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CPLR 5201: Insurer's Contractual Obligation to Defend and Indemnify Is a "Debt" and Capable of Attachment

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and (2) that the cost of the repairs itemized is usual and customary. Finally, the bill must be served upon the adverse party's attorney at least five days prior to the trial.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Insurer's contractual obligation to defend and indemnify is a "debt" and capable of attachment.

CPLR 5201(a) provides that a money judgment can be enforced against any debt, whether incurred within or without the state or whether incurred by a resident or nonresident. There is no express provision requiring that service of process be possible on the party before the debt can be subject to enforcement, since "jurisdiction over the judgment debtor or garnishee is an implicit requirement for using any enforcement proceeding." [90]

One area of litigation involving this section has been developing a definition of the word "debt" in relation to the contractual obligations of defendant insurance companies.[91] In *Matter of Riggle*,[92] petitioner, a New York resident, was injured by decedent, a resident of Illinois, in Wyoming. He moved to have an administrator of Riggle's property appointed in New York. Basing its decision on Section 47 of the Surrogate's Court Act,[93] the Court held that even though no judgment had been obtained against Riggle or his estate, he was considered a creditor, and the insurance carrier was held to be a debtor within the meaning of the statute.[94]

In *Seider v. Roth*,[95] the plaintiffs, residents of New York, were allegedly injured in an accident in Vermont through the negligence of the defendant, a Canadian domiciliary. The defendant was insured by a company doing business in New York, however, the policy was issued in Canada. An order of attachment[96] directed

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[90] 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5201.04 (1965).

[91] See also CPLR 6202, which provides that "any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment."

[92] 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

[93] This section provides that a debt owing to a defendant by a resident of New York is regarded as personal property the situs of which is within the county where the debtor resides.

[94] Although not confronted with similar jurisdictional problems since the accident occurred in New York, another court has stated that a nonresident insurer's "contractual obligation to defend and indemnify defendant is a debt or cause of action capable of being attached . . . ." Fishman v. Sanders, 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (2d Dep't 1962), *rev'd on other grounds*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965).

[95] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[96] CPLR 6202.

the sheriff to levy on the contractual obligation of the insurer to defend and indemnify the defendant under the liability policy. Since the insurer was doing business in New York, the attachment papers were served on it within the state. It is significant to note that the defendant was not served in New York, but was personally served in Canada, and that the insurer was also a foreign domiciliary.

In denying defendant's motion to vacate the attachment, the majority stated that "as soon as the accident occurred there was imposed on . . . [the insurer] a contractual obligation which should be considered a 'debt' within the meaning of CPLR 5201 and 6202." [97] This statement by the Court appears to raise myriad problems both theoretical and practical. The theoretical difficulties, as noted by Judge Burke in his dissent, involve the classification of these types of contractual obligations as a "debt." These obligations, called a debt by the majority, do "not fall within the definition of attachable debt contained in CPLR 5201 (subd. [a]), *i.e.*, one which 'is past due or which is yet to become due, certainly or upon demand of the judgment debtor.' " [98] This conclusion was reached since the contract imposed the obligation to defend and indemnify only *"if a suit is commenced* and *if damages are awarded."* [99] In conclusion, the dissent noted that since jurisdiction was obtained only by attachment of the liability policy, this, in effect, was allowing a "direct action" against the foreign insurer under the pretext of in rem jurisdiction over a nonresident motorist.

Although the theoretical problems exist, it appears that the practitioner will be more interested in the practical difficulties which will arise from this decision. For example, this action was one involving in rem jurisdiction under CPLR 320(c),[100] and the defendant offered no defense on the merits. Having appealed to the highest court, and having lost on the jurisdictional issue, the defendant now may either defend on the merits or default in the action. If he defaults, the judgment will have to be satisfied out of the attached property. Therefore, a question must arise as to the value of the attached property, viz., the insurer's obligation to defend and indemnify. If the value of the obligation to indemnify is held to be the face value of the policy, there will no longer be any distinction between in rem and in personam jurisdiction. This conclusion is mandated since New York will have extended its jurisdiction extraterritorially without having a recognized basis for doing so, since there is no "long-arm" statute applicable here,

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[97] Seider v. Roth, 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966).

[98] *Id.* at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (dissenting opinion).

[99] *Ibid.*

[100] This provides that the defendant may make a special appearance to contest the jurisdiction of the court.

and since the "long-arm" basis is the furthest the United States Supreme Court has gone in sustaining the extraterritoriality of state court process.

Assuming that the aforementioned difficulties were resolved by equating in rem and in personam jurisdiction, another problem now arises. Since New York courts must entertain a suit brought by one of its residents,[101] the litigation resulting from this decision could add to our already overburdened calendars. Previously, a resident could not sue a foreign domiciliary in New York if he had no jurisdiction over the latter; however, as a result of this case, our courts would give the plaintiff jurisdiction of the defendant, since many foreign insurers have sufficient presence in New York to make them garnishees in a New York action.

CPLR 5206(b): Amendment.

The amendment to this section rectifies an inaccuracy which had heretofore existed. Instead of recording the property exempted as a homestead in the county clerk's office, the section is now worded so that such recording is done in the office of the *recording officer.* This clause was necessitated by the fact that in some counties the office of the county clerk is not the office of the recording officer.

CPLR 5252: Amendment.

This section, effective January 1, 1967, protects an employee from discharge when his employer has been served with an income execution. However, if an employer is served with more than one income execution within a twelve-month period, this section does not apply and the employer can discharge his employee. An employee who is wrongfully discharged under this section is given the opportunity to institute a civil action for wages lost if such action is commenced within ninety days after the discharge. The court, in addition to giving the employee damages, can also order his reinstatement.

For a more detailed discussion of this amendment, see Professor David D. Siegel's *1966 Commentary* in McKinney's CPLR.

ARTICLE 55 — APPEALS GENERALLY

CPLR 5520(c): Amendment.

Due to an increasing number of appeals wherein there are defective notices of appeal and motions directed thereto, the Judicial

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[101] See Wagner v. Braunsberg, 5 App. Div. 2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958).