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**JAVOREK v. LARSON: INSURER'S OBLIGATION TO
DEFEND AND INDEMNIFY INSUFFICIENT TO
ESTABLISH JURISDICTION—SEIDER
SOURS IN CALIFORNIA**

INTRODUCTION

With its recent decision in *Javorek v. Larson*,¹ the California Supreme Court has joined the growing number of states which have rejected the exercise of jurisdiction based upon the quasi in rem attachment of automobile liability insurance policies. This particular jurisdictional basis was first recognized in the New York case of *Seider v. Roth*,² where the insurer's obligation to defend and indemnify the insured was found to be an attachable debt, yielding jurisdiction to the plaintiff's home state of New York, even though the defendant was a Canadian resident and the accident occurred in Vermont. The only requirement of a *Seider* attachment is that the defendant's insurance company be licensed to conduct business in the plaintiff's home state.³ *Seider* has gained few followers and has been the target of considerable criticism.⁴ This note will analyze the *Javorek* court's rejection of *Seider* and its potential impact on other states. Additionally, some constitutional problems not raised in *Javorek* will be examined. Finally, some proposals will be made concerning current jurisdictional trends.

BACKGROUND

The facts in *Javorek* follow a pattern typical of *Seider*-type cases. California residents Jack and Juanita Larson were injured in an auto-

1. 131 Cal. Rptr. 768, 552 P.2d 728 (1976).

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

3. 17 N.Y.2d at 114, 269 N.Y.S.2d at 102, 216 N.E.2d at 315. See also Siegel, *Jurisdiction Ad Infinitum: New York's "Rem" Seizure of the Insurance Policy for Jurisdiction in Accident Cases*, 20 INT. & COMP. L.Q. 99 (1971) [hereinafter cited as *Jurisdiction Ad Infinitum*].

4. Articles supporting *Seider* include: Seidelson, *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970) [hereinafter cited as *The Urge Toward Reason*]; Comment, *Jurisdiction—Quasi In Rem: Seider v. Roth to Turner v. Evers—Wrong Means to a Right End*, 11 SAN DIEGO L. REV. 504 (1974) [hereinafter cited as *Wrong Means to a Right End*]; Note, *Seider v. Roth in the Wild and Woolly West*, 5 SW. U.L. REV. 417 (1973) [hereinafter cited as *Wild and Woolly West*]; 51 MINN. L. REV. 158 (1966). For articles criticizing *Seider*, see notes 71 and 86 *infra*.

mobile collision in Oregon due to the alleged negligence of Frank Javorek.⁵ After his wife's death from her injuries, Larson filed suit in California, attempting to serve the summons and complaint by mail on the defendants in Oregon.⁶ The defendants were never personally served in California and did not make a general appearance in the action. Plaintiffs then obtained a writ of attachment on defendants' property in Sonoma County, California, including the contract obligations of State Farm Insurance Company to defend and indemnify the defendants in any automobile liability claim against them.⁷ State Farm, an Illinois corporation doing business in California, had insured the Javoreks in Oregon and received the writ of attachment at its regional office in Santa Rosa, California.⁸

Defendants challenged the actions in a special appearance. After their motions to quash were denied by the trial court, they sought a writ of mandate from the court of appeals to compel the lower court to grant their motions.⁹ This appellate action was unsuccessful and the defendants turned to the California Supreme Court for relief. The issue presented to the court was whether State Farm's obligation to defend and indemnify Javorek was a sufficient basis for quasi in rem jurisdiction, according to the definition of property in the California interim attachment statutes.¹⁰ In finding for Javorek and the other defendants, the court rejected each of the plaintiffs' following contentions:

- 1) Quasi in rem jurisdiction may be based on the insurer's obligation to indemnify the defendant insured for damages he may owe the plaintiff as a result of the insured's alleged negligence.¹¹

5. 131 Cal. Rptr. at 771, 552 P.2d at 731.

6. *Id.* Co-defendant Marion Brice, also a resident of Oregon, was the driver of a second vehicle involved in the collision.

7. *Id.* at 777, 552 P.2d at 737. See also note 43 *infra* and accompanying text.

8. *Id.* at 777, 552 P.2d at 737.

9. *Id.*

10. California's interim attachment law in force at the time of the *Javorek* case was Section 537 of the Code of Civil Procedure. It provided, in pertinent part, that:

[t]he plaintiff, in an action specified in Section 537.1, at the time of issuing the summons, or at any time afterwards, may have the property specified in section 537.3 of a defendant specified in section 537.2 attached in accordance with the procedure provided for in this chapter, as security for the satisfaction of any judgment, as provided for in this chapter.

CAL. CIV. PROC. CODE § 537 (West) (repealed 1977).

Other parts of Section 537 permitted the attachment of all property of a defendant not residing in California in an action for the recovery of money.

Section 537 was enacted in 1972 and repealed as of January 1, 1977, replaced by Section 482.010, known as the "The Interim Attachment Law". It is contained in a new Title 6.5 Attachment, of Part 2, Civil Actions of the Code of Civil Procedure.

11. 131 Cal. Rptr. at 778, 552 P.2d at 738.

