

# Attachment of Liability Insurance Policies

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## ATTACHMENT OF LIABILITY INSURANCE POLICIES

By sanctioning attachment of an insurer's obligation to defend and indemnify the insured, the New York Court of Appeals has adopted a unique method of obtaining jurisdiction over nonresident defendants on foreign causes of action. This reflects a decision that the convenience of the plaintiff outweighs the conflicting interests of insurers and nonresident defendants. Although this result may be defensible, the court's approach is open to both practical and constitutional objections. An effective solution can be achieved only through legislation.

### I

#### SEIDER AND SIMPSON

State courts have quasi in rem jurisdiction over property located within their state's borders. Under the Supreme Court rule of *Harris v. Balk*,<sup>1</sup> a court may assert quasi in rem jurisdiction over intangible property, such as a debt, whenever it has personal jurisdiction over the debtor. The New York Court of Appeals, in the 1966 case of *Seider v. Roth*,<sup>2</sup> held that an insurance company's contingent obligations to defend and indemnify a policy holder could serve as the basis of a quasi in rem action.

The plaintiff, a New York resident injured by the defendant's automobile in Vermont, wanted to litigate the claim in his home state; however, personal jurisdiction over the defendant could not be obtained in New York. The defendant's only contact with that state was an insurance policy issued in Vermont by a company also doing business in New York. Except for the suggestion that the obligations constituting the res might include the duties to pay medical expenses, investigate, defend, or indemnify, the court neither defined the res nor assigned it a value.<sup>3</sup>

The decision was strongly criticized on both constitutional and practical grounds.<sup>4</sup> One commentator suggested that the court's dis-

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<sup>1</sup> 198 U.S. 215, 222 (1905).

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

<sup>3</sup> *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

<sup>4</sup> See Seigel, Practice Commentary to N.Y. CIV. PRAC. LAW § 5201 (McKinney Supp. 1967); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Quasi in Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654 (1967). See also 8 B.C. COMM. & IND. L. REV. 147 (1966); 51 MINN. L. REV. 158 (1966).

regard of the policy's "no action" clause<sup>5</sup> violated due process, because New York did not have sufficient contacts with the foreign contract to permit a New York court to determine rights under it.<sup>6</sup> Others pointed out that the practical effect of *Seider* is to encourage plaintiffs to bring their actions in New York courts in order to enjoy the liberal verdicts of New York juries.<sup>7</sup> Since most insurance companies do some business in New York, and since the decision in *Seider* was not limited to resident plaintiffs,<sup>8</sup> New York would be an available forum in virtually every motor vehicle negligence action.

The Court of Appeals, despite such criticism, recently reaffirmed *Seider* in *Simpson v. Loehmann*.<sup>9</sup> The facts were substantially the same as those in *Seider*. Chief Judge Fuld, writing for the court,<sup>10</sup> attempted to clarify and justify *Seider*. He stated that the duty of the insurance company to defend and indemnify the insured was equal in value to the face amount of the policy.<sup>11</sup> His response to constitutional conten-

<sup>5</sup> A typical "no action" clause reads as follows:

No action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

E. PATTERSON & W. YOUNG, CASES ON INSURANCE 705 (1961).

<sup>6</sup> Comment, *supra* note 4, at 559-60. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Supreme Court declared that Texas could "not validly affect contracts which are neither made nor are to be performed in Texas." *Id.* at 410. In *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954), the Court permitted Louisiana to subject a foreign insurer to a direct action and thereby disregard the "no action" clause in a foreign contract. The Court said that such revision was justified by Louisiana's legitimate interest in providing remedies for persons injured within the state. But the cause of action in *Seider* arose in Vermont; thus, a similar interest was not present.

<sup>7</sup> See authorities cited note 4 *supra*.

<sup>8</sup> One New York lower court has recently permitted a nonresident plaintiff to use the *Seider* technique. A Norwegian plaintiff was injured in North Carolina by a North Carolina driver. Defendant's insurer was doing business in New York and plaintiff attached the policy there. A group of insurers sought an interlocutory injunction in federal court to prevent attachment of the proceeds of their policies under an order of the New York courts. The federal court declared that it had no jurisdiction to grant the injunction. *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556, 563 (S.D.N.Y. 1967).

