1-1-1967

Levy and Sale Under Judgment Execution on Stock in Professional Service Corporations

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power to strike a contract provision which it finds to be "unconscionable."[32] The second alternative would be for the courts to allow recovery based upon strict tort liability.[33] This cause of action is independent of implied warranty liability and cannot be disclaimed.[34]

With the decision in the instant case, Florida seems to have now given full recognition to Lord Ellenborough's cogent statement. No longer will a manufacturer immunize itself from liability by inserting a vague phrase in a contract of sale. Henceforth, the only "lemons" Florida consumers must accept will be the agricultural variety.

RONALD WM. SABO

LEVY AND SALE UNDER JUDGMENT EXECUTION ON STOCK IN PROFESSIONAL SERVICE CORPORATIONS

Plaintiffs brought suit to enjoin the sale of their stock in a professional service corporation to satisfy a judgment against them individually. The chancellor permanently enjoined the sale of the stock on the basis of Florida Statutes, sections 621.09 and 621.11.[1] The Third District Court

32. FLA. STAT. § 672.2-302 (1965). However, it has not yet been held by any decision which this writer is aware of, that a court may use this section to void a disclaimer which meets the requirements set forth in the U.C.C. At least one legal writer has taken the position that such a valid disclaimer cannot be struck by the courts:

> [I]t appears to be a matter of common assumption that section 2-302 *is* applicable to warranty disclaimers. I find this frankly, incredible. Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problems at hand. It contains no reference of any kind to section 2-302, although nine other sections of article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as "unconscionable" under 2-302 seems explainable if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness. (footnotes omitted)
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> Leff, *Unconscionability and the Code——The Emperor's New Clause,* 115 U. PA. L. REV. 485, 523 (1967).

At least one court has inferentially taken the same view. Chronologically, the case was similar to the instant one in that the U.C.C. was not in effect when the cause of action arose, but it was when the case was decided. There the court refused to strike the disclaimer as contrary to public policy because they felt the legislature had established public policy when it adopted the U.C.C. which specifically declared that warranties may be disclaimed. Murray v. Marshall Oldsmobile, Inc., —— Va. ——, 154 S.E.2d 140 (1967).

33. The RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . .

34. *Id.*, comment *m* at 355.

1. No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

FLA. STAT. § 621.09 (1965).

No shareholder of a corporation organized under this act may sell or transfer his

of Appeal reversed,[2] and certified a question to the Florida Supreme Court.[3] On certiorari to the Florida Supreme Court, *held*, affirmed: The stock in a professional service corporation is not exempt from levy and sale, under execution of a judgment against some of its shareholders, by a non-professional judgment creditor. *Street v. Sugerman*, 202 So.2d 749 (Fla. 1967).

Professional service corporations[4] are a recent development in the law, and are the result of the demand by professionals for equality of tax treatment with non-professionals.[5] Florida's Professional Service Corporation Act[6] is typical of many statutes recently passed in other states.[7] None

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shares in such corporation except to another individual who is eligible to be a shareholder of such corporation, and such sale or transfer may be made only after the same shall have been approved, at a stockholders meeting specially called for such purpose . . . .

FLA. STAT. § 621.11 (1965).

The Florida legislature amended § 621.11 in 1967 to eliminate the need for stockholders' approval of a sale or transfer of shares by an individual stockholder, Fla. Laws 1967, ch. 67-590 § 3. That amendment should not have any effect on this decision, but rather may strengthen it.

2. Sugerman v. Street, 198 So.2d 57 (Fla. 3d Dist. 1967).

3. Whether stock owned by attorney-shareholders in a professional service corporation is exempt from levy and sale, under execution, as a result of a judgment against some of the shareholders, by a non-professional judgment creditor.

Street v. Sugerman, 202 So.2d 749, 750 (Fla. 1967).

4. Before the advent of the Professional service corporation, the members of the learned professions could not practice as or through a corporation. This bar was due to the personal nature of the services rendered, and the fear that a sloppy workman would hide behind the shield of limited corporate liability. To avoid this problem, the Florida legislature provided that:

> [A]ny officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable *only* for negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered; and provided further that the personal liability of shareholders . . . in their capacity as shareholders . . . shall be no greater in any aspect than that of a shareholder-employee of a [normal business] corporation . . . . (emphasis supplied).

FLA. STAT. § 621.07 (1965) *as amended*, Fla. Laws 1967, ch. 67-590 § 2. But, the corporate veil still exists as to negligent acts by persons not under "his direct supervision and control" or for corporate debts.

5. *See In re* Florida Bar, 133 So.2d 554 (Fla. 1961), where the Florida Supreme Court intimated that the only purpose for these statutes was to allow professionals the benefits of corporate tax treatment.

