DUE PROCESS, POSTJUDGMENT GARNISHMENT, AND "BRUTAL NEED" EXEMPTIONS

In *Finberg v. Sullivan*[1] the Court of Appeals for the Third Circuit, sitting en banc, held that Pennsylvania's postjudgment garnishment procedure violated the due process clause of the fourteenth amendment.[2] To date, the *Finberg* court is the only court of appeals to hold a postjudgment summary-execution procedure unconstitutional.[3] Until recently courts have reasoned that any extended due process analysis of a postjudgment seizure was foreclosed: the proceeding underlying the judgment served as constructive notice to the debtor that the creditor would execute his judgment on the debtor's property.[4]

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

2. U.S. CONST., amend. XIV, § 1.

3. Postjudgment seizure laws have been struck down by one federal district court, Betts v. Tom, 431 F. Supp. 1369 (D. Hawaii 1977), see notes 81-94 *infra* and accompanying text, and by several state courts, *e.g.*, Easterwood v. Leblanc, 240 Ga. 61, 239 S.E.2d 383 (1977); Cole v. Goldberger, Pedersen & Hochron, 95 Misc. 2d 720, 410 N.Y.S.2d 950 (Sup. Ct. 1978).

4. Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). In *Endicott* the Supreme Court held that due process does not require postjudgement garnishment procedures to provide a debtor with notice or hearing before garnishment. The Court reasoned that the underlying proceeding acted as constructive notice to the debtor that the creditor would execute on the debtor's property:

> the established rules of our system of jurisprudence do 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. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."

Id. at 288. The reasoning of *Endicott* has dominated the area of postjudgment garnishment. *See, e.g.*, 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); Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); Agnew v. Cronin, 148 Cal. App. 2d 117, 306 P.2d 527 (1957); District Credit Clothing, Inc. v. Square Deal Trucking Co., 163 A.2d 822 (D.C. 1960); South Florida Trust Co. v. Miami Coliseum Corp., 101 Fla. 1351, 133 So. 334 (1931); Chalmette Petroleum Corp. v. Myrtle Grove Syrup Co., 175 La. 969, 144 So. 730 (1932); Commercial Nat'l Trust & Sav. Bank v. Hamilton, 101 N.J. Eq. 249, 137 A. 403 (1927). But the continued efficacy of *Endicott* has been questioned. Hammer v. DeMarcus, 390 U.S. 736, 740-42 (1967) (Douglas, J., dissenting to dismissal of certiorari). *See* Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877, 892-98; Note, *Due Process Requires Notice of Exemptions and a Prompt Postseizure Hearing For Postjudgment Garnishment*, 46 MO. L. REV. 857, 860-62 (1981); Note, *Pennsylvania's Postjudgment Garnishment Procedures Violate the Due Process and Supremacy Clauses*, 26 VILL. L. REV. 579, 585-90 (1980-81). The *Finberg* court expressly distinguished *Endicott* on the basis that *En-*

The facts of *Finberg*, however, illustrate how due process can become an important issue in the postjudgment context. Beatrice Finberg was a sixty-eight year old widow entirely dependent on social security retirement benefits. The Sterling Consumer Discount Company obtained a default judgment against Finberg and proceeded to execute the judgment pursuant to the Pennsylvania rules. Pennsylvania law provided for the seizure of assets, without notice or opportunity for a hearing, following the judgment creditor's filing of a praecipe[5] for a writ of execution. Under this procedure, Sterling garnished Finberg's limited bank accounts, which contained the proceeds of her social security benefits. Finberg was alerted to the seizure of the funds when the garnishee-bank sent her a copy of the writ of execution after the event had occurred.[6]

The critical fact in the *Finberg* case is that all of the garnished money was actually exempt from seizure. Federal law proscribes the seizure of social security benefits,[7] and Pennsylvania law provides a $300 cash exemption to debtors in Mrs. Finberg's position.[8] Thus the due process issue arose—whether Pennsylvania procedure adequately protected Mrs. Finberg's statutory right to exempt certain property from seizure.[9] The right to the exemptions was not addressed in the

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dicott did not involve exempt property. Finberg v. Sullivan, 634 F. 2d 50, 56-57 (3d Cir. 1980). See note 9 *infra*.

5. A praecipe is a suggested order that the petitioner asks the clerk or magistrate to issue. *See, e.g.*, Yazoo & Miss. Valley R.R. Co. v. Clarksdale, 257 U.S. 10, 19 (1921).

6. Finberg v. Sullivan, 634 F.2d 50, 52 (3d Cir. 1980) (en banc). Within weeks of the freezing of the accounts, Mrs. Finberg filed a petition claiming the exemptions. Release of all of the funds, however, was not obtained until five months later. In the interim, Finberg also filed suit in federal district court challenging the constitutionality of the Pennsylvania postjudgment garnishment procedures. The District Court for the Eastern District of Pennsylvania granted summary judgment upholding the statute. The court relied on a Pennsylvania rule of civil procedure, not used by Finberg, which, the court held, would have provided a sufficiently prompt postseizure hearing. Finberg v. Sullivan, 461 F. Supp. 253, 262-63 (E.D. Pa. 1978), *rev'd*, 634 F. 2d 50 (3d Cir. 1980).

7. 42 U.S.C. § 407 (1976). The exemption of social security benefits continues when the benefits are held in bank accounts. Philpott v. Essex County Welfare Bd., 409 U.S. 413, 416 (1973).

8. 42 PA. CONS. STAT. ANN. § 8123 (Purdon 1979).

9. The statutory exemption of property from seizure is an entitlement, a type of "new property" protected by the 14th amendment. Both the asset and the exemption itself, a type of entitlement, represent constitutionally protected property which cannot be deprived by the government without due process of law.

Beginning with the 1969 case of Goldberg v. Kelly, 397 U.S. 254 (1969), the Supreme Court expanded the concept of property protected by due process to include areas other than the common-law property of realty and personalty. In *Goldberg* the Court held that welfare benefits were "a statutory entitlement for persons qualified to receive them and hence protected by due process." *Id.* at 262. *See id.* at 397 n.8.

underlying proceeding; by its nature the right does not become an issue until after a finding of liability.

