

No. A09-1221

State of Minnesota  
In Supreme Court

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Mona Savig and Robert Savig,

Plaintiffs,

vs.

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

Defendants.

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

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**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF RETAIL  
COLLECTION ATTORNEYS AND CAPITAL ONE BANK (USA), N.A.**

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## INTRODUCTION<sup>1</sup>

Enforcing money judgments is neither a new issue in Minnesota nor a rare one. For 150 years, the process for enforcing judgments has been governed, not by the common law, but by statutory procedures set by the Legislature. Plaintiffs in this appeal argue that creditors, debt collectors, and garnishees should be subject to strict liability for conversion under the common law for serving a garnishment summons on a joint bank account if the account turns out to contain funds that ultimately cannot be used to satisfy the judgment—even if they do so in compliance with the garnishment statute. That position is directly inconsistent with legislative intent and would upset the careful balance of interests that the Legislature has struck.

In the garnishment statute, the Legislature created a two-step garnishment process to balance the interests of the many groups who have a stake in the process of collecting judgments. The first step authorizes judgment creditors to broadly serve garnishment summonses on third parties to locate and temporarily freeze money or property that may potentially be used to satisfy a judgment. The second step protects the interests of all affected parties by quickly assessing the ownership interests in the garnished property and determining whether the property can be used to satisfy the judgment or else must be released. Creditors who fail to follow the statutory garnishment process are subject to strict penalties. But no Minnesota state court has held that a creditor, debt collector, or garnishee who *follows* the statutory process is subject to

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity other than NARCA and Capital One, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

liability under the common law simply because some property that is initially frozen is ultimately determined not to be subject to execution. Indeed, the second step of the two-step process was created precisely because the Legislature knew that some temporarily frozen property would later be released.

In this brief, *Amici* National Association of Retail Collection Attorneys (“NARCA”) and Capital One Bank (USA), N.A., explain the process established by the Legislature, show how the Legislature made deliberate policy choices to balance the competing interests of all affected parties, and urge the Court to hold that, because the Legislature authorized the temporary freeze of money in the first step of the garnishment process, it does not violate the common law—even if some of the frozen money ultimately cannot be used to satisfy the judgment. *Amici* thus support the answers to the certified questions advocated by the defendants, First National Bank of Omaha and Messerli & Kramer, P.A.

#### **IDENTIFICATION OF AMICI**

The National Association of Retail Collection Attorneys (“NARCA”) is a nationwide, not-for-profit trade association of over 700 skilled debt-collection law firms, in-house counsel of creditors, and industry vendors, including firms in Minnesota. All NARCA members meet association standards to assure experience, professional responsibility, and professionalism.

Capital One Bank (USA), N.A. is a nationally-chartered bank that does business in Minnesota. Capital One is both a creditor that seeks collection of debts owed it, primarily through its credit card business, and a depository institution that receives

garnishment summonses. Capital One is also party to a putative class action pending in the United States District Court for the District of Minnesota, *Bowers v. Messerli & Kramer, P.A., et al.*, Civ. No. 09-1036 (JNE/JJK), which presents the same questions as those certified in this action, and in which the proceedings have been stayed pending resolution of the certified question by this Court.

### ARGUMENT

**I. The Court should reject Plaintiffs' attempt to institute common law liability for creditors, debt collectors, and garnishees who follow the two-step garnishment process created by the Legislature.**

Garnishment has been authorized by Minnesota statutes in some form since 1860. Its purpose "is to reach property in the hands of the garnishee in order to apply it in satisfaction of the judgment . . . [and] 'to protect creditors without injustice to debtors or garnishees.'" *Nordstrom v. Eaton*, 652 N.W.2d 79, 82 (Minn. Ct. App. 2002) (quoting *Knudson v. Anderson*, 272 N.W. 376, 379 (Minn. 1937)). The current version of the statute, found at Minn. Stat. §§ 571.71–571.932, was enacted in 1990. It establishes a two-step process to efficiently resolve disputes about property rights between five distinct groups of entities—judgment creditors, judgment debtors, other creditors of the debtors, other people with interests in property that may be used to satisfy a judgment, and third parties (such as banks) who may be holding the property. In the first step, a creditor who has gained a court-sanctioned right to collect broadly issues garnishment summonses to temporarily freeze assets of the debtor in the possession of third parties. In the second step, all of the parties with an interest in the property have the opportunity to assert their interest. The debtor may claim an exemption.

