# RECENT DEVELOPMENTS

## NONPOSSESSORY PREJUDGMENT ATTACHMENTS OF REAL AND PERSONAL PROPERTY IN VERMONT

When a creditor, by replevin[1] or attachment,[2] seeks to take physical possession of a debtor's property or to take over the use of that property, the courts have generally held that unless there are extraordinary circumstances,[3] the due process protections of notice and hearing must be afforded the debtor before the deprivation.[4] Although it is unsettled as to whether due process mandates these procedural protections in nonpossessory prejudgment attachments,[5] the Vermont General Assembly has recently enacted a statute requiring that such protections be afforded the debtor prior to the

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1. In Fuentes v. Shevin, 407 U.S. 67, 79 (1972), replevin was defined as "the seizure of property before a final judgment . . . most commonly used by creditors to seize goods allegedly wrongfully detained."

2. In Wilder v. Inter-Island Steam Navigation Co., 211 U.S. 239, 245-46 (1908), attachment was defined as "a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event the debt shall be established."

3. Prior notice and hearing are not necessary if the following factors are present: (1) the seizure is necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; (3) the person exercising the power is a government official responsible for determining under the standards of a narrowly drawn statute that it was necessary to exercise that power in that instance. Fuentes v. Shevin, 407 U.S. 67, 91 (1972). For an in-depth discussion of extraordinary circumstances, see Kay & Lubin, *Making Sense Of The Prejudgment Seizure Cases,* 64 Ky. L.J. 705 (1976). The court in Briere v. Agway, Inc., 425 F. Supp. 654, 660 (D. Vt. 1977), specifically found that it was not a case involving an "extraordinary situation."

4. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I. 1972), *aff'd sub nom.* Georges v. McClellan, 409 U.S. 1120 (1973).

5. *Compare* United States General, Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976); Terranova v. AVCO Financial Services, Inc., 396 F. Supp. 1402 (D. Vt. 1975); Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Bay State Harness Horse Racing and Breeding Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four N. State St. Corp., 360 F. Supp. 933 (D.N.H. 1973); *and* Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973); *with* Henson v. Weyerhaeuser Co., 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); *and* Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974). These cases concerned the nonpossessory prejudgment attachment of real property.

issuance of a nonpossessory writ of attachment.[6] This note will examine the conflicting views of the Vermont Supreme Court and the Federal District Court in Vermont which led to the enactment of this new statute, and will explain the effect that the statute will have on nonpossessory prejudgment attachments of real and personal property.

Until recently the important decisions concerning nonpossessory attachments involved real property, but in *Briere v. Agway, Inc.*,[7] a three-judge Federal District Court in Vermont[8] extended the mandate of prior notice and hearing to nonpossessory prejudgment attachments of personal property. The Brieres were owners of a dairy farm in the Town of Cambridge, Vermont. In September of 1975 they decided to sell their personal property at a farm auction. The day before the auction, Agway filed suit in Vermont Superior Court against the Brieres and the Rogers.[9] Agway claimed that the Brieres were liable for the purchase price of grain and other farm supplies which had been sold to the Rogers. The Rogers, the Brieres' daughter and son-in-law, were leasing the dairy farm from the Brieres when the purchases from Agway were made. The supplies, which had not been paid for, were no longer available to creditor Agway because they had been consumed in the dairy farm operation. Consequently, as a means of preserving assets for a possible judgment in state court, Agway sought a writ of attachment on personal property of the Brieres which was unrelated to the purchases of the Rogers. A writ was obtained in an *ex-parte* proceeding as was then permitted by Vermont statutory procedure;[10] there had

6. Act of Apr. 1, 1978, S. 124 § 1 (to be codified in VT. STAT. ANN. tit. 12, § 3295). *See* text accompanying note 45 *infra*.

7. 425 F. Supp. 654 (D. Vt. 1977).

8. The case was brought pursuant to 28 U.S.C. §§ 2281, 2284 (1948). 28 U.S.C. § 2281 was repealed, effective August 12, 1976. The *Agway* case was brought before the effective date and was, therefore, not affected by the repeal.

9. The question of liability to Agway, which does not affect the constitutional issue discussed in this paper, will be decided in Vermont state court. Agway v. Rogers, C-86-75 Lc (Nov. 17, 1977), *appeal docketed*, No. 342-77 (Vt. Sup. Ct. Dec. 16, 1977).

