

## CPLR 5201: Sheriff May Recover Poundage Fees Upon Vacatur of "Seider" Attachment

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Judge Friendly, writing for a less than enthusiastic majority found that *Seider*, as construed by the New York Court of Appeals, is constitutional. While the Court noted the many problems that *Seider* has created, it felt compelled to salvage its constitutionality on the basis of the New York Court of Appeals' per curiam opinion accompanying a denial of a motion to reargue *Simpson v. Loehmann*.<sup>48</sup> The per curiam opinion undermines the objections of *Podolsky* by stating that New York's jurisdiction is limited to the face value of the attached policy thus in effect, allowing the insured a limited appearance.

In spite of *Minichiello* there may still be some relief for the over-burdened defendant and his insurer in the federal courts. In *Jarvick v. Magic Mountain Corp.*,<sup>49</sup> another "*Seider*" case removed to the federal district court, a motion was made, under the federal transfer statute, to transfer the action to defendant's venue.<sup>50</sup> The motion was granted on the condition that the defendant appear generally. If a defendant can show, to a federal court's satisfaction, that venue should be transferred, the problems created for him by *Seider* would be significantly reduced.

While *Seider* has thus far met the constitutional challenges raised against it, a motion for rehearing of the *Minichiello* case has been granted and it will now be reheard, on briefs alone, by the Court of Appeals, Second Circuit en banc. Afterwards, the United States Supreme Court might be called on to determine the constitutionality of attaching the contingent obligations in a liability insurance policy.

*CPLR 5201: Sheriff may recover poundage fees upon vacatur of "Seider" attachment.*

In *Gazerwitz v. Adrian*,<sup>51</sup> plaintiffs were involved in an out-of-state accident and commenced an action pursuant to the procedure sanctioned in *Seider v. Roth*.<sup>52</sup> An order of attachment was presented to the sheriff and he levied on the defendant's liability insurance policy.

Plaintiffs proceeded with the action; however, obstacles at every step of the way<sup>53</sup> prompted the institution of an in personam action in the United States District Court in New Jersey. The New Jersey action was settled for an amount in excess of the face

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<sup>48</sup> 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

<sup>49</sup> 290 F. Supp. 998 (S.D.N.Y. 1968) (plaintiff was injured on a ski lift in Vermont).

<sup>50</sup> 28 U.S.C. § 1404(a) (1964).

<sup>51</sup> 57 Misc. 2d 748, 293 N.Y.S.2d 441 (Sup. Ct. Kings County 1968).

<sup>52</sup> 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

<sup>53</sup> *Sazerwitz v. Adrian*, 28 App. Div. 2d 556, 280 N.Y.S.2d 233 (2d Dep't 1968). See *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 451 (1968).

value of the policy attached in New York,<sup>54</sup> and it was provided that the defendant and his insurer would be released from all liens to which the sheriff might be entitled on the attached policy in New York.

The plaintiffs moved under CPLR 6223 to vacate the order of attachment upon the ground that the attachment was unnecessary to their security. The Sheriff of the City of New York opposed the motion and cross-moved for an order directing the plaintiff to pay poundage fees.<sup>55</sup> The cross-motion was granted. The court felt that violence would be done to the letter and spirit of the statutory provisions if plaintiffs were allowed to vacate an attachment on the basis of a settlement without payment of poundage.<sup>56</sup>

As the instant case illustrates, *Seider* plaintiffs, who use the services of a sheriff to obtain quasi-in-rem jurisdiction in New York, must now anticipate the payment of poundage fees. Poundage will be exacted despite the fact that a settlement is procured in a foreign state in personam action.

*CPLR 5226: Installment payment order available despite existence of prior outstanding income executions.*

CPLR 5226 allows a judgment creditor, upon motion and notice thereof to the judgment debtor, to request the court to order specified installment payments based upon the judgment debtor's ability to pay. Relief may be granted under the section despite the existence of prior outstanding income executions.

In *Schwartz v. Goldberg*,<sup>57</sup> a judgment creditor applied for an installment payment order and the debtor argued that such an order

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<sup>54</sup> The Court of Appeals has designated the face value of the attached policy as the limit of the quasi-in-rem jurisdiction. See *Simpson v. Loehmann*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

<sup>55</sup> It should be noted that the defendant is not liable for sheriff's fees if he has obtained a vacatur of an attachment order. See, 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶6223.01 (1968). (See also CPLR 8012 (b)(3) providing the court with power to order the party at whose insistence the order of attachment was granted to pay the sheriff's fees where the order is vacated or set aside.

<sup>56</sup> In *American Broadcasting-Paramount Theatres, Inc. v. E. & E. K. Enterprises, Inc.*, 231 N.Y.S.2d 633 (Sup. Ct. N. Y. County 1962), *aff'd*, 18 App. Div. 2d 975, 238 N.Y.S.2d 663 (1st Dep't 1963) plaintiff had attached property in New York and then attached property in California. Plaintiff informed the New York Sheriff that he had abandoned the action in New York. The Sheriff moved to affix poundage and the motion was denied. The court held that there must be a collection or the facts must come within the purview of a statutory exception, *i.e.*, settlement. In this case, the California action was still pending and no settlement had been made at the time of motion. It would appear that plaintiff by giving notice of abandonment before any judgment or settlement outside New York could escape the burden of poundage. See also *Personeni v. Aquino*, 6 N.Y.2d 35, 159 N.E.2d 559, 187 N.Y.S.2d 764 (1959).

<sup>57</sup> 58 Misc. 2d 308, 295 N.Y.S.2d 245 (Sup. Ct. Bronx County 1968).