AN INSURER'S OBLIGATIONS TO DEFEND AND INDEMNIFY AS A BASIS FOR QUASI IN REM JURISDICTION: SEIDER REVISITED

INTRODUCTION

A liability insurer's obligations of defense and indemnity traditionally have not been a basis for quasi in rem jurisdiction.¹ When the New York Court of Appeals allowed these duties to be attached in Seider v. Roth,² the resulting doctrine established a new basis for quasi in rem jurisdiction.³ The doctrine permits a resident plaintiff to bring a lawsuit in New York for a tort committed by a nonresident in another state.⁴ Attachment of the obligations of the insurer to defend and indemnify is permissible if there is an insurance contract between the defendant and his insurer and the insurer does business within the forum state.⁵ The Seider decision has been rejected by other courts⁶ and it has received extensive criticism by commentators.⁷

³ Id. at —, 216 N.E.2d at 315, 269 N.Y.S.2d at 101-02.
⁵ Seider at —, 216 N.E.2d at 315, 269 N.Y.S.2d at 102. Judge Breitel, concurring on the basis of Seider v. Roth, stated in Simpson v. Loehmann: "[I]t will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with State." 21 N.Y.2d 305, —, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967).
⁷ See generally Carpenter, New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?, 22 Hastings L. J. 1173 (1971); LaBrum, The
Although Seider has not received widespread acceptance or approval, it continues to remain a viable doctrine in New York. Prior to Seider, New York residents injured in states other than New York could only utilize New York courts if the defendant either owned property in New York or was subject to in personam jurisdiction. Adoption of the Seider doctrine expanded New York's definition of attachable property to include the obligation of the defendant's insurer to defend and indemnify, thereby expanding the number of potential defendants subject to New York quasi-in rem jurisdiction. This comment will review the significant developments of the Seider doctrine, outlining the basic criteria necessary to utilize the doctrine in New York. After reviewing several of the criticisms levied against the doctrine, three recent cases will be discussed and analyzed. Special emphasis will be devoted to a recent statute which has been interpreted in one of these recent decisions to specifically permit Seider doctrine garnishments. Such a statute may be the future trend of the doctrine.

THE DEVELOPMENTS OF THE SEIDER DOCTRINE

The Seider doctrine established a new res for purposes of quasi in rem jurisdiction. This res consists of the insurer's obligation to defend and indemnify its insured. The basic constitutional requirements for quasi in rem jurisdiction were enumerated in Pennoyer v. Neff: presence of the res, seizure of the property, and adequate notice. In Harris v. Balk, the United States Supreme Court broadly construed the type of property that can be present for purposes of quasi in rem jurisdiction. The definition of property was extended to include intangible debts, in addition to tangible real and personal property. The obligations of a debtor be-

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11. Id. at 222-23.
12. Id. at 726-27. Although Pennoyer refers to the action as in rem, the court was discussing what is called quasi in rem jurisdiction in more recent decisions. See also Mullane v. Central Hanover Bank, 399 U.S. 306, 312-13 (1949), defining the minimum efforts needed to satisfy constitutional due process when substituted service is utilized in quasi in rem actions.
13. Id. at 222-23.
came a basis for quasi in rem jurisdiction when the debtor was present in the forum state.

New York, interpreting the doctrine set forth in *Harris v. Balk,* broadly construed attachable debts in the 1962 decision of *In re Riggle's Estate,* to include the obligations of an insurance company to defend its insured under a liability insurance policy. By defining these obligations as property, the court was able to maintain jurisdiction over the case even though in personam jurisdiction was lost upon the defendant's death. The defendant's estate, consisting of these obligations, allowed the court to appoint an administrator over whom the court exercised jurisdiction. Maintenance of jurisdiction in New York was thus based on a liberal interpretation of a debt. However, New York's willingness to provide convenient forums for its residents was not limited to the use of quasi in rem jurisdiction.

In *Oltarsh v. Aetna Insurance Co.,* the New York Court of Appeals granted jurisdiction over a cause of action arising from an accident in Puerto Rico. The court allowed the plaintiff to utilize a Puerto Rican statute permitting direct actions against a defendant's insurance carrier. In this case New York used a direct action statute to allow a claim against the defendant insurer, the only defendant subject to New York jurisdiction. By so doing, New York's courts were kept open to its residents, but the most controversial development toward expansion of New York's jurisdiction occurred a year later.

In 1966 Mr. and Mrs. Seider, residents of New York, sued for

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North Carolina, permitted Harris to assert his payment to Epstein as satisfaction of his debt to Balk, under the full faith and credit clause of the United States Constitution. *Id.* at 226-27.

15. *Id.* at —, 181 N.E.2d at 437, 226 N.Y.S.2d at 416-17.
16. *Id.*
17. *Id.* See also *In re Estate of Kandlbinder,* 183 Neb. 178, 179-80, 159 N.W.2d 199, 200-01 (1968), in which the Nebraska Supreme Court treated the liability insurance policy of a nonresident decedent as a sufficient basis to sustain litigation of the tort claim of a Nebraska decedent.
19. *Oltarsh* at —, 204 N.E.2d at 627, 256 N.Y.S.2d at 585.
damages they received in an accident which had occurred in Vermont. The injuries were allegedly caused by the negligence of Lemiux, a citizen of Quebec, Canada. Both the residence of Lemiux and the situs of the tort prevented the New York courts from obtaining in personam jurisdiction, and Vermont law did not provide for direct action against the insurance company. Relying heavily upon its decision in In re Riggle, the New York Court of Appeals in Seider v. Roth allowed garnishment of the insurance obligation. The obligation the insurer owed wasn't clearly defined except that the court approved the In re Riggle view of the debt as the obligation "to defend and contingently indemnify." This holding was subsequently affirmed by the court of appeals in Simpson v. Loehmann. The New York court justified Seider by stating in Simpson: "[R]ealistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation." This doctrine was not followed by a federal district court in 1968. In Podolsky v. Devinney, a diversity action brought in a New York federal district court, the court vacated writs of attachment and dismissed a Seider doctrine action on the constitutional notions of "fair play and substantial justice." The court held that although Erie v. Tompkins requires a federal court to follow state law in a diversity action, this procedure does not apply if the law is unconstitutional. Relying primarily upon due process, the court in Podolsky held that jurisdiction based on the attachment of the insurer's policy obligation was unconstitutional. The court found that an insurer is placed in an "unenviable position" if it fulfills

