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attachment proceedings in New York will soon be resolved by the Supreme Court, which noted probable jurisdiction in *Sugar* on April 14, 1975.²⁶⁷ It is hoped that the nature of the hearing and other safeguards contemplated by the due process clause in the area of prejudgment attachment will be clarified in order to avoid future uncertainty in other states as well.

CPLR 6202: Retaliatory adoption of Seider v. Roth by New Hampshire.

The *Seider v. Roth*²⁶⁸ doctrine, which permits the grounding of quasi-in-rem jurisdiction over a nonresident defendant upon attachment of the contractual obligations contained in the defendant's automobile liability insurance policy,²⁶⁹ continues to generate new

²⁶⁷ 43 U.S.L.W. 3550 (U.S. Apr. 14, 1975) (No. 74-859).

²⁶⁸ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), noted in 67 COLUM. L. REV. 550 (1967); 51 MINN. L. REV. 158 (1966); 43 ST. JOHN'S L. REV. 58 (1968). For an excellent discussion of *Seider's* development and a thorough analysis of the constitutional and procedural issues involved, see 7B MCKINNEY'S CPLR 5201, supp. commentary at 15-74 (1974).

²⁶⁹ Under *Seider*, the duty to defend and indemnify is attached as a debt within the meaning of CPLR 5201 and CPLR 6202. CPLR 6202 states that "[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment." CPLR 5201(a) in pertinent part provides:

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.

Seider held that the obligation of the insurer to defend and indemnify becomes fixed at the time of the accident. Critics have challenged this analysis, contending that at that point, the insurer's obligation is contingent and not fixed. Moreover, criticism has also been directed at what has been characterized as the "bootstrap" approach of *Seider*, whereby the contractual obligation to defend and indemnify, which arguably does not mature until jurisdiction has been acquired over the insured, is seized to provide the sole basis for jurisdiction. 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); *Simpson v. Loehmann*, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 642 (1967) (Burke, J., dissenting); *Minichiello v. Rosenberg*, 410 F.2d 106, 113 (2d Cir. 1968) (Anderson, J., dissenting), *aff'd en banc*, 410 F.2d 117, 120 (2d Cir.) (Anderson, J., joined by Lumbard, C.J. & Moore, J., dissenting), *cert. denied*, 396 U.S. 844 (1969).

In *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rearg. denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968) (mem.), the Court of Appeals held that in a *Seider* suit, recovery is to be limited to the face amount of the policy and the insured is entitled to make a limited appearance, i.e., he may defend on the merits without subjecting himself to in personam jurisdiction. The constitutionality of the *Seider* doctrine was thereafter upheld on the strength of the limited appearance created by *Simpson*. See *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

In addition, several decisions have suggested that *Seider* is to be limited to instances where the plaintiff is a New York resident. See *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 342 (1969) (dictum would restrict *Seider* to New York plaintiffs); *Vaage v. Lewis*, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968), discussed in *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 305, 341 (1968) (doctrine of *forum non conveniens*

problems. In the past, *Seider* has weathered constitutional attack²⁷⁰ as well as attempts by insurers to circumvent its grasp by rewriting insurance policy provisions to preclude *Seider* attachments.²⁷¹ The legislature, concerned with the breadth of the *Seider* doctrine,²⁷² approved a direct action statute which was subsequently vetoed by the Governor.²⁷³ At present, however, the Judicial Conference has abandoned further studies of *Seider* and direct action statutes.²⁷⁴ Thus, it appears that *Seider* will continue to thrive in New York.

Since its inception in 1966, only one other state intermediate appellate court²⁷⁵ and one federal district court²⁷⁶ have elected to adopt the *Seider* rationale, while six states have directly or indirectly rejected it.²⁷⁷ A new wrinkle, foreseen by *Seider* critics,²⁷⁸ has now

applied to dismiss *Seider* action where neither party was a New York resident). *Contra*, *McHugh v. Paley*, 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. N.Y. County 1970) (permitting *Seider* action by nonresident plaintiff against nonresident defendant and New York co-defendant).

²⁷⁰ Initially, the *Seider* doctrine was held unconstitutional in *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968). However, its constitutionality was later sustained after the limited appearance qualification was enunciated by the Court of Appeals in *Simpson. Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969).

²⁷¹ See *Seligman v. Tucker*, 75 Misc. 2d 72, 347 N.Y.S.2d 240 (Sup. Ct. Erie County 1973), discussed in *The Survey*, 48 ST. JOHN'S L. REV. 611, 631 (1974), wherein the court held void as against public policy a liability insurance policy provision disclaiming an obligation to defend and indemnify where such an obligation would provide the sole basis of jurisdiction over the insured.