10. VT. R. CIV. P. 4.1(b)(1) (Cum. Supp. 1977), provided in part that: "[A] writ of attachment of real estate or of personal property where such property is not to be removed or taken into possession, shall be filled out by the plaintiff's attorney, as provided in subsection (c) of this rule." Rule 4.1(b)(1) was nullified by the recently enacted statute which requires that writs of attachment be issued only upon the order of a superior or district judge. Act of Apr. 1, 1978, S. 124 § 3 (to be codified in VT. STAT. ANN. tit. 12, § 3295).

not been notice, hearing, or review of Agway's claim by a court prior to the issuance of the writ of attachment. The constable of the Town of Cambridge served the Brieres with a copy of the writ. Notwithstanding the writ of attachment, the Brieres continued with their plan to hold the auction. During the auction the constable informed the potential buyers that because of the writ of attachment they would not receive clear title to any property purchased. Nevertheless, the sale proceeded. The Brieres subsequently claimed that as a result of the announcement they did not obtain full value for the personal property sold. They sued Agway in federal district court on the grounds that the announcement of the attachment, which resulted from the writ of attachment being issued without due process safeguards, was a denial of their constitutional right to alienate property for full market value.[11]

At the core of the Brieres' argument that prior notice and hearing are required by due process before a party may secure a nonpossessory prejudgment attachment of personal property was the United States Supreme Court's decision in *Fuentes v. Shevin.*[12] *Fuentes* was the first major prejudgment attachment case considered by the Supreme Court. In that case, the Court invalidated Florida and Pennsylvania statutes which permitted creditors to repossess personal property without prior notice and hearing. *Fuentes* was cited by the Brieres for the proposition that prior notice and hearing must precede any significant taking of property by the state.[13] Although *Fuentes* involved an actual repossession of property—a possessory attachment—the Brieres argued that its holding was controlling in a nonpossessory attachment case under the authority of *Terranova v. AVCO Financial Services, Inc.*[14]

*Terranova,* a 1975 decision by the same court before which the Brieres were arguing, held that the *Fuentes* requirement of prior

11. The Brieres contended, on the authority of Terranova v. AVCO Financial Services, Inc., 396 F. Supp. 1402 (D. Vt. 1975), that a property owner has a constitutional right to sell his property for full market value. It was argued that they had been deprived of this property right because the writ of attachment on their personal property was issued without affording them prior notice and hearing. Brief for Plaintiff at 8, Briere v. Agway, Inc., 425 F. Supp. 654 (D. Vt. 1977).

12. 407 U.S. 67 (1972).

13. *See* Brief for Plaintiff at 4, Briere v. Agway, Inc., 425 F. Supp. 654 (D. Vt. 1977).

14. 396 F. Supp. 1402 (D. Vt. 1975).

notice and hearing should be followed in nonpossessory attachment cases. In *Terranova,* the creditor, without affording the debtor prior notice and hearing, secured a nonpossessory prejudgment attachment of real property. The *Terranova* court expressly recognized that even though nonpossessory attachments involve a somewhat lesser interference with property rights, they constitute a cognizable interference with such rights and should therefore be considered significant takings of property under *Fuentes.*[15] By holding that a nonpossessory attachment was a significant taking, the court in *Terranova* extended the *Fuentes* requirement of prior notice and hearing from possessory attachments to nonpossessory attachments of real estate.

Despite the fact that *Terranova* had involved a nonpossessory attachment of real property, the Brieres contended that its rule was applicable to nonpossessory attachments of personal property. To support this contention, the Brieres relied on the United States Supreme Court's most recent full opinion in the area of prejudgment attachments, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[16] In *North Georgia Finishing* the debtor, in accordance with a Georgia garnishment statute, was deprived of the use of a sizable bank account. The debtor was not afforded notice and hearing prior to the seizure. The Supreme Court, in striking down the statute as unconstitutional, was not swayed by the argument that the type of property seized should affect whether due process attaches. The Court stated that "[w]e 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."[17]

The argument relied upon by defendant Agway to counter the Brieres' contentions was based primarily on the United States Supreme Court's decision in *Mitchell v. W.T. Grant Co.*[18] In *Mitchell,* which involved an actual seizure of goods, the Supreme Court up-

15. *Id.* at 1406.

16. 419 U.S. 601 (1975).

17. *Id.* at 608, *quoted in* Terranova v. AVCO Financial Services, Inc., 396 F. Supp. at 1406, and in Briere v. Agway, 425 F. Supp. at 659. A contrary judicial interpretation of the quoted language can be found in First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 480, 549 P.2d 257, 260 (1976), *vacated and remanded on other grounds,* 113 Ariz. 572, 558 P.2d 917 (1976).