22. Id.
23. Id. at —, 216 N.E.2d at 314, 269 N.Y.S.2d at 102. See also N.Y. CIV. PRAC. LAW § 5201 (a) (McKinney 1963). The statute states:
A money judgment may be entered 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.
27. Id. at 500.
28. 304 U.S. 64 (1938).
29. Podolsky at 500.
30. Id. at 498.
its duty to advise the insured that his liability may exceed the policy limits, because a court may find this advice to have "literally invited the insured to withhold co-operation."31 However, the court asserted that noncooperation is the only real defense available to the insurer, and that this defense may be unavailable if noncooperation ensued from the insurer’s advice. Thus the insurer has been deemed to in effect have given up the defense of noncooperation.32 In addition to the lack of this defense, the insurer cannot proceed on the merits of the case without the insured's permission. Authorization is, however, unlikely if by so doing the insured will be subject to in personam jurisdiction for any excess recovery in the suit over the policy limit.33 Hence, the insurer who has a greater interest than a simple garnishee is deprived of the property without the opportunity to adequately defend the action establishing the debt, in contravention of due process.34

A rehearing of Simpson solved this problem by limiting the amount recoverable in a quasi in rem proceeding to the face value of the policy, “even though . . . [insured] . . . proceeds with the defense on the merits.”35 This right of the insured to defend on the merits without subjecting himself to in personam jurisdiction was limited to Seider doctrine garnishments.36 If damages exceed the policy limit, plaintiff must relitigate in another jurisdiction where the insured is subject to suit,37 e.g., where the insured resides or the state where the tort occurred if it has a long arm statute.38

31. Id. at 495 n.17.
32. Id. at 498-99. Such defenses as nonexistence of a valid policy, fraud, lack of notice, and failure of cooperation by the insured are available to the insurer. Id. at 499 n.28. However, this quotation is not applicable to the present case.
33. Id. at 498-99.
34. Id. at 496-500.
35. Simpson, rehearing denied at —, 238 N.E.2d at 320, 290 N.Y.S.2d at 916.
36. See N.Y. CIV. PRAC. LAW § 320 (McKinney 1962). Although in Simpson this limited appearance to defend on the merits was only allowed in Seider doctrine garnishments, New York's attachment statute was later amended to allow limited appearance in all garnishment actions. N.Y. CIV. PRAC. LAW § 320(c) (McKinney 1970); McLaughlin, Practice Commentaries in N.Y. CIV. PRAC. LAW § 320 at 373 (McKinney 1972). See generally Carrington, Collateral Estoppel and Foreign Judgments, 24 OHIO ST. L.J. 381, 383-85 (1963), suggesting the due process clause requires that the right to make a limited appearance is mandated in all actions based on quasi in rem jurisdiction.
37. Simpson, rehearing denied at —, 238 N.E.2d at 320, 290 N.Y.S.2d at 916.
Relying upon the limitations developed in the rehearing of Simpson, the Seider doctrine was held constitutional by the Second Circuit Court of Appeals in Minichiello v. Rosenberg. Judge Friendly, writing the opinion for the majority, relied heavily upon the United States Supreme Court's approval of a Louisiana direct action statute in Watson v. Employers Liability Assurance Corp. In Watson, the direct action statute reviewed was limited in application to accidents occurring within Louisiana, because the victims would either be Louisiana residents or nonresidents who if seriously injured would be Louisiana's social burden. This interest was sufficient to allow it to utilize the direct action statute against the nonresident defendant's insurer. In Minichiello the court of appeals found that New York's interest in protecting its citizens injured in other states was as great as Louisiana's interest in protecting nonresidents injured within its borders.

By means of the Seider doctrine, New York has thus extended the constitutionally acceptable definition of attachable property to encompass obligations under an insurance policy. New York limits this recovery to the face value of the policy and permits only residents to utilize the doctrine.

LIMITATIONS OF THE SEIDER DOCTRINE

A court must adhere to several procedural rules to remain

(Smith-Hurd 1968), for an example of a state's long-arm statute. See also Restatement of Judgments § 15 (1942), which states: "A court may acquire jurisdiction over an individual by proper service of process upon him within the State, although he is only temporarily present within the State." Id.

39. 410 F.2d 106 (2d Cir. 1968).
41. Watson at 72.
42. Minichiello at 110. The Supreme Court precedent in Watson involved a direct action against an insurer whose policy was issued in Massachusetts and delivered in Illinois to an Illinois corporation. Complainant received injuries from a defective product sold in Louisiana by the Illinois corporation. The Court stated, "[P]ersons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them." Watson at 72. In Minichiello the court found the necessary constitutional basis as long as the plaintiff resides in the state asserting jurisdiction. The court said: "We doubt that the ... [Supreme] ... Court would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, we equally doubt whether Seider could validly be applied in such a case." Minichiello at 110.
within constitutional limitations as espoused by the Second Circuit Court of Appeals decisions of *Minichiello* and *Farrell v. Piedmont Aviation Inc.* a Minnesota federal district case, summarized the prerequisites necessary to satisfy constitutional mandates where jurisdiction is obtained by garnishment of intangibles. First, the defendant must be accorded adequate notice; secondly, the amount recoverable cannot exceed the policy limits; and finally, the plaintiff must reside in the forum state.

