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# CPLR 5201: Constitutionality of Seider v. Roth Reluctantly Upheld by Divided Federal Court

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what constitutes an implied waiver in the case of a two-stage trial had not been previously adjudicated and thus should have been dealt with more extensively by the court. The polling procedure gives each juror the opportunity to dissent from the verdict to which he had previously agreed. A denial of this opportunity may therefore cause the verdict to be recorded in the minutes of the court[183] without specific confirmation. In view of the procedure employed in *Pickering*, the damages issue would be tried only after the liability verdict was recorded. By denying defendants' request to have the jury polled at the conclusion of the liability phase of the proceedings, the trial court did not give due recognition to the possible implications of its denial. If the jury had not confirmed the first verdict upon being polled, the question of liability would have to have been reconsidered, no entry in the court's records could have been made, and the need for proceeding with the second phase of the trial would have been obviated.

Moreover, the second department failed to consider the primary purpose of the polling procedure — to make certain that each juror actually agrees with the pronounced verdict and that no coercion has taken place in the jury room.[184] It would seem that a juror who has been coerced into acquiescing in a verdict would be less likely to disclose the coercion several days after it has occurred. In addition, once the damages phase had begun, the defendants' liability for such damages would likely have become conclusively fixed in the jurors' minds. Accordingly, it would have been proper to confirm the liability verdict immediately after it was rendered and not several days thereafter.

### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5201: Constitutionality of* Seider v. Roth *reluctantly upheld by divided fededral court.*

The recently added subdivision (1) in CPLR 320(c) provides that "an appearance is not equivalent to personal service upon the defendant . . . if jurisdiction is based solely upon a levy on defendant's property within the state pursuant to an order of attachment." This amendment to CPLR 320 was necessitated by the widely criticized *Seider v. Roth*[185] doctrine authorizing a New York plaintiff

183 *See* CPLR 4112.

184 It has been stated that the object of the poll is to "ascertain with certainty . . . that no one has been coerced or induced to agree to a verdict to which he does not actually assent." Brith Trumpeldor of America, Inc. v. Bermil Sales & Serv. Co., 16 Misc. 2d 186, 174 N.Y.S.2d 725 (N.Y.C. Munic. Ct. N.Y. County 1958), *modified*, 17 Misc. 2d 206, 183 N.Y.S.2d 887 (App. T. 1st Dep't 1959).

185 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

injured in a foreign jurisdiction to attach a nonresident defendant's liability insurance policy, if issued by an insurer doing business in New York. By allowing a *Seider* defendant the right to a limited appearance, and thereby eliminating any concern that he would feel compelled to default rather than risk personal liability beyond the value of his insurance coverage, the New York legislature has answered what was perhaps the most valid criticism of the *Seider* attachment. The significance of this legislation is negligible, however, since it is merely a codification of a New York Court of Appeals ruling.[186] Of greater significance is the fact that the legislature, while recognizing that many other difficulties have been created by *Seider*, left the resolution of these problems to the courts.[187] Three such problems center around collateral estoppel, due process, and an insurer's disclaimer should the defendant elect to default.

*Collateral Estoppel:*

With the addition of subdivision (1) to CPLR 320(c), a *Seider* defendant need no longer fear personal liability beyond the value of his insurance coverage if he defends on the merits. However, what would be the result in a situation wherein a plaintiff, having prevailed in a New York *Seider* action, later brings suit for the unsatisfied balance of his damages in a forum having in personam jurisdiction over the defendant? Although the adjudication under the auspices of the *Seider* attachment would have been limited as to the amount of damages available to the plaintiff, it would nevertheless have fully determined the defendant's liability. Under the doctrine of collateral estoppel, a subsequent in personam action by the plaintiff would apparently be restricted to a determination of the damages he sustained beyond the amount awarded in the previous *Seider* action. Thus, the defendant would be theoretically barred from raising any defenses to his alleged misfeasance because the New York adjudication would be deemed to have previously determined his liability. The nonresident would therefore seemingly be compelled to defend the original quasi in rem action, regardless of any burden, or be thereafter estopped from contesting his alleged negligence.

*Due Process:*

A basic criticism of the *Seider* procedure concerns the burden imposed on a nonresident forced to defend a tort action in a distant

186 Simpson v. Loehman, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 317, 290 N.Y.S.2d 914 (1968).

187 *See* BENDER'S CPLR 320, at 3-15 (Pamphlet ed. 1969).

state merely because his insurer has chosen to do business in that forum. In view of the fact that modern concepts of jurisdiction are based upon "minimum contacts" with the forum state and "traditional notions of fair play and substantial justice,"[188] the exercise of quasi in rem jurisdiction over a *Seider* defendant would appear to be based upon tenuous grounds. The juridical situs of an intangible, such as the insurer's obligations to defend and indemnify his insured, is a legal fiction. The selection of the situs of property is traditionally based upon the requirements of justice and convenience, in keeping with the due process clause of the fourteenth amendment.[189] One must question whether the establishment of New York as the situs of a debt, by means of the *Seider* procedure, is consistent with these traditional requirements.

*Insurer's disclaimer should defendant elect to default:*

In addition to the expenses and inconvenience imposed upon a *Seider* defendant, if he chooses to default rather than tolerate these burdens, he is confronted with section 167 of the Insurance Law.[190] Under this provision the insurer can disclaim liability if he can show a failure to cooperate on the part of his insured. Therefore, if a *Seider* defendant allows judgment to be entered upon his default, could not the insurer withdraw, and successfully assert lack of cooperation in any action brought against him?

