

65401-2

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No. 65401-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

UMPQUA BANK,
Plaintiff/Judgment Creditor

v.

BINGO INVESTMENTS, LLC., a Washington limited liability company;
FRANCES P. GRAHAM and JOHN DOE GRAHAM, and the marital
community composed thereof; DAVID S. BINGHAM and SHARON G.
BINGHAM and the marital community composed thereof; SCOTT F.
BINGHAM and KELLY BINGHAM and the marital community
composed thereof; CHRISTOPHER G. BINGHAM and CHERISH
BINGHAM and the marital community composed thereof; and BINGO
DEVELOPMENT, LLC, a Washington limited liability company,

Judgment Debtors,

and

RAYMOND JAMES FINANCIAL SERVICES INC.,

Garnishee Defendant.

2011 JUN 20 10:02 AM

UMPQUA BANK,
Respondent,

v.

UNION BANK, N.A.,

Appellant.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Union Bank, N.A.¹ should have been permitted to intervene in the garnishment proceedings below. Contrary to Umpqua Bank's arguments, Union Bank made a sufficient showing of its right to intervene under CR 24(a), and denying its motion to intervene was unreasonable under the relevant facts and circumstances. Union Bank explained why it did not intervene earlier, and no prejudice to Umpqua Bank would have resulted from granting the motion to intervene (given that Umpqua Bank could still assert a right to the Raymond James Financial Services accounts on the merits, if it actually believed it had a superior claim). Union Bank had no notice that Umpqua Bank was proceeding to judgment on what Umpqua Bank had been informed were pledged accounts subject to valid, perfected security interests. Umpqua Bank's actions in pursuing the judgment, including proceeding without notice and repeatedly failing to make proper disclosures to the superior court, further warrant reversal of the order denying the motion to intervene. Union Bank should have been permitted to intervene to defend and protect its senior security interests in the garnished accounts.

¹ Union Bank is the successor in interest to the Federal Deposit Insurance Corporation as receiver of Frontier Bank. This brief sometimes refers to Union Bank rather than Frontier Bank even where the relevant actions were those of Frontier Bank.

II. SUPPLEMENTAL STATEMENT OF THE CASE²

As described previously, in its answers to the writs of garnishment Raymond James specifically informed Umpqua Bank (“Umpqua”) that each of the garnished accounts (one in the name of Scott Bingham and one in the name of Sharon Bingham) was a “pledged account with a first priority perfected security interest granted to the lender.” CP 84-89. Raymond James requested in its answers that “all claims to the said property or debts be determined and adjudicated. . . .” It appears that Umpqua already knew that these were pledged accounts, since Umpqua has relied upon documents it had obtained from the judgment debtors stating exactly that. CP 916 and CP 918.

In opposing Union Bank’s motion to intervene, Umpqua told the superior court that its delay in seeking entry of judgment on its writs of garnishment without notice “was as a result of initial scheduling conflicts with Judge Washington (the original Judge assigned to this matter), a change in Judges, and the Judgment Debtors’ counsel withdrawing from representation.” CP 210.

In other cases in which Umpqua received garnishment answers identifying claimed security interests in the garnished funds or accounts,

² Union Bank includes this Supplemental Statement of the Case to identify additional facts relevant to the statements and assertions made in Umpqua’s Statement of the Case.

Umpqua had both followed up with the garnishee regarding the referenced security interest and then controverted the garnishment answer pursuant to statute. See CP 473-82; 543-52.

After Umpqua attempted to obtain a judgment from a court commissioner without notice to any party and was twice denied relief (first for failing to submit the Raymond James garnishment answers and then after submitting the answers showing the existence of a third party security interest and being told to provide notice to adverse parties), Umpqua submitted a letter from its counsel to Judge DuBuque that it has characterized as a “complete explanation.” See CP 628-41, 658, line 14. Umpqua did not send this letter to any of the parties.

Umpqua’s counsel’s letter of “complete explanation” stated that the garnishment judgments it sought, including against Raymond James for more than \$400,000, were on “uncontested garnishments.” Umpqua failed to advise the judge that Raymond James’ garnishment answers specifically identified the garnished accounts as pledged accounts subject to prior perfected security interests. Umpqua did not submit the court commissioner’s order directing it to give notice to adverse parties, and apparently did not submit the Raymond James answers to the judge, either.

