11 U.S.C. § 547(b)(4)(A)
11 U.S.C. § 547(e)(1)(B)
O.R.S. 29.125 - 29.265
O.R.S. 23.450 - 23.480
Garnishment (as preferential transfer)

Sticka v. Yosten, Adv. No. 689-6170-H
In re Estate of Empire Northwest, Inc., Case No. 689-61106-H7

6/29/90 PSH unpublished

Trustee sought to avoid a pre-petition garnishment as a preferential transfer. The writ of garnishment was served before the 90 day preference period commenced. However, within the 90 day preference period, the garnishor purchased at sheriff's sale the debtor's right to insurance proceeds from litigation pending in state court for indemnity for theft loss.

The issues were whether such contingent claims are garnishable and whether the transfer was perfected, for purposes of § 547(e), upon service of the writ of garnishment or at some later time within the preference period. The court held that such contingent claims are garnishable, and although a garnishor may not hold an absolutely unequivocal or irrevocable lien under state law, its interest is superior to that obtainable by any subsequent judicial lien creditor, including the trustee in bankruptcy. Thus, a perfected "transfer" within the meaning of § 547(e) occurred when the writ of garnishment was served, outside the preference period, and the trustee could not avoid the garnishor's claim to the proceeds.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
ESTATE OF EMPIRE NORTHWEST, INC. by RONALD R. STICKA, TRUSTEE,	)	
	)	
Plaintiff,	)	
vs.	)	Adversary No. 689-6170-H
	)	
JERRY YOSTEN,	)	
	)	MEMORANDUM OPINION
Defendant.	)	

This matter is before the court and may be decided on cross motions for summary judgment. The issue is whether, under facts stipulated to by the parties, there are transfers which the trustee under 11 U.S.C. § 547 may avoid as preferential. The stipulated facts are as follows:

1. Empire Northwest, Inc., filed a voluntary petition in bankruptcy under 11 U.S.C. Chapter 7[1] in the Bankruptcy Court of the District of Oregon on April 11, 1989.

[1]All references hereinafter are to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

2. Defendant obtained judgment against debtor in the sum of $13,748.43, plus interest and attorney's fees, on September 16, 1988.

3. On December 21, 1988, the Defendant caused to be issued a writ of garnishment against Hartford Fire Insurance Company, a Connecticut corporation ("The Hartford"). On December 27, 1988, the writ of garnishment was legally and duly served on The Hartford.

4. The Hartford returned its certificate of garnishee denying money owed or property held, and further explained: "On March 16, 1988, the debtor filed a claim for indemnity under an insurance policy issued by the Hartford Fire Insurance Company, arising out of the January 24, 1988, theft loss. That claim is currently under investigation to determine, in part, whether there is coverage under the policy. Once a determination is made, The Hartford will file an amended certificate."

5. An amended certificate of garnishee has not been filed.

6. On March 20, 1989, the sheriff of Multnomah County, Oregon purportedly sold the proceeds of debtor's claim for indemnity under the said insurance policy arising out of the January 24, 1988, theft lost to Defendant for the sum of $500.

7. Debtor's claim for indemnity from The Hartford for the theft loss is the subject of pending litigation in Polk County, Oregon, Circuit Court Case No. 89P-1006.

8. The Hartford has not made any disbursement on the pending claim by debtor.

9. At all pertinent times since September 16, 1988, debtor has been insolvent.

10. Defendant is not an insider within the meaning of 11 U.S.C. § 102(28).

11. In addition to the claim by Defendant, the scheduled debt to other unsecured creditors totals $26,558. His garnishment allowed the defendant to receive more than he would have received if it had not been made and he had received a distribution from the debtor's estate.

No question is raised with regard to the regularity of the garnishment proceedings. The steps followed by the defendant garnishor are outlined by statute as follows:

A writ of garnishment may be issued by the garnishor's attorney, O.R.S. 29.137(2), or the clerk of the court, O.R.S. 29.137(1), and is valid for 60 days. O.R.S. 29.138(2).

Property is garnished by serving the writ of garnishment on the garnishee. O.R.S. 29.185(1).

The delivery of the writ shall be effective to garnish all property of the debtor which is in the garnishee's control including debts and other obligations then in existence and payable in money, whether due or to become due. O.R.S. 29.205(1).

Within five days of delivery of the writ the garnishee must

file a certificate stating the property held, or if unknown or uncertain, must file a certificate stating that it will file an amended certificate when the property becomes certain. O.R.S. 29.235(1)(c).