In addition to these requirements, the insurance company must be subject to in personam jurisdiction. In *Beja v. Jahangiri*, the Second Circuit Court of Appeals indicated the additional requirement that the insurer must have the necessary minimum contacts with the forum state. The court found that the insurer had been continually licensed in New York for twenty years, had an agent and office there, and regularly did some business in the state. These facts were deemed to be sufficient contacts to fulfill the fairness test. The minimum contact requirements applicable to in personam jurisdiction are also applicable to the *Seider* doctrine quasi in rem actions, because the insurer must be subject to in personam jurisdiction.

44. *See note 43 supra.*
45. 411 F.2d 812 (2d Cir. 1969). The wrongful death actions brought by New York administrators of several nonresident decedents were dismissed. All of the decedents were nonresidents and the tort had occurred in another state. New York state did not have sufficient contact with decedents to permit attachment under the *Seider* doctrine. In *Minichiello* the court also indicated that in quasi in rem actions counterclaims are merely permissibe under *FED. R. CIV. P.* 13(a). *Id.* at 112-13.
46. 362 F. Supp. 1044 (D. Minn. 1973). Applying Minnesota law, this court permitted garnishment under the *Seider* doctrine. *Id.* at 1050.
48. *Rintala* at 1054. *See also Simpson* at —, 238 N.E.2d at 320, 290 N.Y.S.2d at 916, and *Minichiello* at 112.
49. *Rintala* at 1055. *See also Minichiello* at 110; *Vaage v. Lewis*, 29 App. Div. 2d 315, —, 288 N.Y.S.2d 521, 523 (1968); and *Varady v. Margolis*, 303 F. Supp. 23 (S.D.N.Y. 1968). The action brought in New York by plaintiffs of both New York and New Jersey was dismissed as to the New Jersey plaintiffs. *But see Donawitz v. Danek*, 83 Misc. 2d 1086, 374 N.Y.S.2d 582 (1975), *aff'd*, 53 App. Div. 2d 679, 385 N.Y.S.2d 134 (1976), which allowed a nonresident plaintiff to utilize the *Seider* doctrine to obtain jurisdiction in rem over an additional defendant, where the primary defendants were subject to in personam jurisdiction. These were considered "special considerations," *Id.* at —, 374 N.Y.S.2d at 584.
50. 453 F.2d 959 (2d Cir. 1972).
jurisdiction for the debt to be present in the state.\textsuperscript{53} There are, it is asserted, few large insurers who do not conduct some business in New York which is sufficient to establish jurisdiction.\textsuperscript{54}

Another limitation is the collateral estoppel effect accorded to a decision based on quasi in rem jurisdiction utilizing an insurance obligation as the attachable property under the \textit{Seider} doctrine.\textsuperscript{55} Under the doctrine of collateral estoppel, parties are barred from relitigating identical issues determined in prior adjudications.\textsuperscript{56} \textit{Minichiello} indicated that in \textit{Seider} doctrine attachments, collateral estoppel would not be available.\textsuperscript{57} Refusal was based on the due process clause of the constitution which prevents a state from giving a quasi in rem judgment such effect.\textsuperscript{58} This is because “the whole theory behind [the \textit{Seider}] . . . procedure is that it is in effect a direct action against the insurer,”\textsuperscript{59} and “accordingly, the insured cannot be yoked with an unfavorable judgment rendered by a court that did not have jurisdiction over his person.”\textsuperscript{60}

In order to meet constitutional requirements as indicated by the New York and federal decisions, the \textit{Seider} doctrine has been confined within very narrow boundaries. Garnishment of insurance obligations is only permitted as to resident plaintiffs, when the defendant is given adequate notice and recovery is limited to the value of the insurance policy. In addition, the attachment is only permissible in those situations where the insurance company is subject to in personam jurisdiction. Although it is confined within these nar-

\begin{itemize}
\item \textsuperscript{53} Id. at 962.
\item \textsuperscript{55} \textit{Minichiello} at 112.
\item \textsuperscript{56} \textit{James Talcott, Inc. v. Allahabad Bank, Ltd.}, 444 F.2d 451, 458-59 (5th Cir. 1971). The court stated:
\begin{quote}
The traditional threshold requirements for application of the doctrine of collateral estoppel are that
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\item the issue to be concluded must be identical to that involved in the prior action;
\item in a prior action the issue must have been “actually litigated”;
\item the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
\end{enumerate}
\end{quote}
\item \textit{Id. See also Carrington, Collateral Estoppel and Foreign Judgments, 24 Ohio St. L.J. 381, 382 (1963).}
\item \textsuperscript{57} \textit{Minichiello} at 112.
\item \textsuperscript{58} \textit{Id. See Carrington, Collateral Estoppel and Foreign Judgments, 24 Ohio St. L.J. 381, 383-85 (1963).}
\item \textsuperscript{59} \textit{Minichiello} at 112.
\item \textsuperscript{60} \textit{McLaughlin, Practice Commentaries in N.Y. Civ. Prac. Law § 320, at 381 (McKinney 1972).}
\end{itemize}
row boundaries, the Seider doctrine has been subject to extensive criticism.

