Fall 1978

Proposals for Reform of Florida's Provisional Creditor Remedies

John W. Larson
Florida State University College of Law

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# PROPOSALS FOR REFORM OF FLORIDA'S PROVISIONAL CREDITOR REMEDIES

**John W. Larson**

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PROPOSALS FOR REFORM OF FLORIDA'S PROVISIONAL CREDITOR REMEDIES*

JOHN W. LARSON**

I. INTRODUCTION

Although virtually impervious for more than a century to the gentle caress of evolutionary change,¹ heightened judicial sensitivity to procedural fairness and newly aroused passions of consumerism finally burst forth in 1969 to revolutionize the law of debtor-creditor relations. In that year the United States Supreme Court held that the prejudgment garnishment by Family Finance Corporation of Mrs. Sniadach's wages, in the amount of $31.59, without affording her any prior notice or an opportunity to be heard, was a deprivation of property without due process of law in violation of the fourteenth amendment to the United States Constitution.² Sniadach v. Family Finance Corp. precipitated a judicial upheaval casting doubt on the continued validity of all the so-called provisional creditor remedies,³ as well as the many special creditor lien statutes,⁴ and caused great concern in the personal finance industry. Resolution of the questions Mrs. Sniadach raised has already spawned four more Supreme Court decisions and a plethora of lower court opinions, many of them conflicting.⁵

Those decisions are analyzed in this article, and an attempt is made to formulate a workable constitutional standard by which to evaluate present creditor remedies. Florida's provisional remedy

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* This article was prepared by the author for the former Florida Law Revision Council to assist the council in its study of Florida's provisional creditor remedies. The opinions, conclusions, and recommendations contained in this article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Florida Law Revision Council.

** Associate Professor of Law, Florida State University College of Law. A.B. 1958, University of Michigan; J.D. 1964, University of Iowa.


³ The phrase "provisional creditor remedy" includes a variety of prejudgment statutory remedies, the most common of which are garnishment, attachment, and replevin. The thrust of these procedures is to permit the creditor to seize property belonging to the debtor pending final adjudication of the underlying claim.

⁴ Statutes granting special lien status to landlords, innkeepers, garagemen, artisans, suppliers, and laborers are common.

statutes and Florida’s procedures for enforcement of final judgments are reviewed. Since most of these statutes have been found unconstitutional, remedial legislation is proposed.

II. THE NATURE OF PROVISIONAL CREDITOR REMEDIES

A. Generally

Before turning to the specific requirements of the statutes, it may be useful to discuss the impact of the provisional remedies on the relationship between creditor and debtor. The norm in our judicial process is that a plaintiff is not entitled to any satisfaction on his claim until it is fully adjudicated and final judgment has been rendered by a court. Only then may he invoke the power of the state, through levy of execution, to have the debtor’s property seized and sold to satisfy the judgment. The provisional remedies, historically deemed extraordinary, enable the plaintiff to cause the defendant’s property to be seized, actually or constructively, and withheld, pending final determination of the plaintiff’s underlying claim.

Thus, from the very beginning of his action, the plaintiff has some assurance that there will be property available to satisfy a final judgment. Moreover, such property is insulated against disposition or dissipation by the defendant during the course of the litigation. The plaintiff in effect becomes a secured creditor, protected from voluntary actions which the defendant might take affecting his ability to satisfy the plaintiff’s judgment. Further, the lien on the debtor’s property establishes the plaintiff’s priority vis-a-vis the defendant’s other creditors with respect to that property. Consequently, without any consent by the defendant or any prior judicial determination of the merits of the plaintiff’s claim, the plaintiff is immune from the competing claims of both subsequent purchasers and creditors, even though the latter might actually obtain judgment first. In addition, in the event of a later bankruptcy of a judgment debtor, the lien of a judgment creditor relates back to the date of attachment or garnishment, thus often serving to defeat the trustee’s extraordinary power to avoid judicial liens obtained within four months of bankruptcy.

One other aspect of the provisional remedies should also be men-

6. References herein to garnishment refer to prejudgment garnishment unless otherwise indicated. Garnishment is also used after judgment to reach indebtedness owed to the judgment debtor by third persons, as well as tangible and intangible property owned by the judgment debtor but held in the possession or control of third persons. FLA. STAT. §§ 77.01, .03 (1977).

tioned. Property seized by attachment or garnishment constitutes the basis for quasi-in-rem jurisdiction over a nonresident defendant. Although, in some cases, in personam jurisdiction might be available under a longarm statute, the certainty afforded by quasi-in-rem process is often of great significance to the plaintiff and an inducement to the nonresident defendant to appear personally. Indeed, the provisional writs had their historical origin in compelling the defendant’s appearance rather than as a prejudgment collection device. The strong interest of the state in providing a jurisdictional basis by which its citizens may have their claims against nonresidents litigated domestically still serves as perhaps the most compelling justification for the provisional remedies.

B. Attachment

In order to appreciate the dictates of the Supreme Court concerning the validity of provisional remedies, it is necessary to examine in some detail their precise procedural requirements. The Florida attachment and garnishment statutes are typical. Chapter 76 of the Florida Statutes authorizes the plaintiff in an action on a debt to obtain a writ of attachment from the court commanding the sheriff to attach so much of the defendant's property as is sufficient to satisfy the debt. The plaintiff must post a bond and allege by

8. The whole area of quasi-in-rem jurisdiction has been thrown into considerable doubt by the recent case of Shaffer v. Heitner, 433 U.S. 186 (1977), in which the Supreme Court overruled the century-old case of Pennoyer v. Neff, 95 U.S. 714 (1877), which had premised quasi-in-rem jurisdiction on the state's power over the property seized. In Shaffer, the Court held that due process requires governing quasi-in-rem jurisdiction by the same standard of fairness and substantial justice which governs in personam jurisdiction, as articulated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). This analysis will require courts to consider the significance to be accorded the presence of the property within the forum state and its relationship to the cause of action asserted in the underlying suit. See 433 U.S. at 208.

And recently, in Kulko v. Superior Court, 436 U.S. 84 (1978), the Supreme Court affirmed its holding in Shaffer. In Kulko, the Court focused on the defendant’s activity in California to determine whether that state's asserted jurisdiction over him was warranted.


10. FLA. STAT. § 76.01 (1977). The debt must be liquidated and not contingent. See Papadakos v. Spooner, 186 So. 2d 786, 789 (Fla. 3d Dist. Ct. App. 1966). It need not actually be due, FLA. STAT. § 76.05 (1977), but if grounds for attachment exist, the debt is accelerated and becomes due. Id. § 76.06. Attachment is not available to the plaintiff in a tort action since the amount of damages cannot be readily and mechanically determined. See Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 157 (Fla. 1st Dist. Ct. App. 1970); cf. Hamilton Michelsen Groves Co. v. Penney, 58 F.2d 761 (5th Cir. 1932) (equitable attachment denied in tort claim).

11. FLA. STAT. § 76.13(1) (1977). The sheriff may attach property of a value sufficient to satisfy the debt and costs of the action.

12. Id. § 76.12. The attachment bond must be in an amount double the debt demanded
motion the existence of one or more of the statutory grounds for attachment. Generally, these grounds include specified actual or threatened acts on the part of the defendant which would put him or his property beyond the reach of creditors or the jurisdiction of the court. Once the motion is filed, the clerk issues the writ without hearing or notice to the defendant. The writ is then delivered to the sheriff for levy.

Personal property is levied on by actual seizure, while real property is levied on by recording a notice of the levy in the official records of the county where the property is located. The defendant thus loses the present use and enjoyment of personal property. Though the attachment does not dispossess the defendant from his real property, it creates a lien giving the creditor priority over all subsequent creditors and purchasers. The defendant may sell the property subject to the attachment lien, but, as a practical matter, the lien constitutes a cloud on the title and ordinarily must be satisfied before sale.

If the defendant wants to regain possession (or have the lien removed) before final judicial determination of the plaintiff's claim, he may either post a bond conditioned on the forthcoming of the property or payment of the judgment if the plaintiff is successful.

and conditioned to pay all costs and damages which defendant may sustain if the attachment is later found to be improper. The measure of damages for wrongful attachment of chattels is the value of their use for the period the defendant was deprived of possession and any loss or injury to the property, plus reasonable attorney's fees incurred in dissolving the attachment. See Williams, supra note 9, at 69. The amount of the recovery is limited by the amount of the bond. However, the defendant may also have a separate action against the plaintiff for malicious prosecution. Strickland v. Commerce Loan Co., 158 So. 2d 814 (Fla. 1st Dist. Ct. App. 1963).

13. FLA. STAT. §§ 76.09-.10 (1977). When the debt is actually due, the creditor need only allege he has reason to believe in the existence of adequate statutory grounds. If the debt is not yet due, the creditor must prove, by affidavit (other than his own) or other satisfactory proof, the actual existence of one or more of the statutory grounds.

14. Id. §§ 76.04, .10. When the debt is actually due, the statutory grounds for attachment can be summarized to include (1) the nonresidency of the defendant, (2) that he is actually removing or about to remove himself or his property from the state or the judicial circuit, (3) that he is absconding or concealing himself or secreting his property, or (4) that he is actually disposing or about to dispose of his property fraudulently. The grounds are more limited when the debt is not yet due and include only the actual removal of the debtor's property from the state or the fraudulent secreting or disposal thereof.

15. Id. § 76.14.

16. Section 76.18 of the Florida Statutes (1977) provides for the posting of a "forthcoming" bond requiring the surety to pay the plaintiff if the defendant fails to bring forth the attached property for execution and sale in the event of a final judgment for the plaintiff. Section 76.19, on the other hand, offers the defendant the option of posting a so-called "satisfaction" or "payment" bond requiring the surety to pay the plaintiff the full amount of any final judgments rendered in favor of the plaintiff if the defendant fails to do so.

Posting one of these bonds is often referred to as "rebonding" since the plaintiff was
Alternatively, he may move to dissolve the attachment on the ground that it was improperly issued. One reason for such a dissolution might be that the specific factual grounds alleged by the plaintiff are not true. The court is always open to hear such motions. If the plaintiff fails to prove the truth of his allegations, the writ is dissolved and the property returned or the lien discharged. If the writ is so dissolved, the defendant may thereafter sue on the bond to recover all costs and damages sustained in consequence of improper attachment. If the defendant does not contest the validity of the attachment, any property seized remains in the sheriff’s custody until final disposition of the plaintiff’s action. If the plaintiff succeeds on the merits, he may satisfy his final judgment by having the attached property sold on execution by the sheriff.

C. Garnishment

The prejudgment garnishment provisions of chapter 77 are similar to those of attachment. However, garnishment differs in that it is used to reach debts due to the defendant by a third person, such as nonexempt wages or bank accounts, for any tangible or intangible property of the defendant in the possession of a third party, such as a bailee. Any plaintiff in an action on a debt is entitled to a writ of garnishment after posting a bond and filing a motion stating that the debt is “just, due and unpaid,” that the garnishment is not for the purpose of injuring the defendant, and that the plaintiff believes the defendant will not, after judgment, have sufficient visible property on which a levy can be made to satisfy the claim.
The clerk issues the writ without hearing or notice to the defendant, and the sheriff serves the writ on the named garnishee. The writ commands the garnishee to disclose by answer within twenty days any indebtedness to the defendant and any property belonging to the defendant which is in the garnishee's possession or control. The garnishee is then required, in effect, to withhold and to retain, pending final adjudication, any debt owing or property belonging to the defendant, in an amount up to double the amount of the plaintiff's claim. As in the case of attachment, the defendant can obtain the release of any debt or property garnished by posting a bond or he can move to have the writ dissolved on the basis of any untrue allegation in the plaintiff's motion.

These allegations include, however, only the existence of the unpaid debt and the plaintiff's belief, reasonably apprehended, in the defendant's future inability to satisfy a judgment, as contrasted with the more limited grounds upon which a writ of attachment may issue. If the defendant successfully dissolves the garnishment, he is entitled to any payments or property due from the garnishee, and the defendant may have an action on the bond for any costs or damages suffered as a result of the wrongful garnishment. If the defendant does not contest the garnishment, or does so unsuccessfully, upon final judgment against him the garnished funds are applied to satisfy the judgment, with any excess paid over to the defendant, and the garnishee's obligation to the defendant on the debt or for the return of the property garnished is discharged.

23. FLA. STAT. § 77.04 (1977). The garnishee must also disclose whether he knows of any other person indebted to the defendant or who may have possession of any property belonging to the defendant. Id.

24. Id. § 77.19. The garnishee's liability extends to any indebtedness due or property held at the time of service of the writ upon him or at any subsequent time until his answer is served. Id. § 77.06. If the garnishee fails to answer the writ, a default judgment can be entered against him for the full amount of any final judgment recovered by the plaintiff against the defendant. Id. § 77.081.

25. Id. § 77.24. Again, such bond must be double the amount actually garnished, conditioned to pay any final judgment entered against the defendant up to that amount. On motion and notice to the plaintiff, the defendant may also request the court to release any sums garnished in excess of an amount sufficient to satisfy the plaintiff's claim with interest and costs. Id.

26. Id. § 77.07. The court is always open to hearing such motions, and the burden of proof is on the plaintiff to prove the truth of his allegations.

27. See Bertman v. Kurtell & Co., 205 So. 2d 685 (Fla. 3d Dist. Ct. App. 1967), in which the court indicated that the plaintiff's belief must be supported by facts and that the plaintiff must make reasonable inquiry to ascertain defendant's financial circumstances.

28. See note 14 supra.

29. FLA. STAT. § 77.031(2) (1977). The similar liability for improper attachment is discussed at notes 254-69 and accompanying text infra.

D. Replevin

A third provisional remedy is the writ of replevin, commonly used by secured creditors to obtain repossession of their collateral upon default by the debtor. As such, the writ issues ex parte, resulting in seizure of the property by the sheriff, thereby assuring its safety pending the outcome of the trial on the merits. The procedure for obtaining a prejudgment writ of replevin has historically been very similar to that of the other provisional remedies. The writ is issued by the clerk upon application of the plaintiff, accompanying the filing of the complaint alleging the wrongful detention of the property. The plaintiff is also required to post a bond, in an amount double the value of the property seized, conditioned to pay the defendant the value of the property and any damages resulting from the taking if the plaintiff fails to prevail on the merits. The sheriff holds the replevied property for three days, during which time the defendant has a right to recover the property by posting a forthcoming bond. If no bond is posted, the sheriff delivers the property to the plaintiff pending final judgment on the merits.

III. THE SEARCH FOR A CONSTITUTIONAL STANDARD

For many years it was settled law that the provisional remedies permitting creditors to seize debtors' property, before final judgment and without any prior notice or hearing, were constitutionally valid. These remedies were viewed as merely part of the "process" which was "due" under the fourteenth amendment. Where only property rights were concerned, it was felt that the Constitution required no more than an opportunity for a hearing and judicial

31. Section 9-503 of the Uniform Commercial Code provides that on default a secured creditor has the right, unless waived in the security agreement, to repossess the collateral. The creditor may use self-help in effecting repossession if it can be done without breach of the peace. If judicial process is necessary, replevin is the proper procedure to recover the collateral. See Fla. Stat. § 679.503 (1977). See generally 1 S. Rakusin, Florida Creditors' Rights Manual § 3.02B (1975 & Supp. 1977). In addition to being a provisional remedy, replevin is the form of action for recovery of personal property wrongfully detained by another and for any damages sustained by reason of the wrongful taking or detention. See id. § 3.02A. The action can be maintained as an ordinary action at law, resulting after full trial on the merits in a writ of possession awarding the property to the plaintiff, together with a money judgment for damages, if any. See Fla. Stat. §§ 78.18-.19 (1977). See generally 1 S. Rakusin, supra at § 3.06.
35. See note 16 supra.
36. See Fla. Stat. § 78.13 (1977). This provision was not amended.
determination at some stage of the proceedings. Thus, the initial seizure of the debtor’s property at the ex parte behest of the creditor was found to satisfy due process even though the debtor was temporarily deprived of the use and enjoyment of his property pending final judicial resolution of the merits of the creditor's claim. The validity of these procedures was so well established, in fact, that when the issue was presented to the Supreme Court in 1929, in *McKay v. McInnes*, involving Maine’s attachment statute, the Court summarily upheld the statute in a per curiam opinion.37

A. Sniadach and Its Progeny

1. Sniadach

When Family Finance Corporation sued out its garnishment of Mrs. Sniadach’s wages, it could scarcely have anticipated the Court’s turnabout. As required under the Wisconsin statute, Family Finance asserted that Mrs. Sniadach was in default on a promissory note. The Wisconsin Supreme Court had rejected Mrs. Sniadach’s defenses, stressing the minimal nature of the deprivation both in amount and duration, the opportunity to challenge promptly the propriety of the garnishment, the remedies available for improper garnishment, and “the long historical pedigree of the practice.”38

Justice Douglas, writing for the majority on appeal, began by noting that a procedural rule which may satisfy due process for attachments in general does not necessarily satisfy due process in every case. The issue, as he saw it, was whether the “interim freezing of wages without a chance to be heard” violated due process.

Douglas then focused on the nature of the property seized—wages—and observed that wages are “a specialized type of property presenting distinct problems in our economic system.”39 Because of the tremendous hardship garnishment imposes on wage earners with families, the creditor’s leverage is enormous, Douglas explained, and a prejudgment wage garnishment may “as a practical matter drive a wage-earning family to the wall.”40 Thus, he concluded, the prejudgment garnishment of wages “absent notice and a prior hearing”—to tender any defense he may have, whether it be fraud or otherwise—violates the fundamental principles of due process. Summary procedures, on the other hand, may well meet

37. 279 U.S. 820 (1929), aff’g 141 A. 699 (Me. 1928).
40. Id. at 341-42.
the requirements of due process in "extraordinary situations," he suggested, requiring special protection to a "state or creditor interest," such as acquiring quasi-in-rem jurisdiction to adjudicate the plaintiff's claim.

Justice Harlan, in a concurring opinion, chose to premise his decision on a broader ground than the special nature of wages. "Fundamental fairness" and concepts of the "Anglo-American legal heritage" are the judicial guideposts for giving content to the fourteenth amendment, he hypothesized, and, apart from "special situations," due process is afforded only by notice and a prior hearing "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." The "property" of which Mrs. Sniadach had been deprived was the use of her wages pending final judgment, and Harlan could not characterize this deprivation as de minimis.

Justice Black dissented. Scoffing at Harlan's implicit adoption of a "Natural Law concept" of due process, he accused the majority of usurping the power of the state legislature to decide, as a matter of policy, when prejudgment garnishment ought to be available. Black quoted with approval from the Supreme Court of Maine's McKay opinion upholding the constitutionality of provisional creditor remedies generally.

The ambivalent nature of the Sniadach decision left the lower courts perplexed. Understandably, there was confusion as to whether the prior notice and hearing requirement imposed by the majority was confined to the prejudgment garnishment of wages and other types of specialized property or whether it applied to the use of provisional remedies generally. Perhaps in part because of this confusion, it was not long before the Court chose to speak again, this time in more unequivocal terms.

2. Fuentes

Fuentes v. Shevin involved the seizure under Florida's re-

41. Id. at 339.
42. Id. at 342-43.
43. Id. at 343 (emphasis in original).
44. Id. at 342.
45. Id. at 351.
46. Id. at 345.
47. Id. at 348.
plevin statute of a gas stove and a stereo purchased by Mrs. Fuentes from Firestone Tire and Rubber Company under a conditional sales contract. Under the contract, Firestone retained a purchase money security interest in the goods and was entitled to repossess the goods if Mrs. Fuentes defaulted in her payments. Mrs. Fuentes paid more than $400 on the contract. However, with only a $200 balance outstanding, a dispute developed over the servicing of the stove. When Mrs. Fuentes refused to make any more payments, Firestone sued for repossession and caused the goods to be seized by the sheriff under a writ of replevin, without affording Mrs. Fuentes any prior notice or an opportunity to be heard. Mrs. Fuentes brought suit to have the replevin statute declared unconstitutional, but it was upheld by a three-judge federal district court.\(^5\) On appeal to the Supreme Court, the case was consolidated with another action challenging a similar Pennsylvania law. In a split decision, with only seven justices sitting, the Court struck down both statutes.\(^6\)

Speaking through Justice Stewart, the four-justice majority flatly rejected the notion that \textit{Sniadach} was limited to the "necessities" of life. The majority concluded instead that \textit{Sniadach} was "in the mainstream of past cases."\(^7\) The majority also dismissed quickly the argument that there was not real "deprivation of property" because the taking was only temporary and involved mere possession of the goods, citing Justice Harlan's concurring opinion in \textit{Sniadach}.\(^8\) As for the central issue of the requirements of due process itself, the Court stated that "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"\(^9\)

Since the purpose of due process is to minimize "substantively unfair or mistaken deprivations of property" by the state, the Court continued, the right to notice and a hearing must be granted before the state authorizes its agents to seize property in the possession of a person upon the application of another, since no later hearing or damage award can undo an arbitrary taking.\(^10\) The opinion did not reach the question of the nature and form of such a prior hearing beyond echoing Justice Harlan's observation in \textit{Sniadach} that the


\(^{52}\) \textit{Id.} at 88.

\(^{53}\) \textit{Id.} at 86.

\(^{54}\) \textit{Id.} at 80 (quoting \textit{Armstrong v. Manzo}, 380 U.S. 545, 552 (1965)).

\(^{55}\) \textit{Id.} at 81-82.
plaintiff must establish at least the probable validity of his underlying claim.  

Firestone's argument that Mrs. Fuentes had contractually waived her right to notice and a hearing was rejected by the Court on the factual ground that the language of the contract was ambiguous and thus did not satisfy the requirement set forth in *D.H. Overmyer Co. v. Frick Co.* that the waiver of a constitutional right must be made knowingly as well as voluntarily and intelligently.

