Procedural Due Process in Postjudgment Garnishment Proceedings: Indiana Keeps up With the Joneses

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I. Jones v. Marion County Small Claims Court

Indiana recently joined an increasing number of jurisdictions which have questioned the constitutional requirements of procedural due process in postjudgment garnishment proceedings. Under prior law, a judgment creditor in Indiana was authorized to institute a freeze or hold on the bank account of a judgment debtor for 60 days in conjunction with proceedings supplemental to execution.[1] In *Jones v. Marion County Small Claims Court*[2] the United States District Court for the Southern District of Indiana decided that Indiana's bank garnishment statute[3] violates the Due Process Clause of the fourteenth amendment and therefore is unconstitutional.[4]

The plaintiffs in *Jones* claimed that creditors had garnished bank deposits which were exempt from execution under federal law and that such execution violated procedural due process. Elbert Jones's sole income was $265.00 per month of social security and $109.20 of supplementary security income (SSI), all of which was exempt from attachment.[5] After a judgment was taken against him in the Marion County Small Claims Court, his judgment creditor instituted proceedings supplemental to execution on February 29, 1988 which resulted in a freeze on Jones's bank account.[6] A hearing was scheduled for twenty-three days later.[7] As a result of the restriction on his account, checks written for rent and utility bills were dishonored, leaving Jones sixty cents to live on for the remainder of the month.[8] Jones received no notice of the proceedings supplemental to execution nor of the freeze of his account from the

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1. Ind. Code § 28-1-20-1.1 (1988).
2. 701 F. Supp. 1414 (S.D. Ind. 1988). The court ordered a consolidation of Jones v. Marion County Small Claims Court, Lawrence Township Div., IP-88-312-C, and Long v. Huppert, IP-88-346-C.
3. Ind. Code § 28-1-20-1.1 (1988).
4. 701 F. Supp. at 1420.
5. *Id.* at 1417 (citing 42 U.S.C. § 407 (1983)).
6. *Id.* at 1421.
7. *Id.*
8. *Id.*

court, although his bank notified him of the freeze on March 2, 1988.[9] Jones was not informed of any rights to claim his Social Security and SSI funds as exempt from execution, nor of his right to obtain a prompt hearing.[10] Jones subsequently hired counsel who procured the release of the bank deposits on March 17, 1988.[11]

A plaintiff in a similar action,[12] Charles Long, was permanently disabled and subsisted solely on Social Security disability benefits and disability pension benefits.[13] On September 11, 1987, he entered into an agreed judgment in the amount of $1,841.48 with Associates Financial Services Company of Indiana.[14] On January 27, 1988 the judgment creditor commenced proceeding supplemental to execution, and on February 25, 1988 the court ordered Long's bank to put a hold on his account.[15] The amount of $415.17 was frozen in Long's account.[16] Long ultimately received notice of the freeze on his account by letter from his bank on March 5, 1988.[17] Long received no notice from the court of the proceedings supplemental or the order freezing his account.[18] Long filed a motion to release the funds on March 11, 1988 and on March 14, 1988 the court dissolved the freeze.[19]

The plaintiffs filed a consolidated action seeking relief under federal civil rights law,[20] and a declaratory judgment[21] that Indiana's adverse claim statute[22] was unconstitutional. On cross motions for summary judgment, the court reviewed the statute in light of its stated purpose to "protect the financial institution, which, in good faith and prior to notice acts on the strength of the phraseology accompanying the deposit."[23] However, the court was clearly more concerned about the constitutional safeguards necessary to protect the indigent individuals who were the subject of the garnishments. The statute required neither notice to the depositor of the action to freeze his account, nor notice

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9. *Id.*
10. *Id.*
11. *Id.*
12. Long v. Huppert, IP-88-346-C, *consolidated in* Jones v. Marion County Small Claims Court, 701 F. Supp. 1414 (S.D. Ind. 1988).
13. *Jones*, 701 F. Supp. at 1421.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1422.
19. *Id.*
20. 42 U.S.C. § 1983 (1982).
21. 28 U.S.C. § 2201 (1982 & Supp. 1987).
22. IND. CODE § 28-1-20-1.1 (1988).
23. 701 F. Supp. at 1417 (quoting Grimes, *Aunt Mennee's Portrait*, 10 IND. L. REV. 675, 690 (1977)).

of the depositor's right to claim certain funds as exempt from garnishment.[24] Also absent were any provisions requiring a prompt hearing on the issue of exemptions.[25]

In a rather concise analysis of procedural due process, the court observed that some form of due process is required once a deprivation of protected property has occurred.[26] The court also reasoned that a property owner is entitled to due process for even a temporary deprivation of his property rights, citing a line of cases dealing with prejudgment garnishment procedures.[27] The court concluded that Indiana Code section 28-1-20-1.1 was unconstitutional since it did not require notice to a depositor of the restriction on his account or of exemptions available under federal or state law.[28] The statute was also violated due process since it did not require a prompt hearing for the purpose of identifying exempt funds.[29] The court tacitly recognized that the procedural due process required in postjudgment proceedings does not rise to the level of prejudgment proceedings due to the hardships this would work on judgment creditors.[30] The holding in *Jones* was specifically limited to funds maintained on deposit in bank accounts or with trust companies or other financial institutions.[31] *Ex parte* postjudgment seizures of other nonliquid assets were not affected.[32]

