

2017

## Fair For Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities

Aimee Constantineau

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### Recommended Citation

Constantineau, Aimee (2017) "Fair For Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities," *American University Law Review*: Vol. 66 : Iss. 2 , Article 4.  
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# Fair For Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities

## **Keywords**

Due process, procedural due process, debt-collection, Matthews test, Mathews v. Eldridge

## COMMENTS

# FAIR FOR WHOM? WHY DEBT-COLLECTION LAWSUITS IN ST. LOUIS VIOLATE THE PROCEDURAL DUE PROCESS RIGHTS OF LOW-INCOME COMMUNITIES

AIMEE CONSTANTINEAU\*

*Debt collection has burgeoned into a thriving industry over the past decade, and it is estimated to be a \$13 billion dollar business today. Yet, most of the 35% of American adults who owe an average debt of \$5000 do not even know that a creditor is trying to collect the debt. In St. Louis, Missouri, over 100,000 judgments were handed down in debt collection lawsuits from 2008 to 2012, and the overwhelming majority of those lawsuits were against low-income debtors. Collectively, these debtors lost over \$50 million in wages through garnishments, which often forced households into the unthinkable position of allocating what few resources remained. And, more often than not, such financial strain drives families even further into debt because they seek out new loans to repay those debts.*

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\* Note & Comment Editor, *American University Law Review*, Volume 66; J.D. Candidate, May 2017, *American University Washington College of Law*; B.A., International Affairs, 2010, *The George Washington University*. I owe my utmost thanks and sincere gratitude to my colleagues on the *American University Law Review* for their meticulous review throughout the publication process. I especially would like to thank Sara Fairchild, Lisa Southerland, and Jon Bressler for their tireless work, insightful commentary, and gracious advice. To Professor Mark Niles, a special thank you for introducing me to the *Mathews* test and for providing invaluable guidance on this topic. Last, but not least, I would like to extend my heartfelt appreciation to my friends and family—each and every one of you motivate and inspire me more than you could possibly know.

*The debt-collection process in Missouri, from the initial complaint to the garnishment of wages, is governed by a blend of federal and state law, both of which are antiquated and non-comprehensive. This combination of laws fails to provide low-income residents of St. Louis with constitutionally adequate notice or an opportunity to be heard, thereby violating debtors' procedural due process rights. These violations lead to serious social and economic ramifications for the low-income residents of St. Louis. To remedy these constitutional shortcomings, lawmakers should provide for specially tailored notice requirements, access to legal counsel or advice, and additional financial protections to safeguard communities from the overly harsh practices of debt collectors.*

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*“[T]hey aren’t families that didn’t work hard enough or didn’t care. They aren’t people who scoffed at paying their debts.”<sup>1</sup>*

#### INTRODUCTION

Imagine the following scenario.<sup>2</sup> You live in Jennings, Missouri,<sup>3</sup> a city situated just north of St. Louis. You are working at a job that pays you \$8.20 an hour<sup>4</sup> when you need emergency surgery. Uninsured, your hospital bill is over \$10,000. Because your annual income is under \$20,000, you qualify for the hospital’s free care program; you never apply for the exemption, however, because you have not heard of the program, and the hospital does not tell you about it. Instead, you negotiate a payment plan with the hospital’s collection agency, making you the debtor, the hospital the creditor, and the hospital’s collection agency the debt collector. After a few months, you default on your payments in violation of the terms of the repayment plan, and the collection agency files a debt collection lawsuit against you.

You appear at the court proceedings, but you do not have enough savings to hire or consult with a lawyer. Without the aid of legal representation, you do not really know what is supposed to happen. The attorney for the debt collection agency takes you into the hallway before the hearing and offers you new payment terms if you agree in court to owing the debt. The offer seems reasonable to you, so you agree to the terms. The court enters a judgment in favor of the collection agency, thereby making you the judgment-debtor and the collection agency the judgment-creditor. Because you make over \$870 a month, under federal law the collection agency can garnish

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1. Editorial Board, *Editorial: St. Louis Area’s Black Neighborhoods Hardest Hit by Debt Lawsuits*, ST. LOUIS POST-DISPATCH (Oct. 20, 2015), [http://www.stltoday.com/news/opinion/editorial-st-louis-area-s-black-neighborhoods-hardest-hit-by/article\\_a\\_f033c9b-b575-5d4d-bb01-7cebb6b573ab.html](http://www.stltoday.com/news/opinion/editorial-st-louis-area-s-black-neighborhoods-hardest-hit-by/article_a_f033c9b-b575-5d4d-bb01-7cebb6b573ab.html).

2. The premise and facts of this hypothetical situation are derived from circumstances described in Paul Kiel & Chris Arnold, *From the E.R. to the Courtroom: How Nonprofit Hospitals Are Seizing Patients’ Wages*, PROPUBLICA (Dec. 19, 2014, 6:00 AM), <https://www.propublica.org/article/how-nonprofit-hospitals-are-seizing-patients-wages>.

3. The city of Jennings, Missouri has a population of approximately 15,000, a median income of \$27,785, and is 89.8% Black or African-American. *QuickFacts for Jennings City, Missouri*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/2937178> (last visited Nov. 30, 2016).

4. The current minimum wage in Missouri is \$7.65 an hour. *Minimum Wage*, MO. DEP’T OF LABOR & INDUS. RELATIONS, <https://labor.mo.gov/DLS/MinimumWage> (last visited Nov. 30, 2016); see also Paul Kiel & Chris Arnold, *Old Debts, Fresh Pain: Weak Laws Offer Debtors Little Protection*, PROPUBLICA (Sept. 16, 2014, 5:00 AM), <https://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection>.

your pay by seizing 25% of it each week. This reduction in weekly income brings your take-home pay below the minimum wage. A month later, you fall ill again, return to the hospital, and find yourself in the same exact position in the courtroom shortly thereafter. This situation is alarmingly common for many residents of Missouri.

The city of Jennings has seen over 4500 debt-collection lawsuits initiated against residents of the city in the past five years.<sup>5</sup> And Jennings is not alone in this struggle. According to a recent study by ProPublica,<sup>6</sup> a non-profit news organization, debt-collection suits resulting in court judgments in favor of the debt collector disproportionately affect low-income communities across the country, and the study found that the effects are even more pronounced in majority-black communities.<sup>7</sup> In the St. Louis area in particular, judgment rates peaked in low-income neighborhoods, and in many cases majority-black, low-income neighborhoods saw an even higher

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5. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>. Latanya Graves, who lives in Jennings, talked about the lack of options she faced when she had to decide which bill most warranted payment. *Id.* “Hoping that if [I] don’t pay this bill for a few months and [the utility] doesn’t get cut off,” she “could see that as a safety net.” *Id.* “It brings back a lot of memories, a lot of bad memories.” *Id.* Cori Winfield, also of Jennings, had to decide between “keeping the gas on, finding a place to live, [or] saving for another car” after her minivan was repossessed when she was sued successfully by the subprime auto lender that was garnishing her wages to repay the debt. *Id.* Stress and anxiety provide one explanation for the hesitancy of Jennings community members to discuss openly the debt-collection suit affliction: “Employees often find it humiliating, because the courts have had to intervene and employers have become involved in their otherwise private struggles.” ADP RESEARCH INST., GARNISHMENT: THE UNTOLD STORY 6 (2014) [hereinafter ADP REPORT], <http://www.adp.com/tools-and-resources/adp-research-institute/insights/~media/RI/pdf/Garnishment-whitepaper.ashx>.

6. Kiel & Waldman, *supra* note 5 (reporting on a study that was the first of its kind and focused specifically on data from communities in and around three major metropolitan areas: St. Louis, Missouri; Chicago, Illinois; and Newark, New Jersey). The methodology of the study conducted on the disparity in debt-collection lawsuits focused on the three cities over a five-year period (2008–2012), and it overlaid census tract data on population, race, and income with judgment location data that allowed the researchers to look at the probable income and race of debtors in the lawsuits. *Id.*

7. Arguably, low-income residents in majority-black communities in Missouri have an Equal Protection claim because of the possible discriminatory effect against classes of judgment-debtors due to both poverty and race, based on the volume of judgments in collection suits that involve these two classes. The Equal Protection argument, however, is beyond the scope of this Comment. *Cf.* *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959) (holding that a docket and filing fee required to commence an appeal could not be applied to indigents under both the Due Process and Equal Protection Clauses).

rate.<sup>8</sup> Specifically, the study looked at over 100,000 judgments from St. Louis City and County and found that 90% of those judgments fell in lower income communities.<sup>9</sup> Furthermore, over \$50 million in garnishments was collected from the judgment-debtors located in those communities.<sup>10</sup>

When the rates of judgments and garnishments were broken down by race while holding income constant, almost half of the judgments fell in majority-black, lower income communities, and approximately 60% of the \$50 million in garnishments was collected from judgment-debtors located in those communities.<sup>11</sup> ProPublica therefore concluded the following: (1) that debtors in majority-black communities are more than twice as likely as income-equivalent debtors living in majority white neighborhoods to have debt collectors attempt to recover delinquent debts through legal action; and (2) that debtors living in majority black neighborhoods are 20% more likely than income-equivalent debtors living in white neighborhoods to have their judgments satisfied through garnishments.<sup>12</sup> ProPublica noted that “[i]t is not unreasonable to attribute these perils to [racial] discrimination,”<sup>13</sup> but the study also pointed to other contributing

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8. See ANNIE WALDMAN & PAUL KIEL, PROPUBLICA, RACIAL DISPARITY IN DEBT COLLECTION LAWSUITS: A STUDY OF THREE METRO AREAS 1, 6, 26 (2015), <https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf>. Judgment rates in debt-collection lawsuits in St. Louis County and City were highest in census tracts with a median income between \$20,000 and \$40,000, and the risk of judgment was twice as high in majority-black neighborhoods as in majority white ones. *Id.* at 1, 6.

9. *Id.* at 3, 22. Over 26,000 judgments were against low-income residents, and over 63,000 against middle-income residents. *Id.* at 22. The study defined the low-income range as \$22,000–\$33,000 and the middle income range as \$33,000–\$68,000. *Id.* The median household income in Missouri, however, is only \$47,746 (based on the Census Bureau’s five year estimates; St. Louis City’s median income is only \$34,800), 42% of the population of St. Louis County falls below the \$50,000 family income level, and the data does not relay where on the scale of \$33,000–\$68,000 the bulk of the judgments lay. See *id.* at 22; *QuickFacts for Missouri*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/29,2937178> (last visited Nov. 30, 2016) (listing the median household incomes for Missouri and St. Louis city); *American FactFinder*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (last visited Nov. 30, 2016) (listing family income levels for St. Louis County, Missouri).

10. WALDMAN & KIEL, *supra* note 8, at 22.

11. *Id.*

12. *Id.* at 1, 2, 4, 11.

13. Paul Kiel, *Why Small Debts Matter So Much to Black Lives*, PROPUBLICA (Dec. 31, 2015, 8:00 AM), <https://www.propublica.org/article/why-small-debts-matter-so-much-to-black-lives> (“But there’s no question that the main reason small financial problems can have such a disproportionate effect on black families is that, for largely

factors, such as fewer assets in low-income households, fewer resources available to lean on, and customer bases with large racial disparities.<sup>14</sup> These results are largely mirrored in the study's findings in Illinois and New Jersey, and reporting shows that many low-income debtors across the country, regardless of race, have felt the brutal effects of a debt collection lawsuit.<sup>15</sup>

The debt collection industry has seen shocking levels of growth in recent times. Indeed, the Consumer Financial Protection Bureau estimates that debt collection has burgeoned into a \$13 billion dollar industry.<sup>16</sup> Alongside the debt collection industry is the parallel growth of consumer debt, which affects close to 35% of American adults today.<sup>17</sup> The number of debtors increased substantially during the most recent economic downturn,<sup>18</sup> and while the average consumer's debt is a little over \$5000, most consumers are unaware that a creditor is trying to collect funds from them—or in other words, that they have a debt in collection.<sup>19</sup>

This Comment argues that current federal and state laws governing debt collection lawsuits and the garnishment of wages in Missouri violate the procedural due process rights—guaranteed by the Fifth

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historical reasons rooted in racism, they have far smaller financial reserves to fall back on than white families.”).

14. See WALDMAN & KIEL, *supra* note 8, at 18, 20–21.

15. See *id.* at 1; see also Paul Kiel, *For Nebraska's Poor, Get Sick and Get Sued*, PROPUBLICA (Apr. 28, 2014, 4:00 AM) [hereinafter Kiel, *Nebraska's Poor*], <https://www.propublica.org/article/for-nebraskas-poor-get-sick-and-get-sued> (recounting the stories of families in Nebraska who have been the victims of debt collection lawsuits); Paul Kiel, *At Capital One, Easy Credit and Abundant Lawsuits*, PROPUBLICA (Dec. 28, 2015, 5:00 AM) [hereinafter Kiel, *Capital One*], <https://www.propublica.org/article/at-capital-one-easy-credit-and-abundant-lawsuits> (discussing the volume of debt-collection lawsuits initiated by major banks in New York, Nevada, Florida, and Virginia); Paul Kiel, *In Alabama, a Public Hospital Serves the Poor—with Lawsuits*, PROPUBLICA (Dec. 22, 2014, 12:00 PM) [hereinafter Kiel, *Alabama Public Hospital*], <https://www.propublica.org/article/in-alabama-a-public-hospital-serves-the-poor-with-lawsuits> (reviewing the debt-collection suits initiated by public hospitals in Alabama).

16. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2015, at 1, 7–8 (2015) [hereinafter CFPB ANNUAL REPORT], [http://files.consumerfinance.gov/f/201503\\_cfpb-fair-debt-collection-practices-act.pdf](http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf) (estimating that the debt-collection industry has roughly 6000 firms with 140,000 employees).

17. *Id.* at 7 (stating that “77 million of the 220 million Americans with credit files” have debts that are in collection).

18. ADP REPORT, *supra* note 5, at 13.

19. CFPB ANNUAL REPORT, *supra* note 16, at 7 (finding that debts in collection can range from \$25 to more than \$125,000).



and Fourteenth Amendments—of low-income communities in the St. Louis area. Specifically, the collection suits brought against residents of low-income neighborhoods in St. Louis resulting in judgments provide neither adequate notice nor ensure an opportunity for debtors to be heard. Part I explores the social and economic ramifications of debt collection for families in low-income communities across Missouri and the explosive growth of the debt-buyer industry, which directly contributes to the growth in debt collection lawsuits filed. Part I also explains the relevant state and federal laws that regulate the debt-collection process in Missouri and provides a brief overview of procedural due process doctrine and its particular application to pre-judgment garnishment statutes. Part II demonstrates that debtors' wages are a constitutionally protected interest and outlines the deficiencies in notice and the opportunity to be heard that are commonplace in Missouri debt-collection cases. It then applies a modified *Mathews v. Eldridge*<sup>20</sup> test to the debt collection process in Missouri, demonstrating that more judicial procedures and safeguards are required in Missouri debt collection lawsuits to protect the constitutional due process rights of debtors in low-income communities. Part III concludes with suggestions and remedies to satisfy procedural due process requirements.