The *Finberg* court held the Pennsylvania law unconstitutional for failing to provide prompt post-seizure adjudication of claims of exemption[10] and for failing to require that the debtor be informed of the existence of the exemptions.[11] These two requirements greatly increase a debtor's opportunity to correct an erroneous deprivation. The *Finberg* court, however, specifically refused to require further procedures that would prevent or limit the actual occurrences of erroneous deprivations.[12]

This comment examines the application of due process to postjudgment garnishment. A discussion of the contours of contemporary due process analysis[13] provides the context for the application of due process to postjudgment seizures.[14] Safeguards designed to prevent erroneous deprivations are constitutionally required when the asset to be seized is both potentially exempt and "brutally needed" by the

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The Court has since incorporated into this concept of "new property" such rights as employment tenure, Mathews v. Eldridge, 424 U.S. 319 (1976); prisoner parole, Morrisey v. Brewer, 408 U.S. 471 (1972); probation, Wolff v. MacDonnell, 418 U.S. 539 (1974); and state-issued licenses, Mackey v. Montrym, 443 U.S. 1 (1978); Barry v. Barch, 443 U.S. 55 (1978). "The term 'property' . . . incorporates living characterizations of statutorily bestowed benefits." O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (Blackmun, J., concurring).

The basis for such entitlements is the federal and state legislation that confers the specified right. Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1127 (W.D. Pa. 1980). Most states have enacted laws that exempt certain property from seizure. *See* Vukovich, *Debtor's Exemption Rights*, 62 GEO. L. J. 1 (1974). By sealing these rights clearly in the statutory language, the state is giving a debtor a "legitimate claim" to the exemption; the debtor's entitlement to exemption represents a type of property which must be afforded the protection of due process of law. Brown v. Liberty Loan Corp., 539 F.2d 1355, 1365 n.9 (5th Cir. 1976) (court recognized that exemption created "statutory entitlement"). Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877, 898-906; Comment, *Postjudgment Wage Garnishment Procedure that Gives Debtor No Notice or Opportunity to Assert Statutory Exemption Prior to Garnishment is Unconstitutional*, 3 FLA. ST. U.L. REV. 626, 634-37 (1975).

It should be noted, however, that although the cases to date raising the constitutionality of postjudgment summary seizure statutes have all involved exemptions, commentators have suggested that these statutes might conflict with due process even when no exemptions are involved. If the summary execution statute provides that the seizure will take place only upon the establishment of certain facts, due process could require an adversarial hearing on the existence of such facts before the deprivation. For instance, many state statutes allow wage garnishment only when there is no other property to seize. The debtor should have prior notice of the wage garnishment and opportunity to demonstrate the availability of other assets for seizure. Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating* Sniadach *and Its Progeny*, 65 GEO. L.J. 1, 25 (1976); *see* Comment, *supra*, 3 FLA. ST. U.L. REV. at 637 n.74.

10. 634 F.2d 50, 61 (3d Cir. 1980).

11. *Id.* at 62.

12. *Id.* See text accompanying notes 66-68 *infra*.

13. See text accompanying notes 17-59 *infra*.

14. See text accompanying notes 60-94 *infra*.

debtor.[15] This comment concludes with a proposed summary-seizure statute that accommodates all the interests involved in postjudgment attachment and garnishment.[16]

I. CONTEMPORARY DUE PROCESS ANALYSIS

A. *Inconsistent Rationales in the Prejudgment Cases.*

At first glance, the best authority on due process in postjudgment garnishment appears to be the Supreme Court cases discussing due process in the prejudgment context. In a series of four cases dating from 1969 to 1974, the Court examined different prejudgment attachment statutes for due process violations. In each case a debtor whose property had been seized prior to judgment sued to invalidate an execution because it failed to provide the debtor with notice or a hearing prior to the seizure. To a large extent, any similarity among the cases ends there. The rationales of the four opinions establish two distinct and contradictory approaches to the constitutionality of prejudgment summary-seizure procedures. The prejudgment cases remain significant, however, because they illustrate the evolution of the Court's current consensus on the characteristics of due process analysis, and because, notwithstanding the great variance in their rationales, their holdings are consistent.

The rationales presented in the prejudgment cases conflict. In the first case, *Sniadach v. Family Finance Corp.*,[17] the Court held that, because the garnishment of wages is such a severe deprivation, due process requires that it be preceded by notice to the debtor and by an opportunity for a hearing.[18] The holding rests entirely on the Court's characterization of wages as a type of property of unique importance in our economic system.[19]

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15. See text accompanying notes 76-77 *infra*.

16. See text accompanying notes 95-102 *infra*.

17. 395 U.S. 337 (1969).

18. 395 U.S. at 340. Douglas, however, did not detail the type of notice and hearing required.

19. "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. In explaining why wages are unique, Douglas quoted Congressman Gonzales:

> For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense, in such a process?

Id. at 342 n.9 (quoting 114 CONG. REC. 1833 (1968)). Douglas concluded that "prejudgment garnishment . . . may as a practical matter drive a wage earning family to the wall." 395 U.S. at 341-42.

In *Fuentes v. Shevin*,[20] the Court held that a replevin statute[21] violated due process because it failed to provide the debtor with prior notice and an opportunity to dispute the creditor's claim of default.[22] The Court stressed the ex parte nature of the proceedings, noting that one party was permitted to trigger the coercive machinery of the state solely on the basis of conclusory, unreviewed affidavits.[23]

The *Fuentes* Court based its holding on two extremely broad principles. First, except in "extraordinary circumstances," any taking of property that is not de minimis must be preceded by prior notice and a hearing.[24] Second, the Court applied a broad definition of constitutionally protected property and expressly refused to distinguish between "necessities of life," such as the wages at issue in *Sniadach*, and the consumer goods seized in *Fuentes*.[25] This language is inconsistent with the *Sniadach* rationale, which relied on the special importance of wages.[26] The *Fuentes* Court stressed that distinctions between property may be relevant to the form of the prior notice and hearing but not to the requirement that notice and a hearing occur before the deprivation.[27]

Justice White, joined by Chief Justice Burger and Justice Blackmun, dissented in *Fuentes*. Justice White insisted that the Court erred by not giving sufficient weight to the creditor's interests: "I would not ignore, as the Court does, the creditor's interest in preventing further

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Sniadach spawned two kinds of lower court decisions: those limiting the holding closely to its facts, *e.g.*, Brunswick Corp. v. J. & P., Inc., 424 F.2d 100, 105 (10th Cir. 1970); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 68, 280 A.2d 862, 863 (1971), and those using the opinion to expand the application of due process to prejudgment attachment procedures of other types of property, *e.g.*, Aaron v. Clark, 342 F. Supp. 898, 901 (N.D. Ga. 1972); Santiago v. McElroy, 319 F. Supp. 284, 293-94 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722-23 (N.D.N.Y. 1970).