Finally, the Court recognized, as it had in *Sniadach,* that "[t]here are 'extraordinary situations' which justify postponing notice and opportunity for a hearing." These situations must, however, be "truly unusual," cautioned Justice Stewart. The additional costs of a prior hearing in time, effort, and expense do not outweigh the constitutional requirements since procedural due process is not intended to promote efficiency. Such exceptions must be necessary to secure an "important governmental or general public interest," evidencing a "special need for very prompt action," and the state must keep "strict control" over the use of such force. Prejudgment replevin, he concluded, serves no such important governmental or general public interest since only private gain is directly at stake. He conceded, though, that there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.

Although clarifying the scope of *Sniadach,* the *Fuentes* decision raised a host of new questions about the nature and form of the required preliminary hearing, the requisites of a valid contractual waiver, if any, and the possible justification of some provisional creditor remedies, especially attachment, under the extraordinary circumstances exception. The decision provoked a strong dissent by Justice White. He complained that a secured creditor with a security interest or other lien, such as Firestone, also has a legitimate "property" interest in the collateral which is as deserving of protection as the debtor's possessory interest. White argued that due pro-

56. *Id.* at 97.
59. *Id.* at 90.
61. *407 U.S. at 93. Even in such a situation, the state must maintain effective control over the use of summary power by reviewing the basis of the claim to repossession and evaluating the need for immediate seizure. *Id.* at n.30.
cess does not call for an inflexible procedure to be applied in every situation but rather requires a balancing of the competing interests in each set of circumstances. He would have found the statutory procedures, requiring a bond and entitling the debtor to a prompt postseizure hearing, sufficient. White was also critical of the result from a pragmatic viewpoint, predicting that creditors would circumvent debtors' rights to a hearing by properly drafted contractual waivers and that, in any event, few debtors would in fact ever appear at the hearing, although all would suffer from the increased cost of collection which he assumed would be passed on by creditors.  

3. Mitchell

Predictably, *Fuentes* touched off a flood of challenges to every conceivable type of creditor remedy. Even where the extraordinary situation exception might have applied on the facts, few statutes were "narrowly drawn" to meet such unusual conditions. However, the "Procrustean rule" of *Fuentes* was short-lived. Less than two years later, the Court spoke again in *Mitchell v. W.T. Grant Co.*

Mr. Mitchell had purchased a stove, refrigerator, washing machine, and stereo from Grant Company under an installment sales contract on which there remained an overdue and unpaid balance of $574.17. Grant Company filed suit on the debt and simultaneously obtained a writ of sequestration, without prior notice to Mitchell or an opportunity for a hearing. The merchandise was seized by the constable. Mitchell filed a motion to dissolve the writ on the ground that the seizure violated due process. The Supreme Court of Louisiana upheld the seizure. In a five-to-four decision, the United States Supreme Court affirmed.

Justice White, who had dissented in *Fuentes*, wrote the majority opinion in *Mitchell*. The majority did not overrule *Fuentes* but purported to distinguish it. White noted at the outset that, as in *Fuentes*, both the buyer and the unpaid seller had "current, real interests in the property . . . ." (Under the Louisiana Civil Code an unpaid seller has a vendor's lien for the price even though he does not retain title or obtain a consensual security interest.)  

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62. *Id.* at 102-03.
64. 416 U.S. 600 (1974).
66. 416 U.S. 600.
maintained that resolution of the due process question must take this duality of interests into account. Moreover, he asserted, where only property rights are involved, the usual rule permits the postponement of a hearing until after the seizure, provided the opportunity for ultimate judicial determination of liability is adequate. White then compared the statutory safeguards in the Louisiana sequestration statute to those in the replevin statute held invalid in Fuentes.

A number of factors were identified as significant. First, in applying for the writ in Louisiana, the creditor was required to allege by specific factual affidavit the grounds which entitled him to the writ. In contrast, mere conclusory allegations were required by the statute in Fuentes. Second, the factual issues raised by the application in Louisiana—the existence of a lien and the debtor's default—were narrowly confined and susceptible to documentary proof. The broad fault standard involved in Fuentes—the wrongful detention of the property—was inherently subjective and required adversarial input. Third, the Louisiana writ could only be issued after a judicial determination that the factual allegations made by the creditor in his ex parte application clearly demonstrated he was entitled to the writ. Ministerial issuance of the writ by a clerk was allowed by the statute in Fuentes.

Fourth, the creditor in Louisiana was liable to the debtor for damages arising out of a wrongful seizure and was required to post a bond for the payment of any such damages, including attorney's fees. Fifth, the Louisiana statute expressly provided for an immediate postseizure hearing at which the creditor had the burden of proving both his probability of success on the merits and the truth of the allegations upon which the writ was issued. In Fuentes, it was unclear under the Florida statute whether the debtor had an unconditional right to such hearing, who was required to initiate it, or when the matter would be heard. Sixth, the Louisiana debtor was entitled to the return of the property by posting his own bond, whether or not he contested the validity of the initial seizure.

After cataloging these factors, Justice White concluded that the Louisiana statutory scheme minimized the risk of a wrongful seizure through judicial control of the entire process and that it protected the debtor's interest "in every conceivable way" short of prior notice and an opportunity to be heard before the seizure. Therefore, con-

68. 416 U.S. at 604.
69. Id. at 611.
70. Id. at 616-17.
71. Id. at 618.
sidering the procedure as a whole, he was convinced that the state had reached a "constitutional accommodation of the competing interests" of the debtor and the creditor.\footnote{Id. at 610.} A majority of the Court agreed on this conclusion.

Concurring, Justice Powell stated that the decision "withdr[ew] significantly from the full reach" of the principle that due process requires an adversary hearing before a debtor may be temporarily deprived of a possessory interest in property and that "to that extent" \textit{Fuentes} was overruled.\footnote{Id. at 623.} In his view, "[t]he determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected."\footnote{Id. at 624.} According to Powell, the state's function in \textit{Mitchell} was "to provide a reasonable and fair framework of rules to facilitate commercial transactions on a credit basis."\footnote{Id.} The statute was designed to protect the legitimate interests of both creditors and debtors.

In light of the obvious risk that a defaulting debtor may conceal, convey, or destroy the collateral, as well as diminish its value by continued use, Powell argued that a requirement of notice and a hearing before sequestration would impose a serious risk that the creditor might be deprived of his security. The state was entitled to balance this risk against the debtor's interest in the uninterrupted possession of the collateral. But although even a brief loss of the household effects sequestered might cause significant inconvenience, he said, it would hardly place the debtor in a situation of a "brutal need," such as the loss of welfare support, where a prior hearing is required.\footnote{See Goldberg v. Kelly, 397 U.S. 254, 261 (1970).} Given the various procedural safeguards identified in the majority opinion, he was confident that due process was fully satisfied.\footnote{416 U.S. at 624-25.}

Three justices—Douglas, Marshall, and Brennan—joined in a dissenting opinion by Justice Stewart. In their view, the case was identical to \textit{Fuentes}, the only perceivable difference being the makeup of the Court.\footnote{Id. at 635.} The dissenters were unpersuaded by the majority's enumeration of statutory safeguards. The affidavit requirement can be met by any plaintiff who "fills in the blanks on [an] appropriate form," they contended, and does no more than
test the strength of the plaintiff's own belief in his rights. "Whether
the issuing functionary be a judge or a clerk, he can do no more than
ascertain the formal sufficiency of the plaintiff's [application] . . . ."79
Finally, the dissenters could see no difference between the
issues found in Mitchell to be particularly suited to ex parte deter-
mination and those posed by the plaintiff's application in Fuentes.80
In short, they concluded, the case was "constitutionally indistin-
guishable" from Fuentes, and the Court had "simply rejected that
case and adopted instead the analysis of the Fuentes dissent."79

4. Di-Chem

Even before the lower courts and legal commentators had a
chance to sort out the relationship between Fuentes and Mitchell
or to decide whether or not the full panoply of Mitchell safeguards
was essential in every case, the Court handed down yet another
decision. North Georgia Finishing, Inc. v. Di-Chem, Inc.,82 decided
only eight months after Mitchell, differed materially in two respects
from its predecessors: (1) it involved a commercial debtor rather
than an individual consumer debtor, and (2) it involved the garnish-
ment of a bank account rather than the repossession of collateral
already subject to a security interest.

Di-Chem sued North Georgia for goods sold and delivered on open
account in the amount of $51,279.17. Simultaneously, and without
notice to North Georgia or a hearing, Di-Chem obtained a writ of
garnishment which was served on the First National Bank of Dal-
ton. After first obtaining release of the garnished funds by posting
a bond, North Georgia moved to dismiss the garnishment and re-
lease the bond on the ground that the statutory procedure violated
due process. The state courts upheld the garnishment, reasoning
that Sniadach merely carved out an exception in favor of wage
earners.83

The Court held the garnishment unconstitutional. Justice White
spoke for the majority in a six-to-three decision. First, he rejected
the argument that only consumers who are the victims of adhesion
contracts are protected: "It may be that consumers deprived of
household appliances will more likely suffer irreparably than corpo-

79. Id. at 632-33.
80. Id.
81. Id. at 634.
82. 419 U.S. 601 (1975).
601 (1975). Subsequently, a three-judge federal court declared the same statute unconstitu-
rations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error."

On the matter of what procedures are necessary to satisfy due process, the *Di-Chem* opinion may be more significant for what Justice White and the majority did not say. White spurned without a word the premise he had so carefully nurtured in *Fuentes* and *Mitchell* as justification for postponing the hearing until after seizure—that a lien creditor has a present, real "property" interest in the goods as equally deserving of protection as the debtor's possessory interest. Instead, he used the same "saving characteristics" analysis developed in *Mitchell*—despite the fact that the creditor had absolutely no present interest in the garnished funds. Finding that the writ was issued by a clerk based on mere conclusory allegations and, moreover, that there was no provision for an early hearing, at least without filing a bond, Justice White quickly concluded that the statute was not "saved" by *Mitchell*. Thus, *Di-Chem* is not a clear holding that a *Mitchell* analysis is applicable to the prejudgment seizure of property not subject to a preexisting lien. Nevertheless, that is the unmistakable implication of the case.

The majority opinion in *Di-Chem* also further clouds the status of *Fuentes*, which was considered to be overruled by a majority of the justices in *Mitchell*. Justice White's opinion, on the other hand, seems to give *Fuentes* renewed vitality. This is especially perplexing in light of his past rejection of the emphasis in *Fuentes* on the necessity for a preseizure hearing. Nevertheless, White stated conspicuously that the Georgia Supreme Court "failed to take account of *Fuentes*." In the next breath, though, he recast the rule of *Fuentes* as prohibiting seizures without the opportunity for a prior hearing "or other safeguard against mistaken repossession."

If this was an oblique effort to reconcile *Fuentes* and *Mitchell*, it is not very convincing. The lip service to *Fuentes* did, however, evoke a response from Justice Stewart: "It is gratifying to note that my report [dissenting in *Mitchell*] of the demise of *Fuentes v. Shevin* [citations omitted] seems to have been greatly exaggerated. Cf. S. Clemens, cable from Europe to the Associated Press, quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1912)."

84. 419 U.S. at 608.
85. Id. at 607.
87. 416 U.S. at 623.
88. 419 U.S. at 605-06.
89. Id. at 608 (Stewart, J., concurring).
Justice Powell, who, with Justice White and the minority in *Mitchell*, became a majority in *Di-Chem*, concurred in the result but expressly rejected the reasoning of the majority opinion because it “appears to resuscitate *Fuentes*.”90 In Powell’s opinion, the state has a legitimate interest in facilitating creditor recovery through prejudgment garnishment and attachment remedies, and prior notice and an opportunity to be heard before seizure are “antithetical to the very purpose” of such remedies.91 However, he agreed with the majority in *Di-Chem* that the Georgia garnishment statute failed to afford fundamental fairness in its accommodation of the respective interests of creditors and debtors. It authorized the issuance of the writ on the basis of a conclusory affidavit “insufficient to enable a neutral officer to make even the most superficial preliminary assessment of the creditor’s need.”92 In addition, the Georgia statute failed to provide a prompt postseizure hearing in which the creditor has “the burden of showing probable cause to believe there is need to continue the garnishment” pending the final outcome on the merits.93 Justice Powell did not believe it necessary for a judge to issue the writ, saying a clerk is sufficient.94 But he went beyond the majority by indicating that the debtor should have an absolute right to a return of the property by posting adequate security.95

Justice Blackmun, joined by Justices Rehnquist and Burger, dissented. They found the safeguards provided by the Georgia statute adequate “in the commercial world.”96 They also decried the confusion imposed on “those who owe and those who lend” by “a waver- ing tribunal off in Washington.”97

5. Carey

When Curtis Circulation Company sued Wrestling Revue, Inc. to recover an unpaid debt and attached $24,374 due Revue under a contract with National Sports Publishing Corporation, the stage was set for a further and final (to date) consideration of provisional remedies by the Supreme Court in *Carey v. Sugar*.98 Under the New York statute, the writ of attachment was ordered by a judge upon Curtis’ factual affidavit alleging fraud, one of the statutory grounds

90. *Id.* at 609 (Powell, J., concurring).
91. *Id.* at 610-11.
92. *Id.* at 612.
93. *Id.*
94. *Id.* at 611 n.3.
95. *Id.* at 612.
96. *Id.* at 619 (Blackmun, J., dissenting).
97. *Id.*
for attachment, together with a bond indemnifying the defendant if it prevailed on the merits. Although the New York statute accorded the defendant the right to move for dissolution of the attachment on the ground that it was unnecessary to the plaintiff’s security or, alternatively, to have the attachment discharged by posting adequate security, Revue did neither. Instead, Revue brought an action to have the statute declared unconstitutional and the attachment vacated.

A three-judge federal district court held that the New York statute violated due process because it did not provide the defendant with an adequate opportunity to vacate the attachment. The postseizure hearing appeared to the court to be limited to the question of whether the attachment was necessary to the plaintiff’s security and not to the broader question of whether the plaintiff was likely to prevail at the trial on the merits.\(^9\) The precise scope of the preliminary hearing, however, was unclear as a matter of state law. State officials, joined as parties defendant by Revue, insisted that the New York law, as construed, required the attaching plaintiff to demonstrate the probable merits of his underlying claim.\(^10\) On direct appeal, the Supreme Court held that, under the circumstances, the lower court should have abstained from deciding the constitutional question until definitive construction of the New York law could be obtained from the state courts.\(^11\)

Despite the lack of a decision in Carey on the constitutionality of the New York statute, several observations are pertinent. First, implicit in the remand was a determination that an “adequate” postseizure hearing would be constitutionally sufficient—even though Curtis had no preexisting interest in the property attached. Thus, the Court tacitly concluded that a Mitchell analysis of the statute’s “saving characteristics” was appropriate, thereby dispelling any lingering doubt as to the application of this analysis to seizures of property not subject to a prior lien.\(^12\) Also of signifi-


101. Carey v. Sugar, 425 U.S. 73 (1976). The Supreme Court noted that the district court also had found the New York statute deficient because the burden of proof at the hearing would be on the defendant rather than on the plaintiff as apparently required in Mitchell, but did not consider the question further. Id. at 77 n.2.

102. The Supreme Court obviously was conscious of this question since it observed that the lower court had noted the fact. Id.
cance in the case was the emergence of the "constitutional standard" that the postseizure hearing must inquire into the likelihood of the plaintiff's ultimately prevailing on the merits of his claim, at least where the issue is raised by the defendant. In its previous decisions the Court had studiously avoided any meaningful discussion of the precise nature of the questions to be considered at the postseizure hearing, other than Justice Harlan's passing reference in Sniadach to "probable validity" of the underlying claim, echoed in Fuentes, and Justice White's reference in Mitchell to the fact that the Louisiana statute required the plaintiff to prove the truth of the allegations upon which the writ has been granted.

Yet the Court in Carey adopted this previously unarticulated "constitutional standard" without discussion—beyond naked recognition—and without comment on the altogether different question clearly mandated by the New York statute for consideration at the preliminary hearing, namely the necessity of the attachment to the plaintiff's security pending the final outcome on the merits. There is not the slightest indication in the per curiam opinion whether or not this question must also be dealt with at the preliminary hearing, as suggested twice by Justice Powell in his concurring opinions in Mitchell and Di-Chem, or whether probable success on the merits is the sole issue for determination at the postseizure hearing. Thus, the precise scope of inquiry constitutionally mandated at the postseizure hearing remains cloudy beyond the plaintiff's burden to demonstrate his probability of success on the merits.

B. The Present Constitutional Standard

In spite of Fuentes' tenacity as authority, a clear majority of the Court seems committed to the view that when only property rights are involved, due process does not compel a hearing prior to seizure but is satisfied by a prompt postseizure hearing coupled with such additional procedural safeguards as are deemed adequate to minimize the risk of mistake and the impact of wrongful seizure. Accord-

103. Id. at 77.
104. 395 U.S. at 343.
105. 407 U.S. at 97.
106. 416 U.S. at 618.
107. Id. at 626-27.
108. 419 U.S. at 613.
109. See Northeast Inv. Co. v. Leisure Living Communities, Inc., 351 A.2d 845, 851-52 (Me. 1976), in which the court construed the standard of "likelihood of success" on the merits to mean that the claim is "not of such insubstantial character that its invalidity so clearly appears as to foreclose a reasonable possibility of recovery." The term connotes "mere probability of success or a favorable chance of success" but need not take the form of a full adjudication on the merits. Id.
ingly, Mitchell's "saving characteristics" constitute a separate and independent basis against which to test the validity of creditor remedies, although of course a Fuentes-type preliminary hearing before seizure remains constitutionally acceptable.

Today, even when the creditor has no preexisting lien or other interest in the property, reliance on the Mitchell standard appears comfortably established, despite its original premise and lack of forthright articulation by the Court. Under this analysis, it is not necessary to invoke the extraordinary situation "exception" to Fuentes in order to justify a prehearing seizure. The Court already has determined that on balance a state's interest in providing a fair and reasonable system of effective creditor remedies, including prehearing seizures, outweighs the interest of debtors in uninterrupted possession and enjoyment of their property, provided that the risk of error and adverse impact on the debtor are minimized. On the other hand, Di-Chem and Carey dispelled any doubt that the principles enunciated in these cases are confined to individual consumer debtors. Commercial debtors, too, are entitled to the full protection of due process.

The narrow holding of Sniadach remains intact and creates an exception in favor of wage earners. The prejudgment garnishment of a debtor's wages—a special type of property—must be preceded by notice and a hearing. This exception perhaps may be extended to cover a few other types of property seizure of which would place the debtor in "brutal need."

One additional issue has caused some confusion and disagreement among the lower courts. All the cases decided so far by the Supreme Court have involved an actual seizure of tangible personal property which interfered with the debtor's present possessory interest. When real property is attached, however, the "seizure" usually takes the form of a lien or charge on the property. Such a lien does

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110. Conversely, extraordinary seizures effected before hearing under the Fuentes exception, such as to obtain quasi-in rem jurisdiction over a nonresident defendant, apparently must exhibit the saving characteristics approved in Mitchell. This seems implicit in Fuentes' requirement that the state keep close control over such exceptional use of its power. See Fuentes v. Shevin, 407 U.S. at 90-93.

111. See North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 611 n.2 (Powell, J., concurring); Mitchell v. W.T. Grant Co., 416 U.S. at 614. But see 419 U.S. at 608 ("We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause."); Fuentes v. Shevin, 407 U.S. at 89-90.


113. Traditionally, a levy on real property was accomplished by some overt act constituting a trespass on the property, manifesting an interference with the debtor's right of possession, often accompanied by posting a notice of levy to put third parties on notice of the levy.
not dispossess the debtor from the property or interfere with his use or enjoyment. He may even sell or mortgage the property, but the purchaser or mortgagee takes title subject to the lien. Therefore, the purchase price or loan value of the property is usually diminished and, on occasion, its marketability is destroyed altogether.

The question is whether the placing of a nonpossessory lien against the debtor's property constitutes the "deprivation" of a substantial "property" interest invoking due process protection. Several lower courts have held that it does, stressing the lien's substantial economic effects—as on the property's marketability. Such a lien may also affect the debtor's credit rating and is a burden which the debtor must take some initiative to remove.

However, there is some authority to the contrary, particularly involving mechanics' liens. These cases reason that the lien does not prevent the owner from selling the property and that the effect of the lien may be ameliorated through bonding. In theory, it would seem impossible to distinguish an attachment lien from a mechanics' lien in the nature of the "property" interests involved or the economic consequences. If they are to be accorded different protection under the due process clause, more rationally it should flow from the greater weight assigned to the state's interest in protecting the claims of workmen or perhaps from the lesser weight assigned to the interest of the owner who impliedly consented to the lien when he contracted for the work.

1. The Saving Characteristics

The Mitchell analysis itself raises many questions. First, it is not clear whether all the saving characteristics must be present in every

See 13 FLA. JUR. Executions § 41 (1957). FLA. STAT. § 76.14 (1977) provides that the attachment lien becomes binding on subsequent judgment creditors and purchasers only from the time notice of the levy is properly recorded. Although not entirely free from doubt, today such recordation alone appears sufficient to constitute a levy on real property. See O'Flarity v. Gurley, 22 Fla. Supp. 196, rev'd on rehearing, 30 Fla. Supp. 186 (Fla. 4th Cir. Ct. 1964) (levy valid).


117. See FLA. STAT. §§ 76.18 (forthcoming bond), 19 (satisfaction bond) (1977). Generally, posting a satisfaction bond operates to release the property from the attachment lien, while posting a forthcoming bond does not. See D. EISEN & J. LANDERS, DEBTORS AND CREDITORS 7-8 (1978). The Florida Supreme Court, however, seems to have taken the position that an attachment lien is not released by filing a satisfaction bond. Cowart v. Venable, 98 So. 219 (Fla. 1923).
case or whether some are merely desirable but not essential. If some are not essential, which ones are essential or in what mix? The formulation of the standard itself suggests that it is not the factors individually, but the overall effect, which is dispositive.