CP 628-29.³ Instead, Umpqua represented that it had twice attempted to handle the matter through the *ex parte* department, selectively quoting the commissioner's comment that he had "no time to figure out what the status of the litigation is but it is clear a hearing is to be set before Judge Dubuque." Umpqua insisted in this latest *ex parte* communication that it "deserved to have the **uncontested** garnishments concluded." (Emphasis added.)

The judgment debtors did not controvert Raymond James' garnishment answers, which already had specifically advised Umpqua that the garnished accounts were pledged accounts subject to prior perfected security interests. The judgment debtors did, after learning that Umpqua had proceeded to obtain a judgment without notice and in the manner previously described, join in the Raymond James motion to vacate that the superior court ultimately granted. In doing so, the judgment debtors specifically asserted at the hearing on the motion to vacate that Union Bank had a security interest in the accounts, "that's perfected and valid." CP 845, lines 9-10. Their counsel accused Umpqua of attempting conversion. *Id.* at lines 12-14. Union Bank has a valid and perfected

³ The letter from Umpqua's counsel identified as enclosures only the orders Umpqua said it was entitled to have entered.

security interest. See CP 164-91; RCW 62A.9A.314(a); RCW 62A.9A-106 and cmt. 4.

Neither Raymond James nor Union Bank had any knowledge that Umpqua was seeking a garnishment judgment until after the judgment had been entered. See CP 248.

III. ARGUMENT

A. Standard of Review

Umpqua challenges the description of the standard of review set forth in Union Bank’s opening brief. An appeal of an order denying a motion to intervene post-judgment involves multiple standards of review. Rulings on motions to intervene as a matter of right pursuant to CR 24(a) are reviewed *de novo*. DeLong v. Parmalee, 157 Wn. App. 119, 163, 236 P.3d 936 (2010) (citations omitted). Union Bank acknowledges that a trial court’s evaluation of timeliness generally is reviewed for an abuse of discretion. Id. at 164. The trial court abuses its discretion when its decision is manifestly unreasonable, **or** exercised on untenable grounds, **or** for untenable reasons. Id.

The Washington Supreme Court has emphasized that CR 24(a) “is liberally construed to favor intervention.” Olver v. Fowler, 131 Wn. App. 135, 139, 126 P.3d 69 (2006) (post-judgment intervention allowed). “On

the question of timeliness in particular, CR 24(a) allows intervention as of right *unless* it would work a hardship on one of the original parties.”

Columbia Gorge Audubon Society v. Klickitat County, 98 Wn.App. 618, 989 P.2d 1260 (1999) (reversing denial of motion to intervene; emphasis in original), citing Loveless v. Yantis, 82 Wn.2d 754, 759 513 P.2d 1023 (1973).

Union Bank also acknowledges that Washington courts have repeatedly held that post-judgment intervention “requires a strong showing that intervention is necessary, taking into consideration all of the circumstances including prior notice, prejudice to the other parties, and reasons for the delay.” Olver at 139 (citations omitted).

B. Union Bank Should Have Been Permitted to Intervene.

Umpqua does not dispute that a secured creditor is entitled to intervene in a garnishment proceeding as a matter of right to protect its rights in the property subject to garnishment. See Zesbaugh Inc. v. General Steel Fabricating Inc., 95 Wn.2d 600, 627 P.2d 1321 (1981). Accordingly, the main issue on appeal is whether the Bank’s motion to intervene was timely under all of the relevant circumstances, in light of the strong policy in favor of permitting intervention as of right (and resolution of matters on their merits), and the recognition that garnishment

constitutes an “extraordinarily harsh” remedy as to which the Court should “strictly construe” the garnishment statute against the garnishing party.

Watkins v. Peterson Enter., Inc., 137 Wn.2d 632, 646, 973 P.2d 1037 (1999).