If the property held by the garnishee is property other than a debt or is another obligation payable in money or a debt not due within 45 days the garnishee must serve a copy of its certificate on the sheriff. O.R.S. 29.235(4)(b).

Within five days of the receipt of the certificate the sheriff must send a notice to the garnishor of his fees for taking possession of the property and selling it. If the garnishor pays the fees within the statutory time frame of 20 days from the date of the delivery of the writ on the garnishee, the sheriff shall proceed to sell the property. O.R.S. 29.237.

If the sheriff's fees are not timely paid by the garnishor the garnishment shall have no further force and effect. O.R.S. 29.237(3).

Within five days following the sale of the defendant's interest in the property the sheriff shall advise the garnishee in writing of the identity of the purchaser and that the purchaser will be entitled to possession of the property. O.R.S. 29.237(4)(b).

The sale shall be in the same manner in which property is sold on execution. O.R.S. 29.265(2)(b).

An execution sale is made by auction, O.R.S. 23.470, with notice of the sale of personal property being posted in three public places of the county where the sale is to take place, not less than 10 days successively, and being sent to the judgment debtor by registered mail. O.R.S. 23.450.

The debtor does not have a right of redemption for the sale of personal property nor does the court confirm the sale. Where the purchaser of the personal property cannot take immediate possession of it, the sheriff shall give the purchaser a bill of sale containing acknowledgment of payment. O.R.S. 23.480.

A writ of garnishment directed to a third party "reaches tangible or intangible personal property of the [debtor] in the possession, control or custody of or debts or other monetary obligations owing by" that third party. O.R.S. 29.135. It is clear from the language of the statute that this may include debts from the third party to the primary debtor which may not become due for some time. If the garnishee may hold property of, or owe a debt to, the primary debtor, but it is unable to say what or how much, it is clear that the garnishee must fill out and return the certificate anyway. Property which may not be taken by garnishment shall include but is not limited to equitable interests, property in the possession of a conservator and property in the possession of a personal representative constituting the subject matter of a trust contained in a duly probated will of the decedent. O.R.S.

29.205(3).

The parties before the court disagree both as to what extent the debtor's insurance company, the garnishee, held either property of the debtor or owed an obligation to the debtor which was subject to garnishment, and the identity of the object garnished. The cases cited on these issues, with two exceptions, are inapposite to the facts before the court. Snyder v. Nelson, 278 Or. 409, 564 P.2d 681 (1977); State Farm Fire & Cas. v. Reuter, 299 Or. 155, 700 P.2d 236 (1985); and Stumpf v. Eidemiller, 94 Or. App. 576, 767 P.2d 77 (1989), each involved circumstances where the creditor had obtained a judgment and then garnished the insurance company pursuant to the statutory provisions of O.R.S. 23.230. This statute allows garnishment of an insurer under circumstances where the injury or damage on which the judgment was gained was covered by the policy. The dicta from each of these cases that indicates that the debtor's insurer is subject to garnishment rests on the clear language of the enabling statute which is inapplicable under our facts. In our case the judgment held by the creditor did not arise out of the liability covered by the policy issued by the insurer.

On the other hand, on facts similar to those before this court, an Oregon court has held that an insurer is subject to garnishment. In Fireman's Fund Ins. Co. v. Walker, 132 Or. 73, 282 P. 230 (1930), a creditor holding a judgment arising from suit on a

note garnished the debtor's insurance company. The writ was served on the insurance company after the debtor had suffered a fire loss and had made a claim for coverage with his company but before the company's liability, which was later denied, had been determined. The issue the court addressed was whether the proceeds of a standard insurance policy are subject to garnishment after loss by fire but prior to an adjustment of such loss between the insurer and the insured. In holding that they were the court first looked at the language of the garnishment statutes. It interpreted "property" subject to garnishment to include goods, effects and credits; it interpreted "debts" to include debts not yet due. The court held these debts included a "prima facie obligation" to indemnify the assured against loss which obligation arose when the fire occurred. Id., 132 Or. at 78. Under Fireman's Fund the debt of the insurer arises when a loss occurs although the amount owed may be undetermined at the time of garnishment.