In *Mitchell*, for instance, Justice White repeated the familiar litany that the requirements of due process “are not technical, nor is any particular form of procedure necessary” and that the very nature of due process “negates any concept of inflexible procedures universally applicable to every imaginable situation.”\(^{118}\) He then concluded: “Considering the Louisiana procedure *as a whole*, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller.”\(^{119}\)

To the same effect was Justice Powell’s conclusion in *Di-Chem* that it was the “combination” of deficiencies which he considered fatal to the Georgia garnishment statute.\(^{120}\) As to the possible omission of any of the enumerated characteristics, it may be noted that at one time or another a majority of the present justices have rejected the notion that a judge, rather than a clerk, must review the creditor’s ex parte application and issue the writ.\(^{121}\) At the other end of the spectrum, Justice Powell has referred to the need for an early hearing as the “most compelling” factor.\(^{122}\)

*a. Factual Affidavit*

Turning to the specific requirements of *Mitchell*, the plaintiff must make a specific factual showing, by sworn affidavit or verified pleading, of the “grounds” entitling him to the writ.\(^{123}\) Justice Powell, in his concurring opinion, framed this requirement somewhat differently. He spoke in terms of a specific factual showing of “probable cause to believe” that the creditor is entitled to the writ.\(^{124}\) Since the statutory grounds for issuing a writ are usually stated in conclusory terms, while the creditor’s affidavit is to be factual, “probable cause” may refer to the judge’s preliminary determination that the statutory grounds are met by the facts alleged, subject to later proof at the postseizure adversary hearing.

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118. 416 U.S. at 610.
119. *Id.* (emphasis added).
120. 419 U.S. at 613 (Powell, J., concurring).
121. *Id.* at 611 n.3; *id.* at 619 (Blackmun, Rehnquist, & Burger, JJ., dissenting).
122. *Id.* at 613 (Powell, J., concurring).
123. 416 U.S. at 616. The reference to “grounds” presumably means those grounds specified in the statute defining the circumstances under which the writ can be issued. Nowhere in the majority opinion is anything further said as to any constitutional restrictions on such grounds, and apparently this is for the state to decide as a matter of substantive policy.
124. *Id.* at 625.
However, in *Di-Chem*, Justice Powell again chose somewhat different words. There he spoke of the affidavit's providing a factual basis for the “need” to resort to the writ as a means of preventing removal or dissipation of assets required to satisfy the creditor’s claim. He then went on to say that at the postseizure hearing the creditor must show “probable cause to believe” there is a “need” to continue the garnishment. In an accompanying footnote he indicated that the initial showing of probable inability to collect the debt absent the issuance of the writ “need [not] be elaborate.”

All this seems to suggest that there is some constitutional restriction on the “grounds” for invoking the provisional remedies, and it is not left entirely to the discretion of the state. Although not articulated as a necessary condition, implicit in *Mitchell’s* balancing process is the necessity for a genuine need on the part of the creditor for summary seizure. Absent a compelling need, the balance would seem to swing inexorably in favor of according the debtor notice and an opportunity to be heard before seizure.

In *Mitchell* itself, for example, Justice White emphasized the creditor’s need for summary seizure of the goods since under Louisiana law the seller’s lien was lost upon transfer of possession by the buyer. In such circumstances, he continued, “[t]he danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied [since] the notice itself may furnish a warning to the debtor acting in bad faith.” The state is entitled, White concluded, to recognize the “reality” of the situation and to provide the creditor adequate protection. The Louisiana statute upheld in *Mitchell* was narrowly drawn, limited to those situations where it was within the “power” of the debtor to transfer, conceal, or waste the property, or to remove it from the jurisdiction.

Thus, it appears doubtful whether summary seizure can be justified unless prior notice or the time needed for a preliminary hearing pose a real danger to the plaintiff’s interest. On the other hand,

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125. 419 U.S. at 611 (Powell, J., concurring).
126. *Id.* at 612.
127. *Id.* at n.5.
128. 416 U.S. at 609.
129. *Id.*
130. *Id.* at 608.
131. *Id.* at 605. Under the Louisiana statute, it is the debtor’s “power” to impair the creditor’s security, not the creditor’s apprehension that he will do so, which triggers the right to sequestration. *Id.* at n.4.
it seems permissible for a state, in formulating its policy, to take into account the power of the debtor to affect the property rather than the impending exercise of such power. In effect this means that the state may, in deciding the grounds for provisional relief, presume that at least some debtors in possession will act in bad faith. Accordingly, summary seizure (with Mitchell safeguards) can be provided without the necessity of proof in each case of an actual likelihood of loss to the creditor.

The Court in Mitchell also stressed the fact that the factual issues raised by the creditor's affidavit, and thus, by reflection, the issues framed by the grounds of the Louisiana statute, were narrow and uncomplicated. In particular, they did not raise subjective issues, such as fault or intent, which are subject to "factual determination" and "documentary proof." Since many state statutes include the debtor's fraudulent removal or conveyance of his property as one ground for granting prejudgment relief, this requirement might pose a stumbling block, and one lower court has so held.

This result is somewhat anomalous in light of the purpose of the provisional remedies. In addition, it involves a situation in which summary seizure is most necessary to and prior notice most destructive of the creditor's interest. Thus, a strong argument can be made that in the fraud situation the state's interest in providing creditors with an ex parte remedy outweighs the added risk of error resulting from the subjective nature of fraud.

b. Ex Parte Judicial Supervision

There is some doubt as to the constitutional necessity of having the writ issued by a judge rather than a clerk. Justice White felt that anyone less than a full judicial officer would leave the debtor "at the unsupervised mercy of the creditor and court functionaries." Justice Powell, though, specifically rejected this requirement in his concurring opinion in Di-Chem. He would entrust the preliminary ex parte review of the creditor's application to any "neutral officer or magistrate."

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133. 416 U.S. at 617-18.
134. Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 649 (S.D.N.Y. 1974), rev'd on other grounds sub nom. Carey v. Sugar, 425 U.S. 73 (1976). The Supreme Court did not even mention the fact that the writ had been issued on the ground of fraud. This suggests that the Court no longer considers it material or at least that it is of little weight in the overall balancing process.
136. 419 U.S. at 611 n.3. At one time or another, seven justices have rejected the judge-clerk distinction. See also id. at 614 (Blackmun, Rehnquist, & Burger, JJ., dissenting); Mitchell v. W.T. Grant Co., 416 U.S. at 632 (Stewart, Douglas, & Marshall, JJ., dissenting).
Whether a clerk is sufficient probably turns on the nature of his office. Justice White found that approval of the creditor's application was not, as decried by the dissent, a "mere ministerial act," but involved a proper evaluation of the grounds, thus implying that some degree of judgment and discretion is required. In 1975, in *Hutchison v. Bank of North Carolina*, the federal district court held, in a very able opinion, that the writ could be issued by a clerk, at least where he was "a judicial officer and not a mere administrative functionary." Thus, this issue may turn on the nature of the office of the clerk of the court under the law and the practice of each jurisdiction.

c. Indemnity Bond

The posting of a bond or other adequate security by the creditor for the payment of all expenses and damages occasioned by a wrongful seizure is already required by many provisional remedy statutes. Under the *Mitchell* analysis, the purpose of the bond is to minimize the adverse impact on the debtor in the event of error. By imposing a direct and substantial cost on the creditor, in the form of the bond premium, the requirement also serves to check unnecessary, as well as unwarranted, resort to prejudgment process as a means of harassment. The bond approved in *Mitchell* was also conditioned to cover the reasonable attorney's fees incurred by the debtor in obtaining release of the property. However, this factor has not been stressed subsequently by the courts. The bond need only be "adequate," and the exact amount apparently may be left to the judge's discretion.


139. In Louisiana, such damages include compensation for loss of use of the property (not restricted to pecuniary loss) and injury to reputation and social standing, as well as humiliation. Reasonable attorney's fees may be included in recoverable expenses. See *Mitchell v. W.T. Grant Co.*, 416 U.S. at 606 n.8.

140. Id. at 606, 617.
d. Prompt Postseizure Hearing

The right to a prompt postseizure adversary hearing is an essential saving characteristic of Mitchell. Indeed, Justice Powell has said that a prompt and adequate postseizure hearing is the "most compelling" of the Mitchell safeguards. The debtor's right to be heard after seizure must be unqualified and cannot be conditioned on the posting of a bond or other security, as provided in the Georgia garnishment statute invalidated in Di-Chem.

On the other hand, it seems clear that the debtor may be required to take the initiative in requesting a hearing. The Louisiana statute upheld in Mitchell, for example, provided for a hearing upon the defendant's motion to dissolve the writ. This is consistent with the general notion that when only property rights are involved, rather than personal liberty, due process merely affords the parties an opportunity to be heard and does not impose a mandatory obligation that the taking be judicially reviewed, even if no objection is made.

If the debtor does request a postseizure hearing, though, the matter must be heard promptly. In this regard, Justice White contrasted Mitchell's right to an "immediate" hearing under the Louisiana sequestration statute with Mrs. Fuentes' right to an "eventual" hearing under the Florida replevin statute. There is scant authority on what is constitutionally "prompt," but it seems safe to say that at least a few days delay is permissible in order to give notice of the hearing, and probably any form of accelerated docketing of such hearings will suffice.

It is clear that the burden of proof at the hearing must be on the creditor to show that he was entitled to the writ, not on the debtor to show that the creditor was not. It is not so clear just what the

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143. Id.

144. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961), referred to by the Court, 416 U.S. at 618.


creditor must prove. In *Mitchell*, Justice White said that the issue at the preliminary hearing concerns the possession of the property pending trial—which turns on the existence of the statutory grounds for the writ.\(^\text{147}\) The creditor, he added, needs to establish only the probability that his case will succeed in order to justify the seizure.\(^\text{148}\) In *Di-Chem*, White noted that the Louisiana statute upheld in *Mitchell* required the creditor to prove the grounds on which the writ had issued, thus striking down the Georgia statute because there was "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."\(^\text{149}\)

Justice Powell, in his concurring opinions, stated the requirement somewhat differently. In *Mitchell*, he said that the creditor had to make an ex parte, preseizure showing of "probable cause to believe that he is entitled to the relief requested," followed promptly after seizure by a hearing "to determine the merits of the controversy."\(^\text{150}\) Later, in *Di-Chem*, Powell referred to the creditor's burden of showing "probable cause to believe there is a need to continue the garnishment . . . ."\(^\text{151}\) Presumably, this need is established if the statutory grounds for the writ are found to exist.\(^\text{152}\)

In sum, it appears that the creditor must prove the factual existence of the statutory grounds alleged in his motion for summary seizure as well as a factual basis for his underlying claim. These requirements are consistent with the overall rationale of *Mitchell* that the state may constitutionally seize property without a prior hearing if, and only if, it is necessary, on balance, to protect a legitimate state need.\(^\text{153}\) This conclusion is not jeopardized by *Carey*, in which the Court stressed the requirement that the creditor demonstrate his likelihood of success on the merits of the underlying claim when factual issues are raised on a motion to vacate the

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\(^{147}\) 416 U.S. at 609. Later, Justice White reemphasized that the Louisiana law expressly provides for an immediate hearing and dissolution of the writ "unless the plaintiff proves the grounds upon which the writ was issued," quoting from article 3506 of the Louisiana Code of Civil Procedure. 416 U.S. at 618.

\(^{148}\) 416 U.S. at 609.

\(^{149}\) 419 U.S. at 607.

\(^{150}\) 416 U.S. at 625. It is not entirely clear whether "controversy" refers to the existence of the statutory grounds upon which the writ was issued or to the merits of the plaintiff's underlying claim. The context suggests that Justice Powell intended to refer to the existence of the statutory grounds.

\(^{151}\) 419 U.S. at 612.

\(^{152}\) See notes 123-34 and accompanying text supra.

\(^{153}\) See 416 U.S. at 608-10. The Court in *Mitchell* recognized the legitimacy of the state's need for effective creditor remedies when there is a real danger of loss or destruction of the debtor's property.
attachment. This same concern was expressed by Justice Stewart in *Fuentes* when he said that the creditor must establish "at least the probable validity . . . of the underlying claim" since the essential reason for a preliminary hearing is to prevent unfair and mistaken deprivations of property. Therefore, when property is seized without a prior hearing, the debtor has a right to challenge the legality of the seizure with respect to the probable merits of the underlying claim as well as the factual existence of the statutory grounds for seizure.

e. Rebond

The final saving characteristic of *Mitchell* was the debtor's absolute right to return of the property upon posting a bond. Although not stressed in *Mitchell*, this requirement seemed to gain added significance in *Di-Chem* when Justice Powell pointed out that, in a garnishment situation, the funds impressed usually bear "no relation to the controversy giving rise to the alleged debt," and therefore the state should give the debtor an opportunity to free those funds by posting adequate security. Such rebonding provisions are quite common. As a matter of policy, there does not seem to be any reason not to permit the debtor to substitute security. Several lower courts have, nevertheless, held that it is not essential.

2. Waiver of Due Process

The issue of waiver also must be considered. It is clear that, in theory, constitutional rights may be waived—even in advance. Because the use of provisional creditor remedies so often arises out of a preexisting contractual relationship between the debtor and the creditor, it is not surprising that creditors use their superior bargaining position to extract contractual waivers, especially from individual consumer debtors. The issue arose in *Fuentes*, but the Court disposed of the question on the factual ground that the waiver clause was ambiguous and, being construed against the creditor who drafted it, ineffective. Since future creditors will obviously be able

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154. 425 U.S. at 78.
155. 407 U.S. at 97 (quoting Sniadach v. Family Fin. Corp., 395 U.S. at 343 (Harlan, J., concurring)).
156. 416 U.S. at 607.
157. 419 U.S. at 612 (Powell, J., concurring).
160. 407 U.S. at 96-96.
to correct this deficiency by proper draftsmanship, it is necessary to consider the effectiveness of such waivers.

The leading case on waiver of constitutional rights is *D.H. Overmyer Co. v. Frick Co.*,\(^{163}\) in which the Supreme Court in 1972 upheld a cognovit note in which the debtor had waived its constitutional rights to notice and an opportunity to be heard in the event of default.\(^{162}\) However, the facts of the case were not typical. The debtor was a business corporation with substantial bargaining power and financial sophistication. The creditor had specifically bargained for the cognovit provision, and the debtor received substantial benefits from agreeing to it. Applying the standards governing waiver of constitutional rights in a criminal proceeding, although not ruling that such standards must necessarily apply, the Court held that on that facts of the case the contractual waiver of due process rights was made "voluntarily, intelligently, and knowingly."\(^{163}\) It was not, the Court pointed out, a "contract of adhesion" resulting from unequal bargaining power or overreaching.\(^{164}\) In short, there was a voluntary and intentional relinquishment of a known right.

It is significant that the Court in *Overmyer* did not hold cognovit notes constitutionally invalid per se but rather held that the validity of such notes in each case turns on the effectiveness of the debtor's waiver of his due process rights. It has been suggested, however, that cognovit notes may be invalid per se in the case of consumer debtors, as opposed to the commercial debtor in *Overmyer*. The theory is that there is always a disparity of bargaining power in a consumer setting, and the debtor receives nothing for his waiver other than the loan itself.\(^{165}\)

On the other hand, the Uniform Commercial Code, now the law in forty-nine states,\(^{166}\) provides that unless otherwise agreed a se-

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162. Cognovit notes are invalid in Florida. FLA. STAT. § 55.05 (1977).
163. 405 U.S. at 187.
164. Id. at 186.
165. *See* Swarb v. Lennox, 405 U.S. 191 (1972). The lower court held cognovit notes invalid per se as to all persons with incomes of less than $10,000 but refused to do so as to persons with higher incomes. The *plaintiff* appealed the latter result only, but the Supreme Court affirmed. Note, however, that in this posture the Court did not address itself to the first issue at all and thus has not held cognovit notes invalid per se as to any class of debtors.
166. *The American Law Institute & National Conference of Commissioners on Uniform*
cured creditor may, upon default, repossess the collateral without judicial process if it can be done without breach of the peace.\textsuperscript{167} If such "self-help" repossession cannot be accomplished peaceably, the creditor must resort to legal process. If legal action is necessary, the debtor, of course, is entitled to due process of law. But since the creditor cannot resort to "self-help" if the security agreement provides otherwise, the execution of an agreement which does not provide otherwise is, in effect, a waiver of due process. Nevertheless, the validity of consumer security agreements which do not exclude "self-help" by the creditor has never been seriously questioned on the constitutional issue of waiver—despite the fact that they are classic examples of adhesion contracts. The validity of such agreements supports the view that not all consumer waivers are per se unconstitutional.

If a debtor may waive his constitutional right to a trial on the merits, then theoretically he may waive his right to a preliminary hearing to contest a prejudgment seizure pending trial. To be effective, it must be shown that the waiver is intentional, voluntary, and informed. Since these facts cannot be demonstrated merely by proving the execution of the contract itself, some proof outside the four corners of the agreement must be introduced to establish the validity of the waiver.

The question is: just when and how should this showing be made in the context of provisional creditor remedies? There are several possibilities. The writ might be issued simply on the basis of the waiver document itself, leaving all proof of the extrinsic factors to a later time if and when the debtor challenges the validity of the waiver, such as by motion to dissolve the writ or by an action for damages. A second possibility would be to issue the writ upon an ex parte showing, by factual affidavit, of the necessary extrinsic factors. Finally, a full adversary hearing on the waiver could be held before the writ is issued.\textsuperscript{168} The second alternative would appear to be the most appropriate choice in light of Mitchell, but there is little authority on the question.

\textbf{IV. THE PREJUDGMENT PROCESS IN FLORIDA}

The Florida provisional remedies of replevin, attachment, and prejudgment garnishment have all been challenged successfully on


\textsuperscript{168} See Clark & Landers, supra note 38, at 376.
due process grounds. The constitutional defects of each statute will be examined, and appropriate curative legislation will be proposed.

A. Replevin (Chapter 78 of the Florida Statutes)

The original Florida replevin statute169 fell to Mrs. Fuentes' challenge in the United States Supreme Court because it failed to provide for notice and a hearing before her property was seized, as previously discussed.170 Even though the Court subsequently modified the constitutional standard in Mitchell, the majority chose to distinguish Fuentes (rather than overrule it) because under the Florida replevin statute the writ was issued ex parte by the court clerk on the basis of the creditor's conclusory assertion171 that the property was being "wrongfully detained" by the debtor.172 Furthermore, the only way the debtor could obtain the release of the property pending trial was to file a forthcoming bond, there being no opportunity for an early judicial review of the seizure before the "eventual" trial on the merits.173 Thus, the replevin statute invalidated in Fuentes would also have failed to pass constitutional muster under the Mitchell test.

The Florida Legislature responded to the problem by amending chapter 78 of the Florida Statutes in 1973.174 This amendment was a thoughtful attempt to satisfy the preseizure hearing requirement of Fuentes while at the same time utilizing the extraordinary circumstances exception allowed in that case to enable a creditor to obtain summary seizure of property upon a showing of unusual need. The usual procedure established by this amendment—which remains in effect—is to have the court order the debtor to show cause why the property should not be taken from him and delivered to the creditor.175 No bond is required of the creditor. Hearing on the order is held five to ten days after service of the order on the debtor unless waived by the debtor.176 If, upon hearing, the court determines that there is a reasonable probability that the creditor will

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169. Act of Mar. 11, 1845, ch. 43, §§ 1-14, 1845 Fla. Laws 112 (current version at Fla. Stat. ch. 78 (1977)).
170. See notes 49-62 and accompanying text supra.
171. 416 U.S. at 615.
172. Id. at 617. In the Court's opinion, wrongful detention involves a "fault" standard more appropriately resolved after an adversary hearing. Id.
173. Id. at 615, 618.
176. Id. § 78.065(2)(a).
177. Id. § 78.075.
prevail on the merits of the underlying claim, the clerk will be ordered to issue a writ of replevin directing the sheriff to seize the property. After three days, the sheriff delivers the property to the creditor unless the defendant has reclaimed possession by posting adequate security.

The 1973 amendment also established some novel procedures affording creditors additional protection when haste was essential. These innovations—involving a temporary restraining order and emergency writ—bear mentioning even through they have since been repealed. Upon request and an ex parte showing by affidavit reasonably tending to establish that the property was in danger of destruction, concealment, removal from the jurisdiction, or transfer, the court was authorized, in its discretion, to issue a temporary restraining order prohibiting such acts pending the preliminary show cause hearing. As a further and final safeguard against loss of the property, the court was empowered, in its discretion and upon a showing by the creditor that the defendant “probably” would violate the temporary restraining order, to order summary seizure of the property under an emergency writ of replevin.

The constitutionality of this procedure was never litigated, perhaps because the temporary restraining order and emergency writ provisions were seldom used. The lack of creditor interest in the temporary restraining order provision is rather curious since the requisite grounds for obtaining it were quite similar to the traditional grounds for obtaining a writ of attachment and thus were not unfamiliar to either creditors or the bar. Moreover, it seems likely that most debtors would be hesitant to disobey a restraining order—a contempt of court—and thus it would appear to have been reasonably successful in protecting creditors’ security interests. Furthermore, the cost of obtaining a restraining order would not have been appreciably greater than the cost of obtaining an order to show cause, since both orders could be obtained at the same ex parte judicial appearance. Thus, the only additional cost of obtaining a restraining order would have been the time spent drafting the request and supporting affidavits.

It is not surprising, on the other hand, that few emergency writs were sought. It is hard to imagine the unusual circumstances neces-

178. Id. § 78.067(2).
179. Id. § 78.08.
180. Id. § 78.13.
182. Id.
183. Cf. Fla. Stat. § 76.04 (1977) (debtor likely to remove or destroy the property).
sary to support a finding that the debtor would "probably" violate a restraining order. Seemingly, only a past history of such contempt would suffice. Thus, as a practical matter, the emergency writ provision was of little value to creditors.