### I. DEBT COLLECTION IN MISSOURI

Consumers accumulate debt through a multitude of everyday services, such as credit cards, auto loans, mortgages, medical debt, and student loans.<sup>21</sup> When consumers fail to pay their debts for these everyday services, creditors can file debt collection lawsuits in a process similar to that described above. Various debt collectors appear in these collection lawsuits, including banks, hospitals, utility companies, high-cost lenders,<sup>22</sup> and, increasingly, debt-buyers—

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20. 424 U.S. 319 (1976).

21. CFPB ANNUAL REPORT, *supra* note 16, at 7; Kiel & Waldman, *supra* note 5 (listing sources of debt as credit card bills, medical bills, loans, and, frequently for the citizens of the St. Louis area, “the sewer bill”).

22. High-cost lenders, such as payday lenders or auto-title lenders, extend credit to consumers under agreements that can contain exorbitantly high fees or interest rates. See Paul Kiel, *The Payday Playbook: How High Cost Lenders Fight to Stay Legal*, PROPUBLICA (Aug. 2, 2013, 9:00 AM), <https://www.propublica.org/article/how-high-cost-lenders-fight-to-stay-legal>; Paul Kiel, *Let the Game of Whack-A-Mole Begin: Feds Put Forward New Payday Rules*, PROPUBLICA (Mar. 27, 2015, 12:07 PM), <https://www.propublica.org/article/let-the-game-of-whack-a-mole-begin-feds-put-forward-new-payday-rules>.

companies that purchase debt accounts at steep discounts and then try to collect the debts.<sup>23</sup>

When a creditor prevails in a debt-collection suit, that party, the judgment-creditor, may collect the amount of the judgment from the person who owes the debt, the judgment-debtor. To do so, judgment-creditors often seek garnishments.<sup>24</sup> A garnishment is a legal order that a judgment-creditor can use to collect the outstanding funds from the judgment-debtor through a third-party garnishee, such as an employer or a bank.<sup>25</sup> In debt collection actions, a judgment-creditor typically serves the legal garnishment order on the judgment-debtor's employer.<sup>26</sup> That garnishment order compels the employer to periodically withhold a judicially-determined percentage of the employee's paycheck and send that money to the judgment-creditor each pay period until the debt is satisfied.<sup>27</sup>

A study by ADP, a major supplier of payroll services in the United States, revealed that in 2013, judgment-creditors garnished wages from 7.2% of employees.<sup>28</sup> The study also demonstrated that the percentage of employees who had wages garnished was greater in low-income job industries than in higher-income job industries.<sup>29</sup> Notably, the Midwest region of the United States, where Missouri is located, saw the highest garnishment rates of the study.<sup>30</sup> The

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23. Kiel & Waldman, *supra* note 5; see also Kiel, *Capital One*, *supra* note 15.

24. WALDMAN & KIEL, *supra* note 8, at 2.

25. 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 552 (2016) (stating that a third-party garnishee holds the property of the debtor, and that the property can be reached by a judgment-creditor through a garnishment order); ADP REPORT, *supra* note 5, at 4.

26. *Id.*; Kiel & Arnold, *supra* note 4.

27. Paul Kiel, *When Lenders Sue, Quick Cash Can Turn into a Lifetime of Debt*, PROPUBLICA (Dec. 13, 2013, 10:46 AM), <https://www.propublica.org/article/when-lenders-sue-quick-cash-can-turn-into-a-lifetime-of-debt> (relaying the story of one judgment-debtor whose entire judgment was satisfied through garnishments over a five-year period).

28. ADP REPORT, *supra* note 5, at 3. "There are limited national statistics about wage garnishment." *Id.* at 4. "Garnishments are predominantly regulated by diverse and complex state laws." *Id.*

29. *Id.* at 9. As reported by ADP, the three industries with the highest percentage of employees experiencing wage garnishment were (1) transportation and utilities (11.2%), (2) manufacturing (10.2%), and (3) construction (9.1%). *Id.* The three industries with the lowest percentage of employees experiencing wage garnishment were (1) education and health services (5.7%), (2) information services (5.5%), and (3) professional and business services (5.4%). *Id.* ADP believes that the imbalance in garnishment frequency in these particular industries indicates a "possible relationship between garnishment and blue- and white-collar job categories." *Id.*

30. *Id.* at 11.

combination of predatory debt collection, garnishment practices, and an inability to repay debts has led to a cycle of poverty in Missouri that, for many, is unending, unalterable, and unforgiving.<sup>31</sup>

#### A. *The Missouri Debt Collection Crisis*

When a family's single largest expense every month is a garnishment, life in the suburbs of St. Louis often forces that family to make a difficult trade-off between which bills to pay and which bills to neglect.<sup>32</sup> Priorities swing unpredictably from securing a stable living situation, to keeping the utilities running, to accessing transportation.<sup>33</sup> One desperate financial situation can easily lead a debtor into even more perilous debt, and both racial disparity in debt-collection cases and the judicial process in Missouri contribute to such a situation.<sup>34</sup>

##### 1. *Racial disparity in debt-collection lawsuits in St. Louis*

Debt-collection lawsuits that result in judgments and garnishments disproportionately affect lower income communities in the St. Louis region, and the repercussions are even more pronounced in majority-black low-income neighborhoods.<sup>35</sup> Between 2008 and 2012, debt collectors seized an estimated \$34 million from residents in mostly black neighborhoods in the St. Louis area.<sup>36</sup> Judgments in such suits are demonstrably concentrated in areas of St. Louis that are majority black, revealing an aspect of racial disparity in the debt-collection process in lower income St. Louis communities.<sup>37</sup> The debt-

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31. *See id.* (“You go to bed thinking about, ‘How am I going to pay these bills? How am I going to do this?’ You wake up thinking about it. You go to work thinking about it.”).

32. *See* Kiel & Arnold, *supra* note 4 (illustrating a couple's difficult choice to pay an electricity bill rather than allocate the funds for their daughter's dental needs); Kiel & Waldman, *supra* note 5 (“When you rank those bills, you're definitely going to put those things that are essential to health and safety—that you can't function without on a day-to-day basis—first.”).

33. Kiel & Waldman, *supra* note 5 (explaining that low-income debtors often view a utility company not shutting off power after a missed payment as a “safety net”).

34. *See id.* (providing an example of a resident who took out a high-interest loan to save herself from foreclosure).

35. *See id.* (“[T]he rate of judgments was twice as high in mostly black neighborhoods as it was in mostly white ones.”).

36. *Id.* In that same time period, debt collectors filed one lawsuit for every four residents in the nearby suburb of Jennings, Missouri, which is 90% black. *Id.*

37. *Id.* (citing April Kuehnhoff, an attorney at the National Consumer Law Center, that the ProPublica analysis raised “crucial questions about how racial

collection practices of the local water utility, Metropolitan St. Louis Sewer District (“MSD”), provide an example of this disproportionate effect. MSD files a particularly high number of debt-collection suits in Missouri courts.<sup>38</sup> Judgments obtained in favor of the utility company affect debtors in black neighborhoods at a rate four times higher than in white neighborhoods.<sup>39</sup>

Although racial bias in the debt-collection industry is not substantially evidenced by data or testimony,<sup>40</sup> the “pernicious” gap in wealth between white and black communities is. Wealth inequality has “vastly” expanded along racial lines the past thirty years: the median net worth of black households is \$11,000, whereas the median net worth of white households is \$141,000—more than ten times greater.<sup>41</sup> Additionally, federal survey data demonstrate that black households have lower incomes and fewer assets on average.<sup>42</sup> Therefore, even if a black household falls within the \$40,000–\$60,000

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disparities are entering the debt-collection system and what we can do to eliminate these disparities”).

38. *Id.* (“In 2010, [Metropolitan St. Louis Sewer District (“MSD”)] decided too many customers weren’t paying their bills, so it dramatically increased its collection efforts.”); *see also infra* notes 149–52 and accompanying text (describing the head-of-household exemption program MSD has for low-income customers, but noting the low application rates).

39. *See* Kiel & Waldman, *supra* note 5.

40. MSD claims to have no demographic data on customers and attributes the racial disparities present in judgments on collection suits to the “broader ills [of] our community.” *Id.* DBA International, a debt buyers’ trade group, states that debt buyers are not aware of the race of debtors when purchasing accounts, and debt buyer behavior does not create the “racial gap” in the patterns developed by the collection suits—an executive for the group stated, “Truly, nobody is treated differently in the process.” *Id.*

41. *Id.*; Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession> (restating a study’s conclusion that the wealth gap, despite the recent economic recovery, has widened along racial lines, and that the wealth gap is at its highest point since 1989, when white families had seventeen times the wealth of black families).

42. *Id.* (citing to the Federal Reserve’s 2013 Survey of Consumer Finances and applying the data to ProPublica’s analysis). “[T]he typical white family with annual income between \$20,000 and \$40,000 had about \$2,010 in liquid assets, while the typical black family in that [income] range had just \$650.” *Id.* The Bureau of Labor Statistics Consumer Expenditure Survey found that for individuals earning between \$20,000 and \$30,000 annually, basic expenditures on housing, transportation, food, and health care total approximately \$22,000 per year. *Consumer Expenditure Survey*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cex> (last visited Nov. 30, 2016). The average annual income after taxes for the same demographic in the \$20,000–\$30,000 income bracket is also reported to be about \$26,000. *Id.*

household income bracket, that household's median net worth is likely to be four times lower than, and available liquid assets almost twice as low as, a white household's.<sup>43</sup> Black households also tend to have more limited access to social networks or legal resources that can provide assistance in a time of financial need.<sup>44</sup> Such discrepancies demonstrate that a black household often has fewer resources than a white household to resolve even small debts.<sup>45</sup> A "disparity [running] as deep as the nation's history"<sup>46</sup> is not a problem that lends itself to an easy fix.

Racial tensions in St. Louis compound the crippling amounts of debt and economic turmoil that the area's black community faces.<sup>47</sup> In the summer of 2014, the St. Louis suburb of Ferguson, Missouri faced protests and unrest after a white police officer shot and killed Michael Brown, an unarmed black teenager, an act for which a grand

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43. Kochhar & Fry, *supra* note 41.

44. See Kiel & Waldman, *supra* note 5 ("Low-income families generally do 'very, very well given the very meager resources and high expenses they have,' said Michael Collins, faculty director of the Center for Financial Security at the University of Wisconsin-Madison. 'But there comes a point in time when there's just nothing there. There's no more income, there's no more savings, and the options are pretty limited, because you don't have the social network, you don't have the legal and other resources available to you to find a solution.'").

45. *Id.* ("[G]enerations of discrimination have left black families with grossly fewer resources to draw on when they come under financial pressure.").

46. *Id.* (quoting William A. Darity Jr., a professor of economics and public policy at Duke University). The wealth gap between white and black households can be traced back to the institution of slavery, but in more recent history it can also be linked to damaging policies that promoted white homeownership and restricted mortgage access to black households, such as redlining. *Id.*; cf. Laura Bliss, *After Nearly a Century, Redlining Still Divides Baltimore*, CITYLAB (Apr. 30, 2015), <http://www.citylab.com/politics/2015/04/after-nearly-a-century-redlining-still-divides-baltimore/391982> (showing a map connecting current poverty rates in Baltimore with zones redlined for "undesirable racial concentrations" in the 1930s); Brentin Mock, *Redlining Is Alive and Well—And Evolving*, CITYLAB (Sept. 28, 2015), <http://www.citylab.com/housing/2015/09/redlining-is-alive-and-welland-evolving/407497> (outlining nine recent cases demonstrating that redlining practices are still prevalent and have expanded past the realm of housing and mortgages); *San Francisco Tells Pizza Shops to Hold the Excuses*, N.Y. TIMES (July 14, 1996), <http://www.nytimes.com/1996/07/14/us/san-francisco-tells-pizza-shops-to-hold-the-excuses.html> (reporting on a San Francisco ordinance making it illegal for businesses to redline normal service areas for "no deliveries" when Domino's Pizza flagged areas based on prior threatening or violent incidents or reputation).

47. Kiel & Waldman, *supra* note 5 ("In Jennings, the struggles with debt compound other hardships common to black communities in St. Louis and elsewhere: conflicts and tension with police, and a municipal court system that has jailed residents over unpaid traffic tickets.").

jury failed to indict the officer.<sup>48</sup> In March of 2015, the U.S. Department of Justice (DOJ) issued a report on Ferguson law enforcement, uncovering constitutional violations, corruption, and the use of excessive force, and recommending an overhaul of the Ferguson criminal justice system.<sup>49</sup>

Partly in response to the public outcry after the death of Michael Brown, in November of 2014, Missouri Governor Jay Nixon established the Ferguson Commission (“the Commission”).<sup>50</sup> The Commission was formed to conduct a “thorough, wide-ranging and unflinching study of the social and economic conditions that impede progress, equality and safety in the St. Louis region.”<sup>51</sup> According to the Commission, the lack of economic mobility in St. Louis is one underlying cause of the tensions in the area.<sup>52</sup> The Commission focused on the “two sides” of the economic mobility issue by suggesting that improvements in access to education and job training in the community have the ability to “push people up the ladder,” whereas the negative effects of debt collection “drag them down.”<sup>53</sup>

The Commission’s focus on economic mobility underscores the more serious problems facing the communities of the St. Louis area.

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48. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

49. See *id.* (citing the Ferguson report’s statement that the Ferguson criminal justice system engaged in “many constitutional violations”); Carol D. Leonnig et al., *Darren Wilson’s First Job Was on a Troubled Police Force Disbanded by Authorities*, WASH. POST (Aug. 23, 2014), [https://www.washingtonpost.com/national/darren-wilsons-first-job-was-on-a-troubled-police-force-disbanded-by-authorities/2014/08/23/1ac796f0-2a45-11e4-8593-da634b334390\\_story.html](https://www.washingtonpost.com/national/darren-wilsons-first-job-was-on-a-troubled-police-force-disbanded-by-authorities/2014/08/23/1ac796f0-2a45-11e4-8593-da634b334390_story.html). See generally U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (detailing law enforcement practices that “violate the law and undermine community trust, especially among African Americans”).

50. THE FERGUSON COMM’N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 12 (2015), <http://forwardthroughferguson.org/>.