2) Even if the court should find that the obligation to indemnify is contingent upon an actual award of damages, the implied covenant of good faith and fair dealing between insurer and the defendant makes certain the insurer's *obligation to indemnify* prior to the instigation of the suit. Since this obligation exists prior to the filing of the suit, it may be attached as a basis of quasi in rem jurisdiction.¹²

3) In addition to the obligation to indemnify, the insurer has a separate duty to defend the insured. This duty matures and becomes fixed and certain upon the commencement of any action against the insured, and is therefore subject to attachment.¹³

ATTACHMENT OF CONTINGENT INSURANCE OBLIGATIONS

In reaching its decision, the *Javorek* court examined *Seider* and other antecedent cases which had considered the attachment or garnishment of intangible obligations for jurisdictional purposes. Such actions are dependent on statutory authorization within the forum state,¹⁴ which generally permits the seizure of defendant's property within the jurisdiction to satisfy the plaintiff's potential award of damages. In addition to real and personal property, debts and other intangibles¹⁵ are subject to seizure, provided the nonresident defendant has received adequate notice.¹⁶ The difficulty with intangible property is determining its location. The insurer's contractual obligations sought to be attached in a *Seider*-type case have been viewed as debts¹⁷ and assignable contractual rights¹⁸ which are considered to be located with the obligor.¹⁹ Thus, if the insurance policy may be prop-

12. *Id.* at 779, 552 P.2d at 739. This is apparently the first time this claim has been made in a *Seider* type action.

13. *Id.*

14. 6 AM. JUR. 2d *Attachment and Garnishment* § 9 (1963). For a general discussion, see Comment, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58, 61 (1968) [hereinafter cited as *The Constitutional Phase*].

15. Intangibles such as stocks, bonds, warehouse receipts, and other commercial instruments are ordinarily deemed to be present in the jurisdiction where the document is located. Debts, assignable causes of action, and other pure intangibles (such as contractual rights) are subject to the same jurisdiction as the obligor. See *Harris v. Balk*, 198 U.S. 215 (1905); and *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) [hereinafter cited as *Developments in the Law*].

16. *Harris v. Balk*, 198 U.S. 215, 227 (1905); *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1878). These cases only established the constitutionality of states to assert jurisdiction over property located within their boundaries. Procedures for asserting this jurisdiction differ according to local statute.

17. 131 Cal. Rptr. at 778, 552 P.2d at 738.

18. *Id.* at 779, 552 P.2d at 739.

19. See *Developments in the Law*, *supra* note 15, at 951, as noted in *The Constitutional Phase*, *supra* note 14, at 61 and n.15.

erly viewed as a debt or other assignable interest, jurisdiction may be asserted wherever the insurance company operates.²⁰

It is seriously doubted, however, that the obligations to defend and indemnify may be classified as debts or an assignable interest. As do most jurisdictions, New York allows attachment of a debt if it is past due, due on demand, or certain to become due.²¹ The obligations to defend and indemnify the insured are none of these; rather, they are contingent upon the instigation of a valid lawsuit against the insured.²² If the insured is never involved in an accident, or if a lawsuit is never filed against him, the defense and indemnity obligations will never arise. Thus, they are uncertain and, according to the *Seider* dissent, unattachable under New York law.²³

Since jurisdiction is a necessary element of a valid claim,²⁴ many commentators have labeled the *Seider* procedure an exercise in bootstrapping because it attaches certain obligations in order to establish jurisdiction, despite the nonexistence of these obligations until jurisdiction is validly asserted.²⁵

To circumvent the bootstrap accusation, the *Seider* majority relied upon *In re Riggle's Estate*,²⁶ wherein the plaintiff, a New York resident, brought an action in New York against Robert Riggle, an Illinois resident, for injuries suffered in an automobile accident in Wyoming.²⁷ Personal service of the summons and complaint was effected on Riggle

20. See *Jurisdiction Ad Infinitum*, *supra* note 3.

21. See *Seider v. Roth*, 17 N.Y.2d 111, 113, 269 N.Y.S.2d 99, 101, 216 N.E.2d 312, 314 (1966) N.Y. CIV. PRAC. LAW § 5201(a) provides in part:

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. A debt may consist of a cause of action which would be assigned or transferred accruing within or without the state.

N.Y. CIV. PRAC. LAW § 6202 provides:

Any debt or property against which a money judgment may be enforced as provided in Section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in Section 5201. . . .

22. 131 Cal. Rptr. at 779, 552 P.2d at 739. See also *Seider v. Roth*, 17 N.Y.2d 111, 115, 269 N.Y.S.2d 99, 103, 216 N.E.2d 312, 315 (1966) (Burke, J., dissenting).

23. 17 N.Y.2d at 115, 269 N.Y.S.2d at 103, 216 N.E.2d at 315 (Burke J., dissenting).

24. *Id.*

25. See Note, *Seider v. Roth: Attachment of an Insurer's Obligation to Defend*, 71 DICK. L. REV. 653, 660 (1967); 36 MO. L. REV. 272, 278 (1971). See also Justice Burke's dissent in *Seider*, 17 N.Y.2d at 115, 269 N.Y.S.2d at 103, 216 N.E.2d at 315. "Bootstrapping" is a popular term describing the circular reasoning of which all *Seider* critics complain.