Whatever the merits of the temporary restraining order and emergency writ provisions of the 1973 amendment, they were scrapped by the Florida Legislature in 1976 in favor of an ex parte procedure closely resembling the Louisiana sequestration procedure approved by the Supreme Court in *Mitchell*. The heart of chapter 76-19, Laws of Florida, was the adoption of a new section 78.068 of the Florida Statutes. This section provides that a prejudgment writ of replevin may be issued ex parte by a judge upon the plaintiff's sworn allegations as to the nature and amount of the underlying claim and the specific statutory grounds for a prejudgment writ. The plaintiff must also post a bond in an amount twice the value of the property or twice the balance due, if less, conditioned to pay any damages suffered by the defendant if the writ is issued wrongfully, including attorney's fees. The judge may order the clerk to issue

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184. Act of May 19, 1976, ch. 76-19, § 1, 1976 Fla. Laws 28 (codified at *Fla. Stat.* § 78.068 (1977)), which provides:

(1) A prejudgment writ of replevin may be issued and the property seized delivered forthwith to the petitioners when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the verified petition or by separate affidavit of the petitioner.

(2) This prejudgment writ of replevin may issue if the court finds, pursuant to subsection (1), that the defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser, during the pendency of the action, or that the defendant has failed to make payment as agreed.

(3) The petitioner must post bond in the amount of twice the value of the goods subject to the writ or twice the balance remaining due and owing, whichever is lesser, as determined by the court, as security for the payment of damages the defendant may sustain when the writ is obtained wrongfully.

(4) The defendant may obtain release of the property seized under a prejudgment writ of replevin by posting bond, within 5 days after serving of the writ, in the amount of one and one-fourth the amount due and owing on the agreement, for the satisfaction of any judgment, which may be rendered against him.

(5) A prejudgment writ of replevin shall issue only upon the signed order of a circuit court judge or a county court judge.

(6) The defendant, by contradictory motion filed with the court within 10 days after service of the writ, may obtain the dissolution of a prejudgment writ of replevin, unless the petitioner proves the grounds upon which the writ was issued. The court shall set down such motion for an immediate hearing. This motion shall be in lieu of the provision of subsection (4).


186. *Id.* § 78.068(1).

187. *Id.* § 78.068(3).

188. *Id.* § 78.20.
a prejudgment writ of replevin if he finds that it "clearly appear[s]" from the "specific facts" alleged by the plaintiff\(^\text{189}\) that the defendant is engaging in, or is about to engage in, conduct that may place the property "in danger of" destruction, waste, concealment, removal from the state or jurisdiction of the court,\(^\text{190}\) or to transfer to an innocent purchaser, or if he finds that "the defendant has failed to make a payment as agreed."\(^\text{191}\)

After seizure of the property by the sheriff under a prejudgment writ of replevin, the defendant may obtain the release of the property by posting a satisfaction bond\(^\text{192}\) or, in the alternative, by moving to dissolve the writ.\(^\text{193}\) The motion for dissolution must be given an "immediate" hearing by the court, at which time the plaintiff has the burden of proving the existence of the "grounds" upon

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189. Id. § 78.068(1).

190. Id. § 78.068(2). It is not clear what removal from the "jurisdiction" of the court means in this context. A writ of replevin may be ordered by a judge of either the circuit court or the county court, Id. § 78.068(5), depending upon the value of the property. See id. §§ 26.012(2)(a) (circuit court has jurisdiction in all actions not cognizable by the county courts), 34.01(1) (county court has jurisdiction when the matter in controversy does not exceed $2,500). Both the circuit court and the county court have statewide "jurisdiction" with respect to service of process, id. § 48.011, and enforcement of judgments, id. § 56.031, although a replevin action is properly venued in the county where the property is located, id. § 78.03. The purpose of § 78.068(2) would seem best served by construing "jurisdiction" to mean the territorial limits of the judicial circuit since that is the basic judicial entity in Florida. Cf. id. § 76.04(12) (attachment if debtor is about to remove himself beyond the limits of judicial circuit in which he resides) (emphasis added).

191. Id. § 78.068(2).

192. Id. § 78.068(4). This is inconsistent with § 78.13, which provides that the defendant may recover the property by posting a forthcoming bond in an amount equal to the value of the releived property as appraised by the sheriff. There would seem to be no explanation for the discrepancy except that the Louisiana statute upon which § 78.068 is modeled requires a payment bond of one and one-fourth the amount of the plaintiff's claim. It is unclear whether a defendant whose property has been replevied pursuant to a writ issued under § 78.068 can obtain its release by posting bond in the amount provided in § 78.13 or vice versa.

193. Id. § 78.068(6). The statute requires the defendant to file his motion to dissolve "within 10 days after service of the writ." This is a curious requirement since there is no express requirement that a copy of the writ itself ever be served on the defendant. Rather, the writ is executed by seizure of the property. This may or may not afford notice in fact to the defendant, depending on the circumstances. The defendant must, of course, be served with a copy of the summons and complaint in the underlying action—although this may be by publication or posting if the defendant is not amenable to personal service. Thus, by the time the defendant actually learns of the replevy, the time may have passed for him to bring a motion to dissolve. Since the five days in which the defendant may rebond the property also tolls from "service" of the writ, he may not be able to recover the property until after the trial on the merits of the plaintiff's underlying claim. This is unfortunate, especially since no legitimate interest is served by requiring the defendant to act so quickly. The problem might be alleviated by inferring obliquely from § 78.068(6) a requirement that the defendant be served with a copy of the writ, although this was probably not intended by the legislature. The problem is avoided under § 78.065(2)(c), which requires that the show cause order be served on the defendant in the manner prescribed by the court.
which the writ was issued.\textsuperscript{194} If the plaintiff fails to do so, the writ is dissolved and the property is returned to the defendant pending full trial on the merits of the plaintiff’s underlying claim. If the defendant ultimately prevails on the merits, he is entitled to judgment against the plaintiff and the bonding company for his damages, if any, for the taking of the property, including his attorney’s fees.\textsuperscript{195}

In 1978, in Gazil, Inc. v. Super Food Services, Inc.\textsuperscript{196} the Florida Supreme Court held that section 78.068 satisfies the principles of federal due process laid down in Mitchell as well as those imposed by the Florida Constitution.\textsuperscript{197} Specifically, the court noted that (1) section 78.068 requires the plaintiff to show by verified motion “facts indicating a right to the property” sought to be repleived; (2) the plaintiff’s ex parte application must be presented to a judge, as opposed to a ministerial court official; (3) the facts alleged must show the “necessity” for replevin, which is sufficiently shown if the debtor is in possession of the property and the plaintiff establishes that there is a “possibility” of waste, concealment, or transfer of the property, or that the debtor is in default on his payments;\textsuperscript{198} (4) the plaintiff must post a bond to protect the debtor from “mistaken” repossession;\textsuperscript{199} and (5) the debtor is entitled on request to an imme-

\begin{itemize}
\item \textsuperscript{194} Id. § 78.068(6).
\item \textsuperscript{195} Id. § 78.20.
\item \textsuperscript{196} 356 So. 2d 312 (Fla. 1978).
\item \textsuperscript{197} See Fla. Const. art. I, § 9.
\item \textsuperscript{198} 356 So. 2d at 313. The court decided the state due process question without discussion. The defendant argued that a mere default in payments is an impermissible ground for replevin, but the court summarily dismissed this contention with the observation that the Mitchell rationale does not limit a state’s right to identify the circumstances in which pre-judgment seizure is appropriate. Id. The point is an interesting one and perhaps merits more attention than the short shift accorded it. Although never clearly articulated by the United States Supreme Court as a condition precedent to its application, the Mitchell balancing test was predicated on a real risk of loss to the creditor if the debtor were forewarned of the impending seizure. Indeed, the Court noted as an “important factor” that under Louisiana law the seller’s lien being foreclosed by sequestration would expire if the buyer transferred possession of the goods. See 416 U.S. at 609. Thus, the Court implicitly found this danger sufficient to invoke the Mitchell balancing test. Under the Uniform Commercial Code, however, security interests perfected by filing are usually binding on purchasers even if they have no actual knowledge of the lien. See U.C.C. § 9-301(2)(c); Fla. Stat. § 679.301(2)(c) (1977). A buyer in the ordinary course of business, such as a purchaser at retail, takes free of a security interest in the goods purchased, however, even if he has actual knowledge of the lien. U.C.C. § 9-307(1); Fla. Stat. § 679.307(1) (1977). (This exception is to preserve the free flow of goods at retail.) On the other hand, there is always the latent danger that a debtor in possession of the collateral for a secured debt will damage or conceal the goods if given advance notice of the creditor’s intention to repossess. Thus, while not rising to the level of danger present in other grounds for replevin enumerated in § 78.068(2) of the Florida Statutes, mere delinquency in payment by a debtor in possession of the collateral may be adequate constitutionally to outweigh the need for a prior hearing.
\item \textsuperscript{199} 356 So. 2d at 313. The actual condition of the statutory bond is the payment of
diate postseizure hearing on the issue of possession. Finding that section 78.068 composes with the Mitchell standards, the court held it constitutional.

There is at least one other constitutional objection to section 78.068 which the Florida Supreme Court did not address in Gazil. This involves the showing which the plaintiff must make at the hearing on a motion to dissolve the writ. Under section 78.068(6) the plaintiff is required only to prove the existence of the "grounds" upon which the writ was issued, that is, evidence of the defendant's conduct which is allegedly impairing the safety or value of the property to be replevied. This provision of the statute was taken almost verbatim from the Louisiana statute upheld by the Supreme Court in Mitchell. However, the Court announced a somewhat different "constitutional standard" in Carey, requiring the plaintiff to demonstrate at the postseizure hearing the likelihood that he would ultimately prevail on the merits. Section 78.068(6) might be construed to require such a showing.

Two rationales are possible, but neither seems convincing. First, the requirement that the plaintiff's application for the writ show the nature and amount of his claim, as well as the grounds for summary seizure, might be read to require a consideration of the merits of the underlying claim. However, this would clearly require the addition by a sympathetic court of a gloss not fairly contemplated by the language of section 78.068(1), which refers to the "grounds" for the writ in the conjunctive with the nature and amount of the plaintiff's claim, not as inclusive of the underlying claim. Secondly, it might be argued that section 78.068(6) must be read in pari materia with section 78.067(2), which requires the court to consider "the probable validity of the underlying claim" at the hearing on the order to show cause why the property should not be seized and delivered to the plaintiff. Although this is precisely the question damages sustained by the debtor if the writ is obtained "wrongfully." Fla. Stat. § 78.068(3) (1977). There are no cases construing the meaning of "wrongful" replevin, and it may not be synonymous with "mistaken." See notes 254-69 and accompanying text infra regarding damages for "improper" attachment under the analogous statutory bond.

200. 356 So. 2d at 313; see Fla. Stat. § 78.068(5) (1977). In Gazil, the Florida court "receded" from its previous decisions to the extent that they had suggested that a postseizure hearing was "required" under Mitchell and declared unequivocally that due process is satisfied by the "opportunity" for a prompt hearing at the request of the defendant after seizure. 356 So. 2d at 313; see Ray Lein Constr., Inc. v. Wainwright, 346 So. 2d 1029 (Fla. 1977) (garnishment), discussed at notes 312-18 infra; Phillips v. Guin & Hunt, Inc., 344 So. 2d 568 (Fla. 1977) (distress for rent); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067 (Fla. 1976) (attachment), discussed at notes 209-18 infra.

201. 425 U.S. at 78.

202. It was this possibility which led the Court to remand Carey. 425 U.S. at 78-79.

mandated by Carey, section 78.068 stands as a separate procedure, independent of the show cause procedure. There is thus no reason to read section 78.067(2) in pari materia with section 78.068(6).

Apart from this possible constitutional infirmity, easily remedied, it would seem desirable from both a substantive and a stylistic point of view to model reform of the other Florida provisional remedies after section 78.068. As a matter of policy, rather than constitutional compulsion, it could be argued that a Fuentes-type preliminary hearing should be held before every prejudgment seizure, absent an extraordinarily compelling need for haste. However, the Florida Legislature seems consciously to have rejected such a policy in 1976 when it amended chapter 78 to provide for summary seizure, judicially supervised as in Mitchell.

Given the fundamental state policy favoring sharper creditor devices at the expense of greater debtor protection, there would seem to be little reason to deviate substantively from the balance drawn in section 78.068 in revising the attachment and prejudgment garnishment statutes. Moreover, both the bench and bar undoubtedly would appreciate a consistent prejudgment procedure regardless of the specific writ involved, and uniformity of language would aid in construction through the development of a body of broadly applicable judicial precedent. However, before accepting blindly the proce-

204. As originally enacted in chapter 73-20, a show cause order was used in conjunction with a temporary restraining order or emergency writ of replevin. Functionally, the ex parte procedure of § 78.068 is the substitute for the restraining order and emergency writ provisions which were repealed upon the adoption of § 78.068, thus suggesting that the show cause procedure must be used in conjunction with the summary procedures of § 78.068. However, § 78.068 itself makes no reference to a show cause order, and several of the specific requirements of § 78.068 are inconsistent with counterpart requirements of chapter 78 applicable to the show cause procedure. For example, § 78.068(3) requires the plaintiff to post a bond while the show cause procedure does not. Furthermore, under § 78.068(4) the defendant may obtain release of the property seized by posting within five days a satisfaction bond in the amount of one and one-fourth the amount due, while under § 78.13 the sheriff must deliver the replevied property to the plaintiff unless within three days the defendant posts a forthcoming bond in an amount equal to the value of the property. A more fundamental inconsistency concerns the paradox of according the defendant under § 78.068(6) a right to move within 10 days for the dissolution of the writ if there is in all cases to be a show cause hearing within 10 days on the plaintiff's right to the writ. See Fla. Stat. § 78.065(2)(a) (1977). This would result in two hearings and strongly suggests that § 78.068 is a separate and independent procedure for obtaining a prejudgment writ of replevin. See 1 S. Rakusin, supra note 31, at § 3.05A, at 56a.

Section 78.068 does not, however, render the show cause procedures of chapter 78 nugatory. Since the requisite grounds for an ex parte writ may not exist or the plaintiff may simply decide there is little danger in giving the defendant prior notice of the replevy, the plaintiff may choose to use the show cause procedure rather than the summary procedure of § 78.068. There are at least two affirmative reasons why a plaintiff may prefer the show cause procedure: first, it reduces the risk of a wrongful seizure for which he might be liable, and second, it is less expensive since it does not require posting a bond.
dures and language of section 78.068 as a model for further statutory reform, it is necessary to examine them critically for clarity and precision. In this light, section 78.068 does not fare too well.

Section 78.068(1) requires the statutory grounds for the issuance of the writ to be shown by specific facts alleged in either a verified petition or a separate affidavit. Although this seems to meet the *Mitchell* test, it raises several problems of statutory construction. First, as a matter of style, the Florida Statutes usually use the term "petition" to refer to the initial pleading for the commencement of an independent action and the term "motion" to refer to a pleading for the commencement of a proceeding ancillary to the main action. For example, both the writs of attachment and garnishment are obtained by "motion," and this term should also be used in section 78.068(1).

As written, the section also provides that the factual basis for the writ be shown by petition "or by separate affidavit of the petitioner." There would seem to be no objection to a third person’s attesting to the existence of the statutory grounds, and in fact such testimony might be preferable in an ex parte proceeding. For instance, section 76.10 provides, when the debt is not yet due, that the existence of the grounds for attachment must be shown by an affidavit *other than* the plaintiff’s. Permitting third-party testimony would also allow for a showing of the statutory grounds by personal knowledge rather than on mere information and belief of the plaintiff, since in many cases the plaintiff will not have personal knowledge of the conduct by which the defendant is endangering the property. This, of course, assumes that the plaintiff can meet his constitutional burden by allegations of fact not within his own personal knowledge.

The Supreme Court has never spoken on this issue, but it would not seem unreasonable to allow the judge to consider hearsay affidavit testimony in an ex parte proceeding since the plaintiff will be put to his proof soon in an adversary hearing at which the witnesses will be subject to cross-examination.205 On the other hand, the constitutional purpose of this requirement is to minimize the risk of error, and restricting affidavit testimony to the affiant’s personal knowledge might reduce the possibility of error. The judge, of

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205. According to Justice Powell, the "basic protection" is the assurance of a prompt postgarnishment hearing for the rectification of any error in the initial decision to issue the writ. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 611 n.3 (Powell, J., concurring); accord, *Vt. R. Civ. P. 4.1(i)*, as amended March 12, 1975: "Affidavits required by this rule [attachment] shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant’s own knowledge, information, or belief; and, so far as upon information and belief, shall state that he believes this information to be true."
course, is not required to accept the truth of every allegation and can consider the source of any indirect testimony in making his findings. Moreover, the plaintiff's exposure to liability for wrongful seizure serves as a check upon irresponsible allegations not within the plaintiff's personal knowledge. Given the open nature of the issue, the legislature should weigh the competing interests and resolve the question explicitly as a matter of statutory policy.

Section 78.068(2) provides that the judge "may" order the issuance of a prejudgment writ of replevin if he "finds, pursuant to subsection (1)," that there are adequate grounds for the writ. The reference to subsection (1) probably incorporates the requirement that the grounds "clearly appear" from the specific facts alleged, thereby creating a higher standard of proof than a mere prima facie showing. It implies that the judge, as the ex parte reviewer of the facts, should not accept every statement at face value. Instead, he perhaps should be somewhat skeptical, even in the absence of any contradictory evidence (which will almost always be the case).

The Supreme Court has never discussed the standard of proof constitutionally required at this stage of the proceedings, except for Justice Powell's footnote reference in Di-Chem that the initial showing need not be "elaborate." As a matter of policy, however, the somewhat more stringent standard suggested by section 78.068(1) seems entirely appropriate in light of its intended purpose of preventing mistaken seizures. But this standard should be more clearly articulated as a measure of proof and moved to section 78.068(2), which establishes the findings requisite for the issuance of a writ.

One other aspect of section 78.068(2) merits consideration. The section provides that a prejudgment writ of replevin "may" issue upon proper findings. It is not clear whether issuance of the writ is mandatory in such circumstances or whether it is discretionary with the court. "May" usually connotes a permissive action, as contrasted with the mandatory "shall." It would be desirable, as a matter of policy, to give the judge some discretion in issuing this extraordinary writ—even where the statutory grounds are found to exist. This would be consistent with the traditional equitable nature of the provisional remedies generally. Again, comparison with the former temporary restraining order and emergency writ provisions of chapter 73-20 is instructive. In both cases, the statute expressly

206. 419 U.S. at 612 n.5.
207. Such as the requirement in subsection (6) that the court "shall" hear immediately a motion to dissolve the writ.
208. See, e.g., OKLA. STAT. ANN. tit. 12, § 1152 (West Supp. 1976), noted in TeSelle & Love, supra note 86, at 268 n.73.
provided that, upon the requisite findings, "the court, in its discre-
tion, may issue" the relief requested. Any remedial legislation
should be equally clear if equitable discretion is intended.

Under section 78.068, the debtor has two alternative means of
regaining possession of the property seized. He may either post a
satisfaction bond under subsection (4) or file a contradictory motion
under subsection (6) to dissolve the writ. Since he has an absolute
right to seek dissolution without posting a bond, the basic scheme
of these sections is constitutionally sound. As a model for similar
legislation, however, these subsections pose several problems.
Subsection (4) requires the defendant to post the bond within five
days after service of the writ while subsection (6) requires him to
file the contradictory motion to dissolve the writ within ten days
after service.

First, as a matter of style, the Florida Statutes do not normally
use the term "contradictory motion," which the legislature bor-
rrowed verbatim from the Louisiana statute used as a model by the
draftsman of section 78.068. Furthermore, as a technical matter,
tolling the time periods from the service of the writ is somewhat
perplexing, for there is no express requirement in section 78.068 that
the writ of replevin be "served" on the defendant. Rather, the
sheriff executes the writ by levy on the property, either actually or
constructively. It would, of course, be possible (and desirable) to
add a provision requiring personal service of the writ on the defen-
dant in addition to levying on the property.

The most serious problem with these subsections, however, is the
basic notion of compelling the defendant to choose his course of
action within five or ten days or, by implication, waive his right to
seek repossession of the property pending the final outcome of the
trial on the merits. In many cases, the defendant might not even be
aware of the seizure until after the time for action has elapsed. This
objection might be overcome by requiring personal service of the
writ on the defendant and tolling the time periods from such ser-
vice.

211. The defendant must, of course, be served with a copy of the summons and complaint
in the underlying action, as in any other lawsuit. Service of the complaint may not, however,
always be accomplished within the five- or ten-day period in which the defendant must post
bond or move to dissolve the writ.
212. Constructive levy is accomplished by openly exercising dominion and control over
the property in a manner hostile to the defendant's ownership interest, for example, by
padlocking, rendering equipment inoperative, or posting conspicuous notice of levy. See, e.g.,
Fla. Stat. § 76.16(2) (1977).
213. The court might construe § 78.068(4), (6) to require service of the writ on the defen-
A better solution would be to allow the defendant to post bond or file for dissolution of the writ at any time after seizure. This is consistent with the analogous provisions of present Florida law regarding attachment\textsuperscript{214} and garnishment.\textsuperscript{215} There is no apparent reason to put the defendant to his election in such a short period of time. In many cases, the short time allowed will put the defendant under some duress. Virtually always, he must consult an attorney even to become aware of his options, and, if he seeks to post bond, he may have to raise liquid collateral equal to the amount of the bond as security for the bonding company.\textsuperscript{216}

Moreover, there is no apparent reason to coerce the defendant into hasty action from the plaintiff’s point of view. Since section 78.068(1) provides that the property seized may be delivered “forthwith” to the plaintiff, arguably the requirement that the defendant timely elect his course of action might be intended to facilitate release of the property by the sheriff to the plaintiff. Section 78.068 does not, however, elaborate on the meaning of “forthwith,” and section 78.13 establishes as a general rule that the property shall be delivered to the plaintiff after three days unless the defendant has posted a bond within that time.\textsuperscript{217} Thus, the sheriff may already have delivered the property to the plaintiff before the end of the time given the defendant to act, and, on posting bond or on dissolution of the writ, the property would have to be recovered from the plaintiff.