51. *Id.*

52. See *id.* at 48 (stating that economic mobility in St. Louis ranks forty-second out of the fifty largest metro areas in the country); see also Kiel, *infra* note 138 (“‘I really needed cash, and that was the only thing that I could think of doing at the time,’ she said. The decision has hung over her life ever since.”).

53. Kiel & Waldman, *supra* note 5; see also FERGUSON COMM’N, *supra* note 50, at 52 (stating that the Ferguson area’s calls to action should “build a love of learning” and provide funding for “job training programs that show impact”); *id.* at 134 (acknowledging that in Missouri, “nearly 50% of payday loan borrowers eventually defaulted on a loan, even after they had paid over 90% of the loan amount in fees alone”).

When a family is forced from home to home, fueled by the desire for a stable environment free from burglaries and shootings,<sup>54</sup> the burden of debt becomes an even greater one to bear. Bearing a sizeable portion of the blame are Missouri's "lax" debt-collection regulations, which have created an environment in which high-cost lenders can "thrive."<sup>55</sup> These lenders' loans are convenient and sometimes the only available solution for low-income families that do not have access to traditional avenues for credit.<sup>56</sup> Not only do predatory lenders charge exorbitant interest rates, but they file over 9000 debt-collection lawsuits each year.<sup>57</sup> The Ferguson Commission noted that far more black families have predatory loans than white families, even though black families constitute a smaller percentage of all high-interest loan borrowers.<sup>58</sup> The Commission also acknowledged the overwhelming and deep-seated obstacles families in St. Louis face in attempting to break free from the perilous cycle of debt that grips them. As one resident noted, "Coming from East St. Louis from a poor family, I started off in debt."<sup>59</sup>

2. *How a loan becomes a garnishment in Missouri: A transformation with few obstacles*

In Missouri courtrooms, debt-collection lawsuits "fly" through the judicial process in droves, sometimes with as many as several hundred

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54. See Kiel & Waldman, *supra* note 5 (interviewing one woman who has moved her family four times in three years—once due to increased shootings and robberies in the area—and another woman whose family moved when her landlord refused to fix a plumbing problem that was causing raw sewage to leak into her home); *Crime Rate in St. Louis, Missouri (MO)*, CITY-DATA.COM, <http://www.city-data.com/crime/crime-St-Louis-Missouri.html> (providing statistics on various violent crime rates).

55. FERGUSON COMM'N, *supra* note 50, at 49 (recommending that lawmakers further protect low-income borrowers from predatory lenders by capping APR rates and reevaluating loan repayment terms and underwriting standards).

56. *Id.* at 50.

57. *Id.* at 49 (citing the University of Missouri's research finding that on average, payday loans in Missouri have an annual percentage rate (APR) of 444.61%, which gives Missouri the highest APR rate when compared to the eight contiguous states); Kiel, *infra* note 140 (highlighting the snowball-effect of predatory loans).

58. See FERGUSON COMM'N, *supra* note 50, at 58 (reporting that 12% of black Americans received a payday loan in 2012 as compared to only 4% of white Americans); THE PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY (July 19, 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/07/19/who-borrows-where-they-borrow-and-why> (indicating that although they are "more than twice as likely as others to have used a payday loan," black families "make up less than a quarter of all payday borrowers").

59. Kiel & Waldman, *supra* note 5.

lawsuits appearing before a judge in just one day.<sup>60</sup> Debtors, however, are rarely present at these proceedings; some debtors do not even know they have a debt in collection until a garnishment appears in their paycheck.<sup>61</sup> On the few occasions that they do appear in court, they almost always appear without counsel.<sup>62</sup> Data from 2008 to 2012 show that in most debt-collection suits resulting in a judgment, the debt collector attempts to garnish the debtor's wages regardless of whether the debtor was present at the hearing.<sup>63</sup> Many debtors who want to hire a lawyer to help with the complicated debt-collection process cannot afford one.<sup>64</sup> Creditors or debt collectors who appear in debt-collection actions in Missouri may be banks or hospitals and, more often than not, they are debt-buyers.<sup>65</sup> Though federal debt-collection laws seek to minimize the burden on low-income debtors, they often fall short. For instance, the laws place the "onus" on the debtor to navigate the complexities of the judicial system.<sup>66</sup> In short, a debtor must know the laws exist and how to properly make a claim before he can enjoy the protections of these laws.<sup>67</sup> Because few debtors have access to legal counsel, however, they rarely have the information necessary to protect themselves.

While Missouri law does offer some protections from garnishment for the head of a household, these protections alone are ineffective absent legal knowledge or counsel. The notice of garnishment may inform a debtor that he can apply for the exemption by requesting a hearing,<sup>68</sup> but the notice does not always explain to the debtor that

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60. *Id.*

61. See HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 36 (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/us0116\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf) (finding that debtors are unaware of judgments against them until a garnishment commences, and discussing concerns over "sewer service," where process servers falsify information that a debtor has been served with notice); Kiel & Waldman, *supra* note 5 (discussing a debt-collection suit against Rosalyn Turner where the court file reported that she was personally served with a summons, but she had no recollection of the event).

62. Kiel & Waldman, *supra* note 5 (relaying that between 2008 and 2012, debtors in St. Louis had counsel roughly 8% of the time, and in "lower-income black neighborhoods," only 4% had an attorney).

63. *Id.*

64. Kiel & Arnold, *supra* note 4 (sympathizing with a couple who found they could not afford an attorney due to medical bills).

65. *Id.*; see also Editorial Board, *supra* note 1. See generally *infra* Section I.B (discussing the debt buying industry).

66. Kiel & Arnold, *supra* note 4.

67. *Id.* (identifying some legal aid offices that receive weekly applications for assistance in debt-collection claims from debtors who "can't make ends meet").

68. Kiel & Waldman, *supra* note 5.



qualifying for the exemption can significantly reduce the amount garnished weekly.<sup>69</sup> Debt collectors often pursue judgments operating under the de facto assumption that the debtor has no dependents and is therefore subject to the full 25% rate of garnishment permitted under law.<sup>70</sup> Therefore, unless a debtor is both aware of the head-of-household exemption and actually files for that reduced rate, the debt collector can seize more from each paycheck than the collector is actually entitled to.

*B. Debt Buying: The Biggest Industry You Have Never Heard of*

The debt-collection industry has experienced phenomenal growth over the past decade due in large part to the advent of debt buyers.<sup>71</sup> A debt buyer is an entity that purchases accounts of defaulted debts from original creditors, such as banks or credit card companies, and then pursues the collection of the debt, often relentlessly.<sup>72</sup> Debt buyers typically repackage the defaulted debts into portfolios and resell them to other debt-buying companies.<sup>73</sup> This bundling introduces additional complications into the collection of debt: as the debt moves further from the original creditor, the information

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69. *Id.*

70. *See infra* note 138.

71. *See* CFPB ANNUAL REPORT, *supra* note 16, at 8 (“The two biggest debt buyers are publicly traded companies; combined, they grossed more than \$1.9 billion in annual revenues in 2014.”); FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 13 (2009), <http://www.ftc.gov/bcp/workshops/debt-collection/dcwr.pdf> (“The most significant change in the debt collection business in recent years has been the advent and growth of debt buying.”); HUMAN RIGHTS WATCH, *supra* note 61, at 10.

72. *See* CFPB ANNUAL REPORT, *supra* note 16, at 7–8 (reporting that debt buyers account for close to a third of the debt-collection industry’s revenue with earnings over \$4 billion dollars); *see also* FTC, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 12 (2013) [hereinafter STRUCTURE AND PRACTICES], <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (recounting that in the savings and loan crisis of the 1980s and 1990s, the federal agency responsible for liquidating failed thrifts auctioned off \$500 billion in unpaid loans owned by creditors, and seeing the success of the government sales at producing revenue, other creditors began engaging in the practice of selling debt).

73. STRUCTURE AND PRACTICES, *supra* note 72, at 17; *see also* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 53 (2015) (“Subsequent debt buyers of an account have no relationship to the original creditor.”).

that is being used to enforce the debt collection, such as debtor names and addresses, becomes less verifiable.<sup>74</sup>

The methods debt buyers use to collect debts range from lawful practices to outright fraud and deceit.<sup>75</sup> The debt-buying business model is a basic one: purchase a debt (or, more likely, large portfolios of bundled debts)<sup>76</sup> at the lowest price possible, employ economically efficient collection practices, and recoup a sizeable profit.<sup>77</sup> Debt buyers often purchase voluminous portfolios of debt in a single transaction, and the documentation regarding the accounts contained in the debt purchase is generally sparse.<sup>78</sup> Another common practice is for the sellers to disclaim all liability and warranty regarding the debts sold.<sup>79</sup> Some sellers even include contractual provisions that explicitly decline to warrant that the information about the debts is accurate.<sup>80</sup> Debt buyers, however, are able to

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74. CFPB ANNUAL REPORT, *supra* note 16, at 8 (“The sale and resale of debts has raised concerns about debt data integrity and information flows from creditor to debt buyer to subsequent debt buyers.”).

75. *See, e.g.*, CFPB ANNUAL REPORT, *supra* note 16, at 34–35 (describing FTC actions in 2014 against debt collectors that engaged in fraudulent conduct).

76. *See* STRUCTURE AND PRACTICES, *supra* note 72, at 29 (“[D]ebt buyers typically receive from debt sellers at the time of sale only an electronic spreadsheet containing minimal information about debts and debtors.”).

77. *See* HUMAN RIGHTS WATCH, *supra* note 61, at 11 (observing that debt buyers can “realize substantial profits by collecting even a small percentage of the debts they purchase”); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 191–93 (2014) [hereinafter Holland, *Junk Justice*] (discussing the “seemingly easy money to be made” from the “purchase, sale, and suing upon old, unreliable, inaccurate” records of outstanding debts).

78. *See* STRUCTURE AND PRACTICES, *supra* note 72, at iii (reporting that debt buyers obtain “very few documents” related to their purchases, and most buyers receive no documentation at the time of the sale); Holland, *Junk Justice*, *supra* note 77, at 193 (explaining how creditors sell debts “as is,” and that the industry is plagued by “inaccurate documentation of . . . consumer . . . accounts”); HUMAN RIGHTS WATCH, *supra* note 61, at 40 (asserting that debt purchases contain minimal amounts of identifying information, “such as names, social security numbers, amounts allegedly owed, and last known addresses”).

79. *See* Jiménez, *supra* note 73, at 59–60 (discussing how debts are sold “as is” and “with all faults,” and sellers make “no affirmative representations” that they even have title to the debts or whether the debts are “unencumbered”); STRUCTURE AND PRACTICES, *supra* note 72, at iii (reporting on the absence of any guarantee regarding the accuracy of the information provided about debts during a sale).

80. HUMAN RIGHTS WATCH, *supra* note 61, at 2; *see also* STRUCTURE AND PRACTICES, *supra* note 72, at iii–iv (explaining that debt buyers have limited access to account documents, original creditors often have no obligation to provide any documentation to subsequent buyers, and sellers typically disclaim the availability of documents pertaining to debts sold).

purchase these debts at extremely low prices, significantly reducing any financial risk in the investment.<sup>81</sup>

Representatives of the debt-buying industry claim to prefer resolving debts with consumers outside the courtroom.<sup>82</sup> Federal consumer protections restrict debt buyers that adhere to this policy of “voluntary” resolution from using deceptive or abusive collection methods.<sup>83</sup> However, debt buyers’ courtroom practices controvert their claimed interest in informal resolution because it is well documented that debt buyers collect debts primarily through litigation.<sup>84</sup>

Once in the litigation phase, debt buyers engage in many questionable debt-collection practices. Debt buyers’ claims can fall far short of federal information requirements when portfolio purchases provide scant information regarding the ownership and history of a debt.<sup>85</sup> Yet, debt buyers are prevailing in filing lawsuits

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81. See STRUCTURE AND PRACTICES, *supra* note 72, at 23–24 (finding in a study that debt buyers were paying an average of 4 cents for each dollar of debt, though some purchases were for as little as 2.2 cents per dollar); Kiel & Waldman, *supra* note 5 (“The companies buy debts for pennies on the dollar and then try to recover what they can from debtors.”).

82. HUMAN RIGHTS WATCH, *supra* note 61, at 16 (quoting DBA International, a leading industry trade association of U.S. debt buyers, on its preference to resolve debts with consumers under “voluntar[y]” conditions). Encore Capital, one of the dominant debt buying firms in the market, asserts that it turns to litigation against debtors as a “last resort.” *Id.* at 13, 16 (stating that some debt buyers engage in alternative collection practices, such as phone calls, mailings, or through third-party collection agencies); see also Terry Carter, *Debt-Buying Industry and Lax Court Review Are Burying Defendants in Defaults*, ABA J. (Nov. 1, 2015, 4:20 AM), [http://www.abajournal.com/magazine/article/debt\\_buying\\_industry\\_and\\_lax\\_court\\_review\\_are\\_burying\\_defendants\\_in\\_default](http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default) (“The last thing a debt buyer wants to do is file suit and seek judgment . . . . They want to work out a payment plan. It’s expensive to sue. We sue the ‘won’t pays,’ not the ‘can’t pays.’” (quoting Jan Stieger, Executive Director of DBA International)).

83. See *infra* Section I.C.1 (reviewing the protections of the Fair Debt Collection Practices Act (“FDCPA”)).

84. See HUMAN RIGHTS WATCH, *supra* note 61, at 13 (alleging that hundreds of thousands of new debt-collection claims are filed across the country by debt buyers each year); Holland, *Junk Justice*, *supra* note 77, at 183 (“Lawsuits filed by junk debt buyers expose a business model that is, literally, the buying and selling of claims to be utilized in litigation for profit.”); Kiel & Waldman, *supra* note 5 (charging that debt buyers “now routinely use the courts to pursue millions of people over even small consumer debts” and “filed the most suits of any type of plaintiffs between 2008 and 2012”); see also HUMAN RIGHTS WATCH, *supra* note 61, at 16 (reporting that in 2014, two large-scale debt buyers together earned nearly \$1 billion through debt collection lawsuits alone, which amounted to roughly half of their total respective collections for the year).

85. See *supra* notes 73–78 and accompanying text (explaining the lack of information that is passed on with a debt during a sale).

that should fail for a whole host of reasons, one example being affidavits with inaccurate and unverified information about who owns a debt or how much the consumer actually owes.<sup>86</sup>

Most courts require debt-buyers seeking to collect a debt to submit an affidavit “attesting that they have personal knowledge of the debt at issue and believe that the allegations presented in the lawsuit are true and accurate.”<sup>87</sup> The common industry practice of “robo-signing,” however, aggravates the risk that these debt buyers are including incorrect or deficient information in these affidavits.<sup>88</sup> “Robo-signing,” which is “the practice of signing affidavits and other documents so quickly” that the information in the document “could not possibly” be verified by the signer, has led to much of the faulty information provided in lawsuits.<sup>89</sup> Including unverified and potentially inaccurate information means that such lawsuits may actually target the wrong person or the wrong debt, further exacerbating problems with the debt-collection process.

