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Seider *viable notwithstanding* Shaffer v. Heitner

In the landmark decision of *Seider v. Roth,*[325] the Court of Appeals held that, where a liability insurance policy is issued by an insurer doing business in New York,[326] quasi-in-rem jurisdiction[327] over a nonresident insured may be obtained by attaching the insurer's obligation to defend and indemnify.[328] Using a *Seider* attachment as a basis for jurisdiction, a New York plaintiff[329] injured with-

[325] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *see* Stein, *Jurisdiction by Attachment of Liability Insurance,* 43 N.Y.U. L. REV. 1075 (1968); Comment, *Garnishment of Intangibles: Contingent Obligations and The Interstate Corporation,* 67 COLUM. L. REV. 550 (1967); Note, *Seider v. Roth: The Constitutional Phase,* 43 ST. JOHN'S L. REV. 58 (1968) [hereinafter cited as *Constitutional Phase*].

[326] 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).

[327] 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.

[328] 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.*

[329] In Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977), the Court of Appeals held that only a New York resident may utilize a *Seider* attachment as a predicate for quasi-in-rem jurisdiction. *See* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *cert. denied,* 396 U.S. 844 (1969), *discussed in The Survey,* 44 ST. JOHN'S L. REV. 532, 570 (1970); Farrel v. Piedmont Aviation, Inc., 411 F.2d 812, 817 (2d Cir.), *cert. denied,* 396 U.S. 840 (1969); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968); *cf.* ERNETA v. Princeton Hospital, N.Y.L.J., Dec. 11, 1978, at 5, col. 1 (1st Dep't) (plaintiff need not be New York resident when accident occurs). *But cf.* McHugh v. Paley, 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. N.Y. County 1970) (attachment by nonresident per-

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

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mitted to prevent undue hardship). Although this rule originally was based on principles of *forum non conveniens*, Vaage v. Lewis, 29 App. Div. 2d 315, 318, 288 N.Y.S.2d 521, 524-25 (2d Dep't 1968), the *Donawitz* Court based its holding on jurisdictional grounds, reasoning that the obligation to defend and indemnify is not of sufficient substance to support the assertion of quasi-in-rem jurisdiction where the plaintiff is a nonresident. 42 N.Y.2d at 142 & n.*, 366 N.E.2d at 256 & n.*, 397 N.Y.S.2d at 595 & n.*. Some critics of the *Donawitz* decision, however, have argued that this reasoning is unsound since the plaintiff's residence would seem irrelevant to the court's exercise of jurisdiction over a defendant. *See, e.g.*, McLaughlin, *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 *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).

[330] *See* 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).

[331] Throughout its 12-year history, commentators and jurists have expressed discomfort with the *Seider* doctrine. *See, e.g.*, Seider 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); Note, *Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108 (1968); Note, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725, 744-65; *Constitutional Phase*, *supra* note 325; Note, *Quasi in rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654 (1967). The *Seider* doctrine has had the support of only a bare majority on the Court of Appeals. *See* Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); Victor v. Lyon Assoc. Inc., 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). In Neuman v. Dunham, 39 N.Y.2d 999, 1000, 355 N.E.2d 294, 294, 387 N.Y.S.2d 240, 240 (1976), the Court upheld *Seider* jurisdiction "on the ground of stare decisis alone." While the Court again reaffirmed *Seider* in 1977, it did so in a manner which reflected considerable dissatisfaction with the doctrine. *See* Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977). *See also* Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968); CPLR 5201, commentary at 16 (McKinney Supp. 1977); Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975).

Several jurisdictions outside New York have rejected the *Seider* procedure outright. *See, e.g.*, Robinson v. Shearer & Sons, Inc., 429 F.2d 83 (3d Cir. 1970); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Javorek v. Superior Court, 17 Cal. 3d 629, 644 P.2d 728, 131 Cal. Rptr. 768 (1976); Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); State *ex rel.* Gov't Employees Ins. Co. v. Laskey, 454 S.W.2d 942 (Mo. App. 1970); Johnson v. Farmers Alliance Mut. Ins. Co., 499 P.2d 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A.2d 513 (1964); De Rentiis v. Lewis, 106 R.I. 240, 258 A.2d 464 (1969); Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967). *But see* Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Savshuk v. Rush, 245 N.E.2d 624 (Minn. 1976), *discussed in* note 357 *infra*. Moreover, in a decision which seemed to be a retaliation against New York's adherence to *Seider*, one state court held that the doctrine could be invoked only against a New York defendant. *Compare* Forbes v. Boyton, 113 N.H. 617, 313 A.2d 129 (1973) *with* Camire v. Scieszka, 116 N.H. 281, 358 A.2d 397 (1976).

