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Jurisdiction--Quasi in Rem: Seider v. Roth to Turner v. Evers--Wrong Means to the Right End

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JURISDICTION—QUASI IN REM: SEIDER v. ROTH
TO TURNER v. EVERS—
WRONG MEANS TO THE RIGHT END

I. INTRODUCTION

*Turner v. Evers,*¹ a recent lower state court decision in California, has followed a line of New York cases beginning with *Seider v. Roth*² in 1966, which have held an insurer’s contractual obligations³ under a liability insurance policy to be subject to attachment by the plaintiff as “debts” owed to the defendant-insured [hereinafter—insured]. Such “debts” constitute property of the insured under the earlier cases of *Matter of Riggle’s Estate*⁴ in New York and *Keck v. Superior Court*⁵ in California, and may serve as a basis for quasi in rem jurisdiction in the state in which the property may be found. Adding the concept of *Harris v. Balk*⁶—that the debt follows the debtor and may thus be attached wherever personal jurisdiction of the debtor may be attained—the practical result is that the insurer may be forced to defend in the plaintiff’s home state even though the tortious incident happened in the insured’s home state. The rationale of *Seider* and *Turner* is that the insured’s debtor, his insurance carrier, can most likely be found doing business in the plaintiff’s home state and, although the tortious incident occurred in a foreign state, the plaintiff may return to his home forum and attach the insurer’s obligations.

The *Seider* procedure has struck many as unfair and impractical to the insured and his insurance carrier. Indeed, the *Seider* procedure had always been rejected in states other than New York⁷

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³. In *Turner,* the insurer’s contractual obligations were held to be property within the meaning of attachment statutes relating to contract actions against non-residents.
⁵. 3 Civil No. 13521 (Cal., filed Nov. 14, 1972).
⁶. 198 U.S. 215 (1905).
and has been the target of much criticism by commentators. On the other hand, the procedure has the potential to supply a remedy for a valid action where otherwise a remedy would be, in a practical sense, unavailable.

The goal of the Seider cases, providing a resident plaintiff with a home forum, must be balanced with the desirability of forcing the insured and the insurer to defend in the plaintiff's home forum. The thesis presented is that a direct action against the insurer would achieve such balance.

II. BACKGROUND

A. Turner v. Evers

In Turner, plaintiffs, residents of California temporarily in Washington, had their car serviced in a Tacoma service station for the return trip to California. The car subsequently became inoperable. Turner claimed that Evers had failed to service the car properly and that $658.16 in damage was sustained for additional repair expense and loss of use of the car. In California, the plaintiffs obtained a writ of attachment directing the attachment of property of defendant and specifically the garnishment . . . of [the] liability insurer's contractual obligation to defend and indemnify [Evers'] debt owing [to the plaintiffs].

Evers' motion to quash personal and quasi in rem jurisdiction was granted on the basis that he neither conducted business nor owned property in California. On appeal, the Superior Court, Appellate Department, reversed, holding that the motion to quash was improperly granted and that the insured's rights to a defense and indemnification constituted "property" within the meaning of the attachment statutes.


12. The motion to quash was treated as a motion to quash the attachment since that was the way the parties had treated it. The court noted
The court recognized the weak limb it was climbing on by predi-
cating jurisdiction on *Seider v. Roth*, stating "to our knowledge
it is the first case outside of New York that accepts, rather than re-
jects *Seider.*"\(^1\) The *Turner* court relied heavily on *Minichiello v. Rosenberg*,\(^1\) a Second Circuit decision, for a complete discussion of
the *Seider* procedure.

