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Due Process Requires Notice of Exemptions and a Prompt Postseizure Hearing for Postjudgment Garnishment

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DUE PROCESS REQUIRES NOTICE OF EXEMPTIONS AND A PROMPT POSTSEIZURE HEARING FOR POSTJUDGMENT GARNISHMENT

Finberg v. Sullivan[1]

On October 25, 1977, Sterling Consumer Discount Co. (Sterling) obtained a default judgment against Beatrice Finberg, a sixty-eight-year-old widow living on Social Security retirement benefits. Sterling then sought garnishment of her checking and savings accounts, which contained $550 in Social Security benefits. In accordance with Pennsylvania law, the bank sent Mrs. Finberg a copy of the writ of execution, which she received on November 7. On November 18, she filed a petition in state court to set aside the writ of execution on the grounds of two exemptions: the federal Social Security benefits exemption[2] and a general $300 exemption under Pennsylvania law.[3] Five months later, the last of her money was ordered released.

Before the state suit was resolved, Mrs. Finberg filed an action[4] in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. § 1983.[5] She asserted that the Pennsylvania postjudgment garnishment procedures violated the due process clause of the fourteenth amendment because they did not provide her with adequate notice of the garnishment and the opportunity for a prompt postseizure hearing on the exemption issue.[6] The district court held that the Pennsylvania procedures were constitutional.[7] The United States Court of Appeals for the Third Circuit, over a vigorous dissent, vacated the district court's decision and remanded, holding that the Pennsylvania procedures violated the due pro-

1. 634 F.2d 50 (3d Cir. 1980).

2. 42 U.S.C. § 407 (1976). The exemption covers benefits deposited in bank accounts. *See* Philpott v. Essex County Welfare Bd., 409 U.S. 413 (1973).

3. PA. STAT. ANN. tit. 12, § 2161 (Purdon 1967) (repealed 1978).

4. Sterling, Americo V. Cortese (the prothonotary who issued the writ of execution), and Joseph A. Sullivan (the sheriff who served the writ) were named as defendants. 634 F.2d at 52.

5. (1976) (amended 1979).

6. 634 F.2d at 59. In the district court, Mrs. Finberg claimed in the alternative that due process required that the notice and hearing be provided prior to the seizure. Finberg v. Sullivan, 461 F. Supp. 253, 256 (E.D. Pa. 1978), *vacated,* 634 F.2d 50 (3d Cir. 1980). Before the court of appeals, she conceded that preseizure notice and hearing were not constitutionally required. 634 F.2d at 59. *See* note 42 and accompanying text *infra.*

7. 461 F. Supp. at 263.

cess clause because the procedures did not require notice to Mrs. Finberg of her two exemptions and of the procedures for claiming them, and because a prompt postseizure hearing was not available.[8]

In reaching its conclusion, the court applied the standards of due process developed by the United States Supreme Court in the four leading cases involving prejudgment seizure of property:[9] *Sniadach v. Family Finance Corp.*,[10] *Fuentes v. Shevin*,[11] *Mitchell v. W.T. Grant Co.*,[12] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[13] The *Finberg* notice requirement was unprecedented in the case law.[14] Moreover, the propriety of applying the four prejudgment cases to a case of postjudgment seizure is far from settled because of the conflicting rationale of *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*,[15] the leading United States Supreme Court case on postjudgment seizure.

The "*Sniadach* series" of cases, *i.e.*, *Sniadach*, *Fuentes*, *Mitchell*, and

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8. 634 F.2d at 61-62. Other holdings of the court were that the prothonotary and the sheriff were proper defendants, that the case had not become moot when Mrs. Finberg recovered all her money, and that the district court's denial of class certification did not have a valid basis. *Id.* at 55-56, 64. Furthermore, the court held that the Pennsylvania procedures were invalid under the supremacy clause of the United States Constitution because they allowed a "significant interruption of access to [Social Security] benefits." *Id.* at 63. The court's supremacy clause analysis was much shorter and simpler than the due process analysis. It appears that the court was eager to deal with the unsettled due process issue regarding postjudgment seizure of property because it could have invalidated the procedures solely on the simpler supremacy clause grounds. *See, e.g.*, Wood v. Georgia, 101 S. Ct. 1097, 1100 (1981) (decision of "novel" constitutional question avoided by remanding on another constitutional issue).