Debt buyers filing claims seeking to recover uncollectable debts should also fail at the filing stage. A debt is uncollectable when, for instance, the debt has already been paid in full or is already in collection elsewhere.<sup>90</sup> Failures to satisfy documentation requirements when filing a claim can lead debt buyers to sue a consumer twice on a debt that has already been recovered, paid, or settled elsewhere, causing “duplicative judgments.”<sup>91</sup> Such judgments mean that debtors may find themselves paying one debt collector only to be sued on the same debt by a separate debt collector.<sup>92</sup> Or, a debtor may be trying to repay the original creditor without knowing that the debt has been sold.<sup>93</sup>

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86. HUMAN RIGHTS WATCH, *supra* note 61, at 45; *infra* notes 114–15 and accompanying text (reviewing the verification requirements under the FDCPA).

87. HUMAN RIGHTS WATCH, *supra* note 61, at 45 & n.119 (acknowledging the affidavit as necessary to ensure compliance with the “business records exemption” to the general bar on hearsay evidence”).

88. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 268–69 (2011) [hereinafter Holland, *Robo-Signing*].

89. *Id.* Employees at debt-collection firms report signing hundreds of affidavits a day, with one woman even reporting that she signed an affidavit about every thirteen seconds. David Segal, *Debt Collectors Face a Hazard: Writer’s Cramp*, N.Y. TIMES (Oct. 31, 2010) <http://www.nytimes.com/2010/11/01/business/01debt.html>.

90. Holland, *Robo-Signing*, *supra* note 88, at 270–71.

91. *Id.* (chastising this confusing practice, noting that it can even lead to firms filing suit against each other to obtain the right to collect on a debt).

92. *Id.*

93. *Id.*

Time-barred claims, or “zombie debts,” are also improperly filed if they are brought after the statute of limitations has run.<sup>94</sup> While knowingly filing or threatening to file a time-barred claim for debt is an unfair practice in violation of federal law,<sup>95</sup> courts have held that simply attempting to collect on a “potentially time-barred debt that is otherwise valid” is not a violation.<sup>96</sup> Furthermore, while federal law limits the types of actions debt buyers can take over time-barred debt, consumers must assert the statute of limitations as an affirmative defense in most states.<sup>97</sup> Because debtors often lack awareness of the legal process and lack representation, this requirement results in a much larger window of time in which a debt buyer can legally attempt to collect on a debt.

Concern regarding unethical debt-collection practices has not slowed the debt-buyer industry down.<sup>98</sup> In 2013, one of the largest

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94. 15 U.S.C. § 1692e (2012); Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 327–28 (2014) (“Just as the zombies in movies come back from the dead to terrorize individuals, dead debts may resurface to wreak havoc on consumers.”).

95. See, e.g., *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001).

96. See *id.*; see also *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 35 (3d Cir. 2011) (permitting debt collectors to seek repayment of time-barred debt, as long as there is no threat of legal action); *Larsen v. JBC Legal Grp., PC*, 533 F. Supp. 2d 290, 303 (E.D.N.Y. 2008) (“Although it is permissible for a debt collector to seek to collect on a time-barred debt voluntarily, it is prohibited from threatening litigation with respect to such a debt.”); *Kimber v. LVNV Funding, LLC*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (limiting debt collectors from filing lawsuits that appear to be time-barred when filed, rather than suits that were later determined to be time-barred). But see *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (splitting from the Third and Eighth Circuits by holding that threatened litigation is not required for a misrepresentation claim under the FDCPA); *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511, 513 (5th Cir. 2016) (holding that a settlement offer letter for a time-barred debt did violate the FDCPA, despite no mention of litigation in the letter). See generally Sobol, *supra* note 94, at 328, 330–31, 345, 369 (addressing the growth of litigation over “zombie”—or time-barred—debts, the failure of federal law to prevent courts from reaching the judgment stage in suits filed to collect time-barred debts, and how states can correct the problem).

97. See STRUCTURE AND PRACTICES, *supra* note 72, at 45; see also APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT’L CONSUMER LAW CTR., ZOMBIE DEBT: WHAT THE CFPB SHOULD DO ABOUT ATTEMPTS TO COLLECT OLD DEBT 2 (2015), [https://www.nclc.org/images/pdf/debt\\_collection/report-zombie-debt-2015.pdf](https://www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf) (“Debt collectors frequently exploit [consumer] ignorance [of time-barred debt] by pursuing collection of old debts long after the relevant statute of limitations has run.”).

98. See HUMAN RIGHTS WATCH, *supra* note 61, at 11 (reporting that in 2013 and 2014 an industry-leading debt buyer purchased accounts totaling almost \$100 billion); STRUCTURE AND PRACTICES, *supra* note 72, at ii (finding that over three years,

debt-buying companies in the country reportedly collected over \$1 billion in outstanding debts.<sup>99</sup> The movement in the debt buyer industry of a debt from creditor to debt buyer to subsequent debt buyer thus creates “untraceable cycles” of debt resales that do not adequately retain consumers’ personal information or protect it from being used erroneously by the debt buyer in collection attempts.<sup>100</sup>

*C. Federal and State Law Regulating Debt-Collection Practices in Missouri*

In Missouri, a combined regime of state and federal laws regulates debt-collection practices, from initiating a claim through the collection of a court judgment. The applicable federal laws are specific to debt collection and wage garnishment, while the relevant Missouri state laws are general to all civil actions, including the enforcement of judgments.<sup>101</sup>

*1. The Fair Debt Collection Practices Act*

Congress enacted the Fair Debt Collection Practices Act (“FDCPA”)<sup>102</sup> in 1977 in response to the “abusive, deceptive, and unfair” practices debt collectors increasingly employed against consumers.<sup>103</sup> The language of the FDCPA makes clear that Congress was trying to protect the rights of ethical creditors to collect on valid debts while also limiting the ability of unscrupulous third-party debt collectors to manipulate or mistreat consumers.<sup>104</sup> The FDCPA defines “creditor” as any person who extends credit that creates a debt.<sup>105</sup> However, the statute explicitly excludes from the definition

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debt buyers purchased over 5000 portfolios containing almost 90 million consumer accounts with a cumulative value of \$143 billion).

99. Kiel & Arnold, *supra* note 4.

100. CFPB ANNUAL REPORT, *supra* note 16, at 8–9 (contending that with the lax hold over personally identifying information attached to the ownership of the debt, it becomes far more difficult for debt buyers to ensure that they have “unique ownership” over the debts they are trying to collect).

101. See 15 U.S.C. §§ 1671, 1692 (2012); MO. REV. STAT. §§ 407.010–1610 (2016).

102. 15 U.S.C. § 1692.

103. *Id.* The FDCPA defines “consumer” as a “natural person obligated or allegedly obligated to pay any debt.” *Id.* § 1692a(3).

104. *Id.* § 1692(b) (“Existing laws and procedures for redressing these injuries are inadequate to protect consumers.”); *id.* §§ 1692b, 1692d (addressing and limiting the ability of debt collectors to contact consumers); Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 802, 91 Stat. 874, 874 (1977) (declaring that “[a]busive debt practices contribute” to the development of social ills such as “bankruptcies, . . . marital instability, [and] the loss of jobs,” and ensuring the protection of “debt collectors who refrain from using abusive debt collection practices”).

105. 15 U.S.C. § 1692a(4).

of creditor a person who receives “an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.”<sup>106</sup> A “debt collector” is defined in the FDCPA as any person whose “principal purpose . . . is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”<sup>107</sup> Based on the plain language of these definitions and the case law interpreting their scope, courts interpret the term “debt collector” as encompassing debt-collection agencies, debt-buying entities, and debt-collection law firms.<sup>108</sup>

The FDCPA protects consumers from a variety of unfair and unconscionable collection practices,<sup>109</sup> including harassment or abuse, the use or threat of violence, the use of obscene language, or public reputational harm.<sup>110</sup> A debt collector is also prohibited from engaging in false or misleading representations related to the collection of a consumer’s debt.<sup>111</sup> Specifically, debt collectors

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106. *Id.*

107. *Id.* § 1692a(6).

108. Michael A. Rosenhouse, Annotation, *What Constitutes “Debt Collector” for Purposes of Fair Debt Collection Practices Act (15 U.S.C.A. § 1692a(6))*, 173 A.L.R. Fed. 223 § 2a (2001). Debt buyers and debt-collection law firms who purchase debt have tried to argue that they do not fall under the FDCPA’s definition of “debt collector.” *Id.* Courts have routinely ruled against this line of reasoning. *Id.*; see, e.g., McKinney v. Cadleway Props., Inc., 548 F.3d 496, 501 (7th Cir. 2008) (holding that a purchaser of a defaulted debt still falls under the definition of debt collector in the FDCPA); FTC v. Check Inv’rs, Inc., 502 F.3d 159, 173–74 (3d Cir. 2007) (finding that a company was a debt collector because an entity cannot be both a “creditor” and “debt collector” under the FDCPA, and the debts were obtained after they were already in default); Crossley v. Lieberman, 868 F.2d 566, 569 (3d Cir. 1989) (noting that Congress removed the statutory exception for attorneys collecting debt on behalf of clients, and finding that an attorney engaging in that practice was a debt collector under the FDCPA); see also Conor P. Duffy, Note, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 FORDHAM URB. L.J. 1147, 1168 nn.139–40 (2013) (reviewing cases that interpreted “debt collector” broadly).

109. See 15 U.S.C. § 1692f (forbidding debt collectors from issuing arbitrary fees or charges; cashing or threatening to cash checks in a delayed or premature fashion, demanding payment by threat of criminal prosecution or baseless threats of judicial action, communicating about the debt via postcard, or attempting to disguise a mailed notice as something else).

110. See *id.* § 1692d.

111. *Id.* § 1692e.

cannot misrepresent the legal status of a debt, the threat of legal action, or the information regarding applicable legal remedies.<sup>112</sup>

The FDCPA requires debt collectors to follow certain procedural obligations as well. In a debt collector's initial communication with the consumer, whether written or oral, the debt collector must disclose that it is attempting to collect a debt, and that any information gained from the interaction with the consumer may be used in further attempts to secure repayment.<sup>113</sup> The burden of validating the information connected to a debt in collection also falls on the debt collector.<sup>114</sup> A debt collector must send a validation notice to the consumer within five days of the initial contact and provide baseline information regarding the debt.<sup>115</sup>

There are few affirmative actions available to consumers to combat abuses by debt collectors. A consumer can dispute a debt within thirty days of receiving the validation notice.<sup>116</sup> Upon notice of the dispute, the debt collector must cease all efforts to collect the debt until further information verifying the amount and owner of the debt has been provided to the debtor.<sup>117</sup> Furthermore, a consumer can halt all communication with a debt collector if the consumer notifies the collector in writing that the consumer refuses to pay the debt or

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112. *Id.* (stating that debt collectors cannot falsely lead a debtor to believe that they may be subject to a garnishment, the loss of a defense, a seizure, or any other legal ramifications).

113. *Id.* § 1692e(11).

114. *Id.* § 1692g(a). The validation notice must include the following information:

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

*Id.*

115. *Id.* If the debt collector meets the notice requirement during the initial communication, the debt collector does not need to send a separate validation notice. *Id.*

116. *Id.* § 1692g(b).

117. *Id.*



that the consumer wants the collector to cease all communication.<sup>118</sup> Of note, the FDCPA precludes debt collectors from using a consumer's failure to dispute the validity of a debt as an admission of liability in a lawsuit.<sup>119</sup> The final safeguard in the FDCPA creates an individual private right of action, imposing potential civil liability on any debt collector who fails to act in accordance with any of the requirements of the FDCPA.<sup>120</sup>

## 2. *The Consumer Credit Protection Act of 1968*

In 1968, Congress enacted the Consumer Credit Protection Act ("CCPA").<sup>121</sup> The legislature was aware that predatory lenders would continue employing harmful practices against consumers absent protections against the unrestricted garnishment of wages.<sup>122</sup> Congress enacted the CCPA to protect the poorest populations—those making minimum wage or less—from garnishment.<sup>123</sup> Nonetheless, as ADP stated in its garnishment study, "the laws have not necessarily evolved with the times."<sup>124</sup> Applying the CCPA today is increasingly complicated because the minimum wage calculation has not been scaled to account for inflation over the past several decades.<sup>125</sup> In 1968, the federal minimum wage was \$1.60; adjusted for inflation, that equals \$10.34 in 2012 dollars.<sup>126</sup> The current federal minimum wage is only \$7.25, meaning the law will only protect workers who earn less than \$217.50 per week.<sup>127</sup> Under the

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118. *Id.* § 1692c(c) (indicating that debt collectors can continue communication to invoke a specific remedy).

119. *Id.* § 1692g(c).

120. *See id.* § 1692k (detailing that a debt collector found liable to the debtor could be held responsible for actual damages, additional damages as allowed by the court up to \$1000, and attorney's fees); *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1171 n.1 (2013) (recognizing that the private enforcement provision of the FDCPA authorizes aggrieved debtors to recover from debt collectors who "fail[] to comply" with the FDCPA).

121. 15 U.S.C. § 1671.

122. *See id.* § 1671(a)(1), (2) ("The unrestricted garnishment of compensation . . . encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments . . . . The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor . . .").

123. *Id.* § 1673(a).

124. ADP REPORT, *supra* note 5, at 5.

125. *See* Kiel & Arnold, *supra* note 4 (stating that the current method of calculation for garnishment is the same standard used in 1968, "when the financial life of Americans was much simpler").

126. *Minimum Wage Chart*, U.S. DEP'T OF LABOR, <http://www.dol.gov/featured/minimum-wage/chart1> (last visited Nov. 30, 2016).

127. *Id.*; Kiel & Arnold, *supra* note 4.

CCPA, only workers earning approximately \$11,000 or less per year qualify for the statute's garnishment protections.<sup>128</sup> An income at that rate places a worker at or below the federal poverty guidelines.<sup>129</sup>

The CCPA also caps the amount that a worker's after-tax pay can be garnished at 25%, which federal survey data indicates is enough of a deduction in income to place a strain on family finances.<sup>130</sup> Local reporting by ProPublica and NPR shows that debtors are losing hundreds of dollars each week in garnished wages to debt collectors that have obtained judgments on outstanding debts.<sup>131</sup>

The CCPA is silent on a debt collector's authority to seize funds from a debtor's bank account.<sup>132</sup> This omission creates a gap in the federal law regulating the garnishment of funds after a court has awarded a judgment in a debt-collection lawsuit. Essentially, once a judgment-debtor who is legally subject to a wage garnishment deposits a paycheck into a bank account, the statute's silence allows a judgment-creditor to seize all of the funds in that bank account—far more than the 25% the CCPA contemplates.<sup>133</sup>

The CCPA includes safeguards for heads of households and consumers who are already subject to a pre-existing court-ordered

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128. Kiel & Arnold, *supra* note 4.