18. 416 U.S. 600 (1974).

held a Louisiana prejudgment attachment statute, though it did not require prior notice and hearing. Unlike the Florida and Pennsylvania statutes struck down in *Fuentes* and the Georgia garnishment statute which was subsequently invalidated in *North Georgia Finishing,* the Louisiana sequestration procedure protected the debtor to such an extent that the court found " 'mere postponement of the judicial enquiry [into property rights] is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate.' "[19] Agway argued that the Vermont nonpossessory prejudgment attachment procedure, as the Louisiana sequestration statute in *Mitchell,* did not offend due process by disregarding prior notice and postponement of the hearing until after the attachment because it afforded the debtor adequate post-seizure protection.[20]

An argument that was not raised by defendant Agway, but was addressed by the *Agway* court, related to the United States Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*[21] In that case the creditor secured a lien on the debtor's mobile home park pursuant to the Arizona mechanics' and materialmen's lien statute even though the debtor was not afforded prior notice and hearing. While the lien was in effect, the debtor remained in possession of the property; the debtor's use of the property was not hindered, and he retained the right to sell the property.[22] The situation in *Terranova,* a crucial case in the Brieres' argument, was similar. The debtor in *Terranova* also retained possession, use of, and the right to sell his property while under attachment. In fact, the attachment procedure in *Terranova* had an effect on real property that was constitutionally indistinguishable from the effect of the mechanics' and materialmen's lien in *Spielman-Fond.*[23] Con-

19. *Id.* at 611 (quoting Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931)).

20. Under the Vermont rule the defendant whose property has been attached without prior notice or a hearing has a right to a post-attachment hearing at which the plaintiff must demonstrate a reasonable likelihood that he will recover judgment. VT. R. CIV. P. 4.1(e)(1) (Cum. Supp. 1977). A judge may discharge an attachment of personal property upon motion of the defendant and a hearing if the encumbrance will cause the defendant undue hardship. *Id.* Rule 4.1(e)(2). The attachment may be completely dissolved if the defendant posts a bond. *Id.*

21. 379 F. Supp. 997 (D. Ariz. 1973), *aff'd,* 417 U.S. 901 (1974).

22. *Id.* at 998-99.

23. In First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 480, 549 P.2d 257, 260 (1976),

trary to the court's holding in *Terranova,* however, the Arizona Federal District Court reasoned that the mechanics' and materialmen's lien on real property did not amount to a significant taking of property. The Arizona court found that *Fuentes* was not controlling in this situation because its rule applied only to significant takings of property, in other words, possessory attachments. The *Agway* court recognized that defendant Agway could have argued that the Supreme Court's summary affirmance of *Spielman-Fond* tacitly limited *Fuentes* to possessory attachment cases. The *Agway* court also realized that if the *Fuentes* rule were limited to possessory attachment cases by the Supreme Court in *Spielman-Fond* then *Terranova,* which was based on *Fuentes,* would be of questionable validity. If defendant Agway had contended under *Spielman-Fond* that nonpossessory attachments were not significant takings, and therefore prior notice and hearing were unnecessary, then its argument for the overruling of *Terranova* might have been more plausible.

Defendant Agway did maintain, however, that even if the federal district court were unwilling to overrule its decision in *Terranova* it ought to limit *Terranova* to nonpossessory attachments of real property. Agway argued that personalty is distinguishable from real property because personal property is more easily transferred, concealed, destroyed, or sold to the detriment of a creditor.[24] The movable nature of personalty makes it necessary for the creditor to act swiftly when proceeding to attach such property. Agway reasoned that because of the creditor's legitimate interest in expeditiously securing a writ of attachment and in light of the debtor's ability to transfer, conceal, or destroy the property, the requirements of prior notice and hearing should not apply in nonpossessory attachments of personal property.[25]

The Federal District Court in Vermont was not persuaded by Agway's arguments, and held that the nonpossessory prejudgment

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*vacated and remanded on other grounds,* 113 Ariz. 572, 558 P.2d 917 (1976), the court held that "[t]he Arizona prejudgment attachment procedure has an effect on real property that is constitutionally indistinguishable from the effect of the mechanics' and materialmen's lien procedure challenged in *Spielman-Fond.*"

