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Jurisdiction—Quasi-in-Rem—Insurance—Attachment of Automobile Liability Insurer's Obligations to Defend and Indemnify.—Seider v. Roth

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CASE NOTES

Jurisdiction—Quasi-in-Rem—Insurance—Attachment of Automobile Liability Insurer's Obligations to Defend and Indemnify.—*Seider v. Roth*.[1]—In Canada, the Hartford Accident and Indemnity Company issued an automobile liability policy to Lemiux, a Canadian citizen. While in Vermont, Lemiux was involved in an auto accident[2] with the plaintiffs, who were New York residents. Plaintiffs were unable to procure in personam jurisdiction over Lemiux in New York, and attempted to obtain quasi-in-rem jurisdiction by attaching the obligation of Hartford to defend and indemnify him. Hartford was served with the attachment papers in New York, where it conducted business and was subject to suit. Lemiux, having been personally served in Canada, moved to vacate the attachment and the service of summons and complaint. The motion was denied by the lower courts.[3] The New York Court of Appeals, in a 4-3 decision, affirmed. HELD: An insurance company's contractual obligation to defend and indemnify under an automobile liability policy is a debt subject to attachment. The dissent argued that the obligations of the insurer do not ripen until jurisdiction is properly acquired over the defendant, and that they are therefore contingent and not subject to attachment under New York statutes.

There are two significant problems raised by the *Seider* case. The first, and most conspicuous, is whether New York, within its statutory confines, could acquire jurisdiction. The second problem, inherent in the case although not mentioned in the opinion, is whether the due process clause of the federal constitution permits this unusual exercise of jurisdiction.

In order to hold that quasi-in-rem jurisdiction had been acquired, the court had to find: (1) that the defendant, Lemiux, possessed a res whose situs was in New York;[4] (2) that the res was "property" within the meaning of New York attachment statutes;[5] (3) that the res had been effectively seized prior to the commencement of suit;[6] and, (4) that the absent defendant had received adequate notice.[7]

It is unquestioned in the present case that the fourth requirement was satisfied, and the opinion does not discuss satisfaction of the third. To support its conclusion that the first and second requirements had been met, the court relied primarily upon *Matter of Estate of Riggle*.[8] That case was a proceeding to appoint an administrator of a deceased non-resident motorist who had injured New York residents in a Wyoming automobile collision. The

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[1] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[2] Roth, the driver of a third car involved in the collision, was the co-defendant.

[3] Seider v. Roth, 23 App. Div. 2d 787, 258 N.Y.S.2d 795 (1965).

[4] Pennoyer v. Neff, 95 U.S. 714, 722-23 (1877).

[5] N.Y. Civ. Prac. Law §§ 5201, 6202.

[6] Pennoyer v. Neff, supra note 4, at 726.

[7] Harris v. Balk, 198 U.S. 715, 227 (1905).

[8] 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962), 14 Syracuse L. Rev. 130 (1962).

court held that: (1) an automobile liability policy issued to Riggle before his death constituted a "debt or personal property" within the meaning of Section 47 of the New York Surrogate Court Act for the purpose of conferring jurisdiction upon a surrogate's court to appoint an administrator; and (2) for that purpose the obligations of a foreign insurer authorized to do business in New York are located in New York, despite the general rule that the situs of an insurance policy is the principal place of business of the insurer.

The court in *Seider* stated that *Riggle* "cannot be distinguished away."[9] Nevertheless, there are significant factual and legal distinctions between the two cases. In *Riggle*, the insurance policy had been issued in New York and an in personam suit had been instituted in that state, the defendant having been personally served there before his demise.[10] In addition, the obligations of the insurer were held to be a debt under the Surrogate Court Act,[11] rather than Sections 5201 and 6202 of the Civil Practice Law (upon which the court in *Seider* had to base its decision). Property which will support the appointment of an administrator is not necessarily subject to attachment.[12] It is therefore submitted that *Riggle* will not support the reliance placed upon it in *Seider*.