26. 11 N.Y.2d 73, 226 N.Y.S.2d 416, 181 N.E.2d 436 (1962).

27. *Id.* at 74, 226 N.Y.S.2d at 417, 181 N.E.2d at 437.

in New York, but he died before trial.²⁸ In order to continue the action commenced in New York, the court appointed an administrator for any property Riggle might have in New York. The only property in Riggle's "estate" in New York was the obligation of an insurance carrier to defend and indemnify Riggle.²⁹ The *Riggle* court concluded that the insurance company was now a creditor of Riggle's estate, and that a debt was owed the estate within the meaning of the New York statutes.³⁰

The *Seider* court found this reasoning sound and felt that in following *Riggle*, it could properly classify insurance liability obligations as debts per se.³¹ But an important distinction existed between these cases, as noted by the *Seider* dissent.³² In *Riggle*, in personam jurisdiction was properly obtained before the defendant died; thus, the obligation to defend had already matured and the debt was no longer contingent.³³ The *Seider* majority erroneously concluded that because the liability obligation could be administered *after* it became due, it could also be attached *before* it became due in order to establish quasi in rem jurisdiction.³⁴

Having noted this fallacy in the *Riggle/Seider* analogy, the *Javorek* court then examined *Simpson v. Loehmann*,³⁵ a *Seider* offspring which introduced constitutional challenges to the attachment of a liability insurance policy. A New York resident was injured in Connecticut through an accident involving the defendant's boat.³⁶ The defendant, a Connecticut resident, objected, claiming that not only was the attachment improper, but that it effectively denied due process.

Since New York did not permit a limited appearance in quasi in rem actions,³⁷ he contended that he was forced to choose between

28. *Id.*

29. *Id.* Riggle was driving the automobile involved in the accident with the permission of its owner, Walter Wells. Wells' insurance on the car provided liability coverage for additional drivers.

30. *Id.* at 438-39. See note 21 *supra*.

31. 17 N.Y.2d at 113, 269 N.Y.S.2d at 101, 216 N.E.2d at 314.

32. See analysis of *Seider* dissent in *Javorek v. Larson*, 131 Cal. Rptr. 768, 772-73, 552 P.2d 728, 732-33 (1976).

33. *Id.*

34. *Id.* See *Seider v. Roth*, 17 N.Y.2d 111, 113-14, 269 N.Y.S.2d 99, 101-02, 216 N.E.2d 312, 324-15 (1966).

35. 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319 (1968).

36. *Id.*

37. N.Y. CIV. PRAC. LAW 320(c) provides:

In a case where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not the equivalent to personal service of sum-

making an appearance, thereby subjecting himself to in personam jurisdiction and liability in excess of his policy limits, or failing to appear, which was in violation of his contractual obligation to cooperate with his insurance company in defending the action.³⁸ All this in spite of the fact that his only contact with the forum state was the licensing of his insurer to do business there.

In denying the defendant's challenge to New York's exercise of jurisdiction, the New York Court of Appeals found that the presence of the "debt" (the obligation to defend and indemnify) in New York was itself a sufficient nexus to create in rem jurisdiction.³⁹ Reargument was denied with the assertion that *Seider* and *Simpson* did not create in personam jurisdiction but remained actions in rem. To allow the out-of-state defendant his due process rights, the court liberally construed state statutes and held that recovery would be limited to the face value of the insurance policy, even if the defendant appeared to defend on the merits.⁴⁰ Thus the due process objection to *Seider* attachments in New York was abated by an instance of judicial legislation.⁴¹

THE JAVOREK DECISION

In considering the plaintiffs' contentions in *Javorek*, the California Supreme Court first noted that the only applicable decision on record in California had upheld the *Seider* procedure as valid under California's interim attachment law.⁴² Relying on that case, the *Javorek* plaintiffs had sought attachment of all the defendants' property, includ-

mons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted by motion or in the answer . . . unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.

See Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 *BUFFALO L. REV.* 374, 387 (1965); *The Constitutional Phase*, *supra* note 14, at 64 and n.31.

38. See discussion of *Simpson v. Loehmann* in *Javorek*, 131 *Cal. Rptr.* 768, 774, 552 *P.2d* 728, 734; see also note 72 *infra*.

39. *Simpson v. Loehmann*, 21 *N.Y.2d* 305, 310, 287 *N.Y.S.2d* 633, 636, 234 *N.E.2d* 669, 671 (1967).

40. *Simpson v. Loehmann*, 21 *N.Y.2d* 990, 290 *N.Y.S.2d* 914, 916, 238 *N.E.2d* 319, at 320 (1968).

41. 131 *Cal. Rptr.* at 774, 552 *P.2d* at 734.