24. This argument was used by the creditor in Mitchell v. W.T. Grant Co., 416 U.S. 600, 608-09 (1974).

25. Brief for Defendant at 3, Briere v. Agway, Inc., 425 F. Supp. 654 (D. Vt. 1977).

attachment of personal property without prior notice and hearing was a violation of the due process clause of the fourteenth amendment. Judge Coffrin, writing for the court, acknowledged that *Mitchell* and *Spielman-Fond* might have been authority for the position that the Vermont nonpossessory prejudgment attachment statute was valid.[26] The court, however, found that both were distinguishable on the theory that the creditors in *Spielman-Fond* and *Mitchell,* unlike creditor Agway, had a pre-existing right or interest in the attached property.[27] Another distinguishing factor was the difference between the statutes interpreted in *Spielman-Fond* and *Mitchell,* and the statute in *Agway.* Although the *Agway* court's opinion did not contain a detailed statutory analysis, the court concluded that Rule 4.1 of the Vermont Rules of Civil Procedure was less protective of a debtor's interests than either the Arizona statute upheld in *Spielman-Fond*[28] or the Louisiana prejudgment attachment procedure upheld in *Mitchell,* and was therefore unconstitutional.[29]

In deciding whether the Vermont rule afforded the debtor adequate post-seizure protection, the *Agway* court, in following its

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26. 425 F. Supp. 654, 660 (D. Vt. 1977). The court noted that in *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975), the constitutionality of a Maine nonpossessory attachment statute, Rule 4A of the Maine Rules of Civil Procedure, substantially similar to Rule 4.1 of the Vermont Rules of Civil Procedure, was upheld on the authority of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd,* 417 U.S. 901 (1974).

27. 425 F. Supp. 654, 661 (1977). In Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd,* 417 U.S. 901 (1974), the pre-existing interest in the debtor's property was the labor and materials supplied. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the creditor's pre-existing interest in the debtor's property was a vendor's lien.

The court in *Agway* indicated that the extent of the creditor's interest in the property sought to be attached "is one of the several factors that are weighed in determining the extent of the process that is due." Briere v. Agway, Inc., 425 F. Supp. at 661.

28. 425 F. Supp. at 660 n.21 (1977).

29. In reaching its conclusion as to the constitutionality of the Vermont rule, the *Agway* court in discussing the New York prejudgment attachment statute challenged in Carey v. Sugar, 425 U.S. 73 (1976), and the Louisiana statute in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) stated:

> The procedures provide that the order of attachment must issue from a judge based on an affidavit or other written evidence of the debt and after an undertaking is given by the plaintiff . . . . Vermont's statute has no such protections . . . . [N]o conceivable interpretation of [VT. R. CIV. P. 4.1(e)] or the Rule as a whole will remedy its constitutional infirmities.

425 F. Supp. at 658.

*Terranova* decision, was again confronted by the arguably conflicting Supreme Court opinions of *Mitchell* and *North Georgia Finishing.*[30] Both *Mitchell* and *North Georgia Finishing,* like *Fuentes,* involved possessory attachments. As noted above, the Supreme Court in *Mitchell,* focusing on the specific provisions of the Louisiana statute in question, found that the post-seizure safeguards present were so much more protective of the debtor's rights than those provided for in the Florida and Pennsylvania statutes invalidated in *Fuentes,* that prior notice and hearing were unnecessary.[31] Many commentators found that the focus of the *Mitchell* court was unclear because the validated Louisiana statute was not clearly distinguishable from the statutes that were invalidated in *Fuentes.*[32] In fact, Mr. Justice Stewart, dissenting in *Mitchell,*

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30. "In arguing the principles of *North Georgia Finishing, Mitchell, Fuentes,* and *Sniadach,* defendants advance no arguments that we did not consider in *Terranova.* We, therefore, are disposed to follow our former reasoning." Briere v. Agway, Inc., 425 F. Supp. at 659.

For discussions of the conflicting Supreme Court opinions of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc., 419 U.S. 601 (1975), see Note, *Specifying the Procedure Required by Due Process: Towards Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510, 1513-14 (1975); Note, *The Evolving Definitions of Procedural Due Process on Debtor-Creditor Relations: From Sniadach to North Georgia Finishing,* 8 LOY. L.A.L. REV. 339, 340, 361 (1975); Note, *A Confusing Course Made More Confusing: The Supreme Court, Due Process and Summary Creditor Remedies,* 70 NW. U.L. REV. 331, 344-51 (1976); Note, *North Georgia Finishing, Inc. v. Di-Chem, Inc.: Prejudgment Due Process Rights Redefined,* 48 TEMP. L.Q. 1013, 1016-17, 1020 (1975).