On March 26, 1981, the defendants filed two motions with the court of appeals. The first motion requested vacation of judgment and entry of an order directing the district court to dismiss the case as moot. The defendants argued that amended postjudgment garnishment rules promulgated by the Pennsylvania Supreme Court on March 16, 1981, corrected the deficiencies in notice and hearing found by the court of appeals. The motion was denied. The second motion requested withdrawal of the notice of appeal to the United States Supreme Court; this motion was granted. Finberg v. Sullivan, No. 79-1129, slip op. at 2-4 (3d Cir. May 11, 1981).

9. 634 F.2d at 57-58.

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

11. 407 U.S. 67 (1972).

12. 416 U.S. 600 (1974).

13. 419 U.S. 601 (1975). The *Sniadach* series of cases was not a "radical departure from established principles of procedural due process," but rather a part of the "mainstream of past cases" that had established those principles. *See* Fuentes v. Shevin, 407 U.S. at 88.

14. 634 F.2d at 84 (Aldisert, J., dissenting).

15. 266 U.S. 285 (1924).

North Georgia Finishing, may be summarized by stating that the specific elements of due process required when property is seized depend on a balancing of the competing interests.[16] The particular procedures in each case must be evaluated in light of the interests of the parties. In *Sniadach*, the Court held that the due process clause was violated when wages were garnished before judgment without prior notice and opportunity for a hearing.[17] The same conclusion was reached in *Fuentes* with respect to seizures under two replevin statutes.[18] In *Mitchell*, the Court appeared to retreat from *Fuentes* by upholding a sequestration statute that did not provide preseizure notice and hearing but that did provide other procedural safeguards. The safeguards present in *Mitchell* were the requirement that the person seeking seizure of the property post a bond and submit an affidavit of specific facts justifying the seizure, the issuance of the writ by a judge rather than a clerk, and the availability of an immediate postseizure hearing for the person whose property was seized.[19] The *Mitchell* Court did not hold that due process required that particular combination of procedural safeguards, but rather that the "procedure as a whole" satisfied due process; no minimum safeguards were specified.[20] *North Georgia Finishing* demonstrated that *Mitchell* had not overruled *Fuentes*.[21] The Court held a garnishment statute invalid because it did not provide for a preseizure hearing and because other procedural safeguards, such as those available in *Mitchell*, were not present.[22]

In sharp contrast to the flexible standards of due process presented by the four recent prejudgment cases stands *Endicott Johnson*. In that 1924 case, a judgment creditor sought to garnish the wages of the judgment debtor. The debtor's employer asserted that the garnishment statute violated the due process clause because it required no notice or hearing for the judgment debtor prior to the garnishment. The Court held that prior notice and hearing were not required because the debtor had already had an opportunity to be heard in the proceedings leading up to the judgment and thus was required to take notice of future proceedings the judgment

16. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 605-06; Mitchell v. W.T. Grant Co., 416 U.S. at 604, 607, 618-19; Fuentes v. Shevin, 407 U.S. at 82, 86-87; Sniadach v. Family Fin. Corp., 395 U.S. at 340; Brown v. Liberty Loan Corp., 539 F.2d 1355, 1365 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977); Betts v. Tom, 431 F. Supp. 1369, 1374 (D. Hawaii 1977); First Nat'l Bank v. Hasty, 410 F. Supp. 482, 490 (E.D. Mich. 1976). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (requirements of due process in administrative cases depend on balancing of private and governmental interests).

17. 395 U.S. at 341-42.

18. 407 U.S. at 96-97.

19. 416 U.S. at 604-07.

20. *Id.* at 610.

21. 419 U.S. at 608 (Stewart, J., concurring).

22. *Id.* at 606-07.

creditor might use to enforce the judgment.[23] The Court took a historical approach in its analysis, emphasizing state practices.[24] There was no balancing of the respective interests of the creditor and the debtor.

