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Creditor's Rights

Robert DeBruyn

Paul A. Webber

CREDITOR'S RIGHTS

Motor Vehicle Chattel Mortgages—Dual Aspects of Notice by Registration and Filing. In *Olympia State Bank & Trust Co. v. Craft*[1] the Washington court answered for the first time the question whether compliance with registration under the Washington Highway License Act[2] supersedes the chattel mortgage act[3] in establishing lien priorities of chattel mortgagees on motor vehicles. The court held that a chattel mortgagee of a motor vehicle must comply with both the registration provisions of the motor vehicle registration act[4] and the filing provisions of the chattel mortgage act[5] in order to establish a lien priority over creditors, subsequent purchasers, and encumbrancers of the motor vehicle.

The court was presented with the following fact pattern. Craft executed to the bank a chattel mortgage on two automobiles in May, 1955, to secure a note in the sum of $2,309. The certificates of ownership to the two automobiles were indorsed to show the bank as the legal owner, in compliance with the motor vehicle registration act.[6] The Department of Licenses and the parties made the appropriate changes on the registration certificate. The bank, however, failed to file the chattel mortgage in the office of the county auditor as required by the chattel mortgage act.[7]

On February 14, 1958, the bank commenced this action to foreclose the chattel mortgage alleging that Craft had defaulted in the payments on the note. On March 5, 1958, Craft was adjudged a bankrupt and a trustee was appointed and qualified. The trustee, representing the general creditors of the bankrupt, was granted leave to intervene in the foreclosure proceedings. The trustee's complaint in intervention

[1] 156 Wash. Dec. 481, 354 P.2d 386 (1960).
[2] RCW 46.
[3] RCW 61.04.
[4] RCW 46.12.170: "If, after a certificate of ownership is issued, a mortgage is placed on the vehicle described therein, the registered owner shall, within ten days thereafter, present his application to the director, signed by the mortgagee, to which shall be attached the certificate of license registration and the certificate of ownership last issued covering the vehicle. . . . The director, if he is satisfied that there should be a reissue of the certificates, shall note such change upon his records and issue to the registered owner a new certificate of license registration and to the mortgagee a new certificate of ownership."
[5] RCW 61.04.020: "(1) A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith . . . and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."
[6] *Supra* note 4.
[7] *Supra* note 5.

alleged that the bank had failed to file its chattel mortgage with the county auditor and that the chattel mortgage was therefore void as against the claims of the general creditors of the bankrupt. As summarized by the court, "the trial court held the motor vehicle registration act superseded the filing act, and 'that it has become no longer necessary for a chattel mortgagee of any motor vehicle to comply with . . . RCW 61.04.020 [the filing act].' "[8]

The Washington court reversed the trial court's decision and answered the question which had been raised in *Merchants Rating & Adjusting Co. v. Skaug*.[9] In *Merchants Rating* the court held that noncompliance with the motor vehicle registration act and compliance with the chattel mortgage filing provisions did not preserve the priority of the lien of the mortgagee as to creditors. In *Merchants Rating* the court avoided answering the question whether the title registration act was enacted to establish a title system similar to the Torrens system[10] of land title registration or merely an enactment to aid state officers in enforcing police regulations as to such vehicles.[11] The court chose to decide against the mortgagee on the equitable principle that "of two persons injured by the wrongful act of a third, he who makes the loss possible must suffer."[12]

In the instant case, the court reasoned that the legislature did not intend the registration act to be a filing act. The court's reasons were that the registration act made no provision for establishing constructive notice of the lien; contained no provision for lien priorities or which class of creditors might be protected by compliance with the act; lacked a requirement that the original instruments be filed for public inspection; and was devoid of a provision for enforcement of a lien claim or for fixing venue.[13] These same four reasons were put forth by the court for concluding that the registration act lacked the essential requirements of a conclusive motor vehicle title act.[14]

Thus the court was able to conclude that the registration act and the

[8] 156 Wash. Dec. 481, 483, 354 P.2d 386, 387 (1960).