31. The safeguards present in the Louisiana statute that were not afforded by the Florida and Pennsylvania statutes invalidated in *Fuentes* were outlined by Mr. Justice Stewart as follows:

> (1) the plaintiff who seeks the seizure of the property must file an affidavit stating "specific facts" that justify the sequestration; (2) the state official who issues the writ of sequestration is a judge instead of a clerk of the court; (3) the issues that govern the plaintiff's right to sequestration are limited to "the existence of a vendor's lien and the issue of default" and "[t]here is thus far less danger here that seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing."

Mitchell v. W.T. Grant Co., 416 U.S. 600, 631 (1974) (Stewart, J., dissenting) (quoting the majority).

32. *See, e.g.,* Steinheimer, *Address—Summary Prejudgment Creditor's Remedies and Due Process of Law: Continuing Uncertainty after Mitchell v. W.T. Grant Company,* 32 WASH. & LEE L. REV. 79, 91 (1975); Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach to North Georgia Finishing,* 8 LOY. L.A.L. REV. 339, 347-55 (1975); Note, *A Confusing Course Made More Confusing: The Supreme Court, Due Process, and Summary Creditor Remedies,* 70 NW. U.L. REV. 331, 342-43 (1975); Note, *Pre-Judgment Seizures and the Due Process Clause: North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 29 SW. L.J. 660, 664-68 (1975).

thought that *Fuentes* had been overruled by the majority.[33] The fears of Stewart and the commentators were eased, but their confusion was enhanced, by the Supreme Court's next attachment decision, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[34] In that case the Court found that the post-seizure safeguards in the Georgia statute were markedly less protective of debtors than those in the Louisiana statute in *Mitchell.* Therefore, the Court held that the reasoning in *Fuentes* was controlling and that the Georgia statute was unconstitutional. Again, observers found that the Supreme Court's distinction between the valid and invalid statutes was less than obvious, leaving unanswered the question of when due process protections in prejudgment attachment cases are required.[35]

Although there was confusion as to when due process protections attached in possessory cases, the *Agway* court emphatically affirmed its prior holding in *Terranova,* re-expressing its belief that the due process safeguards of prior notice and hearing must be provided in nonpossessory as well as possessory attachment cases.[36] More importantly, the court held for the first time that notice and hearing must be afforded a debtor before a creditor can secure a nonpossessory prejudgment attachment of personal property. The *Agway* decision thus broadens *Terranova* by extending the *Terranova* rule from realty to personalty. *Agway* is a strong pro-debtor statement securing for debtors due process safeguards in a situation where the creditor was traditionally favored because of the need for prompt action when attaching personal property.

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33. 416 U.S. 600, 635 (1974) (Stewart, J., dissenting).

34. 419 U.S. 601 (1975).

35. *See* Note, *Pre-Judgment Seizures and the Due Process Clause: North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 29 Sw. L.J. 660, 661-69 (1975); Note, *North Georgia Finishing, Inc. v. Di-Chem, Inc.: Pre-Judgment Due Process Rights Redefined,* 48 Temp. L.Q. 1013, 1020 (1975).

36. Briere v. Agway, Inc., 425 F. Supp. 654, 659 (D. Vt. 1977). Arguably, the *Agway* and *Terranova* decisions are contrary to the trend in nonpossessory attachment cases. Since *Spielman-Fond* and *Mitchell* have been decided, the majority of constitutional attacks on nonpossessory attachment statutes that did not provide for prior notice and hearing have failed. *See* Hanson v. Weyerhaeuser Co., 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974); First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257 (1976), *vacated and remanded on other grounds,* 113 Ariz. 572, 558 P.2d 917 (1976); Bustell v. Bustell, ___ Mont. ___, 555 P.2d 722 (1976).

The facts in *Agway* justified the court's finding that the Brieres were entitled to the due process protections of prior notice and hearing. It is clear that the writ of attachment, secured without protecting the interests of the Brieres, had an adverse effect on the sale of personal property at the farm auction. The loss of full value for the personal property sold was a deprivation of a property right.[37] If the Brieres had been afforded notice and hearing prior to the issuance of the writ of attachment, the monetary setback to them would probably have been prevented. The fact that creditor Agway did not have any pre-existing right or interest in the attached property of the Brieres was crucial because it permitted the *Agway* court to distinguish both *Spielman-Fond* and *Mitchell.* Those cases had been used by other courts as authority for the validation of nonpossessory prejudgment attachment statutes that lacked the due process safeguards of prior notice and hearing.[38] In light of the particular fact pattern in *Agway,* however, and the failure of the United States Supreme Court to give clear guidance in this area as evidenced by the conflicting decisions regarding the constitutionality of nonpossessory attachment statutes in the federal circuit and district courts, the *Agway* court's holding was appropriately limited to the parties at bar.[39]