II. Historical Analysis of Procedural Due Process

The opinion in *Jones* represents a logical extension of constitutional safeguards required by the fourteenth amendment in garnishment proceedings. The United States Supreme Court first considered procedural due process rights in garnishment proceedings in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*[33] In *Endicott*, Encyclopedia Press recovered a judgment against an employee of Endicott and applied for a wage garnishment pursuant to New York statute.[34] The statute authorized the

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24. *Id.* at 1420.
25. *Id.*
26. *Id.* (citing *In re* Special March 1981 Grand Jury, 753 F.2d 578, 581 (7th Cir. 1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1968)).
27. 701 F. Supp. at 1420 (citing *In re* Special March 1981 Grand Jury, 753 F.2d 578, 581 (7th Cir. 1985); Fuentes v. Shevin, 407 U.S. 57, 85 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1968)).
28. 701 F. Supp. at 1420.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. 266 U.S. 285 (1924).
34. *Id.* at 287.

garnishment of wages without notice to the affected employee.[35] A garnishee defendant, Endicott, refused to withhold the ordered weekly garnishment and continued to pay the employee his entire weekly wage.[36] Encyclopedia Press then brought suit against Endicott and recovered judgment for the amount of the garnished wage.[37] On appeal, the Supreme Court concluded that once a defendant has had an opportunity to be heard and has had his day in court on the underlying judgment, due process does not require further notice and another hearing before supplemental proceedings can be instituted to enforce the judgment.[38] The Court determined that New York's garnishment statute did not violate the requirements of the due process clause, although it did not consider the ramifications of exempt property on the state's execution proceedings.[39]

Forty-five years later, the Supreme Court revisited the requirements of procedural due process in prejudgment garnishment procedures in *Sniadach v. Family Finance Corp.*[40] In *Sniadach*, the Court considered the constitutionality of a Wisconsin statute which authorized wage garnishment before the filing of a summons and complaint against a defendant.[41] Family Finance was owed $420.00 by Sniadach pursuant to a promissory note and garnished Sniadach's wages in conjunction with the filing of a suit.[42] Sniadach moved for dismissal of the proceeding as violative of the due process requirements of the fourteenth amendment.[43] The Wisconsin statute required only that the plaintiff serve the summons and complaint upon the defendant within ten days after service of the garnishment order on the garnishee.[44] The garnishment procedure was initiated by the clerk of the court who issued the summons at the request of the creditor's lawyer.[45] The defendant's wages remain garnished until trial of the main suit, at which time they may be unfrozen if the defendant prevails.[46] In the interim, the defendant was denied an opportunity to be heard or tender a defense.[47]

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35. *Id.* at 286.
36. *Id.* at 287.
37. *Id.*
38. *Id.* at 288.
39. *Id.* at 290.
40. 395 U.S. 337 (1969).
41. *Id.* at 338-39.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 339.
47. *Id.*

The Court reversed lower court findings of constitutionality, holding that wages constituted a unique property interest which warranted special consideration.[48] While Wisconsin's garnishment procedure may meet the requirements of due process in extraordinary situations, there were insufficient interests present to justify the special protection afforded to a creditor.[49] Citing *Mullane v. Central Hanover Bank & Trust Co.*,[50] the *Sniadach* Court reasoned that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[51] The prejudgment garnishment procedure described in the Wisconsin statute authorized deprivation of property rights which would result in substantial hardship on wage earners with families to support.[52] In addition, grave injustices may result from a prejudgment garnishment where the sole opportunity to be heard comes after the taking, thereby ensuring enormous leverage to the creditor.[53] The Court concluded that the obvious taking of such a fundamental property right requires notice and a prior hearing to satisfy the principles of procedural due process.[54]

A few years later, the Supreme Court considered the requirements of procedural due process in replevin proceedings in *Fuentes v. Shevin*.[55] In *Fuentes*, the Court reviewed the constitutionality of replevin laws in Florida and Pennsylvania which authorized the summary seizure of goods or chattels in a person's possession. Under the laws of both states, a party could obtain a prejudgment writ of replevin simply upon an *ex parte* application and the posting of a security bond.[56] Neither statute required notice to the possessor of the property, or an opportunity to challenge the seizure at a hearing.[57] Fuentes was purchasing over time a stove and stereo from Firestone Tire, and had these items repossessed as a result of a service dispute.[58] Other appellants had also purchased household goods on contract which were the subject of summary replevin proceedings.[59] Appellant Washington was the subject of a replevin order which authorized the seizure of her child's toys and clothes by her

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48. *Id.*
49. *Id.*
50. 339 U.S. 306, 314 (1950).
51. *Sniadach*, 395 U.S. at 339-40.
52. *Id.* at 340.
53. *Id.* at 340-41.
54. *Id.* at 342.
55. 407 U.S. 67 (1972).
56. *Id.* at 69.
57. *Id.* at 70.
58. *Id.*
59. *Id.* at 71.

divorced husband.[60] The plaintiffs in both cases instituted litigation challenging the constitutionality of the prejudgment replevin statutes under the Due Process Clause of the fourteenth amendment.[61] Both federal district courts upheld the constitutionality of the statutes.[62]