[9] 4 Wn.2d 46, 102 P.2d 227 (1940), discussed in Comment, 15 WASH. L. REV. 182 (1940).

[10] The purpose of the registration of title is to make title ascertainable by reference to a certificate issued by a government official. This certificate is issued after a judicial proceeding in the nature of a suit to quiet title, and all subsequent transfers or transactions, affecting the title are either noted on the certificate, or on a new certificate substituted for it.

[11] Merchants Rating & Adjusting Co. v. Skaug, 4 Wn.2d 46, 51, 102 P.2d 227, 229 (1940).

[12] *Id.* at 52, 102 P.2d at 230, citing Von Normann v. Woodson, 182 Wash. 271, 46 P.2d 1050 (1935).

[13] 156 Wash. Dec. 481, 484, 354 P.2d 386, 388 (1960).

[14] *Ibid.*

filing act were not inconsistent, and that they could be read together, with meaning, force and validity given to each.[15] The court took notice that "motor vehicles are so mobile and transient in nature that one obvious reason for the enactment of the registration act could have been to deter the sales or illegal transfer of stolen vehicles and to aid in their detection."[16]

The Washington court has aligned itself with those courts which interpret motor vehicle registration statutes as an exercise of the police power which does not supersede existing notice requirements of chattel mortgage statutes.[17] Some courts reach the opposite result,[18] basing their decisions on legislative repeal by implication; the obvious superiority of actual notice; and the difficulty of searching the files of the various counties. Often, however, those courts are interpreting statutes with a general "repealer clause,"[19] which allows a reasonable basis for them to overcome the presumption that the legislature repeals by express provision only.

Judge Mallery, dissenting alone, maintained that actual notice under the registration act and constructive notice under the chattel mortgage act were not concurrently required because of the custom of the legislature to make acts dealing with motor vehicles sui generis. His opinion attacked the onerous nature of the dual requirements with strong language:

> No one has or can point out a single safeguard in the chattel mortgage act that is not more effectively accomplished by the registration act. Nor can anyone show anything to be accomplished by complying with the chattel mortgage act after complying with the title registration act. . . . No legitimate purpose is served by giving notice to strangers who have only a disinterested curiosity.[20]

The respondent's brief urged that the court take judicial notice of the public acceptance of the motor vehicle registration act as being conclusive in negating the necessity of the chattel mortgage filing provisions.[21] These arguments as to the lack of utility of a chattel mortgage filing in addition to motor vehicle registration failed to impress

[15] See, *e.g.*, Lindsey v. Superior Court, 33 Wn. 2d 94, 204 P.2d 482 (1949).
[16] 156 Wash. Dec. 481, 485, 354 P.2d 386, 388 (1960).
[17] Amick v. Exchange State Bank, 164 Minn. 136, 204 N.W. 639 (1925); King-Godfrey, Inc. v. Rogers, 157 Okla. 216, 11 P.2d 935 (1932).
[18] *E.g.*, Commercial Credit Co. v. American Mfg. Co., 155 S.W.2d 834 (Tex. Civ. App. 1944).
[19] *E.g.*, "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."
[20] 156 Wash. Dec. 481, 486-87, 354 P.2d 386, 388 (1960).
[21] Brief for Respondent, pp. 7-9, Olympia State Bank & Trust Co. v. Craft, 156 Wash. Dec. 481, 354 P.2d 386 (1960).

the majority of the court. While certainly it is difficult for one to see any worthwhile purpose to be served by the dual requirements of registration and filing, the court chose to base its decision on the fact that the legislature had failed to define its intention in the two enactments. Therefore, the resolution of the problem of the needless dual requirements for maintaining the lien priority of a chattel mortgagee on a motor vehicle has been placed squarely upon the legislature.