1. Non-Washington Authorities Do not Establish that Union Bank’s Motion to Intervene Was Untimely.

The superior court’s ruling that Union Bank’s motion to intervene was untimely, was erroneous and an abuse of discretion.

In its opening brief, Union Bank relied on Dailey v. Walden, 648 P.2d 258 (Kansas 1982), where the court held that a motion to intervene in a garnishment proceeding was timely where the garnished funds had not been paid over to the plaintiff in satisfaction of his garnishment request until after the motion had been made:

Generally, where there are no time provisions in the statute the application must be made before the garnishment is satisfied.

Id. at 261 (citation omitted).

In challenging the Dailey court’s determination, Umpqua relies on a general statement from 38 Corpus Juris Secundum Garnishment (“CJS”), §385 (2010 Supp.) that is not consistent with CR 24(a) and the Washington courts’ interpretation of it, given that in this State post-judgment interventions are not prohibited. Moreover, Umpqua ignores the

statement in the same CJS section that “intervention after judgment for the plaintiff **may** be barred by laches,” thus acknowledging the possibility of post-judgment intervention in a garnishment proceeding.

Umpqua notes that in Dailey the third party had no notice. Here, there was no notice that the garnishing plaintiff was challenging the third party security interest.

Umpqua’s “could have” arguments (Umpqua Brief, pp. 22-23) are irrelevant, since none of those events occurred.

Umpqua also relies on various non-Washington cases, which are themselves distinguishable, as discussed below.

In Jefferson Sav. & Loan Ass’n. v. Adams, 802 S.W.2d 811, 813 (Texas Appellate 1990), the court simply cited other Texas cases for the proposition that an intervention was timely and proper if brought pre-judgment. Again, to the extent post-judgment interventions are banned in Texas, that is plainly inconsistent with Washington law.

Umpqua cites two Colorado cases, El Paso County Bank v. Charles R. Milicen & Co., 622 P.2d 594, 596 (Colo. Ct. App. 1980), and Hahnewald v. Schlapfer, 260 Pac. 105 (Colo. 1927). In El Paso, a third-party bank that had a security interest in certain garnished funds moved to intervene post-judgment, the trial court denied the motion and the bank did

not appeal. Instead, the bank initiated a post-judgment proceeding to recover the disbursed proceeds from the garnishing creditor based on the priority status of the bank's security interest. The Colorado Court of Appeals held that, under Colorado law, the bank could choose whether to intervene or instead pursue a separate action. The court upheld the bank's post-judgment recovery of funds from the garnishing creditor, which had proceeded with knowledge of the bank's status as preferred creditor. Thus, the secured party was given a full and fair opportunity to litigate the merits and priority of its security interest.

In Hahnewald, a 1927 case, the court merely held that a pre-judgment intervention was timely under the Colorado garnishment statute in effect at the time, which specifically provided that intervention could occur "at any time before the garnishment proceedings are determined." The Washington statute does not address intervention.

Finally, Umpqua relies on Shawmut Commercial Paper Co. v. Cram, 98 N.E. 696 (Mass. 1912). In that 99-year-old case, the court held that because final judgment had effectively been entered, the lower court was without jurisdiction to entertain a motion to vacate. The Massachusetts court also held that liability was not made absolute by the judgment in the original action, however, and that relative priorities could

be determined in a separate statutory “scire facias” proceeding. The court noted that “[t]here is no indication in the record that the rights of the [parties] may not be fully protected in such proceeding.” *Id.* at 697.

Here, by contrast, Umpqua has repeatedly asserted that Union Bank has completely lost its priority security position in the Raymond James accounts as a result of the judgment that Umpqua was finally able to convince the superior court to enter on an *ex parte* basis, and without any adjudication on the merits.⁴

2. There Was a “Strong Showing” in Support of Intervention.

Given the substantial defects in the process by which Umpqua obtained the garnishment judgment against Raymond James, as discussed below, a lesser showing in support of intervention was and is appropriate in this case. Even under the “strong showing” standard, though, the evidence is such that the superior court should have permitted Union Bank to intervene—and this Court should reverse the denial of Union Bank’s motion to do so.