The facts of the case present an appropriate situation for the use of forum non conveniens. In suits brought by nonresident plaintiffs, the New York courts have taken the position that forum non conveniens is usually appropriate. See A. EHRENZWEIG, *CONFLICT OF LAWS*, 122 n.5 (1962); Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 404-05 (1947); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 916-18 (1947).

<sup>9</sup> 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

<sup>10</sup> Judge Van Voorhis joined in Chief Judge Fuld's opinion. Judge Keating wrote a separate concurring opinion. Judge Breitel also wrote a separate concurring opinion in which Judge Bergan joined. Judges Burke and Scileppi dissented.

<sup>11</sup> 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 637.

tions was that the carrier had full control of the litigation, and that the insurer's presence in New York provided sufficient contacts for the exercise of jurisdiction.<sup>12</sup>

Judge Keating, in a concurring opinion, agreed with the Chief Judge and added that he thought *Seider* was fair because it represented no more than the judicial creation of a direct action against insurers.<sup>13</sup> Judge Breitel, new to the Court of Appeals, and Judge Bergan concurred only because of the recent precedent of *Seider*.<sup>14</sup> Although they criticized both the theoretical soundness of attaching contingent obligations and *Seider's* practical consequences, they said, "Only a major reappraisal by the Court, rather than the accident of a change in its composition, would justify the overruling of that precedent."<sup>15</sup>

The dissent of Judges Burke and Scileppi characterized attachment of the insurer's obligations as improper and illogical. They criticized *Seider* for disregarding the policy's "no action" clause and for finding jurisdiction where there were insufficient contacts.

*Seider* remains a danger to both insurers and nonresident defendants since litigation of foreign causes of action in New York courts involves both increased expense and high jury verdicts.<sup>16</sup> The procedure developed in *Seider*, however, might be abrogated or effectively negated in several ways. It might be declared unconstitutional by the Supreme Court or changed by the New York legislature. The New York Court of Appeals, of its own accord, might reduce the effect of *Seider*, although it is not likely to expressly overrule the decision. If the court is forced to attribute a value to the res, and that value is determined to be minimal, then insurers are likely to default and pay that amount to the plaintiff. Thus, insurers could avoid, with minimal expense, the onerous consequences of defending in New York. If another action is brought in a forum having personal jurisdiction over the defendant, the amount paid on the default should be offset against the second judgment.<sup>17</sup>

<sup>12</sup> *Id.* at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

<sup>13</sup> *Id.* at 313-14, 234 N.E.2d at 673-74, 287 N.Y.S.2d at 639-40.

<sup>14</sup> *Id.* at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.

<sup>15</sup> *Id.*, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.

<sup>16</sup> In criticizing the practical consequences of *Seider*-type procedure, Judge Breitel said, "This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases . . ." *Id.* at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 633. He cited *Gilchrist v. Trans-Canada Air Lines*, 27 App. Div. 2d 524, 275 N.Y.S.2d 394 (1st Dep't 1966), as an example of a case brought in New York courts for the purpose of obtaining higher judgments. Although the accident in that case occurred in Canada, the plaintiffs, Canadian residents, sued in New York. Moreover, defendants were ready to admit defeat in the Canadian action, but plaintiffs continued with the New York proceeding. In light of these facts, the appellate division dismissed and urged that the action be litigated in Canada.

<sup>17</sup> *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 834 (1952).

## II

## FORCING VALUATION OF THE RES

Valuation of the res may be forced in two ways under New York procedure. First, Civil Practice Laws and Rules section 6222 [hereinafter cited as CPLR] allows the defendant to replace the attached property with a bond of equal value, thereby discharging the attachment.<sup>18</sup> Such a motion does not subject the defendant to personal jurisdiction and requires computation of the value of the res in determining the amount of the bond. Second, the insurer and defendant may merely default, thereby forcing the plaintiff to bring a proceeding in aid of garnishment under CPLR section 5227 to satisfy the claim.