Several courses of action are open to the legislature in resolving this problem. The chattel mortgage statute[22] could be amended to exclude motor vehicles from the filing provisions. The motor vehicle registration statute[23] could be amended to establish it as the exclusive means of registration and notification as to chattel mortgages. The Washington court in *Olympia State Bank* has specifically directed to the legislature's attention four shortcomings in the motor vehicle statute which prevent it from being a filing act or a conclusive motor vehicle title act.[24]

The legislature may well look to the enactments of sister states in this matter. The California Vehicle Code[25] is especially clear in dealing with these areas noted by the court and some others, such as a longer filing period and liens for services and materials. The legislature probably would examine the provisions of the conditional sale contract statute[26] at the same time it considers a treatment of this problem regarding chattel mortgages.[27]

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[22] RCW 61.04.

[23] RCW 46.12.

[24] See note 13 *supra* and accompanying text.

[25] CAL. VEHICLE CODE § 6300: "(a) No chattel mortgage on any vehicle registered under this code . . . is valid against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has deposited with the department, at its office in Sacramento . . . a properly endorsed certificate of ownership to the vehicle subject to the mortgage showing the chattel mortgagee as legal owner if the vehicle is then registered under this code, or if the vehicle is not so registered an application in usual form for an original registration, together with an application for registration of the chattel mortgagee as the legal owner, and upon payment of the fees as provided in this code.

(b) Deposit of a certificate within 30 days after the date of a mortgage shall be deemed a deposit within reasonable time."

CAL. VEHICLE CODE § 6301: "When the chattel mortgagee, his successor or assignee, has deposited with the department a properly endorsed certificate of ownership showing the mortgagee as the legal owner or an application in the usual form for an original registration, together with an application for registration of the chattel mortgagee as legal owner, the deposit constitutes constructive notice of the mortgage to creditors and subsequent purchasers and encumbrancers, but the mortgaged vehicle shall be subject to a lien for services and materials. . . ."

CAL. VEHICLE CODE § 6303: "The method provided in this part for giving constructive notice of a chattel mortgage on a vehicle registered under this code is exclusive, the execution of the chattel mortgage need not be acknowledged or proved and certified, and any such chattel mortgage is excepted from the provisions of [sections relating to recording of mortgages on personal property]."

[26] RCW 63.12.

[27] RCW 63.12.010 provides that all conditional sales contracts shall be absolute as

Enactment of the Uniform Commercial Code by the legislature would relieve the need for piecemeal action in this matter. Section 9-302[28] of the Code specifically exempts from the filing provisions of the Code motor vehicles subject to a central filing statute.[29]

Until legislative action is taken to remove the dual requirement of compliance with the chattel mortgage filing and the motor vehicle registration provisions, the prudent Washington mortgagee will have to comply with both in order to maintain a lien priority on a motor vehicle.

ROBERT DEBRUYN

Litigation of a Tort Claim in a Garnishment Proceeding—Levy of Execution Upon a Tort Claim. In the recent case of *Murray v. Mossman*[1] the Washington court held that a judgment creditor, in a garnishment proceeding, cannot litigate the issue of whether the judgment debtor's insurance company acted negligently or in bad faith as to its insured, by failing to accept a settlement offer made by the creditor.

The case arose as a result of the plaintiff's recovery of a judgment against the defendant in a claim arising out of an automobile collision. Prior to the entry of the judgment, the plaintiff offered to settle with the defendant's insurance company within the defendant's policy limits. This offer was refused. Thereafter, a judgment was entered against the defendant in excess of the policy limits. The plaintiff, claiming that the defendant's insurance company had demonstrated negligence or bad faith toward its insured by not accepting the offer of settlement within the policy limits, caused a writ of garnishment to issue against the insurance company. The plaintiff intended to litigate the

to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors unless a signed memorandum of the sale is filed within ten days after the vendee takes possession in the auditor's office of the vendee's county of residence.

[28] UNIFORM COMMERCIAL CODE § 9—302: "(3) The filing provisions of this article do not apply to a security interest in property subject to a statute . . . *Note:* states to select either Alternative A or Alternative B. *Alernative A*—(b) of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property. *Alternative B*—(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by a public official on a certificate or duplicate thereof. (4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official."

