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Constitutional Law—Due Process—Garnishment Procedures Must Provide for Notice to Postjudgment Debtor

Kathleen A. Hillegas

NOTES

CONSTITUTIONAL LAW—DUE PROCESS—GARNISHMENT PROCEDURES MUST PROVIDE FOR NOTICE TO POSTJUDGMENT DEBTOR. *Davis v. Paschall,* 640 F. Supp. 198 (E.D. Ark. 1986).

Rosemary Davis defaulted on a loan made by Michael Motor Company, Inc. To collect this debt, Michael Motor Company obtained a judgment against Davis in Jefferson County Circuit Court. In order to satisfy the judgment, Marjorie Paschall, the Circuit Clerk, issued a writ of garnishment and served it on Davis' employer, the Holiday Inn. Accordingly, Holiday Inn paid approximately $222.00 of wages owed to Davis into the registry of the Jefferson County Circuit Court as prescribed by the Clerk's order. According to Davis, these payments were made without notice and without her written consent, denying her an opportunity to claim exemptions allowable under federal law.[1]

Davis brought suit in federal district court claiming that the Arkansas garnishment statute[2] denied her due process because it permitted a postjudgment taking of her property without notice and opportunity for a hearing concerning potential exemptions. Davis also asserted that since the Arkansas garnishment statute conflicts with the federal statute[3] that prescribes the amount of wages that may be garnished, it violates the supremacy clause of the United States Constitution.[4]

The United States District Court for the Eastern District of Arkansas held that the Arkansas statute violates the due process clause of the fourteenth amendment because it does not require notice to the judgment debtor informing him or her of the garnishment and any pos-

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1. 15 U.S.C. § 1673 (1982) (Restriction on garnishment) provides in pertinent part: "[T]he maximum part of the aggregate disposable [after deductions] earnings of an individual for any workweek which is subjected to garnishment may not exceed (1) 25 per centum of his disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . in effect at the time the earnings are payable . . . ."

2. ARK. STAT. ANN. § 31-501 to -521 (1962).

3. 15 U.S.C. § 1673 (1982).

4. U.S. CONST. art. VI, cl. 2.

sible state and federal exemptions, or the process by which such exemptions may be claimed. *Davis v. Paschall*, 640 F. Supp. 198 (E.D. Ark. 1986).

The fourteenth amendment to the United States Constitution[5] forbids states from depriving persons of life, liberty, or property without due process of law. The United States Supreme Court has interpreted the term "due process" to require that before a person is deprived of property by the state that person must first be given notice and an opportunity to present reasons why the property should not be taken.[6] The Court has defined the notice component of due process as requiring that notice be "reasonably calculated" to inform interested parties of the impending deprivation at a time when they still have an opportunity to present any objections.[7] These definitions supplemented the Supreme Court's previous discussion of the opportunity to be heard in *Iron Cliffs Co. v. Negaunee Iron Co.*[8] In *Iron Cliffs* the Court held that a person deprived of property should be afforded an appearance before an impartial tribunal to contest the claim against him and assert his rights.[9]

The United States Supreme Court began to focus on due process in prejudgment remedies when it decided the landmark case of *Sniadach v. Family Fin. Corp.*[10] In *Sniadach* the Supreme Court addressed Wisconsin's prejudgment garnishment procedures.[11] A creditor brought suit on a promissory note and before judgment, a writ of garnishment was served on Sniadach's employer without providing Sniadach with notice or an opportunity for a hearing. Under Wisconsin law, Sniadach's wages were frozen until judgment.[12] The Court held that this garnishment procedure was unconstitutional because notice and opportunity for a hearing were not afforded to Sniadach.[13] The Court explained its decision to extend due process requirements to the area of commercial law practices by suggesting that prior due process analogies were outdated and were better applied to feudal times than to

5. U.S. CONST. amend. XIV, § 1.

6. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).

7. *Id.* at 314.

8. 197 U.S. 463 (1905).

9. *Id.* at 473.

10. 395 U.S. 337 (1969).

11. *Id.* at 338.