42. *Id.* at 776, 552 *P.2d* at 736. The case referred to is *Turner v. Evers*, 31 *Cal. App. 3d Supp.* 11, 107 *Cal. Rptr.* 390 (1970), where the plaintiffs, California residents, had their car serviced by the defendant in Washington state in preparation for the return trip to California. After traveling only a short distance, the car broke down completely. Plaintiffs filed an action for breach of contract, negligence, and fraud in California, seeking attachment of defendant's business liability insurance through the insurer's office in California. The court allowed the attachment, thereby establishing a *Seider* precedent in California. See note 10 *supra* discussing California's interim attachment law.

ing the contract obligations of the State Farm Insurance policy.⁴³ But the *Javorek* court observed a distinction in the statute that was overlooked in the earlier California appeals court decision in *Turner v. Evers*.⁴⁴

While it agreed that intangibles such as debts not yet due may be garnished in California⁴⁵ (even though the amount of the debt was presently unascertainable), the court concluded that a distinction existed between debts whose eventual *amount* of liability was uncertain and those where the *fact* of liability was uncertain. If the amount was unascertainable, the debt was nonetheless subject to garnishment, but if the fact of the debts ever becoming due is in doubt, the court felt there was nothing with which to satisfy California's jurisdictional requirements. This distinction was then applied to each of the claims for jurisdiction.

Plaintiffs first asserted jurisdiction on the basis of the policy obligation to indemnify defendants.⁴⁶ Although the duty was contingent upon an award of damages against the insured, plaintiffs felt that it was an attachable debt because of the possibility of a judgment against defendants, and the certainty that State Farm would then have to pay any judgment that was awarded, up to the policy limits. Applying the amount of liability/fact of liability distinction, the court found the obligation to indemnify one in which the fact of liability ever occurring was uncertain, since the defendants' negligence had yet to be determined.⁴⁷ The actual liability might never accrue, rendering the indemnity obligation unattachable.

Anticipating this result, plaintiffs offered their second claim: attachment of the insurance policy's implied covenant of good faith and fair dealing.⁴⁸ As a viable contract right, it exists prior to the instigation of a lawsuit and is, therefore, certain and attachable.⁴⁹ The court

43. 131 Cal. Rptr. at 777, 552 P.2d at 737. Plaintiffs sought to attach "all property of each defendant as per CCP 537.3(c), including the contract obligations of State Farm Mutual Automobile Insurance Company . . . to defend and indemnify . . . these defendants against a debt owing to . . . the plaintiffs." See note 42 *supra*.

44. 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1970).

45. *Id.* See also 2 WITKIN, CAL. PROCEDURE § 219 at pp. 1616-17 (1970).

46. 131 Cal. Rptr. at 777, 552 P.2d at 737.

47. *Id.* at 778, 552 P.2d at 738.

48. The implied covenant of good faith and fair dealing was recognized as present in insurance policies in California in the cases of *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 556, 108 Cal. Rptr. 430, 510 P.2d 1032 (1973); *Crisci v. Security Insurance Co.*, 66 Cal.2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967); *Commune v. Traders & General Insurance Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958).

49. *Id.* at 779, 552 P.2d at 739.

dismissed this claim on two separate grounds. First, the duty is a non-assignable one owed to the insured personally and is not subject to attachment.⁵⁰ Second, it failed the fact of liability test. The covenant did not give rise to a cause of action until there had been a breach, and a breach could not occur until the insurer had failed to perform a contractual duty.⁵¹ This, like the indemnity obligation, may never occur if a lawsuit is never filed or if the insurance company performs in good faith. Thus, the good faith and fair dealing covenant was unattachable per se both as a personal and unassignable right, and because of its contingent and uncertain nature. The court found that both indemnity arguments were dependent on the circular reasoning that is the hallmark of *Seider* and its progeny.⁵²

Plaintiff's third jurisdictional ground, based on the insurer's obligation to defend, was a victim of the same fallacy. Plaintiffs maintained the obligation to defend matured upon the commencement of any action against the insured and was not dependent on a finding of liability.⁵³ Thus, it was not dependent on the obligation to indemnify and could not be defeated by the "contingent and uncertain" argument used against indemnity. The court offered three separate reasons for refuting this argument.

First, it failed the amount of liability/fact of liability distinction. The duty to defend will never arise unless a valid claim is asserted; the fact of liability is uncertain. Moreover, to be valid, a claim must include jurisdictional grounds other than the bootstrap variety provided by the attachment of the obligation to defend.⁵⁴ It was irrelevant that the obligation was separate and arose independently from the obligation to indemnify the insured. Both were contingent—the former on the assertion of a valid claim and the latter on a court decision against the injured. Although the duty to defend is separate, it failed to yield jurisdictional grounds for the same reason as the obligation to indemnify. Both are contingent and, as such, neither is subject to attachment in California.⁵⁵

Second, even if the obligation to defend were sufficiently certain to occur, it was not subject to attachment because it was a personal

50. *Id.*

51. *Id.*

52. *Id.* See also note 25 *supra*.

53. *Id.* at 739-40.