Since Fireman's Fund was decided the language of the garnishment statutes has been amended. The present language leaves no doubt in this court's mind that debts as yet undetermined in amount and intangible property are both garnishable. O.R.S. 29.135 states that a writ of garnishment reaches "tangible or intangible personal property". Debts due after 45 days and forms of tangible and intangible property other than debts presently due and payable, which are held by the garnishee, are specifically addressed

throughout the statute. Their treatment culminates in a sheriff's sale as occurred in this case. Although the list of property excluded from garnishment is not exclusive, the items enumerated in the statute seem to reflect a legislative concern to protect from garnishment trust or custodial property rights which are controlled by third parties. Such is not the case here.

The identification of what the defendant garnished and ultimately purchased at the sheriff's sale is a more difficult question. The Oregon cases cited are not consistent in their description of what has been garnished. State Farm Mutual Auto v. Farmers Ins. Exch., 238 Or. 285, 387 P.2d 825 (1963), says that the contractual liability of the insurer is the asset reached by the garnishment. Id., 387 P.2d at 829. Fireman's Fund, supra, refers both to a property right in the policy and the amount due under the policies after loss as garnishable. Stumpf v. Eidemiller, supra, refers to the insurance policy as garnishable; Snyder v. Nelson, supra, speaks of the proceeds of a policy. O.R.S. 23.230 allows garnishment of the amount covered by the policy of insurance. The sheriff's certificate of sale in this case describes the personal property levied upon and sold as the proceeds of a claim for indemnity under an insurance policy.

In Pringle v. Robertson, 258 Or. 389, 465 P.2d 223 (1970), the judgment creditor attempted to garnish the debtor's claim for negligence and bad faith which debtor may have held against its

insurer for failing to settle the creditor's claim against it. In holding that this claim was not garnishable, the court emphasized that the debtor had not indicated interest in suing its insurer and had not assigned its claim to the creditor. The public policy of prohibiting champerty lay behind its decision. Although the holding rests on facts dissimilar to those before this court, the reasons stated for holding that the debtor's claim against its insurer was not garnishable are equally applicable here. The court stated:

> Plaintiff bears no more relationship to the insurance contract than does any other judgment creditor of the defendant. No duty was owed by the insurer to the plaintiff under the contract . . . . Therefore plaintiff's only interest is that of a judgment creditor of the insured defendant . . . . It is contrary to the policy of the law to permit a third party who has no direct interest in the cause of action to foster litigation of the kind involved here . . . . The law frowns upon third parties with no direct interest promoting litigation of this kind for gain. This is the reason for the rules preventing champerty and maintenance.

Id., 465 P.2d at 225.

Further, this court believes that the debtor's claim against the insurer under the facts here cannot be garnishable because it is not property of the debtor's which is in the possession of the insurer. Rather it is an asset of the debtor which is in his possession and control. For these reasons this court believes that the asset which the defendant herein garnished was the amount ultimately found to be due the insured under the terms of the

policy up to its face amount.

Under 11 U.S.C. § 547(b) the trustee may avoid a transfer of an interest of the debtor in property made for the benefit of a creditor on account of an antecedent debt owed by the debtor before the transfer was made, made while the debtor was insolvent and on or within 90 days before the date of the filing of the petition, if to one not an insider, and which enables the creditor to receive more than it would have received if the transfer had not been made and the creditor had received a distribution on the debt out of the assets of the estate in a Chapter 7 proceeding.

The parties have stipulated to all the recited conditions for a preferential transfer but one. This court must decide whether, under the facts, within 90 days of the filing of the petition in bankruptcy there was a transfer of an interest of the debtor in property.

"Transfer" is defined very broadly in 11 U.S.C. § 101(50) as:

> " . . . every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption."

The timing of a transfer for purposes of § 547, however, is more limited. There a transfer of an interest of the debtor in property will be deemed to have been made at the time of the transfer if the transfer is perfected within 10 days thereafter or at the time of the perfection if not perfected within 10 days. If the transfer is

never perfected it will be deemed to have occurred just before the filing of the bankruptcy petition. § 547(e)(2).

"Perfection" is also defined for purposes of § 547. Section 547(e)(1)(B) states: "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." This language should be compared to that of Section 60(a) of the Bankruptcy Act of 1898 which in pertinent part provided:

> "(2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the right of the transferee . . . (4) A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) or this subsection is a lien arising in the ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy." (emphasis added)

Section 101(32) of the Bankruptcy Code defines "judicial lien" as a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding. (emphasis added). Section 101(47) defines a statutory lien as:

> " . . . a lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether nor not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute." (emphasis

added).