20. 407 U.S. 67 (1972).

21. Replevin occurs when an individual with the right to repossess specific goods acts to recover the property that has been wrongfully taken or detained. *See* Epps v. Cortese, 326 F. Supp. 127, 132 (E.D. Pa. 1971). An attachment occurs when the property is seized from the debtor. *See* Finberg v. Sullivan, 634 F.2d 50, 52 n.1 (3d Cir. 1980). *See generally* Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877. A garnishment occurs when the property is seized from a third party. *See* Frank F. Fasi Supply Co. v. Wigwam Inv. Co., 308 F. Supp. 59, 61 (D. Hawaii 1969).

22. FLA. STAT. ANN. §§ 78.01-.13 (West Supp. 1972-73).

23. 407 U.S. 67, 93 (1972).

24. There is a basic right to "a prior hearing of some kind." *Id.* at 84. That hearing must take place "at a time when the deprivation can still be prevented." *Id.* at 81.

25. *Id.* at 88-90.

26. See note 19 *supra* and accompanying text.

27. 407 U.S. 67, 86 (1972). *See id.* at 89 n.20 (in *Goldberg* the importance of welfare to the recipient is directly related to the form of the hearing required before welfare benefits can be terminated).

use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a 'property' interest as deserving of protection as that of the debtor."[28] Justice White rejected the *Fuentes* majority's sweeping approach and advocated a more cautious balancing of the interests of the parties.[29] White's dissent is significant because it contains the seed for the Court's current approach to due process.[30]

When the third prejudgment case came before the Court, Justice White drafted the majority opinion. Justice White's opinion in *Mitchell v. W.T. Grant Co.*[31] uses the balancing approach outlined in his *Fuentes* dissent to uphold a Louisiana sequestration statute.[32] White observed that both the debtor and the creditor, who had a lien on the goods, possessed substantial property interests in the commercial assets in question.[33]

The Louisiana statute failed to provide for prior notice and a hearing, which the Court required in both *Sniadach*[34] and *Fuentes*.[35] The *Mitchell* Court found, however, that several other features adequately protected the debtor's due process rights. Specifically, the *Mitchell* Court stressed that the Louisiana statute contained "measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking."[36] The statute's most significant protective measures required the creditor to file an affidavit setting forth the facts which entitle him to a writ of execution[37] and declared that only a judge could issue the writ.[38] This judicial control assured that the debtor was not left to "the unsupervised mercy of the creditor and court functionaries."[39]

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28. *Id.* at 102 (White, J., dissenting). In *Fuentes* the creditor's position was strengthened because the petitioners had purchased the goods from the creditor on a conditional sales contract. The creditor retained title to and a security interest in the items. *Id.* at 70.

29. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . ." *Id.* at 101 (White, J., dissenting).

30. See text accompanying notes 50-59 *infra*.

31. 416 U.S. 600 (1974).

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

33. The debtor's continued possession would have put the creditor's interest at heightened risk because, not ouly could the debtor have concealed or damaged the goods, but under the vagaries of Louisiana civil law, a transfer by the debtor would have extinguished the creditor's lieu. 416 U.S. at 609.

34. See text accompanying note 18 *supra*.

35. See text accompanying note 24 *supra*.

36. 416 U.S. at 616-17.

37. *Id.* at 616. The affidavit had to contain "specific facts" and could not consist merely of allegations. *Id.* at 616 n.12.

38. *Id.* at 616.

39. *Id.*

Justice White's opinion carefully distinguishes *Fuentes* and *Sniadach* on the basis that the Florida and Pennsylvania statutes did not provide the range of protections available in the Louisiana statute.[40] But Justice White's balancing approach is in conflict with the *Fuentes* imperative of a prior hearing; and both the concurring and dissenting Justices in *Mitchell* indicated that they understood *Fuentes* to be overruled.[41]

In the fourth and final case in this series, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[42] the majority, fueling the confusion, indicated that *Fuentes* had not been overruled.[43] Relying largely on *Fuentes*, the Court invalidated a Georgia prejudgment garnishment statute. The statute made no provision for prior notice and a hearing and provided none of the redeeming safeguards present in the Louisiana statute at issue in *Mitchell*.[44]

North Georgia engendered more problems than it resolved. Two Justices remarked with surprise that the Court had apparently revived the reasoning of *Fuentes*.[45] Together, the four opinions establish two distinct and contradictory approaches to the constitutionality of prejudgment summary-seizure procedures: (1) *Fuentes*'s categorical insistence on a hearing prior to any deprivation; and (2) *Mitchell*'s balancing of interests to determine whether an adequate "constitutional accommodation" between the conflicting interests of the parties has been reached.[46]

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40. *Id.* at 615-16.

41. *Id.* at 623 (Powell, J., concurring) ("I think it is fair to say that the *Fuentes* opinion is overruled"); *id.* at 634 (Stewart, J., dissenting) ("[T]his case is constitutionally indistinguishable from *Fuentes v. Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent").

42. 419 U.S. 601 (1975).

43. The majority opinion, written by Justice White, twice cited *Fuentes* as controlling authority. *Id.* at 605, 608.

44. GA. CODE ANN. §§ 46-101-04, 46-401 (1974). The writ of garnishment could be issued by a clerk on the basis of a conclusory affidavit and there were only limited opportunities for a hearing to contest the garnishment. 419 U.S. at 607.

45. 419 U.S. at 608 (Stewart, J., concurring); *id.* at 609 (Powell, J., concurring). *See also id.* at 615-17 (Blackmun, J., dissenting).

46. In an apparent attempt to reconcile these two divergent lines of authority, some courts rejected the balancing test and began treating the *Mitchell* opinion as creating a due process "checklist." In this view, a prejudgment attachment statute that did not provide for a prior hearing accorded with due process only if it incorporated the characteristics listed in *Mitchell*.

Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978) is an example of this reasoning. The Court of Appeals for the Fifth Circuit wrote, "[A]fter *Mitchell* and *Di-Chem*, we do not believe that we must engage in *ad hoc* balancing in every case that comes before us." *Id.* at 534 n.16. Instead, the court read the Supreme Court prejudgment cases as requiring "that a prejudgment seizure be authorized by a judge who had discretion to deny issuance of the appropriate writ." *Id.* at 534 (footnote omitted). Accordingly, the court struck down a Georgia prejudgment

In contrast to the rationales, the holdings of the cases appear consistent. In *Sniadach* and *Fuentes* the Court held that summary-seizure proceedings must provide for notice and a hearing prior to the deprivation of wages or consumer goods.[47] In *Mitchell* the Court upheld a procedure that lacked these two safeguards but that contained measures both to permit the debtor to correct an erroneous deprivation in a timely manner and to limit the occurrence of wrongful deprivations.[48] In *North Georgia* the Court struck down a garnishment statute because the statute contained neither notice and hearing provisions nor any surrogate protective measures.[49] Accordingly, the factual holdings of the cases suggest that the prejudgment seizure of an asset is constitutional only if there exist adequate safeguards that limit the occurrence of erroneous deprivations and allow the debtor to correct an erroneous deprivation in a timely manner.

B. *Resolution of the Inconsistency: The* Mathews *Balancing Test.*

Although the Court has never addressed the conflict between *Fuentes* and *Mitchell*, subsequent opinions make clear that reports of *Fuentes*'s demise were not so exaggerated after all.[50] Later Supreme Court administrative due process opinions ignore the broad language of *Fuentes* and instead develop the balancing test suggested by Justice White's dissent in *Fuentes* and his majority opinion in *Mitchell*.[51]

In *Mathews v. Eldridge*[52] the Court presented the first complete formulation of the due process balancing test:

> [I]dentification 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 of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

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statute that did not provide the issuing judge with discretion to refuse to order the writ. Although superficially comporting with the *Mitchell* opinion (and undoubtedly reaching the correct result), the *Johnson* court's approach explicitly disavowed the balancing analysis underlying *Mitchell*. For this reason, *Johnson* has been cited as an example of the "methodological confusion" created by the Supreme Court prejudgment cases. Project, *Recent Developments in Commercial Law*, Part VII, "Prejudgment Attachment," 11 RUT.-CAM., L.J. 657, 671 (1980).

47. See notes 17-30 *supra* and accompanying text.

48. See notes 31-41 *supra* and accompanying text.

49. See notes 42-45 *supra* and accompanying text.

50. *Cf.* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975) (Stewart, J., concurring) (citing 2 A. PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1912)).

51. See text accompanying notes 28-41 *supra*.

52. 424 U.S. 319 (1976).

requirement would entail.[53]

The *Mathews* test, the touchstone of the Supreme Court's present due process review,[54] suggests the Court's resolution of the confusion surrounding the prejudgment attachment cases. First, the *Mathews* formulation may be viewed as a generalization of the concerns suggested in Justice White's prejudgment attachment opinions,[55] affirming the principle that due process involves a balancing test that can require different procedural safeguards when different interests are at stake.[56] Second, the *Mathews* formulation emphasizes that the type of property at stake is a primary consideration in determining the required procedural safeguards. Contrary to dicta in the prejudgment cases,[57] the *Mathews* Court relied heavily on its characterization of disability benefits to determine the extent of the necessary procedural protection.[58]

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53. *Id.* at 335.

54. The test has been applied in all of the Supreme Court's more recent due process cases. *E.g.*, United States v. Raddatz, 447 U.S. 667 (1980); Mackey v. Montrym, 443 U.S. 1 (1979); Parham v. J.R., 442 U.S. 584 (1979); Green Holtz v. Inmates of Neb. Penal and Correction Complex, 442 U.S. 1 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Board of Curators v. Horowitz, 435 U.S. 78 (1978).

55. The requirement that the private parties' interests be affected reflects a concern for the interests of both debtor and creditor. Concern over whether procedures limit the risk of erroneous deprivation appears in all the prejudgment cases. The government-interest provision reflects the prejudgment cases' concern for fair and efficient garnishment laws.

56. Accordingly, to the extent *Fuentes* remains authoritative, it is limited to its facts. The *Mathews* Court cited *Fuentes* as holding "only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk." Mathews v. Eldridge, 424 U.S. 319, 334 (1976). The Court rejected the broad language of *Fuentes* that mandates a prior hearing before any deprivation.

57. In *Fuentes* the Court held that the weight of the parties' interests may determine the form of the hearing, but that it did not affect the debtor's right to some kind of hearing before deprivation. Fuentes v. Shevin, 407 U.S. at 84. In *North Georgia*, the case that allegedly resuscitated *Fuentes*, the Court followed this *Fuentes* ruling that proscribed consideration of the weight of the affected interests. Unlike *Fuentes* and *Mitchell*, which involved consumers, *North Georgia* involved two corporate litigants. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). Although noting that "a sizeable bank account" was at issue, the Court rejected a consideration of the type of property interest involved:

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, 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 (emphasis added).

58. The appellant in *Mathews* claimed that the administrative procedure that terminated his social security disability benefits without a prior hearing violated due process. Mathews v. Eldridge, 424 U.S. 319, 325 (1976). In this respect, the facts are similar to those of the earlier case of Goldberg v. Kelly, 397 U.S. 254 (1970). In *Goldberg* the Supreme Court struck down an administrative procedure that resulted in cancellation of a recipient's welfare benefits without prior notice and hearing. In *Mathews*, however, the Court upheld the procedure. In examining the affected private interests, the Court distinguished Eldridge's interest from the similar interest at issue in

Applying the *Mathews* balancing test determines whether notice and a hearing are required before a temporary deprivation or whether, in part depending on the nature of the property interest in question, lesser procedural safeguards suffice. Furthermore, the Court has interpreted the second part of the test, the weighing of the risk of erroneous deprivation, as requiring adequate prophylactic safeguards to prevent erroneous deprivations from occurring in the first place.[59]

II. THE *MATHEWS* TEST APPLIES TO POSTJUDGMENT GARNISHMENT

A. Finberg v. Sullivan *and* Brown v. Liberty Loan Corp.

Several lower federal courts have applied the *Mathews* balancing test in postjudgment due process cases. In *Finberg v. Sullivan*,[60] the Court of Appeals for the Third Circuit focused its inquiry on the two main considerations listed in the *Mathews* test: effect on the private parties and risk of erroneous deprivation.[61] Concerning the interests of the parties, 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 accounts containing her social security benefits. The court emphasized the importance of these assets to someone in Mrs. Finberg's position:

> A bank account may well contain the money that a person needs for food, shelter, health care, and other basic requirements of life. Many people have no other immediate sources of money. Additional income from a future paycheck, welfare benefit, or other source may not be available for two weeks or more, and that income may be insufficient to meet the person's immediate needs.[62]

The court concluded that the Pennsylvania procedure failed to establish a "fair accommodation of the respective interests of creditor and debtor,"[63] and, hence, violated the due process balancing test set forth in *Mathews*.