B. *The Seider Rationale*

The fact situations in *Seider* and *Minichiello* are similar: a New
York resident injured in an out of state accident with a non-resident
whose insurance carrier did business in New York. In *Seider*,
two New York residents were injured in a Vermont automobile
accident caused by the negligence of a visiting Canadian resident,
Lemiux. No basis existed for personal jurisdiction over Lemiux
for suit brought in New York. However, Lemiux was insured by a
carrier which maintained business offices in New York and Seider
was successful in attaching the obligations the insurance company
owed to Lemiux. The rationale was that the insurer’s obligations,
t.i.e., investigation of the accident and duty to defend and indemnify,
were seizable in New York as “debts” owed to Lemiux. Thus, un-
der these circumstances, a New York plaintiff may sue at home
without benefit of a long arm statute and without personal juris-
diction over the defendant. The insurer’s obligations are “debts”
under *Matter of Riggle’s Estate*, and under *Harris v. Balk* all the
New York plaintiff need do to attach these “debts” is attain per-
sional jurisdiction over the debtor-insurance carrier.\(^1\)

C. *The Jurisdictional Foundations of Seider*

The *Seider* procedure requires personal jurisdiction over the in-
surer and quasi in rem jurisdiction over the insured. Expanding
concepts of both bases of jurisdiction led to the *Seider* result.

Traditional tests for personal jurisdiction were made unworkable
by the increasing mobility of individuals and the growth of multi-

\(^{13}\) *Id.* at Supp. 12, 107 Cal. Rptr. at 391. See *Rintala v. Shoemaker*,
362 F. Supp. 1044 (D. Minn. 1973) for another recent case following the
*Seider* procedure.

\(^{14}\) 410 F.2d 106 (2d Cir. 1968).

\(^{15}\) The *Harris v. Balk* rule is permissive. Not all states have extended
jurisdictional limits to those of Harris. See EHRENZWEIG, CONFLICT OF
state corporations. International Shoe Co. v. Washington marked replacement of the quantitative due process tests of consent, presence, and domicile with the qualitative tests of fairness and reasonableness. To be subject to the personal jurisdiction of a state, there need only be "minimum contacts" with the state such that the exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice." In Seider and subsequent New York decisions, the presence of the insurer doing business in New York was sufficient to satisfy the "minimum contacts" test.

The major relevant force in the growth of quasi in rem jurisdiction has been the landmark case of Harris v. Balk. Harris, a citizen of North Carolina, owed money to Balk, another North Carolina resident. While Harris was temporarily in Maryland, the debt he owed to Balk was garnished by a creditor of Balk. The rationale of the Court was that the indebtedness followed the debtor and could be attached wherever the debtor was subject to personal jurisdiction. When the constitutionality of the Seider procedure was challenged in Minichiello v. Rosenberg, the court relied on Harris. Applying Harris, the presence of the insurance carrier debtor in New York meant presence of the debt in New York. This debt could be attached by the plaintiff having personal jurisdiction over the insurer, and thus supplied a basis for quasi in rem jurisdiction over the insured. As a result, similar New York plaintiffs are provided with a home forum which could not have been obtained by personal jurisdiction over the insured.

As the California court in Turner v. Evers noted, the Seider procedure has been subject to a great deal of criticism. Most of the

17. 326 U.S. 310 (1945).
22. 198 U.S. 215 (1905).
24. 410 F.2d 106, 118 (2d Cir. 1968).
25. See Green, supra note 23.
criticism is aimed not at the end result of Seider, providing a home forum to a resident plaintiff, but at the means by which this is realized.

D. Criticism of the Seider Procedure

The dissent in Seider centered on the contingent nature of the obligations attached.\textsuperscript{27} Obligations to defend and indemnify are contingent upon the commencement of suit and the awarding of damages.\textsuperscript{28} Medical payments depend on proof of the extent of injury and whether to investigate the accident or not is discretionary with the insurance carrier.\textsuperscript{29} The dissenting judge felt that such contingent obligations fell outside the definition of attachable obligations found in CPLP 5201 (Subd. a), i.e., one which is "past due or which is yet to become due, certainly or upon demand of the judgment debtor."\textsuperscript{30}

The dissent also claimed that Seider was guilty of a bootstrap situation:

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. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue.\textsuperscript{31}