The garnishment procedure is a creature of statute. A comparison of the above quoted Code and Act language would suggest, however, that to the extent that under state law it can be said that a lien arises at some point in the garnishment process in favor of the garnishor it would be a judicial lien within the meaning of § 547(e)(1)(B). Further, although the language of § 547(e)(1)(B) does not specifically state, as does § 60(a) of the Bankruptcy Act, that the transfer under preferential attack must be perfected as to any subsequently obtained judicial lien, the House and Senate Reports on that subsection so state. HR Rep. No. 595, 95th Cong. 1st Sess. 374-375 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 89 (1978).

As I stated in In re B-Way Construction, 68 Bankr. 651 (Bankr. D.Or. 1986), what constitutes a transfer and perfection for purposes of § 547 is defined by federal law but the court must look to state law to determine whether the particular transfer was perfected as so defined. Id. at 653. Prior to 1981 Oregon had a series of statutes commencing at O.R.S. 29.110 which governed attachments and garnishments. A writ of attachment was issued by the court and was executed by the sheriff on personal property capable of manual delivery, and not in the possession of a third party, by taking it into custody. The writ of attachment was executed by the sheriff on personal property in the possession of a

third person by leaving a certified copy of the writ and a notice with the person having possession. Attachment lay upon the commencement of a suit or at any time thereafter.

O.R.S. 29.150 stated:

> From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, subject to the conditions prescribed in ORS 29.190 as to real property.

In Nevael Investment Corporation v. Schrunk, 203 Or. 268, 279 P.2d 518 (1955), the court interpreted O.R.S. 29.150 to allow a creditor who, prejudgment, had stock in the hands of a garnishee bank attached, to cut off the rights of an alleged third party purchaser of the stock where the sale had not been perfected by recording, notice or transfer of possession.

In 1981 the Oregon legislature completely revised the state attachment and garnishment statutes. O.R.S. 29.110 et seq., including O.R.S. 29.150, were repealed. "Attachment" is now defined as the procedure by which an unsecured plaintiff obtains a judicial lien on the defendant's property prior to judgment. Oregon Rule of Civil Procedure (ORCP) 81 A(1). By placement in the Rules this definition does not appear to apply to the garnishment process. The attachment process is provided for in ORCP 84 and calls for the issuance and service of a writ of attachment. This writ is executed by the sheriff only against personal property not in the possession of a third party. The plaintiff's lien attaches

when the property is taken into the sheriff's custody. ORCP 84 D.(2)(a).

Personal property in the possession control or custody of or debts or obligations owing by a third person are attached by writs of garnishment as outlined in O.R.S. 29.125, et seq. These statutes do not state whether any lien is created upon the issuance or service of the writ of garnishment.

Older Oregon case law provides little guidance in determining the nature of the rights of the garnishing creditor to the garnished property, including the priorities between a garnishor and other third party claimants. In B-Way, supra, after analyzing two Oregon cases I reached the conclusion that the garnishor will not automatically obtain a lien upon the issuance and service of the writ. I have reviewed those two cases again.

In Murphy v. Bjelik, 87 Or. 329, 169 P. 520 (1917), rehearing denied, 87 Or. 329, 170 P. 723 (1918), the sheriff had sold the garnishee's property to satisfy the judgment held by the garnishor without first demanding payment by the garnishee of the amount it had stated it owed the judgment debtor. The court, in holding that the garnishment statutes must be strictly followed and the sale was void said:

> The garnishment did not create a lien in favor of [the garnishor] upon any money in the hands of the [garnishee] nor upon any property owned by it, but it gave rise to a contingent personal liability to respond to any judgment that might afterward be recovered by [the garnishor] against his debtor and the [garnishee's] creditor . . .

> When [the garnishor] finally secured a judgment even it did not create a lien upon any property owned by the [garnishee] because the only judgment that he was entitled to was a judgment against the makers of the note.

Id., 87 Or. at 353.

This dicta should be interpreted within the context of the facts before the court. The court was concerned that property owned by the garnishee upon which the judgment debtor had no claim, had been sold to satisfy the obligation.