Due to *Riggle's* doubtful support for the present holding, it is necessary to examine directly the New York statutes which control attachment. Sections 5201 and 6202 of the Civil Practice Law define property that may be attached prior to the institution of suit and used as the basis for asserting quasi-in-rem jurisdiction over a non-resident defendant.[13] The pertinent provision of section 6202 states:

> Any debt or property against which a money judgment may be enforced as provided for in section 5201 is subject to attachment. . . .

Section 5201 provides:

> (a) Debt against which a money judgment may be enforced. 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. . . . A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.
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> (b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested. . . .

To be attachable, Hartford's obligation must be either a debt certain to become due or a cause of action which could be assigned. As to the first

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[9] 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

[10] All these facts are important when deciding the location of an intangible asset. Cf. Annot., 15 A.L.R.2d 610 (1951).

[11] N.Y. Surr. Ct. Act § 47 provides: "For the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state . . . is regarded as personal property. . . ."

[12] Cf. Furst v. Brady, 375 Ill. 425, 430-31, 31 N.E.2d 606, 609 (1940); Robinson v. Carroll, 87 N.H. 114, 117, 174 Atl. 772, 775 (1934).

[13] N.Y. Civ. Prac. Law § 314.

possibility, cases decided under the old Civil Practice Act[14] (replaced in 1963 by the present Civil Practice Law) held that there could not be attachment or levy upon a right which may or may not become a cause of action according to the occurrence or nonoccurrence of a future event.[15] If there are any unfulfilled conditions to the judgment debtor's right to payment of the debt, the debt is not certain.[16] Sections 5201 and 6202 made no change in meaning from the pertinent provisions of the Civil Practice Act.[17] Thus, the requirement that the debt or obligation be certain has been maintained by section 5201.[18]

An examination of Hartford's obligations as contained in the insurance policy will reveal that section 5201 does not seem to permit their attachment. Hartford's obligation to defend was contingent upon the commencement of suit[19] which, in turn, depended upon the acquisition of jurisdiction over the insured;[20] its obligation to indemnify was contingent until liability was imposed on its insured in such a suit properly brought.[21] Thus, Hartford's obligations may not be attached until jurisdiction has been acquired by other means.[22] In addition, even after jurisdiction has been properly acquired over the insured, Hartford's obligations are defeasible because they are conditioned upon the continued cooperation of the insured and his compliance with other policy provisions.[23]

Section 5201 also allows the attachment of a cause of action which could be assigned, but Hartford's obligations do not fall within this provision

[14] N.Y. Gen. Laws 1920, ch. 925, §§ 912-16.

[15] E.g., Dutch-American Mercantile Corp. v. Safticraft Corp., 17 App. Div. 2d 421, 423, 234 N.Y.S.2d 683, 686 (1962).

[16] Sheehy v. Madison Square Garden Corp., 266 N.Y. 44, 193 N.E. 633 (1934); Herman & Grace v. City of New York, 130 App. Div. 531, 535, 114 N.Y. Supp. 1107, 1110 (1909), aff'd, 199 N.Y. 600, 93 N.E. 376 (1910) (adopting opinion below).

[17] 6 Weinstein, Korn & Miller, New York Civil Practice ¶ 5201.04, at 52-12 (1965). The court in *Seider* recognized this continuity of meaning. 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

[18] Neilson Realty Corp. v. Motor Vehicle Acc. Indemnification Corp., 47 Misc. 2d 260, 263, 262 N.Y.S.2d 652, 657 (Sup. Ct. 1965). See Cohen v. First Nat'l City Bank, 49 Misc. 2d 141, 267 N.Y.S.2d 146 (Civ. Ct. 1966). That the debt or obligation be subject to no contingencies is a uniform prerequisite for attachment throughout the United States. See Annot., 2 A.L.R. 506 (1919).

[19] Quebec Auto. Ins. Policy, Form No. Q.P.F.1, Hartford Fire Ins. Co.—Hartford Acc. and Indem. Co., Part 1 § A, Additional Agreements (3) provides that: "The Insurer further agrees to defend in the name and on the behalf of any person insured by this policy . . . any civil action which may at any time be brought against such person on account of . . . loss or damage to persons or property."