[29] See, Shattuck, *Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code, Article 9,* 29 WASH. L. REV. 195, 210 & nn. 91 & 92 (1954).

[1] 156 Wash. Dec. 924, 355 P.2d 985 (1960).

issue of negligence or bad faith in the garnishment proceedings. The insurance company, in answer to the writ, conceded that it owed the plaintiff the amount of the judgment up to the limits of the policy, but denied holding any funds of the judgment debtor's in excess of the policy limits. The writ was dismissed. On appeal, the court held that although the insured would have a claim against the insurance company for negligent or bad faith failure[2] to settle within the policy limits and could recover damages in excess of the policy limits, the judgment creditors could not complain of such a failure to settle. The judgment creditor can only recover up to the policy limits in his action against the debtor's insurance company, unless the debtor's policy provides to the contrary.[3]

The court's position on the question of the creditor's rights against the debtor's insurance company in excess of the policy limits is the same as that of the commentators'[4] and other jurisdictions which have considered the problem.[5] However, such a position seems open to question, considering the state's garnishment statutes.[6] One rationale suggested for the court's position is that the insured's right of recovery is based upon bad faith or negligence and "sounds in tort."[7] In order for the insurance company to be subject to liability beyond the policy limits, there must have been a violation of some duty on the part of the insurance company, which, although existing between the insur-

[2] There is a split of authority regarding the question of whether the insurer must have been guilty of bad faith or just negligent in its failure to settle in order to give rise to a claim by the insured. Washington has followed the "bad faith" rule. Evans v. Continental Cas. Co., 40 Wn.2d 614, 245 P.2d 470 (1952); Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 117 P.2d 644 (1941). However, the language in the above mentioned cases does not seem to foreclose the possibility of allowing the insured to recover for the insurer's negligent failure to settle. See 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4713 (1942) for jurisdictions which follow the "negligence" rule.

[3] If the judgment debtor's policy provides that "after a writ of execution against the insured is returned unsatisfied, the creditor may recover against the insurance company to the same extent that the insured could if he had paid the judgment," or similar language, the creditor is permitted to recover in excess of the policy limits to the same extent that the debtor would have been able to recover from the insurer for negligent or bad faith failure to settle. Kleinschmit v. Farmers Mut. Hail Ins. Ass'n, 101 F.2d 987 (8th Cir. 1939); Sturgis v. Canal Ins. Co., 122 So. 2d 313 (Fla. 1960); Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

[4] 8 APPLEMAN, *op. cit. supra* note 2, § 4711 at 74, and § 4713 at 83 (1942); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1175 (1954).

[5] Chittick v. State Farm Mut. Auto. Ins. Co., 170 F. Supp. 276 (D. Del. 1958); Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955); Canal Ins. Co. v. Sturgis, 114 So. 2d 469 (Dist. Ct. Fla. 1959), *aff'd*, 122 So. 2d 313 (Fla. 1960); Francis v. Newton, 75 Ga. App. 341, 43 S.E.2d 282 (1947); Duncan v. Lumbermen's Mut. Cas. Co., 91 N.H. 349, 23 A.2d 325 (1941); Paul v. Kirkendall, 6 Utah 2d 256, 311 P.2d 376 (1957).

[6] It is interesting to note that there was no mention in the *Murray* case of the Washington garnishment statutes.

[7] Murray v. Mossman, 156 Wash. Dec. 924, 927, 355 P.2d 985, 987 (1960).

ance company and its insured, cannot be extended to the judgment creditor.

This argument assumes that the judgment creditor takes the position that there was a duty owing toward him. However, this does not seem to be the case. The judgment creditor claimed that there was a duty existing as to the *insured,* and that there was a breach of *that* duty, which gave rise to a claim in favor of the insured. The creditor, then, merely stands in the shoes of his debtor when he asserts this claim.