The Washington cases requiring a strong showing that intervention is necessary have directed that the court consider “all of the circumstances

⁴ Umpqua Bank has at times conceded that Union Bank had a senior perfected security interest. CP 653 n. 11, 654 n. 12. Umpqua has insisted, however, that Union Bank’s security interest in the Raymond James accounts did not survive the *ex parte* Umpqua judgment. *See, e.g.*, CP 653 n. 11.

including prior notice, prejudice to the other parties, and reasons for the delay.” See, e.g., DeLong, 157 Wn. App. at 164. Umpqua contends in its brief that Union Bank did not submit sufficient evidence below to meet this standard, and Umpqua contends repeatedly that Union Bank cannot come close to meeting the standard.

Umpqua is wrong. The evidence regarding prior notice, the lack of prejudice to Umpqua and the reasons the motion was filed when it was, as well as other relevant circumstances, provided a strong case for intervention to which Umpqua did not—and does not—provide a substantial response.

Again, Union Bank has made an ample showing that it meets the basic criteria of CR 24(a), including its interest in the property that is the subject of the action and the possible prejudice to that interest, as well as the lack of adequate representation of Union Bank’s interests. Umpqua does not dispute that Union Bank qualified as a party entitled to intervene—provided it did so on a timely basis. Union Bank did so.⁵

⁵ Umpqua cites pending litigation between Union Bank and the judgment debtors in seeking to raise a question about Union Bank’s security interest. In the proceedings below, however, the judgment debtors’ attorney specifically acknowledged the priority and validity of Union Bank’s security interest. CP 845.

a. Notice.

With respect to the timeliness issue of prior notice, Union Bank explained just what notice it did—and did not—get. The Senior Vice President in the Special Assets Department, Steven Arrivey, specifically stated in a declaration that:

Frontier Bank was advised by Raymond James in November 2009 that it had received a writ of garnishment relating to the accounts owned by Scott F. Bingham and Sharon G. Bingham. Raymond James indicated that it would be advising Umpqua that the accounts **had previously been pledged to Frontier Bank and could not be garnished.** Frontier Bank assumed that this was the end of the matter.

CP 248, lines 10-15 (emphasis added). Mr. Arrivey went on to say that it was not until after Umpqua had proceeded to take an uncontested *ex parte* judgment without notice, despite having been notified in the garnishment answers that another lender possessed a superior interest in the accounts, that Union Bank became aware of the judgment. *Id.*, lines 16-26.

Umpqua has submitted no evidence of any notice to Union Bank other than that Raymond James indicated it would be advising Umpqua the accounts were pledged to Frontier Bank and could not be garnished. Unlike in other Umpqua garnishment proceedings in which garnishee answers asserted that garnished funds or accounts were subject to a security interest, here Umpqua made **no** effort to follow up and identify

the nature of the claimed security interests and the back-up for such claims, let alone to provide Union Bank with notice that it would try to bypass Union Bank's senior security position by obtaining a judgment against the Raymond James accounts.

Umpqua has pointed to certain account statements that included the names both of Raymond James and Frontier Bank, as though that might bear on the notice issue. See CP 240-43. Mr. Arrivey specifically stated that "Frontier Bank and Raymond James are separate and distinct entities." CP 248, line 8. Umpqua submitted no evidence that this was not the case or that Union Bank had any notice other than as described in Mr. Arrivey's declaration. On the contrary, it is apparent that Umpqua intentionally **avoided** giving notice (including by violating a court order). What is most significant about the account statements that Umpqua cites is that they provided **Umpqua** with independent notice that these were pledged accounts subject to another party's security interest.

b. Prejudice.

Union Bank made an ample showing of the prejudice it faced, as well as the lack of prejudice to Umpqua. Union Bank specifically addressed the issue of prejudice resulting from intervention in the superior court:

Umpqua will not suffer significant prejudice if the Motion to Intervene is granted. Frontier Bank has always possessed the superior interest in the Garnished Accounts and Umpqua has no legitimate right to those accounts. In the unlikely event that Umpqua is somehow able to establish that it has a superior right to the Garnished Accounts, the granting of the Motion to Intervene will not effect its ability to protect those rights.

