

TRUSTEE PROCESS AGAINST EARNINGS IN VERMONT

INTRODUCTION

Trustee process,¹ referred to in many states as garnishment,² is a statutory remedy providing for the collection of debts.³ It is a form of attachment⁴ that enables the plaintiff-creditor to reach property of the defendant-debtor that is held by a third person.⁵ The third person in this scenario is the trustee.

This note is concerned only with trustee process against earnings in Vermont. Although trustee process may be used to attach other forms of property,⁶ the focus here is on earnings in light of

1. The reason for the use of the term "trustee process" in Vermont is not clear. The earliest statute dealing with the subject, Laws of Vermont ch. 55 (1797), was interpreted as applying "first, when the debtor keeps concealed, second, when he has absconded or removed, third, where he never resided within the state." *Leach v. Cook*, 10 Vt. 239, 240 (1838). The *Leach* court described trustee process as "similar to the process of foreign attachment by the custom of London" in that the "process is given in this state only in the absence of the debtor." *Id.* at 239. The court noted, however, that in other states trustee process could be issued whether the debtor was absent from or present in the state and "in those states it is called the trustee process, as indeed, it could not, with any propriety be called foreign attachment." *Id.* at 240. Vermont's trustee process originally did not lie if the debtor resided within the state. If he so resided, normal remedies were available to his creditor. *Baxter v. Vincent*, 6 Vt. 614, 621 (1834).

The *Leach* court's explanation for the use of the term "trustee process" is not very enlightening. Perhaps the term's use reflects the influence the older New England states had on Vermont in its infancy. Maine, Massachusetts, and New Hampshire also refer to the procedure as trustee process. See ME. REV. STAT. ANN. tit. 14, §§ 2601-2910 (1980); MASS. ANN. LAWS ch. 246, §§ 1-83 (Michie/Law. Co-op 1974 & Cum. Supp. 1979); N.H. REV. STAT. ANN. §§ 512.1-.50 (1955).

2. See, e.g., ALA. CODE § 6-6-370 (1975); ARIZ. REV. STAT. ANN. § 12-1571 (Supp. 1957-1979); ARK. STAT. ANN. § 31-102 (1947); COLO. REV. STAT. § 5-5-105(b) (1973); see *Shell Oil Co. v. Milne*, 127 Vt. 249, 250, 246 A.2d 837, 838 (1968).

3. *Shell Oil Co. v. Milne*, 127 Vt. 249, 250, 246 A.2d 837, 838 (1968).

4. C. DRAKE, LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES § 450 (7th ed. 1891). Attachment is a possessory or nonpossessory proceeding against a defendant's real estate, goods, chattels, or other property. See VT. R. CIV. P. 4.1(a) (1971 & Cum. Supp. 1979); VT. STAT. ANN. tit. 12, §§ 3251-3410 (1973 & Cum. Supp. 1979). The property is attached and held to satisfy judgment which the plaintiff may recover. It differs from trustee process in that the property attached is in the possession of the defendant and not in the hands of a third person.

5. *Shell Oil Co. v. Milne*, 127 Vt. 249, 251, 246 A.2d 837, 838 (1968).

6. See VT. R. CIV. P. 4.2 (1971 & Cum. Supp. 1979). Trustee process may be used to

their characterization as "a specialized type of property presenting distinct problems in our economic system."⁷ In many cases wages may be necessary for the very existence of the debtor.⁸ Vermont, by statute and rule, has struggled to balance the critical importance of wages, vis-à-vis continued survival, against the need to provide creditors with a viable means for enforcing their rights. The extent to which Vermont has succeeded in this attempt will be explored in the following format.

In Part I the historical development of Vermont's laws on trustee process against earnings is reviewed through 1969, the year the United States Supreme Court decided *Sniadach v. Family Finance Corp.*⁹ Part II is a discussion of *Sniadach* and the wage garnishment provisions of the federal Consumer Credit Protection Act (hereinafter the C.C.P.A.).¹⁰ *Sniadach's* holding and the C.C.P.A.'s major provisions are reviewed, as are the basic policy reasons supporting them. Part III covers applicable Vermont rules of civil procedure.¹¹ How Vermont adapted the rules to incorporate the *Sniadach* ruling and the C.C.P.A. restrictions on wage garnishment, as well as the problems inherent in the rules, is also discussed. Part IV is a discussion of Vermont's major statutory provisions,¹² the extent to which they supersede the rules, and the present state of wage garnishment law in Vermont. The note will conclude with a discussion of problems presented by Vermont's present procedure

attach "goods, effects, or credits of the defendant in the hands of a third person for the purpose of securing satisfaction of any judgment for damages and costs which the plaintiff may recover." *Id.* 4.2(a). An order approving the issuance of trustee process against property other than wages can be secured only after notice, hearing, and a finding that there is a reasonable likelihood that plaintiff will recover judgment. *Id.* 4.2(b)(2). An ex parte order may be granted upon a showing of a clear danger that the defendant will withdraw his property from the hands of the trustee and remove or conceal it if he is notified in advance of the trustee process. *Id.* 4.2(b)(2). An ex parte order may also issue if plaintiff can show that there is an immediate danger that the defendant will dissipate, damage, destroy, or sell the property if notified of the action, thereby leaving insufficient attachable property to satisfy the judgment. *Id.* 4.2(b)(3).

7. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

8. *Id.*

9. 395 U.S. 337 (1969).

10. 15 U.S.C. §§ 1671-1677 (1976 & Supp. I 1977 & Supp. II 1978).

11. Vt. R. Civ. P. 4.2 (1971 & Cum. Supp. 1979).

12. Vt. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979).

and recommendations for making it a more effective and equitable process.

I. HISTORICAL BACKGROUND

Under the first statute on the subject, enacted in 1797,¹³ trustee process in Vermont applied only to "any person or persons" who had in his possession "any money, goods, chattels, rights or credits of any person who shall have secretly absconded from this state, or who shall keep concealed within the same."¹⁴ The scope of this provision was later expanded to include nonresidents having property within Vermont or having money owed to them by a resident.¹⁵

Under the 1797 statute, trustee process could only issue as a writ of summons against the trustee.¹⁶ A plaintiff could cause a person who had property of the defendant in his possession to be summoned as a trustee of that property for the defendant. The trustee was then required to appear before the court to answer interrogatories under oath as to the defendant's property in his possession at that time.¹⁷ The proceeding against the trustee was not "an original or distinct action. The direct suit . . . [was] between

13. LAWS OF VT. ch. 55 (1797). See also note 1 *supra*.

14. *Id.* § 1.

15. 1830 Vt. Acts No. 7. This provision was amended to include, in addition to absconded or concealed debtors, "any person, residing without this state, [who] shall have any money, goods, chattels, rights or credits to him belonging, with any person or persons in this state." *Id.*

16. LAWS OF VT. ch. 55, § 1 (1797). In 1835, the law was amended to issue also as a writ of attachment against the defendant's property not in the hands of the trustee. 1835 Vt. Acts No. 12, § 1.

The trustee process was originally an attachment of a man's debts, or choses in action, and a summons on him. By the statute of 1835, it is provided that the process may issue to attach his other property along with his debts, that is, to take his choses in possession and in action.

Cleft v. Hosford, 12 Vt. 296, 299 (1840).

In 1850, "the provision specifying what the writ should authorize, was omitted, and the terms were left general, to the effect that all actions founded on contract might be commenced by trustee process." *Divoll v. Nichols*, 70 Vt. 537, 539 (1898); VT. COMP. STAT. tit. 13, ch. 32, § 1 (1850).