The *Finberg* court applied the balancing approach of the *Sniadach* series, distinguishing *Endicott Johnson* on the ground that that Court was not concerned with the possible garnishment of exempt property.[25] This purported distinction, however, cuts to the very heart of *Endicott Johnson* because any execution may be improper for reasons such as the garnishment of exempt property. The proposition that a judgment debtor is entitled to no prior notice or hearing if the execution is proper begs the question to be decided by the hearing, *i.e.*, whether the execution is proper. Other federal courts have used the balancing approach in the postjudgment situation, with various analyses to avoid the application of *Endicott Johnson,* some of which are as doubtful as the *Finberg* distinction.[26] The

23. 266 U.S. at 288.

24. *Id.* at 288-90.

25. 634 F.2d at 56-57.

26. Griffin v. Griffin, 327 U.S. 220 (1946), is often cited in due process analyses of the postjudgment situation. In 1936, Mrs. Griffin obtained an order adjudging her ex-husband liable for alimony due under a 1926 decree. Mr. Griffin participated in both the 1926 and 1936 proceedings. In 1938, Mrs. Griffin moved to have a judgment docketed in her favor, as was necessary under New York law for her to collect the alimony by execution. Judgment was entered ex parte for both the amount due under the 1936 order and further amounts accruing up to 1938. Mrs. Griffin then sued Mr. Griffin to recover on the 1938 judgment. Under New York law, Mr. Griffin could have set up various defenses in 1938 against the motion to docket judgment, had he known of that proceeding, to reduce or eliminate the amount of alimony attributable to the 1936-1938 period.

The United States Supreme Court held that the due process clause was violated to the extent that the 1938 proceeding cut off those defenses because Mr. Griffin was not notified of that proceeding; it "undertook substantially to affect his rights in ways in which the 1926 decree did not." *Id.* at 229. Defenses that Mr. Griffin otherwise could have raised in 1938 concerning the alimony adjudged due in the 1936 proceeding were foreclosed by his notice of the 1936 proceeding, so that the 1938 judgment did not cut off those defenses. Thus, the portion of the 1938 judgment concerning the alimony ordered in 1936 was affirmed because "[d]ue process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given." *Id.* at 233-34.

The relationship between *Griffin* and *Endicott Johnson* turns on the characterization of the garnishment in *Endicott Johnson.* If it is viewed as merely a "confirmation" of the underlying judgment of liability, the two cases are consistent. If, however, the garnishment is viewed as substantially affecting rights not adjudicated in the underlying trial, the two cases conflict. The latter of the two characterizations is more accurate because garnishment is a proceeding by which particular property of the debtor is taken to satisfy the judgment. The garnishment should always raise the issue of whether that particular property is subject to garnishment, an issue not adjudicated in the underlying trial. Thus, *Griffin*

appears to conflict with *Endicott Johnson*. The majority in *Griffin*, however, did not mention *Endicott Johnson*. One dissenter did cite *Endicott Johnson* for the proposition that notice was not necessary before execution. *Id.* at 240 (Rutledge, J., dissenting in part). The United States Supreme Court has had opportunity to consider the effect of *Griffin* on *Endicott Johnson*, but has not done so. *See* note 27 *infra*.

The *Finberg* court did not discuss *Griffin*, but other courts have done so. *See, e.g.*, Brown v. Liberty Loan Corp., 539 F.2d 1355, 1364-65 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977); Betts v. Tom, 431 F. Supp. 1369, 1373-74 (D. Hawaii 1977). Both cases involved postjudgment garnishment. The court in *Brown* recognized the possible conflict beween *Griffin* and *Endicott Johnson*, but was unable to say that *Griffin* had overruled *Endicott Johnson*. After reconciling the two cases by focusing on the confirmation language of *Griffin* as the equivalent of the *Endicott Johnson* rationale, the court concluded that its case could not be decided on a confirmation rationale, citing and applying the balancing test used in the *Sniadach* series. 539 F.2d at 1364-65. *Cf.* Strick Corp. v. Thai Teak Prods. Co., 493 F. Supp. 1210 (E.D. Pa. 1980) (execution on property of alleged alter ego of judgment debtor); Community Thrift Club v. Dearborn Acceptance Corp., 487 F. Supp. 877 (N.D. Ill. 1980) (execution of confessed judgment). The court in *Betts* employed a similar analysis with respect to *Griffin*, noting that the Court in *Griffin* did not mention *Endicott Johnson*. The *Betts* court also mentioned the possibility of reading *Endicott Johnson* as concerning only the standing of the garnishee to assert rights of the judgment debtor and the possibility that *Endicott Johnson* applies only to the garnishment of property that is not arguably exempt. 431 F. Supp. at 1372-74. These two distinctions are unsound. The Court in *Endicott Johnson* did address the standing issue, 266 U.S. at 288, but there is no language in the case limiting the due process holding to the context of a garnishee's challenge. For a discussion of the artificiality of the exemptions distinction, see p. 860 *supra*.

