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Civil Procedure -- Attachment of Liability Insurance Policies

George Hackney Eatman

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ference might frustrate "the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." Although the action of the Court in *Commonwealth* in vacating the arbitration award and imposing a rule requiring disclosure on the arbitrator might at first glance appear to run counter to this ideal, a closer analysis indicates that the contrary is more likely. Certainly it was the aim of the Court, in formulating its rule requiring disclosure, to minimize the judicial role in arbitration. The rule formulated by the Court—that an arbitrator has a duty to disclose to the parties any dealings that might create an impression of possible bias—should strengthen the arbitration process and minimize judicial interference in at least two ways. First, requiring disclosure should give the parties additional faith in the fairness of the proceedings. Mr. Dooley advised: "Trust everybody—but cut the cards." A duty of disclosure is an additional "cut of the cards" that should tend to lessen suspicions of a losing party that he was treated unfairly. With this additional confidence in the settlement process, the loser is less likely to take his complaint to the courts. Second, the rule requiring disclosure will provide an easily recognizable standard of conduct for the arbitrator. A hazy standard regarding impartiality might lead the losing party to attempt to obtain a favorable court interpretation. Judicial review of an arbitration award would appear to be sought less often where the demarcation between acceptable and unacceptable conduct is clear. Thus, the decision in *Commonwealth* should serve to strengthen the participants' confidence in arbitration, and should decrease further the possibility of unnecessary judicial interference in the arbitration process.

John M. Murchison, Jr.

Civil Procedure—Attachment of Liability Insurance Policies

The plaintiff, a New York resident, is injured in an automobile accident in another state. The wrongdoer, who is not subject to personal jurisdiction in New York, is insured under a liability policy issued in the state of his residence by an insurance company that does business in New York...
York. Plaintiff brings his suit in New York against the insurer, and contends that the insurance policy obligations constitute an attachable res in a quasi in rem proceeding.

Confronted with these facts, the New York Court of Appeals in Seider v. Roth held that an automobile insurance policy issued by an out-of-state insurer that does business in New York was an attachable debt within the statutory definition of "debt." The debt subject to attachment was found to be the obligation of the insurance company to defend and indemnify the assured upon the occurrence of an accident. This novel theory of quasi in rem jurisdiction, which has caused both uncertainty and speculation among commentators, was followed recently by the District Court.

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1 It would not matter that suit was brought in a federal forum, for as stated in Arrowsmith v. UPI, 320 F.2d 219 (2d Cir. 1963), "the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits...." Id. at 223.

2 For a discussion of quasi in rem jurisdiction, see H. Wachtel, New York Practice Under the CPLR 15-16 (2d ed. 1966). The author states:

[I]f any property belonging to the defendant is within the state, such property may be seized (levied upon) pursuant to an order of attachment, and the property so levied upon is then deemed to constitute a "res" within the state, permitting the court to adjudicate whether the debt claimed by plaintiff should be satisfied out of the attached property.

Id.


4 See N.Y. Civ. Prac. Law §§ 5201, 6202 (McKinney 1963). Section 5201 provides:

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

Id. § 5201. Section 6202 provides that debts described in section 5201 are subject to attachment. Id. § 6202.

5 17 N.Y.2d at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102.

for the Southern District of New York in *Barker v. Smith*.\(^7\)

In *Barker*, the insurance contract was written and the accident subsequently occurred in Michigan. The corporate offices of both the insurer and the insured were also located in Michigan. Since Michigan had previously neither permitted the attachment procedure sanctioned in *Seider* nor authorized a direct action against the insurer,\(^8\) the New York rather than the Michigan attachment procedure had to be applied to obtain quasi in rem jurisdiction. The court in *Barker* found that the expenses and pain suffered by the plaintiff in New York coupled with the fact that the insurer was doing business in New York constituted sufficient "activities relating to the contract"\(^9\) to apply the New York rule treating the policy obligations as an attachable debt.\(^10\)

Prior to *Seider*, attachment of an insurer's obligations would not have been possible primarily because the interpretation given to the statutory definition of an attachable debt in New York did not include these obligations. Thus, a necessary prerequisite for in rem or quasi in rem jurisdiction—the presence of an attachable res within the state\(^11\)—had been absent. Then, in *Seider*, the insurer's obligation to defend and indemnify the insured was held to be the attachable res. This reasoning appears to be consistent with the rule of *Harris v. Balk*\(^12\) that the situs of a debt follows the debtor and is subject to garnishment wherever the debtor is found. That case emphasized, however, that it was dealing with a simple debt,\(^13\) which can only be in one place at one time.\(^14\) But if the insurance company's "debt" is found to be in New York because the insurance company is doing business in New York, the debt also exists in every other jurisdiction in which the insurer is doing business. Moreover, the general rule is that an obligation subject to a condition precedent is not attachable.\(^15\) Yet the courts in *Seider* and later in *Barker*, finding that certain obligations of the insurance company accrue as soon as it

\(^7\) 290 F. Supp. 709 (S.D.N.Y. 1968).