The *Finberg* court held that to conform to the dictates of due process, the state procedure must provide for a more prompt post-seizure

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Goldberg. "[W]elfare assistance is given to persons on the very margin of subsistence . . . . Eligibility for disability benefits, in contrast, is not based upon financial need." 424 U.S. at 340. Based on the less drastic effects of the *Mathews* deprivation and other slight differences in the actual procedures, the Court held that the need for a prior evidentiary hearing was less compelling than in *Goldberg*. *Id.* at 341-43.

59. See note 74 *infra*.

60. 634 F.2d 50 (3d Cir. 1980).

61. *Id.* at 58.

62. *Id.*

63. *Id.*

hearing[64] and for the inclusion of a statement explaining the social security exemption and the Pennsylvania $300 cash exemption in the notice of the seizure.[65] These measures represent a great increase in the protection afforded debtors in Finberg's position. The measures fail to address, however, the problem of preventing erroneous deprivation; they only facilitate correction after an erroneous deprivation has occurred.

The *Finberg* court stressed the importance of safeguards against erroneous deprivation, but explicitly refused to adopt such *Mitchell* safeguards as requiring an affidavit from the creditor that exempt goods would not be attached; 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.[66] The court said, "[A]lthough [these] requirements might be desirable, we do not believe their absence constitutes a violation of due process."[67] In support, the *Finberg* court cited the postjudgment due process case of *Brown v. Liberty Loan Corp.*[68]

In *Brown* the Court of Appeals for the Fifth Circuit reviewed a Florida postjudgment wage-garnishment statute that did not provide for prior notice, a hearing, or any of the safeguards against erroneous deprivation.[69] Applying a balancing test similar to the one formulated in *Mathews*,[70] the *Brown* court held that the postjudgment garnishment procedure satisfied due process.[71] Commenting on the second part of the *Mathews* test, the risk of erroneous deprivation, the court 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 . . . ."[72] Nevertheless, the *Brown* court held that the creditor's testimony was not necessary for due process protection because the risk of erroneous deprivation "has a smaller significance with respect to the Florida postjudgment garnishment provisions than it had in *Mitchell* and *North Georgia Finishing, Inc.*"[73] The temporary deprivation of the small, garnishable portion of

64. *Id.* at 61.

65. *Id.* at 61-62.

66. *Id.* at 62. For a discussion of the *Mitchell* safeguards, see text accompanying notes 36-39 *supra*.

67. 634 F.2d at 62.

68. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

69. FLA. STAT. ANN. §§ 77.01, 77.03 (West Supp. 1975-76).

70. 539 F.2d at 1365.

71. *Id.* at 1368.

72. *Id.* at 1369.

73. *Id.*

Brown's wages did not cause him irreparable harm; apparently the *Brown* court felt such harm was at issue in the Court's prejudgment attachment cases.

The *Finberg* court's reliance on *Brown* is misplaced. First, *Brown* is suspect authority. The Supreme Court has repeatedly held, in contexts other than postjudgment garnishment, that government procedures for seizing property must include at least some provision to prevent wrongful deprivation before it occurs.[74] Furthermore, the debtor's interest at stake in *Finberg* is more important than the one involved in *Brown*. Brown would not have been deprived of his whole paycheck, but only a small portion of it.[75] Thus, Brown would still have some assets to provide for his basic needs. On the other hand, Finberg was completely deprived of her only asset. She was dependent for subsistence on the social security benefits contained in the garnished bank accounts. As such, Finberg's interests deserved more procedural protection—including preventive protection—than did Brown's.

In *Goldberg v. Kelley*,[76] the Supreme Court held that welfare beneficiaries threatened with deprivation of their benefits deserve the highest procedural safeguards, including a prior evidentiary hearing, which

74. *See, e.g.*, cases cited in Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

The Supreme Court requires different degrees of protection against wrongful deprivation depending on the extent of the injury a wrongful deprivation would cause. In Goldberg v. Kelley, 397 U.S. 259 (1970), the Court required a prior evidentiary hearing in an administrative action to terminate welfare benefits. See text accompanying notes 76-77 *infra*. In other situations the Court has upheld ex parte procedures offering little preventive protection against wrongful deprivation. *See, e.g.*, Barry v. Barachi, 443 U.S. 55 (1979) (ex parte procedure depriving petitioner of his horse racing license was upheld because acting government official was an expert in determining whether a horse was drugged; official's status as an expert was held to represent an adequate prophylactic safeguard); Mackey v. Montrym, 443 U.S. 1 (1979) (ex parte police procedure depriving petitioner of his driver's license was upheld because policeman's status as a "trained observer" was a safeguard against erroneous deprivation).

The only administrative procedure upheld by the Court that provided no prophylactic safeguard whatsoever concerned the temporary deprivation of a limited commercial interest that most likely did not constitute property protected by due process. *See* New Motor Vehicle Bd. v. Orrin Fox Co., 439 U.S. 96 (1978). In *Orrin Fox* the Court upheld an entirely ex parte procedure in which a protest from an allegedly affected private party automatically triggered an order by the California New Motor Vehicle Board requiring an automobile franchisor to refrain from opening or relocating a dealership. There was some question whether the franchisor's right to relocate his business was a "property right" protected by due process, but the Court stated: "Even if the right to franchise had constituted a protected interest [under due process] . . . the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees." *Id.* at 106-07.