[20] Suit is commenced when an order for attachment is granted if, within thirty days thereafter, the summons is served upon the defendant. N.Y. Civ. Prac. Law § 203(b)(3).

[21] Quebec Auto Ins. Policy, supra note 19, Part 1, § A provides: "The Insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from ownership, use or operation of the automobile. . . ."

[22] The other "obligations" of the insurer mentioned by the court are also conditional; the promises to investigate and settle are left to the discretion of the insurer. Id. § A, Additional Agreements (2). The medical payments agreement is separate from the third party agreement under which plaintiffs claim, and runs only in favor of the insured and passengers in his car. Id. § B—Medical Payments.

[23] Id., Part 2, Item 8. See id., Part 1, Conditions.

either. Lemiux has no cause of action against Hartford which he could assign or transfer, because Hartford, to date, has repudiated none of its obligations contained in its policy.[24] Nor does the defendant possess rights under the policy which he could assign or transfer. It is uniformly held that a liability policy is personal and cannot be assigned without the consent of the insurer before loss occurs.[25] After loss has occurred, the policy may be assigned without the consent of the insurer only if rights under the policy have already accrued.[26] Under the terms of the policy, Lemiux acquires a right to be defended only when suit has been properly instituted against him, and a right to indemnification only when final judgment has been rendered against him.[27] Since Lemiux has at this time neither a cause of action against the insurer, nor rights under the policy which he could assign or transfer, New York is precluded from basing attachment upon these grounds.

Even if section 5201 does allow the attachment of these obligations, there remains the further question of whether the state is permitted to do so under the due process clause of the federal constitution. Because the law in this area is in a state of flux,[28] resolution of this question requires the examination of two different rules: the traditional one of quasi-in-rem jurisdiction and the recently developed, not yet crystallized test of "minimum contacts."

Under the traditional rule, all that would be required for a state to assert quasi-in-rem jurisdiction would be location of a res within its borders, its effective seizure prior to suit, and adequate notice to its owner.[29] The only question in the present case is that of the situs of the property sought to be attached. Although this is a particularly difficult problem when the "property" of the non-resident is an intangible asset, it would seem that *Harris v. Balk*[30] supports the court's conclusion that Hartford's obligation was located in New York. That case held that jurisdiction is proper for purposes of garnishment wherever the debtor (garnishee) may be personally served.[31] Thus, New York has seemingly met the requirements of the traditional quasi-in-rem suit.

Recently, however, another test has been emerging, that of "minimum contacts." A significant trend that has accompanied this development is the shift in emphasis away from the traditional classification of jurisdiction as in personam, in rem, or quasi-in-rem.[32] As the bases for personal jurisdiction

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[24] Anoka Lumber Co. v. Fidelity & Cas. Co., 63 Minn. 286, 294-95, 65 N.W. 353, 356 (1895).

[25] 7 Appleman, Insurance Law & Practice § 4269, at 66-67 (1962).

[26] Id. at 70.

[27] Quebec Auto. Ins. Policy, supra note 19, Part 1, Conditions ¶ 12(2): "The Insured may not bring an action to recover the amount of a claim under this policy . . . until the amount of the loss has been ascertained . . . by a judgment against the Insured after trial of the issue, or by agreement between the parties with the written consent of the Insurer."

[28] See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950).

[29] Harris v. Balk, supra note 7, at 227; Pennoyer v. Neff, supra note 4, at 722-23.

[30] Supra note 7.

[31] Id. at 222.

[32] See Mullane v. Central Hanover Bank & Trust Co., supra note 28, at 312.

over non-residents have expanded, greater emphasis has been placed on the minimum contacts which the non-resident must have with the forum state, so that the assertion of jurisdiction is inoffensive to principles of "fairness and justice."[33] Although the "minimum contacts" requirement originated with the jurisdictional problems presented by corporations, it has gradually been applied to individuals.[34] It may, in a like manner, be applied to the situation now categorized as quasi-in-rem jurisdiction,[35] which is simply one lever by which a state may exercise its jurisdictional power, however labelled, over a non-resident defendant.