CP 253.⁶

Umpqua offered no evidence of prejudice to it, let alone of prejudice that might justify denial of a motion to intervene. “[P]rejudice in the context of CR 24(a) does not mean the extra bother resulting from having to deal with the intervenor’s issues.” Columbia Gorge Audubon Society, 98 Wn. App. at 629 (citation omitted) (intervention appropriate where the timing of the motion “allowed all parties ample time to prepare to meet any new issues.” “[A] belated filing may be deemed timely provided that the defendant is not hampered in his defense by the late addition of a new party.” Id. at 628 (citation omitted). Thus, that Umpqua would prefer not to confront Union Bank’s rights on the merits—something Umpqua has gone to extraordinary lengths to avoid in this case—is not prejudice.

⁶ Certain of Union Bank’s submissions, such as this one, were, as Umpqua notes, submitted by way of reply. Umpqua had, and took, the opportunity to submit a sur-reply in response. CP 254-57.

c. Reasons for delay.

Union Bank also compellingly addressed in the superior court the reasons for filing its motion to intervene when it did. Again, it was advised that Raymond James would be notifying Umpqua in its garnishment answers that Union Bank had a security interest in the two garnished accounts. Subsequently, neither Union Bank nor Raymond James received **any** notice that Umpqua was proceeding to obtain a judgment without notice, even when Umpqua was specifically required by court order to provide notice to adverse parties. Union Bank, like Raymond James, received no notice that Umpqua was demanding that judgment be entered as to Union Bank's security based on a highly misleading "complete explanation" that represented Umpqua's claim to the funds in question as "uncontested" and failed to advise Judge DuBuque of the court commissioner's order requiring notice—or that the garnishment answers had specifically put Umpqua on notice of the existence of Union Bank's valid and perfected security interests in the garnished accounts.

The passage of time that Umpqua characterizes as Union Bank's "delay" is one that resulted from Umpqua deciding that it was not going to controvert the answer within the 20-day period following its receipt of the

garnishment answers (in which case notice would have been statutorily required), and then waiting two more months itself without any follow-up inquiries, for reasons that it characterized to the trial court as resulting from changes in the judge and counsel.⁷

Mr. Arrivey specifically testified that Union Bank did not act out of a matter of “legal strategy.” CP 248. This distinguishes Martin v. Pickering, 85 Wn.2d 241, 533 P.2d 380 (1975), on which Umpqua relies, where the would-be intervenor’s lateness was a matter of tactics.

Union Bank did not act unreasonably in believing that Raymond James had satisfactorily addressed the matter and in not guessing that Umpqua would go so far as to try to obtain a judgment without notice. See 38 CJS §381 (“When, either by the garnishee’s answer or otherwise, it appears that the property involved is subject to adverse claims, notice to those claimants is mandatory. The procedures covering a garnishment proceeding contemplate that parties with an interest in the subject property

⁷ Umpqua Bank now says that it did not controvert within 20 days (when it would have had to give notice) because it did not then doubt that a senior security interest existed, but that it subsequently developed doubt and therefore could proceed to obtain judgment without giving any notice whatsoever. Garnishing parties should not be encouraged to develop doubt only at the point that they can then claim they had no duty to give notice. Moreover, the garnishment statute says that a doubting garnishing creditor “may” controvert within 20 days. Were Umpqua Bank’s view of its duties under the garnishment statute allowed to prevail, a future creditor like Umpqua Bank might assert that it could proceed to judgment without notice after the period for controverting an answer because it was not **required** to controvert an answer. Umpqua’s approach and

must be given notice and a full opportunity to present their claims. Until this is done, no garnishment judgment can be entered.”) (Footnotes omitted.) See 28 Wash. Prac. §8.11 at 186 (“[I]f a plaintiff is aware of a third party’s claim, the plaintiff should require the third party to interplead for litigation of the claim.” (Footnote omitted.)

Union Bank was not, as Umpqua argues or implies, **required** to initiate an earlier intervention, particularly given the lack of notice from Umpqua. Zesbaugh, 95 Wn.2d 600, does not require intervention, let alone by any particular deadline.