12. *Id.* at 338-39. Frozen wages cannot be utilized by the debtor. *Id.*

13. 395 U.S. 337, 342. For a discussion of this case see Durham, *Postjudgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S.D.L. REV. 78, 94 (1976).

modern times.[14] The Court indicated that modern society's dependence on wages required the Court to address the protection of these wages.[15] Justice Douglas, speaking for the majority, stated, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system."[16]

Then in *Fuentes v. Shevin*[17] the United States Supreme Court seemed to reject a restrictive reading of *Sniadach*,[18] and applied its due process requirement to the prejudgment deprivation of consumer goods.[19] The Court held that the prejudgment seizure, though allowed under Florida law,[20] was a denial of due process.[21] The Court found significant the fact that the buyer was deprived of the use of the property without notice and the opportunity for a hearing.[22] This decision appeared to put the "necessities of life" argument of *Sniadach* to rest,[23] and established a broadly applicable standard requiring due process before deprivation of any property.

Justice White dissented in *Fuentes*, joined by Chief Justice Burger and Justice Blackmun. Justice White insisted that the interests of the creditor were not given sufficient consideration by the majority.[24] He

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14. 395 U.S. 337, 340. *See also* Durham, *supra* note 13, at 95.

15. 395 U.S. at 340.

16. *Id.*

17. 407 U.S. 67 (1972).

18. *Id.* at 85.

19. 407 U.S. at 88-89. A Florida resident purchased consumer goods from a retailer under an installment sales contract in which the retailer retained a security interest. The buyer ceased making payments when a dispute arose over a stove that was part of the contract. The seller brought suit in small claims court and also obtained a writ of replevin under which the sheriff seized the goods. *Id.* at 70. *See also* Durham, *supra* note 13, at 89.

20. 407 U.S. at 73 (citing FLA. STAT. ANN. §§ 78.01-.13 (West Supp. 1972-73)(revised 1973)).

21. 407 U.S. at 96. *See also* Durham, *supra* note 13, at 89.

22. Durham, *supra* note 13, at 89. The creditor in *Fuentes* argued that the requirements of posting a bond for double the value of the property and the debtor's right to sue for wrongful attachment gave the debtor adequate protection. But the Court stated that these "protections" missed the point. 407 U.S. at 83.

23. No doubt, there may be many graduations in the 'importance' or 'necessity' of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free-enterprise system, an indivudual's choices in the market place are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.'

407 U.S. at 89-90.

24. 407 U.S. at 102 (White, J., dissenting).

suggested a more cautious balancing of the interests of the parties (creditor and debtor).[25] White's dissent is significant because it provided the basis for the Court's decision two years later in *Mitchell v. W. T. Grant Co.*[26]

Mitchell was the third prejudgment case the Supreme Court heard. Justice White wrote the majority opinion, in which the Court applied a type of balancing test[27] and found that the Louisiana property seizure procedure[28] effected a constitutional accomodation of the conflicting interests of the creditor and debtor.[29] The Court found that the statute protected the creditor's rights by guarding against the danger of destruction or alienation of property, while protecting the debtor's rights with the possibility of damages and attorney's fees if the grounds for the creditor's writ should fail.[30] Thus, the Court found that the Louisiana procedure did not violate the due process provision of the fourteenth amendment, even though no notice or opportunity for a hearing was provided prior to deprivation of property.[31]

In its next case on prejudgment seizures, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[32] the Supreme Court relied largely on *Fuentes* to invalidate a Georgia prejudgment garnishment statute.[33] The Court, holding that the Georgia statute violated the fourteenth amendment, again rejected a strict interpretation of due process requirements and refused to distinguish among different kinds of property.[34] So, at that

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25. *Id.* "I would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest." *Id.*

26. 416 U.S. 600 (1974). *See also* Note, *Due Process, Postjudgment Garnishment, and "Brutal Need" Exemptions*, 1982 DUKE L.J. 192, 197 (1982).

27. 416 U.S. at 618. *See also* Durham, *supra* note 13, at 91.