The court in First Nat'l Bank v. Hasty, 410 F. Supp. 482 (E.D. Mich. 1976), used the balancing of interests test and looked especially to *Mitchell* in deciding whether the postjudgment garnishment procedures involved were constitutional. *Griffin* was not mentioned, and *Endicott Johnson* was questioned on the basis of the dissent in Hanner v. DeMarcus, 390 U.S. 736, 736-42 (1968) (Douglas, J., dissenting) (certiorari dismissed as improvidently granted). *See* note 27 *infra*. A further reason advanced for following *Mitchell* rather than *Endicott Johnson* was that the statute in *Hasty* more closely resembled the *Mitchell* statute than the *Endicott Johnson* statute. 410 F. Supp. at 487-88, 489 & n.8, 490-91. This reasoning is unsound. What is provided by the statute determines whether the statute meets a predetermined standard; the statute should not be allowed to control the selection of that standard. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (Powell, J., concurring); *id.* at 177 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., dissenting). In *Arnett*, six Justices adhered to the view that a statute creating an interest may not limit the due process required to protect that interest.

For cases following *Endicott Johnson* without a discussion of *Griffin*, see Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974); Katz v. Ke Nam Kim, 379 F. Supp. 65 (D. Hawaii 1974); Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973) (per curiam). The courts in *Halpern* and *Langford* limited the application of the *Sniadach* series to the prejudgment situation.

best analysis of *Endicott Johnson* is not to attempt to distinguish it, but rather to question its validity directly on the ground that the Court there did not use the modern balancing approach of the *Sniadach* series.[27] This rationale was suggested by the *Finberg* court as a second reason for applying the balancing approach rather than *Endicott Johnson.*[28]

Simply because the property deprivation occurs after judgment does not eliminate the need for a balancing analysis. As pointed out by the *Finberg* court, the judgment merely establishes the debtor's liability. It does not give the creditor title to any of the debtor's property, and the ex-

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27. *See* Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions,* 1975 WASH. U.L.Q. 877, 884-87; Comment, *A Due Process Analysis of New York's Postjudgment Garnishment Procedure,* 44 ALB. L. REV. 849, 853 (1980); Comment, *Postjudgment Garnishment in Georgia: Acting Largely in the Dark,* 12 GA. L. REV. 60, 73 (1977).

