THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS,
Plaintiff,

vs.

H. CRAIG VAN ENGELEN AND KRISTIN L. VAN ENGELEN,

Defendants.

Case No. CV-OC-2009-17209

ORDER STAYING EXECUTION ON VAN ENGELENS' APPEAL RIGHTS

On November 12, 2010, the Court granted Washington Federal Savings' Motion for Summary Judgment against H. Craig and Kristen Van Engelen (collectively "Van Engelens"), finding that as guarantors, the Van Engelens were contractually obligated to Washington Federal ("the Bank"). On December 14, 2010, the Court entered a money judgment against the Van Engelens in the amount of $4,996,101.65. The Bank moved for costs and attorney fees. The Court granted attorneys fees and costs. The Court entered an Amended Judgment in the amount of $5,036,998.86 on January 27, 2011, including costs and fees. On January 25, 2011, the Van Engelens filed a Notice of Appeal.

Prior to filing the Notice of Appeal, on December 16, 2010, the Van Engelens requested the Bank waive the supersedeas bond requirement and the Bank refused.

On May 12, 2011, the Court issued a Writ of Execution. The Bank then instructed the Ada County Sheriff to levy upon and sell all claims, causes of action, choses in action, defenses, affirmative defenses, rights to appeal, and all rights, title, and interest held by the Van Engelens. The Sheriff set the execution sale for July 7, 2011. On June 21, 2011, the Van Engelens filed a Claim of Exemption and Supplemental Claim of Exemption claiming that their appeal rights were exempt from levy. They also alleged that they were financially unable to post a supersedeas bond in the amount required under the appellate rule, I.A.R. 13(b)(15).

On June 28, 2011, the Bank contested the Van Engelens' claim of exemption. On July 6, 2011, the Van Engelens moved the Court to waive any requirement for a supersedeas bond and stay execution. The Court heard argument on July 7, 2011.

After hearing argument, the Court ordered additional briefing. More specifically, the Court ordered the parties to address any due process or other constitutional claims that might be implicated by the Bank's execution on the Van Engelens' appeal rights and subsequent dismissal of their appeal.

The parties filed additional briefing, and the Court heard argument on September 1, 2011, and took the matter under advisement.

For the reasons stated below, the Court finds that in Idaho, because parties have a statutory right to appeal pursuant to I.C. § 13-101, the constitutional requirements of due process and equal protection apply to the exercise of that right. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951). Therefore, the Court finds that allowing a judgment creditor (the Bank) to purchase the judgment debtor's (the Van Engelens) right to appeal the very judgment giving rise to the debt, effectively permits the judgment creditor to deny the debtor his statutory right to appeal without due process. Based on the Court's ruling, the Court stays the Bank's right to execute on the Van Engelens' right to appeal only. The Court does not stay the Bank's right to execute against any other of the Van Engelens' rights or property absent the Van Engelens posting a proper supersedeas bond pursuant to I.A.R. 13(b)(15).

ANALYSIS

This is a matter of first impression in Idaho.[1] In a nutshell, the Bank contends that the Van Engelens' appellate rights are simply another chose in action that can be purchased at an execution sale by the judgment creditor (the Bank) in that same action. Once the Bank purchases the Van Engelens' appeal right, the Bank intends to dismiss their appeal. While initially arguing that someone other than the Bank would be interested in purchasing the Van Engelens' right to appeal this Court's decision at an execution sale, during oral argument the Bank conceded those appeal rights have no value to anyone other than the Bank or the Van Engelens. Clearly, no one

[1] While the Idaho Supreme Court denied a Motion for Stay in another case, the order was simply entered by the Clerk of the Supreme Court without opinion.

would be interested in purchasing the right to appeal a substantial judgment, thus becoming potentially liable for that same judgment. On appeal the most any such purchaser could obtain *even if successful* was *relief* from paying the $5,000,000 judgment. Therefore, these appeal rights have no value to anyone other than the Van Engelens and the Bank and the Court finds that the only reason the Bank would purchase the appeal rights was to extinguish the Van Engelens' right to appeal that judgment.

