, 402 N.Y.S.2d at 502. The *Alford* court seemed somewhat cautious in upholding *Seider*, neither adopting the direct action analysis nor calling it a quasi-in-rem action against the insured. Id. at 508-07, 402 N.Y.S.2d at 502. The circumspect attitude of the court takes on added significance in light of an earlier fourth department decision which indicated that *Seider* was unconstitutional under *Shaffer*. See *Chappa v. Johncox*, 60 App. Div. 2d 55, 60-62, 401 N.Y.S.2d 332, 336 (4th Dep't 1977).

347 Id. at 507, 402 N.Y.S.2d at 501 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1978)).

348 61 App. Div. 2d at 509, 402 N.Y.S.2d at 503. The *Alford* majority quoted Chief Judge Desmond's statement in *Seider* that "there is no policy reason against requiring the insurer to come in to New York and defend as to an [out-of-state] accident which . . . [injures] New York residents." Id. (quoting *Seider v. Roth*, 17 N.Y.2d 111, 114, 216 N.E.2d 312, 315, 269 N.Y.S.2d 98, 102 (1967)). In addition, the *Alford* majority noted that "[i]n the absence of any corrective measures taken by the Legislature, 'the direct action' effect of *Seider* is consistent with public policy." 61 App. Div. 2d at 509, 402 N.Y.S.2d at 503 (citing *Donawitz v. Danek*, 42 N.Y.2d 138, 142, 366 N.E.2d 253, 256, 397 N.Y.S.2d 592, 595 (1977)).

Justice Hancock, in a separate concurring opinion, argued that *Seider* and its progeny are "no longer the law in this state." 61 App. Div. 2d at 511, 402 N.Y.S.2d at 504 (Hancock, J., concurring). According to Justice Hancock, the majority was merely "attributing the New York contacts of the insurance company to the defendant for the purpose of securing jurisdiction." Id. at 509, 402 N.Y.S.2d at 503 (Hancock, J., concurring). Since the insured had not purposefully availed himself of the privileges or protections of New York laws, he reasoned that the requisite minimum contacts were lacking and an assertion of jurisdiction would be unfair. Id. at 510, 402 N.Y.S.2d at 503 (Hancock, J., concurring). Furthermore, Justice Hancock noted that the fair warning aspect of jurisdiction discussed in *Shaffer* was not satisfied by the *Seider* doctrine since an individual who purchases an insurance policy in some distant state is unlikely to be aware that by doing so he is subjecting himself to the jurisdiction of the New York courts. Id. (Hancock, J., concurring); see *Shaffer v. Heitner*, 413 U.S. 186, 218 (1977) (Stevens, J., concurring).

349 N.Y.L.J., Oct. 30, 1978, at 1, col. 6 (per curiam). In *Baden*, the plaintiffs, apparently New York residents, were injured in an automobile accident in New Hampshire. Id. at 1, col. 6, at 5, col. 1. Seeking to acquire jurisdiction over the defendants, who were New Hampshire
supporting Seider’s continued use. Echoing previous decisions upholding Seider, the Court stated that “[c]onsiderations of stare decisis and institutional stability” required that Seider again be sustained, “absent compelling grounds to the contrary.” While the Baden Court appeared to approve the direct action analysis stressed by the fourth department, it summarily disposed of the constitutional issues and concluded that Seider does not conflict with the principles enunciated in Shaffer.

Despite the Court of Appeals’ recent reaffirmation of Seider, the controversy surrounding the doctrine is likely to continue.

residents, the plaintiffs moved for a Seider attachment. Id. at 5, col. 1. Special Term granted the motion and the appellate division and Court of Appeals affirmed. Id.

349 Id. at 1, col. 6. Recognizing that Seider continued to be a “subject of controversy”, the Court nevertheless found “that it is more important that the law be settled than that it be settled “correctly.”” Id. at 5, col. 1. In a separate concurring opinion, Judge Fuchsberg also stated that stare decisis should be the critical consideration in affirming Seider. N.Y.L.J., Oct. 30, 1978, at 5, col. 2 (Fuchsberg, J., concurring). It is submitted, however, that the Baden Court’s emphasis on stare decisis was misplaced in light of the substantial constitutional and practical issues involved in Seider. As noted by Chief Judge Fuld:

[S]tare decisi does not compel [the Court] to follow blindly a court-created rule—particularly one, as here, relating to a procedural matter—once we are persuaded that reason and a right sense of justice recommend its change.