In Podolsky \textit{v.} Devinney,\textsuperscript{32} the court commented that the complexity of the obligation to defend, the continuing duties of the insured to his insurance carrier and the exclusions present in the policy "militate against the characterization as a simple debt."\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{27} 17 N.Y.2d at 115, 216 N.E.2d at 315-16, 269 N.Y.S.2d at 103 (dissenting opinion). \textit{See also} Simpson \textit{v.} Loehmann, 21 N.Y.2d 305, 320, 234 N.E.2d 669, 677-78, 287 N.Y.S.2d 633, 645 (1967) (dissenting opinion).
\item \textsuperscript{28} "It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy." Simpson \textit{v.} Loehmann, 21 N.Y.2d 305, 314, 234 N.E.2d 669, 674, 287 N.Y.S.2d 633, 640 (1967) (dissenting opinion). \textit{But see} Brainard \textit{v.} Rogers, 74 Cal. App. 247, 239 P. 1095 (1925) dealing with a definite liability under a fire insurance contract but uncertainty as to the amount of liability.
\item \textsuperscript{29} Minichiello \textit{v.} Rosenberg, 410 F.2d 106, 121 (2d Cir. 1968) (dissenting opinion).
\item \textsuperscript{30} 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (dissenting opinion).
\item \textsuperscript{31} Id. \textit{See also} Stein, \textit{supra} note 8, at 1083; Comment, \textit{supra} note 8, at 555.
\item \textsuperscript{32} 281 F. Supp. 488 (S.D.N.Y. 1968). States have declined to follow Seider by refusing to treat the insurer's obligations as simple debts. \textit{See}, \textit{e.g.}, Government Employees Ins. Co. \textit{v.} Lasky, 454 S.W.2d 942 (Mo. App. 1970); Howard \textit{v.} Allen, 254 S.C. 455, 176 S.E.2d 127 (1970).
\end{itemize}

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Commentators have also attacked the Seider procedure on the grounds that it may be an unconstitutional burden on interstate commerce, an increase on court congestion and expense, a discouragement to cooperation by the insured, and an open door to undesirable forum shopping by the plaintiff.

The Seider doctrine depends in large part on the continued viability of Harris v. Balk. Arguments of unconstitutionality of Seider were called unpersuasive as long as Harris stands. As long as a debt is attachable wherever the debtor may be found, a foundation will exist for Seider. But, reliance on Harris has been criticized since the debt in Harris was a fixed amount, admittedly owed, and only subject to presence and thus garnishment in one state at a time because the debtor was an individual. Since the obligations or “debts” the insurance carrier owes the insured exist wherever personal jurisdiction over the insurer may be attained, any state following the Seider procedure could lay claim to being the situs of the policy. The Minichiello dissent, quoting Seider critic Professor David D. Siegel, argued that this could lead to “jurisdictional chaos”.

Balk at least enabled a single state to be isolated as the situs of the intangible. Under Seider that is not possible; all of the states in which the insurer does business could seize the policy; and if they were to do so (i.e. adopt Seider) there would be a kind of jurisdictional chaos awaiting in major accident cases.

Harris has also been said to be out of touch with modern jurisdictional thinking. The decision is from the Pennoyer v. Neff era when garnishment of intangibles served as a valuable sub-

34. See Stein, supra note 8, at 1087; Siegel, supra note 8, at 52.
35. See Siegel, supra note 8, at 52.
36. See Comment, supra note 8, at 556.
37. Id., at 565; Comment, 32 AM. TRIAL LAWYER’S J. 328, 335 (1968).
38. 198 U.S. 215 (1905).
40. See Siegel, supra note 8, at 21.
41. Id.
42. Id.
43. Id.
45. 95 U.S. 714 (1877).
stute to personal jurisdiction. The modern trend is toward a less mechanical and more reasonable approach grounding jurisdiction on considerations of fairness to the parties and relevance of the matter before the court to the forum. Writers have suggested that extension of the International Shoe doctrine to quasi in rem situations will lead to a practical elimination of state boundaries and the end of any distinction between when personal and quasi in rem jurisdiction may be exercised. Chief Judge Fuld noted in Simpson v. Loehmann 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 the 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.

A leading case in this trend, Atkinson v. Superior Court, applied the minimum contacts test of International Shoe to the determination of whether quasi in rem jurisdiction should be exercised over intangibles. It has been suggested that the Atkinson trend marks the end of distinctions between quasi in rem and in personam jurisdiction and incidentally the end of the Harris v. Balk rule.

