Creditors in danger of losing garnishment tool

by Michelle Lore

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"There are other ways of going about getting money that actually belongs to the debtor without messing with the nondebtor's funds." —Consumer rights attorney Nick Slade, who represents the plaintiffs in 'Billiar'

The U.S. District Court in Minnesota is poised to hear a case whose outcome could stymie creditors trying to collect on debts.

The issue in Billiar, et al. v. Atlantic Credit & Financial, Inc., et al., is whether the state's garnishment and levy statutes, as interpreted by the Minnesota Supreme Court last year, violate the Due Process Clause of the 14th Amendment to the U.S. Constitution.

The hearing was scheduled for last Thursday, but has been postponed until March 4.

In Billiar, the plaintiffs challenge the actions of a creditor in garnishing $2,655 from several accounts jointly held by Mark Fiers, his children and his partner Kristie Billiar. The funds were attached to satisfy, in part, an $11,800 judgment obtained against Fiers for a credit card debt.

The plaintiffs contend that only a small portion of the money in the joint accounts belonged to Fiers, and that because the nondebtors did not receive notice or have a chance to be heard prior to the attachment of their money, their right to due process has been violated.

Although Billiar deals specifically with credit card arrears, the decision could affect collection procedures on all kinds of debt.

Derrick Weber, a consumer-law attorney in Minneapolis, said the decision could effectively eliminate the garnishment process used to collect on such things as court or tax judgments and even attorney fees.

"The bank levy is a common tool used by many, many attorneys," Weber said, "not just those that collect on consumer debt."

Michael Klutho, an attorney from Minneapolis who represents the creditors in Billiar, agreed.

"This literally is a creditor's remedy issue," he said. It affects "anyone who's got a judgment in Minnesota."

Due process due?

In April of last year, the Minnesota Supreme Court answered several garnishment-procedure questions certified to it by the federal District Court.

In Savig v. First National Bank of Omaha, the state's high court determined that Minnesota's garnishment laws permit a judgment creditor to attach all funds in a joint account regardless

of ownership, and that the burden of proving ownership of the funds is on the nondebtor.

The issue now before the federal District Court in Billiar is whether such a procedure violates nondebtors' right to due process by depriving them of their property without notice or an opportunity to be heard.

"It is a fairness issue, which is what due process is all about," said Nick Slade, an attorney from Minneapolis who represents the plaintiffs in Billiar. Due process "ensures some fairness when money or property is being taken."

Creditors' attorneys say that although the Minnesota Supreme Court did not squarely address constitutional issues in Savig, it was implicit in the court's analysis that the justices were trying to determine what's fair and what's reasonable.

"They were wrestling with basically the same issues [as in Billiar] - what's the most workable, practical solution," said Bridget Sullivan, an attorney with defendant Gurstel, Staloch & Chargo, P.A., a law firm and collection agency.

Creditors' attorneys also point out that banks don't actually take the money seized from joint accounts and immediately turn it over to creditors.

The bank freezes the money and holds it while the debtor is given time to claim exemptions, Sullivan explained.

Weber added that if some of the money belongs to nondebtors, they have the opportunity to come forth and prove it.

But debtors' attorneys argue that even a temporary deprivation of liberty or property is a taking that requires due process. Moreover, they say that nondebtors are hurt when their money is held for even a short time.

Todd Murray, a consumer rights lawyer from Minneapolis, said that creditors tend to garnish on the 1st and 15th of the month, when people get paid and are writing checks for such things as car loans and mortgages.

"To have checks bounce for your expenses can be pretty significant," he said.

Slade said that nondebtor joint account holders also struggle with how to unfreeze their money because the garnishment notice provided to debtors doesn't give the nondebtors any guidance.

"It's an enormous burden on nondebtors to try and figure out how to get their money back," he said, adding that it can be costly as well.

The end of the process?

Creditors' attorneys say that a win for the plaintiffs in Billiar would, in effect, mean the end of the garnishment process altogether.

First, they contend that providing prior notice of the garnishment to all account holders would make the process impractical because all the money would be removed before the garnishment could be completed.

Moreover, lawyers say that because of the liability risk, creditors aren't going to garnish any bank accounts.

When creditors issue a garnishment summons to a bank, they don't know if the account is a joint account or not, Klutho said. So they won't want to risk the possibility of the bank's levying funds in a joint account in violation of the law.

Weber agreed that under the plaintiffs' theory, creditors cannot garnish a bank account without exposing themselves to liability.

Plaintiffs want creditors who levy a joint account to be immediately subject to damages, even if the bank holds the money for just an hour, he said.

Weber said that if the plaintiffs are successful, it would be the equivalent of giving a debtor a Swiss bank account.

"If I want to hide my assets, all I have to do is commingle them with [someone else's]," he said. "They can put $1 in there, and now it's a joint account, and I've just hidden all my assets."

But Slade doesn't buy that argument. There is a lot of evidence out there that people generally pay their debts, he said.

"It's a very slim minority of people who really try to take advantage of the system to avoid paying debts at all," Slade said.

'Minor inconvenience'

Creditors' lawyers contend that certain obligations are inherent in opening a joint account with another person.

Potentially identifying who owns which funds at some point is part of having a joint account, Weber said.

"It's a minor inconvenience that you kind of created by commingling your accounts," he said. "You've got to come forward and separate this all out for everybody, because neither the banks nor the creditors nor the creditors' lawyers have the knowledge to see what was put into the account."

Debtors' attorneys see things differently.

"There are other ways of going about getting money that actually belongs to the debtor without messing with the nondebtor's funds," Slade said, pointing to pre-garnishment discovery and direct wage garnishment as options.

Samuel Glover, a Minneapolis attorney who represents consumers, said that debt buyers are likely paying attention to the case.

"They make a lot of money taking money from people who don't own it," he said, "and they would hate to lose that ability."

If the defendant creditors are successful in maintaining the status quo, Glover offers consumers a warning: Be on alert.

"At that point, you have to tell people that a joint account isn't a very safe place to keep your money," he said. "If there is any doubt in your mind that your joint account holder is a safe bet, then don't have a joint account with them."