

11 USC §544      ORS 87.920  
11 USC §547      assignment  
ORS 79.1040      subrogation

Morrow v. US Fire Ins. Co. 90-3082-S  
In re Latitudes Marine, Inc. 388-00442-S7

DDS      12/11/90      unpublished

The defendant insurance companies prevailed on summary judgment in a suit by the trustee to avoid the defendants' interest in the debtor's tort claim against L & S Marine. The insurance companies advanced funds to the debtor to repair a ship that was damaged by L & S and insured by defendants. L & S initially denied liability, so the defendants advanced funds and the debtor executed loan receipts which stated that the funds were a loan rather than payment on the insurance policies, and the loan was only to be repaid from any recovery against L & S. The insurance industry uses the receipts to create a fictional loan and enable the insurance company to withstand a real party in interest challenge when the insurance company sues in the name of the insured.

The trustee argues that the recitals in the loan receipt are binding under Oregon law, and the effect is to transform the insurance companies from subrogees into unsecured creditors.

Under the law of this case the claim against L & S arises from a tort. The pre-UCC common law of assignment or pledge applies to the transfer of security because it is a claim arising from tort is not subject to the UCC. Defendants could not have created a lien by filing a financing statement. ORS 87.920. The

assignment of the claim to secure payment in the loan receipt created an equitable lien in favor of defendants that was not avoidable by the trustee.

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UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF OREGON

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In Re:

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Bankruptcy Case No.

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LATITUDES MARINE, INC.,

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388-00442-S7

a California corporation,

)

Adversary Proceeding No.

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Debtor,

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90-3082-S

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ROBERT K. MORROW, INC.,

)

MEMORANDUM IN SUPPORT OF

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Trustee of the

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ORDER GRANTING SUMMARY

Bankruptcy Estate of

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JUDGMENT TO DEFENDANTS

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Latitudes Marine, Inc.,

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Plaintiff,

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v.

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U. S. FIRE INSURANCE

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COMPANY, CONTINENTAL

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INSURANCE COMPANY,

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MOTORS INSURANCE

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CORPORATION, and ROYAL

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INSURANCE COMPANY,

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Defendants.

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The trustee filed this suit to determine the validity and

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priority of the interest of the defendant insurance companies in a

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portion of the debtor's claim against L & S Marine, Inc. The

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parties filed cross motions for summary judgment. Summary judgment

1 should be entered in favor of the defendants and against the trustee  
2 for the following reasons.

3         The parties are basically in agreement about the facts of  
4 this case, and when asked at oral argument, both sides stated that  
5 they would not have any further evidence to present to resolve any  
6 fact issues raised in the motions.

7         The debtor chartered the tugboat M/V RAVEN to use in it's  
8 shipping operations. The RAVEN was damaged during an inspection at  
9 L & S Marine's shipyard in August 1987. At that time, the  
10 defendants insured the debtor for property damage to the RAVEN.  
11 Representatives of the defendants and L & S Marine's insurance  
12 company met shortly after the accident to survey the damage and  
13 discuss methods of repair. L & S Marine initially denied  
14 responsibility and refused to pay for the damages.

15         The RAVEN was repaired, and First Interstate Bank and A.T.  
16 LaPrade Jr. advanced money to the debtor to pay for the repairs to  
17 get the RAVEN released. On October 13, 1987, defendants began to  
18 make a series of payments to the debtor for the repairs. Rather  
19 than rely on their rights of subrogation, the insurance companies'  
20 attorney requested that the debtor sign loan receipts acknowledging  
21 the payments. The loan receipts state that the money was paid to  
22 debtor solely as a loan and repayable only to the extent of any net  
23 recovery that debtor may make from L & S Marine, Inc. or anyone else  
24 on account of the cost of repairs to the RAVEN. As security for  
25 repayment, the debtor pledged any recovery and agreed to prosecute a  
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1 claim against L & S Marine at the expense of and under the exclusive  
2 control of the defendant insurance companies.

3         The trustee contends that the loan receipts transformed the  
4 insurance companies into creditors with an unperfected security  
5 interest, rather than claimants with subrogation rights to the cause  
6 of action against L & S Marine. He maintains that the defendants  
7 should have perfected their security interest in accordance with the  
8 Uniform Commercial Code, and that the trustee's interest in the  
9 proceeds of the lawsuit against L & S is superior to the insurance  
10 companies under 11 USC §§ 544 and 547.

11         The insurance companies claim that the loan receipts are  
12 merely a procedural tool to avoid a real party in interest challenge  
13 by L & S, so they retain their subrogation rights. Alternatively,  
14 the insurance companies claim an equitable lien on the proceeds of  
15 the L & S litigation.

16         The Oregon Supreme Court and the Ninth Circuit Court of  
17 Appeals appear to have divergent views on the affect of loan  
18 receipts. The state court has construed the recitals of a loan  
19 receipt as strong evidence that the insurance company actually  
20 intended the payment as a loan rather than payment under the  
21 insurance policy, thereby leaving title to the lawsuit with the  
22 insured. Waterway Terminals Co. v. P. S. Lord Mechanical  
23 Contractors, 242 Or. 1, 406 P.2d 556 (1965), Furrer v. Yew Creek  
24 Logging Co., 206 Or. 382, 292 P.2d 499 (1956). The federal court,  
25 while acknowledging the Oregon cases, seems to look at the substance  
26 of the transaction over its form, and treat the disguised

1 subrogation as subrogation. Willamette-Western Corp. v. Columbia  
2 Pacific Towing Co., 466 F.2d 1390 (9th Cir. 1972).