Due to the economic times, this practice has been increasingly used to abrogate a party's right to appeal specific court decisions. Once the appeal rights are purchased for a minimal amount, any appeal is then dismissed by the new owner of the appeal right – in these cases, the successful party to the same litigation. Especially in cases like this one where a guarantee is at the heart of the cause of action and a substantial judgment has been entered, the judgment debtor (the losing party) may not have the funds for a cash deposit or the ability to obtain a supersedeas bond meeting the appellate rule requirements to stay execution on his appeal rights. *See* I.A.R. 13 (b)(15)(requiring the bond be in the amount of the judgment plus 36%). Therefore, since the current appellate rule grants no discretion to modify the requirement for a bond or cash deposit *even for good cause*, a judgment debtor in this situation effectively loses his right to appeal the very decision creating the judgment without any meaningful process.

However, where, as here, the court does not stay execution against a judgment debtor's other property without posting a proper bond or cash deposit, a judgment creditor's rights are nonetheless protected while still recognizing a party's right to appeal. The Bank can still execute against any other property owned by the Van Engelens.

A. The right to appeal is a statutory right.

As a matter of due process, no one has a constitutional right to an appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Neither Federal nor Idaho Constitutions provides a blanket right to an appeal. *Abney v. U.S.* 431 U.S. 651, 656 (1997), *State v. Moran-Soto*, 150 Idaho 175, 244 P.3d 1261 (Ct. App. 2010). At the time of the adoption of the Idaho constitution, however, a complete system of appeals was a part of the law. The Idaho Constitution specifically requires the legislature to provide a system of appeal. Art. 5 § 13, provides in relevant part as follows:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the

> government; but the legislature *shall* provide a *proper system of appeal*, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution.

(Emphasis added.) Thus, the right to appeal, time for taking appeals, and requirements for appeal have always been an area reserved by the constitution to the legislature for change or modification. *See Weiser Irr. Dist. v. Middle Valley, etc., Co.*, 28 Idaho 548, 552, 155 P. 484, ___ (1916).

The right to appeal, procedures involved, time for appeals, and all other associated processes are presently governed by Idaho Code Title 13, Chs. 1 and 2.[2] As the Idaho Supreme Court observed in *Dolbeer v. Harten*, 91 Idaho 141, 148, 417 P.2d 407, 414 (1965) "[i]t is of interest to note that Title 13, Ch. 1 and all of Ch. 2, (except I.C. § 13-222), were first enacted in 1881." In other words, the right to appeal has been long established in Idaho.[3]

Once an appellate procedure is provided by a state, such procedure must meet the constitutional requirements of due process and equal protection. *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208 (1951).

B. Requiring an appellant to post a bond or cash deposit in order to exercise his right to appeal as set forth in I.A.R. 13(b)(15) violates due process.

On their face, the Idaho appellate rules do not grant any discretion to either the District Court or the Supreme Court to stay execution or enforcement of a money judgment on appeal absent the filing of a supersedeas bond or a cash deposit. I.A.R. 13(b)(15) and (16) provide, in relevant part, as follows:

> **b) Stay Upon Appeal--Powers of District Court--Civil Actions.** In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal; . . .
>
> (15) Stay execution or enforcement of a money judgment *upon the posting of a cash deposit or supersedeas bond by a fidelity, surety, guaranty, title or trust*

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[2] I.C. § 13-201 provides as follows: "An appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribed by Rule of the Supreme Court."

[3] As discussed below, not all states recognize a right to appeal which affects the way such jurisdictions address this situation.

> *company authorized to do business in the state and to be a surety on undertakings and bonds, either of which must be in the amount of the judgment or order, plus 36% of such amount. . . .*
>
> (16) Any order of the Supreme Court as to whether or not a judgment, order, decree or proceeding shall be stayed shall take precedence over any order entered by the district court.