[332] 433 U.S. 186 (1977).

the forum state.[333] 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.[334]

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[333] *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.

[334] 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.

The application in *Shaffer* of the "minimum contacts" criterion is believed to have far reaching effects on the ability of plaintiffs to acquire jurisdiction over nonresident defendants. *See, e.g.*, Comment, *Quasi In Rem on the Heels of* Shaffer v. Heitner: *If* International Shoe *Fits . . .*, 46 FORDHAM L. REV. 459 (1977); Comment, *The Reasonableness Standard in State-Court Jurisdiction:* Shaffer v. Heitner *and The Uniform Minimum Contacts Theory*, 14 WAKE FOREST L. REV. 51 (1978). Some commentators have suggested that *Seider* cannot stand in light of *Shaffer*. *See, e.g.*, Note, *Minimum Contacts and Jurisdictional Theory in New York: The Effect of* Shaffer v. Heitner, 42 ALB. L. REV. 294, 311 (1978); Note, *Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth*, 6 HOFSTRA L. REV. 393, 414-17 (1978). Others, however, believe *Seider* withstands the test of *Shaffer*. *See, e.g.*, Silbermaan, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 90-101 (1978); 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 (1978). *See also* [1978] N.Y. LAW REV. COMM'N REP., *reprinted in* [1978] McKinney's Session Law News A-141, -147, *discussed in* note 354 *infra*.

A number of lower courts utilized the *Shaffer* opinion as a basis for rejecting the *Seider* doctrine. *See, e.g.*, Hutchinson v. Hayes Bros., N.Y.L.J., Mar. 17, 1978, at 4, col. 2 (Sup. Ct. N.Y. County); Schoen v. Berotti, N.Y.L.J., Mar. 17, 1978, at 7, col. 3 (Sup. Ct. Queens County); Vaccaro v. Licker, N.Y.L.J., Feb. 17, 1978, at 7, col. 2 (Sup. Ct. Bronx County); Attanasio v. Ferre, 93 Misc. 2d 661, 401 N.Y.S.2d 685 (Sup. Ct. Schenectady County 1977); Wallace v. Target Store, Inc., 92 Misc. 2d 454, 400 N.Y.S.2d 478 (Sup. Ct. Queens County 1977); Katz v. Umansky, 92 Misc. 2d 285, 399 N.Y.S.2d 412 (Sup. Ct. Kings County 1977); Kennedy v. Deroker, 91 Misc. 2d 648, 398 N.Y.S.2d 628 (Sup. Ct. Fulton County 1977); *cf.* Chapra v. Johncox, 60 App. Div. 2d 55, 60-62, 401 N.Y.S.2d 332, 336 (4th Dep't 1977) (rejecting *Seider* by implication). For a discussion of the dichotomy in the post-*Shaffer* decisions, see Note, *The Constitutionality of* Seider v. Roth *after* Shaffer v. Heitner, 78 COLUM. L. REV. 409, 422-26 (1978).

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*.

[336] *See, e.g.*, Alford v. McGaw, 61 App. Div. 2d 504, 506-07, 402 N.Y.S.2d 499, 501 (4th Dep't 1978); Rodriguez v. Wolfe, 93 Misc. 2d 364, 401 N.Y.S.2d 442, 444 (Sup. Ct. Queens County 1978); Nelson v. Warner Bros. Jungle Habitat, N.Y.L.J., Mar. 17, 1978, at 7, col. 1 (Sup. Ct. Kings County).

[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.[339] Under this approach, the tortfeasor is deemed a nominal defendant in the action, with the insurer viewed as the real party in interest.[340] 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,[341] however, because direct actions against insurers are expressly precluded by statute in New York.[342]

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as a result of having to appear at trial. In addition, an adverse judgment in a *Seider* action could result in an increase in the defendant's insurance rates or the cancellation or nonrenewal of his policy. 7A WK&M ¶ 6202.06a. *Seider*, however, provides a vehicle through which the injured party can seek at least a limited recovery in New York without having to expend time and money in traveling to some distant forum in order to seek redress.