49. See Green, supra note 23, at 1242.
50. Id.
52. 49 Cal. 2d 338, 316 P.2d 960 (1957).
53. See Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 687, 663 (1959); "It is time we had done with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res becomes stranger and stranger... They cannot evaluate the real factors (that should determine jurisdiction) squarely until they give up the ghost of the res." See also, Jurisdiction, Quasi In Rem: A New Basis for Jurisdiction Over Intangibles in California, 46 Calif. L. Rev. 637 (1958).

In Steele v. G.D. Searle & Co., 483 F.2d 339 (5th Cir. 1973), a non-resident plaintiff attempted to assert quasi in rem jurisdiction over a non-resident defendant on a cause of action arising outside the state. The court relied on Hanson v. Denckla in concluding that the territorial concept was still valid and that the distinction between in rem and in personam actions still exists. Citing Harris v. Balk, the court concluded that the
as not satisfying the minimum contacts test.55

E. Purpose of the Seider Doctrine

The Seider doctrine is an attempt to provide a home forum to a resident plaintiff. Traditional theory requires the “attacking” plaintiff to go to the defendant for redress. However, this may be changing:

There has been a movement away from the bias favoring the defendant in matters of personal jurisdiction toward permitting the plaintiff to insist that the defendant come to him when there is sufficient basis for doing so.60

The burden on the real party in interest, the insurer, in litigating the case in plaintiff’s home state may be greater than in the state of the tort.68 However, it would probably be a relatively greater burden on the plaintiff to travel to the tort state to litigate since the insurer likely has offices and manpower already established in plaintiff’s home state as part of its interstate nature.69

A valid action under the Seider procedure is not so likely to be prohibitively expensive for the plaintiff to pursue. New York courts have noted the fact that the plaintiff may not be able to afford to litigate in the foreign jurisdiction as justifying the exercise of quasi in rem jurisdiction over the non-resident insured.60
This then assures the cooperation of the insurer in the resident plaintiff's action. Similarly, the court in Turner v. Evers noted that Turner's claim of $658.16 in damages may be effectively denied if he were forced to pursue a remedy in Washington. 61 The result in a Turner situation is appealing: a remedy is provided for a valid action where before the remedy may have been prohibitively expensive to seek. Ideally, a remedy for a valid action should not be discouraged by the burden of bringing suit.

The Seider procedure thus helps satisfy a need for a viable remedy. On the other hand, the method of Seider has been criticized as impractical and of questionable constitutionality. Such criticism stems primarily from the exercise of quasi in rem jurisdiction over the insured. Is it possible to attain the same result, a home forum for a resident plaintiff, without the exercise of quasi in rem jurisdiction?

III. A MORE DESIRABLE MEANS

The Seider doctrine is in effect a judicially created direct action against the insurer. 62 The exercise of quasi in rem jurisdiction merely uses the insured as a conceptual conduit to reach the insurance carrier, the real party in interest. 63 The results of Seider and of direct actions against the insurer are the same: the usual policy provisions requiring final judgment against the insured before the insurer's obligations arise are overridden. However, states with a true direct action 64 avoid the practical and constitutional problems caused by the attachment of the insurance policies. Professor Siegal has written:

The in rem trappings do not help one whit, and hurt intensely. They take endless quantities of judicial time, to say nothing of that of the lawyers, without adding one jot of benefit to justify the effort. 65

Furthermore, the conceptual basis of attachment has been challenged in recent years. Quasi in rem jurisdiction has been described as a

fiction which necessarily hinders rather than helps to formulate an appropriate body of doctrine to guide the courts in determining

63. Id.
65. See Siegal, supra note 8, at 51.
whether a given forum is an appropriate one for the determination of the legal and factual issues which are presented by a law suit.66

If the action is brought in rem simply to provide a conceptual basis for reaching the insurer via the insured,67 why not recognize the procedure for what it is—a direct action against the insurance carrier?