17. LAWS OF VT. ch. 55, § 4 (1797).

the creditor and the principal debtor.”¹⁸ The action against the trustee was “but a species of attachment,” incidental to the direct suit and dependent upon it.¹⁹

If, upon interrogation, it were found that the trustee did not have any of the defendant’s property in his possession, judgment was rendered in the trustee’s favor for any costs.²⁰ If it were found otherwise, a record of any of the defendant’s goods in the trustee’s possession was made.²¹ The trustee thereby became personally liable to the plaintiff up to the value of the judgment recovered against the defendant.²² The trustee became, therefore, a surety for the defendant’s debt with certain limitations. If the property’s value were less than the amount of the judgment, the trustee was liable only for the value of the property.²³ Execution would issue “against the goods and chattels of the said principal debtor in the possession of the said trustee or trustees” when, and if, judgment was recovered.²⁴

The writ of summons was also served on the principal debtor. If it appeared that the debtor had been notified but failed to appear before the court, “judgment . . . [was] rendered against him for such sum in debt or damages, as the case may be, as the plaintiff . . . prove[d] to be justly due.”²⁵ If the absconded, concealed, or absent debtor did appear at any time before judgment, he was

18. *Baxter v. Vincent*, 6 Vt. 614, 620 (1834).

19. *Id.*

20. LAWS OF VT. ch. 55, § 4 (1797).

21. *Id.* § 5.

22. *Id.*

23. *Id.* The plaintiff acquired a lien upon the property in the trustee’s possession through trustee process. C. DRAKE, *supra* note 4, § 453. This lien, termed an “inchoate lien” in Vermont, Wilder v. Weatherhead, 32 Vt. 765, 766 (1860), gave the plaintiff “the right to hold the garnishee personally liable for [the property] or its value, and to restrain the garnishee from paying his debt to the defendant.” C. DRAKE, *supra* note 4, § 453. In order to perfect that right, the plaintiff had to obtain a judgment in his favor “against the trustee, as well as against the debtor.” 32 Vt. at 768.

24. LAWS OF VT. ch. 55, § 5 (1797). If the judgment were less than the value of the property held by the trustee, execution would issue against “so much thereof as will answer and satisfy the plaintiff’s legal demand and all costs, in the same manner as if the said debt were the trustee’s own proper debt.” *Id.*

25. *Id.* § 7.

given the opportunity to assert his defenses.²⁶

Since 1856, Vermont's statutes concerning trustee process have exempted certain of the defendant's property from garnishment.²⁷ In 1856, a provision was added to the statutes that provided that Vermont's trustee process statutes were "not to be construed . . . to include any wages or compensation due for work and labor performed by the principal debtor in person or by his wife or any minor child of such debtor, after the service of the trustee process upon the trustee."²⁸ This exemption of all wages earned after the trustee process was served remained unchanged until the present statutes became effective.²⁹ In the meantime, the statutes were amended to apply in all actions founded on contract and not only in the case of an absconded, absent, or concealed debtor.³⁰

In 1912, ten dollars of the principal debtor's wages and compensation for labor performed prior to the service of trustee process were exempted from trustee process.³¹ Although a plaintiff-creditor could cause trustee process to issue against the debtor's wages, the employer-trustee was only required to withhold and pay the creditor any amount that was earned by the debtor prior to the service of process and that exceeded ten dollars. The exemption from trustee process for wages earned by the debtor's wife or minor child remained intact.³²

The statute was amended in 1951 to subject to trustee process only the amount of wages due in excess of twenty-five dollars or one-half of the wages earned prior to the service of process upon the employer, whichever was less.³³ By further amendment in 1966, the plaintiff could only garnish wages "due in excess of \$30.00 for

26. *Id.*

27. 1856 Vt. Acts Nos. 16, 17.

28. *Id.* No. 16. Number 17 of the same act exempted "any moneys due or belonging to the debtor as his debenture as a member or officer of the general assembly or as a juror attending any county court." *Id.* No. 17.

29. VT. STAT. ANN. tit. 12, § 3170(c) (Cum. Supp. 1979).

30. VT. STAT. ch. 69, § 1304 (1894). See note 14 *supra*.

31. 1912 Vt. Acts No. 92, § 1666.

32. *Id.* See text accompanying note 28 *supra*.

33. 1951 Vt. Acts No. 34.

each week or part thereof for work or labor performed; and also . . . one-half of all wages or compensation due in excess of \$60.00 for each week or part thereof."³⁴ This effectively provided a fifty-fifty split between the plaintiff and the defendant if the defendant earned over sixty dollars during the week in question.

Although the amount of wages that could be subjected to trustee process changed over the years, the procedure itself remained essentially the same. Service of process upon the trustee-employer was effectively an attachment of the nonexempt wages due the defendant.³⁵ The wages were then held to satisfy a final judgment in the cause between the plaintiff and the defendant.³⁶ Prior to a hearing on the merits, the debtor had no opportunity to appear before the court and challenge the propriety or grounds for the attachment. "Until, and unless the plaintiff obtained a judgment, defendant's wages in the hands of the trustee were immune from the plaintiff's grasp,"³⁷ but they were also unavailable to the defendant. In *Sniadach v. Family Finance Corp.*,³⁸ the United States Supreme Court found a similar process used in Wisconsin denied debtors due process of the laws under the fourteenth amendment.³⁹

II. *Sniadach* AND THE CONSUMER CREDIT PROTECTION ACT

One year before the *Sniadach* decision, the Vermont Supreme Court upheld the constitutionality of prejudgment trustee process against wages in *Shell Oil Co. v. Milne*.⁴⁰ The court held that trustee process against wages was not an unconstitutional deprivation of property.⁴¹ The plaintiff could not reach the wages held by the

34. 1966 Vt. Acts No. 8 (Spec. Sess.) (repealed by 1971 Vt. Acts No. 185 (Adj. Sess.), now covered by VT. STAT. ANN. tit. 12, § 3170 (Cum. Supp. 1979) and Vt. R. Civ. P. 4.2(j)(2) (1971 & Cum. Supp. 1979)).

35. VT. STAT. ANN. tit. 12, § 3013 (1973) (superseded in part by Vt. R. Civ. P. 4.2(a) (1971)).

36. *Id.*

37. *Shell Oil Co. v. Milne*, 127 Vt. 249, 251, 246 A.2d 837, 839 (1968).

38. 395 U.S. 337 (1969).

39. *Id.* at 342.

40. 127 Vt. 249, 251, 246 A.2d 837, 838 (1968).

41. *Id.* at 251, 246 A.2d at 839.

trustee until, and unless, he obtained a final judgment.⁴² Thus, the court reasoned that there was no deprivation of property without due process because "the wages in question were merely detained temporarily pending the final outcome of the case."⁴³

In 1969, the United States Supreme Court decided *Sniadach* which effectively overruled *Shell Oil Co.* The *Sniadach* Court held that Wisconsin's statute, providing for ex parte garnishment of wages prior to notice and an opportunity to be heard, was a denial of procedural due process.⁴⁴ Recognizing that the wages were merely frozen and not paid over to the creditor until the final outcome of the suit, the Court nonetheless held that "in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise."⁴⁵

The *Sniadach* decision was based, in part, on certain policy considerations. These same considerations had been raised by Congress in its consideration and enactment of the federal Consumer Credit Protection Act⁴⁶ one year prior to *Sniadach*.

Both the Supreme Court and Congress were concerned with the low-income, unsophisticated debtor who found himself in a situation where a large portion of his wages was garnished by one of his creditors.⁴⁷ At the time, some states allowed garnishment of fifty percent of the defendant's wages,⁴⁸ while others merely provided a maximum dollar exemption.⁴⁹ In states with harsher rules, a debtor could be forced into personal bankruptcy. If a large portion of his wages were garnished, the amount left to the wage

42. *Id.*

43. *Id.*

44. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969).

45. *Id.* at 339.

46. 15 U.S.C. §§ 1671-1677 (1976 & Supp. I 1977 & Supp. II 1978).

47. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42 (1969); 114 CONG. REC. 1831-42 (1968).

48. See, e.g., ARIZ. REV. STAT. ANN. §§ 12-1594, 33-1126 (1956) (current version at ARIZ. REV. STAT. ANN. § 33-1126 (Supp. 1979)); IDAHO CODE ANN. § 11-205 (1948) (current version at IDAHO CODE ANN. § 11-207 (1979)); WYO. STAT. § 1-17-411 (1977).

49. See, e.g., ALASKA STAT. § 09.35.080(1) (1973) (repealed 1974); MASS. ANN. LAWS ch. 246, § 28 (Michie/Law. Co-op 1974).

earner could have been, in some cases, insufficient to support him and his family. Congress heard testimony about an apparent correlation between the severity of a state's garnishment laws and the number of personal bankruptcies in that state.⁵⁰ Arguably, the harsher the laws, the more personal bankruptcies.⁵¹

Also considered by the Supreme Court and Congress was the danger of nonmeritorious or fraudulent claims.⁵² Without affording the defendant procedural due process prior to garnishment, the defendant could lose the use of wages which might later be found to be rightfully his. This temporary loss could be enough to cause the defendant to suffer severe economic hardship, or bankruptcy, on an unfounded claim.⁵³

Thus, concern for the unsophisticated debtor and potential bankruptcies or frivolous claims that may result from *ex parte* garnishments prompted the Supreme Court in *Sniadach* to require notice and an opportunity to be heard as prerequisites for wage garnishment.⁵⁴ Affording debtors this degree of due process may insulate them from the economic hardships of unwarranted or overly burdensome garnishments. Appearance before a court will, arguably, discourage unmeritorious or vexatious garnishments and give the court an opportunity to determine the proper amount to be garnished.⁵⁵

As noted, these same considerations persuaded the Congress to enact the federal Consumer Credit Protection Act.⁵⁶ The C.C.P.A. places restrictions on wage garnishment by setting a maximum allowable percentage of the debtor's wages that may be garnished, and by defining the character of "earnings" subject to garnishment.⁵⁷ The actual procedure to be followed in garnishment

50. 114 CONG. REC. 1833-34 (1968).

51. *Id.* at 1834.

52. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-41 (1969); 114 CONG. REC. 1831-50 (1968).

53. 395 U.S. at 340-41; 114 CONG. REC. at 1831-50.

54. 395 U.S. at 342.

55. *See* VT. STAT. ANN. tit. 12, § 3168 (Cum. Supp. 1979).

56. 15 U.S.C. §§ 1671-1677 (1976 & Supp. I 1977 & Supp. II 1978).

57. *Id.* §§ 1672, 1673 (1976 & Supp. II 1978).

actions was left to the states.⁵⁸ The C.C.P.A. enables the Secretary of Labor to exempt from the Act's provisions "the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title."⁵⁹

The restrictions placed on the amount of earnings⁶⁰ that could be subjected to wage garnishment are set out in the C.C.P.A. as follows:

[T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnish-

58. See *Crane v. Crane*, 417 F. Supp. 38, 40 (E.D. Okla. 1976).

59. 15 U.S.C. § 1675 (Supp. II 1978). The Reporter believed this exemption would be given to Vermont's rules. *Vt. R. Civ. P. 4.2 Reporter's notes* (1971).

60. "Earnings" are defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a) (1976). In determining what constitutes earnings under this definition, any label given the payment is to be ignored and the sole criteria is that the funds "in fact and in a strict sense, represent 'compensation' for 'personal services.'" *Gerry Elson Agency, Inc. v. Muck*, 509 S.W.2d 750, 753 (Mo. Ct. App. 1974).

"Disposable earnings" are defined as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." 15 U.S.C. § 1672(b) (1976). This term has been interpreted to mean wages from which deductions for social security and withholding taxes have been made. *Marshall v. District Court*, 444 F. Supp. 1110, 1115 (E.D. Mich. 1978).

In *Kokoszka v. Belford*, 417 U.S. 642 (1973), the petitioner, a bankrupt, contended that his income tax refund constituted disposable earnings within the meaning of section 1672(b) of the C.C.P.A. because it had its source in wages. Therefore, the petitioner contended, 75% of the refund was exempted by the C.C.P.A. restrictions. The United States Supreme Court, quoting the court of appeals stated that "'earnings' and 'disposable earnings,' as used in 15 U.S.C. §§ 1672, 1673, did not include a tax refund, but were limited to 'periodic payments of compensation and [do] not pertain to every asset that is traceable in some way to such compensation.'" *Id.* at 651 (citations omitted).

The phrase "amounts required by law to be withheld" has been construed as not including court-ordered alimony or child-support payments. *First Nat'l Bank v. Hasty*, 415 F. Supp. 170, 172 (E.D. Mich. 1976). In *Hasty*, the defendant contended that his alimony and child-support payments should have been deducted from his earnings to compute his disposable earnings as he was required by law to pay them. The court disagreed that this was Congress's intent in enacting the C.C.P.A. provisions and stated that Congress really concluded "implicitly, if not explicitly, that 75% of an individual's wages or earnings must be protected to cover his and his family's basic living expenses so as to mitigate the personal bankruptcy problem." *Id.* at 172. See also note 61 *infra* for the exemptions applicable in actions for support and alimony.

ment may not exceed

- (1) 25 per centum of his disposable earnings for that week, or
- (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . in effect at the time the earnings are payable

whichever is less.⁶¹

In light of the *Sniadach* decision, and Congress's willingness to leave development of the actual procedure to be followed in garnishment actions to the several states,⁶² Vermont was forced to take the initiative and develop an appropriate procedure.

After almost 175 years of treating garnishment of wages like any other garnishment,⁶³ Vermont was required to make a drastic change in its wage garnishment procedure. Wages could no longer be attached pending final outcome of the suit between the debtor and creditor⁶⁴ unless the debtor was provided notice and an opportunity to be heard. Nor was the exemption of wages allowed by statute⁶⁵ sufficient to satisfy federal law.

The first attempt at revamping Vermont's procedure was in the adoption of Rule 4.2(j) of the Rules of Civil Procedure.⁶⁶ As noted below, this attempt was not successful due to problems of interpretation and application. Too much protection was given the debtor which precluded creditors from using the wage garnishment

61. 15 U.S.C. § 1673(a) (1976). Section 1673(b) lowers the maximum allowable percentage of earnings that may be used to enforce a support order (child support or alimony) for any person. The maximum amount that may be garnished to enforce a support order is fifty percent of the defendant's weekly disposable earnings if the defendant is supporting a spouse or child other than the one to whom the support order pertains. *Id.* § 1673(2)(A). If the defendant is not supporting additional persons, sixty percent may be garnished. *Id.* § 1673(2)(B). If the defendant is more than twelve weeks in arrears in support payments, these percentages are increased to fifty-five and sixty-five percent respectively. *Id.* § 1673(2).

62. See *Crane v. Crane*, 417 F. Supp. 38 (E.D. Okla. 1976).

63. Vermont treated garnishment of wages the same as garnishment of other property except that it exempted certain percentages of wages from garnishment. See text accompanying notes 27-34 *supra*.

64. See text accompanying notes 40-43 *supra*.

65. See text accompanying note 34 *supra*.

66. Vt. R. Civ. P. 4.2(j) (1971 & Cum. Supp. 1979).

remedy.⁶⁷ Eight years after the adoption of the rules, statutes were enacted in an effort to remedy problems inherent in the rules.⁶⁸ While some problems were corrected, others were created, leaving wage garnishment in Vermont in a questionable state of workability and effectiveness.