28. LA. CODE CIV. PROC. ANN. art. 3571 (West 1961).

29. 416 U.S. at 610. The four dissenters in *Mitchell* constituted the majority in *Fuentes*, and the two new members on the Court (Justices Powell and Rehnquist) combined with the *Fuentes* dissenters to constitute a majority in *Mitchell*. Durham, *supra* note 13, at 91.

30. 416 U.S. at 606-07.

31. 416 U.S. at 610. This analysis was in accord with Justice White's dissent in *Fuentes*, 407 U.S. at 102 (White, J., dissenting).

32. 419 U.S. 601 (1975).

33. *Id.* at 606. The statute in question permitted garnishment of a bank account through a writ issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer. *Id.* at 601-03.

34. It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank account, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.

Id. at 608; see also Logue, *supra* note 26, at 198.

point, the lineage of the prejudgment cases gave no clear standard by which to judge the due process requirements of prejudgment summary—seizure procedures.[35] Justice Blackmun summarized the confused state of the law:

> The Court once again—for the third time in less than three years—struggles with what it regards as the due process aspects of a state's old and long-unattacked commercial statutes designed to afford a way for relief to a creditor against a delinquent debtor. . . . And, as a result, the corresponding commercial statutes of all other states . . . are left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment.[36]

The Supreme Court attempted to provide something akin to a standard for the requirements of predetermination due process in *Mathews v. Eldridge*.[37] The Court in *Mathews* noted the lack of an identifiable, cohesive rule emerging from *Sniadach, Fuentes,* and *North Georgia Finishing*[38] and offered the first complete formulation of the due process balancing test:[39]

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.[40]

Although *Mathews* provided no support for the constitutionality of (prejudgment) execution statutes, it suggested minimum procedures

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35. Note, *supra* note 26, at 198. The two approaches applied by the court were: (a) *Fuentes'* categorical insistence on a hearing prior to any deprivation; and (2) *Mitchell's* balancing of interests to determine whether an adequate "constitutional accommmodation" between the conflicting interests of the parties had been reached. *Id.*

36. 419 U.S. at 614 (Blackmun, J., dissenting).

37. 424 U.S. 319 (1976). Here prejudgment due process was presented in a different context than in the previous debtor/creditor cases. Eldridge challenged the constitutionality of an administrative procedure established by the Secretary of Health, Education, and Welfare, for assessing the existence of a continuing disability and thus determining the continuance or discontinuance of disability payments.

38. *See id.* at 333-34.

39. Note, *supra* note 26, at 199.

40. 424 U.S. at 334-35.

necessary to satisfy due process[41] and suggested a resolution of the confusion surrounding the prejudgment seizure cases.[42] The *Mathews* formulation could be viewed as a generalization of the concerns indicated in Justice White's prejudgment seizure opinions, affirming that due process involves a balancing test that can require different procedural safeguards when different interests are at stake.[43] Additionally, the test emphasized that the type of property at stake is a primary consideration in determining the required procedural safeguards.[44] In *Mathews* the Court relied heavily on the type of property at stake, disability benefits, to determine the necessary procedural protection.[45] Application of the *Mathews* balancing test seemed to provide courts with a standard to determine whether notice and a hearing are required before a temporary deprivation. Courts would first examine the nature of the property interest in question, and then determine to what extent procedural safeguards would suffice in preventing erroneous deprivations from occurring.[46] The weight given to each side of the balance remains unclear.[47]

Postjudgment due process was first addressed by the United States Supreme Court in 1924 in *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*[48] In *Endicott,* the Court reviewed a New York postjudgment garnishment procedure[49] and found that the procedure was constitutional, although it did not provide for notice or opportunity for a

41. *Id.* at 348-49. As noted above, the case did not involve a prejudgment procedure. Upon examination of the procedure for terminating disability payments under the Social Security Act, the Court found that, before termination, the agency must inform the recipient of its tentative decision and provide him with a summary of the evidence upon which the decision was based and permit him to review the evidence in his file and to respond to the proposed decision with additional evidence. The Court found that these procedures satisfied its due process test and that a full evidentiary hearing was not required. *See also* Greenfield, *A Constitutional Limitation on the Enforcement of Judgment—Due Process and Exemptions,* 1975 WASH. U.L.Q. 877, 918 (1976).