Although neither *Seider* nor *Simpson* presented the court with the valuation problem, Chief Judge Fuld said that the value of the debt owed to the insured equalled the face amount of the policy. The Chief Judge's theory received the approval of Judge Van Voorhis and probably that of Judge Keating who completely supported the decision and would seemingly accept any rationale designed to effectuate the *Seider* result. But four members of the court indicated that the res was worth much less than the face value.<sup>19</sup>

Analysis indicates that Chief Judge Fuld's face value theory, grounded on the proposition "that the liability of the insurer [becomes] fixed on the happening of the accident,"<sup>20</sup> should be rejected. As Judge Burke argued, the reasoning of the majority in both *Seider* and *Simpson* is merely a bootstrap, since the duties attached as the basis for jurisdiction do not arise until an action is brought.<sup>21</sup>

Even if the bootstrap is accepted, and an attachable res is assumed to exist, the face value rule is not valid. The insurer's obligation to defend is certainly not worth as much as the face value of the policy,<sup>22</sup>

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<sup>18</sup> N.Y. CIV. PRAC. LAW § 6222 (McKinney 1963).

<sup>19</sup> Judges Breitel and Bergan argued that even after a cause of action is brought, "there is nothing of economic value to which the insured may make claim, receive, or assign." 21 N.Y.2d at 315, 234 N.E.2d at 674, 287 N.Y.S.2d at 641. The dissent agreed. *Id.* at 320, 234 N.E.2d at 677-78, 287 N.Y.S.2d at 645.

<sup>20</sup> See *Stonborough v. Preferred Accident Ins. Co.*, 292 N.Y. 154, 155, 54 N.E.2d 342, 343 (1944). Although Chief Judge Fuld never specifically cited *Stonborough*, this case provides the sole judicial authority for the rule. *Stonborough*, however, may be explained by its unique facts. Plaintiff was injured while riding in an automobile owned and driven by her fiancé. She waited to sue until after she had married the defendant; then the insurer claimed that the policy did not cover interspousal litigation. The court held that liability was fixed at the time of the accident, avoiding interposition of the defense.

<sup>21</sup> 21 N.Y.2d at 320, 234 N.E.2d 678, 287 N.Y.S.2d at 645, see Comment, *supra* note 4, at 555.

<sup>22</sup> E.g., the duty to defend clearly cannot be worth the face value of a \$200,000 policy. The duty should be assessed in terms of the actual cost of defending a suit.

and only the duty to indemnify can be relied upon as the basis for such a proposition. But a close reading of the policy indicates that the insurer's liability to indemnify does not accrue until an in personam judgment is rendered against the insured. Carriers agree only "[t]o pay on behalf of the insured all sums which the *insured* shall become *legally obligated* to pay."<sup>23</sup> Quasi in rem actions result in judgments against the attached property; they do not impose a personal obligation of payment and satisfaction upon the owner of the res, *i.e.*, the insured. Thus, the insurer never becomes legally obligated to pay if only an in rem action is instituted.<sup>24</sup>

Assuming, however, that the duties to defend and indemnify comprise an attachable res, their respective values should be determined by actual computation and not by the arbitrary face value rule. The duty to defend might be assessed by requesting insurers to furnish information concerning the cost of defending the average negligence action in New York. The duty to indemnify might be valued in terms of its worth to the insured as represented by the premium price. But the worth of the premium is measured at the time of purchase, and it would be more reasonable to consider the value in the light of impending litigation. Although computing the fair value of the attached obligations is difficult, it is a more rational method of evaluating the res than the face value rule. Judges Breitel and Bergan, having criticized the logic of *Seider*, are likely to shift the court in favor of actual computation, since there is no duty to indemnify in quasi in rem actions; and, since the value of the duty to defend does not approach the face amount of the policy, the court should accord only a minimal value to the policy. If the court adopts this rationale, *Seider's* effect would be severely reduced. An insurer's default would result in relatively minor judgments, and thus avoid the expense and inconvenience of litigating in New York.

### III

#### CONSTITUTIONALITY OF ATTACHING LIABILITY INSURANCE POLICIES

##### A. *Analysis of the Mechanical Approach—Neither a Debt nor Personal Jurisdiction Over the Debtor*

The nature of the insurer's obligation also raises due process questions, since quasi in rem jurisdiction requires "property" within the

<sup>23</sup> See E. PATTERSON & W. YOUNG, *supra* note 5, at 697 (emphasis added).