A. Direct Actions

Insurers traditionally seek to avoid direct actions by no-action clauses intended to conceal the existence of insurance from the jury for fear of inflated verdicts.68 “The law maintains the fiction that the insured is the real party in interest at the trial . . . [only] in order to protect the insurance companies against overly sympathetic juries (citations omitted).”69 This fiction may no longer be necessary since the contemporary jury assumes the presence of liability insurance.70 Also, Louisiana and Wisconsin, which have direct action statutes, have experienced very low verdicts in comparison with other states.71

A direct action to replace the Seider procedure would differ significantly in one respect from direct actions presently existing in a few states. These states limit application of the direct action to tortious incidents occurring within the borders of the state.72 This limitation would fall short of satisfying the objective of the Seider procedure—providing a home forum to a resident plaintiff injured outside the state. The advocated direct action, whether

66. See Kurland, supra note 54, at 617.
70. See Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 118, 204 N.E.2d 622, 626, 256 N.Y.S.2d 577, 582-83 (1965); Connelly v. Nolte, 237 Iowa 114, 132, 21 N.W.2d 311, 320 (1946); Prosser, Torts, at 549 (4th ed. 1971). This presumption may harm an uninsured motorist since cases have held it to be improper for that defendant to show that he does not have insurance. See, e.g., Avent v. Tucker, 188 Miss. 207, 194 So. 596 (1940).
72. See supra note 64. Arkansas, however, permits a direct action for injuries sustained in a foreign country, if the tortfeasor's insurer is subject to Arkansas jurisdiction. Ark. STAT. ANN. tit. 66, § 3244 (1966).
created legislatively or judicially, should not be limited by the boundaries of the state.\textsuperscript{73}

1. Legislative Action

Most liability insurance contracts contain a no-action clause foreclosing all obligations of the insurer to indemnify until after a final judgment is secured against the insured. However, a state may act directly to override such no-action provisions subject only to due process considerations.\textsuperscript{74} In Watson v. Employer’s Liability Assurance Corp.,\textsuperscript{75} the Supreme Court allowed Louisiana to override a no-action clause in an insurance contract written outside the state on the theory that Louisiana had sufficient state interests in the accident. In Watson, the tort occurred within the state. A focal point of the Simpson and Minichiello decisions was whether New York had similar legitimate interests to justify overriding the no-action clause when the accidents took place outside of New York.\textsuperscript{76} The Supreme Court in Watson stated:

Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call on friends, relatives or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for the recovery of damages. It has similar interests in policies of insurance which are designed to assure ultimate payment of such damages.\textsuperscript{77}

The Minichiello majority held that sufficiently similar state interests to those enunciated in Watson existed so that “the Supreme Court would sustain the validity of a state statute permitting direct actions against insurers . . . in favor of residents as well as on behalf of persons injured within it.”\textsuperscript{78} On the other hand, Judge Anderson, dissenting, emphasized the occurrence of the accident in Louisiana as the source of Louisiana’s state interests.\textsuperscript{79} This view, had it been the majority, would preclude the use of Watson as authority validating direct actions in favor of residents.

\textsuperscript{73} See Rosenberg, One Procedural Genie Too Many or Putting Seider Back Into Its Bottle, 71 Colum. L. Rev. 660, 669–87 (1971).
\textsuperscript{74} Home Ins. Co. v. Dick, 281 U.S. 397, 407–08 (1930). See also Note, supra note 71, at 387–92.
\textsuperscript{75} 348 U.S. 66 (1954).
\textsuperscript{78} 410 F.2d at 110.
\textsuperscript{79} Id. at 115. See also Comment, supra note 8, at 559; Note, supra note 77, at 389.
The Minichiello majority view seems preferable. The predominate purpose of a direct action is to protect the rights of the injured party by insuring a financially responsible defendant. This purpose does not end when the individual temporarily crosses a state line.

The Supreme Court has held that the domicile state may have sufficient interests to apply its laws in workman's compensation cases. In *Alaska Packer's Association v. Industrial Accident Commission*, the Court held that California, as domicile, could apply its own laws although the relevant injury occurred elsewhere. The Court noted that without a remedy in California such incapacitated claimants "would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state." Similar state interests would be present in the application of a direct action in favor of residents suggesting that such a direct action would be valid.

