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ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

GPLR 5201: Reservation clause in liability policy causes new Seider problems.

The rule of *Seider v. Roth*¹¹⁰ allows a New York plaintiff to maintain a quasi-in-rem action by attaching the contractual obligations of a liability insurer to defend and indemnify a nonresident insured defendant. The value of the attached res is the limit of the liability policy¹¹¹ and the insurer, who is the true party in interest, is liable up to this amount in the event the insured defendant is held responsible for the plaintiff's injuries. Since a plaintiff only resorts to this peculiar procedure when no other basis of jurisdiction over the defendant is available, the typical *Seider* case involves an out-of-state accident and a defendant whose only contact with New York is the amenability of his insurer to process here. Despite the extremely tenuous nexus with the forum state in such cases, *Seider* has thus far withstood constitutional attack.¹¹²

A new problem spawned by the *Seider* doctrine arose in *Seligman v. Tucker*,¹¹³ wherein a New York resident plaintiff commenced a personal injury action arising out of a Massachusetts accident by attaching the Washington, D.C. resident defendant's automobile liability policy. The policy contained the following provision:

The Company shall have no obligation to indemnify, pay to or on behalf of, or defend any person entitled to protection under this policy where such obligations or this policy provide the sole basis

¹¹⁰ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), noted in 67 COLUM. L. REV. 550 (1969); 51 MINN. L. REV. 158 (1966); 43 ST. JOHN'S L. REV. 58 (1968).

¹¹¹ See *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1968).

¹¹² In its first constitutional test in the federal courts, the *Seider* doctrine was held unconstitutional, the court proceeding on the assumption that New York law did not allow a limited appearance. The court reasoned that unless the defendant was permitted to defend on the merits without conferring in personam jurisdiction, he would be denied due process of law. *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968). Indeed at the time *Seider* and *Podolsky* were decided, GPLR 320(c)(1) had not yet been enacted and no other New York authority for a limited appearance existed. Subsequently, however, in *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1968), the New York Court of Appeals held that the defendant in a *Seider*-type action could appear and defend on the merits without suffering any in personam consequences. This holding rescued *Seider* from oblivion. In *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, *rehearing denied*, 396 U.S. 949 (1969), the United States Court of Appeals for the Second Circuit upheld the *Seider* procedure as supplemented by the limited appearance created in *Simpson*. In so holding, the court assumed that if the defendant were unsuccessful in his defense he would not be stopped in a subsequent in personam suit by the quasi in rem judgment rendered against him in the *Seider* action. The court added the proviso that the plaintiff in a *Seider* action must be a New York resident. The latter requirement was reiterated in *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969).

¹¹³ 75 Misc. 2d 72, 347 N.Y.S.2d 240 (Sup. Ct. Erie County 1973).

of jurisdiction of the court over said persons, such obligations, or this policy.¹¹⁴

The defendants moved to vacate the order of attachment, arguing that the above provision prevented any res from coming into existence. The court denied the motion, quoting from the *Seider* opinion wherein it was observed that "the policy [an automobile liability policy without the clause at issue in *Seligman*] casts on the insurer several obligations which accrue as soon as the insurer gets notice of an accident, and whether or not suit is brought."¹¹⁵ These pre-existing obligations, the *Seligman* court held, constitute an attachable res, despite the contractual limitation on the obligation to defend and indemnify.

The court's holding immediately raises certain practical questions. Is the value of the res still the full measure of the policy limits despite the reservation clause, or is it merely the value of the miscellaneous package of rights which accrue before suit commencement, such as the right to receive certain medical payments or to have the insurer investigate the accident? If the latter is the rule, the plaintiff can look forward to only a meager recovery. In *Simpson v. Loehmann*,¹¹⁶ the Court of Appeals held that "[f]or the purpose of pending litigation, which looks to an ultimate judgment and recovery, such value [of the attached res] is [the policy's] face amount and not some abstract or hypothetical value."¹¹⁷ The policy in *Simpson*, however, did not contain the clause at issue in *Seligman*. Unfortunately, the *Seligman* court refused to address the question, stating that the "rights, duties and obligations under the policy here are between [the insurer] and the defendants. It is not for this court to decide those matters in this proceeding."¹¹⁸ The court did, however, strongly suggest that the clause might be given no effect and the insurer held liable for the full policy limits. Referring to the fact that the insurance form had been administratively approved in New York, the court declared that "[t]he administrative act of the Superintendent of Insurance, in approving the form of an insurance contract, cannot be presumed to defeat the public policy of the State of New York, or overcome the law as settled by the Courts of New York."¹¹⁹

If it was the court's intent that the policy provision be vitiated

¹¹⁴ *Id.* at 73, 347 N.Y.S.2d at 242.

¹¹⁵ *Id.* at 74, 347 N.Y.S.2d at 242, quoting *Seider v. Roth*, 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

¹¹⁶ 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1968).

¹¹⁷ *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 637.