After tracing the history and evolution of modern day replevin statutes, the Court revisited the central requirements of procedural due process established in *Baldwin v. Hale*[63] and its progeny that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified" at a meaningful time and in a meaningful manner.[64] The Court rejected the narrow interpretation of *Sniadach v. Family Finance Corp.*[65] urged by the lower courts that a prior hearing is required only with respect to the deprivation of necessary items such as wages and welfare benefits.[66] The contract right to possess and use goods is a sufficient property interest to invoke the Due Process Clause of the fourteenth amendment because possession and use of a chattel constituted a "significant property interest" worthy of protection.[67] Prior notice and an opportunity for hearing can be postponed in "extraordinary situations." But these situations are unusual and narrowly drawn, such as an important general public interest or an overriding need for prompt action.[68] The Court rejected arguments that the plaintiffs had contractually waived their rights to basic procedural due process, noting that the language of the contract was not a clear waiver.[69] Both statutes were unconstitutional since they worked a deprivation of property without due process of law.[70]

In 1974, the Supreme Court found that adequate constitutional safeguards were present in a prejudgment sequestration procedure in *Mitchell v. W.T. Grant Co.*[71] In *Mitchell*, the Court considered the constitutionality of a Louisiana statute which authorized the sequestration of property upon application of a creditor claiming a vendor's lien in the goods. Respondent, W.T. Grant Company, filed suit to recover the unpaid balance of the purchase price for several household items and

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60. *Id.* at 72.
61. *Id.* at 71-72.
62. *Id.* at 72.
63. 1 Wall. 223, 233 (1854).
64. *Fuentes*, 407 U.S. at 80.
65. 395 U.S. 337 (1969).
66. 407 U.S. at 88.
67. *Id.* at 86 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
68. 407 U.S. at 90-91.
69. *Id.* at 95.
70. *Id.* at 96.
71. 416 U.S. 600 (1974).

further requested a writ of sequestration pursuant to statute.[72] The statute authorized a writ of sequestration upon *ex parte* application without notice or hearing.[73] However, the writ would only issue upon the creditor's affidavit and a judge's authority after the posting of a sufficient bond.[74] Petitioner, Mitchell, argued that the sequestration was improper since the items were exempt from execution under state law and since the seizure occurred without prior notice or a hearing in violation of due process requirements.[75] The trial court held that the provisional seizure was not a denial of due process, and this ruling was upheld on appeal to the Louisiana appellate and supreme courts.[76]

The Supreme Court reasoned that Respondent, W.T. Grant, had a vendor's lien in the goods and therefore due process must take into account the interests of both buyer and seller.[77] The Court distinguished *Sniadach*[78] on the grounds that it dealt exclusively with prejudgment garnishment of wages, a property interest in which the creditor had no prior interest.[79] Nor did the Court find the reasoning of *Fuentes*[80] dispositive since it involved state statutes which authorized replevin of property without prior notice or a hearing, and without judicial participation.[81] The Louisiana statute in question was not violative of due process given the requirements of an affidavit, the posting of a bond, and an opportunity for a prompt post-seizure hearing.[82] In addition, the Louisiana law required judicial control of the process from beginning to end.[83] Since the Louisiana system minimized the risk of error of a wrongful interim possession by the creditor, it protected the debtor's interest in every conceivable way, thereby fulfilling the requirements of due process under the fourteenth amendment.[84]

The following year, the Supreme Court considered due process requirements in prejudgment garnishment of commercial property in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[85] In *North Georgia*, Di-Chem filed its suit against North Georgia alleging an indebtedness due and

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72. *Id.* at 601-02.
73. *Id.* at 606.
74. *Id.*
75. *Id.* at 602-03.
76. *Id.* at 603.
77. *Id.* at 604.
78. 395 U.S. 337 (1969).
79. 416 U.S. at 614.
80. 407 U.S. 67 (1972).
81. 416 U.S. at 615, 616.
82. *Id.*
83. *Id.*
84. *Id.* at 618.
85. 419 U.S. 601 (1975).

owing for goods sold and delivered in the amount of $51,279.17.[86] Upon filing of the complaint but prior to service of process, Di-Chem filed its affidavit and bond with the Superior Court, requesting garnishment of a North Georgia bank account pursuant to statute.[87] A few days later, North Georgia filed its bond for the payment of any final judgment, and the judge discharged the bank garnishment.[88] North Georgia then initiated proceedings to discharge its bond, asserting, among other things, that the statutory garnishment procedure was a violation of its constitutional rights of due process and equal protection.[89] The motion was overruled by the trial court and an appeal to the Georgia Supreme Court was unsuccessful.[90]

The Supreme Court agreed with the appellants in *North Georgia*, finding that the Georgia garnishment statute had none of the saving characteristics of the Louisiana statute discussed in *Mitchell v. W.T. Grant Co.*[91] The Court also rejected a narrow application of *Fuentes*[92] or *Mitchell*[93] to limit due process in consumer cases, refusing to "distinguish among different kinds of property in applying the Due Process Clause."[94] Rather, the Georgia statute was defective since the debtor's property interest was impounded without the posting of a bond, without notice or hearing, upon the entry of a court clerk.[95] The Court concluded that the probability of irreparable injury under the circumstances is sufficiently great that additional procedural safeguards are necessary to ensure constitutional compliance.[96]