CRITICISM OF THE SEIDER DOCTRINE

Although Minichiello relied upon the decision in Watson, the direct action statute approved by the Supreme Court was only applied to accidents which had occurred within Louisiana. It is only then that the state's interest in the accident is sufficient. In Kirchman v. Mikula, a later Louisiana Supreme Court decision, the court followed the narrow interpretation as set forth in Watson. The court found legislative intent to indicate that an accident or tort must have occurred within the state's boundaries or that the insurance policy was written or delivered within the state.

Perhaps the strongest criticism levied against the Seider doctrine is the "circular ratiocination" or "bootstrap" reasoning applied by the Seider court to effect the doctrine. In his dissent Justice Burke expressed his disapproval:

The jurisdiction, they assert, is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy.

Even the promise to defend, it is suggested, does not accrue until jurisdiction is obtained. This "bootstrap" reasoning ignores the policy's precondition, "the requirement of an outstanding judgment," and as such also upsets the insurer's expectations under the policy, because insurers do not anticipate direct suits in states that do not have direct action policies.

Additionally, if the defendant resides in a foreign country, an insurer may face the possibility of double liability. The full faith and credit clause will bar another state from rendering a second judgment against the insurer if the policy limit is exhausted, but

61. Minichiello at 113.
63. Watson at 72.
64. 258 So.2d 701 (La. App. 1972).
65. Id. at 703.
66. Seider at __, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (Burke, J., dissenting).
67. Id.
this will not necessarily be the case if suit is brought in a foreign country. The other country is under no obligation, aside from comity or treaties, to honor the prior action.

The limited nature of the Seider doctrine is also subject to criticism. Seider is only applicable to attachments of contingent insurance obligations. In Glassman v. Hyder, the New York Court of Appeals would not allow an extension of Seider to include contingent obligations, such as future rents. The distinctions between Seider and Glassman as to the nature of the obligation do not seem to be very significant. Perhaps “quasi in rem jurisdiction should be available in both cases or neither.”

Reliance on the obligations to defend and indemnify leave Seider open to further criticism. Attachment in Seider doctrine cases is based upon two grounds, the duty to defend and the obligation to indemnify. Although under the policy provisions in Seider and Simpson the insurer was contractually bound to defend its insured, this obligation is of the nature of personal service and as such is not subject to attachment. Indemnity, on the other hand, is the primary debt owed by the insurer, but this duty only arises when the insured defendant is either injured or held legally obligated for his negligence. According to the indemnity agreement, an insurer’s obligation to indemnify does not mature until a valid in personam judgment is rendered against the insured. In addition to criti-

70. Id. at 564-65.
71. In cases where the defendant is subject to suit in two countries, the foreign country, absent treaty, will only respect the decision of a United States court by comity. However, comity is a purely discretionary decision by the court. A. Ehrenzweig, Conflict of Laws 161 (1962).
73. 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).
74. Id. at __, 244 N.E.2d at 261, 296 N.Y.S.2d at 786.
76. Id.
80. Sykes v. Beal, 392 F. Supp. 1089, 1096-97 (1975). The insurance obligations are more than simple debts. There are continuing duties by the insured and exclusions enumerated in the policy. See Podolsky at 494.
insults based upon the nature of the insurer's obligations to defend and indemnify, the Seider doctrine is criticized for permitting a plaintiff to bring his action in one of several possible jurisdictions.

Having residence in a state adopting Seider permits a plaintiff to forum shop. New York will apply its own law in tort cases, rather than the law of the situs of the tort, making New York courts more desirable in certain cases. New York has no limitation on recovery in wrongful death actions and a three year statute of limitations in tort actions. To alleviate the problems posed by the Seider doctrine, there is a suggested alternative to quasi in rem jurisdiction.

In Atkinson v. Superior Court, the court espoused a less mechanical, modern approach to jurisdiction based on quasi in rem attachment. The California Supreme Court said "the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign fictional situs to intangibles." Thus jurisdiction over property in California is based upon the state's contacts with the litigation. It is suggested that Atkinson obliterates the "distinctions between in rem and in personam procedure" as embodied in Harris v. Balk, and may signal the end of artificial distinctions.

RECENT SEIDER DOCTRINE CASES

The criticism of the Seider doctrine has not diminished its viability as a basis for quasi in rem jurisdiction. Although it has not received widespread acceptance, it has yet to be reviewed by the

82. The possible forums are: the state where defendant resides (Restatement (Second) of Conflict of Laws § 28 (1971)), the state where the tort occurred, or a state where plaintiff resides if the state has accepted the Seider doctrine and the insurer does business there. Arguably, this is not undesirable as long as the law of the situs of the tort is applied, which mitigates some of the benefits that forum shopping bestows.

89. Id. at —, 316 P.2d at 965.
United States Supreme Court. California, Minnesota, and New Hampshire have recently considered the doctrine and each has reached contrary results.

**California**

In an early appellate court decision, *Turner v. Evers,* California accepted the *Seider* doctrine. *Turner* relied heavily upon the language of the California Code allowing state courts to "exercise jurisdiction on any basis not inconsistent with the constitution of . . . [California] or of the United States." Considering the United States Supreme Court's unwillingness to review the doctrine and the holding in *Minichiello v. Rosenberg,* the appellate court found a constitutional attack unfounded. The court concluded in light of the broad language of the code that "it is obvious that if New York has jurisdiction in a *Seider* type case, so does California."

*Turner* also discussed the requirements necessary to create an attachable debt. The court held that "the obligation to indemnify requires only the possibility of a valid judgment." In reviewing the rejection of the doctrine by other states, *Turner* apparently found the decisions based upon interpretation of their garnishment statutes and not upon constitutional objections. The California Appellate Court found the statutes applied by other courts considering the *Seider* doctrine not as broad as California's statute. The *Turner* court concluded that any inconvenience created by the garnishment must be considered in light of Hanson v. Denckla where the United States Supreme Court would not accept a center of gravity theory, even though Florida was the state where most of the parties had appeared to litigate, where the decedent had lived and where the will was probated. A trustee and trust fund were in Delaware and not subject to in personam jurisdiction in Florida; the Florida court's decision respecting the trust was of no effect. See generally *Hanson v. Denckla,* 357 U.S. 235 (1958).