There seems to be concern in the *Murray* case on the part of the court over the propriety of litigating unliquidated tort claims in a garnishment proceeding.[8] The Washington position on this matter is explicitly dealt with in *Bassett v. McCarty.*[9] In the *Bassett* case, the plaintiff commenced an action to recover a sum of one thousand dollars from the defendant. Subsequently, he caused a writ of garnishment to issue upon a third party against whom the defendant had recovered a verdict in a slander action. No judgment had been entered, however. The court, after conceding that the garnishment statutes do not expressly prohibit an unliquidated tort claim from being the subject of a garnishment proceeding, declared:

> To say, however, that unliquidated claims are the *subject* of garnishment would be, in our opinion, to impose a burdensome and unreasonable duty upon third parties who are in no way concerned with the outcome of the main action. A garnishee defendant, in such cases, would be under a duty to evaluate and disclose, under oath, every possible and conceivable claim that the principal defendant might have against him, no matter how technical or conjectural such claim might be. To hold that [RCW 7.32.040 and 7.32.100], which require the garnishee defendant to "answer on oath what, if anything, he is indebted to the [principal] defendant," are broad enough to include unliquidated damages, would be, in our opinion, to stretch the language of the statute to unreasonable proportions.[10]

But the applicable statutes do not have to be stretched to permit such an action in this case. RCW 7.32.030 provides:

> Before the issuance of the writ of garnishment the plaintiff or someone in his behalf shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that the plaintiff

[8] The same problem was reflected in Paul v. Kirkendall, 6 Utah 2d 256, 311 P.2d 376 (1957).

[9] 3 Wn.2d 488, 101 P.2d 575 (1940). This case was not mentioned in the *Murray* opinion, yet it appears to be directly in point.

[10] *Id.* at 497, 101 P.2d at 578-79.

> *has reason to believe,* and does believe, that the garnishee, stating his name and residence, is indebted to the defendant. . . . (Emphasis added.)

Statement of a tort theory, upon which the indebtedness rests, seems to be consistent with this language. If the garnishee defendant denies any indebtedness to the defendant, the plaintiff will then have an opportunity to litigate the matter. RCW 7.32.250 provides:

> If the plaintiff should not be satisfied with the answer of the garnishee he may controvert the same by affidavit in writing signed by him, stating that he has good reason to believe and does believe that the answer of the garnishee is incorrect, stating in what particulars he believes the same is incorrect.

Again, this language does not preclude the plaintiff's belief of the garnishee's indebtedness from resting upon tort theory. In any event, the garnishee defendant will have an opportunity to litigate this matter in the garnishment proceedings.[11]

The issue to be resolved in the garnishment proceeding appears to be the *existence* of the indebtedness, not the *basis* of the indebtedness. The basis of the indebtedness is merely the means of determining the existence of the indebtedness. For example, *A* recovers a judgment against *B*. *A* learns of a contractual obligation existing between *B* and *C* which has supposedly resulted in *C's* indebtedness to *B* for a sum certain. *A* causes a writ of garnishment to issue and *C* answers claiming that he is not indebted to *B*. The basis for *C's* answer is the fact that he believes that there was fraud in the inducement of the *B-C* contract on the part of *B*. If *A* controverts *C's* answer to the writ, a trial will follow to determine whether or not *C* is indebted to *B*. The basis for the resolution of the issue of indebtedness will be the determination of the presence or absence of fraud, a tortious act.

Similarly, in the *Murray* case, the basis for the indebtedness is the presence or absence of a tortious act. While it is true that, in the *Murray* case, the debt was unliquidated in the sense that no judgment had been entered upon that cause of action (the negligent or bad faith refusal to settle), the *amount* of the obligation was not uncertain. The indebtedness of the insurance company to its insured would equal the difference between the policy limits and the amount of the judgment.[12] Likewise, in the example set forth above, the contractual obligation would be unliquidated in that the garnishee defendant denies the ob-

[11] RCW 7.32.250.
[12] Evans v. Continental Cas. Co., 40 Wn.2d 614, 627, 245 P.2d 470, 478 (1952).

ligation and no judgment has been entered, but the amount will be certain. And yet the contractual obligation and the breach thereof can be resolved in the garnishment proceeding, but not the breach of an obligation imposed by law.