<sup>24</sup> Lewis v. Continental Ins. Co., 239 F. Supp. 42, 44 (E.D.S.C. 1965); Sexton v. Harleysville Mut. Cas. Co., 242 S.C. 182, 188-90, 130 S.E.2d 475, 478-79 (1963).

forum. The Court of Appeals in both *Seider* and *Simpson* split on the question of the existence of a debt (property) at the time of the attachment. The insurer's obligations to defend and indemnify were contingent upon the bringing of an action, and only circular reasoning sustains the determination that these duties were fixed when the levy was effected.<sup>25</sup> Since there would be no property in the state, there was no constitutional basis for the exercise of jurisdiction.

Regardless of whether a debt exists, there might be no personal jurisdiction over the alleged debtor. Foreign insurers qualifying to do business in New York consent only to suits on contracts made or causes of action arising in New York.<sup>26</sup> In the absence of consent, personal jurisdiction is governed by the *International Shoe* test of "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>27</sup> If the cause of action arises within the boundaries of the forum, *McGee v. International Life Insurance Co.* suggests that even the most minimal contacts will justify jurisdiction.<sup>28</sup> The answer is not as clear when the cause of action arises in a foreign forum.<sup>29</sup> Yet, in both *Seider* and *Simpson*, the Court of Appeals implicitly postulated an answer: there was jurisdiction over the insurers although the accidents did not take place in New York.

New York courts have traditionally shown little hesitation in exercising jurisdiction under such circumstances. In *Tauza v. Susquehanna Coal Co.*,<sup>30</sup> the defendant, a Pennsylvania corporation, had an office in New York staffed by salesmen and clerical assistants, and solicited orders

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<sup>25</sup> See pp. 1109-10 *supra*.

<sup>26</sup> N.Y. INS. LAW § 59(1) (McKinney 1966) provides that insurers doing business in New York must appoint the Superintendent of Insurance as their agent "upon whom all lawful process in any action or proceeding against such insurer on a contract delivered or issued for delivery or a cause of action arising in this state may be served."

<sup>27</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>28</sup> 355 U.S. 220, 223-24 (1957).

In *McGee*, the defendant insurer's only contacts with California were the mailing of the policy to the insured in that state and the receipt of the insured's premium mailed from California. Plaintiff was the beneficiary of the policy and sued the Texas insurer in California. Since the cause of action arose out of that contract, the Supreme Court announced that jurisdiction was proper.

<sup>29</sup> In *International Shoe*, the Supreme Court refused to determine whether personal jurisdiction could constitutionally be asserted over foreign corporations on foreign causes of action. The Court said that when the corporation's activities within the state were few and isolated, personal jurisdiction "has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." 326 U.S. at 317. But it went on to say that personal jurisdiction had been asserted when the corporation's activities in the state were substantial. *Id.* at 318.

<sup>30</sup> 220 N.Y. 259, 115 N.E. 915 (1917).

from New York customers. Although the cause of action arose elsewhere, Judge Cardozo declared that the corporation was doing sufficient business to be present in New York. Thus, he concluded, the corporation was subject to the personal jurisdiction of New York courts.<sup>31</sup> But the fiction of corporate presence was later discarded by *International Shoe* in favor of the minimum contacts test,<sup>32</sup> and *Tauza's* present weight may be questioned. In the case of *Bryant v. Finnish National Airline*,<sup>33</sup> the New York Court of Appeals sustained jurisdiction over a foreign corporation although the plaintiff was injured in a Paris airport. The defendant's activity in New York—maintenance of an office engaged in a small amount of advertising—was much less than that of the *Seider* insurer. *Bryant* demonstrates the unfairness of subjecting a party to personal jurisdiction on a foreign cause of action unrelated to its minimal activity in the forum. Only the absence of an appeal to the Supreme Court has saved the decision from reversal on constitutional grounds.<sup>34</sup>

The Supreme Court considered the problem of exercising jurisdiction over a foreign corporation on a foreign cause of action in *Perkins v. Benguet Consolidated Mining Co.*<sup>35</sup> Defendant, a Philippine corporation, was forced by World War II to conduct its entire, albeit limited, operation in Ohio. Plaintiff, an Ohio resident, sued in the Ohio courts, since the only other forum in which the defendant could be subjected to personal jurisdiction was the Philippines. The Court concluded that defendant's activities in Ohio were "sufficiently substantial" to justify that state's exercise of jurisdiction.<sup>36</sup>

*Perkins* does not lead to the conclusion that foreign corporations

<sup>31</sup> *Id.* at 268, 115 N.E. at 918.