\(^8\) 290 F. Supp. at 713.

\(^9\) 290 F. Supp. at 713.

\(^10\) Id.


\(^12\) 198 U.S. 215 (1905).

\(^13\) Id. at 222.


\(^15\) See, e.g., 38 C.J.S. *Garnishment* § 87 (1943).
receives notice of an accident, held that the entire face amount of the policy, including the insurer's contingent obligation to indemnify, was garnishable, and thus expanded the definition of "debt" to include obligations subject to a condition precedent.

A secondary conflict-of-laws problem was encountered in the fact situations of Seider and Barker. Since an insurance policy is not an attachable debt in Michigan, New York had to apply its laws interpreting the contract to find an attachable res. Initially, the situs of the contract was the only relevant constitutional consideration under the territorially oriented vested-rights theory. The Supreme Court later modified this rule when it decided that a state with a "legitimate interest" in the application of its law may apply it without overstepping constitutional limitations, although it remains unclear exactly what minimum contacts are sufficient to result in such an interest. Although Seider disregarded the problem of minimum contacts, the court in Barker established two prerequisites necessary before a state can constitutionally define the contract obligations under a liability insurance policy written beyond its borders without interfering with the sovereignty of sister states. First, a state must have a legitimate interest in the application of its laws, and in Barker the court found that the interest of New York in preventing its citizens from becoming public charges satisfied this requirement. Second, activities must have occurred within the state that are "neither too slight nor too casual to make application of its law inconsistent with due process." The expenses and suffering of the plaintiff and the insurer's doing business in New York were held sufficient to satisfy this requirement.

if any limiting conditions on the bringing of an action in New York. It appears that the plaintiff need not even be a resident of New York.”

The emphasis that *Barker* placed on the plaintiff’s suffering and medical expenses in New York, however, may imply that mere domicile of the plaintiff and business contacts of the insurer in the attaching state are insufficient contact. If this implication becomes the rule, the attachment of insurance obligations as in *Seider* would be limited to some extent.

Neither *Seider* nor *Barker* attempted to resolve whether attachment of an insurance obligation comports with due process requirements of the fourteenth amendment. The district court in *Podolsky v. Devinney* found that garnishment of insurance policies was violative of due process because New York did not permit the insured to make a personal appearance and defend on the merits without subjecting himself to in personam jurisdiction and to the possibility of a judgment greater than the policy limits. Also found objectionable was that in the event of the insured’s default, “there is no way that the insurance company can appear to litigate its interests.” In response to this decision, the New York Court of Appeals in *Simpson v. Loehmann* held that if the insured were required to defend, in personam jurisdiction would not be extended beyond the limits of the policy. The risk remains, however, that the insured might refuse assistance to the insurer.

The problems arising out of the insurer’s inability to defend either its or the insured’s interests result from applying the rules applicable to the garnishment of simple debts to the attachment of insurance obligations. Generally, the garnishee is considered as having no interest in the res and therefore may not “set up matters which affect the defendant only.”

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24 The Supreme Court, in *Alaska Packers Ass’n v. Industrial Acc. Comm’n*, 294 U.S. 532 (1935), indicated that a plaintiff’s domicile might have a constitutionally supportable interest, but this case, unlike *Seider* and *Barker*, involved a plaintiff who would otherwise have been remediless. Louisiana and Wisconsin, which allow direct actions against insurers, do not permit suits when the accident occurred outside of their state, possibly implying sufficient contact only when the accident occurred within its borders. See *LA. REV. STAT.* § 22:655 (Supp. 1952); *Wis. STAT.* § 260.11(1) (1963).
25 In a very recent case, the second circuit also implied that *Seider* may not be validly applied where the state was neither the place of injury nor the plaintiff’s residence. *Minichiello v. Rosenberg*, — F.2d — (2d Cir. 1968).
27 *Id.* at 489.
28 *Id.* at 499.
30 38 C.J.S. *Garnishment* § 196, at 432 (1943).
In the application of its garnishment law, New York has held that if the insured “chooses not to appear, any unauthorized appearance on his behalf by attorneys retained by the insurance company would be a nullity as against him.” The difficulties are apparent in analogizing an insurance policy to a simple debt, for “the obligation to defend an insured is not to be regarded simply as a duty owed to the holder of the policy but also as an essential right which the insurance company reserves to itself in order to protect itself against unwarranted liability claims.” This problem has not been directly confronted by the New York Court of Appeals, but dictum in Simpson v. Loehmann would allow the insurer to use an insured’s failure to comply with the terms of the policy as a defense. It is not certain, however, that New York will follow this position. Regardless of whether the defense of non-cooperation is allowed, if New York prohibits the insurer from asserting the insured’s defenses, there are obvious opportunities for collusion. Possible collusion between the insurer and the insured exists if a defense of non-cooperation is permitted; collusion opportunities between the insured and the plaintiff arise if such defense is disallowed. In contrast, in a direct action the company can “contest the assured’s liability and raise its policy defenses since here it does not have the option of withdrawing from the case without a complete default on the merits.”