Procedural due process was again considered by the Supreme Court in the 1976 opinion of *Mathews v. Eldridge*,[97] although in the context of administrative proceedings which resulted in the termination of social security benefits. Respondent Eldridge was awarded disability benefits under the Social Security Act in June of 1968.[98] In 1972, a state agency concluded that his disability had ceased and that Eldridge would no longer be entitled to benefits.[99] The agency requested additional infor-

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86. *Id.* at 604.
87. *Id.*
88. *Id.*
89. *Id.* at 604-05.
90. *Id.* at 605.
91. *Id.* at 606. *See supra* notes 71-84 and accompanying text.
92. *Id.* at 605-06. *See supra* notes 55-62 and accompanying text.
93. *Id.* at 608.
94. *Id.*
95. *Id.* at 607.
96. *Id.* at 608.
97. 424 U.S. 319 (1976).
98. *Id.* at 323.
99. *Id.* at 324.

mation pertaining to his condition but Eldridge responded that the agency already had enough evidence to establish his disability.[100] The agency and the Social Security Administration subsequently notified Eldridge that his benefits had been terminated, after which he commenced an action in the federal district court challenging the constitutional validity of applicable administrative procedures.[101] The trial court held that since disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries of the Social Security Act.[102] The Court of Appeals for the Fourth Circuit affirmed the opinion of the trial court.[103]

The United States Supreme Court reversed the lower court decisions, finding that Eldridge had been afforded sufficient procedural due process to satisfy the fourteenth amendment.[104] The Court narrowed its consideration to whether the Due Process Clause requires an evidentiary hearing before termination of Eldridge's benefits. The Court rejected a rigid formulation of constitutional safeguards, and adopted a flexible approach to due process which requires the implementation of whatever safeguards are necessary to assure fairness.[105] A balancing test comprised of three factors was devised to analyze the required due process for any given situation: first, the private interest to be affected by the official action; second, the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards; and third, the government's interest in the procedure, including the fiscal and administrative burdens incurred as a result of the additional or substitute procedural requirements.[106] The Court concluded that an evidentiary hearing under the circumstances was not required since Eldridge had the opportunity to meet the objections raised before final administrative action, and the opportunity for an evidentiary hearing and judicial review before the denial of the claim becomes final.[107]

The Supreme Court has not addressed the requirements of procedural due process in postjudgment garnishment proceedings since its 1924 opinion of *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*[108] However, due process standards in postjudgment proceedings have been

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100. *Id.*
101. *Id.* at 324-25.
102. *Id.* at 325-26.
103. *Id.* at 326.
104. *Id.* at 349.
105. *Id.* at 348.
106. *Id.* at 335.
107. *Id.* at 349.
108. 266 U.S. 285 (1924).

examined by the Third and Fifth Circuit Courts of Appeal. In *Brown v. Liberty Loan Corp.*,[109] Liberty Loan received a judgment in the amount of $646.03 against Brown.[110] Twelve days later, Liberty Loan issued a writ of garnishment pursuant to Florida statute to Brown's employer.[111] Brown received no notice of the garnishment proceedings prior to service of the writ of garnishment on her employer.[112] On the day the writ was served, Brown filed her affidavit of exemption pursuant to statute, to which Liberty responded by filing an affidavit denying the exemption.[113] After hearing, the court found that Brown was qualified for the state exemption and dissolved the writ of garnishment.[114] Brown subsequently brought a class action in federal district court challenging the constitutionality of the Florida statute and requesting declaratory relief and monetary damages.[115] The district court found that the Florida statute violated due process since it authorized garnishment of wages without prior notice and an opportunity for hearing, and Liberty appealed.[116]

The Fifth Circuit Court of Appeals reversed the trial court, delivering an extensive analysis of the competing interests of both the state and individuals involved in debt collection. The interests of the judgment debtor include the disfavored status of garnishment proceedings, the requirements of notice and hearing, the deprivation of wages, and the risk of discharge from employment to avoid administrative burdens.[117] Against these interests, however, must be weighed the state's interest in the enforcement of judgments and the creditor's interest in satisfying its judgment.[118] The court distinguished the holdings in *Sniadach*[119] and its progeny since these cases dealt with the harms attendant to prejudgment garnishments.[120] Consequently, there is no requirement that notice and a hearing must precede postjudgment garnishment of wages.[121] The court concluded that procedural due process was not violated by the Florida garnishment procedure since there were several statutory provisions which, on balance, provided a measure of protection for the judgment debtor.[122] A prompt judicial determination of the debtor's

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109. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).
110. *Id.* at 1357.
111. *Id.*
112. *Id.* at 1357-58.
113. *Id.* at 1358.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1363.
118. *Id.*
119. 395 U.S. 337 (1969).
120. 539 F.2d at 1365-66.
121. *Id.* at 1368.
122. *Id.*

claim of exemption was required and the notice provided in the underlying proceedings at least alert the debtor that further legal action may be taken to satisfy the judgment.[123] The court criticized the garnishment statute for allowing a writ of garnishment to issue upon an unsworn motion of the judgment creditor, but noted that the use of procedures approved in *Mitchell*[124] would "reduce the incidence of wrongful garnishment."[125]

