

NO. A09-1221

State of Minnesota  
 In Supreme Court

Mona Savig and Robert Savig,

*Plaintiffs,*

vs.

First National Bank of Omaha and Messerli & Kramer, P.A.,

*Defendants.*

ON QUESTION CERTIFIED BY UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MINNESOTA, HON. JOAN N. ERICKSEN

**BRIEF OF AMICUS CURIAE, MINNESOTA BANKERS ASSOCIATION**

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## INTRODUCTION AND PRELIMINARY STATEMENT

The Minnesota Bankers Association (MBA) is pleased to provide this Amicus Curiae Brief in support of the Defendants, First National Bank of Omaha and Messerli & Kramer, P.A.<sup>1</sup> The MBA is filing this Brief pursuant to its previously filed Notice and Request for Leave to Participate as Amicus Curiae, and the Court's Order, dated July 30, 2009, granting that request.

The MBA is a trade association representing the commercial banking industry in the State of Minnesota. The MBA was founded in 1889 and represents approximately 430 state and national banks located throughout the state. Its membership includes banks of all sizes, from independent community banks to large regional banks.

The MBA has no interest in this particular case. The Defendant, First National Bank of Omaha, is not a member of the MBA and is not eligible for membership. Our interest is limited to the impact this Court's decision will have on Minnesota banks.

The MBA is in full agreement with the analysis and conclusions in Defendants' Brief. The primary purpose of this Brief is to convey the broad implications this case has for Minnesota banks. The issues presented by this case will affect virtually every bank in Minnesota, both as third party processors of

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<sup>1</sup> This brief was not authored, in whole or in part, by counsel for any party in this action. No party other than the amicus curiae and its members made a monetary contribution to the preparation or submission of this brief.

garnishments and levies, and as creditors. It is important that garnishees be able to process those actions with clarity and without fear of lawsuits from creditors and account holders.

The Minnesota Supreme Court's decision in *Enright v. Lehman*, 735 N.W.2d 326 (2007) created uncertainty for financial institutions when processing garnishments and levies on joint accounts. Prior to *Enright*, banks processed levies and garnishments on joint accounts without determining which account owner contributed the funds. After the *Enright* decision, it was unclear how a bank should treat a garnishment or levy on a joint account. As an association, we were unable to advise a course of action to our members that would protect them from the liability they faced from account holders and creditors.

This Brief will respond to the certified questions from the practical perspective of banks as garnishee and creditor, giving the industry's perspective on the potential impact on banks and account holders if creditors are unable to garnish joint accounts and if the burden of proving net contributions to a joint account is placed on anyone except the account holder.<sup>2</sup>

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<sup>2</sup> Those issues outside the scope of the record are raised in the interests of fulfilling the role of Amicus Curiae by informing the Court "as to facts or situations which may have escaped consideration or to remind the court of legal matters which may have escaped its notice." Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997), Cummings v. Koehnen, 568 N.W.2d 418, 424 (Minn. 1997).

### STATEMENT OF ISSUES

May a judgment creditor serve a garnishment summons on a joint account to satisfy the debt of an account holder when not all of the account holders are judgment debtors, and if so, (1) is it the judgment creditor or the account holders who bear the burden of establishing net contributions to the account during the garnishment proceeding, and (2) what applicable presumptions regarding ownership, if any, apply in the absence of proof of net contributions?

### STATEMENT OF FACTS

The MBA respectfully incorporates by reference the Statement of Facts set forth by the Defendants' Brief.

## ARGUMENT

### I. JUDGMENT CREDITORS MUST BE ABLE TO SERVE GARNISHMENT SUMMONSES ON JOINT ACCOUNTS.

Judgment creditors must be able to serve garnishment summonses on joint accounts because there is no other reasonable alternative. If joint accounts were judgment proof, debtors would be able to thwart creditors simply by adding another owner to their account. Owning a bank account is necessary for the vast majority of people. People with unsatisfied judgments are no exception and they will often go to great lengths to keep an account while avoiding their creditors.

It is already a common practice for debtors to evade garnishment and levy by finding someone who will add them as an authorized signer to an account. They then will abuse that account by using it to process their own deposits and withdrawals. It is safe to assume that if joint accounts are made judgment proof, debtors will use that to their advantage and keep all their funds in a joint account without having to worry about being removed from the account or the account being closed. They would have all the benefits of banking without exposing their funds to creditors and this could be accomplished as easily as adding a child or friend to the account.

It is important to remember that joint account holders come in many forms. A debtor may own an account jointly with a party completely under his or her control, such as a corporation, an LLC, an employee or a child. To decide that these accounts are off limits for creditors would be poor public policy. The

inability to collect by garnishment would have a major impact on all creditors, including state agencies attempting to collect past-due taxes or child support, negatively impacting those agencies, recipients of support, and the taxpaying public.

As creditors, the ability to garnish or levy an account is very important to banks. If this path of recovery is closed to them, they will have to price their products for the additional risk of not being able to collect the debt through garnishment or levy. This increased cost would apply to loan products and to deposit products where the account could be overdrawn, resulting in a debt to the bank. While the increased risk might result in higher loan rates for only those consumers that are less credit-worthy, increased fees for deposit accounts would likely be spread to all customers, since a full credit check is not usually performed before opening a deposit account.