54. See note 24 *supra*.

55. 131 Cal. Rptr. at 780, 552 P.2d at 740.

promise to provide a defense for the insured and was not assignable to satisfy the claims of a creditor.⁵⁶

Third, the defense obligation was incapable of valuation. Plaintiffs asserted that a reasonable estimate could be made as to potential fees and costs,⁵⁷ However, this was irrelevant. Even though the parties may have an idea of what the attorneys fees might be, the value will be consumed as the duty is performed. At the end of the trial, the fees will be owed to the attorneys, and the executed obligation will be worth nothing to the defendant. This leaves nothing from which an award may be paid since the plaintiffs must satisfy a *quasi in rem* judgment out of the garnished property.⁵⁸

Dismissing the plaintiffs' contentions,⁵⁹ the court concluded that State Farm's obligations to defend and indemnify defendant Javorek was not subject to attachment and therefore failed to confer quasi in rem jurisdiction on the lower court.⁶⁰ In so ruling, the court disapproved of inconsistent portions of the *Turner* decision and thus rejected *Seider's* application in California.⁶¹

SEIDER V. ROTH AFTER JAVOREK

What is the future of the *Seider* attachment now that California has deserted the already slim ranks of states employing the procedure? Eight states and two federal courts have rejected the *Seider* theory;⁶² only three states, including New York, now observe the *Seider* procedure.

The Supreme Court of New Hampshire adopted the rule in *Forbes v. Boynton*,⁶³ but suggested in dictum that it was applying the rule in retaliation to New York because the defendant was a New York

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 741.

61. 131 Cal. Rptr. at 781, 552 P.2d at 741.

62. See *Robinson v. Shearer & Sons, Inc.*, 429 F.2d 83 (3rd Cir. 1970); *Ricker v. LaJoie*, 314 F. Supp. 401 (D. Vt. 1970); *Kirschman v. Mikula*, 285 So. 2d 701 (La. App. 1972); *Missouri ex rel. G.E.I.C.O. v. Lasky*, 454 S.W.2d 942 (Ct. App. Mo. 1970); *Johnson v. Farmers Alliance Mutual Insurance Company*, 499 P.2d 1387 (Okla. 1972); *Jardine v. Donnelly*, 413 Pa. 474, 198 A.2d 513 (1964) (*per curiam*); *DeRentis v. Lewis*, 258 A.2d 464, (R.I. 1969); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970); *Housely v. Anaconda Co.*, 19 Utah 2d 124, 427 P.2d 390 (1967); *Werner v. Werner*, 84 Wash. 2d 360, 526 P.2d 370 (1974).

63. 313 A.2d 129 (N.H. 1973).

resident.⁶⁴ In Minnesota, a United States District Court approved a *Seider* attachment in its interpretation of applicable Minnesota law in *Rintala v. Shoemaker*.⁶⁵ The court reserved its application of such attachments for cases in which the plaintiff was a Minnesota resident,⁶⁶ in the belief that a state has a duty to provide a forum for its citizens, but has no duty to stretch the statutes for nonresidents. In so ruling, the Minnesota decision provided a solution to the problem of forum shopping encouraged by the *Seider* procedure.⁶⁷ Thus, New Hampshire with its suggestion of retaliation against New York and Minnesota with its limitation of the rule as applying to Minnesota residents left California as the only jurisdiction which had employed *Seider* at full strength.⁶⁸ In reversing its stand,⁶⁹ California cost *Seider* its only viable ally outside New York. *Javorek* is therefore the most significant rejection of *Seider* to date and may signal an end to attachment of contingent liability insurance as a means of establishing jurisdiction.

SEIDER'S OTHER WEAKNESSES

It is important to note that *Javorek* and most of the other cases

64. *Id.* at 133.

65. 362 F. Supp. 1044 (1973).

66. *Id.* at 1052-53.

67. *Id.* at 1056. Forum shopping occurs when states have laws which vary either in substance or interpretation from the laws of other jurisdictions, thereby encouraging the plaintiff to seek out the jurisdiction most favorable to his legal position or the defendant to enter a forum non conveniens motion with the intention of moving the action to a court more likely to rule in his favor. Since justice is theoretically meted out in all jurisdictions, courts naturally frown on forum shopping. *Seider* is said to promote forum shopping in that it provides plaintiffs with quasi in rem jurisdiction in any state where the defendant's insurance company is doing business. This places the policyholders of the larger insurance companies in the position of being vulnerable to lawsuit in almost any area of the United States. The only stop-gap has been the unwillingness of most states (all but New York, Minnesota, New Hampshire, and formerly California) to adopt the *Seider* procedure.

68. See *Turner v. Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973). Recently, the Minnesota Supreme Court adopted the *Seider* procedure in *Savchuk v. Rush*, 245 N.W.2d 624 (Minn. 1976), ending the speculative position offered by the Federal District Court in *Rintala v. Shoemaker*. The court held that unfairness and inconvenience to the defendant could be met by allowing a forum non conveniens motion. While the court seems to have employed *Seider* at full strength, it retained the limits set by the District Court in *Rintala v. Shoemaker*, limiting the practice to Minnesota residents.

69. The court stated:

We reject as inapplicable in California the rule announced in *Seider v. Roth* [citations omitted] and cases following it, and we disapprove to the extent that it is inconsistent with the views herein expressed, *Turner v. Evers* [citations omitted].