The Third Circuit Court of Appeals reached a different conclusion in *Finberg v. Sullivan*,[126] which considered the constitutionality of Pennsylvania's postjudgment garnishment procedures. In *Finberg*, the Sterling Consumer Discount Company obtained a default judgment against Finberg, a 68 year old widow, whose sole source of income was social security retirement benefits.[127] Sterling immediately initiated garnishment procedures which resulted in Finberg's bank account totaling $550.00 being frozen. The bank account consisted of social security benefits.[128] She received no notice of the garnishment action and had no opportunity to assert her exemption claims prior to the attachment.[129] After the attachment, she received no notice that her accounts might be exempt from garnishment or of procedures available for obtaining a release of exempt property.[130] None of these measures was required under the Pennsylvania law.[131] Finberg obtained the release of $300.00 from her account nearly six weeks after the writ was issued, with the balance being released on May 30, 1978, over six months after the original garnishment.[132] During the pendency of the state court garnishment proceeding, Finberg challenged the constitutionality of Pennsylvania's postjudgment garnishment procedures in federal court. The court ultimately held that the statute contained sufficient protection for the judgment debtor to satisfy the Due Process Clause and avoid conflict with the Social Security Act exemption.[133]

On appeal, the Third Circuit Court of Appeals considered the Pennsylvania statute in the historical context of procedural due process as it has evolved from *Endicott*[134] through the prejudgment cases of *Snia-*

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123. *Id.*
124. 416 U.S. 600 (1973).
125. *Brown*, 539 F.2d at 1369.
126. 634 F.2d 50 (3d Cir. 1980).
127. *Id.* at 51.
128. *Id.* at 52.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 53.
134. 266 U.S. 285 (1924).

dach,[135] *Fuentes*,[136] *Mitchell*,[137] and *North Georgia*.[138] The Court reasoned that *Endicott*[139] was not controlling since it did not address the issue of the debtor's exempt property, and instead relied solely on the later prejudgment cases for relevant analysis.[140] These cases do not require notice and an opportunity to be heard prior to postjudgment garnishment so long as the debtor is protected from "erroneous or arbitrary seizures."[141] "The procedural protection is adequate if it represents a fair accommodation of the respective interests of creditor and debtor."[142] Noting that a fundamental requirement of due process is an opportunity to be heard at a meaningful time, the court found that Pennsylvania's garnishment statutes violated the Due Process Clause since it failed to require a prompt post-seizure hearing and adjudication of exemption claims.[143] Considering that the garnished bank account may well contain money needed by a person for food, shelter, health care and other basic requirements of life, the debtor is entitled to an especially prompt hearing.[144] The Court further determined that the notice received by Finberg failed to inform her of the exemption available under federal law, or of the existence of a state exemption or of the procedure for claiming these exemptions.[145] The failure to so notify Finberg with this information was a violation of due process.[146] In a colorful and angry dissent, Justice Aldisert criticized the majority for failing to acknowledge the interest of the creditor as possessor of a valid judgment vis-a-vis *Brown*[147] and the inevitable economic impact resulting from the Court's ruling.[148]

More recently, the Seventh Circuit considered the requirements of procedural due process in a 1986 opinion, *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*[149] In *Del's*, the Seventh Circuit considered the constitutionality of Wisconsin's replevin statute which was used to seize a grocery store. Del's provided Carpenter Cook with a security interest

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135. 395 U.S. 337 (1969).
136. 407 U.S. 67 (1972).
137. 416 U.S. 600 (1974).
138. 419 U.S. 601 (1975).
139. 266 U.S. 285 (1924).
140. Finberg v. Sullivan, 634 F.2d at 56-57.
141. *Id.* at 58.
142. *Id.*
143. *Id.* at 61.
144. *Id.* at 59.
145. *Id.* at 61-62.
146. *Id.* at 62.
147. *Id.* at 72.
148. *Finberg*, 634 F.2d at 85-86.
149. 795 F.2d 1344 (7th Cir. 1988).

in both inventory and fixtures to secure the obligations of a promissory note.[150] Upon Del's default, Carpenter Cook obtained an *ex parte* order of replevin which directed Del's to surrender all collateral and directed Carpenter Cook to assume control over the operations of the store.[151] The writ of replevin was issued upon Carpenter Cook's affidavit, under the supervision of the court, after the posting of a $100,000 bond.[152]

The replevin statute authorized an immediate post-deprivation hearing, but one was never requested.[153] Nearly three months after entry of the replevin order, Del's filed suit in federal court alleging deprivation of its property rights without due process of law.[154] The federal district court granted Carpenter Cook's motion to dismiss, and shortly thereafter, the Wisconsin state court entered judgment against Del's on the allegations of Carpenter Cook's complaint.[155]

The Seventh Circuit of Appeals affirmed the lower court's dismissal, noting that sufficient safeguards were present under Wisconsin statute to satisfy constitutional requirements of procedural due process.[156] The costs of delay for a pre-deprivation hearing under the circumstances were too great since the creditor must move rapidly to liquidate the collateral.[157] The court also found fault with Del's since it failed to utilize any of the available state procedures for obtaining an immediate hearing on the replevin.[158] Wisconsin's replevin procedure provided adequate constitutional safeguards such as detailed factual allegations under oath, and judicial supervision.[159] The statute also requires the posting of a bond by the creditor, that the order be issued by a judge, and a prompt hearing is available to the debtor upon request.[160]

III. Indiana's Adverse Claim Statute Failed to Provide Judgment Debtors with Procedural Due Process

Both judgment creditors in *Jones*[161] commenced proceedings supplemental to execution against the defendants pursuant to Trial Rule 69(E)[162]