While no legitimate interest of the plaintiff appears to be served by the short time accorded the defendant to decide what action to take, there is a strong coercive effect on the defendant which greatly increases the plaintiff’s leverage in negotiating a hasty settlement. The plaintiff knows that if settlement cannot be reached within five days, the defendant has waived his right to rebond the property, and, if there is no settlement within ten days, the defendant has waived any possibility of regaining possession of the property until after the trial. This is true even if the seizure is wrongful. The plaintiff knows the defendant must decide quickly whether to spend

dant for the sole purpose of tolling the time periods. If so, the time within which the defendant could move to dissolve the writ or rebond the property would never be tolled unless the writ were served on the defendant.

\textsuperscript{214} FLA. STAT. §§ 76.19 (rebond), .24 (motion to dissolve) (1977).

\textsuperscript{215} Id. §§ 77.07 (motion to dissolve), .24 (rebond).

\textsuperscript{216} See Alexander, Wrongful Attachment Damages Must Be Fixed in the Original Suit, 4 U.S.F.L. Rev. 38, 40 (1969).

\textsuperscript{217} It is not clear whether § 78.13 applies to property repleived under § 78.068, especially if the latter section is deemed an independent procedure. See discussion at notes 192-95 supra.
the additional money to post bond or retain counsel to contest the seizure. The plaintiff is in a position to wait and the defendant is not, thus creating an unequal bargaining situation. On balance, the coercive time limits for the defendant's action should be eliminated, and the defendant should be allowed to rebond the property or move to dissolve the writ at any time after seizure.

Thus, while section 78.068, with slight modification, provides a minimally constitutional model for revision of the other Florida provisional writ procedures, it has a number of shortcomings which ought not be perpetuated in the name of uniformity. On the other hand, where the procedures or terminology of section 78.068 are sound, technically and stylistically, as well as constitutionally, they should be carried over to enhance procedural familiarity and to provide greater opportunity for judicial interpretation.

B. Attachment (Chapter 76 of the Florida Statutes)218

1. Constitutionality

In Unique Caterers, Inc. v. Rudy's Farm Co.219 the Florida Supreme court held chapter 76 of the Florida Statutes unconstitutional insofar as it permits prejudgment seizure of personal property without either notice and a prior hearing or the saving characteristics of Mitchell.220 Specifically, the court found chapter 76 constitutionally deficient in three respects:221 (1) it does not require that a

218. After this article was completed and substantially through the editorial process prior to publication, the Florida Legislature amended chapter 76 to address some of the matters discussed in this section. Act of May 12, 1978, ch. 78-38, 1978 Fla. Laws 50. First, § 2 of ch. 78-38 requires that "the grounds relied on for issuance of the writ clearly appear from specific facts shown by a verified complaint," as recommended in section IVB.2.a infra. The balance of the author's analysis remains to be addressed, however, by the legislature.

Second, § 1 of ch. 78-38 requires a judge to issue the attachment writ as recommended in section IVB.2.b infra. Again, the author raises other considerations which should be studied by the legislature.

Third, § 4 of ch. 78-38 requires the court to set the defendant's motion to dissolve "for an immediate hearing." This is an improvement over the previous provision of § 76.24(1) of the Florida Statutes, see text accompanying note 274 infra, but further considerations, as discussed in section IVB.2.d infra, still need to be addressed.

And finally, § 3 of ch. 78-38 amends § 76.18 to reduce the amount of the forthcoming bond from double the value of the property levied to one and one-fourth the value of the property levied or the amount of the claim, whichever is less. This again is an improvement, but the author recommends that the amount of the bond ultimately be left to the judge's discretion, in light of possible damages. For convenience, the author would allow the plaintiff initially to use the value of the property, subject to the judge's further order. See discussion in section IVB.2.e infra.

219. 338 So. 2d 1067 (Fla. 1976).
220. Id. at 1071.
221. Id.
judge issue the writ;\textsuperscript{222} (2) it does not require that an affidavit support the alleged grounds for the writ;\textsuperscript{223} and, (3) "most seriously," it does not require that the defendant's postseizure motion to dissolve the writ be heard immediately.\textsuperscript{224} In other respects, the court found that the statute does satisfy the \textit{Mitchell} standards.\textsuperscript{225} It requires the plaintiff to post a bond before the writ issues.\textsuperscript{226} It permits the defendant to recover the property by posting a bond.\textsuperscript{227} And it places the burden of proof on the plaintiff to prove the existence of the grounds upon which the writ issued.\textsuperscript{228}

Although the court in \textit{Unique Caterers} did not limit its opinion on the constitutionality of chapter 76 to the attachment of personal property, such a distinction is plausible. The basis for this distinction is the difference in the nature of the "taking" in the attachment of real property and the attachment of personal property. Real property is attached by recording a notice of levy in the official records of the county in which the property is located.\textsuperscript{229} The attachment results in the creation of an inchoate judicial lien on the property.\textsuperscript{230}

\begin{itemize}
\item \textsuperscript{222} FLA. STAT. \textsection 76.03 (1977).
\item \textsuperscript{223} \textit{Id.} \textsection 76.09.
\item \textsuperscript{224} \textit{Id.} \textsection 76.24(1). It has been suggested that the Florida Supreme Court went beyond the \textit{Mitchell} requirements in \textit{Unique}, holding that the postseizure hearing was mandatory even if the defendant did not move to dissolve the writ. \textit{See} 1 S. RAKUSIN, \textit{supra} note 31, at \textsection 1.02D. This reading of the opinion stemmed from the court's statement that the statute was deficient because it "does not require an immediate post-seizure hearing." 338 So. 2d at 1071 (emphasis in original). To the extent \textit{Unique} intimated that due process "required" a postseizure hearing, it was overruled in Gazil, Inc. v. Super Food Servs., Inc., 356 So. 2d 312 (Fla. 1978), discussed at note 200 \textit{supra}, which declared that due process merely requires an opportunity for a postseizure hearing at the request of the defendant. 356 So. 2d at 313. This is entirely consistent with \textit{Mitchell}, in which Justice White noted that the Louisiana statute "entitles the debtor immediately to seek dissolution of the writ" by filing a contradictory motion. 416 U.S. at 606 (emphasis added). There is not the slightest intimation in any of the United States Supreme Court's decisions that the hearing is mandatory, nor has any lower court or legal commentator suggested it. \textit{See} TeSelle \& Love, \textit{supra} note 86, at 268, 278. Moreover, a mandatory hearing would add little meaningful protection for the defendant at considerable cost to the plaintiff. If the defendant does not object to the attachment, he presumably will not attend the hearing since to do so would result in additional legal fees. In the defendant's absence, the postseizure hearing will not be an adversary proceeding but will merely duplicate the ex parte showing already made by the plaintiff in obtaining the writ. A mandatory hearing would, however, significantly increase the cost of attachment for plaintiffs (creditors) as a class since in all cases a lawyer would have to be paid to appear at the hearing. This cost would, of course, be passed on to debtors, as a class, in the form of higher interest rates or the loss of credit altogether for marginal-risk debtors.
\item \textsuperscript{225} 338 So. 2d at 1071.
\item \textsuperscript{226} FLA. STAT. \textsection 76.12 (1977).
\item \textsuperscript{227} \textit{Id.} \textsection 76.18.
\item \textsuperscript{228} \textit{Id.} \textsection 76.24(2); \textit{see} Luciano v. Service Mach. Corp., 112 So. 2d 890, 892 (Fla. 2d Dist. Ct. App. 1959).
\item \textsuperscript{229} FLA. STAT. \textsection 76.14 (1977); \textit{see} notes 15-18 and accompanying text \textit{supra}.
\item \textsuperscript{230} An attachment lien is contingent until "perfected" by entry of final judgment. However, the creditor's priority is established in the order of attachment, not perfection.
\end{itemize}
This attachment lien in no way interferes with the defendant's use or possession of the property, but it does constitute a cloud on the defendant's title since the lien is binding on subsequent purchasers and creditors.\textsuperscript{231}

The real economic consequence of an attachment of real property is that a prospective purchaser will either insist that the cloud be removed by the seller \textit{before} sale or that the purchase price be reduced by the amount of the claim. To remove the cloud, the defendant may post a satisfaction bond\textsuperscript{232} or otherwise obtain a voluntary satisfaction of the lien from the plaintiff, either by payment of the claim or by substitution of security.\textsuperscript{233} Many prospective purchasers, on the other hand, simply do not want to become embroiled in a lengthy foreclosure proceeding and will not purchase the attached property unless a full satisfaction can be obtained quickly and cleanly before purchase. Thus, the defendant may suffer substantial economic consequences if he wishes to sell or mortgage the property.

While some courts have held such consequences to be so de minimis as not even to constitute "property" worthy of protection under the due process clause,\textsuperscript{234} the better view is that the imposition of an attachment lien is, for constitutional purposes, the "taking" of "property" but, because of the nature of the "taking," it is one which requires less protection than the seizure of personal property. Conversely, no creditor interest is served by not according the same \textit{Mitchell}-type safeguards to the attachment of real property since the attachment lien effectively precludes alienation of the property by the debtor. Thus, with respect to any proposed amendment of chapter 76, there is no reason, as a matter of policy, to consider providing a separate procedure for the attachment of real property, even though it might be constitutionally possible.

\textsuperscript{231} FLA. STAT. § 76.14 (1977); \textit{see} Florida Ins. Exch. v. Adler, 174 So. 2d 75, 77 (Fla. 2d Dist. Ct. App. 1965).

\textsuperscript{232} The release of attached property under a satisfaction bond extinguishes the attachment lien, giving the defendant clear title. Release of attached real property under a forthcoming bond does \textit{not} extinguish the attachment lien and thus is of little benefit to the defendant since his use and enjoyment of the property is not impaired anyway.

\textsuperscript{233} The Florida Legislature recently recognized this problem with respect to judgment liens. Section 55.10 of the Florida Statutes was amended in 1977 to provide for the transfer of a judgment lien from the debtor's real property to other security deposited with the court, such as a sum of money or a satisfaction bond in an amount equal to the judgment plus six percent interest for three years and $100 court costs. Upon such deposit, the clerk issues a certificate of transfer, and upon recordation the lien is released. Act of June 30, 1977, ch. 77-462, § 1, 1977 Fla. Laws 1892 (codified at FLA. STAT. § 55.10(2)-(4) (1977)).

\textsuperscript{234} \textit{See}, \textit{e.g.}, Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. 1st Dist. Ct. App. 1970).
2. Recommendation

The threshold question to be addressed before turning to the specifics of any proposed reform of chapter 76 is the appropriate measure of protection to be accorded debtors as a matter of state policy. For example, although it is clearly not necessary constitutionally to give the debtor notice and an opportunity for an adversary hearing before attaching his property, prior notice and an opportunity to be heard are the most effective means of preventing mistake and wrongful seizure if a state wishes to minimize these possibilities. On the other hand, there are significant risks to the creditor's interests if the debtor is given prior notice of the creditor's intention to attach the debtor's property. Since the notice itself furnishes a warning to the debtor, there is a real danger that a debtor acting in bad faith will damage or alienate the property before the hearing. A state is entitled—if it wishes—to recognize this reality and to provide somewhat more protection for the creditor.

Traditional Florida policy, as evidenced by present chapter 76, resolves this fundamental question in favor of the creditor. Although the Florida Legislature did amend chapter 78 in 1973 to provide for notice and a hearing before the seizure of property pursuant to a prejudgment writ of replevin—a remedy analogous to attachment—this amendment was adopted under the duress of Fuentes and did not represent a free policy choice. Any doubt on this score was resolved in 1976 when the legislature again amended chapter 78, after Mitchell, to restore the right of summary seizure, properly supervised. Thus, the legislature appears to have eschewed any design to change, as a matter of state policy, the fundamental balance between the rights of debtors and creditors with respect to the provisional remedies. The task then becomes one of fashioning adequate safeguards to satisfy the Mitchell standards.

a. Affidavit

In the words of the Florida Supreme Court, Mitchell requires "a supporting affidavit clearly setting out the grounds for issuance of the writ." The affidavit must allege the specific facts constituting the statutory grounds rather than a mere conclusory statement such as "the debtor is about to remove his property out of the state." In addition, the affidavit must allege specific facts supporting the plaintiff's underlying cause of action since the judge must also de-

237. Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d at 1070.
termine the prima facie sufficiency of the plaintiff's claim. The new replevin statute requires that both the nature of the claim and the statutory grounds for the writ be shown clearly by affidavit or verified petition.238

Chapter 76 should likewise require factual allegations in support of both the underlying claim and the statutory grounds for the writ. Contrary to the provisions of section 78.068, however, there should be no requirement that the plaintiff be the affiant. Any person with knowledge of the facts is competent to swear to the requisite facts. If the plaintiff is a corporation, it becomes imperative to accept the testimony of officers or agents. In other situations as well there would seem to be no rational reason to limit sworn testimony to the plaintiff himself. Indeed, the reliability of the testimony might actually be enhanced if it came from an independent source.

The affidavit requirement poses a question which does not seem to have been litigated to date. That is: must the affiant have personal knowledge of the facts alleged or may he swear to the facts on information and belief?239 Hearsay is, of course, traditionally barred from the courtroom, subject to numerous exceptions, because of the increased likelihood of error and the inability to test such testimony by cross-examination. In the context of a creditor's application for a writ of attachment, only the first of these reasons is applicable. The application is ex parte, so there is no occasion for cross-examination. From the debtor's perspective, permitting hearsay may increase the possibility of error. From the creditor's standpoint, however, prohibiting hearsay may increase significantly the cost of attachment by requiring affidavits from a number of witnesses. In some cases such a requirement might preclude seeking the writ altogether, as where a key witness is unavailable or refuses to cooperate.

238. Id. at 1071; see Fla. Stat. § 78.068 (1977).
239. Under the Florida statute, when the debt is actually due, the plaintiff's motion must allege that he "has reason to believe in the existence of one or more of the special grounds in § 76.04, stating specifically the grounds." Fla. Stat. § 76.09 (1977) (emphasis added). The Florida Supreme Court has held that the plaintiff's oath is not absolute in character, requiring only a reasonable belief in the existence of the statutory grounds for attachment so that "conscientious men would [not] hesitate before taking such an oath." Zinn v. Dzialynski, 13 Fla. 597, 601 (1871). The real issue is the reasonableness of the plaintiff's belief, based on the defendant's actual conduct, not the truth of the plaintiff's belief. The mere fact that the plaintiff has been credibly informed that the defendant had fraudulently parted with his property, for example, would not justify sustaining the writ, but if it can be shown that the defendant had in fact so acted, or that he had in fact acted in a manner to justify a reasonable belief that he fraudulently disposed of his property, the writ should be sustained. See Reese v. Damato, 33 So. 459, 462 (Fla. 1902); Eckman v. Munnerlyn, 13 So. 922, 924 (Fla. 1893); Meinhard, Bros. & Co. v. Lilienthal, 17 Fla. 501, 505-06 (1880).
On balance, it would be better to allow hearsay affidavits. An ex parte process concedes the increased possibility of error, and the reliability of the process would not be diminished significantly by the hearsay nature of the affidavit. Moreover, since the writ is discretionary, the judge can always deny the application if there is reason to doubt the authenticity of the hearsay allegations. Finally, if the defendant disputes the truth of any allegation, he may quickly put the plaintiff to his proof in an adversary proceeding conducted in accordance with the rules of evidence.

b. Judicial Supervision

Although Justice White's opinions speak of the necessity of having a judge review the plaintiff’s application and authorize the issuance of the writ, a majority of the Supreme Court justices have expressed the view that this is not a meaningful requirement. Several lower courts have approved procedures permitting the writ to be issued by a court clerk, at least where the clerk has the authority and the expertise needed to exercise discretion in such matters and is not acting merely pro forma. Although in Unique Caterers the Florida Supreme Court stated flatly that chapter 76 was deficient because it did not require that a judge issue the writ, the same court has spoken subsequently of “a judicial officer,” suggesting that clerks may so qualify.

The court has observed that if a clerk can make an initial determination of probable cause to arrest in a criminal proceeding, “it is certainly constitutionally permissible for him to make an initial determination regarding the issuance of a [creditor's] writ.” Thus, it may well be that on reconsideration the court would approve the issuance of writs of attachment by clerks without judicial order. However, casting court clerks in the role of judicial officers

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242. See cases cited note 138 supra.

243. 338 So. 2d at 1071.

244. See Phillips v. Guin & Hunt, Inc., 344 So. 2d 568, 574 (Fla. 1977), in which the Florida nonresidential distress-for-rent procedure, Fla. Stat. §§ 83.11-.19 (1977), was held unconstitutional.

exercising independent judgment and discretion, rather than acting pro forma in a ministerial capacity, would be almost unique in Florida jurisprudence. Therefore, the statute should be amended to prohibit clerks from issuing writs of attachment except upon order of a judge.

Although not unmindful of the added burden this would place on the state’s judges, it would perhaps assure debtors of a more perceptive and sensitive guardian of their rights and a more desirable balancing of the interests of debtors and creditors. Moreover, as evidenced by the most recent amendment of the replevin statute, the Florida Legislature has already determined the appropriateness of entrusting to a judge, rather than a clerk, the initial decision of whether the creditor is entitled to have the debtor’s property seized summarily.

The statute should also make clear precisely what finding is required of the judge in order to support an order of attachment. Implicit in Mitchell’s requirement that the motion must be supported by an affidavit alleging specific facts is the notion that the judge will scrutinize the factual allegations and, upon finding them sufficient, order the writ to be issued.

The statute should also make clear what showing is required of the plaintiff. The Louisiana sequestration statute approved in Mitchell called for the grounds to be “clearly apparent” from the facts alleged. Both Justices White and Powell distinguished the Florida replevin statute struck down in Fuentes by noting that it did not require a “convincing showing” that the plaintiff was entitled to relief. This requires that the judge “properly evaluate” the facts alleged. According to Justice White, approval is not a mere ministerial act—contrary to the view of the dissent. In Di-Chem, Justice Powell said the initial showing need not be “elaborate.” In accordance with these views, the Florida statute should authorize the judge to order the attachment writ if he finds that the facts alleged by the plaintiff reasonably tend to establish the existence of one or more of the statutory grounds, as well as the prima facie validity of the plaintiff’s underlying claim.

248. Id. at 616 n.12.
249. Id. at 632-33 (Stewart, Douglas, & Marshall, JJ., dissenting), referring to the “formal sufficiency” of the affidavit.
250. 419 U.S. at 612 n.5.
c. Bond

The present attachment statute requires the plaintiff to post a bond with surety payable to the defendant in an amount at least double the amount of the plaintiff's claim, conditioned to pay all costs and damages sustained by the defendant if the attachment is improperly sued out. Although the Florida Supreme Court implied in *Unique Caterers* that this provision satisfies the *Mitchell* requirements, the court did not attempt a careful analysis. In fact, neither the present Florida law nor the precise constitutional parameters of the bond requirement are entirely clear.

First, it is not clear under what circumstances the defendant can recover under the bond. The statutory condition is "to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the attachment." Liability under the statutory bond for improper attachment is distinct from the common law tort actions of malicious prosecution and abuse of process. No showing of malice is required for an action on the bond, contrary to the requirement under either tort theory. To prove the attachment was "improper," the defendant must show either that the plaintiff's underlying claim was without merit or that, in fact, no grounds existed for the attachment. Liability is thus not assumed merely because the writ is dissolved or the plaintiff fails to recover a final judgment in the main action. The writ is not "improper" if dissolved because of some technicality or irregularity or because the plaintiff voluntarily dismissed the main action. On the other hand, a final judgment on the merits dismissing the plaintiff's main action has been held sufficient proof that the attachment was "improper."

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253. 338 So. 2d at 1071.
254. Fla. Stat. § 76.12 (1977). Section 559.77(1) provides: "If it appears to the court that the suit brought by the plaintiff was ill-founded or brought for purposes of harassment, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant."
258. Id.
In an action on the statutory bond, the defendant may recover all costs and damages suffered as a result of the improper attachment, including damage to the property,\(^{261}\) loss of use of the property for the period held,\(^{262}\) injury to the defendant's reputation,\(^{263}\) and attorney's fees incurred in obtaining dissolution of the writ.\(^{264}\) Punitive damages are not recoverable under the bond but may be recovered under either of the tort theories.\(^{265}\) Recovery is limited to the amount of the bond.\(^{266}\) Procedurally, the rule in Florida seems to be that the defendant cannot counterclaim for improper attachment but must bring a separate action independent of the plaintiff's main action.\(^{267}\)

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\(^{261}\) See, e.g., American Sur. Co. v. Florida Nat'l Bank & Trust Co., 94 F.2d 216 (5th Cir. 1938) (loss of garnished funds when bond failed); Gonzalez v. De Funiak Havana Tobacco Co., 26 So. 1012 (Fla. 1899) (deterioration of attached cigars); Florida Transp. Co. v. Dixie Sightseeing Tours, Inc., 139 So. 2d 175 (Fla. 3d Dist. Ct. App. 1962) (damage to attached buses).


\(^{263}\) Nash v. Walker, 78 So. 2d 685 (Fla. 1955). In Martin v. Martin, 196 So. 2d 26 (Fla. 2d Dist. Ct. App.), cert. denied, 201 So. 2d 548 (Fla. 1967), the trial court awarded damages for shame, humiliation, and personal inconvenience. The case was reversed on other grounds.