III. VERMONT'S RULES OF CIVIL PROCEDURE

As noted, Vermont's first response to *Sniadach* and the C.C.P.A. was to include in its rules of civil procedure Rule 4.2(j) entitled "Trustee Process Against Earnings."⁶⁹ Rule 4.2(j) does not allow trustee process to issue against earnings⁷⁰ "except on a claim

67. See note 81 *infra*.

68. VT. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979).

69. VT. R. CIV. P. 4.2(j) (1971 & Cum. Supp. 1979). Rule 4.2(j) reads in part as follows:

(1) *In General*. No trustee process shall issue against any person for any amount due from such person to the defendant as earnings except on a claim that has first been reduced to judgment.

(2) *Monetary Limitations*. Trustee process against earnings is subject to the following limitations:

(i) Where defendant's weekly disposable earnings are \$92 or less, only such earnings in excess of \$69 may be attached.

(ii) Where defendant's weekly disposable earnings exceed \$92, no more than 25 per cent of such earnings may be attached.

(iv) In no event shall the amounts subject to trustee process under . . . (i) and (ii) of this paragraph exceed the lesser of twenty-five per cent of the defendant's disposable earnings for that week or the amount by which his disposable earnings for that week exceed 30 times the federal minimum hourly wage.

(3) *Procedure*. In connection with the enforcement of a judgment for payment of money, trustee process may be used during a period of 30 days after entry of judgment to attach earnings due the defendant. Subject to the provisions of law and of this subdivision, earnings due the defendant from the trustee as of the time of such attachment, and not subsequently, shall be available for satisfaction of the judgment in the same manner and to the same extent as for other goods and credits of the defendant attached . . . The summons to a trustee for earnings due the defendant shall be issued on request of the judgment creditor by the clerk of the court granting judgment and shall state the date and amount of the judgment. A copy of the summons to a trustee shall be served upon the judgment debtor with the officer's endorsement thereon of the date or dates of service upon the trustee or trustees.

70. Vermont adopted verbatim the C.C.P.A.'s definitions of "earnings" and "disposable earnings" in the Rules. Compare 15 U.S.C. § 1672(a)-(b) with VT. R. CIV. P. 4.2(j)(4) (1971).

that has first been reduced to judgment."⁷¹ This provision protects the debtor from nonmeritorious claims of a creditor because it requires a judgment against the debtor before trustee process may issue against the employer. This rule does not require that the judgment be final before trustee process can issue, as evidenced by Rule 4.2(j)(3). That rule allows for attachment of the debtor's earnings during the thirty-day period after entry of judgment,⁷² the time period usually allowed for appeals.⁷³ Even so, Rule 4.2(j) complies with the *Sniadach* doctrine by affording the debtor notice and a prior hearing before trustee process may issue against his earnings.⁷⁴

The rules of civil procedure adopted the maximum percentage of garnishable earnings that are allowed by the C.C.P.A.⁷⁵ The 1971 version of Rule 4.2(j)(2) allowed garnishment of only that portion of the defendant's weekly disposable earnings in excess of forty-eight dollars if his earnings were sixty-four dollars or less.⁷⁶ If the earnings were greater than sixty-four dollars per week, the plaintiff could garnish only twenty-five percent of those earnings.⁷⁷ The forty-eight dollar figure represented thirty times the federal minimum wage of \$1.60 in 1971.⁷⁸ In 1977, Rule 4.2(j)(2) was amended, and sixty-nine dollars and ninety-two dollars were substituted for forty-eight dollars and sixty-four dollars respectively to reflect changes in the federal minimum hourly wage.⁷⁹ In the same year, a new subsection was added to dispense with the necessity of amending the rules every time the minimum wage was changed and that subsection is substantially the same as section 1673(a) of the C.C.P.A.⁸⁰

71. VT. R. CIV. P. 4.2(j)(i) (1971) (superseded by VT. STAT. ANN. tit. 12, § 3167 (Cum. Supp. 1979)).

72. VT. R. CIV. P. 4.2(j)(3) (1971). See note 69 *supra* for text of the rule.

73. *Id.* 62(a) (Cum. Supp. 1979).

74. *Id.* 4.2 Reporter's notes (1971).

75. *Id.* 4.2(j)(2) (1971 & Cum. Supp. 1979).

76. *Id.* 4.2(j)(2)(i) (1971) (superseded by *id.* 4.2(j)(i) (Cum. Supp. 1979)).

77. *Id.* 4.2(j)(2)(ii) (1971) (superseded by *id.* 4.2(j)(ii) (Cum. Supp. 1979)).

78. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (1966).

79. VT. R. CIV. P. 4.2(j)(i)-(ii) (Reporter's notes to 1977 Amendment) (Cum. Supp. 1979).

80. *Id.* 4.2(j)(iv) (Cum. Supp. 1979). See note 69 *supra* and text accompanying note 58

The actual procedure prescribed by the rules was generally unworkable.⁸¹ Under the rule procedure, the judgment creditor had to request the clerk of the court granting judgment to issue a summons to the trustee for earnings due the defendant.⁸² The summons was served on both the trustee and the defendant.⁸³ The trustee was required to disclose the credits due the defendant within thirty days after service.⁸⁴ Upon disclosure to the court and after further proceedings that may have been necessary to determine questions of fact arising from his disclosure,⁸⁵ the employer could be adjudged trustee on account of money due the defendant.⁸⁶ The court would then determine the amount the employer would be required to pay on the judgment and execution would issue against the money held by him.⁸⁷

Unless the creditor timed the service of process on the employer correctly, the amount attached had the potential of being very small. This is due to the provision in Rule 4.2(j)(3) which states that "earnings due the defendant from the trustee as of the time of such attachment, and not subsequently, shall be available for the satisfaction of the judgment."⁸⁸ Because the employer was

supra.

81. "We do have a trustee process in present law. . . . But it is ineffective. . . . I have never seen it used by a lawyer because it is so cumbersome and expensive." *Proposed Bill on Trustee Process Against Earnings: Hearings on H.189 Before the House Judiciary Comm.*, 55th Biennial Sess. (Feb. 8, 1979) (statement by Stephen Kimbell).

82. Vt. R. Civ. P. 4.2(j)(3) (1971), see note 69 *supra* for text of the rule. Upon receipt of the summons, the trustee was required to disclose "under oath of what cause, if any . . . why execution upon the judgment in the amount of \$___ entered on ___ day . . . for the said plaintiff against the said defendant should not issue against the credits due him from you as earnings to the value of said judgment." *Id.* Form 2(B).

83. *Id.* 4.2(j)(3).

84. *Id.* 4.2(f). See also note 82 *supra*. Upon return of the trustee's disclosure, the proceedings were governed by statute. *Id.* Prior to enactment of the 1979 statutes, VT. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979), the governing provisions were found in *id.* §§ 3060-3166 (1973).

85. VT. STAT. ANN. tit. 12, § 3067 (1973).

86. *Id.* § 3080.

87. *Id.*

88. Vt. R. Civ. P. 4.2(j)(3) (1971). "Such attachment" refers to previous language in the same subsection that states that "trustee process may be used during a period of 30 days after entry of judgment to attach earnings due the defendant." *Id.* The rule is not clear on whether the restriction being discussed applied when trustee process was used after the 30-

required to withhold only the nonexempt portion of the defendant's earnings due as of the time of service of process and not later, it became incumbent upon the creditor to have the employer served at a time when he owed the defendant a substantial percentage, and perhaps all, of his wages for a particular pay period.⁸⁹

Also, subsequent attachments were not allowed unless the creditor went back to court, made a motion, and showed cause why another attachment should issue.⁹⁰ This forced the creditor back into court if one garnishment failed to satisfy the judgment. If the court allowed a subsequent attachment to issue, the creditor had to again be very careful when process was served on the employer.