(Emphasis added.) Given that appeal rights are property[4] and are subject to execution,[5] the Court is without authority under the Rule to stay execution of that property unless the appellant posts the requisite bond or cash deposit.

However, the statute authorizing the Supreme Court to adopt rules addressing stays on appeal, I.C. § 13-202, provides, in relevant part, as follows:

> (1) Upon and after an appeal of a judgment or order of the district court in a civil action, the judgment or order appealed from, or any other order or proceeding in the action *may* be stayed by the district court or the supreme court as provided by rule of the supreme court.
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> (2) If a plaintiff in a civil action obtains a judgment for punitive damages, the supersedeas bond or cash deposit requirements *shall* be waived as to that portion of the punitive damages that exceeds one million dollars ($1,000,000) if the party or parties found liable seek a stay of enforcement of the judgment during the appeal.
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> ***
>
> (4) *The supersedeas bond or cash deposit requirements may* ***also*** *be waived in any action for* ***good cause*** *shown as provided by rule of the supreme court.*

I.C. § 13-202 (emphasis added). The legislature clearly intended that the court have the discretion to waive the requirement that an appellant post bond or cash deposit for good cause.

The Idaho Appellate Rules, however, do not allow any discretion even though the enacting legislation, subsection (4), clearly anticipates they would. In fact, the Idaho Appellate Rules do

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[4] Idaho law recognizes that a "thing in action" or "chose in action" is included within the definition of "personal property". *See e.g.* I.C. § 73-114(2)(c) (personal property includes "things in action"). Idaho Law recognizes that "things in action" are transferable. *See* I.C. § 55-402 (Transfer and Devolution of Things in Action).

[5] Idaho Code § 11-201 governs a writ of execution on a judgment:

> PROPERTY LIABLE TO SEIZURE – All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and property and rights of property, seized and held under attachment in the action, are liable to execution.

(Emphasis added); *see also* I.C. § 11-301 (Execution of Writ).

not incorporate subsection (2) specifically requiring that any supersedeas bond or cash deposit be waived for punitive damages in excess of $1,000,000.

As the Supreme Court recently observed, ordinarily, the right to appeal, as well as many of the procedures applicable to that right, are governed by the Idaho Appellate Rules. *See Camp v. East Fork Ditch Co., Ltd.,* 137 Idaho 850, 860, 55 P.3d 304, 314 (2002). That is because Idaho Code § 13-201 provides, "An appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribed by Rule of the Supreme Court."

As the Supreme Court also observed, "in enacting that statute, *however*, the legislature *did not and could not* divest itself of its constitutional power . . ." related to the right to appeal. *See Deeds v. Regence Blueshield of Idaho*, 143 Idaho 210, 214-216, 141 P.3d 1079, 1083-1085 (2006) (emphasis added). Throughout the years, the Supreme Court has frequently recognized the legislature's authority to determine what may be appealed or under what circumstances. *Oneida v. Oneida,* 95 Idaho 105, 108, 503 P.2d 305, 308 (1972); *Wilson v. DeBoard,* 94 Idaho 562, 563, 494 P.2d 566, 567 (1972); *State ex rel. State Board of Medicine v. Smith,* 80 Idaho 267, 269, 328 P.2d 581, 581-82 (1958), 80 Idaho at 328 P.2d at; *Evans State Bank v. Skeen,* 30 Idaho 703, 704-05, 167 P. 1165, 1165-66 (1917).

Any attempted abrogation of the right to appeal[6] must meet the constitutional requirements of due process and equal protection. *Dowd, supra.* The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a ***meaningful*** opportunity to be heard. *See Fuentes v. Shevin,* 407 U.S. 67 (1972); *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983) (citing *Mays v. District Court,* 34 Idaho 200, 200 P. 115 (1921)). While conceding this principle applies, the Bank contends the meaningful opportunity to be heard is met at the Sheriff's sale. This Court disagrees.