42. Note, *supra* note 26, at 200.

43. *Id.*

44. *Id.*

45. 424 U.S. at 340-41. The Court distinguished an earlier case, Goldberg v. Kelly, 397 U.S. 254 (1970), which required an evidentiary hearing before a temporary deprivation of welfare assistance. The Court in *Mathews* found that the hearing in *Goldberg* was required because welfare assistance was the "type" of property given to persons on the very margin of subsistence. Note, *supra* note 26, n.58, at 200.

46. Note, *supra* note 26, at 201.

47. *See* Greenfield, *supra* note 41, at 918-23.

48. 266 U.S. 285 (1924).

49. *Id.* at 286-87, where the Court discusses N.Y. CIV. PRAC. LAW, § 1391. That statute provided that if a judgment had been obtained and an execution returned unsatisfied, a judge or justice could order an execution or garnishment be issued against the debtor's wages without notice to the judgment debtor.

hearing to the debtor before taking the property.[50] The Court stated that if notice were given to the judgment debtor before issuing the garnishment, the purpose of the writ could be frustrated since the property in question could be disposed of before service could be had.[51] Accordingly, the Court held that notice to the debtor was not necessary in a postjudgment proceeding.[52]

Because of the severity and risk of erroneous deprivation resulting from this rule, lower courts in recent years have refused to apply *Endicott* in postjudgment cases and have instead relied on comparisons to the balancing tests applied in the prejudgment cases.[53] Although the Supreme Court has not overruled *Endicott*,[54] there is some support to view it as representing an outdated due process analysis,[55] especially since *Endicott* did not consider the possibility that the judgment debtor might be deprived of exempt property.[56] A series of recent postjudgment cases have succeeded in distinguishing *Endicott*, and have instead looked to the prejudgment cases as authority. The first case in this series is *Brown v. Liberty Loan Corp.*[57] In *Brown* the Court of Appeals for the Fifth Circuit reviewed a Florida postjudgment wage-garnishment statute[58] that did not provide notice, opportunity for a hearing, or any other safeguard to prevent erroneous deprivation of property.[59] The court applied a balancing test similar to the one stated in *Mathews* and held that the Florida postjudgment garnishment statute satisfied due process requirements.[60] The court addressed the risk of erroneous dep-

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50. *Id.* at 288.

> [O]ur system of jurisprudence [does] not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

Id.

51. *Id.* at 290.

52. *Id.* at 288.

53. *See infra* text accompanying notes 57-90.

54. The Supreme Court granted certiorari to two cases challenging the holding in *Endicott*, but both times it subsequently refused to hear the case. Moya v. De Baca, 395 U.S. 825 (1969) (motion to dismiss granted); Hanner v. DeMarcus, 390 U.S. 736 (1968) (certiorari dismissed as improvidently granted). For further discussion, see Note, *A Due Process Analysis of New York's Postjudgment Garnishment Procedure*, 44 ALB. L. REV. 849 (1980).

55. Greenfield, *supra* note 41, at 886. Four justices dissented from the dismissal of the writ in Hanner v. DeMarcus (an Arizona postjudgment case); three of them suggesting that *Endicott* should be overruled. *Id.* at 886 n.50 (citing *Hanner*, 390 U.S. 736, 740-42 (1968)).

56. Greenfield, *supra* note 41, at 887.

57. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

58. 539 F.2d at 1362 (citing FLA. STAT. ANN. §§ 77.01, 77.03 (West Supp. 1975-76)).

59. 539 F.2d at 1365. For discussion, see *supra* note 26, at 202.