Umpqua cites Wise v. Reed, 79 Wash. 134, 139 Pac. 753 (1914) for the proposition that a claimant should have intervened sooner if she wanted to assert her rights in a garnishment proceeding. In that case, however, the third party was a witness in a trial between the garnishing party and the garnishee over whether the garnishee’s transfer of the garnished note was fictitious and should be invalidated. Obviously, in that case—unlike this one—the third party was very specifically aware and **involved** in the adjudication of the garnishing party’s claim of priority. Rather than supporting Umpqua’s position here, Wise is one more

interpretation are not in keeping with the well-established principle that the garnishment statutes are to be strictly construed against the garnishing party.

illustration of the inequity and inappropriateness of the course of action Umpqua has pursued in this case.

- d. Post-judgment intervention should have been allowed due to the defects in obtaining the judgment.

The judgment entered against Raymond James was defective in several respects and ultimately vacated by the superior court.

Notwithstanding Umpqua's argument to the contrary, these defects provide an additional strong basis for permitting intervention here.⁸

Initially, the judgment was defective due to Umpqua's failure to comply with the rules governing garnishments. It is undisputed that the answers to the writs of garnishment expressly stated that although Raymond James held accounts in the name of Scott Bingham and Sharon Bingham the assets in the accounts were subject to a perfected security interest in favor of a third party lender (Union Bank). If Umpqua wished to challenge this allegation, it should have controverted the Answer. RCW 6.27.210.

Umpqua contends that it developed doubts about the Raymond James garnishment answers only **after** the 20-day period for controverting the answers had passed and therefore could aggressively pursue a

judgment without the notice required in controverting a garnishment answer. That is not appropriate under Washington law, given the strong policies in favor of protecting senior security interest holders' rights and protecting against excesses in the seeking of the "extremely harsh remedy" of garnishment. "Parties with an interest in the subject property of the garnishment proceeding must be given notice and a full opportunity to present their claims." 38 CJS §381.

In contending that it did not have a basis to controvert the Raymond James answers, Umpqua essentially is conceding that for at least 20 days it acquiesced in the senior position of the creditor for whose benefit the Raymond James accounts were pledged. If in fact Umpqua subsequently developed doubts, it was hardly too late at that point to properly notice the matter. In Robb v. Kaufman, 81 Wn. App. 182, 913 P.2d 828 (1996), the court upheld the joinder by a garnishing party of a third party with a potential claim on the garnished assets. The garnishing creditor did so well after the garnishment answer was filed. The court emphasized the appropriateness of the garnishing creditor's joinder of the third party: "Indeed, resolving the issue of whether the assignments had priority over Robb's levy was crucial to determining whether Robb [the

⁸ Indeed, where a creditor obtains a judgment on a writ of garnishment in violation of the garnishment statutes, the judgment is void and may be set aside. See Shreve v.

garnishing party] was entitled to relief under the garnishment statutes.”

The court further noted that the general rule in Washington is “first-in-time, first-in-right.” Id. at 188.

The court permitted the garnishing party to join a third party in order to establish the priority of their respective claims to the garnished assets. That is in keeping with general garnishment principles: “Where a third person’s rights or claims are questioned by the parties to the garnishment proceeding, it is obviously proper that the third person should be made a party to the proceeding.” 38 CJS §379. Washington courts have been flexible in a number of cases in determining the appropriate mechanisms for addressing issues on the merits, as in Robb. See also Blair v. GIM Corp., 88 Wash.App. 475, 945 P.2d 1149 (Wash.App. Div. 3 1997) (permitting garnishing plaintiff to proceed by motion to quash instead of controverting).

Nor is Umpqua’s failure to give notice excused by the absence of a filed claim of exemption by the judgment debtors. There are many reasons a judgment debtor would see no reason to file a claim of exemption in this situation, including where the garnished accounts are subject to a valid security interest in favor of a third party. For example, “[i]f the answer is

Chamberlin, 66 Wn. App. 728, 832 P.2d 1355 (1992).

favorable to defendant and asserts a defense that the defendant would assert...the defendant need not file a controverting affidavit....” 28 Wash. Prac. §8.50 at 246. Moreover, it is not Union Bank that is limited by what the debtors do. In fact, it is Umpqua whose rights with respect to the garnished assets can be no greater than those of the judgment debtors. 28 Wash. Prac. §8.11 at 184 (2010).