There will be additional problems if other jurisdictions adopt similar attachment procedures. For example, if an accident occurred involving plaintiffs who were citizens of New York and of another jurisdiction that allowed such attachment, and the defendant’s insurer was doing business in both jurisdictions, would the debt be situated in both states at the same time? A related problem arises when attachment is levied in New

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33 21 N.Y.2d at 309 n.2, 234 N.E.2d at 670 n.2, 287 N.Y.S.2d at 635 n.2. See also Siegel, Simpson Upholds Seider—Problems for Both Sides, Notes and Views, N.Y.L.J., Jan. 24, 1968, at —.
34 Louisiana and Massachusetts do not permit the defense of non-cooperation. See, e.g., West v. Monroe Bakery, 217 La. 190, 46 So. 2d 122 (1950); Mass. Ann. Laws ch. 175, § 113A(5) (1959).
York by one of two plaintiffs injured simultaneously in a foreign jurisdiction and the other plaintiff has obtained an in personam judgment against the defendant and seeks execution out of the attached insurance policy.  

New York is the first jurisdiction in which the highest state court has "enacted" the equivalent of a direct action statute. By an extremely broad definition of a simple debt, an expanded conflicts test, an extended jurisdiction test, and a novel use of the garnishment process, New York has protected its residents under the guise of a quasi in rem proceeding. Admittedly, the state of the plaintiff's residence has a definite interest in protecting its citizens. Barker, however, dismisses the interests of the insurer and the insured by recommending that "inconvenience or hardship . . . may be alleviated by way of a motion for a change of venue." This statement is based on the assumption that the parties will be able to obtain federal jurisdiction or that the forum will allow a change in venue. Even though Barker allowed the attachment of the insurance obligation, there is no necessary implication that all attachments possible under Seider are valid. The basic issue remains a determination of whether there are sufficient interests and contacts in New York to sustain jurisdiction over a corporation's intangible obligations on a cause of action arising out of state. It has been suggested that the insurance contract

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37 See Note, Civil Procedure—The Insurance Policy of a Non-Resident Insured May Be Subject to Attachment in New York, 18 Syracuse L. Rev. 631 (1967).


39 290 F. Supp. at 714. The court here employed the approach of Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), which held that when "a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies." Id. at 73. In Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935), the Court stated that a party who challenges a court's choice of laws "assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." Id. at 547-48. While Watson may allow a state to apply its law if it has sufficient contact regardless of the other state's interests, Alaska Packers seems to imply a balancing of competing interests.

40 The insurer may be unable to obtain federal jurisdiction for diversity or jurisdictional amount reasons and the jurisdiction in which the suit is brought may not recognize the doctrine of forum non conveniens. See 28 U.S.C. § 1332 (1964).

41 See, e.g., Comment, Attachment of "Obligations"—A New Chapter in Long Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L.
should be regarded merely as another contact and not the sole determinant of jurisdiction over an out-of-state cause of action. Perhaps a legislative solution to this problem might resolve the present uncertain status of New York attachment law.

GEORGE HACKNEY EATMAN

Civil Procedure—Serving Statement of Case on Appeal in North Carolina—An Unfortunate Interpretation

In North Carolina two formal steps are required in appealing a decision from a trial court. The appellant must prepare and serve to the appellee a statement of the case on appeal, and the case must be docketed on the appellate court’s calendar in accordance with the rules of the higher court.

N.C. GEN. STAT. § 1-282 allows only fifteen days to serve statement of case on appeal and ten days thereafter for counter case or exception, but the statute includes a proviso that gives the trial judge discretion "to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case." The statute does not expressly authorize any subsequent extensions of time to be ordered by the judge hearing the case. As a practical matter, however, it is sometimes impossible for the appellant to secure a copy of the transcript of the trial and to prepare his statement within the original extension period set by the judge. Often the delay is occasioned by an official of the court, but the North Carolina Supreme Court has ruled that this does not excuse a failure to serve the statement within the time allotted. Consequently, it has been common practice for the trial judge, even without specific statu-

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Rev. 550 (1967); Note, Quasi In Rem Jurisdiction Based on Insurer’s Obligations, 19 Stanford L. Rev. 654 (1967).


43 Such a statute should at least do the following: (1) allow the insurer to set up the defenses of the insured, (2) resolve whether the insurer can defeat an action successfully on the insured’s failure of cooperation, and (3) clearly specify the minimum contacts in New York sufficient to attain jurisdiction.


2 Id.

3 Id.