129. See Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3236, 3236–37 (Jan. 22, 2015) (stating that for a single-person household, the poverty guideline is \$11,670). The U.S. Census Bureau estimates that in 2015, 43.1 million Americans lived below the HHS poverty guidelines. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015, at 12 (2016).

130. See 15 U.S.C. § 1673(a) (2012) (stating that the maximum garnishment rate is either 25% of disposable weekly earnings or the amount calculated using the federal minimum wage, whichever is less); Kiel & Arnold, *supra* note 4 (“It makes you feel hopeless, that you’re working for no reason and that you’re never going to be able to succeed.”). The Federal Reserve, in a recent survey, found that nearly 20% of respondents with average salaries of \$20,000–\$30,000 felt that they could not possibly cover an emergency expense of \$400. *Id.*

131. Kiel & Arnold, *supra* note 4 (reporting on a Nebraska household that loses about \$760 each month and how, in repeated instances, the family saw hundreds of dollars garnished from their bank account at once); Kiel & Waldman, *supra* note 5 (discussing Yolonda Henderson, who reported seizures of \$382 from her credit union account in one day and \$185 from a single paycheck; Miranda Jones, who described a seizure of \$800 from her bank account in one instance; Dora Byrd, who lost \$645 in a single seizure from her bank account; Rosalyn Turner, who lost about \$300 a month to a garnishment; and Cori Winfield, who had almost \$250 seized from her pay every two weeks).

132. See Kiel & Arnold, *supra* note 4 (discussing the CCPA's silence on bank account seizures).

133. See *id.* (commenting on the “punishing” nature of collectors' actions to empty a bank account, and noting that few states have regulations that will automatically protect minimum amounts of funds in a debtor's bank account).

garnishment.<sup>134</sup> However, like the FDCPA, the CCPA leaves debtors with the burden of asserting one of the exceptions outlined above to “protect their assets.”<sup>135</sup>

### 3. *The regulatory environment for debt collection in Missouri*

Missouri currently has very few state statutes or regulations that specifically address debt-collection practices.<sup>136</sup> Accordingly, any debt-collection action commenced in Missouri is governed primarily by the general Missouri Revised Statutes and the FDCPA.<sup>137</sup> Under Missouri law, a judgment-creditor may legally garnish 25% of a debtor’s disposable income.<sup>138</sup> The Missouri Revised Statutes state that the minimum rate of interest to be attached to a judgment is 9% yearly, but judgment-creditors are also legally allowed to set the post-judgment interest rate on the debt at the rate set forth in the contract extending the original credit to the judgment-debtor.<sup>139</sup> The effect of high post-judgment interest rates is a form of “exploding debt,” which a judge in the St. Louis area has likened to “indentured servitude.”<sup>140</sup> Debts that originated in the hundreds of dollars can

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134. 15 U.S.C. § 1673(b).

135. Kiel & Arnold, *supra* note 4.

136. The “Debt Collection” page of the Missouri Division of Finance’s website displays the following language: “Missouri does not regulate collection agencies; however, these companies do need to comply with the Federal Fair Debt Collection Practices Act.” *Debt Collection*, MO. DIV. OF FIN., [http://finance.mo.gov/consumers/debt\\_collection.php](http://finance.mo.gov/consumers/debt_collection.php) (last visited Nov. 30, 2016). The website’s message concludes, “Further information can be found on the Federal Trade Commission’s Web site at <http://www.ftc.gov>.” *Id.*

137. This statutory framework means that debt collectors in Missouri still must adhere to the notice, communication, and validation requirements in the FDCPA. *See supra* text accompanying notes 109–15 (covering the requirements of the FDCPA).

138. *Wage Garnishment*, ST. LOUIS COUNTY SHERIFF’S OFF., <http://www.stlouisco.com/LawandPublicSafety/CircuitCourt/SheriffsOffice/WageGarnishmentInformation> (last visited Nov. 30, 2016); *see also* Paul Kiel, *Loan Amounts Can Snowball When Payday Lenders Sue Borrowers*, ST. LOUIS POST-DISPATCH (Dec. 14, 2013), [http://www.stltoday.com/business/local/loan-amounts-can-snowball-when-payday-lenders-sue-borrowers/article\\_4032d388-609a-5e5b-8812-9bd67c50fb85.html](http://www.stltoday.com/business/local/loan-amounts-can-snowball-when-payday-lenders-sue-borrowers/article_4032d388-609a-5e5b-8812-9bd67c50fb85.html) (observing that twenty states allow debt collectors to garnish up to 25% of a borrower’s paycheck, while only four states prohibit wage garnishment for most types of debt).

139. MO. REV. STAT. § 408.040(2) (2015).

140. Kiel, *supra* note 138 (describing a debtor who paid \$3573 towards his \$400 debt over the course of seven years but still owed \$16,000 due to interest accruing over that period); *see also* Ian Liberty, Note, *From Debt Collection to Debt Slavery: How the Modern Practice of Debt Collection Is a Violation of the 13th Amendment’s Prohibition on Involuntary Servitude*, 15 RUTGERS RACE & L. REV. 281, 308 (2014) (analogizing modern debt collection with Civil War-era practices of slavery and indentured servitude).

quickly “balloon” to tens of thousands of dollars.<sup>141</sup> One debtor, for instance, saw a \$1000 loan grow to over \$40,000 of debt in only a five year period.<sup>142</sup> When faced with a debt of such immense proportions, a debtor’s options become severely limited: declare bankruptcy or “make payments for . . . life.”<sup>143</sup>

The Missouri Revised Statutes do contain a head-of-household exemption that limits the amount that can be garnished from a debtor’s wages.<sup>144</sup> Under the exemption, a debtor qualifying as the head of a household can reduce the amount garnished to 10% of his or her income, protecting 90% of the income that the primary, oftentimes sole, wage earner of a family earns.<sup>145</sup> That 10% cap is the maximum amount that can be garnished from any individual paycheck even when multiple judgment-creditors are entitled to payment.<sup>146</sup> The burden of asserting this protection falls on the judgment-debtor, who must file an affidavit with the court asserting his or her status as the head of a family.<sup>147</sup>

Public entities in Missouri have implemented policies that, while not as authoritative as statutes, afford protections to low-income debtors.<sup>148</sup> The public water utility, MSD,<sup>149</sup> has a program for low-income customers to reduce their payments, similar to the reductions

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141. Paul Kiel, *What Can Be Done Right Now to Fix the Legal System for Debt Collection*, PROPUBLICA (Oct. 8, 2015, 11:00 AM), <https://www.propublica.org/article/what-can-be-done-to-fix-the-debt-collection-right-now>.

142. Kiel, *supra* note 138.

143. *Id.*

144. MO. REV. STAT. § 513.440 (“Each head of a family may select and hold, exempt from execution, . . . wages, not exceeding in value the amount of [\$1250] plus [\$350] for each of such person’s unmarried dependent children under the age of twenty-one years or dependent . . . except ten percent of any debt, income, salary or wages due such head of a family.”); *see also Wage Garnishment*, *supra* note 138 (“For the primary or sole wage earner of a family, 90% of his or her income is protected from garnishment.”).

145. MO. REV. STAT. § 513.440.

146. *Wage Garnishment*, *supra* note 138.

147. Kiel & Waldman, *supra* note 5 (referring to the burden that falls on debtors to protect their assets); *Affidavit for Head of Family Exemption of Wages Garnishment*, MO. CTS., <http://www.courts.mo.gov/file.jsp?id=58441> (last visited Nov. 30, 2016).

148. *See, e.g., Billing FAQs*, METRO. ST. LOUIS SEWER DIST., <http://www.stlmsd.com/msd-faqs/billing-faqs> (last visited Nov. 30, 2016).

149. MSD “dramatically increased” the volume of suits it filed for collecting debts from 3000 in 2010 to 11,000 in 2012. Kiel & Waldman, *supra* note 5. The suits, generally for small debts, were mostly filed against consumers in majority black communities despite the fact that most of MSD’s customers are white. *Id.*

provided under the head-of-household exemption.<sup>150</sup> Again, however, the burden of claiming such a reduction lies with the debtor.<sup>151</sup> In 2015, MSD estimated that 39,000 customers were potentially eligible for the reduction, but as of June 2015, only 2300 were enrolled in the program, meaning only about 5% of customers had taken advantage of the program.<sup>152</sup>

In searching for a remedy to unfair debt-collection practices, consumers in Missouri have attempted to use the Missouri Merchandising Practices Act (“MPA”).<sup>153</sup> The applicable provisions of the MPA protect consumers against fraud, deception, and unfair practices.<sup>154</sup> The MPA provides that “[a]ny person who purchases or leases *merchandise* . . . and thereby suffers an ascertainable loss . . . may bring a private civil action . . . to recover actual damages.”<sup>155</sup> Despite its seemingly broad scope, courts have interpreted the MPA’s use of the word “merchandise” to limit consumers’ ability to apply the statute to third-party debt-collection actions. In private actions brought under the MPA, courts have required a connection between the unfair or deceptive practice and the original transaction.<sup>156</sup> While

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150. *Billing FAQs*, *supra* note 148. MSD’s Customer Assistance program offers reduced rates for low-income residents who own or rent the property for which they are applying for a reduction. *Id.* The reduction equals 50% of the current charges for wastewater and storm water services on a customer’s monthly sewer bill. *Id.*

151. *Id.* To receive a reduced rate, a customer must apply by completing an application and submitting it to MSD. *Id.* Applications are only available after placing a request via phone to MSD. *Id.* Reduced rates are only valid for a one-year period at which time a new application is required to reapply. *Id.*

152. Kiel & Waldman, *supra* note 5 (adding that MSD was “not satisfied with [the] level of enrollment”).

153. MO. REV. STAT. §§ 407.010–407.1610 (2016). The Missouri General Assembly enacted the law in 1967 to provide a statutory cause of action to protect consumers and to codify the common law remedies for deceptive practices. Jeremy Gogel, *Remedies (and Lack Thereof) for Victims of Abusive Debt Collection Practices*, 66 J. MO. B. 330, 333–34 (2010); *see also* State *ex rel.* Danforth v. Indep. Dodge, Inc., 494 S.W.2d 362, 368 (Mo. Ct. App. 1973) (“In order to give broad scope to the statutory protection and to prevent ease of evasion because of overly meticulous definitions, many of these laws such as the Missouri statute ‘do not attempt to define deceptive practices or fraud, but merely declare unfair or deceptive acts or practices unlawful . . . ,’ leaving it to the court in each particular instance to declare whether fair dealing has been violated.” (alteration in original) (citation omitted)).

154. MO. REV. STAT. § 407.020(1).

155. *Id.* § 407.025(1) (emphasis added).

156. *See* State *ex rel.* Koster v. Prof'l Debt Mgmt., LLC, 351 S.W.3d 668, 670–71 (Mo. Ct. App. 2011) (dismissing an action for failure to state a claim because the Missouri Merchandising Practices Act (“MPA”) does not extend to unfair or deceptive debt-collection practices by a third-party collector who was not a participant in the original consumer transaction and the actions occurred after the

the statute contains the language “before, during or *after* the sale,” courts have read this language as a mere modification of the requirement that an unfair practice be connected to a sale or merchandise, not as an extension to interactions with third parties.<sup>157</sup> As a result of this narrow interpretation, the MPA does not reach a third-party collector, such as a debt buyer or a collection agency, “who ha[s] no other involvement with the . . . transaction” past purchasing the defaulted debt from the original creditor.<sup>158</sup>

*D. The Evolution of Procedural Due Process and Garnishment Actions*

Debt collection practices in Missouri illustrate the complex process through which a debt results in a garnishment. Garnishments, however, raise procedural due process questions because the Fifth and Fourteenth Amendments to the U.S. Constitution protect against the “deprivation of life, liberty or property.”<sup>159</sup> Courts have found that these constitutional amendments provide individuals facing deprivations with the right to notice and an opportunity to be heard

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initial sale of merchandise); *Lavender v. Wolpoff & Ambramson, LLP*, No. 07-0015-CV-W-FJG, 2007 WL 2507752, at \*2 (W.D. Mo. Aug. 30, 2007) (dismissing a deceptive practices claim against a debt-collection law firm under the MPA when debtors could not establish they were clients or customers of the debt collectors, and the debt collectors never sold any goods or merchandise or provided any services to debtors). The Supreme Court of Missouri recently extended the protections of the MPA to the mortgage-loan context, but both a Missouri appellate court and the U.S. Court of Appeals for the Eighth Circuit have declined to extend that holding to two cases involving third-party debt collectors. Compare *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 412, 415–17 (Mo. 2014) (en banc) (limiting the holding in *Koster* by finding that a loan servicer and a mortgagee’s assignee undertook unfair actions enforcing the terms of a mortgage loan “in connection with” the original loan transaction under the MPA, even though the servicer and assignee were not parties to the original loan transaction), with *Wivell v. Wells Fargo Bank, N.A.*, 773 F.3d 887, 892, 895 (8th Cir. 2014) (finding that *Conway* does not apply to a trustee, but a foreclosure may be “in connection with” a sale under the MPA when the debtors were informed that modification of a loan would suspend a foreclosure), and *Geran v. Xerox Educ. Servs., Inc.*, 469 S.W.3d 459, 467 (Mo. Ct. App. 2015) (declining to extend *Conway* to a loan servicer’s actions regarding repayment for a loan because a schedule modification is not “in connection with” a sale under the MPA).

157. MO. REV. STAT. § 407.020(1) (emphasis added); see, e.g., *Koster*, 351 S.W.3d at 674 (“We are not persuaded that actions occurring after the initial sales transaction, which do not relate to any claims or representations made before or at the time of the initial sales transaction, and which are taken by a person who is not a party to the initial sales transaction, are made ‘in connection with’ the sale or advertisement of merchandise as required by the MPA.”).

158. *Koster*, 351 S.W.3d at 674; Gogel, *supra* note 153, at 334.

159. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

“appropriate to the nature of the case.”<sup>160</sup> Due process protections ensure the right to be heard—a right that can only be enjoyed when the person facing a deprivation has received meaningful and reasonable notice of the opportunity to be heard.<sup>161</sup> The United States Supreme Court developed its jurisprudence in a line of cases ending in *Mathews v. Eldridge*, the seminal case that established the analysis necessary to ensure due process prior to a deprivation of property.<sup>162</sup> Around the same time period, the Court was reviewing the procedural due process required in cases regarding prejudgment seizures of property. In the 1990s, when the Court ruled again on the constitutionality of prejudgment seizures of property in *Connecticut v. Doebr*,<sup>163</sup> the Court relied on both series of cases to develop a modified test for due process.