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150. *Id.* at 1345.
151. *Id.*
152. *Id.*
153. *Id.* at 1348.
154. *Id.* at 1345-46.
155. *Id.*
156. *Id.* at 1351.
157. *Id.* at 1348.
158. *Id.* at 1347.
159. *Id.* at 1351.
160. *Id.* at 1347.
161. 701 F. Supp. 1414. *See supra* notes 1-35 and accompanying text.
162. Ind. R. Tr. P. 69.

and several statutory sections.[163] As was customary practice in Indiana at the time, bank interrogatories were filed with the court in connection with the proceeding supplemental and thereafter forwarded to banks which were holding deposits for the defendants.[164] Indiana's adverse claims statute required that the judgment creditor provide the bank with notice of garnishment proceedings against the depositor, notice of the unpaid amount of the judgment, sufficient information to verify the judgment defendant as its depositor and a court order authorizing the proceedings.[165] Once the creditor has provided the bank with the information required by statute, the bank is required to restrict withdrawal of deposits by the judgment debtor, not to exceed the unpaid amount of the judgment.[166] The freeze continues for a maximum of sixty days pending the court's determination of the judgment creditor's rights to garnish the deposits.[167]

The court in *Jones* correctly observed that the adverse claims statute is silent as to the due process rights of the judgment defendants. The statute lacks any requirements of prompt notice of the garnishment, or of notice that exemptions may be claimed pursuant to Indiana and federal statutes. Nor does the statute provide depositors with the opportunity for a prompt hearing for the purpose of identifying exempt funds. However, the court in *Jones* failed to consider the provisions of Trial Rule 69(E)[168] which governs the procedure for implementation of the adverse claims statute, and instead, examined only the adverse claims statute in isolation. Under Trial Rule 69(E), the proceedings supplemental may only be instituted upon a showing that the judgment creditor is the owner of a judgment against the defendant, and that the creditor has no knowledge of property of the defendant which will satisfy the judgment.[169] This procedure must be instituted by verified motion or accompanied by an affidavit, and conducted under judicial supervision.[170] A hearing must be conducted not less than twenty days after service.[171] Indiana's statutory garnishment scheme is by design merely a continuation of the original cause and assumes that the judgment defendant has a duty to pay the plaintiff or inform him of assets available for execution.[172]

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163. IND. CODE §§ 34-1-44-1 to -8 (1988).
164. 701 F. Supp. at 1421.
165. IND. CODE § 28-1-20-1.1 (1988).
166. *Id.*
167. *Id.*
168. IND. R. TR. P. 69.
169. *Id.*
170. *Id.*
171. *Id.*
172. *See Civil Code Study Commission Comments*, State of Indiana (1969), *reprinted in* C. THOMPSON, INDIANA FORMS OF PLEADING & PRACTICE, ¶ 69.03 (1989).

The court in *Jones* also failed to consider the state's interest in facilitating the enforcement of judgments or the creditor's interest in pursuing execution of its judgment. The opinion, rather, focuses almost entirely on the historical requirements of due process, notice of the action and opportunity to be heard. Indiana's statutory scheme for proceedings supplemental to execution provided many safeguards of procedural due process established by the United States Supreme Court and other opinions considering this issue. The application for garnishment proceedings is made under oath or by verified motion and is the subject of judicial supervision.[173] Trial Rule 69(E) further requires that the motion, along with the order to appear and interrogatories, be served upon the defendant in accordance with Trial Rule 5.[174]

The court in *Jones* was faced with a statutory scheme not unlike the Florida scheme considered in *Brown*,[175] although *Brown* dealt with the garnishment of wages. These cases, however, illustrate a fundamental difference in the treatment of exemptions under Florida and Indiana law. Under Florida law, the defendant is entitled to file an affidavit challenging the wage garnishment and to a prompt hearing on its claim.[176] The court in *Brown* found this procedure to be a significant factor in preserving procedural due process.[177] On the contrary, Indiana had no statutory scheme to preserve and advocate exemptions under federal and state law in conjunction with bank garnishments, although both banks involved in *Jones* voluntarily released the accounts upon verified motions to the court of the exempt nature of the garnished deposits. Jones was thus deprived of his exempt benefits for seventeen days, and Long was deprived of his benefits for eleven days. In both cases, the court promptly dissolved the garnishment orders upon the necessary showing.

The court in *Jones* correctly detailed the flawed nature of Indiana's postjudgment garnishment procedure. Neither Jones nor Long were advised of their rights to claim exemptions under Indiana and federal law, nor was a statutory scheme available to implement the claimed exemptions. These results are particularly harsh on the elderly and disadvantaged population which are dependent on social security or other governmental benefits for their existence. The constitutional requirements of procedural due process mandate that adequate notice be provided to such individuals and an immediate hearing be scheduled for the purpose of establishing exempt benefits. The court limited its holding to funds kept in bank

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173. IND. R. TR. P. 69.
174. *Id.*
175. 539 F.2d 1355 (5th Cir.), *cert. denied*, 430 U.S. 949 (1976).
176. FLA. STAT. ANN. § 222.12 (West 1967).
177. 539 F.2d at 1365.