Though injured in another state, the typical plaintiff will normally return to his home state for the bulk of his medical attention. In another workmen's compensation case, the Supreme Court noted this fact with language that by analogy favors the Minichiello majority:

> The State where the employee lives has perhaps even a larger concern [than the state where the tort occurs], for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt.83

The interstate character of insurance carriers has also been thought by the Court to be a valid consideration in allowing forum states to apply their own law in changing the terms of the insurance contract. In *Clay v. Sun Insurance Office, Ltd.*, Florida was allowed to apply its five year statute of limitation on filing claims of personal property loss despite the fact that the insurance contract barred such claims after twelve months. The policy had been written in Illinois where the claimant had then resided, but the Court noted that the insurance carrier did not confine coverage to Illinois: "Particularly since the company was licensed to do busi-

80. 294 U.S. 532 (1935).
81. Id. at 542.
83. Id. at 41.
84. 377 U.S. 179 (1964).
ness in Florida, it must have known it might be sued there.” Since an insurance carrier must be doing business within the direct action state to be subject to the direct action, applying the language of Clay suggests that the insurance carrier would have thereby knowingly consented to suit under that state’s direct action.

Assuming the majority opinion in Minichiello, that a direct action in favor of residents would be constitutional, two conditions appear from the Seider line of cases to be necessary before such a direct action could be applied by a state. First, the plaintiff would have to be a resident of the state. In Farrel v. Piedmont Aviation, Inc., a wrongful death action was brought in New York by the administrators of the estates of non-residents killed in a North Carolina plane crash. The court noted the lack of New York contacts with the action except for the doing of business by the insurer within New York. The court doubted that New York could constitutionally call upon the insured to respond noting that “[t]he constitutional doubt arises from New York’s lack of meaningful contact with the claim; a court of another state cannot supply this by picking a New Yorker as administrator of the estate of a non-resident who has suffered a fatal injury.” In another instance, a New York court held that exercise of jurisdiction upon the sole contact of presence of defendant’s insurance carrier would adversely affect the administration of justice in New York by resulting in an influx of unwarranted and unnecessary lawsuits. In light of the stated purpose of Seider, supplying a home forum to a resident plaintiff, restriction of the procedure to residents of that state seems only reasonable.

The second condition necessary before the state could override an insurance contract’s no-action clause is the presence of the insurance carrier doing business within the state. Without this condition, the state would be attempting to alter the insurance contract on the sole basis of the plaintiff’s residence. Residence alone has not been a sufficient basis for the exercise of jurisdiction. In Home Insurance Co. v. Dick, the Supreme Court concluded that although Dick’s permanent residence was in Texas, he was present

85. Id. at 182.
86. Hanover Ins. Co. v. Victor, 393 U.S. 7 (1968), was dismissed by the Supreme Court “for want of a substantial federal question” possibly deciding the issue.
87. 411 F.2d 812 (2d Cir. 1969).
88. Id. at 817.
90. See Rosenberg, supra note 73, at 673.
91. 281 U.S. 397 (1930).
and acting in Mexico at all relevant times. Texas therefore was without power to affect the terms of contracts so made.\textsuperscript{92} 

In California and New York the “doing business” test is equivalent\textsuperscript{93} to the minimum contacts test of \textit{International Shoe}.\textsuperscript{94} Cases have indicated that the necessary contacts may be quite slight in a \textit{Seider} context.\textsuperscript{95}

2. \textit{Judicial Creation of a True Direct Action}

A true direct action may be created by judicial decision as the Supreme Court of Florida did in \textit{Shingleton v. Bussey}.\textsuperscript{96} The Florida Court concluded that a “direct cause of action now inures to a third party beneficiary\textsuperscript{97} against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida.”\textsuperscript{98} Up until the time of \textit{Shingleton}, Florida law had required final judgment against the insured as a condition precedent to bringing an action against the insurer.\textsuperscript{99} In fact, direct legislation had in the past failed passage.\textsuperscript{100} The court avoided the no-action clause calling it “axiomatic” that

\textsuperscript{92} Id. at 408. \textit{See also} Hanson v. Denckla, 357 U.S. 235 (1958), where despite the convenience to the plaintiff in suing at home, the test was said to be whether the defendant had sufficient contacts with the forum. Justice Black, dissenting, felt that residence of the plaintiff should be adequate for jurisdiction as long as the defendant is not inconvenienced. \textit{Id.} at 259. \textit{Accord}, Ehrenzweig, \textit{Ehrenzweig in Reply}, 9 J. of Pub. L. 328, 331 (1960).