The principle advantage of corporate tax treatment is the availability of pension funds for the employees of the corporation under INT. REV. CODE of 1954, § 404. Under this provision, the corporation can deduct the premiums paid under a qualified plan, but the employee does not have to pay income tax on the premiums paid for him. These pension funds are not available to a partnership since a partner could not be considered an emloyee in relation to the partnership. Whether or not these professional service corporations will be treated as corporations for tax purposes depends on future developments in the law and rulings by the Internal Revenue Service. *See* note 25 *infra*. For a discussion of corporate tax treatment and the professional service corporation see Annot., 4 A.L.R.3d 383 (1965); Buchmann and Bearden, *The Professional Service Corporation—A New Business Entity*, 16 U. MIAMI L. REV. 1 (1961).

6. FLA. STAT. ch. 621 (1965).

7. *E.g.*, IDAHO CODE tit. 30 ch. 13 (1967); MICH. COMP. LAWS ANN. §§ 450.221-.253 (1967); REV. CODE OF MONT. tit. 15 ch. 21 (1967); CODE OF VA. tit. 54 ch. 25 (1967).

of these statutes provide for the possibility of a forced sale of an individual's stock in the corporation under a judgment execution,[8] although all of them provide that only duly licensed or otherwise legally qualified individuals may own stock in the corporation.[9] The case law is practically nonexistent, and this specific question is one of first impression.[10]

The Florida Supreme Court based its decision on public policy,[11] but the roots of the decision can be found in prior partnership law. Under Florida law, a partner's interest is subject to levy and sale under judgment execution.[12] Furthermore, once the interest is sold, the partnership is at an end, and the purchaser may maintain a bill in equity to have the partnership dissolved and an accounting made of his interest.[13] It was therefore only natural for the Florida Supreme Court, when faced with a business organization so closely resembling a partnership,[14] to apply reasoning to reach a result consistent with that of a debtor-partner in a partnership.

Whether or not other states will follow Florida's lead when faced with this question is a matter of speculation. States which have adopted the Uniform Partnership Act[15] are not subject to the same public policy

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8. *See* note 7 *supra.*

9. *E.g.*, IDAHO CODE § 30-1308 (1967); MICH. COMP LAWS ANN. § 450.230 (1967); REV. CODE OF MONT. § 15-2111 (1967); CODE OF VA. § 54-888 (1967).

10. Approximately thirty states have professional service corporation statutes, but the earliest of these was enacted in 1951, and most of the statutes were enacted after 1961. The lack of cases on the subject is due to the recent passage of the statutes.

11. The privilege of incorporation was most definitely not created or extended in order that those availing themselves of the benefits could be cloaked with an immunity inimical to legal order and public interest.

Street v. Sugerman, 202 So.2d 749, 751 (Fla. 1967). The Florida Supreme Court cited with approval the Third District Court of Appeal's opinion that:

Such a holding could afford professionals a shelter for their assets, which appears to be inconsistent with the spirit of the [professional service corporation] act. We see no reason to carve out a judicial "no man's land" for shareholders in a professional corporation which is not available to shareholders in non-professional groups.

Sugerman v. Street, 198 So.2d 57, 59 (Fla. 3d Dist. 1967). Would a charging order on the stockholder's interest create a "judicial no man's land?" *See* note 17 *infra.*

12. "The language of the statute is sufficiently comprehensive to authorize a sale under execution of the judgment debtor's partnership interest in the firm." B.A. Lott, Inc. v. Padgett, 153 Fla. 308, 309, 14 So.2d 669, 670 (1943).

13. Once that interest is sold the partnership is at an end and the purchaser at execution sale becomes the owner of the property interest of the judgment debtor . . . . There can be little dispute but that the execution purchaser is authorized to maintain a bill in equity to have his newly acquired property interest ascertained and adjudicated, and the property sold, the partnership debts paid, and the surplus divided between the parties in accordance with their proportionate interests.

B.A. Lott, Inc. v. Padgett, 153 Fla. 308, 309, 14 So.2d 669, 670 (1943).

14. The Florida Professional Service Corporation may so closely resemble a partnership as to be taxed as one. *See* note 25 *infra.*

15. Forty states plus the District of Columbia have adopted the UNIFORM PARTNERSHIP ACT. 7 U.L.A. *Partnership* Table III (Supp. 1967). Besides Florida, the only states which have not adopted the U.P.A. while adopting a professional service corporation statute are Alabama, Georgia, and Kansas. Of these, Georgia definitely follows the U.P.A. view, Citizens' Bank & Trust Co. v. Pendergrass Banking Co., 164 Ga. 302, 138 S.E. 223 (1927). Alabama and Kansas have no definite rulings on the subject, although Kansas may follow

considerations as Florida. Under the Uniform Partnership Act, a partner's interest is not subject to attachment or execution,[16] but rather is subject to a charging order, which entitles the creditor to the partner's share of the income.[17] The charging order does not dissolve the partnership as a matter of law.[18] The creditor is held to be amply protected under this provision.[19] Therefore, states under the Uniform Partnership Act may analogize their Professional Corporation Act to their existing partnership law and thereby subject a stockholder's interest to a charging order rather than a levy and sale under judgment execution.