3         In reality, the defendants issued the checks to the debtor as  
4 payments under the insurance policy. The loan receipts were  
5 executed as a time honored procedural device on the advice of  
6 counsel. The parties did not actually intend that the insurance  
7 companies would loan the debtor money. A review of the bankruptcy  
8 schedules shows that the debtor did not list the defendants as  
9 creditors. The debtor only included as an asset the portion of the  
10 claim against L & S Marine based on the loss of use of the RAVEN.  
11 It did not list the damage claim for repairs to the RAVEN as an  
12 asset. If Willamette-Western is construed to uphold substance over  
13 form, and federal law is controlling on the question under Bohemia  
14 Inc. v. Home Ins. Co., 725 F.2d 506, 510 (9th Cir. 1984), then the  
15 defendants motion for summary judgment should be granted and  
16 plaintiffs motion denied. However, the defendants reliance on  
17 Willamette-Western seems misplaced given the narrow holding of that  
18 case.

19         Alternatively, even if state law applies, and the terms of  
20 the loan receipt have transformed the defendants into creditors and  
21 title to the claim against L & S became property of the estate, the  
22 defendants should still prevail.

23         The Uniform Commercial Code does not apply to a transfer of  
24 claims arising from tort. ORS 79.1040(11). It is the law of this  
25 case that the recovery from L & S at issue here is a claim arising  
26 from tort and not subject to the U.C.C. See; transcript of oral

1 ruling dated February 7, 1989 in Adversary No. 88-0212, attached to  
2 the affidavit of Vivienne Popperl filed in this proceeding on June  
3 26, 1990.

4           Since the transfer is excluded from the U.C.C. and there is  
5 no other filing required or authorized to perfect an interest in a  
6 tort claim, the defendants could not have created a lien or affected  
7 the title to the tort claim by filing a document with the state or  
8 county. ORS 87.920. The pre-U.C.C. common law of assignment or  
9 pledge applies to the transfer of security in this case. In re Ore  
10 Cargo Inc., 544 F.2d 80 (2nd Cir. 1976).

11           The language of the loan receipts pledging the recovery from  
12 L & S to the defendants and giving them control of the litigation is  
13 sufficient to constitute an equitable assignment of the lawsuit to  
14 the defendants, and create an equitable lien on the proceeds. In  
15 Oregon, no special form is required to effect an assignment. Levins  
16 v. Stark, 57 Or. 189, 110 P. 980 (1910). The priority of the  
17 interests of assignees is determined according to when the  
18 assignment was granted. Meier v. Hess, 23 Or. 599, 32 P. 755  
19 (1893). If only part of the funds due to the assignor is  
20 transferred, the pledge may still be enforced as an equitable  
21 assignment. McDaniel v. Maxwell, 21 Or. 202, 27 P. 952 (1891),  
22 Matter of Estate of Vaughn, 38 Or. App. 29, 588 P.2d 1295 (1979).  
23 The assignment to and resulting equitable lien of the insurance  
24 companies was prior to any other assignment of the debtor's interest  
25 in the lawsuit.

1 All of the equities in this case favor the insurance  
2 companies over the trustee. L & S Marine, the debtor on the claim,  
3 had notice of the defendant insurance companies' interest in the  
4 lawsuit from the outset of the investigation and damage. No  
5 creditor relied on the proceeds of the suit in advancing credit to  
6 the debtor or as an asset in this chapter 7. In fact, the debtor's  
7 assignment of the damage action to A.T. LaPrade in exchange for an  
8 advance for the ship repairs was made subject to the rights of the  
9 insurance companies. The financing statements filed by A.T. LaPrade  
10 purported to perfect an interest in the claims against anyone  
11 responsible for the damage to the RAVEN to the extent the proceeds  
12 were not otherwise payable to the debtor's insurers. The facts of  
13 this case are distinctly different from those faced by the court in  
14 Arkwright Mut. Ins. Co. v. Bargain City, U. S. A., Inc., 373 F.2d  
15 701 (3rd Cir. 1967), cert. den. 389 U. S. 825, 19 L. Ed. 279, 88 S.  
16 Ct. 63 (1967). The debtor and other creditors would be unjustly  
17 enriched at the expense of the insurance companies if the trustee  
18 were to prevail in this proceeding. In re Angus, 9 Bankr. 769  
19 (Bankr. D. Or. 1981).

20 The trustee's claim that any perfection of the defendants'  
21 lien was a preferential transfer should also be rejected. The  
22 equitable assignment and lien arose when the loan receipts were  
23 issued. The loan receipts were not executed for an antecedent debt,  
24 because the advances were made to the debtor at essentially the time  
25 the loan receipts were signed, or thereafter. The defendant L & S  
26 Marine was aware of the defendant insurance companies' interest in

1 the suit from the outset, so the post-petition amendment of the  
2 complaint against L & S to add the defendant insurance companies as  
3 a plaintiff was unnecessary to effectuate the assignment and  
4 equitable lien in this case.

5           The defendants' claim to the proceeds of the claim against L  
6 & S Marine for physical damage to the RAVEN is prior to that of the  
7 trustee, under either their right of subrogation or based on an  
8 equitable lien. A separate order granting summary judgment to the  
9 defendants shall be entered.

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