<sup>32</sup> To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. . . . These demands may be met by such contracts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there.

326 U.S. at 316-17.

<sup>33</sup> 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

<sup>34</sup> One commentator on *Bryant* argued that the airline's activities in New York were not sufficiently substantial to justify the exercise of jurisdiction. Where the cause of action has no substantial connection with the state, the local business must have sought and derived significant benefits from the state. Thus, the airline lacked sufficient contacts with New York, and the exercise of jurisdiction was unconstitutional. 51 CORNELL L.Q. 586, 596-97 (1966).

<sup>35</sup> 342 U.S. 437 (1952).

<sup>36</sup> *Id.* at 447-48.

are subject to jurisdiction on every foreign cause of action.<sup>37</sup> The term "substantial" indicates that the Supreme Court adopted a more rigid test for foreign than domestic causes of action, and a narrow reading of the opinion would indicate that only a corporation conducting its entire business in the forum would meet the test.<sup>38</sup> Subjecting the *Perkins* defendant to jurisdiction in Ohio was certainly not unfair since the president, all the corporate records, and the corporate funds were there. But the insurers in *Seider* and *Simpson* were conducting only a part of their business in New York, and their contacts were arguably not "substantial."

Moreover, *Seider*-type actions create a further dilemma for the insurer, since the defendant-insured will likely try to avoid New York's personal jurisdiction.<sup>39</sup> If the insured refuses to appear and cooperate, the defense must be conducted without benefit of his testimony. Such a refusal, of course, might be construed as a breach of the policy's cooperation clause,<sup>40</sup> thereby relieving the insurer of any obligation—and eliminating the existence of the res.<sup>41</sup> But not every refusal to appear

<sup>37</sup> Most commentators have indicated that *Perkins* may be limited to the unique facts of the case; i.e., the Philippine corporation was conducting all of its business in Ohio and the plaintiff could sue only in Ohio or the Philippines. See Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569; 602 (1958); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 932 (1960); Note, *Jurisdiction Over Foreign Corporations—An Analysis of Due Process*, 104 U. PA. L. REV. 381, 398 (1955). But see, Note, *The Growth of the International Shoe Doctrine*, 16 U. CHI. L. REV. 523, 530-31 (1949).

<sup>38</sup> It should be noted that the Court used the term "substantial" in *International Shoe*, 326 U.S. at 318, in discussing the exercise of jurisdiction over foreign causes of action. The use of this terminology in the only two cases considering the problem is not mere coincidence. In *McGee*, where the cause of action arose in the state, minimum contacts were required. But *Perkins* demanded more than that minimum.

<sup>39</sup> N.Y. CIV. PRAC. LAW § 320 (McKinney 1963) abolishes the right of limited appearance in quasi in rem actions brought in New York. Subsection (c) provides:

an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction . . . is asserted at the time of appearance 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.

*Id.* § 320(c). Thus, no defense may be made on the merits without subjecting oneself to personal jurisdiction. Any giving of testimony would be construed as an appearance, since the New York courts have said that defendant's participation "in the litigation as an actor in a genuine and substantial sense" amounts to an appearance. *Henderson v. Henderson*, 247 N.Y. 428, 433, 160 N.E. 775, 777 (1928). See *Farmer v. National Life Assoc.*, 138 N.Y. 265, 270, 33 N.E. 1075, 1076 (1893).

<sup>40</sup> See *Shalita v. American Motorists Ins. Co.*, 266 App. Div. 131, 135, 41 N.Y.S.2d 507, 511 (3d Dep't 1943); *Cameron v. Berger*, 336 Pa. 229, 235, 7 A.2d 293, 296 (1939).

<sup>41</sup> "When the condition [is] broken, the policy [is] at an end, if the insurer so [elects]." *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 277, 160 N.E. 367, 369 (1928).

is a breach of the cooperation clause,<sup>42</sup> and the insurer might be forced to defend without any help from the defendant. On the other hand, if the insurer forces an appearance leading to personal jurisdiction over the insured, a court might hold that the carrier has disregarded the insured's interests and is therefore liable for the entire amount of the judgment.<sup>43</sup> Thus, the insurer's dilemma places him at a disadvantage not encountered by the defendant in *Perkins*.