\(^{264}\) See, e.g., Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U.S. 135 (1903); Wittich v. O'Neal, 22 Fla. 592, 599 (1886); Normal Babel Mortgage Co. v. Golden Heights Land Co., 117 So. 2d 205 (Fla. 3d Dist. Ct. App.), cert. denied, 122 So. 2d 407 (Fla. 1960). In Wittich, the Florida Supreme Court spoke eloquently of the equity of awarding attorney's fees where the plaintiff has wrongfully seized the defendant's property pursuant to an extraordinary remedy. Only the attorney's fees incurred to obtain the release of attached property are recoverable, not those incurred to defend in the main action, even though a successful defense will result in a return of the attached property. Consequently, it has been held that attorney's fees may be awarded only when the plaintiff successfully moves to dissolve the attachment in a separate proceeding. See, e.g., Bondy v. Royal Indem. Co., 184 So. 241 (Fla. 1938); Ritter v. Miami Marine Agency, Inc., 133 So. 2d 107 (Fla. 3d Dist. Ct. App. 1961); Norman Babel Mortgage Co. v. Golden Heights Land Co., 117 So. 2d 205 (Fla. 3d Dist. Ct. App.), cert. denied, 122 So. 2d 407 (Fla. 1960).


\(^{266}\) See Florida Transp. Co. v. Dixie Sightseeing Tours, Inc., 139 So. 2d 175 (Fla. 3d Dist. Ct. App. 1962).

\(^{267}\) See, e.g., Nash v. Walker, 78 So. 2d 685 (Fla. 1955) (improper garnishment); Calcagni v. Mumber, 262 So. 2d 467 (Fla. 3d Dist. Ct. App. 1971); Martin v. Martin, 196 So. 2d 26 (Fla. 2d Dist. Ct. App.), cert. denied, 201 So. 2d 548 (Fla. 1967). But cf. Jones-Mahoney Corp. v. C.A. Fielland, Inc., 114 So. 2d 18 (Fla. 2d Dist. Ct. App. 1959), in which the court correctly observed that the Florida Supreme Court in Nash held merely that the trial of the defendant's counterclaim for improper garnishment should be separated from the plaintiff's action so as not to confuse the jury. This distinction has generally been overlooked by lower Florida courts which consistently cite Nash as precluding counterclaims for improper attachment or garnishment. See also Ritter v. Miami Marine Agency, Inc., 133 So. 2d 814 (Fla. 1st Dist. Ct. App. 1963) (counterclaim in tort for wrongful garnishment properly raised but must be separately tried).
Thus, under the present Florida statute, the defendant will usually (but not always) be able to recover any damages proximately caused by an erroneous attachment. These damages are limited to double the amount of the plaintiff's underlying claim, which may not be enough to cover all consequential damages, and the defendant must suffer the cost and delay incident to another independent lawsuit to recover fully. If the defendant believes the plaintiff attached without probable cause or otherwise acted with malice, he can sue on a tort theory to recover punitive damages in addition to actual damages. However, the surety on the bond is not liable for any recovery other than in a suit on the bond.

Chapter 76 should be amended to provide a cause of action for wrongful attachment which does not require proof of any impropriety in seeking the improvident writ. Although it is probably not compelled constitutionally, affording the defendant an absolute right of redress for a wrongful attachment, no matter how well intentioned that attachment may be, seems manifestly appropriate as a matter of policy in striking a balance between the needs of creditors and the rights of debtors. Rather than requiring a preseizure hearing, the Mitchell rationale strives, first, to minimize the risk of ex parte error and, where error occurs, to reduce its impact on the debtor. Recognizing both that pre-judgment seizure is the exception in our judicial system and that pre-hearing seizure is the exception in our constitutional system, it does not seem unfair to impose the cost of innocent error, as well as deliberate overreaching, on the party who elects to exercise such an extraordinary remedy.

Further, the defendant should be entitled to compensatory damages on the successful prosecution of a motion to dissolve the writ or by counterclaim incident to a successful defense on the merits of the plaintiff's underlying action, rather than being forced to bring a later action of his own. The statute should expressly authorize the allowance as damages of a reasonable attorney's fee incurred in recovering the property (but not in defense of the plaintiff's underlying cause of action). This recommendation appears to be consistent with present Florida policy as evidenced by the recent replevin amendments. Section 78.20 was amended in 1976 to provide that upon dissolution of a prejudgment writ of replevin, or upon final judgment for the defendant on the merits, the defendant shall be

268. FLA. STAT. § 76.12 (1977) fixes the bond in this amount.
269. See Alexander, supra note 216, at 41-42.
270. In Steen v. Ross, Keen & Co., 22 Fla. 480, 485 (1886), the Florida Supreme Court recognized the extraordinary nature of attachment and the legitimate need for appropriate safeguards against the "improvident" issue of such writs.
awarded any damages sustained and his attorney's fees and costs.  

The statute also provides expressly that this remedy does not preclude any other legal remedies available to the defendant, presumably preserving the right to seek punitive damages in an action for malicious prosecution or abuse of process. This is probably the best resolution of the punitive damages issue, for proof of malice requires additional evidence of an entirely different nature and is uniquely appropriate for jury trial. It seems reasonable to provide a speedy and sure (by reason of the plaintiff's bond) means of compensating the defendant for his actual and consequential damages but to relegate to another day his claim for punitive damages.

One other aspect of the bond provision should be mentioned. The present statute fixes the amount of the plaintiff's bond at double the amount of his claim against the defendant. This makes little sense. The purpose of the bond is to indemnify the defendant for any injury he may suffer as a result of improper attachment. This has no necessary relation whatsoever to the amount of the plaintiff's claim, which may greatly exceed the value of the property attached. Likewise, in the case of real property, the defendant does not actually lose possession until after final judgment, so there is no danger that the property will be destroyed in the meantime. Conversely, the value of the property seized may not be adequate to safeguard the defendant fully since consequential damages may greatly exceed the value of the property attached. For example, attachment of a merchant's inventory, even for a short period of time, may utterly destroy his business, such as through the seizure of souvenir programs and pennants just before the big game, where no market for the goods will exist after their return.

A preferable method of determining the amount of the plaintiff's bond would be to have the judge, in his discretion, fix the amount at the time the plaintiff applies for the writ. The judge can weigh variables such as the nature and value of the property and the likelihood and magnitude of potential consequential damages. For convenience, the statute might fix the amount at double the value of the property to be attached unless the judge provides otherwise by order.


273. In such a case, attachment will not benefit the plaintiff other than by putting pressure on the defendant to settle quickly.
d. Motion to Dissolve

The Florida Supreme Court said in *Unique Caterers* that the most serious flaw in current chapter 76 is that it does not accord the defendant a right to an "immediate" postseizure hearing. Instead, it simply keeps the court open at any time to hear dissolution motions.\(^{274}\)

The United States Supreme Court has never established any fixed time requirements for the postseizure hearing but has variously characterized the requirement as the right to an "immediate,"\(^{275}\) "prompt,"\(^{276}\) or "early"\(^{277}\) hearing. The new replevin statute provides that the court shall set down the motion to dissolve for "immediate" hearing.\(^{278}\) This would seem to be sufficient.

The statute, though, should also make clear that the defendant may file his motion to dissolve at any time.\(^{279}\) There is no rational reason to require the defendant to act quickly in filing his motion. The plaintiff suffers no prejudice from a delay, and the effect of a short filing period, such as that found in the new Florida replevin statute,\(^{280}\) is to put the defendant under some duress in trying to arrange a hasty settlement.\(^{281}\)

In order for the defendant to avail himself of his right to contest the validity of the attachment, he must have timely notice of the ex parte issuance of the writ and the levy on his property. At present, chapter 76 does not require notice of the attachment to be served on the defendant, although the Florida Rules of Civil Procedure generally require service of all motions, orders, and other papers on every party to the action.\(^{282}\) The common law assumption was that the sheriff's levy of the writ by seizing the property would afford ample notice to the defendant. Although in many cases the seizure may in fact afford actual notice of the attachment, this may

\(^{274}\) 338 So. 2d at 1071; see Fla. Stat. § 76.24(1) (1977).


\(^{276}\) Id. at 625 (Powell, J., concurring).


\(^{279}\) This is consistent with present law. See J. Pollack & Co. v. George K. Murray & Co., 20 So. 815, 818 (Fla. 1896).


\(^{281}\) See note 213 and accompanying text supra.

\(^{282}\) Fla. R. Civ. P. 1.080. Service is made by delivery or mail to the party himself, unless represented in the action by an attorney. Id. at (b). All original papers must also be filed with the court either before service or immediately thereafter. Id. at (d). Thus, the defendant should be served with a copy of the motion for attachment, supporting affidavits, and bond, as well as a copy of the writ itself. See 1 S. Rakusin, supra note 31, at § 1.05A, at 37. When suit is begun by attachment, the motion and writ may be served with the original process. Id. See also H. Trawick, Florida Practice and Procedure § 33-4, at 592 (1977 ed.).
not always be so, especially in the case of a nonresident defendant, one of the classic uses of attachment. Even in the case of a resident defendant, seizure of isolated personal property may go unnoticed for some time. In addition, in the case of real property, the filing of a notice of attachment in the official records would seldom be timely discovered.

Although *Mitchell* did not require specifically that formal notice of the attachment be given to the defendant, the spirit of the decision strongly suggests it. The opinion did stress the defendant's right to a prompt postseizure hearing. Obviously, this right is set at naught if the defendant does not know of the attachment. Moreover, the interest of the plaintiff is in no way jeopardized by giving the defendant notice after the levy. Therefore, the statute should require expressly that notice of the attachment be served personally on the defendant within three days of the levy unless otherwise ordered by the judge due to unusual circumstances.283

In addition to bare notice, the defendant should also be informed of the consequences of the attachment and of his legal right to contest the attachment or regain possession of the property. Although not constitutionally compelled, the legislature has often recognized the merits of such notice. For example, the new replevin statute requires that the defendant be informed of his right to be heard—personally or by attorney—at the show cause hearing and of his right to regain possession of the property by posting a bond.284

Such notice is even more imperative where the seizure has already taken place. Many defendants may erroneously believe that once the property has been attached there is nothing they can do about it. The notice should advise them of their right to file a motion to dissolve the writ contesting either the grounds for the writ or the merits of the plaintiff's underlying claim. Defendants should also be informed of their right, alternatively, to repossess the property by filing adequate security. Finally, they should be cautioned that they are still entitled to their right to a full trial on the merits of the plaintiff's claim and to the return of the property attached if they are successful.

The statute should also state unequivocally that the burden of proof is on the plaintiff to prove that he is entitled to the attachment.285 This means that he must prove by a preponderance of the

283. *Cf. Fla. Stat. § 78.065(2)(b)-(c) (replevin).*
284. *Id. § 78.065(2)(e).*
285. *Fla. Stat. § 76.24(2) (1977) provides only that "if the allegation in plaintiff's motion which is denied is not proved to be true, the attachment shall be dissolved." This has been construed, however, to put the burden on the plaintiff to prove the truth of the allegations.*
evidence the existence of the factual grounds upon which the writ was issued as well as demonstrate the probable validity of his underlying cause of action. The first showing is conclusive since the issue of the statutory grounds for attachment is immaterial to the underlying claim. The second showing, on the other hand, is not conclusive and must, of course, await full trial on the merits. In this regard, the judge's determination at the hearing on the motion to dissolve is somewhat analogous to the finding of likely outcome generally associated with the issuance of a preliminary injunction.

The determination would require at least some credible evidence in support of the facts necessary to establish a prima facie case for the plaintiff, but it should also take into account any evidence offered by the defendant by way of affirmative defense. The fact that the plaintiff has posted security indemnifying the defendant in the event of a final judgment for the defendant justifies continuing the attachment on the basis of "probable" validity inasmuch as the defendant does not need to post security to contest the attachment. If the judge grants the motion to dissolve the writ, damages on the bond for improper attachment should be awarded as a part of the same proceeding, and the property should be returned forthwith to the defendant.


286. Mitchell v. W.T. Grant Co., 416 U.S. at 618. Under the Florida attachment statute, when the debt is due, the plaintiff must prove the amount of the debt and that it is actually due but need only prove that he "has reason to believe in the existence of one or more of the special grounds" for attachment. See Fla. Stat. § 76.09 (1977). This has been construed to require the plaintiff to prove by admissible testimony actual facts which would induce a prudent creditor justifiably to believe in the existence of the statutory grounds for attachment, such as the defendant's fraudulent disposition of his property. See Reese v. Damato, 33 So. 459, 461 (Fla. 1902); Eckman v. Munnerlyn, 13 So. 922, 924 (Fla. 1893); Meinhard, Bros. & Co. v. Lilienthal, 17 Fla. 501, 505-06 (1880). This does not require the plaintiff to prove that the defendant in fact acted fraudulently, but it does require a factual basis for the plaintiff's belief—that is, something more than being credibly informed as to the existence of the requisite facts. See Reese v. Damato, 33 So. at 461. When the debt is not actually due at the time of the attachment, Fla. Stat. § 76.10 (1977) requires the plaintiff to allege by affidavit other than his own and to prove the actual existence of the special statutory grounds enumerated in § 76.05. See Caldwell v. Peoples Bank, 75 So. 488, 854 (Fla. 1917); Lord v. F.M. Dowling Co., 42 So. 585, 589 (Fla. 1906); Tanner & Delaney Engine Co. v. Hall & Mobley, 22 Fla. 391, 400 (1886).


288. This requirement is variously articulated as a likelihood that the plaintiff will prevail on the merits or as a probability of success at the trial on the merits. See, e.g., B.W. Photo Util. v. Republic Molding Corp., 280 F.2d 806, 807 (9th Cir. 1960); W.A. Mack, Inc. v. General Motors Corp., 260 F.2d 896, 890 (7th Cir. 1958); Flood v. Kuhn, 309 F. Supp. 793, 798 (S.D.N.Y. 1970). See generally J. DOBBIN, INJUNCTIONS IN A NUTSHELL 161 (1974).

289. Cf. Fla. Stat. § 78.20 (1977) (damages, including attorney's fees, awarded upon
e. Rebond

As an alternative to seeking dissolution of the writ, the defendant should have the right to post adequate security and have the attached property returned to him pending trial on the merits. The current Florida statute so provides on the posting of a forthcoming bond in double the value of the property attached or, if the value of the property exceeds the plaintiff’s claim, in double the amount of the claim. Although this provision was approved in Unique Caterers, the amount should be reduced to the actual value of the property attached unless the court orders otherwise. There does not seem to be any reason to provide the plaintiff with security in an amount greater than the value of the property attached since that is the extent of his present security. The increased amount of the bond is reflected in higher premiums for the defendant. The Florida Legislature has already recognized the fairness of this approach in the new replevin statute, which provides for bond in the value of the property replevied.

f. Attachment of Necessities

One further problem must be considered. The Florida Constitution exempts from forced sale under judicial process the debtor’s homestead and one thousand dollars worth of personal property if the debtor is the head of a family. The 1978 Florida Constitution Revision Commission proposed that the personal property exemption be increased to three thousand dollars and that it be extended to every individual debtor, not just to heads of families. Section 76.08 now expressly provides that the plaintiff’s motion for attachment need not state that the debtor has no right to an exemption. Chapter 222, which implements the constitutional dissolution of prejudgment writ of replevin). This would change existing Florida law, which requires the defendant to bring a separate and independent action against the plaintiff for improper attachment. See note 267 and accompanying text supra.
exemptions, affords debtors the opportunity to declare their homestead exemption, either before or after levy, but does not afford them the opportunity to claim their exempt personal property until after levy. Creditors are thus free to attach personal property without regard to its exempt character, thereby depriving the debtor of its use and possession, at least temporarily, until a claim of exemption can be filed.

This may result in severe hardship for the debtor and his family if, for instance, such household necessities as a stove or a refrigerator are attached. Although in such cases the plaintiff may be liable on his bond for improper attachment, if the debtor later elects to exempt the items attached, this remedy may be inadequate and in any event will not alleviate the debtor's immediate needs. The attachment of real property, on the other hand, does not pose any real difficulty since the attachment merely constitutes a lien encumbering the title. No court has ruled on the constitutional efficacy of the present Florida exemption scheme in the context of prejudgment attachment, although at least two Florida trial courts have held the scheme invalid to the extent that it prevents judgment debtors from claiming their exemptions before execution after final judgment.

sonal property exemption since all persons are entitled to the exemption, and, under FLA. STAT. § 222.06 (1977), the debtor has the right to select the particular assets he wishes to protect within the dollar-value limit. There is no way the creditor can foretell which assets the debtor will select.

295. See id. §§ 227.01-.02.
296. See id. §§ 222.06-.07.
297. Under id. § 222.06(2), the sheriff must within 24 hours serve the plaintiff with a copy of the debtor's affidavit of exemption and thereafter return the property to the debtor unless, within 24 hours of service, the plaintiff files a notice of contest. Id. § 222.06(3). Thus, the debtor is generally deprived of exempt personal property for about 48 hours even if his claim of exemption is uncontested.
298. In Randone v. Appellate Dep't, 488 P.2d 13 (Cal. 1971), cert. denied, 407 U.S. 924 (1972), the California Supreme Court held that any prejudgment seizure of the defendant's "necessities of life," even after notice and a hearing, was a violation of the California Constitution's due process clause. The court characterized "necessities" as those items the defendant needs to live on, to work, to support his family, or to litigate the pending action. The court mentioned such items as refrigerators, stoves, furniture, clothing, television sets, automobiles, sewing machines, and personal effects. 488 P.2d at 29-30.

The United States Supreme Court has again mentioned the notion of "necessities" in the context of debtor-creditor relations. In Memphis Light, Gas & Water Div. v. Craft, 98 S. Ct. 1554, 1564 (1978), the Court held the utility's termination procedures unconstitutional for failure to comply with due process.

299. See notes 254-69 and accompanying text supra.
300. See notes 229-34 and accompanying text supra.
Whether or not it is compelled constitutionally, as a matter of legislative choice chapter 76 should be amended to prohibit altogether prejudgment attachment of personal property necessary for the support of an individual defendant and his family. Such a limited prohibition would prevent the severe hardship visited upon a debtor and his family by the deprivation, however temporary, of the necessities of life until such time as the plaintiff has obtained a final judgment and the defendant has had an opportunity to claim his constitutional exemptions. It would not interfere in any way with the attachment of a corporate defendant's assets, nor of a sole proprietor's business assets, which is often of great concern to creditors when the debtor's business begins to fail. This restriction would also seem to have little application to the attachment of property belonging to nonresident or absconding defendants since such property could hardly be deemed "necessary" to their support. Thus, amending the statute would not affect traditional means of invoking quasi-in-rem jurisdiction.

Other methods of dealing with the problem are possible, but seem either too broad or too burdensome. A system of prefiling personal property exemption claims is possible. Such a system would, however, be administratively cumbersome and would require the debtor to take the initiative in filing before any suit has been commenced. Thereafter, periodic revisions would have to be made as the debtor's assets changed. Requiring the plaintiff to negative the debtor's exemptions might work tolerably well in identifying those who do not qualify as the head of the family under the present constitution, but would be totally inadequate to deal with the proposed constitutional changes extending the exemption to all persons and increasing the exemption level to three thousand dollars. Completely barring all attachment of personal property belonging to an individual

Corp., 539 F.2d 1355 (5th Cir. 1976), cert. denied, 430 U.S. 949 (1977) (judgment debtor not entitled to further due process before postjudgment garnishment of exempt funds), discussed in notes 397-413 infra.

302. See, e.g., Cal. Civ. Proc. Code § 487.020 (West Supp. 1978), the new California attachment law, adopted effective January 1, 1977, culminating a five-year effort by the California Law Revision Commission. See generally Note, California's New Attachment Law: Problems in Interpretation, 23 U.C.L.A. L. Rev. 792 (1976). Section 487.020 provides: "The following property is exempt from attachment: . . . (b) Property which is necessary for the support of an individual defendant or the defendant's family supported in whole or in part by the defendant."

The only difficulty with the recommended proposal is the determination of what property is necessary for the debtor’s support and, thus, is not subject to seizure. It will be incumbent on the sheriff to make this determination each time he undertakes to attach the personal property of an individual defendant. Realistically, sheriffs will often rely on the plaintiff’s attorney, who customarily advises what property is to be levied on. Ultimately, of course, the courts must decide what property constitutes the necessities of life. It should not take long for the accumulated precedent to provide adequate direction to the bar and the constabulary.

The statute itself might include an illustrative, but nonexclusive, list of necessities such as the debtor’s usual and ordinary household furniture, clothing, appliances, and personal effects. Some items obviously pose difficulty, such as television sets (which are not necessary in the survival sense but might be deemed a minimal amenity in contemporary American life) and automobiles (which provide the transportation essential to modern urban life and work). The shifting nature of contemporary need is perhaps best left to evolutionary development by the courts, subject to a statutory good faith defense for sheriffs and creditors against claims of improper attachment. A similar statutory defense should be available to the sheriff who fails to attach property claimed by the creditor not to be within the necessities-of-life exemption.

C. Garnishment (Chapter 77 of the Florida Statutes)

1. Constitutionality

In Ray Lein Construction, Inc. v. Wainwright, in 1977, the Florida Supreme Court held the prejudgment garnishment provisions of chapter 77 of the Florida Statutes unconstitutional as a violation of due process. Specifically, the court found the statute constitutionally deficient under the Mitchell standards because it permitted

304. See CAL. CIV. PROC. CODE § 483.010(c) (West Supp. 1978).
305. See 1 S. RAKUSIN, supra note 31, at § 5.05B(2), at 38a.
306. The California Supreme Court suggested in Randone v. Appellate Dep’t that television sets and automobiles were necessities of life. 488 P.2d 13, 29-30 (Cal. 1971), cert. denied, 407 U.S. 924 (1972).
307. Cf. FLA. STAT. § 77.06(3) (1977) (garnishee not liable to defendant if withholds payment in good faith).
309. 346 So. 2d at 1032.
a writ to issue from the clerk without judicial supervision, the writ could issue on an unsworn motion which need not allege any facts showing that the plaintiff is entitled to garnishment, and the statute did not require an immediate postseizure hearing, but merely kept the court open at any time to hear dissolution motions. The court did not mention the requirement that the plaintiff post adequate security to indemnify the defendant for any damages suffered as a result of improper garnishment, so presumably this provision of the present statute is adequate. Likewise, the court did not criticize the defendant’s statutory right to secure release of the garnishment by posting a payment bond in double the amount of the plaintiff’s claim or the amount garnished, whichever is less.

