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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.

ARTICLE 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.

¹⁸⁰ 65 Misc. 2d 1000, 319 N.Y.S.2d 564 (Dist. Ct. Suffolk County 1971).

¹⁸¹ *Id.* at 1001-02, 319 N.Y.S.2d at 566-67, citing *Underhill v. Phillips*, 30 App. Div. 238, 51 N.Y.S. 801, 802 (2d Dep't 1898); *Frontuto v. Frontuto*, 206 Misc. 214, 131 N.Y.S.2d 735, 737 (Sup. Ct. Monroe County 1954); *Susskind v. Freund*, 147 Misc. 486, 488, 263 N.Y.S. 300, 302 (N.Y.C. Munic. Ct. 1933); *Heyman v. Wick*, 142 Misc. 577, 255 N.Y.S. 356, 358 (N.Y.C. Munic. Ct. 1932). These cases were decided under the predecessor statute, CPA 484.

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).

¹⁸⁴ 65 Misc. 2d 692, 319 N.Y.S.2d 51 (Sup. Ct. Bronx County 1971).

¹⁸⁵ *Id.* at 693, 319 N.Y.S.2d at 53.

the policy.¹⁸⁶ 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.¹⁸⁷ Accordingly, the Supreme Court, Bronx County, appointed a receiver to bring suit, respondents' right of action against the company being a property right.¹⁸⁸

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.¹⁸⁹

The Supreme Court, Kings County, resolved this issue, in *County Trust Co. v. Berg*,¹⁹⁰ by holding that gross salary is to be considered in determining whether a judgment debtor is subject to income execution.¹⁹¹ 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.¹⁹² Under CPA 684(1), gross salary was the basis for determining

¹⁸⁶ *Id.* at 692, 319 N.Y.S.2d at 52.

¹⁸⁷ *Browdy v. Statewide Ins. Co.*, 56 Misc. 2d 610, 289 N.Y.S.2d 711 (Sup. Ct. Queens County 1968).

¹⁸⁸ 65 Misc. 2d at 693, 319 N.Y.S.2d at 53.

¹⁸⁹ See 7B MCKINNEY'S CPLR 5231, supp. commentary at 115 (1970); *County Trust Co. v. Duell*, 52 Misc. 2d 411, 412, 275 N.Y.S.2d 910, 911 (Sup. Ct. Westchester County 1966).

¹⁹⁰ 65 Misc. 2d 533, 318 N.Y.S. 2d 154 (Sup. Ct. Kings County 1971).

¹⁹¹ *Id.* at 534, 318 N.Y.S.2d at 157.

¹⁹² *Id.*, 318 N.Y.S.2d at 155.