#### B. *Application of the International Shoe Test to Quasi in Rem Jurisdiction*

Assuming that both a debt and valid personal jurisdiction over the debtor exist, the mechanical rule of *Harris v. Balk* should not be followed blindly. Jurisdiction should be governed instead by the fairness test of *International Shoe*. *Seider* dramatizes the arbitrary nature of quasi in rem jurisdiction, since attachment focuses on the fortuitous presence of a debtor within the state. The existence of property should be considered as just another contact and not as the sole determinant of jurisdiction.<sup>44</sup>

Analysis of quasi in rem jurisdiction in terms of minimum contacts and fairness is not without precedent. In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>45</sup> the Supreme Court said that classification of an action for a trust accounting in terms of in rem or in personam was unimportant, and stressed the interests of each state in the closing of trusts.<sup>46</sup> The California Supreme Court, in *Atkinson v. Superior Court*,

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The insurer cannot, however, avoid liability by urging its insured to refuse appearance. See *Bachman v. Monte*, 326 Pa. 289, 297, 192 A. 485, 488 (1937).

<sup>42</sup> "[A] great variety of circumstances can be imagined under which the failure of the insured to present himself might be sufficiently explained and excused." *Shalita v. American Motorists Ins. Co.*, 266 App. Div. 131, 133, 41 N.Y.S.2d 507, 509-10 (3d Dep't 1943). Most courts require insurers to show that the failure to appear created material prejudice before their liability will be relieved. *Cameron v. Berger*, 336 Pa. 229, 233, 7 A.2d 293, 295 (1939).

<sup>43</sup> The insurer "must act with requisite care . . . toward the Assured's interest. It may, of course, properly consider its own interest, but it may never, never forget that of its Assured." *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525, 532 (5th Cir. 1962). See also *Fidelity & Cas. Co. v. Robb*, 267 F.2d 473, 476-77 (5th Cir. 1959).

<sup>44</sup> The arbitrary nature of quasi in rem jurisdiction has been attacked by a number of commentators. See, A. EHRENZWEIG, *CONFLICT OF LAWS* § 29, at 102-03 (1962); Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 309 (1962); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 960 (1960); Comment, *supra* note 4, at 567-69.

<sup>45</sup> 339 U.S. 306 (1950).

<sup>46</sup> It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws . . . is so insistent and rooted in custom as to establish beyond doubt the rights of its courts to determine the interests of all claimants,

rejected the mechanical approach and concluded "that the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles."<sup>47</sup> Significantly, Chief Judge Fuld recognized in *Simpson* that:

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. . . . Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power.<sup>48</sup>

He concluded that New York had sufficient contacts with the insurer to satisfy the *International Shoe* test. His analysis, however, ignores the interests of the defendant. Although the insurer is the real party in interest, forcing the defendant to come to New York subjects him to expense and inconvenience. Also, he is confronted with a dilemma similar to that facing his insurer. If he appears, he faces personal jurisdiction in a state where high verdicts may absorb the entire insurance coverage and expose him to liability for the excess.<sup>49</sup> On the other hand, a refusal to appear and cooperate, if found unreasonable, could terminate the policy,<sup>50</sup> thus, forcing the defendant to bear the entire expense of any subsequent action against him.

This conflict led a federal court to declare unconstitutional the *Seider*-type jurisdiction in *Podlosky v. Devinnay*.<sup>51</sup> After the insurance policy had been attached as the basis for quasi in rem jurisdiction in the state court, the case was removed to a federal court. That court, applying the *International Shoe* test, held that New York lacked the requisite minimum contacts to subject the insurance policy to levy in New York.<sup>52</sup> Although the court limited its decision to attachment of liability policies where no limited appearance is available, the decision represents the first step in the judicial recognition of *Seider's* impropriety. *Seider* causes expense, inconvenience, and unjustifiable dilemmas

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resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

*Id.* at 313.

<sup>47</sup> 49 Cal. 2d 333, 345, 316 P.2d 960, 964 (1957), noted in 46 CALIF. L. REV. 637 (1958).

*See* Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 662 (1959).

<sup>48</sup> 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 633.