The major question generated by this decision is, "what are the consequences if a non-professional purchases the stock at the judgment sale?" The holding of the stock by a non-professional would be inconsistent with section 621.09 of the Florida Statutes, which provides that only authorized professionals in the same field may own stock in the corporation.[20] The Florida Supreme Court suggested, although not ruling on the point, that the only alternative open to the corporation was to dissolve.[21] This result would be consistent with the result under prior partnership law,[22] and may be the only logical possibility.[23]

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the U.P.A. view, *see* Farmers' & Merchants' State Bank v. Lemley, 105 Kan. 15, 181 P. 606 (1919); Gaynes v. Conn, 185 Kan. 655, 347 P.2d 458 (1959).

16. "A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." U.P.A. § 25(2)(c); Bushmiaer v. United States, 146 F. Supp. 329 (W.D. Ark. 1956) (applying Arkansas law); Sherwood v. Jackson, 121 Cal. App. 354, 8 P.2d 943 (1932); Northampton Brewery Corp. v. Lande, 133 Pa. Super. 181, 2 A.2d 553 (1938).

17. On due application to a competent court by any judgment creditor of a partner, the court . . . may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership . . . .

U.P.A. § 28(1).

18. Scott v. Platt, 177 Ore. 515, 163 P.2d 293 (1945).

19. "[A] creditor is fully protected by the power of a court of competent jurisdiction to charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt." Sherwood v. Jackson, 121 Cal. App. 354, 357, 8 P.2d 943, 944 (1932).

20. *See* note 1 *supra*.

21. It is our impression that this matter could no doubt be effectively dealt with under the provision for dissolution set forth in Chapter 608, Florida Statutes, F.S.A. [Corporate code] or Chapter 621, Florida Statutes, F.S.A., or by a bill in equity in aid of execution.

Street v. Sugerman, 202 So.2d 749, 751 (Fla. 1967).

22. Under prior partnership law, when a partner's interest was attached, the partnership was at an end, and the partnership would dissolve or the creditor could bring a bill in equity to have it dissolved. B.A. Lott, Inc. v. Padgett, 153 Fla. 308, 14 So.2d 669 (1943).

23. If any officer, shareholder, agent or employee of a corporation organized under this act who has been rendering professional service to the public becomes legally disqualified to render such professional services within this State, . . . he shall sever . . . all financial interests in such corporation forthwith. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution.

FLA. STAT. § 621.10 (1965).

While the specific language of Section 621.10 speaks in terms of the legal disqualification of a shareholder "who has been rendering professional service," it is only logical to infer that the same standard of determination as to who may be an

Therefore, stock in a professional service corporation is subject to levy and sale under judgment execution to the same extent as ordinary corporate stock.[24] However, the added feature of a possible forced dissolution may destroy an essential element for an organization to be taxed as a corporation, that is, continuity of life, and result in Florida's professional service corporations being taxed as partnerships.[25] If this should happen, the essential purpose of the statute—to give to professionals the advantages of corporate tax treatment—would be destroyed.

WILLIAM L. SAX

REMOVAL DENIED: THE SURVIVAL OF THE VOLUNTARY-INVOLUNTARY RULE

The plaintiff, a citizen of Mississippi, filed a suit in a Mississippi state trial court against two defendants: one a New York corporation,[1] and the other its employee, a resident of Mississippi. The court entered a directed verdict in favor of the resident[2] defendant. The remaining nonresident defendant immediately filed a petition for removal in the United States District Court for the Southern District of Mississippi contending

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authorized stockholder would serve to preclude as a stockholder *any* person not a professional within the meaning of the statute. This would be the case regardless of the manner in which a nonprofessional happened to legally acquire shares of stock in a professional service corporation.

Street v. Sugerman, 202 So.2d 749, 751 (Fla. 1967).

Even if Florida Statute § 621.10 was not to apply, the inconsistency between a nonprofessional's holding of stock which only professionals may hold per Florida Statute § 621.09 would have to be resolved, and certainly not by avoiding the statute.

24. "Lands and tenements, goods and chattels, equities of redemption in real and personal property, and *stock in corporations* shall be subject to levy and sale under execution." FLA. STAT. § 55.20 (1965) (emphasis supplied).

25. A professional service organization is treated as a corporation . . . only if it has sufficient corporate characteristics to be classifiable as a corporation . . . rather than as a partnership or proprietorship.

Treas. Reg. § 301.7701-2(h)(1)(i) (1965).

There are a number of major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other organizations. These are: (i) Associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) *continuity of life*, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests. (emphasis supplied).

Treas. Reg. § 301.7701-2(a)(1) (1960).

Since many of these characteristics are common to both a partnership and a corporation, only the strictly corporate characteristics are determinative. Therefore, each characteristic is important in determining the status of a corporation for tax purposes, and lack of one characteristic could be determinative of the question.

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1. New York is Dreyfus' place of incorporation and also its principal place of business. For both of these reasons, Dreyfus is a citizen of New York for the purposes of removal under 28 U.S.C. § 1441 (1964).

2. While we recognize that residency is not the equivalent of citizenship, hereinafter defendants will frequently be designated either as "resident" or "nonresident".