Umpqua should not have been able to proceed here by giving even less notice than had it pursued a default judgment against a garnishee. See RCW 6.27.200 (ten days’ notice to garnishee required).

Here, instead of controverting the answers, Umpqua attempted to obtain a judgment without submitting the garnishment answers or bringing the existence of the third party security interest to the attention of the court. See CP 90-100. The court commissioner properly entered a minute order rejecting Umpqua’s request for a garnishment judgment against Raymond James for not providing a copy of the answer. CP 127. Umpqua criticizes the commissioner for this, but the garnishment statute clearly contemplates, if not requires, the court’s review or consideration of the answer before the court enters judgment in favor of the garnishing party in circumstances such as these. See RCW 6.27.250(1)(a).

Umpqua thereafter filed its second declaration seeking entry of a garnishment judgment against Raymond James, which the court commissioner ruled **had** to be resubmitted after notice to the parties. CP 128. Umpqua ignored the commissioner's order and instead obtained a judgment through its highly misleading January 27, 2010 letter to Judge DuBuque, discussed previously. Umpqua provided no notice to any party and chose not to advise the Judge DuBuque of the prior rulings by the court commissioner or that it was on notice of perfected security interests in the Raymond James accounts; Umpqua again told the superior court that the garnishments were "uncontested."⁹ Even aside from the mischaracterizations and omissions contained in the letter, this was improper:

Where the garnishee sets up valid matters of defense, although admitting indebtedness or possession of property, judgment cannot be entered on the answer A similar result will ensue if the answer discloses that the particular indebtedness or property is exempt from garnishment process, or that the contract on which the garnishee is sought to be charged was procured by fraud, **or that there is an adverse claim to the property.**

⁹ Umpqua has repeatedly excused its failure to include or accurately quote or describe key documents in its submissions to the superior court commissioner and judge on the grounds that the underlying documents could have been found somewhere in the voluminous court file had the lower court judges just looked. This Court should not credit that contention.

38 CJS §332 (footnotes omitted). Further, “[a] garnishee has the duty to bring the court’s attention to conflicting claims on the property sought to be garnished.” 38 CJS §379.

The defects relating to the garnishment judgment should have precluded Umpqua from using the obtaining of that judgment as a basis for the denial of Union Bank’s motion to intervene as untimely. At a minimum, these defects help demonstrate that post-judgment intervention should have been permitted, and that disallowing intervention was unreasonable or “not on tenable grounds.” The superior court’s order denying intervention stated that denial was based in part on Union Bank’s purported “ample knowledge of the impending judgment....” CP 259. There was no such knowledge, and that was not a tenable ground for denying the motion to intervene.

Union Bank’s motion to intervene was timely, and there is ample evidence that intervention here was both proper and necessary.¹⁰

IV. CONCLUSION

The superior court should have permitted intervention here. This is exactly the kind of case in which intervention under CR 24(a) is called for.

¹⁰ Union Bank withdraws its previous argument that before denying the motion to intervene the superior court should have held an evidentiary hearing. There was a sufficient showing in the superior court of the need for intervention, given that CR 24(a)

Not to grant Union Bank's motion was unreasonable. Union Bank had good reason for intervening when it did, and there was no prejudice, let alone unfair prejudice, to Umpqua, from permitting intervention even post-judgment. Union Bank had been told Raymond James had received writs of garnishment, and would be advising the garnishing party that the accounts "had previously been pledged to [Union] Bank and could not be garnished." CP 248. Contrary to the superior court's order denying the motion to intervene, Union Bank was never told that Umpqua was proceeding to judgment. This ground for denial is not tenable, and itself warrants reversal under Washington law.