95. *Turner* at —, 107 Cal. Rptr. at 395.

96. Id.

97. Id. at —, 107 Cal. Rptr. at 398.

98. Id. See note 6 supra, for a list of cases rejecting *Seider.*
Insurer's Obligation could be alleviated by relaxed \textit{forum non conveniens} rules, allowing transfer of the action even though one of the litigants resided in the state.\textsuperscript{99}  

California's Supreme Court in \textit{Javorek v. Superior Court}\textsuperscript{100} failed to find any of the arguments espoused in \textit{Turner} convincing and held the \textit{Seider} doctrine incompatible with the California garnishment statute.\textsuperscript{101} In refusing to accept the \textit{Seider} doctrine, \textit{Javorek} found neither the indemnity clause nor the defense clause of the insurance contract adequate to establish an attachable interest.\textsuperscript{102} The Supreme Court of California thoroughly discussed the court's basis for refusing to allow attachment on either ground\textsuperscript{103} and carefully analyzed California's garnishment statute.

Although \textit{Javorek} found California law amenable to attachment of debts, the court found its garnishment statute inapplicable to adoption of the \textit{Seider} doctrine. Debts may be uncertain in amount at the time of attachment as long as the obligation to pay is fixed.\textsuperscript{104} In \textit{Brainard v. Rogers}\textsuperscript{105} proceeds of fire insurance were considered an attachable debt because "the only condition precedent to pay was proof of loss together with the amount thereof."\textsuperscript{106} However, in the case of liability insurance the court refused to permit jurisdiction based on garnishment of the indemnity agreement, because the "liability of the insurer is contingent upon the determination of the liability of the insured, as well as proof of loss and


\textsuperscript{100} 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976).

\textsuperscript{101} Id. at —, 552 P.2d at 741, 131 Cal. Rptr. at 781. See \textit{Cal. Civ. Proc. Code} § 537.3(c) (West 1972). Plaintiff relied on language in the statute allowing attachment of "all property of [the] ... defendant." The court "conclude[d] that 'property' for purposes of Section 537.3 Subdivision (c), does not include interests which are contingent in the sense that they may never become due and payable." \textit{Javorek} at —, 552 P.2d at 741 n.11, 131 Cal. Rptr. at 781 n.11.

\textsuperscript{102} \textit{Javorek} at —, 552 P.2d at 741, 131 Cal. Rptr. at 781.

\textsuperscript{103} Id. at —, 552 P.2d at 731-37, 131 Cal. Rptr. at 771-77.

\textsuperscript{104} Id. at —, 552 P.2d at 737, 131 Cal. Rptr. at 777.

\textsuperscript{105} 74 Cal. App. 247, 239 P. 1095 (1925). See Brunskill v. Stutman, 186 Cal. App. 2d 97, 105, 8 Cal. Rptr. 910, 916 (1960), where the court stated: Where there is no contingency as to the garnishee's liability, the only contingency being as to the amount thereof, and where the amount of liability is capable of definite ascertainment in the future, there is no such contingency as prevents garnishment of the claim, even though, it has been held, it may be that eventually it will be found that nothing is due.

\textit{Id.}

\textsuperscript{106} \textit{Javorek} at —, 552 P.2d at 738, 131 Cal. Rptr. at 778.
amount thereof.” The additional contingency in respect to determination of the insured’s liability made the obligation too uncertain to permit attachment. The court held the Seider doctrine outside the parameter of the garnishment statute. Reliance on the possibility of a valid judgment, as asserted in Turner v. Evers was insufficient.

California’s Supreme Court in Javorek also considered, and disapproved, garnishment of the duty to defend as a basis for quasi in rem jurisdiction. It first held, using the same argument as applicable to the indemnity obligation, that the duty to defend wasn’t sufficiently certain, because “it involve[d] the same type of circular reasoning employed with respect to the obligation to indemnify.” The court also approved of Justice Burke’s dissenting opinion in Seider. In addition to refusal based on these arguments, the court also discussed other arguments against the use of the obligation to defend as an attachable debt.

An insurer has a duty to defend, but the court found the very nature of the obligation would make a judgment levied against the duty meaningless. First, the obligation to defend has a value when the suit commences, but as it concludes “the so-called value . . . will approach zero, until the obligation will have been completely extinguished,” leaving plaintiff without an asset to satisfy the judgment. Having defended the suit, the insurer has totally extinguished its debt. Under California procedure, the only property that can be used to satisfy the plaintiff’s judgment is the property used to obtain quasi in rem jurisdiction and this has been reduced to zero. Secondly, the obligation to defend was held personal to the insured and without a value, because the court “[could not] conceive what there was to be sold.” It was not salable because the “insurance carrier could not be obligated to defend a stranger to the contract by such a sale,” making the obligation valueless for garnishment purposes.