75. In *Brown* only 25% of the debtor's weekly disposable income was garnishable. Brown v. Liberty Loan Corp., 539 F.2d 1355, 1367 n.12 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

76. 397 U.S. 254 (1970).

is the most effective measure for preventing erroneous deprivations. In requiring such a high degree of procedural protection, the Court stated that the crucial consideration was the "brutal need" of the party suffering the deprivation: "[T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits."[77] Similarly, the seizure of Finberg's limited assets pending determination of whether they were exempt left her with no resources on which to live. Thus, Finberg's interest in the garnished funds is analogous to an individual's interest in continued access to welfare benefits.

Though different equities exist in the postjudgment garnishment situation such that a prior hearing would not be required,[78] it is clear that due process requires some sort of prophylactic measure to protect such a vital interest. One district court has held such a measure necessary. In *Betts v. Tom*,[79] the District Court for the District of Hawaii reviewed a postjudgment garnishment procedure that allowed a creditor to garnish a bank account containing welfare benefits and held that due process required such a procedure to include preventive safeguards.[80]

B. Betts v. Tom: *Preventing Erroneous Deprivations.*

The *Betts* court expressly adopted and applied the *Mathews* test.[81] First, the court recognized the creditor's interest in freezing the judgment debtor's bank account pending the decision whether the account contains exempt funds. But the court pointed out that the creditor also has some interest in a procedure that prevents him from garnishing exempt property, which, after all, is a wasted effort. Weeks or even months after a garnishment of exempt property, an order quashing an improper garnishment forces the creditor to start over again.[82] On the

77. *Id.* at 264.

78. Unlike the administrative law situation, postjudgment garnishment involves three parties. In evaluating a postjudgment garnishment procedure, the court must consider the interests of the government, the party adversely affected, and the judgment-creditor. The judgment-creditor's interest is the availability of a prompt, sure, and inexpensive method to collect the judgment that he has already been awarded. A rigid requirement of a prior hearing would substantially prejudice this interest by increasing the cost, the time involved, and the risk that the debtor would tamper with the asset. *See, e.g.*, Brown v. Liberty Loan Corp., 539 F.2d 1355, 1366 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

79. 431 F. Supp. 1369 (D. Hawaii 1977).

80. *Id.* at 1378.

81. *Id.* at 1375.

82. *Id. Betts* is the only instance in which a court has argued that a creditor has an interest in the prevention of an erroneous deprivation. The court explicitly refused to recognize any argument that an erroneons seizure benefits the creditor. "The probability that a creditor can take

other hand, the court viewed the debtor's interest as straightforward and significant. Mrs. Betts and her family had a basic need for the Aid to Families with Dependent Children (AFDC) funds contained in the garnished bank account.[83]

Applying the second part of the *Mathews* test, the court held that the Hawaii statutory scheme presented too high a risk that welfare recipients would be erroneously deprived of needed benefits. The court then considered two possible alternatives to bring the law into accord with due process requirements. The law, as in *Sniadach*, could provide for prior notice of the attempted garnishment and an opportunity for a prior hearing on the exemption issue; or it could require safeguards similar to those upheld in *Mitchell*: (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 post-deprivation notice and a hearing within two days on the exemption claim. The court chose the second, more limited set of protections,[84] observing that

> 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.[85]

The holding represents an accommodation that protects the most important interests of both the creditor and the debtor.

The *Betts* court's first alternative, a requirement of prior notice, compromises the creditor's interest in seizing the asset before the debtor has a chance to tamper with it. A summary-seizure statute provides the postjudgment creditor with a prompt, sure, and inexpensive method to collect the judgment that he has obtained.[86] This interest is "signifi-

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advantage of an ignorant judgment debtor is not an interest which can legitimate Hawaii's present post-judgment system." *Id.* at 1375 n.17.

83. "The very fact that she [Mrs. Betts] receives the [AFDC] grant is a recognition by the state that without the use of these funds, she cannot provide for even the basic needs of her children. Indeed, that is why the grant is exempt from execution under state law." *Id.* at 1375.

84. *Id.* at 1377-78.

85. *Id.* at 1378.

86. In Betts v. Tom, 431 F. Supp. 1369 (D. Hawaii 1977), the court emphasized the "substantial" nature of the creditor's interest:

> The judgment creditor has a substantial interest in the satisfaction of his judgment with a minimum of further effort on his part. Resources expended in the collection process diminish the value of a creditor's ultimate recovery upon a claim which has already been judicially validated. Furthermore, in an era of inflation, any substantial time gap between the entry of a judgment and its collection will lead to a significant loss for the

cantly advanced"[87] when the procedure does not require prior notice to the debtor because of "the obvious risk that a defaulting debtor may conceal, destroy, or further encumber the goods."[88] When special circumstances increase the probability that a debtor will take any of these actions, the creditor's interest in an expeditious proceeding that denies the debtor such an opportunity increases proportionately.[89] The best way to prevent such debtor action is to seize, or at least judicially freeze, the goods without prior notice.

The *Betts* accommodation not only protects the creditor's interest by denying a debtor any opportunity to tamper with the asset, it also protects the debtor's interests. Postjudgment summary-seizure statutes affect the debtor's interest by depriving him of the uninterrupted use of his asset pending the determination of whether it is exempt from seizure.[90] The debtor's interest is affected by the length of the deprivation[91] and by the nature of the asset seized.[92]

The *Betts* procedures protect the debtor by providing two safeguards. As in *Finberg* and *Brown*, the prompt postdeprivation hearing allows the debtor to correct any seizure of exempt property. But the *Betts* decision requires an additional safeguard: prior to the deprivation the creditor must file a factual affidavit, to be reviewed by a judge, that states the basis for the creditor's belief that the asset to be seized is not within the AFDC exemption.[93]

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creditor. Delay in execution of a judgment also increases the risk that the debtor, now that he realizes that he has lost in court, will seek to dispose of his assets in order to avoid payment.

Id. at 1375 (citations omitted). *Accord* Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980) (en banc); Brown v. Liberty Loan Corp., 539 F.2d 1355, 1366 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

87. Brown v. Liberty Loan Corp., 539 F.2d 1355, 1366 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

88. Mitchell v. W.T. Grant Co., 416 U.S. 600, 625 (1974) (Powell, J., concurring).

89. *Id.* at 608-09. See note 33 *supra*.

90. Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980); 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, 1375-76 (D. Hawaii 1977).