60. 539 F.2d at 1368.

rivation, part of the *Mathews* test, and observed that an additional requirement of a sworn, judicially reviewed affidavit by the creditor that the property to be seized is not exempt, "might reduce the incidence of wrongful garnishment . . . ."[61] However, the court in *Brown* did not find that the creditor's testimony was necessary to satisfy due process requirements because the risk of erroneous deprivation had a smaller significance with respect to the Florida postjudgment garnishment provisions than it had in *Mitchell* and *North Georgia Finishing*.[62] Though the court in *Brown* upheld the constitutionality of the Florida statute, it is an important decision in that it applied the due process test of the prejudgment cases.[63]

Relying on *Brown*, the United States Court of Appeals for the Third Circuit, in *Finberg v. Sullivan*,[64] reviewed an action brought by a social security recipient challenging the constitutionality of Pennsylvania's postjudgment garnishment statute.[65] The court in *Finberg* focused its inquiry on the two primary considerations of the *Mathews* test: the effect of due process requirements on the private parties, and the risk of erroneous deprivation.[66] Applying this balancing test, the court considered both the heightened interest of the creditor in the postjudgment situation and Mrs. Finberg's interest in uninterrupted access to the bank account containing her social security benefits.[67] The court found this to be a significant "type" of property.[68] The Third Circuit distin-

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61. *Id.* at 1369.

62. *Id.*

63. *Id.* The court in *Brown* discussed *Endicott* but chose to rely on the more recent prejudgment cases. "More recent decisions to the Supreme Court establish the need to balance various interest in order to determine whether due process requires notice and an opportunity for a hearing whenever an individual is to be deprived of property permanently or temporarily." *Id.* at 1364.

64. 634 F.2d 50 (3d Cir. 1980) (garnishment of a bank account).

65. *Id.* at 59. The statute permitted a creditor to take 15 days to respond to a petition to set aside a garnishment and did not provide a hearing on the issue.

66. *Id.* at 58. *See also* Note, *supra* note 16, at 201.

67. 634 F.2d at 58.

> The attachment of property held by a garnishee is, like a prejudgment seizure, a provisional measure serving the judgment creditor's interests by preventing transfer or concealment of the property before the creditor can execute a final seizure. The attachment affects the debtor's interest by depriving her of the continued use of her property.

Id. at 57-58.

68. *Id.* at 58.

> A bank account may well contain the money that a person needs for food, shelter, health care, and other basic requirements of life . . . . Additional income from a future paycheck, welfare benefit, or other sources may not be available for two weeks or more, and that income may be insufficient to meet the person's immediate needs.

Id.

guished *Endicott* as not addressing the issue of exempt property,[69] and concluded that the Pennsylvania procedure failed to provide a "fair accommodation of the respective interests of creditor and debtor," failing the due process balancing test set forth in *Mathews*.[70] The court in *Finberg* imposed due process requirements of a prompt postseizure hearing[71] and notice that would inform the debtor of possible exemptions.[72] The court emphasized the importance of safeguarding against erroneous deprivation, but refused to adopt the safeguards suggested by *Mitchell*.[73] The court stated that such safeguards may be desirable, but were not required to satisfy due process requirements.[74]

The third case in the recent series of cases distinguishing *Endicott* is *Betts v. Tom*,[75] decided by the United States District Court for the District of Hawaii. In *Betts* the court found that the Hawaiian postjudgment garnishment procedure[76] denied debtors due process of law.[77] The court reviewed the postjudgment garnishment procedure that allowed a creditor to garnish a bank account containing welfare benefits and held that due process required a garnishment procedure to include preventative safeguards.[78] The court in *Betts* expressly adopted and applied the *Mathews* test.[79] Applying the test, the court found that the Hawaii statutory scheme presented too great a risk that welfare recipients would be erroneously deprived of needed benefits,[80] and thus held that safeguards similar to those upheld in *Mitchell* should be included in Hawaii's statutory scheme.[81] The holding considered and bal-

69. 42 U.S.C. § 407 (1976) provides for the exemption of Social Security benefits which were the object of garnishment in *Finberg*. The exemption of social security benefits continues when the benefits are held in bank accounts just as when originally issued to the recipient. Philpott v. Essex County Welfare Bd., 409 U.S. 413, 416 (1973).

70. 634 F.2d at 58-62. For further discussion see Note, *supra* note 26, at 201.