The *Terranova* and *Agway* decisions gave rise to a controversy between the Vermont Supreme Court and the Federal District Court in Vermont regarding the constitutionality of Rule 4.1. The court in *Terranova* remarked that because "constitutional exegesis in the area of prejudgment remedies has run a somewhat uncertain course . . . we cannot be certain that our decision will be upheld."[40] Despite uncertainty about the validity of its decision, the federal district court in *Terranova* suggested that the Vermont Supreme Court remedy the constitutional infirmities of Rule 4.1 of the Ver-

37. 425 F. Supp. at 659.

38. *See generally* Hanson v. Weyerhaeuser Co., 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974); First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257 (1976), *vacated and remanded on other grounds,* 113 Ariz. 572, 558 P.2d 917 (1976); Bustell v. Bustell, ___ Mont. ___, 555 P.2d 722 (1976).

39. 425 F. Supp. at 661.

40. 396 F. Supp. 1402, 1407 (D. Vt. 1975).

mont Rules of Civil Procedure as it applied to real property by means of its broad rule-amending power.[41] In response to this suggestion, the Advisory Committee on the Rules of Civil Procedure submitted a proposed change of Rule 4.1 to the Vermont Supreme Court. Rule 4.1 would have been changed to conform with the federal district court7s holding in *Terranova.* The Vermont Supreme Court, however, unanimously rejected the proposal.[42] Notwithstanding the refusal of the Vermont Supreme Court to amend Rule 4.1, the federal district court again concluded in its subsequent *Agway* decision that the rule was unconstitutional under the due process clause as it applied to personal property. The federal district court's decisions in *Terranova* and *Agway,* and the Vermont Supreme Court's refusal to amend Rule 4.1 to conform with those decisions, resulted in considerable confusion in Vermont as to whether judicial approval was required prior to the issuance of nonpossessory prejudgment attachments of personalty and realty.[43]

A recent enactment by the Vermont General Assembly[44] alleviates this confusion with respect to nonpossessory prejudgment attachments by providing that:

> A writ of attachment of real estate and personal property . . . shall issue only upon the order of a superior or district judge approving attachment in the same manner as is provided by the Vermont Rules of Civil Procedure for attachment of personal property that is to be removed or taken into possession.[45]

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41. *Id.*

42. In a letter from Albert W. Barney, Chief Justice of the Vermont Supreme Court, to Douglas Richards, Chairman of the Advisory Committee on the Rules of Civil Procedure, the Chief Justice wrote:

> This is to advise you that the members of the Supreme Court have considered the recommendations of the Advisory Committee on the Rules of Civil Procedure relating to Rules 4.1 and 4.2 concerning the attaching of real property which you forwarded to us on March 29, 1976.
>
> After thorough discussion, the proposals have been unanimously rejected by the Court.

Letter from Chief Justice Albert W. Barney to Douglas Richards, Esq. (Apr. 14, 1976).

43. *See Hearings on Attachment Necessary, Judge States,* Rutland Daily Herald, Mar. 10, 1978, at 7, col. 1 ("[J]udges have disagreed on whether to require a hearing before real property can be attached.").

44. Act of Apr. 1, 1978, S. 124 (to be codified in VT. STAT. ANN. tit. 12, § 3295).

45. *Id.* § 1.

The Vermont legislature has thus mandated that the due process protections of notice and judicial approval, usually required before the issuance of a writ of possessory attachment, must also be afforded debtors before a nonpossessory writ of attachment of personal or real property will be issued.[46]

## CONCLUSION

The United States Supreme Court has never clearly held that due process procedural safeguards of notice and hearing are required in nonpossessory attachment cases. The Vermont Supreme Court, by refusing to amend Rule 4.1 to conform with the *Terranova* and *Agway* decisions, rejected the notion that prior notice and judicial approval were constitutional prerequisites for securing a nonpossessory attachment. Nevertheless, the Vermont General Assembly has determined that the due process safeguards must be provided before a writ of attachment can be secured by a creditor.

*William T. Koch, Jr.*

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46. Writs of attachment will only issue after five days' notice to the debtor and a hearing in which the party seeking an attachment has shown a reasonable likelihood that he will recover judgment. VT. R. CIV. P. 4.1(b)(2)&(3) (Cum. Supp. 1977).