<sup>49</sup> For a discussion of the insured's plight, see Comment, *supra* note 4, at 565-67.

<sup>50</sup> *See* cases cited note 40 *supra*.

<sup>51</sup> 281 F. Supp. 488 (S.D.N.Y. Feb. 26, 1968).

<sup>52</sup> *Id.*

for both insurers and defendants. It violates due process and, therefore, should be overruled by the courts or corrected by appropriate legislation.

#### IV

#### THE NEED FOR LEGISLATIVE ACTION

Regardless of the final treatment of the constitutional questions, the New York legislature should act to reduce the hardship which *Seider* creates for nonresident defendants. The defendant's dilemma could be eased by providing for a limited appearance in *Seider*-type actions.<sup>53</sup> But a limited appearance would not remove the valuation of the res problem, and the sterile and inflexible procedure would also remain. Complete legislative elimination of *Seider* would be more appropriate. Therefore, CPLR section 5201 should be amended to exclude liability insurance policies from the category of property subject to attachment.<sup>54</sup>

Legislative action, however, should not end with the abrogation of *Seider*. *Seider* is a judicial attempt to provide resident plaintiffs with a chance to sue at home.<sup>55</sup> The decision reflects a policy judgment that

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<sup>53</sup> See note 39 *supra*. The argument against a limited appearance is that a party should not be able to contest his liability without subjecting himself to the court's personal jurisdiction. Although this rationale is normally subject to question, it creates a more onerous situation in *Seider* circumstances. The defendant cannot simply default and forfeit his property as in most quasi in rem cases since this would prejudice the insurer. See Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 *BUFFALO L. REV.* 374, 386-93 (1965).

<sup>54</sup> N.Y. CIV. PRAC. LAW § 5201 (McKinney 1963) presently provides:

(a) 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.

(b) 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, unless it is exempt from application to the satisfaction of the judgment.

<sup>55</sup> Plaintiff's residence alone is not considered a sufficient basis for the exercise of jurisdiction. In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court indicated that despite the convenience of the plaintiff in suing at home, the test was whether the defendant had sufficient contacts with the forum. The court rejected the contention that the nonresident trustee could be subject to Florida jurisdiction because the majority of the litigants resided therein:

It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. . . . [Florida] does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by con-

the interests of resident plaintiffs in suing at home outweigh those of insurers forced to defend in a forum unrelated to the cause of action.

Where the defendants are corporate insurers, severe prejudice is normally not created by allowing resident plaintiffs to sue in their home forums. So long as nonresident defendants can appear and cooperate without fear of becoming subject to personal jurisdiction, insurers can defend effectively in any state where they are doing business. They maintain organizations experienced in the law of each state, and have adequate resources to bear the costs of litigation.<sup>56</sup>

Wherever the cause of action is brought, one party will have to undergo the expense of transporting some of his witnesses. The insurer's witnesses are normally at the scene of the accident, but the plaintiff's medical witnesses are usually located in his home state. By forcing insurers to defend in the plaintiff's home state, the legislature would be shifting some of the litigation costs from the individual plaintiff to a group of policyholders.<sup>57</sup>

There are cases, however, in which forcing insurers to defend in a forum other than where the accident occurred would create severe prejudice. For example, if the accident took place in Arizona, and numerous witnesses are needed to establish an adequate defense, the

sidering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.

*Id.* at 254 (footnote omitted). Yet there are those who argue that plaintiff's residence should be sufficient so long as defendant is not greatly inconvenienced. Justice Black, dissenting in *Hanson*, argued that where a state has substantial connections with the litigation, it has jurisdiction "unless litigation there would impose . . . a heavy and disproportionate burden on a nonresident defendant . . ." *Id.* at 259.

Professor Ehrenzweig has also indicated that plaintiff's residence might be a constitutional basis for jurisdiction, "since, after all, the plaintiff's harm is ultimately most clearly situated at the place of his abode." He continued:

That the United States Supreme Court has not yet declared jurisdictions based on the plaintiff's domicile to be constitutional is clearly due to the lack of statutory schemes based on such jurisdiction. It is regrettable that legislators have so far persisted in using traditional formulas and have thus precluded the Court from giving new life to our obsolescent law of jurisdiction.

Ehrenzweig, *Ehrenzweig in Reply*, 9 J. PUBLIC LAW 328, 331 (1960).