The United States Supreme Court has had occasion to reconsider *Endicott Johnson* but has declined to do so. *See* Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed,* 395 U.S. 825 (1969); Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967), *cert. dismissed per curiam sub nom.* Hanner v. DeMarcus, 390 U.S. 736 (1968). The district court in *Moya* followed *Endicott Johnson* and upheld a statute that allowed the garnishment of wages without notice or a hearing for the judgment debtor. Justices Harlan and Brennan would have vacated and remanded in light of *Sniadach,* which had just been decided. 395 U.S. at 825. *DeMarcus* involved a statute that allowed the master in a divorce proceeding to obtain a writ of execution against the party who failed to pay his fee as ordered by the court, without notice to that party. In his dissent to the dismissal of certiorari, Justice Douglas expressed his view that the Court should have decided whether to overrule *Endicott Johnson,* citing advances in the concept of due process since *Endicott Johnson.* 390 U.S. at 740-41 (Douglas, J., dissenting). His dissent was written before *Sniadach* had been decided. Justice Douglas also discussed the conflict between *Endicott Johnson* and *Griffin. See* note 26 *supra.* Justice Douglas' dissent has been cited as an indication of the demise of *Endicott Johnson. See, e.g.,* First Nat'l Bank v. Hasty, 410 F. Supp. 482, 489 n.8 (E.D. Mich. 1976); Vail v. Quinlan, 387 F. Supp. 630, 635 n.3 (S.D.N.Y. 1975); Scott v. Danaher, 343 F. Supp. 1272, 1277 (N.D. Ill. 1972) (per curiam). On the other hand, the dismissal of *DeMarcus* has been cited as an indication that *Endicott Johnson* is still good law. *See, e.g.,* Katz v. Ke Nam Kim, 379 F. Supp. 65, 69 n.2 (D. Hawaii 1974); Langford v. Tennesee, 356 F. Supp. 1163, 1164 (W.D. Tenn. 1973) (per curiam).

For discussions of due process in the postjudgment situation, *see generally* Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating* Sniadach *and its Progeny,* 65 GEO. L.J. 1 (1976); Dunham, *Post-judgment Seizures: Does Due Process Require Notice and Hearing?,* 21 S.D. L. REV. 78 (1976); Greenfield, *supra*; Comment, *A Due Process Analysis of New York's Postjudgment Garnishment Procedure, supra*; Comment, *Notice and Judicial Supervision in Postjudgment Garnishment—An Analysis of the Georgia Provisions,* 26 EMORY L.J. 597 (1977); Comment, *Postjudgment Garnishment in Georgia: Acting Largely in the Dark, supra.*

28. 634 F.2d at 57-58.

ecution could still be defeated on grounds such as an exemption, which may have been an issue not adjudicated in the underlying trial. Thus, the judgment debtor still has a property interest sufficient to require the use of the balancing analysis.[29]

Notice and an opportunity for a hearing are the basic elements of due process.[30] The controversy in a typical case will concern specifics, such as the type of notice and hearing necessary and when they are to be given.[31] After balancing the competing interests of Sterling and Mrs. Finberg, the court found that the Pennsylvania procedures did not afford Mrs. Finberg adequate notice of the garnishment. Her interest in maintaining access to funds needed to purchase basic necessities compelled a two-part notice: notice of her two exemptions and notice of the procedures for claiming them.[32]

Mullane v. Central Hanover Bank & Trust Co.[33] established that notice must be "reasonably calculated, under all the circumstances, to . . . afford . . . [interested parties] an opportunity to present their objections."[34] The *Finberg* court derived the specifics of its notice requirement from *Memphis Light, Gas & Water Division v. Craft.*[35] The *Memphis Light* Court held that the failure of a municipal utility to notify its customers of the procedures by which they could contest a proposed termination of services violated the due process clause.[36] That holding supports the *Finberg* requirement that the judgment debtor be informed of the procedure to claim an exemption to garnishment.

The requirement that the judgment debtor also be informed of specific exemptions, however, goes beyond the mere notice of procedures required in *Memphis Light.* Even so, notice of the two exemptions required in *Finberg* does not appear to be unreasonably burdensome to the creditor. The court did not specify the exact notice that should have been given, but used language such as notice of the "existence" of the exemp-

29. *Id.* The court's analysis is supported by *Fuentes.* The *Fuentes* Court stated that the purpose of a hearing was "to minimize substantially unfair or mistaken deprivations of property." 407 U.S. at 81. Such deprivations are possible after as well as before judgment. The Court made it clear that even temporary, nonfinal deprivations of property were subject to the mandates of the due process clause and that whether the debtor ultimately would prevail on the merits was irrelevant to his right to due process. *Id.* at 84-87.

30. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

31. *See* Fuentes v. Shevin, 407 U.S. at 86.

32. 634 F.2d at 62. The timing of the notice was not in issue, as Mrs. Finberg conceded that to protect Sterling's interest in preventing her from disposing of the accounts, preseizure notice was not required. *Id.* at 59.

33. 339 U.S. 306 (1950).