### 1. *Procedural due process and Supreme Court doctrine*

When the government infringes on constitutionally protected interests, the right to procedural due process assures that a person has a right to a meaningful prior hearing. In *Goldberg v. Kelly*,<sup>164</sup> the Court laid out the analysis for determining what process is due when a constitutionally protected interest is at stake.<sup>165</sup> The question in *Goldberg* revolved around whether a state had to provide a recipient of public welfare benefits with a hearing before terminating those benefits.<sup>166</sup> The Court held that due process entitled the recipient to a pre-termination hearing during which the recipient could appear in

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160. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment specifies that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The Fifth Amendment applies to the actions of the federal government, while the Fourteenth Amendment applies due process protections to state actions.

161. *Mullane*, 339 U.S. at 314 (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). “The purpose of this requirement . . . is to protect [a person’s] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .” *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972) (holding pre-judgment replevin statutes to be unconstitutional absent a prior hearing).

162. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (establishing a three-part balancing test to address procedural requirements when the government potentially deprives a party of his or her property).

163. 501 U.S. 1 (1991).

164. 397 U.S. 254 (1970).

165. *Id.* at 255.

166. *Id.*

person and offer oral evidence to support his claims.<sup>167</sup> Key to the *Goldberg* opinion is the assertion that the threat of a “grievous loss” of a property interest demands special protections and requires courts to balance unjust deprivation of property with the government’s interest in resolving the matter.<sup>168</sup>

A few years later, in *Board of Regents v. Roth*,<sup>169</sup> the Court continued its examination of how to evaluate due process deprivations.<sup>170</sup> In *Roth*, a professor without tenure rights alleged that the state university violated his due process rights when they provided notice, but not a hearing, regarding his termination.<sup>171</sup> The Court created a two-part analysis where it first determined whether there was a constitutionally protected interest and then—only upon a positive finding—determined what process was due to protect that interest.<sup>172</sup>

In *Mathews*, the Court reviewed the termination of a person’s social security disability benefits without a prior evidentiary hearing.<sup>173</sup> The Court held that the extensive administrative procedures in place ensured that due process requirements were met.<sup>174</sup> In its holding, the Court established a balancing test for the consideration of the different interests at play. The *Mathews* test balances three factors:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>175</sup>

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167. *Id.* at 266–71.

168. *Id.* at 262 n.8, 263–64.

169. 408 U.S. 564 (1972).

170. *Id.* at 569–72.

171. *Id.* at 566–69.

172. *Id.* at 570–72; see *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due.”); *Perry v. Sindermann*, 408 U.S. 593, 596 (1972) (deciding the case alongside *Roth*); *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (holding that in determining what procedures are required under a particular set of circumstances, a court must identify the governmental function and private interests involved).

173. *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976).

174. *Id.* at 349.

175. *Id.* at 334–35.



Both the U.S. Supreme Court and lower courts have used the *Mathews* test in myriad applications since it was established,<sup>176</sup> eventually applying it to find pre-judgment garnishments unconstitutional.<sup>177</sup>

2. *The unconstitutionality of pre-judgment garnishment statutes*

The Supreme Court, in a string of cases from the late 1960s to the early 1970s, established the minimum procedural due process protections required before a debt collector can secure payment from debtors through a private lawsuit.<sup>178</sup> The cases work in a slightly disjunctive fashion to create a framework for the process that is due when property is seized prior to a judgment.<sup>179</sup> Notably, the Supreme Court decided these cases during the “peak of the welfare rights movement,” when the Court stressed the importance of fair legal standards for indigent populations, and this reasoning continued through the *Sniadach* tetrad.<sup>180</sup> The Court’s procedural due process analyses in *Goldberg*, *Roth*, and ultimately in *Mathews*, parallels the

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176. See generally *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011) (determining whether counsel is required in a civil contempt proceeding); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (establishing the process required for a United States citizen held as an enemy combatant); *Addington v. Texas*, 441 U.S. 418, 425, 431–32 (1979) (requiring a higher standard of proof in a commitment case for mental illness to meet due process demands).

177. See *Connecticut v. Doehr*, 501 U.S. 1, 18 (1991) (using a modified version of the *Mathews* test to conduct a due process analysis).

178. *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619–20 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340–42 (1969).

179. Linda Beale, Note, *Connecticut v. Doehr and Procedural Due Process Values: The Sniadach Tetrad Revisited*, 79 CORNELL L. REV. 1603, 1603 (1994) (“When the Supreme Court addressed the prejudgment remedy case of *Connecticut v. Doehr* . . . , it grappled with the *Sniadach* tetrad, a line of precedent that meandered across the due process constitutional law landscape leaving a trail of invalidated state statutes and confused lower courts.” (footnotes omitted)).

180. *Id.* at 1641; see also *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (deciding that a statute requiring payment of fees for divorce proceedings violated due process of indigents); *Tate v. Short*, 401 U.S. 395, 397 (1971) (ruling that a state statute converting court fines to incarceration violated the constitutional rights of indigents); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (protecting government benefit recipients from termination of benefits absent an in-person hearing); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (invalidating three state statutes that required a one-year waiting period for new residents applying for welfare benefits); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (relying on the Equal Protection Clause to overturn a poll tax voting requirement as discriminatory against indigents); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that fair procedure requires the appointment of counsel for an indigent challenging the certification that an appeal is taken in good faith).

procedural due process analysis in the cases involving private debt collection lawsuits: the *Sniadach* tetrad<sup>181</sup> and *Connecticut v. Doehr*.

*a. The Sniadach Tetrad*

The Court first discussed the constitutionality of a pre-judgment garnishment in the context of private suits in *Sniadach v. Family Finance Corp.*<sup>182</sup> In *Sniadach*, a creditor in Wisconsin brought a garnishment action against a debtor and her employer as garnishee, and the debtor moved to dismiss on the grounds that the proceedings violated her due process rights.<sup>183</sup> Under the Wisconsin statute governing garnishment procedure, a complainant could begin the process for an in rem seizure of the debtor's wages solely by requesting the court clerk to issue a summons and serving the summons and the complaint upon the debtor.<sup>184</sup> The debtor's wages would then remain frozen until the matter was resolved.<sup>185</sup> The Court found a procedural due process violation in the garnishment action.<sup>186</sup> Although the creditor had provided the debtor with statutorily adequate notice through service of summons, the Court found that the creditor had not provided constitutionally adequate notice, and that the debtor did not have the opportunity to be heard prior to the seizure.<sup>187</sup>

During this time, the Court addressed the disadvantages that the poor faced in the legal system and established extra protections for indigent parties.<sup>188</sup> The ruling in *Sniadach* was consistent with several other Supreme Court decisions from the period. The Court's reasoning in *Sniadach* emphasized that wages are a "specialized" property interest for which unjust garnishment can lead to uniquely detrimental consequences.<sup>189</sup> Under this reasoning, the Court created

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181. The *Sniadach* tetrad refers to a series of four cases: *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Beale, *supra* note 179, at 1603 & n.3.

182. 395 U.S. 337, 340 (1969).

183. *Id.* at 337–38.

184. *Id.* at 338–39.

185. *Id.*

186. *See id.* at 342 ("Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process." (citation omitted)).

187. *Id.* at 340.

188. *See* Beale, *supra* note 179, at 1609–10; *supra* note 180.

189. *Sniadach*, 395 U.S. at 340 ("We deal here with wages—a specialized type of property presenting distinct problems in our economic system.").

a “hardship” exception to the procedural due process doctrine.<sup>190</sup> The Court designed this exception to heavily favor indigent debtors because it recognized that such individuals can suffer “grave injustices” from even a temporary deprivation of wages.<sup>191</sup>

A few years later, in *Fuentes v. Shevin*,<sup>192</sup> the Court struck down statutes for prejudgment replevin in Florida and Pennsylvania.<sup>193</sup> The debtors in the consolidated cases were consumers who had purchased household items under conditional sales contracts, and in each case the sellers later obtained summary writs of replevin to recollect on the items after late payments or disputes arose.<sup>194</sup> The Florida statute authorized a state agent to seize property after a court clerk issued a writ of replevin based on a creditor’s ability to “fill in the blanks” on a form and post a security bond.<sup>195</sup> The statute did require the initiator of the replevin action to commence an action for repossession at a later date.<sup>196</sup> In Pennsylvania, a claimant could make a similarly basic application for a writ of replevin, but that statute did not require a hearing on the merits of the repossession.<sup>197</sup>

The Court found that both statutes lacked procedural due process protections because neither provided adequate notice nor the opportunity for a “meaningful” hearing before allowing collectors to seize the property.<sup>198</sup> The debtor would only receive notice of the claim at the same moment the items were seized from her.<sup>199</sup> Each state’s procedures allowed courts to issue writs on “bare assertion[s],” and Pennsylvania did not even require that courts provide an eventual hearing.<sup>200</sup>

Relying on *Sniadach*, the Court found that even though the seizures were temporary in nature, a “nonfinal” deprivation was still a

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190. *Id.*

191. *Id.* at 340; see Beale, *supra* note 179, at 1608 (noting the tremendous leverage creditors would gain over debtors in collecting the alleged debt).

192. 407 U.S. 67 (1972).

193. *Fuentes*, 407 U.S. at 96–97.

194. *Id.* at 70–71. One of the appellants in the case had a more “bizarre” experience—Rosa Washington’s former husband, a local deputy sheriff, had obtained a writ in order to seize all of their son’s belongings while the former couple battled over custody. *Id.* at 72.

195. *Id.* at 70–71, 73–74 (noting that the Florida statute did not require an applicant to make a “convincing showing” that he or she had a claim to the goods in question).

196. *Id.* at 75.

197. *Id.* at 77–78.

198. *Id.* at 69–70, 75, 80–81.

199. *Id.* at 80–81.

200. *Id.* at 74, 77.

deprivation under the due process requirements.<sup>201</sup> The Court also acknowledged that the debtors did not have full legal title to the goods under the conditional sales contracts but dismissed that fact as irrelevant.<sup>202</sup> At stake was the debtors' property interest in continued possession and use of the goods, and the matter of the "ultimate" right to continued possession would require a later hearing.<sup>203</sup>

The Court then also rejected a narrow reading of both *Sniadach* and *Goldberg* that limited procedural due process protections to items of necessity, instead stating that those cases did not restrict procedural due process guarantees to only wages or welfare benefits.<sup>204</sup> Stating that "a bed may be equally essential . . . for human beings in their day-to-day lives," the Court reaffirmed that "property" is not a narrowly defined concept under due process.<sup>205</sup>

Following quickly after *Fuentes*, the Court moved in a seemingly different direction with *Mitchell v. W.T. Grant Co.*<sup>206</sup> In *Mitchell*, a creditor obtained a writ of sequestration on goods it sold to the debtor and the debtor challenged that the writ violated his due process rights.<sup>207</sup> The creditor alleged that he had a vendor's lien on the goods, and that the debtor had defaulted on payments.<sup>208</sup> The Louisiana statute at issue provided a writ of sequestration based on a verified application to a judge when a creditor could prove a right to possession, such as through a lien.<sup>209</sup> But the statute also included some protections for debtors. It cautioned against the writ being conclusive on the issue of ownership by providing the debtor the opportunity for a hearing to dissolve the writ if the creditor failed to verify the validity of the information provided in the affidavit.<sup>210</sup> It also called for an immediate post-seizure hearing, bond processes for both the creditor and the debtor to seek attachments, and judicial oversight of the entire process.<sup>211</sup>

In balancing the interests of the debtor and the creditor, the Court found that both parties had a substantial interest in the property at

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201. *Id.* at 85.

202. *Id.* at 86–88.

203. *Id.*

204. *Id.* at 88–90.

205. *Id.* at 90.

206. 416 U.S. 600 (1974).

207. *Id.* at 601–03.

208. *Id.*

209. *Id.* at 605–06.

210. *Id.* at 606–07.

211. *See id.* at 608, 611, 613, 626.

stake.<sup>212</sup> The Court upheld the statute, finding the creditor's interest ultimately outweighed the imposition on the debtor.<sup>213</sup> Further, the Court found that the statute's procedural protections had provided adequate "constitutional accommodation[s]" for the debtor against the risk of an erroneous deprivation.<sup>214</sup>

The *Mitchell* Court distinguished the facts before it from *Sniadach* and *Fuentes* in several notable ways. First, the nature of the interest at stake in *Mitchell* was significantly different from the interest at stake in *Sniadach*.<sup>215</sup> In *Sniadach*, the creditor never previously held a property interest in the debtor's wages prior to the garnishment action, whereas in *Mitchell* the creditor did hold a property interest in the relevant goods because it was collecting on a vendor's lien from a sale of those goods.<sup>216</sup> Second, the Court weighed the differences between a permanent seizure absent an opportunity to be heard and a temporary seizure that takes place prior to a hearing, determining that even if the deprivation in *Mitchell* was temporary and not permanent as that in *Sniadach*, *Fuentes* still established that even "nonfinal" deprivations require appropriate procedure.<sup>217</sup> Third, where the statutes in *Sniadach* and *Fuentes* contained no measures for judicial oversight, the statute as issue in *Mitchell* provided for and required certain court procedures, which the Court ruled created "alternative safeguards" that provided adequate due process to both parties.<sup>218</sup>

The *Mitchell* Court, however, declined to formulate a bright-line rule regarding the deprivation of property, temporary or not, prior to a hearing.<sup>219</sup> In doing so, the Court found an "alternative safeguards" exception to the hardship exception it established in *Sniadach*, where it required a hearing prior to deprivation of property.<sup>220</sup> Noting the importance of the distinction between garnishing wages and recovering personal property that had been sold, the Court found that

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212. *Id.* at 607–10.

213. *Id.* at 607–08, 618.

214. *Id.* at 607.

215. Beale, *supra* note 179, at 1618.

216. *Id.* at 1617–19. Compare *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969) (stating that a person has a stronger interest in wages that they earn), with *Mitchell*, 416 U.S. at 610 (arguing that a vendor has an equally strong interest in loaned property to which he previously had title).

217. *Mitchell*, 416 U.S. at 609–10; *Fuentes v. Shevin*, 407 U.S. 67, 74–75 (1972); Beale, *supra* note 179, at 1619.

218. Beale, *supra* note 179, at 1618.

219. *Fuentes*, 407 U.S. at 91–93; *Sniadach*, 395 U.S. at 341.