By granting discretion to the courts, the legislature's solution meets due process requirements. The legislature correctly recognized occasions where compelling a cash deposit or

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[6] The Court notes that this particular statutory appeal right is limited to civil litigation. Another statute addresses the right to appeal criminal convictions. I.C. § 19-2801.

supersedeas bond to prevent execution on certain property may be inequitable. However, the Idaho Appellate Rules do not contain such discretion making any hearing a waste of time.[7]

Allowing a judgment creditor in the same action to end an appeal of that very judgment using this method violates due process because there is no meaningful opportunity to be heard. While the judgment debtor can have a hearing, such hearing is meaningless because the court has no discretion to grant any relief -- even though such discretion was clearly provided for by the legislature. Thus, the Court finds that allowing the Bank to execute on the Van Engelens' appeal rights in this case and thereby deny them their right to appeal violates due process.[8]

The Court agrees with the Tenth Circuit's clear uneasiness with this method of end running an appeal. The Tenth Circuit expressed real concerns over this practice in a case where a judgment creditor executed upon a final judgment in the same case that produced the judgment upon which it executed thus precluding any review of the merits. *RMA Ventures California v. Sun America Life Ins. Co.*, 576 F.3d 1070, 1072-75 (10th Cir. 2009). On appeal, the only issue before the Tenth Circuit was whether the original judgment debtor had standing to continue to prosecute its appeal; the Tenth Circuit properly ruled it did not have standing.

Although expressing its reservations, the Tenth Circuit refused to address the real issue head on because, according to the Tenth Circuit, the debtor "failed to preserve the issue for appeal" by not appealing the federal court's denial of its motion to stay execution on its appeal rights. Of course, this presupposes that the debtor, RMA, could have preserved it. However, it is

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[7] To the extent that the Van Engelens direct the Court's attention to I.R.C.P. 62(a) and I.A.R. 13(b)(8), such reliance is misplaced. I.R.C.P. 62(a) does not apply to stays upon appeal, I.R.C.P. 62(d) applies to stays upon appeal. Likewise, I.A.R. 13(b)(8) only applies to stays of injunctions or mandatory orders. I.A.R. 13(b)(15) applies to staying execution or enforcement of monetary judgments.

[8] While the Bank discusses Utah cases, the Court notes that Utah does not have a statutory or constitutional right to appeal like Idaho's statute. Furthermore, a careful reading of those cases indicates that these were not choses in action in the same case. *See Applied Medical Techs., Inc. v. Eames,* 44 P.3d 699, 701 (Utah 2002)(allowing a judgment creditor to execute upon a final judgment in one case to purchase a chose in action in a separate and distinct case). Likewise, Utah also decided that it was bad public policy to allow a law firm to purchase the appeal rights of its own malpractice case. *Snow, Nuffer, Engstrom & Drake v. Tanasse,* 980 P.2d 208 (Utah 1999). In addition several states have expressly prohibited the purchase of a pending cause of action at an execution sale. *See* Cal.Civ.Proc.Code § 699.720(a)(3); *Prodigy Ctrs./Atlanta v. T–C Assocs.*, 501 S.E.2d 209, 211 n. 3 (Ga. 1998) ("Choses in action are not liable to be seized and sold under execution, unless made so specifically by statute."). *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex.Ct.App. 1992) (holding that judgment creditor was barred from executing on judgment debtors claims against judgment creditor even though Texas statute provided generally for execution against causes of action).

questionable because its appeal rights would have been purchased by the judgment creditor, SunAmerica. This fact highlights the problem with this entire procedure. In a strong concurring opinion, one Judge, Circuit Judge Lucero, summarized the Circuit Judges' concerns as follows:

> It is with considerable understatement that the majority acknowledges the "degree of discomfort" presented by this case. While I am constrained to agree that we must dismiss, I am troubled by the manner in which SunAmerica has extinguished RMA's right to a merits appeal.
>
> This case presents a classic chicken-and-egg dilemma: By executing on a subsidiary judgment, SunAmerica has extinguished RMA's right to appeal the very merits determination that served as the predicate for the subsidiary judgment in the first place. If we were to reach the merits and reverse the district court's decision, however, there is little doubt that RMA would be entitled to relief from the subsidiary attorneys' fee judgment. . . . . RMA will not have the opportunity to pursue its merits appeal and thus no opportunity to file a 60(b)(5) motion.
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> As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a defendant to purchase its opponent's appellate rights, thereby extinguishing a plaintiff's claim. "[A defendant] obviously has no intention to litigate a claim against itself." *Snow, Nuffer, Engstrom & Drake v. Tanasse,* 980 P.2d 208, 211 (Utah 1999). Today's decision thus incentivizes Utah defendants to attempt an end run around merits determinations by purchasing a plaintiff's right to appeal. This incentive is at its zenith when it is most offensive—in those cases in which a defendant believes it would likely lose the merits appeal.
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> As the Utah Supreme Court has noted, the actual value of a claim purchased by an opponent at auction will never be fairly determined. *Id.* at 211–12. SunAmerica, of course, hoped to purchase RMA's claim at the lowest possible cost. Being the highest and only bidder, SunAmerica paid $10,000 to extinguish a claim against itself that RMA valued at over $950,000. (Perhaps not coincidentally, the defendant in *Tanasse* also paid $10,000 to purchase the claim against itself. *Id.* at 209). Because of our dismissal, we will not know whether SunAmerica paid fair value.
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> Despite these problems, it appears that Utah law generally authorizes judgment creditors to purchase a chose in action through execution on another judgment. *See Applied Med. Techs. v. Eames,* 44 P.3d 699, 701–02 (Utah 2002); *Tanasse,* 980 P.2d at 211. In the absence of a special relationship between the plaintiff and defendant, e.g., attorney/client, a chose in action is an alienable form of property under Utah law. *Tanasse,* 980 P.2d at 211. But in the typical situation—to the extent any such transaction may be termed "typical"—a judgment creditor executes upon a final judgment in one case to purchase a chose in action in a separate and distinct case. By contrast, SunAmerica purchased the right to appeal in the same case that produced the judgment upon which it executed. Thus this

> appeal's circularity: We cannot reach the merits of this appeal if we grant the motion to dismiss, but we cannot know whether the motion to dismiss is well-taken unless we reach the merits.

Id. at 1076-77.

The Court agrees with the Tenth Circuit's observations. It does present a "classic chicken-and-egg dilemma." If the Court permits the Bank to execute on the Van Engelens' appeal rights in this instance, the Bank will have extinguished the Van Engelens' right to appeal the very merits determination that served as the predicate for the judgment in the first place. It would thus deprive the Van Engelens of their statutory right to appeal without due process of law. They will be unable to pursue the merits of their appeal.

Therefore, the Court stays execution of the Van Engelens' appeal rights finding there is good cause to enter such stay. However, the Court will not stay any execution against any other property owned by the Van Engelens absent their compliance with I.A.R. 13(b)(15). This preserves the purpose for requiring a supersedeas bond or cash deposit – to ensure that property is available to satisfy a judgment if the appeal is not successful – while protecting the right to appeal.

IT IS SO ORDERED.

Dated this 13th day of September 2011.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of September 2011, I mailed (served) a true and correct copy of the within instrument to:

DAVID E. WISHNEY
CHAD E. BERNARDS
P.O. BOX 837
BOISE, IDAHO 83701

THOMAS BANDUCCI
DARA PARKER
WADE WOODARD
BANDUCCI, WOODARD SCHWARZMAN
802 W. BANNOCK STREET, SUITE 500
BOISE, IDAHO 83702

CHRISTOPHER D. RICH
Clerk of the District Court

Deputy Clerk