In determining the fairness of jurisdiction, three things must be considered: the contacts of the defendant with the forum state; the interest of the state in controlling the litigation; and the interest of the plaintiff in bringing suit in that particular forum.[36] As to the first consideration, Lemiux's only two relevant contacts with New York were his involvement in a Vermont collision with New York residents and his purchase of an insurance policy in Canada from a company which is authorized to do business in New York. He has, in no manner, sought the protection of the laws of the state. Secondly, New York cannot be said to have a significant interest in controlling an insurance policy issued in Canada to a Canadian citizen by an insurance company incorporated in Connecticut, even though the company is authorized to do business in New York. Finally, the only advantages to the plaintiff from a New York suit would be a friendly forum and the availability there of medical testimony[37] (which could be conveniently produced in another forum through the use of depositions).

Principles of fairness seem to have been violated in this case in view of the defendant's limited contact with New York and the absence of significant interest on the part of the state or the plaintiff in a New York proceeding. The constitutional validity of New York's assertion of jurisdiction is therefore tenuous when tested under the minimum contacts doctrine.

Assuming the constitutional validity of its action remains unchallenged, other considerations should deter New York from pursuing the practice initiated in the present case. One such consideration is that the practice contravenes state policy as embodied in New York statutes. Heretofore, an injured plaintiff has been allowed by statute a direct action against an insurer only when a judgment against the insured has remained unsatisfied 30 days after entry;[38] he may not join the two parties as co-defendants in

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[33] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[34] Nelson v. Miller, 11 Ill. 2d 378, 383-87, 143 N.E.2d 673, 676-80 (1957). See generally Personal Jurisdiction Symposium, 26 La. L. Rev. 352 (1966).

[35] See Atkinson v. Superior Court, 49 Cal. 2d 338, 345, 316 P.2d 960, 965 (1957), appeal dismissed and cert. denied sub nom. Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958); Mullane v. Central Hanover Bank & Trust Co., supra note 28, at 312; Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 956 (1960).

[36] See ibid. See also Reese, Judicial Jurisdiction over Non-Residents; The Impact of McGee v. International Life Insurance Company, 13 Record of N.Y.C.B.A. 139, 141 (1958).

[37] Plaintiffs were treated in New York for their injuries. Brief for Appellee, p. 12.

[38] N.Y. Ins. Law § 167(1)(b); Bornhurst v. Massachusetts Bonding & Ins. Co.,

the initial suit.[39] The *Seider* decision permits a plaintiff to reach the assets of an insurer before judgment has been awarded against the insured, thereby avoiding the necessity of a second suit. It would seem that the court should not presume to change the law where it has been so clearly expounded by the legislature.

New York courts, moreover, should consider the practical problems raised by this decision.[40] If a default judgment is rendered against the defendant, the obligations attached at the commencement of suit must then be measured in precise terms so that the judgment may be satisfied. As a matter of contract between the insured and the company, the upper limit of the obligation to indemnify is set by the terms of the policy; the value of the obligation to defend is at best speculative in a suit where there has been no defense. If the company defends on the question of jurisdiction, the cost of that defense must be deducted from the estimated total cost of defense. This result would be theoretically contrary to one of the purposes of attachment, *i.e.*, to preserve the property to satisfy final judgment.[41]

The plaintiff, after receiving a default judgment against the defendant in New York, may next seek an in personam judgment in another forum. In that suit, the defendant may find that the insurer has been released from all obligations once owed to him by its satisfaction of the New York default judgment. Section 6204 of the Civil Practice Law discharges a garnishee from his debt or obligation to the extent of payment toward final judgment.