71. 634 F.2d at 61.

72. *Id.* at 61-62.

73. *Id.* The safeguards suggested in *Mitchell* were: An affidavit from the creditor that exempt goods would not be attached; or requiring the posting of a creditor bond to compensate the debtor for wrongful seizure; or mandating that only a judge or magistrate issue the writ of execution. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

74. *Id.* at 62.

75. 431 F. Supp. 1369 (D. Hawaii 1977).

76. *Id.* at 1370 (citing HAWAII REV. STAT. § 652-1(b) (Supp. 1979))(amending 1979). This statute contained no requirement that the debtor be notified of the garnishment.

77. 431 F. Supp. at 1378.

78. *Id.* at 1378. For further discussion see Note, *supra* note 26, at 201.

79. 431 F. Supp. at 1375. For further discussion see Note, *supra* note 26, at 204.

80. 431 F. Supp. at 1377-78. For further discussion see Note, *supra* note 26, at 204-05.

81. *Id.* at 1377-78. (1) an affidavit, supported by facts, stating that the assets garnished are not within the welfare exemption; (2) review of the affidavit by a judicial officer; and (3) prompt postdeprivation notice and hearing within two days on the exemption claim. Note the similarily to

anced the most important interests of both the creditor and the debtor.[82] The *Betts* procedures protected the debtor by providing a prompt postdeprivation hearing, as in *Finberg* and *Brown,* and provided the additional safeguard of requiring the creditor to file a factual affidavit to be reviewed by a judge.[83] The court distinguished *Endicott* as not dealing with a judgment debtor's right to exemption.[84]

Finally, a postjudgment case decided in 1984, *Dionne v. Bouley,*[85] clearly rejected *Endicott* and stated that it was inapplicable to cases involving potentially exempt wages.[86] *Dionne* involved the postjudgment attachment of social security benefits, and the district court held that Rhode Island's statutory postjudgment scheme[87] violated the due process clause.[88] The court of appeals stated that the expansive language in *Endicott* was no longer law, given the recent precedent addressing property seizure by creditors and the due process requirements of preventing erroneous deprivation.[89] The court applied the *Mathews* balancing test and required that a judgment debtor be timely notified of an opportunity to challenge any deprivation of his or her exempt property, because an unlawful attachment of the debtor's exempt property affects the debtor's rights in a way that the judgment does not.[90]

When the United States District Court for the Eastern District of Arkansas decided *Davis v. Paschall,*[91] it was faced with this line of

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the *Mitchell* safeguards, *supra* note 73. *See also* Note, *supra* note 26, at 204-05.

82. 431 F. Supp. at 1378. For further discussion see Note, *supra* note 26, at 205.

> The serious hardship on the AFDC recipient would be minimized since an erroneous freezing of funds could only occur for a brief period. The affidavit requirement will help protect the judgment debtor by forcing the creditor to consider the possibility of an AFDC exemption. In addition, by allowing a short *ex parte* seizure this procedure would protect the judgment creditor from being deprived of garnishable assets by those debtors who would immediately dispose of their funds in contemplation of execution.

431 F. Supp. at 1378.

83. Note, *supra* note 26, at 206.

84. 431 F. Supp. at 1374. *See also* Neeley v. Century Fin. Co. of Arizona, 606 F. Supp. 1453, 1461 (D.C. Ariz. 1985) when the court stated, "This court considers the *Endicott-Johnson* holding as not being applicable in those situations where a specific statute, either state or federal, precludes certain assets from being subjected to liability for a person's debts." Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1185 (S.D.N.Y. 1982) (stating that reliance on *Endicott* is misplaced).

85. 583 F. Supp. 307 (D.R.I. 1984), *aff'd as modified,* 757 F.2d 1344 (1st Cir. 1985).

86. 583 F. Supp. at 314-15, 757 F.2d 1351-52.

87. R.I. GEN. LAWS 1956 §§ 9-25-12, 9-28-1, 10-5-2 (1956); District Court Civil Rule 4(j)(2).

88. 583 F. Supp. at 318-19 (D.R.I. 1984).