There seems to be a belief that the judgment creditor is better off by virtue of the insurance company's failure to settle in that the creditor has recovered a judgment in an amount larger than he would have received had his offer for settlement been accepted.[13] However, two observations are relevant with respect to this point.

First, the creditor is merely attempting to stand in the shoes of the judgment debtor. Had the judgment debtor recovered a judgment against his insurance company for negligent or bad faith failure to settle, the court would not deny the judgment creditor the right to cause a writ of garnishment to issue against the debtor's insurance company on the basis of the debtor's judgment. Yet the existence of the judgment against the insurance company makes the creditor's position *no less* anomolous, if his position is anomolous at all. The creditor is still recovering due to the fact that the insurance company failed to accept his offer of settlement.

Secondly, there is always the possibility that the judgment debtor will refuse to bring an action against his insurance company. The debtor might refrain from suing the insurance company because of the fact that they in turn may refuse to renew his policy (this would be the exception rather than the rule). Or, the insured knows that he will probably get nothing as a result of suing his insurance company for his judgment creditor will realize on it through the garnishment proceedings. The debtor will see nothing except his attorney's fee statement. If the debtor had little or no assets other than the claim, then such a prerogative exclusively in the hands of the debtor (which is the result of the *Murray* case) seems to permit fraud upon creditors.

There has been recognition of the problems involved in precluding the creditor from proceeding directly against the debtor's insurance company in some state legislatures. For example, in Ohio a provision was introduced in the legislature which would allow a judgment creditor to recover the amount of the judgment in excess of the policy limits in cases where it could be established that the creditor had made a settlement offer within the policy limits and the offer was rejected by

[13] "It would be therefore anomolous to permit claimant to recover directly against company in his own right..." Keeton, *supra* note 4, at 1176.

the insurer without the consent or approval of the insured.[14] A similar provision has been introduced in the New York legislature.[15]

The purpose of this Note is not solely to criticize, but also to offer a possible alternative solution to this problem. The subsequent discussion centers around the possibility of subjecting the judgment debtor's claim to levy of execution. Although the judgment creditor will not be able to take advantage of this claim directly against the insurance company, it appears that he will be able to do so indirectly.

First, the Washington court recognizes that claims for property damage are assignable.[16] The test of assignability is whether or not the claim survived at common law to the personal representative of the assignor.[17] Since a claim for damage to property survived at common law to the personal representative, it is assignable.

It is clear that an insured's claim of damages for his insurer's bad faith or negligent failure to settle is based upon property damage as opposed to damage to personal reputation or to the person. As a result of the insurance company's negligence or bad faith, the insured is subject to being separated from his property in order to satisfy the judgment in excess of the policy limits. If in fact this threat was brought about by the insurer's misconduct, the debtor should have a present right to have the threat removed.[18] At least one other jurisdiction has recognized that a claim for bad faith or negligent failure to settle is assignable,[19] thus recognizing the "property" nature of the claim. A problematical question arises as to how the judgment debtor has suffered property damage if he has not paid the judgment. One rationale for finding present damage is that when the judgment is entered, the amount of the judgment debtor's debts is increased and represents a presently increased threat to the debtor of loss of property. For example, in Washington, entry of a judgment in a superior

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[14] Thornbury, *Liability of Insurance Companies for Payment of Judgments in Ohio*, 18 INS. COUNSEL J. 442, 444 (1951). However, this is not presently the law in Ohio.

[15] Dempsey, *"Excess Liability,"* 19 INS. COUNSEL J. 44, 57 (1952). This provision did not get out of committee.