91. The Court considers important the duration of any potentially wrongful deprivation of a property interest when assessing the impact of official action on that interest. Mackey v. Montrym, 443 U.S. 1, 12 (1978); Fuentes v. Shevin, 407 U.S. 67, 85 (1972).

92. Consideration of the nature of the asset seized is implicit in the *Mathews* balancing test. See notes 52-57 *supra*. Characterizing the asset to determine the effect its deprivation would have on the debtor was an important step in, for example, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), see notes 17-19 *supra* and accompanying text; Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980), see notes 60-62 *supra* and accompanying text; and Betts v. Tom, 431 F. Supp. 1369 (D. Hawaii 1977), see notes 81-83 *supra* and accompanying text. See also note 58 *supra* and accompanying text and note 74 *supra*.

93. Betts v. Tom, 431 F. Supp. at 1378.

Both the prejudgment cases and the administrative law cases mandate some sort of safeguard to prevent erroneous deprivations. The *Betts* affidavit requirement, modeled after the procedure upheld in *Mitchell*,[94] provides a relatively simple and inexpensive way for the courts to oversee a procedure that otherwise allows a private citizen, acting entirely ex parte, to trigger the machinery of government to deprive another person of property. The *Betts* procedure is the basis for the postjudgment summary-seizure statute suggested in this comment.

III. A RECOMMENDED POSTJUDGMENT SUMMARY-SEIZURE PROCEDURE

The following is a suggested postjudgment summary-seizure procedure. It provides safeguards which are both adequate to protect the debtor's due process interests and sufficiently narrow to protect the creditor's interest in a summary seizure of the debtor's assets.[95]

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94. Mitchell v. W.T. Grant, 416 U.S. 600, 616 (1974).

95. Other suggestions for postjudgment summary-seizure procedures fail to protect the debtor's interest in a sufficiently narrow manner to protect the creditor's interest as well.

Professor Alderman has argued that all postjudgment summary-seizure procedures should provide for notice and an opportunity to be heard before any deprivation occurs. Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating* Sniadach *and Its Progeny*, 65 GEO. L.J. 1, 23 (1976). Because due process does not require such relatively onerous safeguards in the prejudgment context, it clearly does not require them in the postjudgment context. Furthermore, this position infringes, in a manner recognized by the Supreme Court since Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924), the creditor's interest in denying the debtor an opportunity to tamper with the asset prior to the seizure. See text accompanying notes 87-89 *supra*.

A similar, but more limited suggestion is that notice and a hearing be required before only postjudgment wage garnishment. The Court of Appeals for the Fifth Circuit rejected this position in Brown v. Liberty Loan Corp., 539 F.2d 1355, 1363 (5th Cir. 1976), *cert. denied*, 430 U.S. 939 (1977). For a discussion of *Brown*, see text accompanying notes 68-75 *supra*.

Another commentator has suggested that a levy be made by serving notice on the judgment debtor rather than by seizure. Under the levy, the debtor would be forbidden to hide, waste, or dispose of the asset under compulsion of contempt of court. Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877, 923-31. There are several difficulties with this position. First, if the debtor is effectively prevented from using the asset (such as a bank account or the garnishable portion of his wages), he gains no particular benefit by its continued possession. Second, there is serious question whether the threat of contempt would stop a debtor from tampering with the asset. Finally, if the debtor does tamper with the asset, the contempt proceeding usually will not help make the creditor whole.

One commentator argued that due process requires only a prompt post-deprivation hearing. Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S.D.L. REV. 79, 94 (1976). This view fails to recognize that, in some circumstances, the debtor's interest in the continued use of the arguably exempt property is so great that it requires some sort of measure to prevent wrongful deprivations.

Finally, it has been suggested that due process mandates not only prompt post-deprivation notice and a hearing, but also additional safeguards restricting the occurrence of wrongful executions. Note, *A Due Process Analysis of New York's Postjudgment Garnishment Procedure*, 44 ALB.

1. AN APPLICATION FOR A WRIT OF EXECUTION MUST INCLUDE A NONCONCLUSORY AFFIDAVIT BY A CREDITOR PRESENTING A FACTUAL BASIS THAT EXPLAINS WHY THE CREDITOR BELIEVES THE ASSET TO BE SEIZED DOES NOT FALL INTO A LIMITED, SPECIFIED NUMBER OF EXEMPTIONS.

The list should consist of those exempt assets whose temporary deprivation would cause destitution. Included are exemptions for benefits such as welfare, social security, perhaps retirement and unemployment and any cash exemption.[96] The affidavit requirement would have relatively little disruptive impact. If the execution is on corporate property, the affidavit can consist of only one sentence stating as much. If the execution is on an individual's assets, the affidavit must state facts to justify the creditor's belief that the assets are not within any of the specified exemptions. Information regarding consumer-credit transactions can be obtained through a properly drafted credit-application form.[97] The affidavit is an inexpensive and reliable way to isolate those situations that present a high risk of an erroneous deprivation that causes destitution. And unlike prior notice and a hearing, the affidavit does not provide the debtor with an opportunity to tamper with the asset.

2. AN ISSUING OFFICIAL WITH THE AUTHORITY TO DENY THE WRIT OF EXECUTION IF THE AFFIDAVIT IS INSUFFICIENT OR DOES NOT ADEQUATELY SUPPORT THE REQUIRED ASSERTION MUST REVIEW THE AFFIDAVIT.

A judge is not required to review the affidavit. The official reviewing the affidavit need only have the expertise to determine if it is sufficient and the discretion to refuse the writ if it is not. The crucial point

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L. REV. 849, 869 (1980). The proposal of this comment basically adopts such a view, but focuses more specifically on what safeguards should be required.

96. The *Betts* opinion establishes a procedure for only one type of exemption: AFDC grants. A comprehensive framework should present a rationale for discriminating among exemptions. Assets deserving the strongest procedural protection are those exempt assets falling under *Goldberg*'s "brutal need" category. See text accompanying notes 76-77 *supra*. The Supreme Court has held that disability benefits do not fall in this category. See note 58 *supra*. Professor Greenfield has suggested that all exempted property be treated equally because legislators, in providing the exemptions, have determined that such goods and assets are the minimum requirements for an individual to exist in our society. *See* Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877, 879, 919, 923-31. But this view simplifies the different purposes that legislators intended the exemptions to serve and iguores the great range of available exemptions. *See* Vukovich, *Debtor's Exemption Rights*, 62 GEO. L.J. 779, 797-832 (1974); Glenn, *Property Exempt from Creditor's Rights of Realization*, 26 VA. L. REV. 127, 128 (1939).