220. *Fuentes*, 407 U.S. at 86; Beale, *supra* note 179, at 1620.

the statutory provision of adequate oversight by the judicial system in *Mitchell* ensured that the due process requirements were met.<sup>221</sup>

The Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>222</sup> the following year further complicated its stance on due process requirements in a private seizure action.<sup>223</sup> The facts in *Di-Chem* were analogous to those in *Sniadach*, with a creditor in Georgia seeking to garnish the debtor's wages to satisfy a debt on goods sold.<sup>224</sup> The Georgia garnishment statute allowed the creditor to seek a garnishment order so long as the garnishment order was filed concurrently with an indebtedness action.<sup>225</sup> Based on an affidavit from the creditor asserting the debt, the court clerk issued a summons of garnishment.<sup>226</sup> The Court found that the statute violated the debtor's procedural due process rights because the statute allowed the garnishment based only on the creditor's assertions filed with a clerk, not a judge.<sup>227</sup> Further, the garnishment did not allow for a hearing to resolve the matter of possession prior to resolution of the litigation.<sup>228</sup>

The Court's reasoning drew on all three of the previous cases on property deprivation in a private action. The Court disregarded the lower court's interpretation of *Sniadach* as a "carve[d] out . . . exception" for wage earners, chiding the lower court for failing to consider the holding in *Fuentes* in its reasoning.<sup>229</sup> The Court reiterated the rule in *Fuentes*, that whether a debtor is entitled to a hearing does not hinge on the length or severity of a deprivation of property rights, even when those rights are merely for use and possession of the property at issue.<sup>230</sup> Lastly, the Court determined that the Georgia statute contained none of the judicial safeguards found in the statute in *Mitchell*, such as review of the order by a judge and the availability of a hearing immediately after the seizure.<sup>231</sup> The Court did not revisit the issue of balancing creditor and debtor interests in private collection suits until the 1990s in *Connecticut v. Doehr*.

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221. *Mitchell*, 416 U.S. at 610; Beale, *supra* note 179, at 1618.

222. 419 U.S. 601 (1975).

223. *Id.* at 608.

224. *Id.* at 604.

225. *Id.*

226. *Id.*

227. *Id.* at 606–07.

228. *Id.* at 607.

229. *Id.* at 605–06.

230. *Id.* at 606.

231. *Id.* at 607; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 606 (1974).

b. *Connecticut v. Doehr: Updated procedural due process requirements for pre-judgment garnishment actions*

The Court ruled again on the constitutionality of a state statute that permitted creditors to attach property before obtaining a judgment in *Connecticut v. Doehr*.<sup>232</sup> The question in *Doehr* was what procedures a state statute had to contain when a creditor utilized the justice system to deprive a debtor of their property through pre-judgment attachment.<sup>233</sup> As it did in *Di-Chem*, the Court looked at the relevant statute for judicial safeguards similar to those present in *Mitchell*, regarding the existence of such protections as a significant factor for upholding the statute because they would indicate sufficient due process protection.<sup>234</sup>

In its decision in *Doehr*, the Court acknowledged that due process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>235</sup> Guided by this instruction that courts may incorporate flexibility into a due process analysis, the *Doehr* Court applied a modified version of the *Mathews* test.<sup>236</sup> The key difference between the version of the test applied in *Doehr* and that applied in *Mathews* was the Court’s focus on the interest of the private party seeking the attachment (the creditor), instead of the government’s interest.<sup>237</sup> In *Doehr*, the court looked with “due regard [at] any *ancillary* interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.”<sup>238</sup>

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232. 501 U.S. 1, 4 (1991). Under the statute at issue in *Doehr*, creditors could attach the debtor’s property based solely on a verified oath from the creditor demonstrating probable cause of a valid claim. *Id.* at 7. Attachment did not require prior notice or a hearing. *Id.* at 4. The debtor in *Doehr* never received service of the complaint or notice of the attachment until the sheriff actually attached the property. Beale, *supra* note 179, at 1628.

233. *Doehr*, 501 U.S. at 9.

234. *Id.* at 10. The *Doehr* Court noted that in *Mitchell*, the statute provided for an immediate post-deprivation hearing in addition to potential damages; a judge was required to determine whether the creditor provided a “clear showing of entitlement to the writ” and that the required affidavit provided adequate detail. *Id.*; Beale, *supra* note 179, at 1629.

235. *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

236. *Doehr*, 501 U.S. at 11. The traditional application of the *Mathews* test applies to a deprivation by the state of a state entitlement. *Id.* The facts in *Doehr* were found to meet the requirement for state action that triggers a due process analysis. *Id.* at 10–11.

237. Beale, *supra* note 179, at 1630.

238. *Doehr*, 501 U.S. at 11 (emphasis added).

Of note, the deprivation at risk in *Doehr* was neither a complete physical deprivation nor a permanent deprivation.<sup>239</sup> The Court also highlighted that the “one-sided, self-serving, and conclusory submissions” the creditor had submitted in seeking an attachment were likely to lead to an erroneous deprivation absent effective judicial review.<sup>240</sup> In looking at what protections the statute did offer for debtors, the Court identified post-attachment notice and hearing, in addition to possible double damages for the aggrieved party if the lawsuit was commenced absent probable cause.<sup>241</sup> However, the Court also found that certain factors present in *Mitchell* were not present in *Doehr*, including the creditor’s preexisting property interest and that the claim for a vendor’s lien necessarily included documents demonstrating the creditor’s interest.<sup>242</sup> The Court held that if the creditor was only seeking to guarantee the availability of the attached assets in the event that he secured a judgment, the creditor’s interest in the property could not “justify the burdening” of the debtor’s interest.<sup>243</sup> The emphasis that the Court placed on whether a creditor has a preexisting property right was substantial, as it was included in two prongs of the *Mathews* test: determining the importance of the creditor’s interest and ensuring the validity of the lawsuits outcome.<sup>244</sup>

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239. *Id.* at 12 (“[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.”); see also Beale, *supra* note 179, at 1631 (“The attachment [in *Doehr*] may be less injurious than a temporary deprivation of necessary household goods and wages.”).

240. *Doehr*, 501 U.S. at 14; see also Beale, *supra* note 179, at 1631 n.218 (“[A]uthoriz[ing] attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant’s property when the claim . . . rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted.”).

241. *Doehr*, 501 U.S. at 13–14.

242. *Id.* at 15; see also Beale, *supra* note 179, at 1632 n.220 (noting the ambiguity in the *Doehr* Court’s reasoning when it did not elaborate on what protections are required to uphold the constitutionality of a statute).

243. *Doehr*, 501 U.S. at 16.

244. *Id.* The Court also found a historical underpinning for its argument: the “Custom of London” entitled plaintiffs to attach property only when the satisfaction of a judgment was threatened by a defendant’s actions. *Id.* at 16–17.



## II. A CONSTITUTIONAL CHALLENGE TO POST-JUDGMENT DEBTOR GARNISHMENT IN MISSOURI

The Supreme Court established that due process requires adjudication that is preceded by notice and an opportunity to be heard, as “appropriate to the nature of the case.”<sup>245</sup> In relation to post-judgment garnishments in Missouri, a court must first establish that a protected interest exists.<sup>246</sup> Upon finding a constitutionally protected interest, a court can then determine whether the due process protections that a statute provides are adequate.<sup>247</sup>

### A. *Improperly Garnished Wages in Missouri Are a Constitutionally Protected Property Interest*

To invoke a due process protection analysis, a debtor must establish that he or she was deprived of “life, liberty, or property.”<sup>248</sup> The question that invariably arises for a debtor invoking a due process analysis is, “What qualifies as a constitutionally protected interest?”<sup>249</sup> While there is a potential claim that garnishment deprives debtors of a liberty interest,<sup>250</sup> the stronger and more viable argument in Missouri is that wage garnishment deprives debtors of “property.” Unrestrained access to funds to which a debtor is legally entitled creates a clear and substantial property interest.<sup>251</sup> Because judgment-creditors may legally seek up to a quarter of any individual paycheck and can sometimes seize an entire bank account, the

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245. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *see also Doebr*, 501 U.S. at 26 (Rehnquist, C.J., concurring) (supporting adjudication on a case-by-case basis when determining the constitutionality of attachment statutes); Beale, *supra* note 179, at 1637.

246. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”).

247. *Id.*

248. *Id.*; *Mullane*, 339 U.S. at 313.

249. Henry Paul Monaghan, *Of “Liberty” and “Property”*, 62 CORNELL L. REV. 405, 410 (1977).

250. A debtor in Missouri could potentially frame the argument as a deprivation of a liberty interest given the hardships that garnishment imposes on a person’s livelihood. *See generally* Liberty, *supra* note 140, at 284 (identifying the modern debt-collection industry’s similarities with “the system of state facilitated peonage” in the post-Civil War South, which presents a modern violation of the Thirteenth Amendment). That argument, however, is beyond the scope of this Comment.

251. *See Finberg v. Sullivan*, 634 F.2d 50, 58 (3d Cir. 1980) (finding a “very compelling” debtor interest in funds for subsistence).

judgment-debtor can be unjustly deprived of his own funds and can quickly lose the ability to “cover basic living expenses.”<sup>252</sup>

Much like the special protections that may be required for certain property interests, as noted in *Goldberg*, the funds to which judgment-debtors are legally entitled require more safeguarding than current process affords.<sup>253</sup> Although no absolute ownership interest inheres in funds a person expends and currently owes to a debt collector, the key distinction that creates a protected interest is that in many cases the judgment-debtor is legally entitled to the funds garnished by the judgment-creditor.<sup>254</sup> For instance, a debt collector may enter a time-barred claim, fail to validate and verify the debtor’s ownership of the debt, improperly communicate notice to the debtor, or make any number of the violations that debt collectors routinely commit.<sup>255</sup> In the alternative, a judgment-debtor may qualify for an exemption that affords statutory protection from garnishment to a portion of their wages.<sup>256</sup> When a debtor is legally entitled to retain even a portion of their funds under any of the reasoning above, a garnishment deprives that debtor of a legitimate and substantial interest in her property.

The ills felt by low-income Missourians who are burdened with a garnishment are of the same sort as the problems that facilitated the discussion in *Sniadach*.<sup>257</sup> Data demonstrates that courts typically impose the highest rates of garnishments on earners in the \$25,000-

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252. See Kiel, *supra* note 138 (hearing from a debtor who had allegedly accrued \$40,000 in debt, almost exclusively in interest, and faced the grim prospects of either declaring bankruptcy or making payments for the rest of her life); *supra* notes 132–33 (reviewing the ability of debt collectors to legally wipe out an entire bank account under current federal law).

253. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’ . . .”).

254. See Kiel & Waldman, *supra* note 5 (highlighting the common judgment-creditor practice of instituting suits barred by the applicable statute of limitations to capitalize on the typical debtor’s lack of legal counsel).

255. See *supra* notes 85–97 and accompanying text (listing the litigation strategies of debt buyers that result in wrongful debt-collection suits being filed).

256. See *supra* notes 144–45 and accompanying text (describing the Missouri head-of-household exemption). *But see infra* notes 288–90 and accompanying text (noting that the lack of information provided to debtors regarding exemptions is a cause of their underutilization).

257. In the St. Louis area specifically, “generations of discrimination” have limited low-income black families’ access to the range of resources one turns to when faced with a financial downturn. See FERGUSON COMM’N, *supra* note 50, at 7 (grappling with the violence in St. Louis that, in part, finds its origin in the cycle of economic poverty in the region); Editorial Board, *supra* note 1; Kiel & Waldman, *supra* note 5 (“I’m in a generational hole.”).

\$40,000 range, and that garnishment rates are high even in the lower income brackets.<sup>258</sup> When a person's income falls in a lower bracket, the bulk of their income goes towards "basic necessities," such as rent, food, and utilities.<sup>259</sup> Adding garnishment to the equation forces a debtor even further into the proverbial hole and "hits [the] household budget like a bomb."<sup>260</sup> The Court in *Sniadach* focused on the "grave injustices" that result when creditors garnish a "specialized" property prior to a debtor's opportunity to be heard.<sup>261</sup> In *Sniadach*, the Court recognized that indigent populations with little to no access to legal aid feel certain property interest deprivations far more acutely than their higher-income counterparts.<sup>262</sup> The deprivation of the interest at stake is exacerbated by the extreme harm to a household that results when a low-income judgment-debtor in Missouri is deprived of funds to which she should legally retain access.

*B. Debt Collection Practices in Missouri Deny Low-Income Communities Adequate Notice and the Opportunity to Be Heard*

The current patchwork of laws governing Missouri debt-collection practices, both in and out of the courtroom, lack the adequate procedural due process safeguards to protect debtors from low-income communities. Unfortunately, it is precisely these communities that are subject to the majority of judgments in debt-collection suits.<sup>263</sup> Further, in the greater St. Louis area, low-income mostly black communities find themselves far more afflicted by debt-collection judgments and garnishments than their non-black majority counterparts.<sup>264</sup> Debt collectors have evaded due process requirements to provide adequate notice of the claims or the protections to which debtors are entitled, as well as to provide an opportunity to be heard, in part due to ingrained societal blocks for low-income families to access to counsel and legal advice.<sup>265</sup>

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258. Kiel & Waldman, *supra* note 5.

259. *Id.*

260. *Id.*

261. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969).

262. *Id.*

263. *See* Kiel & Waldman, *supra* note 5.

264. *See supra* Section I.A (covering the economic and societal ills black communities in St. Louis face and the burdens that mount when debt-collection judgments result in the garnishment of wages).

265. *See* Kiel & Waldman, *supra* note 5 ("There's no more income, there's no more savings, and the options are pretty limited, because you don't have the social network, you don't have the legal . . . resources available to you to find a solution.").

### 1. *Inadequate notice*

Together, both the FDCPA and Missouri law fail to ensure that low-income households receive constitutionally adequate notice of debt-collection suits.<sup>266</sup> When Missouri courts adjudicate the sufficiency of notice in a debt-collection law suit, they refer to either to the Federal Rules of Civil Procedure<sup>267</sup> or to the Missouri court rules that govern the service of summons.<sup>268</sup> The application of standard federal or state service requirements becomes problematic when debtors rarely remain in the same residence they were living in when they first incurred the debt.<sup>269</sup> Moreover, residents are oftentimes forced to move from home to home for reasons beyond their control, such as escalating violence or habitability concerns.<sup>270</sup> Judgment-debtors in the St. Louis area report never receiving service on the debt-collection suits brought against them.<sup>271</sup> Much like the case in *Fuentes*, where the debtor did not receive notice of the action until the actual seizure of property, some debtors in St. Louis may not even

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266. While related, the issue of providing debtors notice via service of process is distinct from the legal requirements of the FDCPA that regulate debt collectors' provision of a validation notice to consumers over the collection of debt; however, similar concerns arise in both instances regarding verification of who the debt actually belongs to. *See* 15 U.S.C. § 1692g (2012); *supra* Section I.A.1 (reviewing the statutory requirements of the FDCPA); *see also* *Greene v. Lindsey*, 456 U.S. 444, 449–50 (1982) (holding that the opportunity to be heard is only as effective as the notice preceding it, and establishing that service of process requires notice to be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”); Johnny Parker, *The Search for Meaning in the Notice Requirements of the Fair Debt Collection Practices Act: A 30 for 30 Short*, 43 CAP. U. L. REV. 201, 201 (2015) (assessing the protections afforded to consumers under the validation of debts section of the FDCPA, 15 U.S.C. § 1692g).