In addition to the difficulties set out above, language was deleted from Rule 4.2(a) in the 1975 amendments that changed the meaning of the rules concerning trustee process.⁹¹ A literal reading of Rule 4.2(a) suggests that trustee process may now issue against property other than wages only by following the same procedure provided for trustee process against earnings.⁹²

day period expired or even if trustee process could be used after that time. Arguably, the use of the word "may" in the sentence indicates that trustee process may be used any time after entry of judgment and not just within 30 days of that entry. But the Reporter's notes to the 1971 Rules suggest that attachment could be had only within 30 days after entry of judgment unless the court extended the time. *Id.* Reporter's notes.

89. For example, if the debtor was paid every Friday afternoon for work done that week, and process was served on the employer on Monday morning, the employer would be under a duty to withhold only those wages due the defendant at the time of the attachment. On Monday morning, the employer would owe the defendant only for his work done that morning (if it is assumed that he had not worked on either Saturday or Sunday) before the service of process. Therefore the creditor could only attach a few hours' wages, subject, of course, to the exemptions in Rule 4.2(j)(2). In contrast, if the creditor had the employer served on Friday afternoon before the employee had been paid, he could attach essentially all of the debtor's earnings for that week, less the exempted portion.

90. Vt. R. Civ. P. 4.2(i) (Cum. Supp. 1979).

91. Compare *id.* 4.2(a) (1971) with *id.* 4.2(a) (Cum. Supp. 1979). Rule 4.2 refers to the availability of trustee process in attachment of the defendant's property other than wages. The last phrase of 4.2(a), before amendment, read "trustee process shall issue against any person for an amount due from such person to the defendant *as earnings* only as provided in subdivision (j)." *Id.* (1971) (emphasis added). As amended, Rule 4.2(a) reads "trustee process shall issue against any person for an amount due from such person to the defendant only as provided in subdivision (j)." *Id.* 4.2(a) (Cum. Supp. 1979). "As earnings" was deleted.

92. This was obviously not the result intended by the 1975 amendment. Such an inter-

The rules are superseded by the recently enacted amendments to the trustee process statutes⁹³ to the extent they conflict.⁹⁴ The statutes do away with some provisions that made the rule procedure difficult and cumbersome to apply. Although the statutes provide a more workable procedure than the rules, trustee process against earnings in Vermont remains a costly, time-consuming, and generally unsatisfactory procedure.

IV. VERMONT'S STATUTES

Vermont's statutes on trustee process against earnings were recently enacted and became effective on July 1, 1979.⁹⁵ Since 1971 and prior to the enactment of these statutes, trustee process against earnings was covered primarily by the rules of civil procedure.⁹⁶ Notification and service of process on the defendant and trustee are still governed by the rules.⁹⁷ Major provisions governing procedure and exemptions are now found in the statutes.

Under the statutes, trustee process may not issue against earnings until judgment becomes final.⁹⁸ A judgment is final after the thirty-day period provided for appeals has terminated and no ap-

pretation would mean that Vermont's rule and statutory procedure pertaining to trustee process in general were superseded by Rule 4.2(j). Yet the supreme court has subsequently amended Rule 4.2 to provide that prejudgment trustee process against property other than wages shall issue only after hearing and notice and only *ex parte* in exigent circumstances. *Order Amending the Vermont Rules of Civil and Appellate Procedure and the District Court Civil Rules and the Accompanying Reporter's Notes*, effective Dec. 3, 1979. No mention of this major change, if one was intended, was included in the Reporter's notes to the 1975 amendments. VT. R. CIV. P. 4.2(a) Reporter's notes at 18 (Cum. Supp. 1979).

93. VT. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979).

94. 1979 Vt. Acts No. 67, § 8 (set out in the annotation following VT. STAT. ANN. tit. 12, § 2681 (Cum. Supp. 1979)). The statutes do not provide for the case where the debtor receives compensation on other than a weekly basis. This contingency is covered by the rules. Rule 4.2(j)(iii) coincides with provisions in section 1673(a) of the C.C.P.A. on this subject that refers to regulations prescribed by the Secretary of Labor. These federal regulations, 29 C.F.R. § 879.10 (1979), provide formulas for computing the exemptions that will make them equal to those allowed on a weekly basis.

95. VT. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979).

96. See text accompanying notes 69-94 *supra*.

97. VT. STAT. ANN. tit. 12, § 3168(b) (Cum. Supp. 1979).

98. *Id.* § 3167.

peal has been taken.⁹⁹ A plaintiff who has obtained a final money judgment against the defendant may move the court to issue trustee process against the defendant's earnings.¹⁰⁰ This motion may be made whenever the defendant "has neglected or refused to pay or make reasonable arrangements to pay a money judgment in any civil action."¹⁰¹ After notification to the trustee and to the defendant, a hearing is held on plaintiff's motion.¹⁰² At this hearing the court determines whether the defendant has neglected or refused to pay or arrange to pay the money judgment against him.¹⁰³

If it is found that the debtor has neglected to pay, the court will then determine:

- (1) the amount of the judgment unpaid;
- (2) the amount of the judgment debtor's weekly disposable earnings;
- (3) whether the judgment debtor has been a recipient of assistance from the Vermont department of social welfare within two months preceding the date of the hearing; and
- (4) the weekly expenses reasonably incurred for maintenance of the debtor and dependents.¹⁰⁴

The court may then order trustee process against the debtor's earnings.¹⁰⁵ The trustee is bound to withhold the nonexempt portion of the debtor's wages after service of the order.¹⁰⁶

The order may provide for repetitive withholdings from the debtor's earnings.¹⁰⁷ This dispenses with the Rule 4.2(i) requirement of the issuance of a court order before a subsequent attach-

99. This time for appeal may be lengthened as provided in Vt. R. Civ. P. 62(a) (Cum. Supp. 1979).

100. Vt. STAT. ANN. tit. 12, § 3168 (Cum. Supp. 1979).

101. *Id.*

102. *Id.* § 3168(b).

103. *Id.* § 3169(a).

104. *Id.* § 3169(a)(1)-(4). Vermont adopted the definitions of "earnings" and "disposable earnings" in the C.C.P.A. *Id.* § 3169(b)(1)-(2). See text accompanying notes 110-116 *infra* for a discussion of these exemptions.

105. *Id.* § 3169(a)(4).

106. *Id.* § 3171(b).

107. *Id.* § 3170(c).

ment could be made.¹⁰⁸ It also dispenses with the proviso of Rule 4.2(j)(3) that limits the attachment to only those earnings due the defendant at the time of attachment, and not subsequently.¹⁰⁹ Under the statutes, once the order is issued allowing repetitive withholdings, the employer is required to withhold a portion of the earnings until he is notified by the creditor that the debt has been fully satisfied or paid.¹¹⁰

The statutes limit the amount of the defendant's weekly disposable earnings that may be garnished in compliance with the C.C.P.A.¹¹¹ Vermont adopted the federal exemptions¹¹² and thereby exempts seventy-five percent of the defendant's weekly disposable earnings, or thirty times the federal minimum hourly wage, whichever is greater.¹¹³ For example, if a debtor's disposable earnings are determined to be \$93.00¹¹⁴ per week or less, all of his earnings are exempt from garnishment.¹¹⁵

Vermont's laws place more restrictions on wage garnishment than does the C.C.P.A., and more exemptions are allowed. Vermont provides that the court may order a larger exemption of the debtor's earnings from trustee process if it finds that the debtor's weekly expenses reasonably incurred for family maintenance exceed the statutory exemptions.¹¹⁶ No definition of what constitutes reasonably incurred family maintenance expenses is given. It follows that the determination of a particular defendant's reasonably incurred expenses is left to the discretion of the court on a case-by-case basis.¹¹⁷

108. VT. R. CIV. P. 4.2(i) (Cum. Supp. 1979).

109. *Id.* 4.2(j)(3) (1971).