Although these arguments are persuasive for considering plaintiff's residence in exercising jurisdiction, *Hanson* showed that a majority of the Court is not willing to disregard the defendant's contacts.

<sup>56</sup> For another view that forcing insurers to defend in New York would not be unfair, see 51 MINN. L. REV. 158, 163 (1966).

<sup>57</sup> This is somewhat analogous to the concept of non-fault liability—shifting the cost from the injured party to the insurer, who can theoretically spread the loss among a larger group of people. Certainly insurers by their very nature can spread the litigation expenses, thereby reducing the plaintiff's financial burden. See generally A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); W. PROSSER, TORTS § 74, at 508-10 (3d ed. 1964); Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815 (1967).

insurer would be greatly inconvenienced by a New York trial. In the absence of compulsory process,<sup>58</sup> insurers will certainly have difficulty persuading witnesses to travel great distances to testify in foreign litigation.

The legislature could adopt a plan reflecting the interests of both resident plaintiffs and foreign insurers. Insurance companies might be required to consent to direct actions by resident plaintiffs as a condition to doing business in New York.<sup>59</sup> The Superintendent of Insurance could act as their agent for receipt of process in any action by a resident plaintiff against one of their insureds. The appearance and cooperation of insureds can be secured by granting immunity from the imposition of personal jurisdiction.<sup>60</sup> Of course, when insureds refuse to appear and cooperate, the statutory procedure should be inoperable. As a further guarantee of fairness for insurers, the legislature should adopt a *forum non conveniens* provision charging the judiciary with the duty of weighing the interests of each party.<sup>61</sup> If the insurer can show that New York litigation would be inconvenient and prejudicial, the courts should be required to dismiss the suit. An example of such prejudice is the refusal of an important witness to testify in New York.

The insurance industry is likely to oppose such legislation on the ground that it will result in higher verdicts. Their fear of jury reaction to insurer defendants is somewhat naive, however, since New York

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<sup>58</sup> The absence of compulsory process has been cited by the Supreme Court as one consideration in deciding whether *forum non conveniens* is applicable. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the court listed the following important considerations:

[R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Id.* at 508.

<sup>59</sup> This statute would be different from the Louisiana direct action statute which allows direct actions only where the cause of action arises in the state. LA. REV. STAT. ANN. § 22:655 (Supp. 1967). In sustaining the predecessor of the Louisiana statute, the Supreme Court pointed to the state's interests when the cause of action arose in the state. *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954); see discussion in note 6 *supra*. But that statute is not premised on the consent of the insurer to service, and there seems little doubt that a party can be required to consent to service without offending the constitution. *Cf. Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921).

<sup>60</sup> The New York common law provides immunity from personal service for a witness who enters the state for the sole purpose of testifying. But this immunity lies within the court's discretion, and a legislative provision would guarantee freedom from personal service without any fear of judicial abuse of discretion. See J. WEINSTEIN, H. KORN, & A. MILLER, *NEW YORK CIVIL PRACTICE*, ¶¶ 308.05-07 (1967).

<sup>61</sup> This would change the New York presumption against dismissing any suit involving resident plaintiffs. See 26 *FORDHAM L. REV.* 534, 535 & n.6 (1957).

jurors assume that a defendant is insured.<sup>62</sup> An additional objection might be that the proposed legislation will deprive the industry of a possible bargaining point in effecting settlements, since New York plaintiffs, with their home forum available, will no longer accept a smaller sum to avoid litigating elsewhere. Although this argument has some merit, the insurer's ability to effectively defend in any forum and the plaintiff's convenience are overriding considerations. Regardless of the eventual judicial disposition of *Seider*, the proper alignment of the rights and duties involved can be accomplished only through informed legislative channels.

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<sup>62</sup> Motor vehicle insurance is compulsory in New York, N.Y. VEH. & TRAF. LAW §§ 330-68 (McKinney 1960). See Lassiter, *Direct Actions Against the Insurer*, 1949 INS. L.J. 411, 416, where the author argues that concealment of insurance is more prejudicial to the carriers than disclosure of its existence, since most juries merely assume that the defendant is insured. Disclosure would permit insurers to plead for a fair verdict from the jury and perhaps this would result in lower verdicts.