131 Cal. Rptr. at 781, 552 P.2d at 741.

disapproving of *Seider* were based on the view that contingent liability insurance obligations were not attachable debts under the appropriate state statutes.⁷⁰ Courts ruling against *Seider* have avoided ruling on constitutional issues.⁷¹ Law review commentaries, on the other hand, have found serious constitutional gaps in *Seider*.

The due process clause of the fourteenth amendment is the basic constitutional challenge to *Seider*. Automobile liability insurance policies generally include cooperation clauses which require the participation of the defendant in any defense conducted by the insurer.⁷² States like New York which do not permit limited appearances to defend the res⁷³ force the defendant to face the dilemma confronted by the defendant in *Simpson v. Loehmann*⁷⁴—he must either violate his duty to cooperate in good faith with the insurer, or perform that duty and expose himself to in personam jurisdiction and possible liability in excess of the insurance policy's limits.

New York averted the due process problem in *Simpson* by limiting any judgment against the defendant to the face value of the insurance policy, even though the insured participated in the defense on the merits.⁷⁵ This realigns New York with due process standards of fair play and substantial justice, but one questions the practice of

70. *Id.* at 775, 552 P.2d at 735. It could also be said that the courts did not subscribe to *Seider's* circular reasoning in establishing jurisdiction.

71. See generally *Jurisdiction Ad Infinitum*, *supra* note 3; Comment, *Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction*, 16 BUFFALO L. REV. 769 (1967) [hereinafter cited as *Attachment of "Obligations"*]; Note, *Attachment of Liability Insurance Policies: What Remains of the Seider Doctrine After Seven Years of Conflict*, 34 OHIO S.L.J. 818 (1973); *The Constitutional Phase*, *supra* note 15; 36 MO. L. REV. 272. But see *The Urge Toward Reason*, *supra* note 4.

72. A typical "cooperation clause" reads:

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits."

4 RICHARDS ON THE LAW OF INSURANCE 2042, 2050 (5th ed. 1952), *quoted in* 19 STANFORD L. REV. 654, n.4 (1967). See also J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4817, p. 195 (1962).

73. State cases denying the right of limited appearance include *Sands v. Lefcourt Realty Corp.*, 35 De. Ch. 340, 117 A.2d 365 (Sup. Ct. 1955); and *State ex rel. Methodist Old People's Home v. Crawford*, 159 Or. 377, 80 P.2d 873 (1938). Statutes prohibiting limited appearances include: Minn. Rule Civ. Proc. 4.04(2), MINN. STAT. ANN. § 27A (West); and N.Y. CIV. PRAC. LAW 320(c). See note 37 *supra*. See also Frumer, *Jurisdiction and Limited Appearance in New York: Dilemma of the Nonresident Defendant*, 18 FORDHAM L. REV. 73 (1949).

74. *Simpson v. Loehmann*, 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319 (1968).

75. 21 N.Y.2d at 990, 290 N.Y.S.2d at 914, 238 N.E.2d at 320.

altering jurisdictional procedure to allow a *Seider* attachment, and again warping the limited appearance ban to remain within due process standards.

In addition to the limited appearance problem, *Seider* raises broader due process implications when minimum contacts are considered.⁷⁶ Though defendant's contacts within the forum may be nil, jurisdiction is established through the insurance policy and the fiction of labeling defendant's contingent insurance benefits as attachable property. This is, in effect, a direct action against the insurer without the necessary involvement by the state legislature⁷⁷—another example of *Seider* proffering judicial legislation.⁷⁸

The constitutional challenges aimed at *Seider*⁷⁹ warrant judicial review, but the United States Supreme Court has never examined the question.⁸⁰ The Second Circuit rejected a due process challenge to

76. The "minimum contacts" standard set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), enlarged the previous concept of physical presence of the defendant for in personam jurisdiction. See notes 91-103 *infra* and accompanying text.

77. See Note, *Direct Action Statutes: Their Operational and Conflicts-of-Laws Problems*, 74 HARV. L. REV. 357 (1960); Comment, *The Insurer's Duty to Defend Under A Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966). Direct action statutes involve no attachment and do not consider the insured a real party in interest. One author believes *Seider* to be "nothing but a direct action result in an *in rem* disguise", awaiting New York's passage of a direct action statute. See *Jurisdiction Ad Infinitum*, *supra*, note 3, p. 108. But another author feels the *Seider*-direct action analogy is incorrect, in spite of Judge Keating's reliance upon this interpretation in *Simpson v. Loehmann*, 21 N.Y.2d 305, 312, 287 N.Y.S.2d 633, 638, 234 N.E.2d 669, 673. This same author suggests that the analogy was an attempt to justify the questionable *Seider* procedure by linking it to a constitutionally sound device, even though New York had not yet enacted direct action legislation. See *The Constitutional Phase*, *supra* note 14, at 68-69.

78. See note 41 *supra* and accompanying text.

79. A third constitutional challenge is that *Seider* causes an undue burden on interstate commerce by saddling insurance companies with the expense and inconvenience of defending in remote forums; an expense that is passed on to the consumer. See *Jones v. McNeill*, 51 Misc. 2d 527, 533, 273 N.Y.S.2d 517, 522 (Sup. Ct. 1966); and *Attachment of "Obligations"*, *supra* note 71, at 777.