110. VT. STAT. ANN. tit. 12, § 3171(d) (Cum. Supp. 1979).

111. *Id.* § 3170.

112. 15 U.S.C. § 1673 (1976 & Supp. II 1978).

113. VT. STAT. ANN. tit. 12, § 3170(b)(1) (Cum. Supp. 1979).

114. Thirty times the federal minimum hourly wage of \$3.10. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (Supp. II 1978).

115. See note 94 *supra* for a discussion of exemptions for wages paid on other than a weekly basis.

116. VT. STAT. ANN. tit. 12, § 3170(b)(3) (Cum. Supp. 1979). The debtor's weekly maintenance expenses are determined at the trustee process hearing. *Id.*

117. See text accompanying notes 136-38 *infra*.

Vermont further allows that if the debt arose as the result of a consumer credit transaction, eighty-five percent of the weekly disposable earnings, or forty times the minimum wage, whichever is greater, is exempted.¹¹⁸ As defined in 15 U.S.C. § 1602, "credit sale refers to any sale with respect to which credit is extended or arranged by the seller."¹¹⁹ A consumer credit transaction is one "in which the party to whom credit is . . . extended is a natural person" and the "subject of the transaction . . . [is] primarily for personal, family, household, or agricultural purposes."¹²⁰

Finally, Vermont exempts a debtor's earnings from garnishment if he has received aid from the Vermont department of social welfare within two months preceding the date of the hearing.¹²¹

These above exemptions afford the debtor so much protection that they effectively insulate a number of debtors from trustee process against their earnings. If they do not preclude it altogether, their effect must often be to limit the garnishable portions to so small and insignificant a sum that it is not worth the creditor's while to pursue the trustee process procedure.

V. RECOMMENDATIONS FOR CHANGE

The Vermont legislature has decided that trustee process against earnings should be retained as a means of enforcing money

118. VT. STAT. ANN. tit. 12, § 3170(b)(2) (Cum. Supp. 1979).

119. 15 U.S.C. § 1602(g) (1976).

120. *Id.* § 1602(h). The subject need not be used entirely for these purposes. See *Smith v. Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977).

121. VT. STAT. ANN. tit. 12, § 3170(a) (Cum. Supp. 1979). The intent behind this exemption is to allow a family a chance to get back on its feet once it no longer qualifies for aid. The bill originally proposed a six-month period of immunity but as enacted contains a two-month period.

[W]e found that in certain cases a person may be on welfare. He is struggling to get off welfare but he . . . has deep financial problems. He finally gets a job. Because of the problems that occurred before then, if we suddenly allow a creditor to obtain a judgment and then try to attach the wages, what we will do many times instead of keeping the guy gainfully employed, . . . [is to] throw him back on welfare.

Proposed Bill on Trustee Process Against Earnings, Hearings on H.189 Before the Senate Judiciary Comm., 55th Biennial Sess. (Mar. 30, 1979) (statement by Rep. Ketcham).

judgments.¹²² Under the present law, however, trustee process against wages, although more workable than the procedure under the rules of civil procedure,¹²³ is still not a viable solution for the average Vermont judgment creditor. The legislature liberalized the actual procedure somewhat by allowing repetitive withholdings from the debtor's earnings. However, it offset this concession to the creditor by increasing the number and types of exemptions for which the debtor may qualify and by requiring a final judgment before trustee process may issue. Only if the judgment is a large amount that will warrant the expense of going through the trustee process procedure and if the judgment creditor has some assurance that not all of the debtor's wages will be exempt¹²⁴ will trustee process be a useful way of enforcing money judgments. The present procedure does not facilitate the enforcement of small judgments. Yet that small amount may be a substantial sum to the judgment creditor.

Levy of execution,¹²⁵ attachment,¹²⁶ and a judgment lien¹²⁷ are remedies available to the creditor if the debtor has property, other

122. VT. STAT. ANN. tit. 12, §§ 3167-3172 (Cum. Supp. 1979).

123. See text accompanying notes 82-90 *supra* for a discussion of the rule procedure.

124. VT. STAT. ANN. tit. 12, § 3170 (Cum. Supp. 1979). A creditor has no way of knowing for sure whether all of the earnings will be exempt until the hearing. At that hearing, the court may exercise its discretion by determining that a debtor's weekly family maintenance expenses are such that his wages will not support a garnishment. *Id.* § 3170(b)(3).

125. *Id.* §§ 2681-2810 (1973 & Cum. Supp. 1979). Executions on final judgments may be levied against both real and personal property. Writs of execution may be issued by the supreme and superior courts. *Id.* § 2681. The officer who levies and serves the writ must demand of the debtor the sum required. *Id.* § 2689. If the debtor refuses to pay, then the officer must levy an execution on the debtor's property and sell it at a public auction. See generally Note, *A Problem of Post Judgment Executions in Vermont—Sheriffs' Liability*, 2 VT. L. REV. 117 (1977).

126. VT. STAT. ANN. tit. 12, §§ 3221-3410 (1973 & Cum. Supp. 1979); VT. R. CIV. P. 4 (1971). Both real and personal property may be attached, the effect of which is to hold the property "against all subsequent sales, attachments, or executions as if it had been actually removed and taken into the possession of the officer." VT. STAT. ANN. tit. 12, § 3251 (1973).

127. VT. STAT. ANN. §§ 2901-2905 (Cum. Supp. 1979). Under the judgment lien act, a creditor need only record his judgment against the debtor in the town clerk's office of any town where the debtor owns real property. This creates a lien on the property that is effective for eight years, that accrues interest at the maximum rate allowed, and that may be foreclosed. *Id.* § 2903. For a discussion of nonpossessory, prejudgment attachments of real and personal property in Vermont, see *Nonpossessory Prejudgment Attachments of Real and Personal Property in Vermont*, 3 VT. L. REV. 217 (1978).

than wages, that may be attached or subjected to a lien. If the debtor has no such property, the judgment creditor must rely on trustee process against earnings to enforce the judgment. The newly enacted 1979 statutes governing this procedure, however, fail to remedy the ineffectiveness of wage garnishment in Vermont. The garnishable portions of the debtor's wages are so restricted, the procedure is so lengthy, costly, and cumbersome, and the potential time lag between initial judgment and satisfaction is so great that, for most purposes, Vermont might as well not provide for trustee process against earnings.

If Vermont wishes trustee process to be an effective remedy, it should provide for a workable, less cumbersome, more available procedure. In doing so it must provide for the legitimate interests of the creditors, the state, and the debtors. The judgment creditor has a legitimate and recognized interest in gaining satisfaction of his judgment.¹²⁸ The state has an interest "in facilitating the enforcement of judgments obtained in its courts."¹²⁹ Further, the state has an interest in keeping citizens self-supporting and away from bankruptcy. These interests must be weighed against the interests of the debtor. Protection and use of one's wages to support family or self are very important considerations.¹³⁰

Much has been done to protect the debtor's interests in restriction of wage garnishment on the federal level.¹³¹ Vermont has

128. See *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1366 (5th Cir. 1976):

The private interests that are operative in this case are those of the judgment creditor and the judgment debtor. Unlike the prejudgment creditor, the creditor here has a judicially-awarded judgment that evidences the defendant's debt. Thus, its interest is not the freezing of debtor assets pending adjudication of an alleged debt. Instead, it is the enforcement of the judgment against those assets.

129. *Id.* at 1363. The Court of Appeals for the Fifth Circuit also stated that:

Even in the prejudgment context wage garnishments are not necessarily devoid of any relation to a legitimate state interest. . . . Similarly, post judgment wage garnishment procedures may be authorized by a state to facilitate the enforcement of judgments if they satisfy the requirements of applicable federal legislation and the U.S. Constitution.

Id. at 1366.