[339] *See* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 200-01 (2d Cir.), *cert. denied*, 47 U.S.L.W. 3386 (Dec. 5, 1978); Alford v. McGaw, 61 App. Div. 2d 504, 508, 402 N.Y.S.2d 499, 502 (4th Dep't 1978); *cf.* Rich v. Rich, 93 Misc. 2d 409, 402 N.Y.S.2d 767 (Sup. Ct. N.Y. County 1978) (attachment of inheritance proceeds permitted when redress possible only in New York). *See also* Smith v. Kraftco Corp., N.Y.L.J., Mar. 24, 1978, at 12, col. 3 (Sup. Ct. Kings County); Nelson v. Warner Bros. Jungle Habitat, N.Y.L.J., Mar. 17, 1978, at 7, col. 1 (Sup. Ct. Kings County); Rodriguez v. Wolfe, 93 Misc. 2d 364, 401 N.Y.S.2d 442 (Sup. Ct. Queens County 1978).

[340] 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."

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

> It is said by affirmance here we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance 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.

17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102; *accord*, Donawitz v. Danek, 42 N.Y.2d 138, 143, 366 N.E.2d 253, 261, 397 N.Y.S.2d 592, 595 (1977) (Jasen, J., concurring); Donawitz v. Danek, 42 N.Y.2d at 151, 366 N.E.2d at 262, 397 N.Y.S.2d at 601 (Cooke, J., dissenting); Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 671-72, 287 N.Y.S.2d 633, 637 (1967).

[342] 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*,[343] a recent fourth department decision. Utilizing both lines of reasoning in support of its holding,[344] the *Alford* court concluded that the exercise of juris-

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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.

Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967) (citations omitted).

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. 349.

As support for the contention that direct action statutes are constitutionally permissible, Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954), is the case most often cited. In *Watson*, the United States Supreme Court upheld the Louisiana direct action statute, LA. REV. STAT. ANN. § 22:655 (West 1978). Other jurisdictions have direct action statutes, *e.g.*, P.R. LAWS ANN. tit. 26, §§ 2001, 2003(1) (1958 & Supp. 1975-1976); R.I. GEN. LAWS § 27-7-2 (Supp. 1977); WIS. STAT. ANN. § 803.04(2) (West 1977). Such statutes differ significantly from the *Seider*-form of direct action, however, since the statutes require that the accident occur within the state itself. *See* Lee-Hy Paving Corp. v. O'Connor, 27 U.S.L.W. 3386, 3387 (Dec. 5, 1978) (Powell, J., dissenting), *denying cert. to* 579 F.2d 194 (2d Cir.). In analogizing *Seider* to a judicially created direct action, New York courts have not addressed this distinction. *But see* Minichiello v. Rosenberg, 410 F.2d 106, 110 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). Therefore, even if *Seider* is viewed as a direct action against the insurer, its constitutionality may be open to question. For a general discussion of direct action statutes, *see* Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357 (1960).

[343] 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 occured 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.

[344] 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*.[345] The court stressed that the "insurer plays the critical role" and "bears the major risk" of the litigation.[346] 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 . . . .'"[347] 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."[348]

Since *Alford* was decided, the Court of Appeals has resolved the question of *Seider*'s continuing viability after *Shaffer*. In *Baden v. Staples*,[349] the Court of Appeals focused on the policy considerations

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[345] 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 506-07, 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).

[346] 61 App. Div. 2d at 508, 402 N.Y.S.2d at 502.

[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 99, 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.[350] 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."[351] While the *Baden* Court appeared to approve the direct action analysis stressed by the fourth department,[352] it summarily disposed of the constitutional issues and concluded that *Seider* does not conflict with the principles enunciated in *Shaffer.*[353]

Despite the Court of Appeals' recent reaffirmation of *Seider,* the controversy surrounding the doctrine is likely to continue.[354]

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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.*

[350] *See* N.Y.L.J., Oct. 30, 1978, at 5, cols. 1, 2.

[351] *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.

Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 363, 278 N.E.2d 619, 623, 328 N.Y.S.2d 398, 404 (1972). *See also* Donawitz v. Danek, 42 N.Y.2d 138, 148-51, 366 N.E.2d 253, 259-61, 397 N.Y.S.2d 592, 599-601 (1977) (Jasen, J., concurring).

[352] N.Y.L.J., Oct. 30, 1978, at 5, col. 1; *see* notes 344-348 and accompanying text *supra.* The *Baden* Court also cited O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3386 (Dec. 5, 1978), wherein the second circuit sustained a *Seider* attachment.

[353] 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).

[354] 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.[355] The various approaches offered in support of *Seider*'s constitutionality,[356] 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.[357]

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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 "[t]he *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.