accounts or with trust companies or other financial institutions.[178] *Ex parte* postjudgment seizures of other non-liquid assets were not affected.[179]

IV. Indiana's Legislative Response

The publication of *Jones* on December 6, 1988 caused considerable confusion in the trial courts of Indiana which were engaged in postjudgment garnishment proceedings. A number of courts published their own bank garnishment forms which included lengthy recitals regarding the defendant's right to claim exemptions as well as a right to a prompt hearing upon request. The confusion was relieved on May 5, 1989, with the passage of House Enrolled Act No. 1031 which substantially amended Indiana Code section 28-1-20-1.1 and enacted the Depository Financial Institutions Adverse Claims Act (the "Act").[180]

The Act cures the constitutional deficiencies of the prior adverse claims statute identified in *Jones* and provides clear procedural guidelines for the garnishment of bank deposits. Chapter 3 of the Act[181] addresses the issue of notice and retains many elements of the prior adverse claim statute relating to information provided to the financial institution. However, the Act has added substantial notice requirements which must be provided if the judgment defendant is an individual.[182] The court

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178. 701 F. Supp. at 1420.

179. *Id.*

180. Pub. L. No. 258-1989, Sec. 2, 1989 Ind. Acts 1869 (codified at Ind. Code Ann. §§ 28-9-1-1 to -5-3 (West Supp. 1989)).

181. Ind. Code Ann. §§ 28-9-3-1 to -5 (West Supp. 1989).

182. Ind. Code Ann. § 28-9-3-4(b) (West Supp. 1989) provides:

A depository financial institution may not be held accountable to an adverse claimant for funds in a deposit account that are claimed by the adverse claimant unless the adverse claimant has done all of the following:

(1) Provides the depository financial institution notice of garnishment proceedings, the unpaid amount of the judgment, and sufficient identifying information about the judgment defendant to enable the depository financial institution reasonably to verify the judgment defendant as the depositor.

(2) Serves or causes to be served upon the depository financial institution an order to answer interrogatories.

(3) If the judgment defendant is an individual, serves or causes to be served upon the depository financial institution a copy of a notice, or an apparently valid order containing a notice, issued by a court that is directed to the judgment defendant (which is to be used by the depository financial institution to comply with I.C. 28-9-4-2(a)(2)) and that:

(A) states that the adverse claimant has or may have served or caused to be served upon one(s) or more depository financial institutions notice that may result in the placing of a hold on deposit accounts maintained by the judgment defendant, either individually or jointly with another person, in such depository financial institutions;

must now notify the defendant that a hold may be placed on his account and that various exemptions may be available under federal and state law.[183] The notice must also state that the defendant is entitled to a prompt hearing to present evidence and establish statutory exemptions.[184] A pre-printed detachable form must be included with the notice to expedite the defendant's request for hearing.[185] The Act emphasizes the importance of notice by requiring information about exemptions and the opportunity for hearing to be conspicuous, either by capitalization, printing format or contrasting color.[186] A form which complies with the

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(B) states that under federal and state law certain funds are exempt from garnishment including Social Security, Supplemental Security Income, veterans benefits, certain disability pension benefits, and benefits under any pension paid from a trust qualified under the Employee Retirement Income Security Act of 1974, and that there may be other exemptions from garnishment under federal or state law;

(C) states that if the judgment defendant or another person who maintains a deposit account jointly with the judgment defendant believes that some or all of the funds in the deposit account on which a hold may have been placed are exempt, such person is entitled to a prompt hearing for the purpose of presenting evidence to establish exemptions and seeking removal of the hold; and

(D) has attached to it a preprinted detachable form that may be used by the judgment defendant or other person maintaining a deposit account jointly with the judgment defendant in requesting the prompt hearing specified in clause (C) and that generally instructs such person as to how the form should be used in requesting this hearing.

(4) Serves or causes to be served upon the depository financial institution an apparently valid order issued by a court that expressly directs the depository financial institution to place a hold on a deposit account identified in the order whenever the conditions under subdivision (1) through (3) are met.

183. IND. CODE ANN. § 28-9-3-4 (West Supp. 1989).

184. *Id.*

185. *Id.*

186. IND. CODE ANN. § 28-9-3-5(b) (West Supp. 1989) provides:

Use of the following forms will constitute compliance with the notice requirements of section 4(b)(3) of this chapter:

NOTICE OF CERTAIN EXEMPTIONS
AND YOUR RIGHT TO A PROMPT HEARING

It may be that the plaintiff has or will give notice to your bank or other persons holding property or assets for you of the intent to put a hold on certain accounts held by you, either individually or jointly with another person, including, but not limited to bank, share, and credit union accounts. Under Indiana law, this notice may already have resulted in the placing of a hold on those accounts. UNDER FEDERAL AND STATE LAW, CERTAIN FUNDS ARE EXEMPT FROM GARNISHMENT. THIS MEANS THAT THESE FUNDS MAY NOT BE TAKEN BY CREDITORS EVEN IF THEY HAVE BEEN DEPOSITED INTO YOUR ACCOUNTS. SOCIAL SECURITY, SUPPLEMENTAL SECURITY INCOME, VETERANS BENEFITS, CERTAIN DISABILITY PENSION

requirements of the Act is included.[187] The Act requires the depository institution to place a hold on the account described in the notice.[188] The

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BENEFITS, AND BENEFITS UNDER ANY PENSION PAID FROM A TRUST QUALIFIED UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 CANNOT BE TAKEN. THERE MAY BE OTHER EXEMPTIONS UNDER STATE OR FEDERAL LAW. IF YOU OR ANOTHER PERSON WHO MAINTAINS A JOINT ACCOUNT WITH YOU BELIEVE THAT ALL OR SOME OF THE FUNDS IN THESE ACCOUNTS ARE EXEMPT, YOU OR YOUR JOINT DEPOSITOR ARE ENTITLED TO A PROMPT HEARING IN THIS COURT TO PRESENT EVIDENCE TO ESTABLISH EXEMPTIONS AND TO SEEK REMOVAL OF THE HOLD.