2. Recommendation

a. Affidavit

The present statute provides that a writ of garnishment may be issued before judgment upon an unverified motion if the plaintiff states that the debt owed him by the defendant is “just, due and unpaid,” that the garnishment is not sought in order to injure either the defendant or the garnishee, and that the plaintiff “does not believe that defendant will have in his possession after execution is issued, visible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy plaintiff’s claim.” This provision has been construed to create a duty on behalf of the plaintiff to investigate the defendant’s assets and financial condition, and the plaintiff’s belief has been deemed justified where, for example, the defendant’s balance sheet showed it was insolvent.

In Ray Lein the court identified two respects in which the motion

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310. Fla. Stat. § 77.031 (1977). Fla. R. Civ. P. 1.160 also provides that mesne process may be issued by the clerk without praecipe.


312. 346 So. 2d at 1032. The court subsequently overruled Ray Lein to the extent the opinion intimated due process “requires” a postseizure hearing, declaring unequivocally that due process merely requires an “opportunity” for a prompt postseizure hearing at the request of the defendant. See Gazil, Inc. v. Gregor Food Serv., Inc., 356 So. 2d 312 (Fla. 1978), discussed in notes 196-200 and accompanying text supra.

313. Fla. Stat. § 77.031(2) (1977) requires the plaintiff to post security in at least double the amount of the debt demanded.

314. Id. § 77.24.

315. Id. § 77.031(1).


317. See North Am. Tel. Corp. v. RDM Communication Serv., Inc., 535 F.2d 911 (5th Cir. 1976). The precise meaning of the word “visible,” however, is obscure. Query whether it means “known,” “tangible,” or “solvent”?
called for by the present statute is deficient. First, it is unsworn, and second, it does not require the plaintiff to allege specific facts in support of his belief that the defendant’s assets will be insufficient to satisfy a judgment.

These defects should be cured by requiring the basis for plaintiff’s belief in the defendant’s lack of visible property to appear clearly from specific facts alleged in a verified motion or in a separate affidavit in support of the motion. The language used in the garnishment statute should track its counterpart provision in the attachment statute as nearly as possible in order to promote better understanding and the development of a uniform, cohesive body of judicial precedent construing both provisions.

b. Judicial Supervision

The court stated in Ray Lein that the writ must be issued by a “judicial officer.”318 The opinion went on, however, to reiterate an earlier statement in Phillips v. Guin & Hunt, Inc.319 that the writ might be issued by a clerk after making an “independent factual determination” that the requirements of the statute were satisfied, since clerks operate under the supervision of judges.320 Nevertheless, for the same reasons mentioned in connection with attachment, the statute should be amended to provide that a writ of prejudgment garnishment may be issued by the clerk only on an order of a judge.

The court also emphasized in Ray Lein that it is constitutionally imperative that a prejudgment writ of garnishment issue only after an impartial factual determination is made concerning the existence of the elements essential for issuance of the writ.321 This means that the judge must determine the prima facie sufficiency of the facts alleged by the plaintiff in support of his motion, not merely their formal sufficiency. The judge must also make a preliminary factual determination of the probable validity of the plaintiff’s underlying claim.322 The statute should express the requisite judicial findings in language similar to that proposed for attachment.

c. Bond

For the same reasons discussed in connection with attachment, the amount of the plaintiff’s bond should be related to the likelihood

318. 346 So. 2d at 1032.
319. 344 So. 2d at 574.
320. Id. at n.7 (citing Shadwick v. City of Tampa, 407 U.S. 345 (1972)).
321. 346 So. 2d at 1032.
and magnitude of harm which the defendant may suffer as a consequence of a wrongful garnishment. It makes even less sense in the garnishment of a debt due to the defendant than in the attachment of his property to peg the amount of the bond to the amount of the plaintiff’s claim or the amount ultimately garnished (which usually will not be known at the time the writ is issued), since the debt is not paid to the plaintiff pending the outcome of the trial on the merits but is retained by the garnishee\textsuperscript{323} or paid into court.\textsuperscript{324}

Any harm to the defendant flows from the loss of use of the funds during the period of their impoundment. The wrongful garnishment of a consumer debtor’s bank account may, for instance, result in the impairment of his credit rating because of his checks being dishonored and, eventually, in the repossession of goods he has purchased on credit if he is unable to pay his bills as they fall due. A commercial debtor whose bank account has been garnished faces imminent collapse if he cannot meet his payroll or pay his suppliers. Thus, in the case of garnishment, the only rational basis on which to fix the amount of the plaintiff’s bond is to leave it to the discretion of the judge, taking into account the nature and amount of the funds to be garnished.

Chapter 77 should be amended along the lines suggested earlier for chapter 76, to indemnify the defendant for all costs and damages actually suffered as a result of a wrongful garnishment, including the expense of dissolution proceedings, without regard to any impropriety or fault on the part of the plaintiff in obtaining the writ. Although this would expand the plaintiff’s exposure, and thus the surety’s under the bond—presently limited by the condition that the garnishment be “improper”—it is more consistent with the rationale of Mitchell requiring the state to minimize the impact of erroneous seizures.

Lastly, chapter 77 should be amended expressly to authorize the court to award damages to the defendant (including attorney’s fees incurred in obtaining dissolution of a wrongful garnishment) as a part of the dissolution proceeding or by way of counterclaim when the defendant prevails on the merits of the underlying action, without the necessity of bringing a separate and independent lawsuit.

d. Motion to Dissolve

Presently, the defendant may, within twenty days of service of the

\textsuperscript{323} \textit{Fla. Stat.} § 77.06 (1977). Section 77.19 authorizes the garnishee to withhold up to twice the amount of the plaintiff’s claim.

\textsuperscript{324} \textit{Id.} § 77.082.
writ, move to dissolve the garnishment. The court is always open to hear such motions. In Ray Lein, the court held that this does not satisfy the constitutional requirement for an immediate hearing. The statute should be amended to require the court to set down dissolution motions for an immediate hearing. Further, the statute should place the burden clearly on the plaintiff to prove the existence of the grounds upon which the writ was issued as well as the probable validity of his underlying claim.

Chapter 77 presents two other problems. First, it does not require that the defendant be given timely notice of the garnishment, although the Florida Rules of Civil Procedure require service of a copy of the plaintiff’s motion on the defendant. As in the case of attachment, the spirit of Mitchell compels notifying the defendant of the garnishment so that he may avail himself of his constitutional right to have the garnishment reviewed judicially. The notice should also include a brief summary of the defendant’s legal right to contest the garnishment.

Second, the present statute requires the defendant to file his mo-

325. Id. § 77.07(2). The statute does not specify service on whom, but there is no requirement that the writ of garnishment be served on the defendant, except as provided in § 77.06(2), regarding banks and other financial institutions. Although there is some common law authority that the garnishee has a fiduciary duty to notify the defendant of the garnishment, see, e.g., Agnew v. Cronin, 306 P.2d 527 (Cal. 2d Dist. Ct. App. 1957), the defendant may not actually learn of the garnishment until after the time to file for dissolution has passed. See discussion of analogous problem regarding replevin at notes 211-20 and accompanying text supra.

326. FLA. STAT. § 77.07(1) (1977).
327. 346 So. 2d at 1032.
328. See discussion regarding attachment at notes 282-83 and accompanying text supra.
329. FLA. STAT. § 77.07(2) (1977) is unclear but seems to put the burden of proof on the plaintiff, as constitutionally required.
330. See Pleasant Valley Farms & Morey Condensery Co. v. Carl, 106 So. 427 (Fla. 1925), in which the court examined the truthfulness of the plaintiff’s allegations that the writ was not sued out to injure the defendant and that the defendant did not have visible property upon which execution could be levied after judgment.
331. FLA. STAT. § 77.031(1) (1977) requires the plaintiff to allege that the debt is “just, due and unpaid.” If denied by the defendant in his motion for dissolution, this puts in issue the very matter raised by the plaintiff’s underlying claim. Section 77.07(3)-(4) provides that the judge may expedite the pleadings on this issue so that only one trial will be necessary. See Luciano v. Service Mach. Corp., 112 So. 2d 890 (Fla. 2d Dist. Ct. App. 1959). See generally 1 S. RAKUSIN, supra note 31, at § 2.09(D)(2), at 89.
332. See FLA. R. CIV. P. 1.080. In some jurisdictions there is a common law fiduciary duty on the part of the garnishee to notify the debtor of the garnishment or otherwise protect his interest in the funds, e.g., Agnew v. Cronin, 306 P.2d 527 (Cal. 2d Dist. Ct. App. 1957), but no authority has been found imposing such an obligation in Florida. Where a joint bank account or other cotenancy deposit account is garnished, FLA. STAT. § 77.06(2) (1977) requires that a copy of the garnishee’s answer be served on the defendant.
333. See discussion regarding notice of attachment at notes 284-89 and accompanying text supra.
tion to dissolve within twenty days after service of the writ.334 Even if the statute were amended to require service on the defendant, there does not seem to be any reason to compel the defendant to seek dissolution within any specified period of time. In fact, there is even less reason than in the case of attachment335 since the garnished funds are not turned over to the plaintiff but are simply retained by the garnishee pending final disposition of the underlying action.336 The statute should be amended to permit the filing of a motion to dissolve at any time before final judgment.

e. Rebond

The present statute always permits the defendant to secure the release of garnished funds at any time by posting security in twice the amount garnished or twice plaintiff's claim if less than the amount garnished, conditioned to pay any final judgment rendered in favor of the plaintiff.337 The amount of the bond required of the defendant to secure the release of his funds should be reduced to the lesser of the amount of the funds garnished or one and one-fourth times the amount of the plaintiff's claim. This would compensate the plaintiff fairly for the release of the garnished funds.338

f. Wage Garnishment

In Sniadach v. Family Finance Corp., the Supreme Court relied heavily on the fact that wages are a special kind of property in reaching the conclusion that due process required prior notice and an opportunity to be heard before a defendant's wages could be garnished.339 The expansion of this principle to cover all types of property in Fuentes v. Shevin,340 followed by its subsequent qualification to permit summary seizure under appropriate safeguards in Mitchell v. W.T. Grant Co.,341 left Sniadach's continued vitality with respect to wages unclear. In North Georgia Finishing, Inc. v. Di-Chem, Inc., Justice White, speaking for five members of the Court, eschewed the idea of distinguishing among different kinds of property in rejecting the argument that due process did not apply

335. See discussion at notes 282-83 and accompanying text supra.
337. Id. § 77.24.
338. See discussion regarding attachment at notes 290-91 and accompanying text supra.
341. 416 U.S. 600.
to garnishment of a corporate bank account.\textsuperscript{342} In a concurring opinion, Justice Powell noted the ambiguity engendered by the majority opinion and stated forthrightly his view that \textit{Sniadach} remains an exception to the general rule, requiring prior notice and a hearing \textit{before} the prejudgment garnishment of wages.\textsuperscript{343}

The two statements are not necessarily irreconcilable. Due process clearly applies to the taking of any type of property. However, the nature of the property may be material in striking the proper constitutional balance between the parties' competing interests. The Court in \textit{Sniadach} recognized the compelling interest of debtors in protecting the cash flow generated by their wages against wrongful interruption, even temporarily. In contrast, the need of creditors for summary garnishment of wages is minimal since prior notice of the creditor's efforts is unlikely to prejudice eventual collection.

The debtor could, of course, quit his job and seek employment elsewhere, but this possibility is very remote, especially in these times of chronic unemployment. Indeed, some courts have taken the position that wages should never be garnished before final judgment, even with prior notice and opportunity for hearing. There is always the possibility the plaintiff will not prevail on the merits, and the defendant may suffer irreparable injury for which money damages for wrongful garnishment are inadequate.\textsuperscript{344} The real reason creditors seek to garnish wages before judgment, in the view of many critics, is to gain leverage over the defendant to settle quickly —regardless of the merits of the plaintiff's claim.\textsuperscript{345} The lower courts have not agreed on whether wages may be summarily garnished before judgment under a \textit{Mitchell}-type statute or whether only a statute requiring prior notice and a hearing will pass constitutional muster.\textsuperscript{346}

As a practical matter, the brutal impact of wage garnishment has been reduced significantly by enactment of the Federal Consumer Credit Protection Act of 1968, which exempts from garnishment, before or after judgment, a minimum of seventy-five percent of all debtors' wages.\textsuperscript{347} Florida law also exempts from garnishment all

\textsuperscript{342} 419 U.S. at 608.

\textsuperscript{343} \textit{Id.} at 611 n.2.

\textsuperscript{344} See Randone v. Appellate Dep't, 488 P.2d 13 (Cal. 1971), cert. denied, 407 U.S. 924 (1972). Section 5.104 of the Uniform Consumer Credit Code also bars the use of prejudgment wage garnishment.


\textsuperscript{347} 15 U.S.C. § 1673 (1976). The statute also provides a "floor" exemption for all debtors
wages due the resident head of a family. Thus, the only wages presently exposed to lawful garnishment in Florida are twenty-five percent of those due to persons who are not the head of a family.

The present state and federal exemptions of wages from garnishment partially shield the debtors' personal earnings as a potential source of recovery and thereby reducing the impact of a wrongful seizure of wages. Even so, the Florida Statutes should be amended to prohibit the prejudgment garnishment of wages altogether. This recommendation is consistent with the policy presently reflected in both the state and federal wage exemption statutes, even though it is not constitutionally compelled. Wages would, of course, remain subject to postjudgment garnishment to the extent they are not otherwise exempt. As procedural safeguards to assure that wages are not inadvertently garnished before judgment, the plaintiff's motion should include a statement that the debt sought to be garnished is not due for the defendant's personal labor or services, and all prejudgment writs should bear a conspicuous legend that wages due the defendant are not subject to garnishment and are not to be withheld under the writ.

If state policy is deemed to favor the retention of prejudgment garnishment of nonexempt wages, due process requires that the defendant be afforded prior notice and an opportunity to challenge the legality of the proposed seizure. The statute should be amended to provide for an order to show cause why the defendant's wages should not be garnished. The procedure should be modeled after the chapter 78 replevin procedure in which the judge fixes the time of the hearing and the manner of service of the order on the defendant. The order also should advise the defendant of his right to assert any exemptions to the garnishment as well as to contest the plaintiff's underlying claim. It should explain too the effect of a failure to appear. If upon hearing the judge finds that the plaintiff is entitled to the writ and that the defendant's wages are not exempt, he should find 30 times the federal minimum wage. Thus, the “floor” is presently $79.50 per week. See note 384 and accompanying text infra.


349. This suggestion is also advanced by the author of Note, Florida Wage Garnishment: An Anachronistic Remedy, 23 U. Fla. L. Rev. 681, 700 (1971).

350. Garnishment forms currently in use contain an explanation of the federal wage exemption. The Florida Supreme Court could be invited to include an appropriate legend in its approved garnishment form. See Fla. R. Civ. P. Form 1.907.


352. Cf. id. § 78.065(2)(e)-(f) (order to show cause for writ of replevin).
empt, the garnishment may issue. The usual bonding and rebonding provisions would apply to the garnishment of wages.

V. THE POSTJUDGMENT PROCESS IN FLORIDA

A. The Nature of Postjudgment Process

1. Execution (Chapter 56 of the Florida Statutes)

The primary means of enforcing a money judgment is by writ of execution. A writ of execution may be obtained from the clerk of the court, without obtaining an order of a judge or posting bond, at any time more than ten days after entry of the judgment in the official records. The sheriff executes the writ by levying upon any real or personal property belonging to the judgment debtor which may be found within the jurisdiction. As with attachment, personal property is usually levied on by actual seizure, while real property is levied on constructively by recording a notice of levy in the official records.

After levy, the property is sold by the sheriff at an execution sale, and the proceeds are used to satisfy the judgment, any excess being returned to the judgment debtor. The judgment debtor may obtain a stay of any execution which is alleged to have been issued illegally by filing an affidavit and posting an indemnity bond. He also has the right to obtain release of the property levied upon either by substituting other property of equal value or by posting a forthcoming bond in an amount equal to twice the value of the property seized.

2. Postjudgment Garnishment (Chapter 77 of the Florida Statutes)

Garnishment can be used after final judgment to enable the judgment creditor to reach debts due to the judgment debtor from third parties as well as personal property belonging to the judgment debtor which is in the possession of third parties. The motion to

354. Fla. R. Civ. P. 1.550 provides that execution may issue at any time after the judgment has been recorded and the time for serving a motion for a new trial or rehearing has expired. Such motions must be served within 10 days after rendition of verdict in a jury action or entry of judgment in a nonjury action. Id. at 1.530(b).
356. Id. § 56.27.
357. Id. § 56.15.
358. Id. § 56.11.
359. Id. § 56.12.
360. Id. § 77.01.
obtain a postjudgment writ of garnishment is similar to that for a prejudgment writ.\textsuperscript{361} Garnishment may be sought either before or after the return of an unsatisfied writ of execution.\textsuperscript{362} No bond is required for the judgment creditor for postjudgment garnishment. The judgment debtor may file a motion to dissolve a writ of garnishment issued improperly or he may obtain release of the garnished property by posting adequate security.\textsuperscript{363} The court is always open to hear motions to dissolve a garnishment.\textsuperscript{364} 

3. Exempt Property

For the purpose of protecting the judgment debtor and the debtor's family from destitution, Florida law exempts certain assets from the reach of judgment creditors. The most significant of these exemptions are the homestead, personal property, and wage exemptions.

a. Homestead

Article X, section 4 of the Florida Constitution exempts from forced sale under legal process the residence of a judgment debtor who is the head of a family.\textsuperscript{365} The amount of property which may be exempted as a homestead depends on whether it is urban or rural property.\textsuperscript{366} The Florida Statutes permit property owners to declare

\[\text{\textsuperscript{361}}\text{Id. }\S 77.03.\]
\[\text{\textsuperscript{362}}\text{Id.}\]
\[\text{\textsuperscript{363}}\text{Id. }\S 77.24.\]
\[\text{\textsuperscript{364}}\text{Id. }\S 77.07(1).\]
\[\text{\textsuperscript{365}}\text{FLA. CONST. art. X, }\S 4(a)(1)\text{ provides:}\]

\[\text{(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:}\]

\[\text{(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family . . . .}\]

The 1978 Constitution Revision Commission proposed making the exemption available to all persons, not just heads of families. See Fla. C.R.C., Rev. Fla. Const. art. X, \S 4(a) (May 11, 1978); Wall, supra note 293. This would have avoided the many thorny problems which have long plagued Florida courts regarding who is the "head of a family." See generally Crosby & Miller, Our Legal Chameleon, The Florida Homestead Exemption, 2 U. FLA. L. REV. 12 (1949).

\[\text{\textsuperscript{366}}\text{A rural homestead may include 160 contiguous acres and includes all improvements, but an urban homestead is restricted to one-half acre and excludes all improvements except the residence house. See note 365 supra.}\]
their property as homestead either before or after levy, but judgment creditors can contest the owner's designation at any time. This can be done either by requesting a survey to determine the accuracy of the quantity of property claimed to be exempt or by bringing a creditor's bill to determine the legal validity of the claimed exemption.

b. Personal Property

The Florida Constitution also exempts from execution personal property belonging to the head of a family up to an aggregate value of $1,000. The statutory procedure for claiming the personal property exemption requires the judgment debtor, after levy, to make an affidavit claiming the exemption and including an inventory of all his personal property as well as the "true cash value" of each item. In an accompanying schedule the debtor may select the items he wishes to designate as exempt, subject to the $1,000 limitation.

Judgment creditors can contest the values claimed by the debtor by filing a notice of contest with the sheriff within forty-eight hours of the delivery of the debtor's affidavit. The sheriff then appoints a panel of three disinterested appraisers to value the defendant's property. If no notice of contest is timely filed, the sheriff must

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The 1978 Constitution Revision Commission proposed that the urban homestead exemption be increased to one acre and that it include improvements in addition to the residence itself. The commission proposed also that the distinction between rural and urban homesteads be based on whether or not the property is used for agricultural purposes, rather than whether it is located without or within the limits of a municipality. Mobile and modular homes also would have been entitled to exemption under the commission's proposal. See Fla. C.R.C., Rev. Fla. Const. art. X, § 4(a)(1) (May 11, 1978); Wall, supra note 293.

367. Fla. Stat. § 222.01 (1977). The exemption is claimed by filing a statement in the official records of the county in which the homestead is located.

368. Id. § 222.02. The exemption may be claimed even after sale. See Albritton v. Scott, 74 So. 975 (Fla. 1917); cf. Barclay v. Robertson, 65 So. 546 (Fla. 1914) (a year and a half after sheriff's sale held to be unreasonable and claim of exemption denied).


370. Id. § 222.10. A creditor's bill is an independent suit in equity seeking the court's assistance in satisfying a judgment when there is no adequate remedy at law. A supplementary proceeding under § 56.29 serves much the same purpose. See generally Kline, Collection Pursuant to Florida's Supplementary Proceedings in Aid of Execution, 25 U. Miami L. Rev. 596 (1971).


372. Fla. Stat. § 222.06 (1977). The statute does not permit the debtor to claim his exemption before levy.

373. Id. § 222.07.

374. See id. § 222.06(2)-(3). Section 222.06(2) provides that the sheriff must serve the creditor with a copy of the debtor's affidavit within 24 hours of receipt, and § 222.06(3) gives the creditor 24 hours from receipt to file a notice of contest.