[355] *See* notes 332-333 & accompanying text *supra.*

[356] *See* notes 336-342 & accompanying text *supra.*

[357] *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. Schenectedy 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[358] can bind the signatories to dispose of their estates in a particular manner and preclude a subsequent revocation.[359] Before an agreement

381 A.2d 330 (N.H. 1977), however, the New Hampshire Supreme Court found *Seider* jurisdiction unconstitutional, since its assertion does not require the defendant to have the requisite "minimum contacts" with the forum state. Moreover, although the second circuit upheld *Seider*, O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 47 U.S.L.W. 3386 (Dec. 5, 1978), it is interesting to note that a previous second circuit decision intimated that *Seider* was no longer viable. Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017, 1022 (2d Cir. 1978). Further, the denial of certiorari in *O'Connor* prompted a strong dissent on the part of Justice Powell, in which Justice Blackmun joined. *See* 47 U.S.L.W. 3386 (Dec. 5, 1978) (Powell, J., dissenting), *denying cert. to* 579 F.2d 194 (2d Cir.). In light of these inconsistent views, it is hoped that the Supreme Court will soon address the *Seider* issue.

[358] A joint will has been defined as "a single testamentary instrument that embodies the testamentary plan of two or more persons and is separately executed by each of the testators using the instrument." Rich v. Mottek, 14 App. Div. 2d 89, 95, 217 N.Y.S.2d 409, 414 (1st Dep't 1961) (Valente, J., dissenting), *rev'd*, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962) (quoting 1 PAGE ON WILLS 551 (rev. ed. W. Bowe & D. Parker 1960)). Normally executed by husband and wife, joint wills are used infrequently. *See* Recommendation of the Law Revision Commission to the 1977 Legislature Relating to Proving Contracts to Make Testamentary Dispositions, [1977] N.Y. LAW REV. COMM'N REP. 2, *reprinted in* [1977] N.Y. Laws 2248, 2249 (McKinney) [hereinafter cited as Recommendation on Testamentary Dispositions, *reprinted in* N.Y. Laws].

Although joint in character, such wills operate as the separate will of each subscriber and can dispose of property owned by them either jointly, severally, or in common. *See, e.g.*, Rubenstein v. Mueller, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967); *In re* Will of Diez, 50 N.Y. 88 (1872); *In re* Brown's Will, 26 Misc. 2d 1011, 209 N.Y.S.2d 465 (Sur. Ct. Orleans County 1961). Mutual wills, on the other hand, are separate instruments with provisions that "are reciprocal, identical, or substantially similar." Rich v. Mottek, 14 App. Div. 2d 89, 95, 217 N.Y.S.2d 409, 414 (1st Dep't 1961) (Valente, J., dissenting), *rev'd*, 11 N.Y.2d 90, 181 N.Y.S.2d 445, 226 N.Y.S.2d 428 (1962) (quoting 1 PAGE ON WILLS 553 (rev. ed. W. Bowe & D. Parker 1960)). *See* 9D P. ROHAN, NEW YORK CIVIL PRACTICE EPTL ¶ 13-2.1[7] (1978). The courts have not carefully distinguished between joint and mutual wills. *See, e.g., In re* Aquilino's Will, 53 Misc. 2d 811, 812, 280 N.Y.S.2d 85, 86 (Sur. Ct. Nassau County 1967). Similarly, the Surrogate's Court Procedure Act does not differentiate between joint and mutual wills for probate purposes. N.Y. SURR. CT. PROC. ACT § 2504 (McKinney 1967).

[359] *E.g.*, Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949); Hermann v. Ludwig, 229 N.Y. 544, 129 N.E. 908 (1920) (mem.); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915). A contract may require the disposition of property by will. *See, e.g.*, Shakespeare v. Markham, 72 N.Y. 400 (1878); Stanton v. Miller, 58 N.Y. 192 (1874); Parsell v. Stryker, 41 N.Y. 480 (1869). Likewise, there is no doubt that a testamentary contract may be embodied in a joint will. *See* Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915). *See generally* 1 B. DAVIDS, THE NEW YORK LAW OF WILLS, §§ 412-423 (1923 & Supp. 1965).

When a party breaches a contract not to revoke a joint will by executing a second one after the death of his co-testator, the second will is admitted to probate as the last will and testament of the decedent. *E.g., In re* Higgins' Will, 264 N.Y. 226, 190 N.E. 417 (1934); *cf. In re* Miceli's Will, 1 Misc. 2d 375, 145 N.Y.S.2d 819 (Sur. Ct. Kings County 1955) (mutual wills). Third party beneficiaries claiming under the joint will, however, may seek specific performance of the testamentary contract in the supreme court or surrogate's court. *E.g.*,