CPLR 5231(b): Income Execution Based on Gross Income

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the policy.\footnote{Id. at 692, 319 N.Y.S.2d at 52.} 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.\footnote{Browdy v. Statewide Ins. Co., 56 Misc. 2d 610, 289 N.Y.S.2d 711 (Sup. Ct. Queens County 1968).} Accordingly, the Supreme Court, Bronx County, appointed a receiver to bring suit, respondents' right of action against the company being a property right.\footnote{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 1969).}

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.\footnote{65 Misc. 2d at 693, 319 N.Y.S.2d at 53.}

The Supreme Court, Kings County, resolved this issue, in \textit{County Trust Co. v. Berg},\footnote{Id. at 534, 318 N.Y.S.2d at 157.} by holding that gross salary is to be considered in determining whether a judgment debtor is subject to income execution.\footnote{Id., 318 N.Y.S.2d at 155.} 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.\footnote{Id., 318 N.Y.S.2d at 157.} Under CPA 684(1), gross salary was the basis for determining
the amount subject to income execution.\textsuperscript{193} The court found no evidence of legislative intent to depart from the former law in this respect.\textsuperscript{194} It reasoned that a contrary conclusion would (1) result in the anomaly of an individual with more dependents (who therefore is subject to less withholding) paying more on income execution than one with less dependents (and correspondingly greater withholding),\textsuperscript{195} and (2) encourage judgment debtors to reduce their take-home pay through fraudulent devices.\textsuperscript{196} The aforementioned change in terminology, the court concluded, was intended to make it clear that commissions, overtime, bonuses and other irregular income are subject equally with ordinary wages to income execution.\textsuperscript{197}

The decision in \textit{County Trust Co. v. Berg} is consistent with the legislative history and with logic.\textsuperscript{198} Earnings not subject to income execution perhaps should be increased, but computation should be based on gross income. The gross income standard is simpler and fairer than a net take-home pay basis.

\textbf{ARTICLE 53 — RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS}

\textit{CPLR 5304(b)(6): Case illustrates danger of ignoring foreign arbitration.}

Under the rule of comity as it developed in decisional law, New York upheld foreign judgments if the foreign court obtained jurisdiction over the parties and if the judgment was not secured by fraud

\textsuperscript{193} State Tax Comm'n v. Voges, Sup., 144 N.Y.S.2d 193 196 (Sup. Ct. Queens County 1955); Coller v. Sheffield Farms Co., Inc., 129 Misc. 600, 604, 223 N.Y.S. 305, 311 (St. Lawrence County Ct. 1927).

\textsuperscript{194} 65 Misc. 2d 535-36, 318 N.Y.S. 2d at 156-57; see Sixth Rep. 492-93; 6 WK&M § 5231.11.

\textsuperscript{195} Id. at 535-36, 318 N.Y.S.2d at 156.

Professor Siegel observed that the court's solution to this anomaly further disadvantages all taxpayer debtors:

To prevent the bachelor from getting 'more' than the familyman does, the Berg case sanctifies a system which surcharges both of them. Siegel, \textit{Wage Garnishment in N.Y.: 10 Per Cent of What}, 165 N.Y.L.J. 96, May 19, 1971, at 4, col. 3.

Additionally, Professor Siegel argued that the difference in garnishment under the proposed net income basis reflects the difference in taxes paid by the bachelor and the family man. \textit{Id.}

\textsuperscript{196} 65 Misc. 2d at 536, 318 N.Y.S.2d at 157.

\textsuperscript{197} Id.

\textsuperscript{198} For a contrary view see Siegel, supra note 7, 165 N.Y.L.J. 95, May 18, 1971, at 1, col. 4; id. 96 May 19, 1971, at 1, col. 4. Professor Siegel notes that there was no real distinction between net and gross income when the original statute was enacted, for deductions for Social Security and federal, state and city income taxes did not exist. \textit{Id.} 95, May 18, 1971, at 4, col. 3.