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107. Id.
109. Javorek at —, 552 P.2d at 738, 131 Cal. Rptr. at 778.
110. Id. at —, 552 P.2d at 740, 131 Cal. Rptr. at 780.
111. Id.
112. Id. at —, 552 P.2d at 738-39, 131 Cal. Rptr. at 778-79.
113. Id. at —, 552 P.2d at 740-41, 131 Cal. Rptr. at 780-81.
114. Id. at —, 552 P.2d at 740, 131 Cal. Rptr. at 780.
117. Javorek at —, 552 P.2d at 740, 131 Cal. Rptr. at 780. See also Com-
Although Javorek interpreted the attachment statute in its unamended form, the court indicated that a serious doubt existed whether the “obligations at issue are the types of interests which would ever be the subject of a security interest.” This language, considered with the views expressed in other cases, is possibly too restrictive. Perhaps the court should restrict its analysis to the statute before it, rather than stating its doubt that an insurance obligation would ever be the basis for quasi in rem jurisdiction. Finding the statute and Seider incompatible, the state legislature could, if it so desired, amend the state’s garnishment statute to permit Seider doctrine attachments.

Minnesota

In Savchuk v. Rush the Supreme Court of Minnesota, applying its garnishment statute, upheld jurisdiction based upon garnishment of an insurance obligation. The statute which the court reviewed reads in part:

Subd. 2 Plaintiff in any action . . . may issue a garnishee summons before judgment therein in the following instances only:

* * *

(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that (b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

(3) The garnishee and the debtor are parties to a contract


\[^{119}\] Javorek at —, 552 P.2d at 741 n.11, 131 Cal. Rptr. at 781 n.11.

\[^{120}\] Savchuk v. Rush, — Minn. —, 245 N.W.2d 624 (1976). See text accompanying notes 138-71 infra. See also Howard v. Allen, 254 S.C. 455, —, 176 S.E.2d 127, 129 (1970), where the court stated: “[W]e are not convinced that the contractual obligations of defendant's insurer are a debt subject to attachment under the law of this state. . . .” (but the court did not say that these obligations could never be subject to attachment); Government Emp. Ins. Co. v. Lasky, 454 S.W.2d 942, 950 (Ct. App. Mo. 1970); and Johnson v. Farmer's Alliance Mut. Ins. Co., 499 P.2d 1387, 1390 (Okla. 1972).

\[^{121}\] In light of the reasoning developed by the Second Circuit Court of Appeals in Minichiello that the Seider doctrine is not violative of due process, a court would be buttressed by that case if it construed adoption of the doctrine as a legislative decision.

\[^{122}\] — Minn. —, 245 N.W.2d 624 (1976).

\[^{123}\] Id. at —, 245 N.W.2d at 627.
of . . . insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.\textsuperscript{124}

In interpreting its statute to permit \textit{Seider} doctrine quasi in rem attachments, the court applied the same reasoning employed by a federal district court.\textsuperscript{125} Although the Minnesota federal district court interpreted the statute to allow \textit{Seider} doctrine garnishments, the prerequisite of plaintiff's residence in Minnesota was found necessary.\textsuperscript{126} This limitation of the statute to Minnesota residents is required by \textit{Farrell}.\textsuperscript{127}

In 1976 \textit{Savchuk} was appealed to the Minnesota Supreme Court by the defendants State Farm Insurance and Randall Rush, from a grant by the district court allowing the insurer to be joined as a party. The complaint arose from an accident in Indiana in which the driver of an automobile, Rush, a resident of Indiana, injured his passenger, Savchuk, also a resident of Indiana.\textsuperscript{128} Mr. Savchuk later moved to Minnesota and was a resident of that state at the time the action was instituted.\textsuperscript{129} In permitting the attachment to afford sufficient jurisdiction, the court found "potential liability [to be] all that . . . [the statute] . . . require[d] . . . ."\textsuperscript{130} In rendering its decision the court settled a conflict in wording with an earlier statute limiting application of garnishment by only judgment creditors, in favor of the more recent legislative pronouncement allowing application by all creditors.\textsuperscript{131}

Two positions asserted by the court indicate its interpretation of the statute. First, the court has an "interest in providing a forum to residents of . . . [Minnesota] . . . ."\textsuperscript{132} Second, Minnesota has a "determination in long-arm cases to extend the jurisdiction of . . . [its] . . . courts to the maximum limits consistent with due

\textsuperscript{124} MINN. STAT. ANN. § 571.41 (West 1969) (emphasis added).
\textsuperscript{126} Adkins v. Northfield Foundry, 393 F. Supp. 1079, 1091 (D. Minn. 1974).
\textsuperscript{127} Id. See Farrell v. Piedmont Aviation, 411 F.2d 812 (2d Cir. 1969), and notes 45-49 supra. \textit{Farrell} followed and supported the decision in Mini-chiello.
\textsuperscript{128} \textit{Savchuk} at —, 245 N.W.2d at 626-27.
\textsuperscript{129} Id. at —, 245 N.W.2d at 626.
\textsuperscript{130} Id. at —, 245 N.W.2d at 627. See MINN. STAT. ANN. § 571.41(2) (West 1969).
\textsuperscript{131} \textit{Savchuk} at —, 245 N.W.2d at 627. Compare MINN. STAT. ANN. § 571.41 (West 1969) with MINN. ANN. STAT. § 571.43 (West 1957).
\textsuperscript{132} \textit{Savchuk} at —, 245 N.W2d at 628.
process.” In line with these goals, the court permitted application of the statute to Seider doctrine lawsuits.

To meet the prerequisites of the statute, the court held the rules established by Minichiello necessary for the attachment to meet constitutional minimums. However, a significant development in Savchuk arises in the limitation of the doctrine to cases in which the plaintiff resides in the forum state. In Savchuk the court held the constitutionality of the statute satisfied as long as the plaintiff is a resident "at the time the action is commenced." Therefore, a nonresident can move to a state which has adopted the Seider doctrine to avail himself of its advantages. This certainly increases the "forum shopping" possibilities. Justice Otis in his dissent asserted that allowing a "plaintiff to move... after his cause of action has arisen... means that a plaintiff has a choice of 50 jurisdictions in which to sue," which may result in a violation of "due process."

