CPLR 5228(a): Section Utilized To Permit Indirect Action by Injured Party Against Insurance Company

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where: 1. ten years have elapsed since the first docketing of the judgment. ..." The primary purpose of the provision is to permit the judgment creditor to revive the lien on the judgment debtor's real property that he obtains under CPLR 5203(a).179

In Brookhaven Memorial Hospital, Inc. v. Hoppe, 180 plaintiff instituted an action on a money judgment through personal service of a summons and complaint upon defendant some three months before ten years had expired from the first docketing of the judgment. The District Court, Suffolk County, dismissed the action without prejudice as premature, on the ground that the expiration of ten years is a condition precedent to the action.181

To prevent establishment of a superior lien immediately after expiration of the ten-year period, the action should be allowed slightly prior to expiration. Entry of judgment could be delayed to take effect upon said expiration.

ARTICL E 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5228(a): Section utilized to permit indirect action by injured party against insurance company.

Under CPLR 5228(a), a judgment creditor can move for the appointment of a receiver to administer property of the judgment debtor "or to do any other acts designed to satisfy the judgment." Such a motion is addressed to the court's discretion.182 The section is ordinarily utilized when management of the judgment debtor's property by another is more expedient,183 but may be invoked in special circumstances to expedite satisfaction of a judgment.

A novel use of CPLR 5228(a) is illustrated by In re Kreloff,184 wherein petitioner obtained appointment of a receiver to bring suit against an insurance company as legal representative of respondents.185 The company had not appeared or defended on behalf of respondents, and petitioner had recovered a judgment substantially in excess of

179 See 7B McKinney's CPLR 5014, commentary at 573 (1967); 5 WK&M ¶ 5014.04.
182 E.g., Drucker v. Drucker, 53 Misc. 2d 446, 448, 278 N.Y.S.2d 645, 647 (Sup. Ct. Queens County 1967); see 6 WK&M ¶ 5228.04.
183 See 7B McKinney's CPLR 5228, commentary at 137 (1963).
185 Id. at 693, 319 N.Y.S.2d at 53.
An injured party cannot directly maintain any action against an insurance company to recover money in excess of the insured's policy, even where there is bad faith, negligence, or fraudulent conduct by the insurer in failing to settle before trial. Accordingly, the Supreme Court, Bronx County, appointed a receiver to bring suit, respondents' right of action against the company being a property right.

CPLR 5231(b): Income execution based on gross income.

The Legislature faces the difficult problem of balancing the conflicting interests among judgment creditors, judgment debtors and the public regarding income executions, formerly called garnishees. Section 684(1) of the CPA permitted a lien not exceeding ten percent in cases "where any wages, . . . are due and owing to the judgment debtor, or shall thereafter become due and owing to him, to the amount of thirty dollars or more per week . . . ." CPLR 5231(b), the successor statute, provides in pertinent part: "Where a judgment debtor is receiving or will receive more than eighty-five-dollars per week from any person, an income execution for installments therefrom of not more than ten percent thereof, may be issued . . . ." It is clear that the former law was amended to benefit the judgment debtor by increasing the sum he could earn without subjecting himself to execution. Moreover, there also has been speculation that substitution of the term "receiving" for the phrase "wages due and owing" was intended to decrease earnings subject to execution by replacing gross salary with net take-home pay as the basis for determining whether income execution is permissible.

The Supreme Court, Kings County, resolved this issue, in County Trust Co. v. Berg, by holding that gross salary is to be considered in determining whether a judgment debtor is subject to income execution. Noting that the legal meaning of the words "receiving" and "receive" are not necessarily the same as their colloquial or dictionary definition, the court consulted the legislative history and prior case law. Under CPA 684(1), gross salary was the basis for determining

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186 Id. at 692, 319 N.Y.S.2d at 52.
188 65 Misc. 2d at 693, 310 N.Y.S.2d at 53.
191 Id. at 534, 318 N.Y.S.2d at 157.
192 Id., 318 N.Y.S.2d at 155.