97. The form would require the applicant to list his assets and then state if the asset is related to any of the protected sources of income.

is that the writ cannot issue mechanically upon submission of the creditor's affidavit. The approval of the writ cannot be a "mere ministerial act."[98]

3. IF THE GOVERNMENT OFFICIAL ACCEPTS THE AFFIDAVIT AND ISSUES THE WRIT, THE CREDITOR MUST PROVIDE THE DEBTOR WITH NOTICE SIMULTANEOUSLY WITH OR WITHIN A REASONABLE TIME AFTER THE SEIZURE. THIS NOTICE MUST INCLUDE A LIST OF THE SPECIFIED AND LIMITED NUMBER OF EXEMPTIONS INCLUDED IN PART ONE.

Actual notice of the exemptions greatly increases the probability of promptly correcting erroneous deprivations of the most egregious sort.[99] In addition, the notice should inform the debtor that other exemptions exist under the law. Because the exemptions required to be listed will be set out in the statute authorizing the writ of execution, the creditor will be put to no trouble researching the complicated area of exemption law to determine the exemptions available to the debtor.[100]

4. AN OPPORTUNITY FOR A PROMPT POSTSEIZURE HEARING ON THE ISSUE OF EXEMPTIONS MUST BE PROVIDED.

This safeguard is perhaps the most important one.[101] A sufficiently prompt hearing ensures that the exemption issue will normally be decided before any hardship results from the deprivation. For instance, if a hearing is held one or two days after a wage garnishment, the issue probably can be decided before the first garnished paycheck is issued.[102]

5. IF THE CREDITOR CANNOT FILE AN AFFIDAVIT OF THE KIND LISTED IN PART ONE BECAUSE HE HAS REASON TO BELIEVE THE ITEM FALLS WITHIN ONE OF THE EXEMP-

98. Mitchell v. W.T. Grant Co., 416 U.S. 600, 616 n.12 (1974). *See* Project, *Recent Developments in Commercial Law*, Part VII, "Prejudgment Attachment," 11 RUT.-CAM. L.J. 657, 672 n.78 (1980).

99. *See, e.g.*, Finberg v. Sullivan, 634 F.2d 50, 62 (3d Cir. 1980); Simler v. Jennings, 50 U.S.L.W. 2470 (S.D. Ohio Jan. 18, 1982). For a discussion of *Simler*, see note 101 *infra*.

100. State exemption law can be extremely complicated. It is unfair to require the creditor to explicate the intricacies of this area for the debtor. Finberg v. Sullivan, 634 F.2d 50, 82-84 (3d Cir. 1980) (Aldisert, J., dissenting).

101. *See* Simler v. Jennings, 50 U.S.L.W. 2470 (S.D. Ohio Jan. 18, 1982). In *Simler* the district court held that even if a garnishment procedure requires creditor affidavits to prevent wrongful seizures, the procedure must still provide the debtor with notice of the garnishment and of possible exemptions and with an opportunity of a prompt postseizure hearing to correct a wrongful seizure.

102. Brown v. Liberty Loan Corp., 539 F.2d 1355, 1365 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

TIONS IN PART ONE OR BECAUSE HE DOES NOT POSSESS SUFFICIENT FACTS TO DETERMINE THE APPLICABILITY OF SUCH EXEMPTIONS OR BECAUSE A GOVERNMENT OFFICIAL REJECTS THE AFFIDAVIT, THEN, IN ORDER FOR THE WRIT TO ISSUE:

(A) THE CREDITOR MUST GIVE PRIOR NOTICE TO THE DEBTOR OF HIS INTENTION TO SEIZE THE SPECIFIC ITEM.

This notice must include the exemption list and must inform the debtor that other exemptions are available under the law.

(B) THE DEBTOR MUST BE GIVEN AN OPPORTUNITY TO A HEARING, PRIOR TO DEPRIVATION, ON THE ISSUE OF WHETHER THE PROPERTY IS EXEMPT.

There should be a time limit within which the debtor must make the claim, and the hearing should follow shortly thereafter. The idea underlying Part Five is that risk of an erroneous deprivation of vital property is lessened if the creditor can give factual reasons why he believes that the property to be seized does not fall within the specified exemptions. The creditor's inability to file an affidavit suggests either that he entirely lacks relevant information or that he possesses information indicating that the property may be exempt. In either case, because the situation contains a heightened risk of erroneous deprivation of vital property, the procedure calls for prior notice and a hearing.

This proposal applies the most onerous and most reliable safeguard, prior notice and a hearing, only to those circumstances in which it is needed: situations presenting a significant risk that an erroneous deprivation of a severe nature will occur. Although the burden of the affidavit is placed on those who seek a writ of execution, this burden is made as light as possible by limiting the number of exemptions the creditor must consider. The method of seizure remains ex parte, protecting the creditor's interest by reducing the risk that the debtor will tamper with the asset. For debtors, the affidavit serves to limit the number of erroneous deprivations of a severe nature. The recommended procedure limits the burden of safeguards placed on the creditor while establishing adequate protection of the debtor's vital due process interests.

IV. CONCLUSION

In balancing the interests of the creditor and the debtor in postjudgment summary-seizure procedures, the most significant consideration is that the creditor has already been awarded a judgment against the debtor. This development enhances the creditor's interest

and undermines the debtor's claim to the uninterrupted use of his assets. The due process interests of the debtor outweigh this consideration only when the item to be seized is arguably exempt and is "brutally needed" by the debtor.[103] Due process mandates special procedural protection for this type of property. Because even a temporary deprivation of such property results in extreme hardship, the procedural safeguards must include measures not only to correct erroneous deprivations, but also to prevent them. The least onerous safeguard to fulfill this goal is the requirement that the creditor file an affidavit, to be reviewed by a discretionary official[104] prior to any garnishment, stating why he believes the asset to be seized does not come within a limited number of exemptions.

Thomas W. Logue

103. See text accompanying notes 76-77 *supra*.
104. See note 98 *supra* and accompanying text.

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