89. 757 F.2d at 1351-52.

90. *Id.* at 1352.

91. 640 F. Supp. 198 (E.D. Ark. 1986).

postjudgment cases that seemed to be abandoning the *Endicott* reasoning and moving toward some version of *Mathews*. Some cases have continued to follow the logic of the fifty-year-old *Endicott* decision[92] without expressly referring to it, while others, those previously discussed, have chosen to use the balancing test of *Mathews* that was employed in the prejudgment cases. In *Davis v. Paschall* the court noted that *Endicott* seemed to settle the question of whether a postjudgment debtor was entitled to notice and a hearing to claim exemptions, by not requiring either of these and by stating that the debtor had already had his day in court.[93] But then the court in *Davis* went on to note that the analysis of due process in debtor-creditor cases had changed as a result of cases such as *Mitchell, Fuentes, Sniadach,* and *North Georgia Finishing.*[94] The court noted the Supreme Court's decisions in those four cases and the Supreme Court's determination that a prejudgment procedure for seizure of an asset could be held constitutional only if it provided adequate safeguards to limit the occurrence of erroneous deprivations and allow the debtor to correct such error in a timely manner.[95] To support this proposition the court discussed *Mathews* and viewed it as the Supreme Court's changing analysis of due process.[96] The court quoted the *Mathews* balancing test and then noted that recent postjudgment garnishment cases had begun to utilize the same balancing of interests the Supreme Court had set out in *Mathews.*[97] The court in *Davis* observed that in *Finberg,* the Third Circuit had considered both the creditor's and debtor's interest in the garnishment procedure and required a prompt hearing for claiming exemptions. Then, relying on *Memphis Light, Gas & Water Division v. Craft,*[98] the court in *Finberg* found that notice of the attempted garnishment should inform the judgment debtor of statutory exemptions.[99]

The court also noted a number of cases following *Finberg,* but was particularly persuaded by *Dionne v. Bouley,*[100] and adopted its holding that a state statute was unconstitutional because it did not require no-

92. *See* Credit Serv. Co. v. Linnerooth, 290 Minn. 256, 187 N.W.2d 632 (1971); Bittner v. Butts, 514 S.W.2d 556 (Mo. 1974).

93. 640 F. Supp. at 200.

94. *Id.*

95. *Id.* at 201.

96. *Id.*

97. *Id.*

98. *Id.* at 201 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (a shut-off notice denied due process because the notice did not explain the method for contesting termination)).

99. 640 F. Supp. at 201 (citing *Finberg,* 634 F.2d 50).

100. 583 F. Supp. 307.

tice and a prompt hearing after garnishment of a judgment debtor.[101] The court in *Davis* agreed with *Mathews* and *Brown* that due process does not require notice or a hearing before a postjudgment attachment, but that once the attachment is made, the debtor must be notified and given an opportunity to claim any exemptions.[102] In support of this theory, the court in *Davis* relied on an Arkansas prejudgment decision, *G.A.C. Trans-world Acceptance Corporation v. Jaynes Enterprises,* in which the Arkansas Supreme Court held the Arkansas prejudgment garnishment procedures unconstitutional.[103]

Upon review of the Arkansas procedure pertaining to postjudgment garnishment,[104] the court in *Davis* found that the statutes do not require notice to the judgment debtor informing him of the garnishment, exemptions, or a hearing to claim such exemptions.[105] The court relied on language in *Dionne* stating that "an unlawful attachment of the debtor's exempt property affects the debtor's rights in a way in which the judgment does not."[106] Since the Arkansas procedure required no notice or hearing upon postjudgment seizure, the debtor's right to claim exemptions was not protected. Accordingly, the court applied the holding of *Dionne* and concluded that the Arkansas statutes do not contain sufficient procedural safeguards to prevent erroneous seizures.[107] The court in *Davis* held that this omission of safeguards violated due process and rendered the Arkansas postjudgment garnishment procedures unconstitutional under the due process clause of the fourteenth amendment.[108]

The practical effect of this decision was to cease all garnishment in the State of Arkansas. This had a discernible negative impact on creditors who have an interest in expedient recovery against a judgment debtor. Garnishment is often the only means by which a creditor can collect his or her judgment from the debtor. In response to this interest, Judge Overton, who wrote the opinion in *Davis,* issued an Amended

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101. 640 F. Supp. at 201.