130. See text accompanying notes 40-54 *supra*.

131. See text accompanying notes 60-68 *supra*.

gone even further by (1) requiring a final judgment before trustee process may issue against earnings¹³² and (2) by adding to the federal restrictions on the maximum amounts that may be garnished.¹³³ In some cases, all of a debtor's wages will be exempt,¹³⁴ while in others the court may exercise its discretion and exempt more than the federal minimums.¹³⁵ Finally, the Vermont scheme requires a postjudgment, pregarnishment hearing.

No criteria have been provided in the statutes to aid in making certain determinations. The superior court must exercise its discretion in determining whether the debtor has refused to make reasonable arrangements to pay the money judgment,¹³⁶ in determining the amount of the unpaid judgment,¹³⁷ and in determining the debtor's reasonably incurred expenses for family maintenance.¹³⁸ Determination of what constitutes "reasonable" will vary with each court and each fact situation.

While the court's order may certainly be appealed,¹³⁹ the statute is silent regarding the disposition of the debtor's earnings during the pendency of an appeal. It is not clear whether the creditor is allowed to have the debtor's earnings attached and held by the trustee while the appeal is pending, or, if the attachment is stayed, until the order becomes final. The creditor should be allowed to have the amount in controversy attached and held by the employer or paid into court until the order becomes final.¹⁴⁰ This would

132. VT. STAT. ANN. tit. 12, § 3167 (Cum. Supp. 1979).

133. *Id.* § 3170.

134. *E.g., id.* § 3170(a).

135. *Id.* § 3170(b)(3).

136. *Id.* § 3169(a).

137. *Id.* § 3169(a)(1).

138. *Id.* § 3169(a)(4).

139. According to the Senate Judiciary Committee notes, there was general agreement among the senators that the order was appealable based on Rules 3 and 4 of the Rules of Appellate Procedure, (1971). *Proposed Bill on Trustee Process Against Earnings, Hearings on H.189 Before the Senate Judiciary Comm., 55th Biennial Sess.* (Apr. 17, 1979).

140. There are several ways to deal with this situation. Either the court or trustee could hold the money, the creditor could receive it, or the debtor could receive it pending finality. Allowing the debtor to receive his full wages could result in the dissipation or concealment of those wages or the voluntary termination of his employment. If the creditor were allowed to collect the garnished portion and later lost the appeal, he would have to return the

guarantee that money would be available with which to satisfy the judgment if the creditor prevails on appeal. If the debtor prevails, he would receive all or part of those amounts of his wages previously withheld.¹⁴¹

A. *The Final Judgment Requirement*

More must be done in Vermont to protect the valid interests of the judgment creditor if trustee process against earnings is going to be a viable means of enforcing judgments. Because the creditor has gone through the process of obtaining a judgment against the debtor, the danger of nonmeritorious or fraudulent claims is no longer present. The *Sniadach* requirements have been satisfied because the debtor has had notice and an opportunity to be heard. Once these concerns have been addressed, no policy reason exists for requiring the creditor to wait until judgment becomes final before the debtor's wages may be attached. The creditor deserves a guarantee at the time of the initial judgment that, when the judgment becomes final, there will be money available with which to satisfy it. Hence, the nonexempt portion of the debtor's wages should be attached and paid into court.¹⁴² The waiting period now involved gives the debtor ample opportunity to evade any garnishment of his wages.¹⁴³ The age-old concern about the disappearing debtor is inapplicable here because, once a judgment is issued in Vermont, it is enforceable in other states under the full faith and credit clause of the United States Constitution.¹⁴⁴ Nonetheless, the debtor may still evade garnishment by quitting his job and terminating his income. He may also build up his exemptions by incur-

wrongfully garnished portion. The most reasonable approach is to have the money held by a neutral third party such as the court or the trustee.

141. Arguably, the debtor could appeal the trustee process order issued by the superior court on several grounds. The debtor could allege that the court erred in determining (1) the amount of the unpaid judgment, (2) the amount of his reasonably incurred maintenance expenses, (3) whether the debtor had indeed neglected or refused to pay the judgment, or (4) the amount actually ordered garnished from his weekly disposable earnings.

142. If the debtor prevails on appeal, those attached wages may be paid back with interest.

143. The debtor may avoid garnishment because he has stopped working or because he has left the state before the judgment becomes final.

144. U.S. CONST. art. IV, § 1.

ring additional "reasonable" family maintenance expenses prior to the issuance of the trustee process order. He might also qualify for state assistance within two months prior to the trustee process hearing, thereby exempting all of his wages from garnishment.

B. *Additional Exemptions*

An underlying principle of both *Sniadach*¹⁴⁵ and the C.C.P.A. is that low-income, unsuspecting debtors need protection from unethical creditors.¹⁴⁶ In enacting the C.C.P.A., Congress balanced the relevant interests and developed a scheme that protects the rights of these debtors.¹⁴⁷ The federal exemptions provide the required—and needed—debtor protection while at the same time paying attention to the rights and needs of the creditor.¹⁴⁸ Vermont, however, provides additional protection for the debtor. The intent of the Vermont statutes was "to require those that have sufficient monies to meet the judgments of the court after it has been determined that they are liable for whatever bill was the basis of that suit."¹⁴⁹ By providing additional exemptions, Vermont fails to satisfy the declared intent of the statutes. Although two of the additional exemptions are justifiable,¹⁵⁰ one can take issue with at

145. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

146. See text accompanying notes 40-54 *supra*.

147. 15 U.S.C. §§ 1671-1677 (1976 & Supp. II 1978).

148. The federal statutes also preclude an employer from discharging an employee because his earnings have been subjected to garnishment for any one indebtedness. 15 U.S.C. § 1674 (1976). Vermont has added to this federal restriction by also precluding an employer from discharging an employee "on account of trustee process issued to an employer against earnings." VT. STAT. ANN. tit. 12, § 3172 (Cum. Supp. 1979). Vermont does not limit this prohibition to only one indebtedness as does the federal statute. A rebuttable presumption is also created in favor of the employee. If discharge of an employee occurs "within sixty days of service of a trustee process summons upon an employer[, it] shall be rebuttably presumed to be on account of the issuance of trustee process." *Id.*

149. *Proposed Bill on Trustee Process Against Earnings, Hearings on H.189 Before the Senate Judiciary Comm.*, 55th Biennial Sess. (Mar. 30, 1979) (statement by Rep. Ketcham).

150. These two exemptions are (1) the full exemption if the debtor received assistance from the Vermont department of social welfare within two months preceding the trustee process hearing, VT. STAT. ANN. tit. 12, § 3170(a) (Cum. Supp. 1979), see note 121 *supra*; and (2) the exemption of more than the federally required exemptions if the debtor's reasonably incurred maintenance expenses so require. VT. STAT. ANN. tit. 12, § 3170(b)(3) (Cum. Supp. 1979).

least one of them.

In light of the intent behind Vermont's statutes, the provision that increases the exemption if the debt arose as the result of a consumer credit transaction¹⁵¹ is unwarranted. It serves no purpose except to harm the creditor. In order to prevent a few creditors from abusing the wage-garnishment process, this exemption potentially harms the creditors who innocently extend much-needed credit. This exemption may also harm debtors if it discourages the extension of credit to them for "necessities."

Although these are valid concerns, the manner in which the legislature chose to deal with them is inappropriate and unnecessary.¹⁵² Its purpose is commendable but its scope is too broad. The exemption naturally discriminates against the well-intentioned creditor who engages in a consumer credit transaction. There seems to be a presupposition that all creditors engaging in such transactions are not to be trusted to make proper use of the trustee process mechanism. A more appropriate way to deal with the problem is to simply permit the court to weigh the facts in each such case and determine the applicable percent of exemptions.¹⁵³ The court is already given such discretion with respect to other exemptions allowed by Vermont law.