34. *Id.* at 314.

35. 436 U.S. 1 (1978).

36. *Id.* at 13-15.

tions.[37] In light of the *Mullane* definition of notice, the court may have contemplated something more than a mere reference to the relevant statutory sections, but less than a requirement that the full text of the exemptions be reprinted. The notice apparently would be brief because the court suggested that it be provided on the copy of the writ of execution forwarded to the judgment debtor by the garnishee.[38]

The notice of exemptions requirement, however, could prove troublesome in the future. The court expressly confined its holding to the two exemptions claimed by Mrs. Finberg.[39] As pointed out by the dissent, it is hard to see where the line should be drawn in future cases involving other exemptions; consequently, the eventual impact of *Finberg* might be to require notice of all state and federal exemptions.[40] The cost to the creditor of providing this notice would have to be considered when balancing the interests. At some point, depending on the complexity of the exemptions involved, the burden on the creditor might compel a finding that such a comprehensive notice is not required by due process. Requiring notice of only the most important exemptions should satisfy the requirements of due process.[41]

The *Finberg* court also found that the hearing afforded Mrs. Finberg under Pennsylvania law was constitutionally infirm. Mrs. Finberg conceded that a preseizure hearing was not required by due process because that would defeat Sterling's interest in preventing her from disposing of the accounts.[42] Nevertheless, her interest in regaining the use of funds needed to purchase basic necessities compelled the requirement of a prompt postseizure hearing, as did Sterling's interest in minimal delay to facilitate a quick, inexpensive collection of the debt.[43]

Thus, Pennsylvania law was held to violate the due process clause in both the notice and hearing provided for Mrs. Finberg.[44] According to the

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37. 634 F.2d at 62.

38. *Id.*

39. *Id.*

40. *Id.* at 82 (Aldisert, J., dissenting).

41. *Cf.* notes 63-64 and accompanying text *infra* (important Missouri exemptions).

42. 634 F.2d at 59.

43. *Id.* at 58-59. The court found that the Pennsylvania procedures did not afford a prompt hearing because a decision on an exemption claim might not be made for at least 15 days after the debtor filed his petition claiming an exemption. *Id.* at 59.

44. Mrs. Finberg had asserted that due process required additional, *Mitchell*-type safeguards: the posting of a bond by the judgment creditor, the submission by the judgment creditor of an affidavit stating that exempt funds would not be attached, and the issuance of the writ of execution by a judge or magistrate. The court did not discuss the merits of each assertion, but merely held that due process did not require those safeguards. *Id.* at 62 (citing Brown v.

dissent, the garnishment procedures of only one state would pass constitutional muster under *Finberg*.[45] Indeed, it is doubtful whether the Missouri postjudgment garnishment procedures would be found constitutional if the *Finberg* rationale were to be applied to Mrs. Finberg's situation under Missouri law.

Garnishment in Missouri is covered by Missouri Supreme Court Rule 90.[46] The rule, in general, does not require notice of exemptions to judgment debtors.[47] Garnishment is, however, merely an aid to execution,[48] and the statutes governing executions and exemptions do impose a duty on the officer levying the execution to inform the judgment debtor of his right to claim certain exemptions.[49] This right to notice has been held applicable to the judgment debtor in a garnishment proceeding.[50] The exemptions the officer must include in the notice are those for the head of a family[51] and those for a person other than the head of a family.[52] There is, however, no requirement that he include any federal exemptions,[53] such as the Social Security exemption, or notice of specific procedures by which to

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Liberty Loan Corp., 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977)). The garnishment statute in *Brown* was upheld even though there was no such affidavit or judicial issuance required; a prompt postseizure hearing on the exemption claim, however, was available. Because the due process required in any given case depends on the balance of interests in that case, *Brown* should not be used to uphold every statute that omits the additional safeguards. Similarly, *Mitchell* should not be used to require the safeguards in every case. *See* note 20 and accompanying text *supra*.

45. 634 F.2d at 84 & n.28 (Aldisert, J., dissenting). The dissent noted that only OR. REV. STAT. § 23.665 (1979) would satisfy the majority in *Finberg*.