80. See *Javorek v. Larson*, 131 Cal. Rptr. 768, 775, 552 P.2d 728, 735. Several articles have also called for constitutional review of the *Seider* procedure. See *supra* note 71. Moreover, a United States Supreme Court review of in rem and quasi in rem jurisdiction may be in order:

"It is high time we had done away with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res becomes stronger and stronger. Insofar as courts remain given to asking 'Res, res—who's got the res?' they cripple their evaluation of the real factors that should govern jurisdiction. They cannot evaluate the real factors squarely until they give up the ghost of the res."

Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 663 (1959) [hereinafter cited as *Conflict*], quoted in *The Constitutional Phase*, *supra* note 14, at n.79.

a *Seider* attachment in *Minichiello v. Rosenberg*,⁸¹ but added that the practice would be subject to serious doubt were it not limited in three ways:

1. *Seider* may be applied only in favor of a plaintiff who is a resident of the forum—a reiteration of the rule set down in *Rintala v. Shoemaker*.⁸²
2. There may be no recovery in excess of policy limits—a verification of *Simpson v. Loehmann*.⁸³
3. Neither New York nor any other state may give collateral estoppel effect to a *Seider* judgment.⁸⁴

Thus, New York courts, determined to preserve their unpopular doctrine, have twisted statutes⁸⁵ and offered constitutional compromise to critics of *Seider's* due process shortcomings. In fairness to their stand, the *Seider* procedure is not totally unjust in spite of some critics' opposition from the beginning.⁸⁶ In *Seider's* favor, it has been argued that the defendant should bear the expense of foreign litigation in a transitory cause of action.⁸⁷ Another comment has observed that al-

81. 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844, *rehearing denied*, 396 U.S. 949 (1969). See also *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir. 1969).

82. 410 F.2d at 113; see also note 65 *supra* and accompanying text.

83. 410 F.2d at 113; see also note 74 *supra* and accompanying text.

84. 410 F.2d at 113. The application of the doctrine of collateral estoppel would prevent the redetermination of issues actually litigated in a previous action between the same parties and arising from the same factual situation.

85. See notes 73-75 *supra* and accompanying text.

86. See *supra* note 71. See also *Minichiello v. Rosenberg*, 410 F.2d 106, 115 (2d Cir. 1968), (Anderson, J., dissenting); *Simpson v. Loehmann*, 21 N.Y.2d 305, 316, 287 N.Y.S.2d 633, 642, 234 N.E.2d 669, 675 (1967), (Burke J., dissenting); *Seider v. Roth*, 17 N.Y.2d 111, 115, 269 N.Y.S.2d 99, 103, 216 N.E.2d 312, 315 (1966), (Burke, J., dissenting); *Wrong Means to a Right End*, *supra* note 4; Note, *Seider v. Roth: Attachment of an Insurer's Obligation to Defend*, 5 PAC. L.J. 115 (1974); 36 MO. L. REV. 272 (1971).

87. Professor Seidelson placed two limitations on the proposal:

1) Defendant should be given constructive service reasonably calculated to afford him actual notice and opportunity to defend; and

2) The plaintiff's selection of a forum should be able to withstand a forum non conveniens motion. See *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, *supra* note 4, at 64-65. However, courts do not always entertain forum non conveniens motions. In *Donawitz v. Danek*, 385 N.Y.S.2d 134 (App. Div., 1976), the New York court refused to apply a forum non conveniens motion where the trial court permitted the quasi in rem attachment of a New Jersey doctor's malpractice insurance for an action arising from plaintiff's treatment by the doctor in New Jersey. However, in *Durgin v. Burnette*, 388 N.Y.S.2d 766 (App. Div., 1976), the appellate court reversed the trial court's denial of a forum non conveniens motion entered by the Michigan defendant. The plaintiff was a New Hampshire resident who was working in Michigan in 1973 when he was in an automobile collision with the defendant. Plaintiff commenced his action in New York while undergoing medical treatment there.

although nonresident motorist statutes⁸⁸ and direct action statutes⁸⁹ are designed to provide the proper forum, there still remain some situations where jurisdiction is justifiable but cannot be obtained in personam.⁹⁰ Quasi in rem jurisdiction and the *Seider* attachment provide plaintiff with a home forum where long-arm procedures fail. *Seider* advocates go too far, however. They feel that because the procedure sometimes yields desirable results, the device itself is sound. Additionally, proponents believe *Seider* to be a logical extension of today's expanding notions of jurisdiction.⁹¹ But modern concepts of jurisdiction are generally derived from *International Shoe v. Washington*,⁹² while *Seider* is obviously heir to the older concepts of jurisdiction embodied in *Harris v. Balk*⁹³ and *Pennoyer v. Neff*.⁹⁴

Harris was a viable doctrine in its day, giving state courts some discretionary room after the severe limitations imposed by *Pennoyer*. *Pennoyer* required the defendant's physical presence within the forum for in personam jurisdiction, and the physical presence of the property

The viability in New York of the forum non conveniens test proposed by Professor Seidelson is unclear at present; future cases should tell whether the decision in *Donawitz* was actually a denial of the need for a forum non conveniens test for fairness to defendants in *Seider*-type actions. Minnesota has indicated it will entertain forum non conveniens motions in such cases. See *Savchuk v. Rush*, 245 N.W.2d 624, (Minn. 1976). New Hampshire, the third *Seider* state, is unclear on the matter.