Matsuda v. Noble, 184 Or. 686, 200 P.2d 962 (1948), was also a case with unusual facts. The garnishor's judgment debtor was Noble in his individual capacity. Noble was the agent for Matsuda. The garnishee owed money to Noble in his capacity as agent. In holding that the garnishor did not become entitled to receive money owed by the garnishee to Noble as agent, the court concluded that under the statutory provisions at that time an attaching claimant took subject to any adverse claims of which he has knowledge or sufficient notice to put him on inquiry, and it quoted Murphy to the effect that "[g]arnishment creates no lien on any money in the hands of the garnishee." Id., 184 Or. at 702. Again the court was concerned to protect property improperly obtained by the garnishor which belonged to a stranger to the proceedings.

Because of the focus of the court in both these cases the dicta regarding the effect of garnishment should be read with caution.

In Price v. The Boot Shop, 75 Or. 343, 146 P. 1088 (1915), the court held that personal property in the possession of a third party is "attached" at the time of service of the writ upon the garnishee. Id., 146 P. at 1089.

Neither the present Oregon Rules of Civil Procedure governing attachments nor the Oregon statutes governing garnishments contain the language which appeared in the now repealed O.R.S. 29.150. There is nothing in either the rules, statutes or comments thereto, however, which reveal an intent to overrule the language of O.R.S. 29.150.

Under Oregon law the judgment creditor does not obtain a lien on the defendant's personal property merely by entry of the judgment. As indicated in ORCP 81 A.(1), it is the attachment and garnishment process by which the creditor can reach this property to satisfy the judgment. It is clear the plaintiff has a lien on attached property in the hands of the defendant from the time the sheriff executes the writ. This lien may be obtained either pre- or post-judgment.

The language of repealed O.R.S. 29.150 as interpreted by Neveal, supra, the holding in Price, supra, and the provisions of ORCP 81 A.(1) and 84 D.(2)(a) strongly suggest that although the garnishor may not obtain a lien on the garnished property, he has rights in the property from the date of the service of the writ. These rights are conditioned upon the initial and continued

efficacy of the writ, and, in the case of prejudgment garnishment, obtaining a judgment. These rights will be prior to rights of creditors subsequently obtained in the property through prejudgment attachment, pre- or postjudgment garnishment or execution after judgment.

As I stated in B-Way, supra, the garnishor need not hold an absolute unequivocal or irrevocable lien under state law for the transfer to be perfected within the meaning of § 547(e)(1)(B). The transfer is "perfected", and thus not preferential, merely if, under state law, no subsequent judicial lien creditor can obtain a superior interest to the garnishor's in the property. B-Way, 68 Bankr. at 655.

This court need not be concerned about the priorities between the garnishor and statutory lien creditors because the federal definition of perfection does not encompass those priorities.

The trustee cites Ripke v. Hill (In re Ripke), Civil No. 89-308-RE (D. Or. April 14, 1989), in support of his position that the garnishment process is not complete until a payment in satisfaction of the judgment is made. In Ripke the court did not address any issues under § 547. That case involved a turnover action against a former garnishor. The court held that the property was not property of the estate at the time of the filing and therefore was not subject to turnover. The case is of little help in deciding the issues before this court.

This court concludes, as it did in B-Way, supra, that a transfer to the defendant within the definition of § 547(e) took place at the time the writ of garnishment was served on the garnishee because the transfer was perfected at that time within the meaning of § 547(e)(1)(B).

Under our facts the writ was served outside the 90 day preferential transfer period and the sheriff's sale took place within the 90 day period. The Oregon statutes describe a detailed, multi-step process which must be strictly followed by the garnishor if he is to be successful in obtaining satisfaction of his judgment against his debtor. The trustee argues that the sale was a preferential transfer. The sale appears to fall within the definition of a transfer under § 101(50). But the sale was the final step in the statutorily mandated garnishment process. The defendant held a judgment. The sale was the sole means by which this creditor could reap the benefit of his prior rights in the garnished property and satisfy his judgment. If the trustee succeeded in avoiding the sale as a preferential transfer he would ipso facto avoid the prior rights the creditor obtained through service of the writ to apply the property in satisfaction of his judgment. He would succeed indirectly in avoiding what he could not avoid directly because § 547 does not give the trustee the power to reach the perfected transfer that took place at the time the writ was served. Therefore this court concludes that under the

facts before it the only transfer which was made within the meaning of § 547(e)(2) was the transfer at the time the writ was served on the garnishee.

This memorandum opinion contains the court's findings of fact and conclusions of law and pursuant to Bankruptcy Rule 7052 they will not be separately stated.

An order consistent herewith shall be entered.

POLLY S. HIGDON
Bankruptcy Judge