46. MO. SUP. CT. R. 90. This rule went into effect on January 1, 1981.

47. The rule does require the levying officer to give notice of exemptions to a state employee whose wages are sequestered. *Id.* 90.22.

48. *See id.* 90.02.

49. *See* RSMO § 513.445 (1978). The duty also was found in Mo. Sup. Ct. R. 76.08 (1980), which was not included in MO. SUP. CT. R. 76, which became effective January 1, 1981.

Garnishment also may be in aid of attachment (prejudgment seizure). *See* MO. SUP. CT. R. 90.02. Section 513.445 only covers execution; thus, the attachment debtor is not entitled to notice of exemptions. *See* State *ex rel.* Estes v. Springer, 45 Mo. App. 252, 261 (K.C. 1891).

50. *See* Dancer v. Chenault, 527 S.W.2d 714, 717 (Mo. App., K.C. 1975).

51. RSMO §§ 513.435-.440 (1978).

52. *Id.* § 513.430.

53. The Consumer Credit Protection Act, 15 U.S.C. § 1673 (1976 & Supp. III 1979) provides the maximum amount of wages that may be garnished. RSMO § 525.030 (1978) parallels the Act, and MO. SUP. CT. R. 90.21 provides that the writ of garnishment must include notice of those limitations. There is no requirement, however, that the judgment debtor receive a copy of the writ of garnishment; only the garnishee is served. *Id.* 90.20 does provide for personal service on the debtor in an attachment (prejudgment seizure) proceeding.

claim an exemption. Thus, a court applying the *Finberg* rationale might find these omissions violative of due process.

A Missouri court applying the *Finberg* rationale also might find fault with the procedures by which the judgment debtor claims his exemptions. It may be implied from the statute giving the levying officer the duty to set aside exempt property[54] that the judgment debtor may apply to the officer to claim an exemption. It has been held that only the officer, and not the magistrate court or the circuit court on appeal, has the jurisdiction to set aside exempt property.[55] It is questionable, however, whether the officer's decision would constitute a "hearing" for due process purposes.[56] Furthermore, there are no time limitations placed on the officer's obligation to set aside the property. As a result, his decision in any particular case may not be prompt.[57]

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54. RSMO § 513.445 (1978).

55. *See* Dancer v. Chenault, 527 S.W.2d 714, 716-17 (Mo. App., K.C. 1975); Pacific Fin. Loans, Inc. v. Richardson, 412 S.W.2d 509, 512 (Mo. App., St. L. 1967). An exception to this rule was recognized in Dyche v. Dyche, 570 S.W.2d 293, 295 (Mo. En Banc 1978). The *Dyche* court held that, regardless of the duties of the levying officer, the trial court has the responsibility to enforce garnishment restrictions created by the Consumer Credit Protection Act, 15 U.S.C. § 1673 (1976 & Supp. III 1979). *See generally* note 53 *supra.*

MO. SUP. CT. R. 90.07 may change the *Dancer* rule. Mo. Sup. Ct. R. 90.06 (1980) provided that the garnishee could discharge his liability by delivering the property to the sheriff. MO. SUP. CT. R. 90.07 provides for this delivery to be made to the court, rather than to the sheriff. Under this scheme, it appears logical to allow the judgment debtor to apply the court to claim an exemption, and provision could be made in Rule 90 for a prompt hearing on the exemption claim.

56. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 499 (1978).

57. If the officer refuses to set aside the exempt property, the judgment debtor may sue the officer on his bond. Dancer v. Chenault, 527 S.W.2d at 717.