²⁷² Studies were conducted by the Judicial Conference concerning the need for a direct action statute to supplant *Seider*. A proposed bill embodying the findings of these studies was submitted to the Legislature. See JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES, PROPOSALS RELATING TO A RIGHT OF DIRECT ACTION AGAINST LIABILITY INSURANCE CARRIERS, appearing in 2 N.Y. SESS. LAWS 2046-50 (McKinney 1973); Rosenberg, *Proposed Direct Action Statute*, 16 N.Y. JUD. CONF. REP. 264 (1971). See also Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971).

²⁷³ The Governor vetoed the bill because of its failure to define the parties' rights in a direct action suit with sufficient specificity. Herzog, *Conflict of Laws*, in 1973 *Survey of New York Law*, 25 SYRACUSE L. REV. 11, 19 (1974).

²⁷⁴ See Herzog, *Conflict of Laws*, in 1974 *Survey of New York Law*, 26 SYRACUSE L. REV. 9, 13 (1975).

²⁷⁵ *Turner v. Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (3d Dist. 1973).

²⁷⁶ *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973) (federal court deciding issue and adopting limited appearance requirement).

²⁷⁷ See *Ricker v. Lajoie*, 314 F. Supp. 401, 403 (D. Vt. 1970) (finding *Seider* dissent "more persuasive than the majority opinion on the point of 'contingency'"); *State ex rel. Government Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo. Ct. App. 1970); *DeRentiis 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) (rejecting jurisdiction without mentioning *Seider*); *Werner v. Werner*, 84 Wash. 2d 360, 526 P.2d 370 (1974) (en banc) (rejecting attempt to ground quasi-in-rem jurisdiction on existence of insurers' potential derivative liability under surety contracts with defendant notaries).

²⁷⁸ See dissenting opinions cited note 269 *supra*.

developed — namely, retaliatory adoption by another state. New Hampshire has become the first state to have *Seider* adopted by its highest appellate court.²⁷⁹ More significant, however, is the New Hampshire Supreme Court's apparent intent to limit application of the *Seider* doctrine to cases involving New York defendants.

In *Forbes v. Boynton*,²⁸⁰ plaintiff, a New Hampshire resident injured in a car accident in Maine, sought to acquire quasi-in-rem jurisdiction over defendant, a New York resident, through attachment of defendant's liability insurance policy. In denying defendant's motion to dismiss for lack of jurisdiction, the trial court, apparently overlooking the possibility of a single trial in Maine, concluded that to rule otherwise would require duplication of the trial in New York and New Hampshire, since the co-defendant, who operated the vehicle owned by defendant, was a New Hampshire resident.²⁸¹ According to the court, such duplication would place an unnecessary burden upon the plaintiff. In its view, the real party in interest was the defendant's insurance carrier. Since the insurer did business in New Hampshire and was therefore subject to service in the state, the trial court concluded that the interests of all parties would be furthered by a single action brought in New Hampshire.²⁸² The Supreme Court of New Hampshire, in an opinion by Justice Lampron, sustained the jurisdiction of the court. Justice Lampron noted that the state has a strong interest in allowing residents injured out of state to obtain redress in its courts, "particularly when the State of residence of the defendant would furnish the defendant a forum if the roles were reversed."²⁸³

This rationale is striking in two ways. First, the reasoning underlying the *Forbes* decision closely parallels the development of *Seider* in New York. The *Seider* Court placed heavy reliance on *In re Estate of Riggle*,²⁸⁴ wherein the New York Court of Appeals ordered the appointment of an administrator in order to permit a suit against the estate of a nonresident defendant. The sole asset of the New York estate consisted of the contractual obligation to defend and indemnify contained in the decedent's liability insurance policy. Finding that *Riggle* settled the question of whether an insurer could be a debtor for purposes of prejudgment attachment, the *Seider* Court held that

²⁷⁹ *Forbes v. Boynton*, 114 N.H. 617, 313 A.2d 129 (1974).

²⁸⁰ 114 N.H. 617, 313 A.2d 129 (1974).

²⁸¹ Inasmuch as the accident occurred in Maine, New York's nonresident motorist statute, N.Y. VEH. & TRAF. LAW § 253 (McKinney 1970), could not be used to obtain jurisdiction in New York over the New Hampshire co-defendant.

²⁸² 114 N.H. at —, 313 A.2d at 130.

²⁸³ *Id.* at —, 313 A.2d at 133.

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

jurisdiction had been properly acquired by "attachment since the policy obligation is a debt owed to the defendant by the insurer . . ." ²⁸⁵ Likewise, the *Forbes* court found ample precedent for attachment in *Robinson v. Carroll*,²⁸⁶ a New Hampshire case quite similar to *Riggle*. In *Robinson*, the court concluded that a debt consisting of a promise "not yet due . . . is an obligation of a contractual nature."²⁸⁷ The court went on to hold that such an existing obligation was a sufficient estate to order appointment of an administrator and thereby permit a suit against the decedent debtor.²⁸⁸ Relying on *Robinson*, the *Forbes* court stated that "[i]f [contractual] rights against the insurer are substantial enough to constitute estate [*sic*] to support probate jurisdiction they are sufficient to support their attachment by trustee process."²⁸⁹

The second interesting aspect of the *Forbes* case is that its adoption of *Seider* is defensive in nature, an event foreseen by critics of the New York rule.²⁹⁰ If *Forbes* is to be construed as establishing a future policy²⁹¹ of restricting *Seider*-type attachments to actions in which the defendant is a resident of a jurisdiction that has adopted the *Seider* doctrine,²⁹² a significant constitutional problem surfaces. To permit residents of New Hampshire to attach in actions with *Seider* forum

²⁸⁵ *Seider v. Roth*, 17 N.Y.2d 111, 114, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 102.