¹¹⁸ 75 Misc. 2d at 74, 347 N.Y.S.2d at 242.

¹¹⁹ *Id.* at 74, 347 N.Y.S.2d at 243.

completely, its treatment of the issue seems too perfunctory. By overriding an agreement in a contract negotiated and delivered in another jurisdiction and involving only nonresidents, a state may exceed the bounds of due process. The question of a state's power in this sphere was considered by the United States Supreme Court in *Watson v. Employers Liability Assurance Company*.¹²⁰ There the validity of a Louisiana direct action statute was at issue. The plaintiff was a Louisiana resident, injured in Louisiana by a product manufactured in another state. The Louisiana court allowed a direct action against the manufacturer's liability insurer although the insurance contract, which had been negotiated and delivered outside Louisiana, contained a provision prohibiting such actions. The Supreme Court allowed the Louisiana court to override the policy provision, placing great emphasis on the state's interest in providing a forum for the redress of injuries occurring within its own borders. The Court conceded that "[s]ome contracts made locally, affecting nothing but local affairs, may well justify a denial to other states of power to alter those contracts."¹²¹

It has been argued that in *Watson* the forum state's interest in the case was much stronger than in *Seider*.¹²² In the former case, the injury occurred within the forum state, a fact which in certain circumstances may even provide a basis for in personam jurisdiction.¹²³ In the latter case, the only jurisdictional nexus was the plaintiff's residence in the forum state. Thus in the *Seider* situation the forum's interest may not be strong enough to justify its rewriting a contract between nonresidents.

An earlier United States Supreme Court case, *Home Insurance Co. v. Dick*,¹²⁴ placed a clear limitation on a state's power to disregard provisions in out-of-state contracts. A Mexican resident insured commenced a quasi-in-rem action against a Mexican insurer in a Texas court by garnishing reinsurers present there. The policy sued upon was negotiated, executed, and was to be performed in Mexico, and contained a contractual statute of limitations on claims. Although this limitations period had elapsed, the Texas court allowed the insured to proceed, applying the Texas limitations period to the action. The United States Supreme Court held that "Texas was . . . without power

¹²⁰ 348 U.S. 66 (1954), *rehearing denied*, 348 U.S. 921 (1955).

¹²¹ *Id.* at 71.

¹²² *Minichiello v. Rosenberg*, 410 F.2d 106, 116 (2d Cir. 1968) (Anderson, J., dissenting), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844, *rehearing denied*, 396 U.S. 949 (1969).

¹²³ *See, e.g.*, CPLR 302(a)(3).

¹²⁴ 281 U.S. 397 (1930).

to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law."¹²⁵ The analogy to the *Seligman* case is quite clear. If the *Seligman* court's intent was to ignore the provision absolving the insurer from liability in *Seider*-type cases, the effect would be to impose a greater obligation than the insurer had agreed to assume. *Home Insurance* requires the state to show some interest in the case before it can do this.

As the *Seligman* case demonstrates, the *Seider* doctrine has a boundless propensity for creating new problems.¹²⁶ To ameliorate this situation, a recent legislative proposal would replace *Seider* with a direct action statute.¹²⁷ A right of action would be created against automobile liability insurers doing business or qualified to do business in New York. The action would be maintainable against the insurer regardless of any contrary provision in the policy but only in cases involving out-of-state automobile accidents where no basis of personal jurisdiction over the insured is present. The proposed statute would bar all attachment of liability policies. While an action under this statute might involve the voiding of provisions in out-of-state contracts, its limitation to automobile cases makes it less objectionable than the *Seider* doctrine which could conceivably have a wider application. More importantly, the direct action statute would avoid the quasi-in-rem nature of the proceeding,¹²⁸ thus eliminating the troublesome question of determining the value of the attached res. Hopefully, this proposal will soon become the law.

CPLR 5240: Court indicates that relief from a completed sale of real property will be difficult to obtain.

Too often the sale of a judgment debtor's home pursuant to CPLR 5236 results in a miscarriage of justice.¹²⁹ In many cases, a substantial

¹²⁵ *Id.* at 408.

¹²⁶ *Seider's* difficulties have inspired much critical comment. See, e.g., La Brum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747, 751 (1968); Rosenberg, *One Procedural Genie Too Many Or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660, 687 (1971); Stein, *Jurisdiction By Attachment of Liability Insurance*, 43 COLUM. L. REV. 1075 (1968); 7B MCKINNEY'S CPLR 5201, *supp. commentary* at 14-72 (1973).

¹²⁷ 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, MCKINNEY'S N.Y. SESSION LAWS 2046-50 (1973). This proposal was passed by the 1973 Legislature but was vetoed by the Governor.

¹²⁸ Professor David D. Siegel notes that most of the problems of the *Seider* doctrine arise from its quasi in rem mold. 7B MCKINNEY'S CPLR 5201, *supp. commentary* at 51-52 (1973).

¹²⁹ In 1963, both the right of redemption and the requirement that personal property