Putting the burden on creditors to determine whether a debtor may have a joint account before serving the bank with a garnishment or levy is not reasonable. Absent a court order, there is no way for a judgment creditor to find out in advance how a debtor's accounts are owned. Due to privacy considerations, a bank would not be allowed to disclose to a creditor the ownership structure of an account or the names of joint account holders. Both the common law expectation of privacy and Federal Regulation P would prevent such a disclosure, as banks are prohibited from disclosing any nonpublic personal information about a consumer to a nonaffiliated third party. 12 C.F.R. § 216.10(a)(1). Minnesota Statutes

prevent state agencies, such as the Department of Revenue, from obtaining such information. Minn. Stat. § 13A.02. The Federal Right to Financial Privacy Act, 12 U.S.C. § 3402, prevents federal agencies from receiving that same information.

Because there is no reasonable method for a creditor to determine how a debtor's funds are held pre-garnishment, joint accounts must be subject to garnishment. In addition, debtors must not be allowed to hide funds in joint accounts for public policy reasons.

## II. ACCOUNT HOLDERS MUST BEAR THE BURDEN OF ESTABLISHING NET CONTRIBUTIONS TO A JOINT ACCOUNT DURING THE GARNISHMENT PROCEEDING.

Account holders are in the best position to establish net contributions to the account. Not only do account holders have access to their account information, they have knowledge no one else can have about net contributions to their account.

Net contributions are defined as:

the sum of all deposits thereto made by or for the party, less all withdrawals made by or for the party which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance.

See Minn. Stat. 524.6-201, subd. 6.

Some deposits, such as payroll checks, can easily be attributed to a party. While others, such as deposits of cash, may only be attributed by the account holders. Account holders are able to determine for whose benefit checks were written or other withdrawals made. It would be virtually impossible on most joint

accounts for a third party to determine for whose benefit some deposits and most withdrawals were made.

Because account holders know their own accounts best, they are responsible for claiming their own exemptions under the garnishment and levy statutes and the same should be true for proving net contributions. Minn. Stat. 550.37, subd. 20. Creditors and garnishees aren't required to review an account holder's account to determine if there are any exempt funds present, most likely because it is simple for the account holder to do so. Determining exempt funds is far easier than determining net contributions and there is no compelling reason to make the standards different.

There is, however, a compelling reason to make them the same – account holders know best whether their funds are exempt and to which party they can be attributed. As the Honorable Joan Ericksen stated, “. . . [T]he Court observes that placing the burden of proving net contributions to a joint account on “the party with easier access to relevant information” is consistent with “[b]asic principles underlying the allocations of burden of proof” in Minnesota Law.” Savig v. First National Bank of Omaha and Messerli & Kramer, P.A., Case No., 0:09-cv-00132-JNE-RLE, at 14, (July 6, 2009).

In addition, the process will work a lot more smoothly if account holders are responsible. If a creditor were required to figure out net contributions, there would be significant discovery necessary, which would lengthen the garnishment process, and consequently, the time the account holder's funds are frozen. And, in

the end, the information necessary to determine net contributions would have to come from the account holder.

Although Judge Ericksen did not suggest in any way that financial institutions should be responsible for determining ownership of funds in a joint account when she certified questions to this Court, it is important for the banking industry to express the reasons why such an option shouldn't be considered. As garnishee, banks are an innocent third party to the situation between the account holder and the creditor. As the garnishment statutes state, banks acting in good faith when responding to a garnishment are not liable to the debtor, creditor or any other person. Minn. Stat. § 571.73, subd.2. The legislature clearly did not intend for banks to face liability for handling a garnishment in good faith. Like all third party garnishees, banks are already caught in the middle between creditors and account holders, concerned about potential liability from both sides. This potential liability is a substantial burden for an innocent third party to bear. To add the additional and very considerable burden of determining net contributions to the account would be untenable.

It is likely that most garnishments and levies would take hours to process because of the difficulty of proving net contributions. The tools a bank would have to make such a determination are a computer screen showing dollar amounts of deposits and withdrawals and scanned copies of checks deposited and withdrawn from the account. A bank employee would need to go through all of

this information and attempt to determine to whom the deposits and withdrawals should be attributed.

In almost all situations, this would be virtually impossible for the bank to do. For example, a purchase of gas with a debit card would be difficult to attribute to any owner because the bank would not know into whose car the gas went. Another example is a purchase by check at a grocery store. For whose benefit were the groceries purchased? A bank would have no way to know and the opportunities for creditors and account holders to second guess every single determination made by the bank would be endless. One could argue that a bank should only be liable if the determination were made in bad faith. However, that wouldn't eliminate the tremendous amount of research time, effort and cost put into the determination and the cost to defend the bank's determination. Such potential liability would necessarily be passed on to consumers through increased fees. Another potential impact might be that financial institutions would refuse to offer joint accounts at all due to the tremendous burden of possibly having to prove net contributions.

### III. FUNDS SHOULD BE PRESUMED TO BELONG TO THE DEBTOR.

The MBA respectfully incorporates by reference Section IV of the Defendants' Brief.

## CONCLUSION

The MBA respectfully urges the Minnesota Supreme Court to find that creditors may garnish joint accounts to satisfy the debts of account holders, account holders bear the burden of establishing net contributions to accounts in garnishment or levy proceedings and that, in the absence of proof of net contributions, judgment debtors should be presumed to own all the funds in the joint account.

Respectfully submitted,

Dated this 19th day of August, 2009.

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