102. *Id.* at 202 (citing *Dionne,* 583 F. Supp. 307, *aff'd as modified,* 757 F.2d 1344).

103. *Id.* (citing G.A.C. Trans-World Acceptance Corp. v. Jaynes Enters., 255 Ark. 752, 502 S.W.2d 651 (1973)). The court noted that the Arkansas statutory procedure for garnishment both before and after judgment is set forth in ARK. STAT. ANN. §§ 31-501 to -521 (1962) and that the Arkansas Supreme Court has held the procedure unconstitutional and void as it permitted prejudgment garnishment without notice and a hearing. 640 F. Supp. at 202.

104. ARK. STAT. ANN. § 30-207 (1962) (wages) and ARK. STAT. ANN. § 30-209 (1962) (constitutional exemptions).

105. 640 F. Supp. at 202-03.

106. *Id.* at 202.

107. *Id.* at 203.

108. *Id.*

Consent Judgment. Judge Overton carefully noted that courts ordinarily do not propose or write legislation in actions for declaratory judgment to have a statute declared unconstitutional, and that legislative concerns should be resolved by the General Assembly. But here, he said, all the parties to this action agreed upon a procedure, and the garnishment statute did not prevent implementation of the due process requirements proposed by the parties. Thus, in the Amended Consent Judgment, Judge Overton articulated a procedure for issuing writs of garnishment that meets minimum standards of due process of law.

It is interesting to note that the amended order specifically addressed only procedures to be followed in Jefferson County Circuit Court, but there appeared to be agreement that the procedure should be instituted in other counties.

As a result of *Davis,* the Arkansas General Assembly will have to enact new legislation to bring Arkansas' garnishment statutes into compliance with the district court's ruling on the constitutional requirements of due process. The Arkansas Bar Association has drafted a model garnishment statute, and a revised statute was considered by the 1987 Arkansas General Assembly.[109] The proposed legislation, in an attempt to comply with Judge Overton's order, specifically delineates the contents of the writ of garnishment, requiring that the writ state the specific dollar amounts claimed, the time period in which the garnishee may file an answer to the writ, and the consequence of garnishment by default if the garnishee fails to answer.

Also proposed is a section that would require that the garnishee be informed of possible exempt property or earnings and of nonexempt earnings that are subject to garnishment. The drafted legislation includes sections requiring notice to the judgment debtor and defines what the notice must entail. In the suggested procedure, a judgment debtor would be informed of his right to file a written objection or claim of exemption and the opportunity for a hearing on such a claim. The provisions described seemed to be mandated by the *Davis* decision.

This type of legislation is intended to protect the interests of both the creditor and debtor. The creditor is allowed to garnish as long as he or she informs the debtor of the ramifications of a writ of garnishment and the process for contesting. The debtor is allowed an opportunity to contest any seizure of property and/or wage. The desired result is to minimize the risk of erroneous deprivation of property while affording creditors the right to satisfy judgments.

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109. H.B. 1829, 76th Gen. Assembly, Reg. Sess., 1987 Arkansas.

The *Davis* decision may also have repercussions for Arkansas' execution statutes.[110] Currently in Arkansas, an execution may issue upon any final judgment.[111] Though the statutes provide for a number of property exemptions,[112] and an opportunity for a hearing to claim such exemptions,[113] they do not require that notice be given to the debtor upon issuing the writ of execution. The Arkansas General Assembly may also have to address the issue of notice to avoid a due process challenge similar to that of *Davis*.

Kathleen A. Hillegas

110. ARK. STAT. ANN. §§ 30-101 to -313.
111. *Id.* at § 30-101.
112. *Id.* at §§ 30-201 to -220.
113. *Id.* at § 30-209.