375. Id. § 222.06(4).
immediately return the property claimed to be exempt to the debtor.\textsuperscript{376} The judgment creditor may also challenge the validity of the exemption by filing a creditor's bill.\textsuperscript{377}

c. Wages

Florida law exempts from garnishment or other process any debt or other payment due to a resident head of a family for his personal labor or services.\textsuperscript{378} The tracing of wages already paid to the debtor and held in a bank account is not permitted under the Florida exemption, and such funds are subject to garnishment.\textsuperscript{379} The judgment debtor claims his wage exemption after the garnishment by filing an affidavit with the court issuing the writ.\textsuperscript{380} Notice of the affidavit is served on the judgment creditor, who has forty-eight hours to contest the exemption, failing which the garnishment is dissolved. The judgment creditor can also bring a creditor's bill in equity to adjudicate the validity of the debtor's claimed exemption.\textsuperscript{381}

The Federal Consumer Credit Protection Act exempts from garnishment seventy-five percent of the weekly earnings paid\textsuperscript{382} or payable to any person as compensation for personal services, but in no event does it exempt less than thirty times the current minimum hourly wage.\textsuperscript{383} This assures a minimum "floor" of funds for the debtor's benefit which currently amounts to $79.50 per week.\textsuperscript{384} The federal statute does not require that the debtor do anything to claim the exemption, providing simply that no court shall make or enforce

\textsuperscript{376} Id. § 222.06(3). The remaining nonexempt property is subject to judicial sale, and the proceeds are applied to satisfy the judgment.

\textsuperscript{377} Id. § 222.10. There is no time constraint for filing a creditor's bill. Thus, this procedure may be used to challenge the debtor's exemption at any time.

\textsuperscript{378} Id. § 222.11. See generally Florida Wage Garnishment: An Anachronistic Remedy, supra note 349.


\textsuperscript{380} Fla. Stat. § 222.12 (1977).

\textsuperscript{381} Id. § 222.10.


\textsuperscript{383} 15 U.S.C. § 163(a) (1976). Section 163(b) contains three exceptions, including the collection of support payments and taxes.

\textsuperscript{384} The minimum hourly wage was raised to $2.65, effective January 1, 1978. See Fair Labor Standards Amendment of 1977, Pub. L. No. 95-151, § 2(a), 91 Stat. 1245 (to be codified at 29 U.S.C. § 206(a)(1)).
any order or process in violation of the debtor's right to the exemp-
tion.  

B. Constitutionality

In 1924, the Supreme Court held in Endicott Johnson Corp. v. Encyclopaedia Press, Inc. that due process does not require that a judgment debtor be given notice and an opportunity for further hearing before the issuance of a writ of execution. The rationale of the decision was that the judgment debtor had had his day in court, and the judgment rendered against him served as adequate notice that execution would follow in due course. Endicott did not, however, involve a claim of exemption by the judgment debtor. Nevertheless, for more than fifty years the case has remained a bulwark against the argument that a judgment debtor is entitled to notice of execution or postjudgment garnishment so that he may claim his exemptions before the property is taken from him.

Even prior to Sniadach, the Supreme Court granted certiorari in Hanner v. DeMarcus to reconsider the question of postjudgment notice of execution, but it subsequently dismissed the writ as improvidently granted. Four justices dissented to this dismissal in an opinion written by Justice Douglas which suggested that Endicott should be overruled. Even if due process does not require generally that notice of execution be given to the judgment debtor, a strong argument can be made that under the Court's "entitlement" theory of benefits conferred by statute, exempt property cannot be seized without prior notice or at least a measure of judicial supervision, as in Mitchell.

Several lower courts have considered the question since Sniadach.

386. 266 U.S. 285 (1924); see Alderman, Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and Its Progeny, 65 Geo. L.J. 1, 12 (1976).
387. See, e.g., South Fla./Trust Co. v. Miami Coliseum Corp., 133 So. 334, 337 (Fla. 1931).
390. Id. at 740-42.
A majority of the cases have clung to the Endicott rationale, although several safeguards are necessary before exempt property may be seized.\textsuperscript{392} The issue has been raised twice in Florida. In \textit{Mathis v. Purdy}, in 1973, the judgment debtor attempted to file an affidavit designating the $1,000 worth of personal property he claimed was exempt under the Florida Constitution.\textsuperscript{393} The sheriff refused to accept the affidavit on the ground that the statute did not contemplate filing of the affidavit until after the property had been levied on. The Circuit Court for Dade County held that not permitting the exemption to be claimed before levy would violate due process. But the court went on to construe the statute as permitting the affidavit to be filed before levy, thereby avoiding the necessity of holding the statute unconstitutional. The court also noted that this construction was more consistent with the spirit of the Florida Constitution in that it allowed the debtor the uninterrupted use and enjoyment of the exempt property. The opinion did not go further and require that notice be given to the judgment debtor.

In a similar class action brought on behalf of all judgment debtors in Duval County, the circuit court followed \textit{Mathis} and ordered the sheriff to accept affidavits of exemption filed before levy by either judgment debtors or defendants in pending litigation.\textsuperscript{394} The court's order provided further that upon receipt of an affidavit before levy, the sheriff shall deliver a copy to the judgment creditor or plaintiff, who has twenty-four hours in which to file a notice of contest.\textsuperscript{395} Affidavits filed pursuant to the court's order are valid and must be kept on file by the sheriff for two years, after which they can be renewed by the judgment debtor.\textsuperscript{396}

Florida's postjudgment garnishment procedures have also been attacked. In \textit{Brown v. Liberty Loan Corp.}, in 1974, judgment in the amount of $646.03 was entered against Etta Jane Brown.\textsuperscript{397} Twelve days later, without notice to Ms. Brown, the judgment creditor, Liberty Loan Corporation of Duval, obtained a writ of execution from the clerk of the county court. The writ was served on Ms. Brown's employer, who answered the writ the same day, disclosing

\begin{itemize}
\item \textsuperscript{393} 40 Fla. Supp. 17 (Fla. 11th Cir. Ct. 1973).
\item \textsuperscript{394} Gibson v. Atlantic Nat'l Bank, Civ. No. 74-7076 (Fla. 4th Cir. Ct. Mar. 5, 1975).
\item \textsuperscript{395} \textit{Id.}, slip op. at 3.
\item \textsuperscript{396} \textit{Id.} at 4.
\item \textsuperscript{397} 392 F. Supp. 1023 (M.D. Fla. 1974); see 3 \textit{Fla. St. U.L. Rev.} 626 (1975).
\end{itemize}
its indebtedness to Ms. Brown in the sum of $7.50, which was thereafter duly withheld.

Upon learning of the garnishment the next day from her employer, Ms. Brown immediately filed an affidavit of exemption. Liberty Loan filed a contradictory affidavit denying the exemption. After a hearing, the court upheld Ms. Brown’s exemption claim and dissolved the writ. The day before the hearing, however, Ms. Brown brought a class action in federal district court, alleging that the Florida postjudgment garnishment procedures violated the due process rights of all judgment debtors in Duval County. The district court entered a judgment declaring the statutes unconstitutional and awarding Ms. Brown money damages under United States Code section 1983 for the denial of her civil rights.398

In reaching its conclusion, the district court examined the governmental and private interests involved. It noted that both state and federal policies disfavor wage garnishment, as evidenced by the respective exemption laws, and that the debtor’s interest in prior notice and an opportunity to be heard was very substantial because of the hardship of even a temporary deprivation of wages. The court also observed that many employers will discharge an employee whose wages are garnished because of the burden and expense of responding.399

On appeal by the state, the Fifth Circuit Court of Appeals reversed the district court decision and upheld the Florida postjudgment garnishment statutes as satisfying due process.400 The Fifth Circuit agreed that Endicott was no longer controlling and that a balancing of interests was the proper constitutional analysis,401 but concluded that the district court had struck an erroneous balance because of a failure to weigh adequately certain interests of the state and the creditor.402 Both the state and the creditor have an interest in the enforcement of judgments, the court reasoned, an interest that is “patently weightier than a prejudgment creditor’s interest in freezing debtor assets to insure enforcement of a judgment” which may never issue.403 This, the court felt, sharply distinguishes prejudgment from postjudgment garnishment cases.

399. Although 15 U.S.C. § 1674 (1976) prohibits discharge of an employee for the first garnishment, an employee still may be discharged for a second garnishment. Id. § 1677(2).
401. 539 F.2d at 1365. A similar balancing analysis would be employed under the statutory "entitlement" theory of exemptions. Id. at n.9.
402. Id. at 1363.
403. Id. at 1366.
On the other hand, the court recognized that the debtor has a substantial interest in preserving exempt assets from even a temporary deprivation. The Florida postjudgment garnishment procedures accommodate these competing interests adequately, the court concluded. Although notice of garnishment is not served on the judgment debtor, the court reasoned, both the judgment itself and the garnishee's withholding of the debtor's wages give the debtor effective notice of the garnishment as of the time of the actual deprivation. Further, the fact of entry of judgment is the only essential requisite for the issuance of the writ and, although not reviewed by a judge, is conclusively shown by documentary proof available to the clerk.

The failure of the Florida Statutes to require the creditor to allege specific facts showing that the debtor's wages are not exempt increases the chance of a wrongful garnishment, as in Ms. Brown's case, and is a "substantial defect," the court declared. But it is not fatal because the debtor has the unconditional right, without bond, to a prompt judicial determination of his claim of exemption. Although the statute does not expressly require an immediate hearing, the exemption procedure appeared expeditious to the court and was the "most significant factor" in its decision. The court was also mildly critical of the failure of the Florida law to protect the debtor against wrongful garnishment except when the creditor has maliciously sought to garnish wages known to be exempt.

Ms. Brown argued strenuously that a more effective alternative was available, at minimal risk and inconvenience to the creditor. She pointed to the action in Florida's Fourth Judicial Circuit. Following the district court's decision declaring the Florida Statutes unconstitutional, the chief judge of the circuit, acting under his administrative authority to secure the speedy and efficient administration of the court's business, had adopted an order prohibiting clerks within the judicial circuit from issuing postjudgment writs of garnishment unless (1) the creditor filed an affidavit attesting that the debt sought to be recovered was not due to the judgment debtor as wages, (2) the debtor was mailed notice of the motion for garnishment and failed within ten days to file an affidavit of exemption,
or (3) the clerk was ordered to issue the writ by a judge. Although the Fifth Circuit termed this argument "partially persuasive," it refused to overturn the Florida statutory procedures.

The federal district court for Hawaii recently declined to follow Brown. In Betts v. Tom, in 1977, the court held that postjudgment garnishment of a small bank account consisting entirely of AFDC funds exempt under state law, without prior notice or affidavit of nonexemption, was a violation of due process. The court found that the statutory procedures, which were virtually identical to those in Florida, exposed the debtor to a serious risk of at least temporary deprivation of the exempt funds, thereby jeopardizing the very survival of the debtor and her family. As alternatives, the court suggested either that the debtor be given prior notice of the garnishment and an opportunity to claim her exemptions or that the court supervise the issuance of the writ through ex parte judicial review of specific facts, shown by affidavit, negating the exempt nature of the funds to be garnished, followed by notice of the garnishment and the opportunity for a prompt postgarnishment hearing on any exemptions claimed by the debtor.

C. Recommendation

Although the Florida postjudgment garnishment procedures were finally upheld, the Fifth Circuit was somewhat critical of the lack of debtor protection. The statutory means of asserting the constitutional personal property exemption has been held wanting by at least two state trial courts. It may be possible to devise a system which would provide judgment debtors with significantly greater protection against even temporary deprivation of exempt assets at virtually no additional cost or risk to creditors. The Florida Statutes should be amended to provide for: (1) a means of permitting judgment debtors to claim all their exemptions at any time after the entry of judgment, (2) meaningful notice to all judgment debtors of the judgment, and (3) an opportunity for a prompt postgarnishment hearing on any exemptions claimed by the debtor.


411. 539 F.2d at 1366. The Fifth Circuit said that the Florida procedures significantly advanced the creditor's interest by impounding the debtor's wages pending resolution of the exemption issue, thereby securing the creditor against dispersal of the funds. Id. at 1367. As a matter of policy, however, the debtor's interest in the uninterrupted use of his accrued wages, which may be vital to the welfare of the debtor and his family, must be weighed against the creditor's added security.


413. Id. at 1377-78. The court restricted its decision to the garnishment of exempt AFDC funds. The decision did not apply to all postjudgment garnishment. Id. at 1379. The court construed "prompt" to mean within two working days. Id. at 1378.
their right to claim exemptions, and (3) a prohibition against the seizure of assets claimed to be exempt by filing until after judicial determination of the exemption issue.

1. Right to Prefile Exemptions

Chapter 222 of the Florida Statutes should be amended to allow a judgment debtor to file an affidavit with the clerk of the court claiming his exemptions from final process at any time after the entry of the judgment. Section 222.01 already permits debtors to declare their homestead before levy, and the court order issued by the Circuit Court for Duval County established a prefiling system for claiming exempt personal property.

Other means of preventing the initial seizure of exempt property have been suggested. One alternative is to require judgment creditors to negate the debtor's exemptions. Allowing judgment debtors to claim their own exemptions is the better alternative, however, since debtors are in a better position to know the facts upon which the exemptions are based than are their creditors. Moreover, putting the burden on the judgment debtor to take the initiative in claiming his exemptions is consistent with the present evidentiary burden the debtor carries in claiming exemptions. It is also less expensive for the creditor. No investigation of the debtor's circumstances is necessary, and the lawyer is not required to have the application for process reviewed by a judge. Moreover, it saves judicial time.

The claim of exemption would be made by the debtor's affidavit alleging the requisite facts supporting the claim. For simplicity, the supreme court could be invited to promulgate forms for the use of debtors, and court clerks might be encouraged to assist judgment debtors without counsel.

The homestead and wage exemptions should cause little problem. Both require the debtor to be the head of a family, a status usually apparent, although some nice questions can arise. A description of the premises or the name of the employer, as the case may be, complete the information needed and pose little difficulty. Prefiling the debtor's claim of exempt personal property is more difficult.

415. Although this procedure would permit judgment debtors to claim their exemptions before levy, there undoubtedly would be some debtors who failed to do so. The failure to file for exemptions should not be deemed a waiver, and the debtor would continue to have a right to claim his exemptions after levy as presently provided.
416. Some problems may be encountered regarding the legal description of the premises and the acreage limitations.
The debtor is allowed to select the items of personal property he wishes to protect, subject to the $1,000 valuation limit. A person's personal assets are constantly shifting. Their value is ever-changing as they depreciate or are consumed. Section 222.06 avoids these problems by valuing the property and giving the debtor his choice at the time of each levy.

Any system of prefiling must provide for periodic revision. Change of circumstances affecting exemptions is not, of course, limited to personal property, although the impact of change is much greater. Thus, debtors should be under an obligation to amend their affidavits as material changes in circumstances occur or, in the case of personal property, if they merely wish to change their selection. It is not necessary to perpetuate the present practice which requires the debtor to inventory and value his entire personal estate in order to claim his $1,000 personal property exemption. This serves no useful purpose, except to provide the creditor with some free discovery of the debtor's other leviable assets. It is sufficient for the debtor merely to schedule and value those assets he wishes to exempt.

To ensure that exemption claims do not become stale due to the passage of time and neglect, the effectiveness of a prefilled claim should be limited to twelve months, with an unlimited right of renewal. This would augment the debtor's duty to amend his claim when changes occur and would remind the debtor that the judgment remains unsatisfied.

The prefiling of exemptions necessitates some modification in the procedures by which exemption disputes are heard and resolved. The present exemption statutes (except homestead) require the creditor to deny exemptions claimed by the debtor within forty-eight hours. The property has been seized already and it is necessary to resolve disputes quickly so the property can be returned to the debtor if it is found to be exempt. Where the debtor claims his exemptions before levy, there is no need for exemption disputes to be resolved so hastily. Therefore, the creditor should be allowed to contest an exemption at any time. This is permitted now by creditor's bill under section 222.10, but this procedure is cumbersome, amounting in effect to an independent suit in equity requiring service of process and proper jurisdiction and venue.

A much simpler method of resolving exemption disputes, using present procedures, would be to have the creditor bring his challenge in the form of a supplementary proceeding under section 56.29. A supplementary proceeding is ancillary to the underlying suit in which the judgment was rendered. The proceeding is initi-
ated by a motion which must be served on the judgment debtor, but no independent jurisdictional grounds are necessary.

Although the scope of supplementary proceedings under the present statute is probably broad enough to encompass exemption disputes, section 56.29 should be amended to make specific reference to exemption disputes to alleviate any uncertainty by the bench or bar. The statute also should empower the court to award attorney's fees to the debtor if the creditor is not acting in good faith in contesting the debtor's claim of exemption and, conversely, to award attorney's fees to the creditor if the debtor's claim of exemption is frivolous or in bad faith.

2. *Notice to Judgment Debtor*

A system of prefiling exemption claims will not serve its purpose of preventing the temporary loss of exempt assets unless judgment debtors are given timely and meaningful notice of their right to prefile. Chapter 222 should be amended to require the mailing of written notice to all judgment debtors by the clerk of court at the time the judgment is recorded in the official records. This notice should advise the debtor that a judgment has been entered against him and that the judgment creditor is entitled to an execution on the judgment after ten days without further court action. The notice also should advise the judgment debtor that some or all of his property might qualify for exemption from execution and that he has a right to claim his exemptions by filing an affidavit with the clerk of the court. The exact form of this notice should be prescribed by rule by the supreme court.

3. *Application for Process*

The judgment creditor's application for a writ of execution should include an affidavit attesting to the entry of judgment, want of satisfaction, and the judgment debtor's failure to file an affidavit of exemption or the court's decree that the property is not exempt. Chapter 77 also should be amended to require a similar affidavit in support of the creditor's motion for postjudgment writ of garnishment. Furthermore, since the affidavit need attest only to facts of a conclusory nature, based largely on the court records, there is no reason to have it reviewed by a judge. Thus, the writ may be granted by the clerk upon a pro forma review of the creditor's affidavit, as

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419. *Id.* at 1.550; see discussion at note 354 *supra.*
under the present practice.\textsuperscript{420}

In \textit{Brown}, the Fifth Circuit mentioned as a weakness of the present Florida procedure the lack of a requirement that the judgment creditor show by affidavit facts demonstrating the nonexempt nature of the assets to be seized.\textsuperscript{421} To be meaningful, a factual affidavit of this kind would have to be reviewed by a judge exercising discretion in passing on the sufficiency of the creditor's allegations. Although such a requirement would, perhaps, provide an additional safeguard against seizure of exempt assets when the judgment debtor failed to prefile his exemption claim, it would also add substantially to the cost of execution, both for the creditor and the court. On balance, this added burden is not justified when the debtor is allowed to prefile his exemptions. If the debtor fails to protect his exempt property by prefiling, the judgment creditor should be allowed levy on the property in reliance on the record, without further investigation, subject to the debtor's right to reclaim the property after levy upon a showing of exemption.

The court in \textit{Brown} also noted critically the absence of a meaningful remedy for wrongful postjudgment execution.\textsuperscript{422} Under present Florida law, wrongful seizure of exempt property after judgment is actionable only if the creditor knows the property is exempt and thus is acting maliciously. Judgment debtors should be given a statutory cause of action against judgment creditors for wrongful execution when exempt property is seized after the debtor has filed an affidavit of exemption. A similar action should be created for wrongful postjudgment garnishment.

These new remedies may pose a timing problem when the debtor files his affidavit after the creditor has already obtained the writ and delivered it to the sheriff for levy or service. Since the debtor has ten days to prefile his exemption claim before the creditor can obtain a writ of execution, the debtor is in a better position to avoid the problem through a timely filing. Therefore, the creditor should be held liable for wrongful execution or garnishment only when the debtor's affidavit of exemption was on file at the time the judgment creditor filed his application for process.

As for the measure of damages under the new remedies, the statutes should provide for all consequential damages resulting from wrongful seizure, including reasonable attorney's fees in obtaining release of the exempt property. The judgment creditor should not,

\textsuperscript{420} FLA. R. CIV. P. 1.160.
\textsuperscript{421} 539 F.2d at 1367.
\textsuperscript{422} \textit{id.} at 1367-68.
however, be required to post a bond for these damages as a condition of obtaining a writ of execution or postjudgment garnishment. The risk of a wrongful taking seems minimal, and the judgment debtor can offset his damages against the creditor's judgment, which provides security for the debtor.

The statute should preserve expressly the debtor's present common law remedies of malicious prosecution and abuse of process. Although requiring proof of malice, these remedies would remain effective in preventing a knowing postjudgment seizure of exempt assets when the debtor has failed to prefile his exemptions. In this regard, it is necessary to emphasize the procedural purpose of the prefiling provisions, which merely entitle the judgment creditor to a writ of execution or garnishment for the initial seizure of the property, subject to the debtor's subsequent claim of exemption. The debtor's failure to prefile his exemptions is not a waiver justifying the judgment creditor's seizing property known to be exempt in an effort to take unfair advantage of the debtor's inaction.

Of course, in an action for abuse of process, the debtor carries the burden of proving that the creditor knew or should have known the property was exempt. This may, however, offer the debtor a means of persuading a judgment creditor who obtained a writ of execution before the debtor filed his exemption, but whose writ has not yet been levied, not to carry out the levy after being notified of the debtor's claimed exemption. A debtor then, should always check with the clerk at the time he files his affidavit of exemption, at least if he does not file within ten days of entry of judgment, to see if a writ of execution or garnishment has already been issued to the judgment creditor. If so, prompt notice to the creditor of the claimed exemption may successfully prevent actual seizure of the exempt property.

VI. CONCLUSION

In the past two years the Florida Supreme Court has found serious constitutional defects in the state's present provisional remedy statutes. The United State Supreme Court has concluded that due process in debtor-creditor relations does not always require prior notice and an opportunity to be heard before prejudgment taking of a debtor's property, provided the seizure is subject to close judicial supervision to minimize the risk and reduce the impact of error on the debtor. Due process requires only a proper balancing of the competing interests involved.

The proposals recommended in this article attempt to strike a proper balance between the interest of the state in providing credi-
tors with effective remedies for the prompt and efficient collection of just debts and the interest of debtors in preventing any wrongful interference in the use and enjoyment of their property. These proposals afford debtors significantly greater procedural safeguards with little sacrifice in the effectiveness or cost of collection for creditors. It is hoped that they will both satisfy contemporary constitutional scrutiny and foster continued availability of credit at reasonable cost.