To obtain such a hearing, fill in the form marked "Exemption Claim and Request for Hearing" attached hereto and return it to this court either by mail or by personally bringing it to the court. A copy of that form should also be sent to plaintiff's attorney or to the plaintiff, if the plaintiff is not represented by an attorney, at the address set forth below. A prompt hearing will be scheduled by the court as soon as possible, but generally no later than 5 days (excluding Saturdays, Sundays, and legal holidays) after the completed form is received by the court. Please call the court at (____) ____ to find out when the hearing is scheduled. When calling the court, please have the cause number handy. The cause number is located at the top of the right-hand side of this document. After the hearing, the court will decide whether all or part of the funds in each account on which a hold has been placed or other accounts in which you have an interest may be taken by the plaintiff.

If a joint depositor or you do not request an early hearing, there will be a hearing at the time when you are ordered to appear. At that hearing, you and a joint depositor are entitled to assert any exemptions. However, if a joint depositor or you do not request an early hearing, each account on which a hold has been placed may not be released until the time you are ordered to appear.

EXEMPTION CLAIM AND REQUEST FOR HEARING RETURN THE HONORABLE JUDGE OF THE RETURN COURT OF _____ COUNTY.

ROOM NO. ____

_____

(Address)

_____

(City, State, Zip)

Re: Cause No. _____

I believe that all or part of the money in my account(s) that may have been frozen cannot be frozen since the account (s) contain exempt funds. I would like a hearing at the earliest time.

_____

(Signature)

Check One:

____ I am the judgment defendant.

____ I maintain a joint account with the judgment defendant.

187. *Id.*

188. IND. CODE ANN. § 28-9-4-2(a)(2) (West Supp. 1989).

statute also extended the time of restriction on withdrawal from an account to ninety days,[189] over the sixty days prescribed by the prior statute.

Chapter 4 of the Act addresses the obligations of the financial institution upon receipt of the required notice.[190] The financial institution is now entitled to deduct a garnishment fee of $30.00 or the amount of funds on deposit, whichever is less.[191] The financial institution is then required to restrict withdrawals for the accounts in the amount of the judgment within a "commercially reasonable time" after service.[192] If the account is owned by a defendant who is an individual, the institution must forward to the depositor within one working day of the hold a notice which complies with the provision of Indiana Code section 28-9-3-4(b)(3).[193]

V. Conclusion

The Supreme Court first recognized that procedural due process must necessarily be applied to protect property interests affected by garnishment proceedings in *Sniadech v. Family Finance Corporation*[194] issued in 1969. In numerous opinions issued after *Sniadech*, the Supreme Court continued to develop and refine requirements of procedural due process in various auxiliary proceedings, including prejudgment garnishment,[195] replevin,[196] and sequestration,[197] as well as administrative proceedings.[198] Although the Supreme Court has not considered the precise requirements of procedural due process in postjudgment garnishment proceedings since its 1924 opinion in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*,[199] an increased level of constitutional protection under such circumstances is justified under circumstances involving state and federal exemption statutes.[200]

The state court's order freezing bank deposits which were exempt under federal law contributed substantially to the court's opinion in *Jones*.[201] Indiana's bank freeze statute failed to meet the requirements

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189. *Id.* § 28-9-4-2(b).
190. *Id.* § 28-9-4-2.
191. *Id.* § 28-9-4-3(b).
192. *Id.* § 28-9-4-2(a)(2).
193. *Id.* § 28-9-4-2(a)(3).
194. 295 U.S. 337 (1969).
195. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
196. Fuentes v. Shevin, 407 U.S. 67 (1972).
197. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).
198. Matthews v. Eldridge, 424 U.S. 319 (1976).
199. 266 U.S. 285 (1924).
200. Finberg v. Sullivan, 634 F.2d 50, 56-57 (3rd. Cir. 1980).
201. 701 F. Supp. 1414 (S.D. Ind. 1988).

of procedural due process since it did not provide for notice to the garnishee defendant of allowable exemptions or a prompt hearing to identify these funds.[202] Indiana's new Depository Financial Institution Adverse Claims Act[203] addresses the requirements of procedural due process described in *Jones* and identifies a specific procedure for the practitioner to use in post judgment garnishment proceedings. In addition, the Act establishes a sound procedural framework to avoid the harsh and unjust results which occurred under Indiana's prior law. Ultimately, the Act provides adequate safeguards against arbitrary or erroneous seizures, while representing a fair accommodation of the respective interests of debtor and creditor.

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202. 701 F. Supp. at 1420.
203. IND. CODE ANN. §§ 28-9-1-1 to -5-3 (West Supp. 1989).