\textsuperscript{93} \textit{See} Henry R. Jahn & Son Inc. v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958); Gorfinkel & Lavine, \textit{supra} note 16, at 1168.

\textsuperscript{94} 326 U.S. 310 (1945).

\textsuperscript{95} \textit{See} Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965). If “presence” or “doing business” is the basis of jurisdiction, the cause of action need not be related to forum activities. \textit{See} Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). But if the defendant’s forum activities do not reach such a proportion to make the defendant “present” within the forum, the particular cause of action must arise out of or be connected with the defendant’s forum related activity. \textit{See} Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

\textsuperscript{96} 223 So. 2d 713 (Fla. 1969).

\textsuperscript{97} \textit{See} Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965), relied on extensively by the Florida Supreme Court.

\textsuperscript{98} 223 So. 2d at 715.


by the very nature of liability insurance . . . liability of the in-
insured is a condition precedent to liability of the insurer on the
cause of action against it by the injured third party. Such condi-
tion, however, does not effect a postponement in liability to be
sued but only makes the liability of the insurer to judgment con-
tingent on the establishment of liability to judgment of the in-
sured . . . .

The public interest and third party beneficiary rationale of Shing-
leton was extended to all forms of liability insurance in Beta Eta
House Corp., Inc. of Tallahassee v. Gregory, allowing joinder of
the insurance company as party defendant in tort actions against
the insured.

A judicial decision overriding the no-action clause of the insur-
ance contract could avoid questions of unconstitutional impairment
of contracts. As the Supreme Court noted in Tidal Oil Co. v. Flan-
agan, the provision of the Federal Constitution protecting the
obligations of contracts against state action, is directed only at leg-
islative impairment and not at judgments of courts.

In California, a judgment is required against the insured before
the injured party may proceed directly against the insurer un-
less the policy, or the statute or ordinance under which it was is-
sued, inures to the benefit of third parties. The policy only in-
ures to the benefit of third parties when that intent clearly ap-
pears in the contract of insurance, “and if any doubt exists it should
be construed against such interests.”

However, if subsequent California cases follow Turner v. Evers, the
result may be to encourage California to follow Florida’s ex-
ample and permit a direct action against the insurer via a defini-

101. 223 So. 2d at 716-17.
102. 237 So. 2d 163 (Fla. 1970). A direct action statute may be more
desirable if piecemeal expansion of a judicial direct action is not wanted.
It is questionable whether the presumption of automobile liability insur-
ance means a presumption of all liability insurance. An insurer’s desire
to avoid a direct action may be more valid in the latter situation.
103. COUCH ON INSURANCE 2d 75:538. “In the absence of some pro-
hibition, the injured person having a right of direct action may join both
the insured and insurer as codefendants even though the policy con-
tains a “no-action” clause.”
104. See Comment, supra note 100, at 152.
105. 263 U.S. 444 (1924).
106. Id. at 451.
109. Id. See also Gibbons v. Traveler’s Ins. Co., 274 Cal. App. 2d 812,
Dep’t 1973).
tive judicial decision. As Professor Siegel says of New York:

> [D]irect action is the law of the state right now via the decisional route. *Seider*, after the *Simpson* reargument decision is nothing more or less than a direct action. The only difference is that it stands in rem. [T]his insistence on the in rem form is itself responsible for many . . . procedural problems . . . .

If the *Seider—Turner* result is desired, and that result is essentially already a direct action, existence of such procedural problems as New York has experienced should encourage the court to skip the insured, the mere conduit to reach the insurer, and go straight at the insurance carrier via a true direct action.