Other parties with an interest may intervene. The creditor may object to the claims. The debtor may request a hearing on the objection. At any stage in the process, if the party who holds the burden fails to act, the statute automatically allocates the property to the other side.

As long as all parties act in good faith in the statutory garnishment process, they are safe. But serious sanctions patrol that line. That is the balance the Legislature struck—safety within the process, sanctions outside it. Plaintiffs’ attempt to impose common-law liability for actions taken within the garnishment process is wholly inconsistent with legislative intent, and this Court should reject it.

**A. The first step of the garnishment process specifically authorizes the broad use of garnishment summonses to serve the interests of creditors who have a court-sanctioned right to collect money or property.**

Creditors who successfully meet the burden of proving their claim to a Minnesota court get in return the statutory privilege of using garnishment summonses to locate and temporarily freeze a debtor’s property in order to determine whether it can be used to satisfy a judgment.

The right to use a garnishment summons is tightly constrained to creditors who have brought a lawsuit and earned in one of three ways the right to recover money or property. *See* Minn. Stat. §571.71 (garnishment is “an ancillary proceeding to a civil action for the recovery of money”). A creditor may use garnishment if: (1) a “money judgment” has been entered in “the civil action”; (2) forty days have passed since the service of the summons and complaint in a civil action and a default judgment could be entered; or (3) a court orders the issuance of a garnishment summons. Minn. Stat. §

571.71. The third category requires a creditor to prove either that the debtor is attempting to dispose of nonexempt property “with intent to delay or defraud” the creditors, or that some other sufficiently urgent need exists for pre-judgment seizure. Minn. Stat. § 571.93, subd. 1. There appears to be no dispute in this case that the defendants had the right to issue a garnishment summons.

Creditors who thus earn the imprimatur of the Minnesota court system gain the statutory privilege of using garnishment summonses to locate and temporarily freeze a debtor’s property in order to determine whether it can be used to satisfy a judgment. Minn. Stat. § 571.71. The statute places no limits on the potential recipients of a garnishment summons except the creditors’ good faith belief that they may hold property of the debtor that may be used to satisfy the claim.

To protect the debtor’s interests, the garnishment statute establishes strict notice requirements for the creditor. Within five days of serving the garnishment summons on the garnishee, the creditor must serve on the debtor by mail all of the papers it served on the garnishee. Minn. Stat. § 571.72 subd. 4. The form of the garnishment summons is established by statute. Minn. Stat. § 571.74. A creditor may deviate from the form, but only if the summons it uses is “substantially in the . . . form” prescribed in Minn. Stat. § 571.74. Strict penalties enforce compliance with the statutory prescriptions. Minn. Stat. § 571.72, subd. 7. A creditor must also serve two documents with the garnishment summons. The first is a disclosure form for the garnishee to use to report to the debtor and creditor whether it is holding any money or property in response to the garnishment, and, if so, how much. Minn. Stat. §§ 571.72, subd. 5 and 571.75. The second is an

exemption notice that allows the debtor to claim that any or all of the money or property that the creditor is trying to garnish is exempt and beyond the creditor's power to levy and execute. Minn. Stat. § 571.72, subd. 8.

There appears to be no dispute that the defendants in this case complied with all of the requirements for service of valid garnishment forms.

**B. The second step of the garnishment process protects the interests of debtors and other interested persons by giving them the right to prove that garnished property cannot be used to satisfy the judgment.**

The Minnesota Legislature fully realized that a garnishment summons might reach and temporarily freeze property that may ultimately be unavailable to the creditor to satisfy the judgment—because, for example, it is traceable to someone else, or the debtor later proves that it is exempt from execution under other Minnesota Statutes (chiefly Minn. Stat. § 550.37). That is why the Legislature created a second phase of the garnishment process to sort out the final disposition of the garnished property.