The availability of other procedures for the judgment debtor to assert his exemptions is uncertain under Missouri law. One such possibility is the assertion of the debtor's exemptions by the garnishee. Old Missouri cases have stated that exemptions are personal rights of the debtor and may not be asserted by the garnishee. *See, e.g.*, Howland v. Chicago, R.I. & Pac. Ry., 134 Mo. 474, 480, 36 S.W. 29, 30 (1896); Osborne v. Schutt, 67 Mo. 712, 714 (1878). *Howland* was cited for this proposition as late as 1944. *See* Pugh v. St. Louis Police Relief Ass'n, 237 Mo. App. 922, 938, 179 S.W.2d 927, 936 (St. L. 1944). Yet, in other cases, exemptions asserted by a garnishee have been allowed to the debtor. Ferneau v. Armour & Co., 303 S.W.2d 161, 164, 167 (Mo. App., St. L. 1957); Tombs v. Moore, 64 Mo. App. 667, 668 (St. L. 1896). Regardless of whether a garnishee may assert the debtor's exemptions, there is no requirement that a garnishee assert the debtor's exemptions; thus, this opportunity would not be available to the debtor if the garnishee were uncooperative. The garnishee is required to assert any jurisdictional defenses that the debtor might have. *See* First Nat'l Bank v. Conner, 485 S.W.2d 667, 672 (Mo. App., St. L. 1972) (underlying judgment void for lack of personal service on the debtor).

Finberg has provided more support for the proposition that a judgment debtor is entitled to a balancing of interests analysis in the determination of what process is due him in an execution proceeding. Courts outside the Third Circuit should take the same balancing approach and not apply *Endicott Johnson*. The *Finberg* requirement of a prompt postseizure hearing is sound, as is the notice of exemptions and procedures requirement, if not carried to extremes.[58] The Missouri Supreme Court should consider amending its Rule 90 to provide for a prompt postseizure hearing on the request of the judgment debtor,[59] as is already provided for the garnishee under certain circumstances[60] and for the debtor in attachment[61] and replevin situations.[62] Similarly, the Missouri legislature should consider expanding the notice of exemptions requirement to in-

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Another procedure theoretically available for the judgment debtor is intervention under MO. SUP. CT. R. 90.15, which is available to "[a]ny person other than the garnishor who claims an interest in the property." In practice, this route probably is not open to the judgment debtor. Mo. Sup. Ct. R. 90.08 (1980) stated that "[a]ny person claiming property . . . in the hands of a garnishee" could interplead, but that broad language was interpreted as not including the judgment debtor. *See* Ahlgren v. Colvin-Weber Realty & Inv. Co., 507 S.W.2d 686, 687 (Mo. App., St. L. 1974). Similarly, MO. SUP. CT. R. 76.10, on executions, provides that "[a]ny person, except the judgment debtor, claiming an interest in property which has been levied upon may intervene . . . ." Regardless of whether the judgment debtor can intervene, RSMo § 507.090 (1978) and MO. SUP. CT. R. 52.12, which cover intervention, contain no requirements that the determination be prompt.

A third procedural possibility for the judgment debtor is to apply to the court under *id.* 76.25 for a stay or order to quash the execution. Such a motion, however, has been held to be properly granted only if the underlying judgment is void for lack of jurisdiction. *See* State *ex rel.* Jones v. Reagan, 382 S.W.2d 426, 430 (Mo. App., St. L. 1964). Furthermore, consideration of such a motion is premature if it cuts off the garnishor's right to serve interrogatories on the garnishee. *See* Squire's Shop, Inc. v. Boehlow, 482 S.W.2d 738, 739 (Mo. App., St. L. 1972). Under MO. SUP. CT. R. 90.13(a), the garnishor may wait as late as six days after the return date of the writ to serve the interrogatories. The return date of the writ may be as late as one year after the issuance of the writ, under *id.* 76.04. Mo. Sup. Ct. R. 76.04 (1980) provided for a return date of between 30 and 90 days after the issuance of the writ. The current scheme does not afford the judgment debtor a prompt hearing.

58. *See* note 40 and accompanying text *supra*.

59. Similarly, an amendment to MO. SUP. CT. R. 76 to provide a prompt postexecution hearing for all judgment debtors would be appropriate.

60. *Id.* 90.12 (if court orders immediate delivery of property to sheriff under *id.* 90.08, garnishee may request hearing, which must be held within 10 days after request).

61. *Id.* 85.13 (hearing must be held within 10 days after request by owner of property). Garnishment in aid of attachment is included in *id.* 85 as well as in *id.* 90. *See id.* 85.07, 90.02.

62. *Id.* 99.09 (hearing must be held within 10 days after request of defendant).