²⁸⁶ 87 N.H. 114, 174 A. 772 (1934). It is interesting to note that the *Seider* Court cursorily adopted the reasoning of *Riggle*. In so holding, the Court cited decisions in other states, including *Robinson*, for support. 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

²⁸⁷ 87 N.H. at 117, 174 A. at 775.

²⁸⁸ *Id.*

²⁸⁹ 114 N.H. at —, 313 A.2d at 132. The *Forbes* court further held that defendant would be entitled to make a limited appearance and defend on the merits. *Id.* at —, 313 A.2d at 133.

²⁹⁰ See, e.g., *Minichiello v. Rosenberg*, 410 F.2d 106, 117 (2d Cir. 1968) (Anderson, J., dissenting), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969).

²⁹¹ The court's language in *Forbes* clearly indicates that its holding was strictly limited to the facts before it:

We are not holding that the Seider rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the Seider rule prevails the trial court properly denied the defendant's motion to dismiss plaintiff's action.

114 N.H. at —, 313 A.2d at 133 (emphasis added).

Despite this language, there is nothing contained in the court's opinion that would preclude the application of *Forbes* to a suit brought by a New Hampshire plaintiff against a nonresident defendant, whose state of residence had, like New York, adopted the *Seider* rule.

²⁹² Cf. *Robitaille v. Orciuch*, 382 F. Supp. 977 (D.N.H. 1974), wherein a federal district court sitting in New Hampshire refused to apply *Forbes* to permit attachment of a home owner's liability insurance policy in an action by a New Hampshire plaintiff against a Connecticut defendant. The language the court used in reaching its decision adds credence to the argument that *Forbes* is intended to apply to cases involving only *Seider* forum defendants. See *id.* at 978.

defendants, while at the same time denying other residents of New Hampshire the use of this jurisdictional tool where defendant is from a non-*Seider* forum, arguably denies the latter group equal protection of the law. It might be argued that such a procedure merely serves to put New Hampshire residents on an equal footing with *Seider* forum parties. However, this one-sided application must fall when one considers that the primary basis for adopting a *Seider* procedure was to give residents a convenient forum—a policy which should not be limited to one class of plaintiffs.²⁹³

Seider spawns too many problems on its own, without the aid of new variations of the doctrine such as that espoused in *Forbes*. Such one-sided applications of *Seider* by states, even if only defensively, can only serve to deliver up a host of problems for which neither *Seider* courts nor commentators have formulated solutions.

ARTICLE 65 — NOTICE OF PENDENCY

CPLR 6514: Plaintiff may not file a second notice of pendency where a prior notice was cancelled for failure to serve a timely summons.

Prior to the adoption of the CPLR, New York courts uniformly held that where a prior notice of pendency²⁹⁴ filed against real property was cancelled due to the failure of a plaintiff to serve a timely

²⁹³ States are constitutionally permitted to treat classes of people differently but the classifications

must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Reed v. Reed, 404 U.S. 71, 76 (1971), quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). While this "rational basis test" has been used primarily to test state legislation challenged as violative of the equal protection clause of the fourteenth amendment, see, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961), there would appear to be no reason why it should not apply in like manner to state decisional law, since this, too, can be viewed as "state action." See *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). Moreover, the *Seider* doctrine, as enunciated in New York, has been described as a "judicially created direct action statute." *Minichello v. Rosenberg*, 410 F.2d 106, 109 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969).

²⁹⁴ Upon its filing with a court and indexing by the clerk of the county in which the subject property is located, a notice of pendency provides subsequent purchasers and encumbrancers of the property with constructive knowledge of the existence of a claim concerning it. CPLR 6501. An individual recording a conveyance or encumbrance after the filing of such notice is "bound by all proceedings taken in the action . . . to the same extent as if he were a party." *Id.*

CPLR article 65, which contains the procedure for filing a notice of pendency, was designed to restrict the common law doctrine of *lis pendens*. See 7A WK&M ¶ 6501.03. At common law, a prospective purchaser of property was required to "search the court calendar to determine whether the land he wished to buy or encumber was subject to pending litigation." *Id.* ¶ 6501.01. It should be observed that CPLR article 65 applies only to actions involving real property and not to personal property claims. CPLR 6501.