The garnishment statute navigates the complex set of interests at stake in collections and efficiently allocates property by establishing a decision tree, marked by shifting burdens of action. First, the debtor must claim an exemption, or a third party with an interest must intervene to assert it. Second, the creditor must object to the exemption or third-party interest. Third, the debtor or third party must request a hearing on the objection. At any stage in the process, if the party who holds the burden fails to act, the statute automatically allocates the property to the other side.

The process for asserting and adjudicating claimed exemptions is clear proof that the Legislature knew and expected garnishment summonses to temporarily freeze property that later would be released. As *amici* mentioned earlier, the creditor must serve an exemption notice along with the garnishment summons. Minn. Stat. § 571.72, subd. 8. The exemption notice informs the debtor that a variety of assets are exempt from execution, and thus beyond the reach of judgment creditors, including:

- money arising from any claim for destruction or damage of exempt property, such as certain personal property, farm machines, and certain motor vehicles, Minn. Stat. § 550.37, subd. 9;
- life insurance proceeds, Minn. Stat. § 550.37, subd. 10;
- money payable by fraternal benefit associations or other beneficiary associations, Minn. Stat. § 550.37, subd. 11;
- minor child earnings, Minn. Stat. § 550.37, subd. 15; and
- employee benefits, Minn. Stat. § 550.37, subd. 24.

The statutory process for resolving claims of exemptions is quick and efficient. When the garnishee is a financial institution (as was the case here), the debtor has 14 days from service of the exemption notice to claim that some or all of the garnished property is exempt. Minn. Stat. § 571.913. The debtor must send one copy of the exemption claim to the garnishee and another to the creditor. *Id.* At that point, the creditor has seven days to object to the debtor's exemption claim. *Id.*; Minn. Stat. § 571.914, subd. 1. The debtor may then request a hearing on his or her exemption claim by serving such a request under Minn. Stat. § 571.914, subd. 3, and court staff will assist the debtors in filling out the proper forms, Minn. Stat. § 571.914, subd. 1. The court must decide the exemption issue within three days of the hearing on the matter. Minn. Stat. §

571.914, subd. 1. Any party who asserted an interest in the money or property claimed as exempt may appeal the court's decision. Minn. Stat. § 571.88.<sup>2</sup>

Non-debtors who claim an interest in garnished property may also appear in the proceeding to protect their interests. Courts are authorized under Minn. Stat. § 571.72 subd. 9 to “make any order necessary to protect the rights of those interested” upon the motion of “any party in interest.” Any person who is not a party to the underlying action that created the judgment debt, but has an interest in the money subject to the garnishment, is entitled to intervene in the garnishment proceeding. Minn. Stat. § 571.83. Indeed, in the interests of finality, the court may summon any such person to appear or have their claim barred. *Id.*

The third-party garnishees who receive the garnishment summonses are also expressly protected from liability for complying with their statutory duties—including from liability to persons *other than the debtor* whose property they have temporarily frozen. Garnishees are required by statute to:

- disclose the assets they have to the creditor and debtor, Minn. Stat. § 571.78(1);
- if the garnishee is a financial institution, serve the debtor by first-class mail with two copies of the exemption notice it received from the creditor, Minn. Stat. § 571.913; and

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<sup>2</sup> Debtors and creditors alike are subject to penalties for claiming or opposing an exemption in bad faith, respectively. The consequence of bad faith by either side is actual damages, costs, a statutory penalty not to exceed \$100, and reasonable attorney fees to the opponent. Minn. Stat. § 571.72 subd. 6. Creditors, more generally, are subject to the same penalties for failing to comply with the procedures of the garnishment statute. Minn. Stat. § 571.90.

- retain nonexempt money or property belonging to the debtor in an amount up to 110% of the debt claimed by the creditor, Minn. Stat. § 571.78(2), (3); Minn. Stat. § 571.73, subd. 1.

Garnishees who comply with these duties in good faith are “not liable to the debtor, creditor, or other person for wrongful retention if the garnishee retains [money or property] of the debtor *or any other person*, pending the garnishee’s disclosure or consistent with the disclosure.” Stat. § 571.73, subd. 2 (emphasis added); *see also Midland Loan Finance Co. v. Kisor*, 287 N.W. 869, 870 (Minn. 1939) (“A garnishee is regarded as an innocent person owing money to, or having in his possession property of, another, without fault or blame, and he is supposed to stand indifferent as to who shall have the money or property.”)