C. *Postjudgment, Pregarnishment Hearing*

An additional method of protecting the interests of both the

151. VT. STAT. ANN. tit. 12, § 3170(b)(2) (Cum. Supp. 1979).

152. The Vermont House Judiciary Committee was led to believe that this increased exemption for consumer credit transactions was required by federal regulation. *Proposed Bill on Trustee Process Against Earnings, Hearings on H.189 Before the House Judiciary Comm.*, (Feb. 8, 1979) at 8. No federal regulation mandating this exemption can be found. If one does exist, then, of course, Vermont had no choice but to provide this exemption. If one does not exist, the exemption should be reconsidered in light of the intent in enacting Vermont's statutes and the procedure it has chosen to adopt. See note 153 *infra*.

153. If the court feels the transaction that resulted in the judgment debt was in some way unfair or unreasonable, it can take that into account when determining the amount of earnings to be garnished weekly. Evidence that a particular transaction was not fair would weigh heavily in the debtor's favor and would result in a lower percent ordered garnished for each week. This would have the same effect as the present consumer credit transaction exemption but would not necessarily apply to all such transactions.

creditors and debtors more effectively would be to adopt a procedure which does not require a postjudgment, pregarnishment hearing. Procedural due process requires that the judgment-debtor be given notice and an opportunity to be heard before being deprived of his wages.¹⁵⁴ These requirements are met by the proceedings that resulted in the judgment.¹⁵⁵ Once a judgment is obtained, the defendant is put on notice that the plaintiff can, and may, use any legal means available to obtain satisfaction of that judgment,¹⁵⁶ and the defendant has had an opportunity to be heard.¹⁵⁷

It follows then that the only significant purpose the postjudgment hearing required in Vermont serves is in the determination of the amount of the debtor's earnings that may be garnished. This determination, however, could be made more quickly, and with less cost, without a hearing.

Florida's postjudgment laws are a good example of a procedure that protects both the creditor's interests and the debtor's interests and yet resolves the garnishee-garnishor issues in a speedy and fair manner.¹⁵⁸ Under Florida's procedure, after the plaintiff has obtained judgment he may move that a writ of garnishment be issued.¹⁵⁹ The writ is issued and served on the employer who must answer the writ and withhold the debtor's wages pursuant to it.¹⁶⁰ The debtor, upon learning of the garnishment,¹⁶¹ may file an affidavit in which he swears to certain facts that make him eligible for exemption from garnishment.¹⁶² Notice of this affi-

154. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

155. See *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288 (1924); *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1366 (5th Cir. 1976).

156. *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288 (1924).

157. *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1368 (5th Cir. 1976).

158. FLA. STAT. ANN. §§ 77.01, .03 (West Cum. Supp. 1979).

159. *Id.* § 77.03.

160. *Id.* § 77.01.

161. In *Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976), the plaintiff, who challenged the constitutionality of Florida's wage-garnishment laws, did not receive "actual or constructive notice of institution of the garnishment proceedings before or at the time of service of the writ of garnishment on her employer." *Id.* at 1357-58.

162. FLA. STAT. ANN. § 222.12 (West Cum. Supp. 1977). This provision exempts earnings from garnishment only if the debtor is the head of a family residing in Florida and the money attached is for personal labor and services. *Id.*

davit is given to the creditor who then has two days to deny, under oath, that the facts set forth in the affidavit are true.¹⁶³ If the plaintiff does not do so, the garnishment proceedings are dismissed.¹⁶⁴ If he does deny them, a hearing is held.¹⁶⁵ Although the Florida statutes only allow a single exemption which exempts all of the debtor's earnings from garnishment,¹⁶⁶ in principle it could be applied in the case of any exemption that the Vermont statutes allow.

If this procedure were used in Vermont, the writ of garnishment would necessarily have to instruct the employer to withhold only the statutory nonexempt percentages of the debtor's earnings.¹⁶⁷ The debtor, upon learning of the garnishment action, could file an affidavit in which he swears to certain facts.¹⁶⁸ The facts to which the defendant could swear would include (1) that he received aid from the social welfare department for two months before the service,¹⁶⁹ (2) that his family maintenance expenses exceed the exempt amount of his wages,¹⁷⁰ (3) that he did not neglect or refuse to pay the judgment,¹⁷¹ (4) that the debt arose as the result of a consumer credit transaction and therefore a greater exemption must be allowed,¹⁷² or (5) any combination of these facts.

If the defendant did not file an affidavit, then garnishment of the nonexempt portion of his wages would automatically result as of the time of service of trustee process.¹⁷³ If he does file, then a

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* See note 162 *supra*.

167. VT. STAT. ANN. tit. 12, § 3170 (Cum. Supp. 1979).

168. This affidavit would also be served on the debtor and would inform him of his right to apply for an exemption of all or part of his wages. The exemptions that are available as well as the procedure to follow would be clearly stated on the writ of garnishment.

169. VT. STAT. ANN. tit. 12, § 3170(a) (Cum. Supp. 1979).

170. *Id.* § 3170(b)(3).

171. *Id.* § 3169(a).

172. *Id.* § 3170(b)(2).

173. This would satisfy the notice and hearing requirements of *Sniadach*. The hearing requirement would be met by the proceedings before the initial judgment and the opportunity to claim further exemptions. The notice of garnishment requirement would be met by the service of the writ on the defendant required by Rule 4.2. VT. R. CIV. P. 4.2(d) (*Order*

hearing¹⁷⁴ may be held to determine the validity of his contentions and the added exemptions he may qualify for. If the creditor accepts the debtor's contentions, no hearing would be necessary and the employer would withhold only the agreed-upon portion.

For this procedure to produce fair results, the payment by the employer to the creditor of the garnished wages would have to be stayed upon the defendant's filing of an affidavit. The employer could be required to hold the money pending the outcome of the hearing, if one is held. If payment were made to the plaintiff and it was later found that the defendant did qualify for further exemption, then the plaintiff could be required to repay any wrongfully garnished portion with interest.

Further simplification of Vermont's laws could be obtained through a house-cleaning of Vermont's rules of civil procedure. When the rules are again amended, those rules, or subsections, that have been superseded by the statutes should be deleted. This would clarify exactly the requirements for issuance of trustee process against earnings.

CONCLUSION

Vermont's procedure for trustee process against earnings is in need of reform because it is presently ineffective. A lack of clarity in both the rules and statutes are, in part, to blame. Statutory overkill in carrying out the mandates of the United States Supreme Court and Congress in *Sniadach* and the C.C.P.A. is also a factor. Vermont went too far in carrying out its responsibilities to judgment debtors and effectively ignored its own interest in the enforcement of judgments of its courts and the interest of creditors in the satisfaction of those judgments.

Suggested reforms are to (1) do away with the requirement

Amending the Vermont Rules of Civil and Appellate Procedure and the District Court Civil Rules, effective Dec. 3, 1979).

174. This hearing would have to be held within a reasonable time because of the nature of the proceeding. One of the saving graces of Florida's statutory wage garnishment procedure was "the apparent availability of prompt judicial determination of the debtor's claim of exemption." *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1368 (5th Cir. 1976).

that wages may not be garnished until after final judgment, (2) do away with increased exemptions from garnishment if the debt arose as the result of a consumer credit transaction, and (3) adopt a procedure that more effectively carries out the federal mandates but that still provides for the interests of creditors. Florida's procedure offers the needed balance and expedites the process immensely. If adopted it would, arguably, carry out the intent behind Vermont's statutes to force debtors with sufficient monies to pay their debts. Such a procedure would do away with burdensome time and cost restraints inherent in the present process. Yet it would adequately protect the debtor from wrongful and malicious garnishments while it protects the creditor by giving him a means of collecting legitimate and just debts.

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