B. *Fairness to all Parties—A Balancing Act*

In his *Minichiello* dissent, Judge Anderson stated that the plaintiff’s right to require the defendant’s presence in plaintiff’s forum should be based upon the “fairness and reasonableness of the device as it affects all of the parties involved, the functioning of the courts, and the administration of justice in such an action.” He classified long arm statutes as “fair” since the defendant voluntarily brought himself into the bounds of the state where the accident occurred whereas an Alaska resident driving to his corner store could be forced to defend in New York, under *Seider*, if it was his misfortune to cause an accident with a visiting New Yorker.

A true direct action would avoid much of the Alaskan’s burden and preclude the necessity of the New Yorker to return to Alaska and...
to pursue his remedy. Bringing the action in Alaska could be prohibitively expensive for the plaintiff. A true direct action would bypass the insured, and work against his insurance carrier—\(^{116}\) as long as the insurer could be subjected to in personam jurisdiction in the plaintiff's home forum.

1. **Forum Non Conveniens**

In *Turner v. Evers*,\(^ {117}\) the court suggested a path by which an "overly enthusiastic but not an unconstitutional assertion of jurisdiction"\(^ {118}\) may be restricted. The doctrine of forum non conveniens\(^ {119}\) allows a court to refuse to entertain a lawsuit even though it has jurisdiction over the parties if the forum is a severely inconvenient forum for the trial of the action.\(^ {120}\) The court may dismiss when it believes that "the action before it may be more appropriately and justly tried elsewhere."\(^ {121}\) Commentators have often suggested that forum non conveniens could work as an effective complement to the minimum contacts test of personal jurisdiction.\(^ {122}\) Both are couched in terms of "fairness" and together could achieve the "fair and reasonable" balance between all parties that Judge Anderson, in his *Minichiello* dissent, claimed to be lacking in the *Seider* procedure.\(^ {123}\) However, forum non conveniens has yet to be utilized to this extent in New York and California.

In California, if the plaintiff is a resident, it will be nearly impossible for the defendant to take advantage of forum non conveniens. "*Forum non conveniens* has only an extremely limited application to a case where . . . the plaintiff is a bona fide resident of the forum state."\(^ {124}\) This has been criticized as precluding the vitality of the doctrine in cases where the plaintiff is a resident of


\(^{118}\) Id. at Supp. 24, 107 Cal. Rptr. at 399, quoting Minichiello v. Rosenberg, 410 F.2d 106, 119 (2d Cir. 1968).


\(^{122}\) See, e.g., Traynor, supra note 53, at 658; von Mehren & Trautman, supra note 44, at 1132.

\(^{123}\) Minichiello v. Rosenberg, 410 F.2d 106, 115 (2d Cir. 1968) (dissenting opinion).

California but the “defendant presents facts which reveal that every consideration of fairness and judicial efficiency excludes that state as an appropriate forum.”

New York has recently liberalized its forum non conveniens rule in regard to the residence factor. Residence, though “an important factor to be considered,” is no longer controlling. Rather, the motion should be granted when it “plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties.” In a recent Seider type case, however, a New York court held that New York was not a “clearly inconvenient forum.”

Despite a persuasive dissent, the court concluded, in denying the forum non conveniens motion, that the ends of justice and convenience did not conclusively favor the alternative forum.

As long as the residency factor effectively precludes a forum non conveniens dismissal in all Seider type cases, “reasonable fairness” to all concerned parties will often be denied. A flexible forum non conveniens policy would encourage an equitable application of a true direct action. But an extended use of forum non conveniens is especially desirable with the present Seider procedure where the action is initiated against the non-resident insured rather than the interstate insurer.

IV. CONCLUSION

The Turner court provided a plaintiff with the means to a needed remedy where an effective remedy had before, for practical purposes, been unavailable. Though the result is consistent with expanding trends of jurisdiction, the Seider procedure employed by the Turner court seems to be one improvised to reach a desired re-

127. Id.
sult but open to criticism in terms of fairness to all parties. An expanded use of forum non conveniens would make the Seider procedure fairer to all concerned parties. But, since a true direct action would achieve the same results without many of the problems that accompany the in rem form of the Seider procedure, it is submitted that either a direct action statute or a judicially implemented direct action favoring state residents is desirable.

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