Savchuk also examined the rules established in Minichiello and Simpson, which limited recovery to the face value of the insurance policy. Minnesota procedure requires "when quasi in rem jurisdiction has been obtained, a party defending such action thereby submits personally to the jurisdiction of the court." Although the language of the statute was clear, the court found the "question... [to be]... whether in fact the rule applies to a case of this kind." In line with the New York Court of Appeals' interpretation of its similar statute, the Minnesota court found its statute inapplicable to Seider doctrine garnishments. The court relied

133. Id. at —, 245 N.W.2d at 628-29.
134. Id. at —, 245 N.W.2d at 628.
135. Savchuk at —, 245 N.W.2d at 628. The court stated the constitutional criteria: "(1) Proper notice must be given to defendant insured, affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state." Id.
136. Savchuk at —, 245 N.W.2d at 629.
137. Id. at —, 245 N.W.2d at 633.
138. Id. However, Justice Otis failed to explain what he meant by this violation of the insurer's due process. Justice Otis also dissented because, under Schwartz v. Consolidated Freightways Corp., 300 Minn. 471, —, 221 N.W.2d 665, 668 (1974), Minnesota will apply its comparative negligence law rather than Indiana's contributory negligence law. Savchuk at —, 245 N.W.2d at 633.
139. Savchuk at —, 245 N.W.2d at 628-29.
141. Savchuk at —, 245 N.W.2d at 628.
upon "[b]asic considerations of fairness," in allowing a defendant to defend without becoming subject to in personam jurisdiction.\textsuperscript{143}

In line with the constitutional considerations of fairness mandated by the United States Supreme Court,\textsuperscript{144} personal jurisdiction was not available because the defendant, Rush, never "purposefully avail[ed] himself of the privilege of conducting activities in the forum state," and this is required "before personal jurisdiction over him may be properly asserted."\textsuperscript{145} Although personal jurisdiction was not available, quasi in rem jurisdiction was obtainable because the debt by the insurer exists and "the insurer controls the [litigation]."\textsuperscript{146} In addition, the necessary minimum contacts were met by the insurer's amenability to attachments of its debts because of its presence within the state.\textsuperscript{147}

In Savchuk the criteria enumerated in Minichiello and Farrell were satisfied. Adequate notice was accorded defendant Rush, liability was limited to the policy value, and plaintiff was a resident of the state of Minnesota.\textsuperscript{148} Even with adequate jurisdiction, however, a Minnesota court can grant a forum non conveniens dismissal if the "inconvenience for the defendant . . . outweighs the plaintiff's interest in a Minnesota forum. . . ."\textsuperscript{149} This power is in the discretion of the trial court.\textsuperscript{150}

\begin{footnotes}
\textsuperscript{143} Savchuk at \textemdash, 245 N.W.2d at 629. The court said: Basic considerations of fairness underlie our decision. The United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be properly asserted . . . . Defendant Rush had engaged in no such voluntary activity; personal jurisdiction over him could not be justified.

\textit{Id.}

\textsuperscript{144} See generally Hanson v. Denckla, 357 U.S. 235 (1958), where the Court stated: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." \textit{Id.} at 251. See also International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

\textsuperscript{145} Savchuk at \textemdash, 245 N.W.2d at 629.

\textsuperscript{146} \textit{Id.}


\textsuperscript{149} Savchuk at \textemdash, 245 N.W.2d at 630. See also Hill v. Upper Mississippi Towing Corp., 252 Minn. 165, \textemdash, 89 N.W.2d 654, 660 (1958).

\textsuperscript{150} Savchuk at \textemdash, 245 N.W.2d at 630. If a diversity action is transferred from a federal court where the suit was filed to a federal court in another state, the law of the state where the suit was commenced is applied. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). This procedure was held
Two different *forum non conveniens* procedures are represented by Minnesota and Wisconsin. Under Wisconsin procedure, as an example, the trial court can stay the proceedings, forcing the plaintiff to find an available alternative forum. If another forum is not available the plaintiff is allowed to reinstate the action in Wisconsin.\(^{151}\) In Minnesota the district court can only grant dismissal on the basis of *forum non conveniens* if an alternative forum is available in which the defendant is amenable to suit.\(^{152}\) Arguably, if the statute of limitations of all the alternative forums have run, a Minnesota court will not permit dismissal. In granting this procedure in Minnesota, "the trial judge would be justified in conditioning his ruling upon the willingness of the plaintiff to satisfy his claims against the defendant upon exhaustion of the policy limits."\(^{153}\) The court considered this limitation consonant with its view of jurisdiction based upon garnishment under the *Seider* doctrine.

In *Savchuk* the Minnesota Supreme Court introduced two significant additions to the *Seider* doctrine. First, Minnesota is apparently the first state in which the highest court of the state interpreted its garnishment statute as having been written to specifically allow quasi in rem jurisdiction based upon *Seider* doctrine garnishments. Secondly, the court allowed a plaintiff, not a resident of the state when the cause of action accrued, to utilize the *Seider* doctrine as long as he is a resident at the time the complaint was filed. Although Minnesota extended the *Seider* doctrine's acceptance, New Hampshire has limited its prior adoption of the doctrine.\(^{154}\)

**New Hampshire**

In *Forbes v. Boynton*,\(^{155}\) the New Hampshire Supreme Court approved the *Seider* doctrine. In that case two of the parties, the plaintiff and one of the defendants, were residents of New Hamp-

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\(^{151}\) WISC. STAT. ANN. § 801.63 (4) (West 1977). The statute states:

Jurisdiction of the court continues over the parties to a proceeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the proceedings, the court, may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require.