351 N.Y.L.J., Oct. 30, 1978, at 5, col. 1. Five days before Baden was decided, another difficulty for the Seider doctrine appeared. The Appellate Division, Third Department, dismissed a Seider action on the ground of forum non conveniens, although the plaintiff was a New York resident. Epstein v. Sirivejkul, 409 N.Y.S.2d 438 (3d Dep’t 1978). The Epstein court concluded that “there [was] no nexus between this jurisdiction and the instant suit.” Id. at 439. This application of forum non conveniens would seem to provide a vehicle for dismissing Seider actions for those courts continuing to oppose the doctrine. One commentator has suggested, however, that “[a]pplying the doctrine on a case-by-case basis to sustain some Seider-based cases while dismissing others with virtually the same New York contacts could be deemed” an abuse of discretion by the Court of Appeals. Conveniens Dismissal Made of Seider Action by Third Department Despite New York Domicile of Plaintiff, N.Y.L. Dig. no. 226 (October 1978).

352 The Seider question ultimately may be resolved by the legislature. See Report of the Law Revision Commission Relating to Revision of Quasi-In-Rem Jurisdiction and Related Provisions in Article 3 of the CPLR, [1978] N.Y. LAW REV. COMM’N REP., reprinted in [1978] McKinney’s Session Law News A-141. The Commission recently has proposed that the CPLR be amended by the addition of a new section, 302-a, defining the permissible scope of quasi-in-rem jurisdiction. Under the new section, the plaintiff would have the burden of establishing the existence of minimum contacts between the defendant and the forum and demonstrating that due process standards are met. [1978] McKinney’s Session Law News at A-147. This
Shaffer clearly requires that all assertions of jurisdiction comply with the "minimum contacts" criteria. The various approaches offered in support of Seider's constitutionality, however, do not answer the question whether the insured, rather than the insurer, has sufficient contacts with New York so that Shaffer's mandate is not violated.

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section would require the court to consider seven factors in determining the existence of "minimum contacts":
(1) the plaintiff's relationship to the state;
(2) the relationship of plaintiff's cause of action to the state;
(3) the defendant's relationship to the state;
(4) any benefit accruing to the defendant because of the relationship of his property or debt to the state;
(5) the relationship of the garnishee to the state;
(6) whether the property is tangible or intangible and if tangible, whether it is permanently or temporarily located in the state;
[and]
(7) whether there is another forum reasonably convenient to plaintiff in which he can obtain relief.

Id. Even under this new proposal, however, Seider's viability may be open to question. The Commission itself felt that "the Shaffer decision renders New York's Seider rule an extreme application of attachment jurisdiction and highly questionable." Id. Moreover, the legislative proposal itself is somewhat confusing. Of the seven factors, only the third, fourth and perhaps the sixth are relevant to the issue of the defendant's contacts with the state. The other criteria, which are more closely related to the question of forum non conveniens, do not appear helpful in determining whether the Shaffer requirements are met. Since under Shaffer, it is the defendant's contacts with the forum state which determine the constitutionality of any assertion of jurisdiction, 433 U.S. at 212, it is difficult to perceive the usefulness of the Commission's proposal.

See notes 332-333 & accompanying text supra.
See notes 336-342 & accompanying text supra.

See Intermeat, Inc. v. American Poultry, Inc., 575 F. 2d 1017, 1022 (2d Cir. 1978); Torres v. Towmoter Inc., No. 77 Civ. 1810, slip op. at 29 (E.D.N.Y. Nov. 18, 1977); notes 334, 337-338 supra. See also Attanasio v. Ferre, 93 Misc. 2d 661, 664, 401 N.Y.S.2d 685, 687 (Sup. Ct. Schenectady County 1977). In Hanson v. Denckla, 357 U.S. 257 (1958), the Supreme Court indicated that, in every assertion of jurisdiction, "it is essential . . . 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." Id. at 253. This position was reiterated in Shaffer. 433 U.S. at 216. It is difficult, however, to accept that a nonresident purposefully avails himself of the laws of New York merely by purchasing a policy from an insurer doing business within the state. But see, Williams, The Validity of Assuming Jurisdiction By The Attachment of Automobile Liability Insurance Obligations: The Impact of Shaffer v. Heitner upon Seider v. Roth, 9 RUT.-CAM. L.J. 241, 274-77 (1978).

Following its decision in Shaffer, the Supreme Court remanded a Seider challenge for reconsideration by the state court. Rush v. Savchuk, 433 U.S. 902 (1977), remanding 245 N.W.2d 624 (Minn. 1976). On remand, the Minnesota Supreme Court sustained that state's statutory version of Seider, concluding that the doctrine is consistent with the dual policies of "providing a forum to residents and extending its jurisdiction to the maximum limits consistent with due process." 47 U.S.L.W. 2290, 2291 (Nov. 7, 1978). In Rocca v. Kenney,
Use of plural pronouns in joint will can create binding obligation

New York courts have long recognized that a joint will\textsuperscript{358} can bind the signatories to dispose of their estates in a particular manner and preclude a subsequent revocation.\textsuperscript{359} Before an agreement...