[16] Cooper v. Runnels, 48 Wn.2d 108, 291 P.2d 657 (1955); Polk v. Spokane Interstate Fair, 73 Wash. 610, 132 Pac. 401 (1913); Jordan v. Welch, 61 Wash. 569, 112 Pac. 656 (1911).

[17] Cooper v. Runnels, *supra* note 16, at 110, 291 P.2d at 658. By virtue of Wash. Sess. Laws, 1961, c. 137, *all* claims survive, with exceptions not applicable here.

[18] Other rationales are discussed in Note, 72 HARV. L. REV. 568, 572 (1959).

[19] Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). Brown v. Guarantee Ins. Co. 155 Cal. App. 2d 679, 319 P.2d 69 (1957). The *Communale* case seems to be based upon a breach of a contractual promise, while the *Brown* case seems to sound in tort. The court in the *Brown* case drew the similarity between the insured's cause of action against his insurance company and one involving deceit.

court automatically commences a lien upon real estate located in the county in which the judgment is entered.[20]

Another problem to be considered is that of ascertaining when the debtor's claim against his insurance company arises. The Washington position indicates that the claim arises upon entry of the judgment against the insured, regardless of whether the insured has paid that portion over and above the policy limits.[21] This seems to foreclose any consideration of whether the policy is an "indemnity" policy or a "liability" policy. Prior cases had incidated that if the policy was an "indemnity" policy, the judgment debtor must first pay the judgment before proceeding on the policy.[22] If the policy was a "liability" policy, then the insurer was liable on the policy as soon as the insured's liability was established.[23] When the insured's claim is based upon the insurer's bad faith in failing to settle, such a claim sounds in tort, and no defense on the contract can be maintained;[24] the insured is not thereby attempting to recover on the insurance contract.

However, this position is not universal. A number of other jurisdictions require payment by the insured of the amount in excess of the policy limits before the insured's claim arises for that excess.[25]

Since this claim for negligent or bad faith failure to settle is one for property damage and arises in this jurisdiction upon entry of the judgment against the insured, it is submitted that *at that time the claim is also subject to levy of execution.* "Stated otherwise, all kinds of personal property of the debtor which he can make the subject of voluntary transfer of title can by execution be made the subject of involuntary transfer."[26] The Washington statute governing execution provides that "all property, real and personal, of the judgment debtor, not exempted by law, shall be liable to execution."[27] The court has

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[20] RCW 4.56.190-.200.

[21] Murray v. Mossman, 156 Wash. Dec. 924, 926, 355 P.2d 985, 987 (1960). Other cases taking this position include Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955); Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); Schwartz v. Norwich Union Indem. Co., 212 Wis. 593, 250 N.W. 446 (1933).

[22] Ford v. Aetna Life Ins. Co., 70 Wash. 29, 126 Pac. 69 (1912).

[23] Landaker v. Anderson, 145 Wash. 660, 261 Pac. 388 (1927).

[24] Evans v. Continental Cas. Co., 40 Wn.2d 614, 245 P.2d 470 (1952).

[25] State Auto Ins. Co. v. York, 104 F.2d 730 (4th Cir. 1939); Lee v. Nationwide Mut. Ins. Co., 184 F. Supp. 634 (D. Md. 1960); Dumas v. Hartford Acc. & Indem. Co., 92 N.H. 140, 26 A.2d 361 (1942); Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935); Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727 (1935).

[26] 33 C.J.S. *Executions* § 19, at 153 (1942).