\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) Hill v. Upper Mississippi Towing Corp., 252 Minn. 165, —, 89 N.W.2d 654, 657 (1958).


\(^{156}\) Savchuk at —, 245 N.W.2d at 630.
shire. The other defendant was a resident of New York. The accident had occurred in Maine where the statute of limitations had run. The courts in New York, however, were not amenable to the use of the Seider doctrine by nonresidents. Plaintiff could sue the defendant in the defendant's state, but could not bring the New Hampshire defendant to New York. This made New Hampshire the only forum available in which all of the parties could be joined in one action. New Hampshire's interest "was sufficient to make the assumption of jurisdiction reasonable." Further, New York's broad grant of jurisdiction made New Hampshire's application of the Seider doctrine to a defendant residing in New York fair.

However, in Camire v. Scieszka, the Supreme Court of New Hampshire narrowly interpreted Forbes. Garnishment to establish quasi in rem jurisdiction under the Seider doctrine was interpreted by a federal district court prior to Camire to apply only in very limited circumstances. In Robitaille v. Orciuch, the court denied jurisdiction because the defendant did not reside in a Seider doctrine state. In Camire the Supreme Court of New Hampshire confirmed the federal district court's application of Forbes by limiting it to the same extent.

The New Hampshire Supreme Court found in Camire that the defendant, a resident of Missouri, injured the plaintiff, a resident of New Hampshire, in an accident in Connecticut. In analyzing Forbes, the court reached the conclusion that the application of the Seider doctrine under these facts was not permissible. The court enumerated two criteria necessary to allow garnishment of an insurance obligation: "1) the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation; and 2) it has to be consistent with principles of fair play and substantial justice." Neither of these tests were met in Camire.

156. Id. at —, 313 A.2d at 130-31.
158. Id.
160. Camire at —, 358 A.2d at 399.
163. Id. at 979. This was a diversity action applying New Hampshire law.
164. Camire at —, 358 A.2d at 399.
165. Id. at —, 358 A.2d at 398.
166. Id. at —, 358 A.2d at 399.
168. Camire at —, 358 A.2d at 399.
New Hampshire's only contact with the action in Camire was plaintiff's residence in the state. Missouri, the state where the defendant resided, would not allow application of the Seider doctrine.\textsuperscript{169} The court said "[o]nly in Connecticut (the state where the accident occurred) where both parties were amenable to suit and in personam jurisdiction [sic] can all litigants obtain a full trial on the merits."\textsuperscript{170} Finally, the court found "no special circumstances (as had existed in Forbes) . . . to justify the assumption of quasi in rem jurisdiction."\textsuperscript{171} The court failed to clarify the meaning of special circumstances, but considering the fact that only one defendant was involved and amenable in two other states to in personam jurisdiction, the court was satisfied that special circumstances were absent.\textsuperscript{172}

New Hampshire's restricted application of Seider is grounded, in part, on the court's acceptance of the modern approach embodied in Atkinson v. Superior Court.\textsuperscript{173} The New Hampshire court prefers the center of gravity theory and accepts "the general principles governing jurisdiction over persons and property rather than . . . an attempt to assign a fictional situs to intangible[s]."\textsuperscript{174} Therefore, in a case such as Forbes, where two of the parties were amenable to suit in New Hampshire, it was the preferable forum. Any alternate forum would have necessitated two actions: one in New York, where one of the defendants resided and the other action in New Hampshire, where the second defendant resided.\textsuperscript{175} This dilemma was absent in Camire, because only one defendant was involved; consequently, the situs of the accident was the center of gravity.\textsuperscript{176}

Although New Hampshire has an extremely limited application of the Seider doctrine,\textsuperscript{177} it is clear that defendants from New York

\textsuperscript{169} Id. See Government Emp. Ins. Co. v. Lasky, 454 So.2d 942, 950 (Mo. App. 1970).
\textsuperscript{170} Camire at —, 358 A.2d at 399.
\textsuperscript{171} Id. at —, 358 A.2d at 399-400.
\textsuperscript{172} Id. at —, 358 A.2d at 399. Although the court stated that Connecticut was the only state in which a full trial on the merits could be held, this fails to consider that plaintiff could also obtain jurisdiction over the defendant in Missouri, his state of residence. See Restatement (Second) of Conflict of Laws § 48 (1971).
\textsuperscript{173} Camire at —, 358 A.2d at 399. See also Comment, Garnishments of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550, 567-69 (1967).
\textsuperscript{174} Camire at —, 358 A.2d at 399.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} See notes 161-74 and accompanying text supra.
and Minnesota are subject to the doctrine in New Hampshire. Furthermore, if the Camire decision can be construed to only require a defendant's residence in a Seider doctrine state, legislation in other states will serve to expand the effect of Camire.

CONCLUSION

The Seider doctrine, in existence since 1966, is still controversial. Although a majority of the jurisdictions which have considered the doctrine have rejected it, Turner v. Evers178 indicates this may be due to restrictive state statutes rather than constitutional prohibitions. As long as the United States Supreme Court declines to review a Seider doctrine case, the doctrine appears to be constitutional under Minichiello v. Rosenberg. A state should have the power to allow the doctrine's utilization in its jurisdiction. Minnesota's adoption of a statute written to cover Seider doctrine attachments indicates legislative power to adopt the doctrine. This suggests that in many of the states which have rejected the doctrine and in those which have not yet considered it, the future applicability of Seider will rely upon legislative adoption of appropriate statutes. To the extent that any language in Camire and Javorek are interpreted to restrict Seider doctrine legislation, it is contended that they are being read too narrowly.

Thomas A. Myers—'78

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178. See notes 92-99 and accompanying text supra,