88. Nonresident motorist statutes provide jurisdiction over transients using the fiction of requiring the motorist to appoint an agent, usually the state registrar of motor vehicles, who may receive service of process for the motorist. See *Hess v. Pawloski*, 274 U.S. 352 (1927), in which the Supreme Court upheld a Massachusetts statute holding that it did not unconstitutionally deprive the nonresident of due process or property. See also *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876, (1950); *Dambach, Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A. L. REV. 198, 199-211 (1958); *Stumberg, Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268 (1959); Note, *Nonresident Motorist Statutes—Their Current Scope*, 44 IOWA L. REV. 384 (1959).

89. See note 77 *supra*.

90. See 51 MINN. L. REV. 158, 164-65 (1966).

91. Two examples of *Seider* advocates' belief in expanding jurisdiction are reflected in the following quotes:

"Either the New York Court of Appeals or the highest appellate court of some other state is about to recognize and take advantage of total jurisdiction over nonresident defendants which due process permits, and the sooner the better."

The Urge Toward Reason, supra note 4, at 65.

"When the environment necessitates change, and the authority hesitates to institute or incorporate that change, the environment will bypass the normal avenues for improvement and suddenly inculcate the requisite change itself, thereupon forcing the authority to react rather than respond. *Seider* and *Turner* are here to stay."

Wild and Woolly West, supra note 4, at 429.

92. 325 U.S. 310 (1945).

93. 198 U.S. 215 (1905).

94. 95 U.S. 714 (1877).

for in rem or quasi in rem jurisdiction,⁹⁵ thus curtailing the exercise of a state's jurisdiction outside its borders. To limit the deadening effect of this hard and fast rule, *Harris* proposed that intangibles such as debts move with the debtor.⁹⁶ Where *G* owes *D* a sum of money and is passing through *P*'s state, *P* may initiate an action against *D* by attaching *G*'s debt. *Harris* was an attempt to loosen the *Pennoyer* restraints. *Seider* is a modern version of *Harris*, allowing the seizure of contingent debts, in spite of requirements that debts are attachable only if payment is due or certain to become due.⁹⁷ The *Seider* revision stretches *Harris* to its credible limits.

International Shoe ended *Pennoyer*'s control of in personam jurisdiction. Under the new approach, states may now assert jurisdiction over persons outside the forum who have established certain minimum contacts within the state,⁹⁸ regardless of their presence for service of process. Everyone from nonresident motorists⁹⁹ to corporations¹⁰⁰ whose products enter the state are now subject to in personam jurisdiction. *Pennoyer* and *Harris* still govern quasi in rem actions,¹⁰¹ but their use is limited now and certainly not consistent with the minimum contacts approach employed today.¹⁰² If *Harris* is questionable as an outmoded doctrine, *Seider* as a perversion of *Harris* is extremely questionable.¹⁰³

CONCLUSION

California's rejection of the *Seider* procedure should undermine its acceptance and growth in other jurisdictions. While constitutional

95. *Id.* The doctrine was applied to the states via the due process clause of the fourteenth amendment. See CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 92-82, 92d Cong., 2d Sess. at 1417-39 (1972); Kurland, *The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 572-73 (1958) [hereinafter cited as *Due Process*].

96. See *Jurisdiction Ad Infinitum*, *supra* note 3, at 100.

97. 131 Cal. Rptr. at 774, 552 P.2d at 734. See also 19 STAN. L. REV. 654, 658-59 (1967).

98. See generally *International Shoe v. Washington*, 325 U.S. 310 (1945).

99. See note 88 *supra*.

100. See *Due Process*, *supra* note 95, at 577-86.

101. *The Constitutional Phase*, *supra* note 14, at 81.

102. See *Conflict*, *supra* note 80; *Jurisdiction Ad Infinitum*, *supra* note 2, at 100, ¶110; *The Constitutional Phase*, *supra* note 14, at 81-82.

103. As one author concluded "Seider is an up-to-date result extruded through an anachronistic device." *Jurisdiction Ad Infinitum*, *supra* note 3, at 110. See also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1178 (1966); *Developments in the Law*, *supra* note 15, at 957-60; Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

review by the Supreme Court does not appear imminent, growing dissatisfaction with its due process shortcomings may cause the demise of the *Seider* attachment in New York, Minnesota, and New Hampshire. Finally, in an era of sophisticated long-arm statutes, a review of in rem and quasi in rem jurisdiction is in order. Although we may not choose the extreme of eliminating the concept of res from theories of jurisdiction,¹⁰⁴ we should discourage the attachment of contingent obligations—a procedure arising from the outmoded *Harris* doctrine.

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104. See *Conflict*, *supra* note 80.