[27] RCW 6.04.060.

interpreted "property" to include claims based upon contractual indebtedness,[28] and has stated:

> It is said, however, that some property is not subject to execution because the executing officer cannot, by reason of its nature, take it into his manual possession, and that such is the character of this property [a claim for indebtedness]. The statutes contemplate that, when it is possible to do so, the levying officer must take actual possession of the property levied upon, but it does not follow that a levy is insufficient or cannot be made because of the inability of the executing officer to actually take possession of the thing levied on. All that is necessary under such circumstances is that he take it under his dominion—into his constructive possession—by giving notice to the owner of the property that it is levied upon and will be sold.[29]

Although a later decision by the court indicates that it has not decided whether such procedure as outlined above applies to claims sounding in tort,[30] there is some language in the opinion to indicate that had the proper procedure been followed, the court would have recognized the validity of such action.[31] One other jurisdiction, which has interpreted the Washington execution statute to be identical with its own,[32] allows levy of execution with respect to claims sounding in tort.[33]

While it is true that the cases in which levy on claims has been allowed were those in which the judgment debtor had already commenced court proceedings, this should not be a prerequisite to levy of execution. The cited cases which hold that claims for property damage are assignable were not cases in which the assignor had started court proceedings.[34] If the commencement of legal proceedings is not a necessary prerequisite for the voluntary transfer of claims, then it should not be a prerequisite for involuntary transfer. One possible explanation for the fact that legal proceedings were commenced in each case involving levy of execution is that the creditor probably wanted to make sure that the claim was worth something before pro-

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[28] Johnson v. Dahlquist, 130 Wash. 29, 225 Pac. 817 (1924).

[29] *Id.* at 31-32, 225 Pac. 818 (1924).

[30] Swanson v. Olympic Peninsula Motor Coach Co., 190 Wash. 35, 66 P.2d 842 (1937).

[31] In the *Swanson* case, the creditor attempted to levy upon the debtor's claim by serving notice of the levy with a copy of the writ upon the clerk of the court in which the claim was pending. The court held that this was an invalid levy. The debtor, not the clerk, was in possession of his claim even when it was pending in court. The sheriff could levy upon it and reduce it to possession only after notice to the debtor. This appears to the writer as a tacit recognition of the availability of the execution process as to claims sounding in tort.

[32] Meserve v. Superior Court, 2 Cal. App. 2d 468, 38 P.2d 453, 456 (1934).

[33] Everts v. Wills S. Fawcett Co., 24 Cal. App. 2d 213, 74 P.2d 815 (1937).

[34] See cases cited note 16 *supra*.

ceeding against it. The fact that legal action had been commenced by the debtor is some indication that the claim could result in a favorable judgment for the debtor, and thus is some indicia of its value. Further, the judgment creditors might not have known of the existence of the respective claims until the commencement of legal proceedings. Whatever the reason, it does not appear to be due to any requirement of law.

One possible explanation for the court's position in the *Murray* case might be applicable with reference to the procedure just outlined. Some thought may have been given by the court to the impact upon settlement negotiations if the creditor had been permitted to proceed directly against the debtor's insurance company. There may have been concern over the propriety of placing such a weapon in the hands of a plaintiff who would be negotiating with the defendant's insurance company. Perhaps the court felt that a truly *undeserving* plaintiff might force the defendant's insurance company to settle rather than risk a suit for allegedly demonstrating bad faith or negligence in failing to settle within the policy limits. If the court was concerned over such a possibility arising had *Murray* gone the other way, such concern should also arise by permitting levy of execution upon the insured's claim against his insurance company.

However, if such a policy consideration did enter into the *Murray* decision, it is submitted that the concern was misplaced, at least as to its application with reference to levy of execution upon a defendant's claim. First, the judgment creditor would have to buy such a claim at the execution sale. He is not likely to do so or even threaten to do so unless there is a reasonable belief, supportable by admissable evidence, that in fact the insurance company was demonstrating bad faith in refusing to settle. An undeserving plaintiff would be hard pressed to find any such evidence. If the insurer is demonstrating bad faith, there is no reason not to allow pressure in the form of a threat of a later levy of execution upon the insured's cause of action.

Although the Washington position seems to be solidified against a judgment creditor's direct action against his debtor's tortfeasor in light of *Murray v. Mossman*[35] the path seems to be clear for the creditor to accomplish the same result by levying upon the claim in the hands of the debtor.

PAUL A. WEBBER

[35] 156 Wash. Dec. 924, 355 P.2d 985 (1960).