It is impossible to read these statutory provisions and conclude that the Legislature meant to allow common law liability for creditors, debt collectors, or garnishees who temporarily freeze property in a joint account through the statutory garnishment process, simply because the property is later released.

**C. Plaintiffs’ requested rule is inconsistent with the garnishment statute and would disrupt the balance of interests chosen by the Minnesota Legislature.**

Three things are clear from reviewing the process established by the garnishment statute.

First, the process carefully and sensibly balances the interests of all five groups of entities involved. *See Knudson*, 272 N.W. at 379 (garnishment “protect[s] creditors without injustice to debtors or garnishees”) (quoting *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Pierce*, 115 N.W. 649, 651 (Minn. 1908)). The process

begins with the court-sanctioned interests of the judgment creditors, who do not know what property a debtor has to satisfy the judgment. If they ask the debtor, the debtor is likely as not to dissemble or hide the assets. So instead, they are allowed to cast a wide net to locate and temporarily freeze assets, wherever they may be. The limited benefit to the creditor of having a temporary freeze on the debtor's assets is part of the benefit it wins by obtaining a judgment. The limited detriment to the debtor—and of others who hold property together with the debtor—is part of the detriment they suffer from being on the losing side of a judgment in a Minnesota court of law. The garnishment statute provides short deadlines in order that everyone's respective rights in the property may be resolved (and the property unfrozen, if need be) expeditiously. The burden of coming forward with information about the assets is placed where it belongs—on the parties who hold the information. Hence, garnishee financial institutions must serve disclosures identifying the funds they have that belong to the debtor, and debtors must serve exemption notices identifying the grounds on which garnished funds may not be available to satisfy a judgment. Disputes are resolved how they should be: by agreement, or in a courtroom on an expedited basis.

Second, as part of the balance of interests, the Legislature quite deliberately authorized garnishment summonses to reach and temporarily freeze property that will later be released in the second step of the process. That is why judgment debtors receive notice of potential exemptions, why third parties with an interest in garnished property may intervene in judicial proceedings to determine parties' respective rights in

the garnished property, why the garnishment statute sets procedures and timelines for judicial determination whether garnished property should be released, and why garnishees are expressly protected from liability for seizing property that belongs to persons other than the debtor. Because the Legislature has authorized this temporary seizure, it is lawful and cannot be conversion. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (conversion “is defined as an act of willful interference with personal property, done *without lawful justification* by which any person entitled thereto is deprived of use and possession” (emphasis added, internal quotation omitted)).

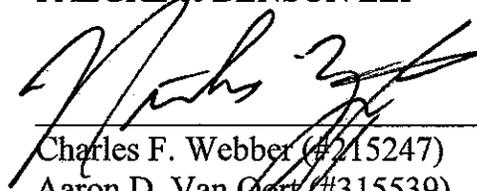
Third, Plaintiffs’ proposed rule is completely inconsistent with the garnishment statute and would bring the process of enforcing judgments to a halt by placing strict liability (plus punitive damages) on parties who must act without complete information. Creditors do not know in advance whether an account held at a potential garnishee bank is single or joint, or whether it contains funds that are exempt from garnishment for some reason. Garnishees do not know whether the money in a joint account came all from the debtor, all from the other account holder, or a mix of both. Privacy laws, the ability of judgment debtors and their joint account holders to evade collection efforts, and cost preclude creditors and garnishees from getting the missing information through discovery-type requests. The situation requires a first, temporary step—a step protected from liability—when assets can be frozen while the information is sorted out. That is what the garnishment statute provides.

## CONCLUSION

Plaintiffs, in their zeal for their own particular clients, advance a rule of common law liability that upsets the careful statutory balance struck by the Legislature between the competing interests of five different groups of persons and entities, all of whom have a stake in the garnishment process. This Court should enforce the process established by the Legislature and hold that creditors, debt collectors, and garnishees who comply with the garnishment statute are not liable at common law for garnishing money in joint accounts, even if the debtor or another interested party ultimately proves that some or all of the money in the joint account cannot be used to satisfy the creditor's judgment.

Date: August 19, 2009.

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