It is unlikely, however, that this case will result in a default judgment. New York law does not allow a defendant to make a limited appearance:[42] the defendant must submit to full personal jurisdiction if he wishes to defend on the merits after his objection to jurisdiction has been ultimately overruled.[43] The defendant may prefer a default judgment; but the insurance company will not normally be willing to pay plaintiff's claims without defending on the merits. Since the company is an agent for its insured for the purpose of defending any suit brought against him,[44] it may personally appear in his name. And since the agency is intended primarily for the company's benefit,[45] the insured may not revoke this power.[46] New York will thus acquire personal jurisdiction over an alien for a foreign tort which allegedly injured resident plaintiffs by attaching the obligations of a foreign insurance company authorized to do business in the state, thereby converting quasi-in-rem jurisdiction into in personam.

Thus, while the constitutional problems raised by this decision are the

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12 Misc. 2d 149, 151, 175 N.Y.S.2d 542, 544-45 (Sup. Ct. 1958), rev'd on other grounds, 11 App. Div. 2d 632, 200 N.Y.S.2d 955 (1960).

[39] Cf. Spadaro v. Newark Ins. Co., 21 App. Div. 2d 226, 230, 249 N.Y.S.2d 753, 757 (1964).

[40] See generally Siegel, Supplementary Commentary to N.Y. Civ. Prac. Law § 5201, 7B McKinney's Consol. Laws (Supp. 1965).

[41] Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239, 245-46 (1908).

[42] N.Y. Civ. Prac. Law § 320(c).

[43] 1 Weinstein, Korn & Miller, op. cit. supra note 17, ¶ 320.18.

[44] 7A Appleman, op. cit. supra note 25, § 4681, at 424.

[45] See id. at 423.

[46] Restatement (Second), Agency §§ 138-39 (1957).

most serious, questions of practical administration should be sufficient to convince New York courts that the assertion of quasi-in-rem jurisdiction under these circumstances is an unwise and difficult method by which to provide a forum to injured residents.

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Labor Law—Railway Labor Act, Section 2 Seventh—Carrier's Self-Help and Duty to Operate During a Strike.—*Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry.*[1]—On March 1, 1961, the non-operating railway unions, pursuant to Section 6 of the Railway Labor Act (RLA),[2] notified virtually all major carriers that they desired to change the existing collective bargaining agreements as to wages and advance notice of lay-offs. Negotiation and mediation on a national level failed to bring about agreement. A Presidential Emergency Board was then appointed to investigate the dispute. By June 1962, every carrier but Florida East Coast Railway (FEC) had settled with the unions on the basis of the recommendations of the Emergency Board.[3]

Local negotiations and mediation between FEC and the non-operating unions were unsuccessful, and both parties rejected the National Mediation Board's suggestion of arbitration. When the Board terminated its services in October 1962, the parties were free to resort to self-help.[4] The non-operating unions struck in January 1963, and the operating unions refused to cross the picket lines. After a short time, FEC resumed partial operations, using supervisory personnel and replacements. The railroad made separate agreements with the replacements as to rates of pay, rules, and working conditions, on terms different from those in the outstanding collective bargaining agreements.[5] The non-operating unions subsequently changed their position and agreed to arbitrate the wage and notice dispute, but FEC refused this offer.[6] In September 1963, FEC served a section 6 notice on the unions, proposing permanent changes in the collective bargaining agreements which would bring those agreements into conformity with existing operations. Negotiation and

[1] 384 U.S. 238 (1966).

[2] 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964).

[3] 384 U.S. at 241.

[4] Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963). The term "self-help" refers to the economic weapons that labor and management have traditionally used to induce the other to meet its demands. See Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965). For instance, after the RLA procedures have been exhausted, the unions are free to strike, Pan Am. World Airways, Inc. v. Flight Eng'rs Ass'n, 306 F.2d 840 (2d Cir. 1962), and the carrier is free to implement the changes discussed and attempt to operate, Flight Eng'rs Ass'n v. Eastern Airlines, Inc., 208 F. Supp. 182 (S.D.N.Y. 1962), aff'd per curiam, 307 F.2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963).

[5] These terms were considerably less favorable to the replacements than the outstanding collective bargaining agreements. For example, FEC reclassified many jobs to six-day rather than five-day, thus avoiding overtime pay. Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, supra note 4, at 182.

[6] 384 U.S. at 242.