Moreover, given Umpqua's knowledge of Union Bank's priority security interest, combined with Umpqua's improper pursuit of a garnishment judgment without adequate notice and disclosure, it was erroneous and an abuse of discretion to deny Union Bank's motion. The superior court's Order Denying Frontier Bank's Motion to Intervene

is liberally construed to favor intervention and that the record demonstrates that Union Bank acted in a timely manner under the relevant circumstances.

should be reversed and remanded for entry of an order allowing Union Bank to intervene in the garnishment proceeding.¹¹

RIDDELL WILLIAMS P.S.

By: 

Michael Pierson, WSBA No. 15858
Joseph E. Shickich, WSBA No. 8751
Attorneys for Appellant Union Bank

¹¹ In the event that this Court upholds the superior court's decision in Appeal No. 65706-2-1, Union Bank agrees that this appeal will be moot.

No. 65401-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

UMPQUA BANK,
Plaintiff/Judgment Creditor

v.

BINGO INVESTMENTS, LLC., a Washington limited liability company;
FRANCES P. GRAHAM and JOHN DOE GRAHAM, and the marital
community composed thereof; DAVID S. BINGHAM and SHARON G.
BINGHAM and the marital community composed thereof; SCOTT F.
BINGHAM and KELLY BINGHAM and the marital community
composed thereof; CHRISTOPHER G. BINGHAM and CHERISH
BINGHAM and the marital community composed thereof; and BINGO
DEVELOPMENT, LLC, a Washington limited liability company,

Judgment Debtors,

and

RAYMOND JAMES FINANCIAL SERVICES INC.,
Garnishee Defendant.

UMPQUA BANK,
Respondent,

v.

UNION BANK, N.A.,
Appellant.

APPENDIX TO APPELLANT'S REPLY BRIEF

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AT SEATTLE

INDEX OF APPENDIX

I. RCW 62A.9A-106 APPX. 1
II. RCW 62A.9A-314(a)..... APPX. 2

APPENDIX 1

RCW 62A.9A-106
Control of investment property.

(a) **Control under RCW 62A.8-106.** A person has control of a certificated security, uncertificated security, or security entitlement as provided in RCW 62A.8-106.

(b) **Control of commodity contract.** A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) **Effect of control of securities account or commodity account.** A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

[2000 c 250 § 9A-106.]

APPENDIX 2

RCW 62A.9A-314
Perfection by control.

(a) **Perfection by control.** A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under RCW 62A.9A-104, 62A.9A-105, 62A.9A-106, or 62A.9A-107.

(b) **Specified collateral: Time of perfection by control; continuation of perfection.** A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights is perfected by control under RCW 62A.9A-104, 62A.9A-105, or 62A.9A-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) **Investment property: Time of perfection by control; continuation of perfection.** A security interest in investment property is perfected by control under RCW 62A.9A-106 from the time the secured party obtains control and remains perfected by control until:

(1) The secured party does not have control; and

(2) One of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

[2000 c 250 § 9A-314.]

No. 65401-2-1

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and

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UMPQUA BANK,
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v.

UNION BANK, N.A.,
Appellant.

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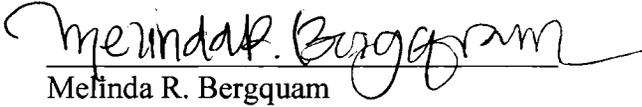
ORIGINAL

I certify that I am a secretary at the law firm of Riddell Williams P.S. in Seattle, Washington. I am over the age of eighteen years and not a party to the within cause. On January 28, 2011, I caused to be served a true and correct copy of the Appellant's Reply Brief and Appendix to Appellant's Reply Brief on counsel of record for all other parties to this action via the following method:

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DATED this 28th day of January, 2011 at Seattle, Washington.


Melinda R. Bergquam

No. 65401-2-1

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OF THE STATE OF WASHINGTON
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UMPQUA BANK,

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STATE OF WASHINGTON
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I certify that I am a secretary at the law firm of Riddell Williams P.S. in Seattle, Washington. I am over the age of eighteen years and not a party to the within cause. On January 28, 2011, I caused to be served a true and correct copy of the Appellant's Reply Brief, Appendix to Appellant's Reply Brief and Supplemental Excerpts of Record on counsel of record for all other parties to this action via the following method:

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DATED this 31st day of January, 2011 at Seattle, Washington.


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