*Minichiello v. Rosenberg*,[191] decided by the Court of Appeals for the Second Cricuit, involved virtually the same facts as *Seider v. Roth*. Although the *Minichiello* court called for a reexamination of *Seider*, it specifically answered the foregoing questions in upholding the constitutionality of that decision. Although recognizing the right of a *Seider* defendant to defend the attachment without subjecting himself to in personam jurisdiction, the court found it necessary to deal with the contention that a later suit brought by the plaintiff for the unsatisfied balance of his demands would be decided against the defendant under the theory of collateral estoppel. This contention was refuted by interpreting a *Seider* action as "in effect a direct action against the insurer."[192] Therefore, the court reasoned that since the insured would

188 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

189 Severnol Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931).

190 N.Y. INS. LAW § 167 (McKinney 1966).

191 410 F.2d 106 (2d Cir. 1968), *rehearing en banc*, 410 F.2d 117 (2d Cir. 1969), *cert. denied*, — U.S. — (1969).

192 410 F.2d at 112.

not have been the true defendant in a *Seider* action, no state could constitutionally give collateral estoppel effect to a *Seider* judgment.

The allegation that an attachment under *Seider* is violative of the due process clause of the fourteenth amendment was answered in *Minichiello* upon en banc reconsideration. The basis for rehearing was the defendant's contention that the court failed to give adequate attention to the burden imposed on a nonresident forced to defend a tort action in a distant state merely because his insurer has chosen to transact business in that forum. The Second Circuit again upheld the constitutionality of *Seider* in this respect, placing heavy reliance on the landmark case of *Harris v. Balk*.[193]

*Harris* involved what would today be an attachment of a debt under CPLR 5201(a). The defendant, a resident of North Carolina, was forced to defend the action in Maryland, simply because his debtor had been present in that state. Since the debt was said to follow the debtor, the attachment was held valid. In applying this rule, the *Minichiello* court reasoned that a *Harris* defendant had no more control over the whereabouts of his debtor than a *Seider* defendant has over the business transactions of his insurance company. As long as *Harris* stands, said the court, no unfair burden can be found to be imposed on a *Seider* defendant. Although not specifically noted by the court, it is apparent that under the *Harris* rule the requirement of due process is less stringent for the exercise of quasi in rem jurisdiction than for jurisdiction in personam.

The *Minichiello* court next responded to criticism that the insurer would be able to resist liability on the basis of the insured's non-cooperation, should the defendant choose to default. Any potential problems in this regard were obviated by the court's holding that a breach of the insured's obligation to cooperate would merely relieve the insurer of liability under the *Seider* attachment. In any subsequent action, he would again be liable to defend and indemnify his insured.

Despite the fact that *Minichiello* has adequately disposed of several objections to the continued viability of the *Seider* procedure, the most interesting, and perhaps the most significant aspect of the Second Circuit's decision was set forth in the majority's conclusion upon rehearing:

> [W]e are not required to decide whether *Seider* might produce constitutionally impermissible results if applied so as to prefer one claimant over another in cases of multiple claims where the

193 198 U.S. 215 (1905).

> damages exceed the policy limits and the insured is without funds to pay the excess. We would hope that realization of the complexities of such problems and the considerations urged in our brother ANDERSON'S dissent might stimulate the reexamination of *Seider*. . . .[194]

Thus, while sustaining the constitutionality of the *Seider* doctrine, the *Minichiello* court has joined the ranks of those who criticize the decision because of the myriad of problems it has created.[195]

*CPLR 5234: Stipulation between parties incorporated in court order is held to be insufficient to establish priority of creditor.*

Priority among judgment creditors is determined by CPLR 5234(c) where the attached res is in the possession of a third party, and, generally speaking, priority is obtained by the creditor who files his court order first. However, a creditor's judgment will not be deemed prior unless he obtains a turnover order[196] pursuant to either CPLR 5227 or CPLR 5225(b) directing a third party indebted to the judgment debtor,[197] or holding money or property belonging to the debtor,[198] to pay what is owed, or so much of it as will satisfy the judgment, to the judgment creditor. The procurement and service of a restraining order, or any other steps taken by the creditor, no matter how diligent, are insufficient in themselves to qualify for priority.[199]

A question of priority between judgment creditors arose in *Cook v. H.R.H. Construction Corp.*,[200] wherein the plaintiff (Cook) sought an adjudication declaring his claim against funds held by defendant H.R.H. Construction Corporation (H.R.H.) to be superior to the claim of defendant-creditor Goldman.

On August 12, 1966, Cook had served a restraining notice on H.R.H. with respect to property in which Grunwald, the plaintiff's judgment debtor, and Grunwald's business concern, conducted under the name of Shur-Fit Metal Products Corporation (hereinafter Shur-Fit), had an interest. H.R.H. moved for an order vacating the restraining notice, and Cook, in opposition to that motion, moved for a turnover order. Before the court ruled on these motions, however, the

194 410 F.2d at 119.

195 *See, e.g.*, 7B McKINNEY'S CPLR 5201, supp. commentary 18 (1965-69).

196 As used in the present discussion, a "turnover order" is an order to deliver or pay the property or money, or an order to transfer such, to a receiver. *See* 6 WK&M ¶ 5234.17 (1969).

197 CPLR 5227.

198 CPLR 5225(b).

199 City of New York v. Panzirer, 23 App. Div. 2d 158, 259 N.Y.S.2d 284 (1st Dep't 1965).

200 32 App. Div. 2d 806, 302 N.Y.S.2d 364 (2d Dep't 1969).