267. *See* FED. R. CIV. P. 4(c) (dictating the required procedures for effecting service of an original complaint).

268. MO. R. R.C.P. §§ 54.01–54.22 (2016).

269. *See* Kiel & Waldman, *supra* note 5 (discussing four separate residents of the St. Louis area, each of whom have had to move since their initial encounters with creditors or debt collectors). Rapidly changing where one lives introduces new complications into a court's analysis of whether service has been effected on the proper place of residence. *See* *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 257 (2d Cir. 1991).

270. *See supra* note 54 and accompanying text.

271. The demonstrated lack of awareness that debtors have that a suit has been levied against them indicates that service has not been reasonably calculated to provide adequate notice under *Greene*. *See Greene*, 456 U.S. at 451; Kiel & Arnold, *supra* note 4 (reporting on a couple whose court file reflects that a summons was left at their current house, even though the house was uninhabited and undergoing renovations at the time).

know that a court has rendered a judgment against them until they begin to see a deduction in their paycheck.<sup>272</sup> The current federal and state procedures governing service of process fail to adequately account for the particularized housing circumstances that plague many low-income communities in St. Louis.

Debt collectors' failure to adhere to the validation requirements of the FDCPA also contributes to the problem of inadequate notice.<sup>273</sup> Under the FDCPA, debt collectors must validate a debt in a written notice to the debtor prior to engaging in any collection activities.<sup>274</sup> If debt collectors do not provide such validation notices, they are already engaging in unfair practices for which they could be held liable.<sup>275</sup> If debt collectors were to comply with the FDCPA's provision on validation, they would be placing debtors on constructive notice that the debts were in collection, thereby partially alleviating the concerns that arise during the service of process of a debt-collection claim. However, if many debtors are not even aware that they have a debt in collection, then debt collectors are clearly not strictly adhering to the validation notice requirements.<sup>276</sup>

Additionally, Missouri courts do not protect debtors from claims that should be barred due to a faulty pleading. Inaccurate information about who holds a debt should bar a suit from even reaching an inquiry into whether the creditor provided adequate notice. Yet, creditors and debt collectors often serve process on suits that should not proceed.<sup>277</sup> The current pleading requirement for a debt-collection lawsuit in a Missouri court sets a very low bar; there

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272. See *supra* notes 195–99 and accompanying text (recounting that the replevin orders in *Fuentes* were issued simultaneously with the filing of the collection actions, but the debtors had not yet received a summons); NEW ECONOMY PROJECT, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1–2 (2010) (sampling 451 New York residents sued by debt buyers, 71% of who reported either never being served or served improperly).

273. 15 U.S.C. § 1692g (2012).

274. *Id.* § 1692g(a)(1)–(5) (including information such as the amount and the name of the original creditor).

275. *Id.* § 1692k.

276. See, e.g., CFPB ANNUAL REPORT, *supra* note 16, at 7 (“Many consumers are not aware that they have debts in collections until they . . . review their credit reports.”); see also CONSUMER FIN. PROT. BUREAU, *CFPB Considers Debt Collection Rules* (Nov. 6, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-considers-debt-collection-rules> (“Consumers are complaining about only becoming aware of a collection account when they find it on their credit report . . .”).

277. See *supra* notes 85–97 and accompanying text (listing the various deficiencies in the filing practice of debt buyers that should result in a suit being barred); see also Kiel & Waldman, *supra* note 5.

are no additional or specialized statutory requirements placed on collection suits.<sup>278</sup> Debt collectors frequently succeed in obtaining judgments against debtors based on minimal evidence that the debtor actually owes the debt.<sup>279</sup>

The lack of adequate notice to protect against a defective claim being filed against a debtor mirrors the due process failures of the statutes the Court found unconstitutional in *Fuentes*.<sup>280</sup> In *Fuentes*, the state courts had routinely issued writs of replevin based upon affidavits containing “bare assertion[s],”—debt collectors needed only to state their entitlement to the property in a “conclusory fashion” for a clerk to issue a writ.<sup>281</sup> The same situation is playing out in courtrooms across Missouri. Debt collectors are able to bring a claim, issue a summons, succeed in a suit, and obtain a garnishment order based solely on the paltry information provided by the debt collector regarding whether the debtor being sued actually owns the debt, regardless of whether it is within the statute of limitations.<sup>282</sup> Much like the “bare assertion[s]” alleged in *Fuentes* that ultimately led to unjust garnishments, debt collectors in Missouri often assert claims based on often erroneous and unverified information, leading to similarly unjust garnishments.<sup>283</sup> Proper adherence to the validation requirements would place debtors on notice that a false claim is

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278. MO. R. R.C.P. § 55.22 (2016) (“When a claim or defense is founded upon a written instrument, the same may be pleaded according to legal effect, or may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.”); *see also* Letter from Attorney Gen. of Mo. to Hon. Lisa White Hardwick (Dec. 3, 2015) [hereinafter Attorney General’s Letter], <https://ago.mo.gov/docs/default-source/press-releases/2015/debtcollectionpractices.pdf?sfvrsn=2> (lamenting the repeated failure of debt buyers to provide adequate proof of ownership of a debt when filing a claim, despite a ruling from the Missouri Supreme Court that expressly required debt buyers to demonstrate a clear chain of assignment in order to have standing to bring a collection claim (citing *CACH, LLC v. Askew*, 358 S.W.3d 58, 65 (Mo. 2012))).

279. *See* HUMAN RIGHTS Watch, *supra* note 61, at 45; Kiel & Waldman, *supra* note 5.

280. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

281. *Id.* at 74.

282. *See supra* Section I.B (examining the practices of debt buyers, including liability disclaimers and robo-signing, that result in very little information about a debt being transmitted during the sale of a debt portfolio, yet indicating the out-sized number of collection suits that debt buyers bring each year based on that information).

283. *Fuentes*, 407 U.S. at 75. Further, as in *Fuentes* where the debtor had no chance to rebut the claim because the garnishment was effected pre-judgment, debtors in Missouri also do not have the chance to contest the allegation because of inadequate opportunity to be heard due to the failures in the process. *Id.* at 82–83.

being filed against them, and also enable the debtor to halt the collection process prior to the commencement of a suit.

Time-barred debt, or so-called “zombie debt,”<sup>284</sup> is another method through which debt collectors are securing judgments based on less-than-ethical practices.<sup>285</sup> Creditors often bring debt-collection suits after the statute of limitations has run, but debtors are largely unaware that a statute of limitations even exists.<sup>286</sup> That debt collectors continue to bring these claims, even when counsel is present on the opposing side, demonstrates the willingness of the debt-collection industry to resurrect old debts.<sup>287</sup>

Missouri creditors are also not providing debtors with adequate notice regarding possible exemptions. There is a demonstrated gap in awareness among the low-income debtor population in Missouri regarding qualifications for the head-of-household exemption to garnishment.<sup>288</sup> Currently, the burden falls on the debtor to assert the exemption in court,<sup>289</sup> but even when debtors appear, they generally lack counsel or knowledge of the exemption.<sup>290</sup> Notice of a debt-collection action should contain explicit instructions on how debtors can obtain an exemption to which they legally are entitled.<sup>291</sup> The current practice of providing notice that is lacking clear,

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284. Sobol, *supra* note 94, at 327–28; KUEHNHOFF & SAUNDERS, *supra* note 97, at 2 (offering suggestions on how to prevent time-barred debts from being revived).

285. STRUCTURE AND PRACTICES, *supra* note 72, at 45 (charging that the practice of initiating suits to collect time-barred debts is a clear violation of the FDCPA).

286. Kiel & Waldman, *supra* note 5.

287. *Id.*; Sobol, *supra* note 94, at 346 (“Despite prohibitions on threatening or filing lawsuits, collectors continue to threaten legal action, file lawsuits, and obtain judgments (primarily default judgments) on time-barred debts. In the majority of states, the passage of the limitations period is an affirmative defense that the debtor must raise. As a practical matter, alleged debtors rarely raise this defense, since most lawsuits result in default judgments.”).

288. Kiel & Waldman, *supra* note 5; Kiel & Arnold, *supra* note 4 (identifying service of process requirements that allow debtors to request a hearing when they are incorrectly identified as “not head of a family,” but noting that the notice does not include information indicating that correct identification as head of a family will lead to a reduction in the garnishment by close to half).

289. *See* Kiel, *supra* note 141 (referencing the lack of “clear notice” provided to debtors regarding the head of family exemption, and the burden that falls on the debtors to assert the exemption); *supra* note 147 and accompanying text (explaining the head-of-household exemption requirements).

290. Kiel & Waldman, *supra* note 5 (reporting that the mayor of Jennings, Missouri, was initially unaware that there was a head-of-household exemption that could have offered her some protection from overzealous debt collectors).

291. Kiel, *supra* note 141.

readable language on exemption requirements fails to adequately protect low-income debtors from an unfair property deprivation.

2. *Lack of opportunity to be heard*

In the St. Louis area, less than 8% of debtors have counsel present in debt-collection suits that move to the judgment stage, and for debtors in mostly black low-income communities, that number drops to 4%.<sup>292</sup> While debtors are not constitutionally entitled to counsel in civil matters such as debt-collection suits,<sup>293</sup> the limited access that low-income communities have to legal advice places them at a far greater risk of being deprived of the opportunity to be heard prior to a post-judgment garnishment.<sup>294</sup> This issue echoes the Court's concerns in both *Goldberg* and *Sniadach* regarding the inability of low-income debtors to obtain access to legal advice.<sup>295</sup> Debtors can appear in court to contest a debt or to negotiate reduced rates of repayment with the creditor.<sup>296</sup> However, the high incidence of default judgments issued against residents in low-income communities in St. Louis suggests that debtors are not pursuing these two advantageous and lawful avenues for resolution of the claim.<sup>297</sup>

Another similarity to the limited access to counsel in Missouri can be found in a comparison with *Fuentes*. In *Fuentes*, the Court held that procedures that do not provide a debtor with an opportunity to rebut a creditor's garnishment claim are inadequate because they do not provide a "real test" of the issue.<sup>298</sup> The same problem presents in Missouri. Debtors either do not have notice of a suit, do not understand the service of process they have received, or simply do

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292. Kiel & Waldman, *supra* note 5.

293. *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 25 (1981) (stating that the right to counsel is only automatic in instances when a defendant's physical liberty is at stake; in alternative situations, a court is to apply the balancing test established in *Mathews*); *see also id.* at 27 (holding that an indigent woman was not entitled to counsel in a civil proceeding, despite a substantial interest in the potential termination of her parental status).

294. *See* Kiel & Arnold, *supra* note 2 (reporting that only 3% of Missouri debtors sued by a hospital collection agency had legal representation); Kiel & Waldman, *supra* note 5 (referring to the barriers that prevent low-income black communities from having equal access to legal advice in Missouri).

295. *Goldberg v. Kelly*, 397 U.S. 254, 262-64 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340-41 (1969).

296. Kiel & Waldman, *supra* note 5.

297. *Id.*

298. *Fuentes v. Shevin*, 407 U.S. 67, 96, 97 (1972).



not recognize the legal nature of the action.<sup>299</sup> This lack of appreciation for the situation at hand, coupled with limited legal resources, often results in a default judgment. These limitations create the same situation as in *Fuentes*, where the debtors were denied any chance to contest a taking prior to a hearing on the merits, if at all. In St. Louis, when a debt-collection action proceeds to a garnishment—typically through a default judgment—the debtor has likely never had an opportunity to engage in the legal action. The comparison with *Fuentes* is strengthened by the permanent nature of garnishment in comparison to the temporary property at issue in *Fuentes*.<sup>300</sup> Low-income communities in St. Louis are thus being deprived of an opportunity to be heard, and this is directly related to the community’s lack of access to counsel.

The disadvantages created by the inability to obtain or afford legal advice in low-income communities in St. Louis runs counter to the sentiment expressed by the Court in *Sniadach*.<sup>301</sup> The “hardship” exception created by the *Sniadach* Court aimed to prevent “grave injustices” from befalling indigent debtors.<sup>302</sup> The Court noted that where wages are at stake, a rule that satisfies procedural due process in other contexts may not withstand scrutiny.<sup>303</sup> While the Court in *Mitchell* later narrowed the exception to exclude temporary deprivations of property, the deprivations at stake in Missouri are not temporary.<sup>304</sup> The key distinction between the results in Missouri and the narrowing of the decision in *Mitchell* that makes the “hardship”

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299. See Kiel & Waldman, *supra* note 5 (explaining that the lack of debtors’ understanding of the legal nature of debt-collection lawsuits coupled with the scarce legal options available to them embolden judgment-creditors to file non-meritorious suits).

300. Compare *Fuentes*, 407 U.S. at 84 (clarifying that the Florida and Pennsylvania statutes at issue afforded a person the ability to institute an action to recover what had been replevied prior to a post-seizure hearing and final judgment), with Kiel & Waldman, *supra* note 5 (noting the disproportionate and likely irreparable impact a garnishment judgment of up to a quarter of a worker’s after-tax pay has on lower-income debtors).

301. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340–41 (1969).

302. *Id.* at 340 (reviewing the harms that befall a family when wages are garnished).

303. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 614 (1974); *Sniadach*, 395 U.S. at 340–42 (“The result is that a prejudgment garnishment . . . may as a practical matter drive a wage earning family to the wall.”).

304. See *Mitchell*, 416 U.S. at 617–20 (explaining that the degree of danger resulting from a mistaken seizure is offset by documentary requirements and the temporary nature of the potentially wrongful seizure); see *supra* Section I.A (chronicling the effects of wage garnishment in Missouri).

exception relevant is the permanence of wage garnishment.<sup>305</sup> In majority black communities in Missouri, where access to legal advice is either unavailable or unaffordable, the current wage garnishment procedures do not meet due process requirements under the “hardship” exception.<sup>306</sup> Even a small reduction in weekly take-home pay can have an outsized effect on a low-income family’s ability to survive in the St. Louis area.<sup>307</sup>

C. *Application of the Modified Mathews-Doehr Test*

The modified *Mathews-Doehr* test demonstrates that low-income debtors in Missouri have a more compelling interest in retaining the funds to which they are legally entitled than judgment-creditors have in executing a wage garnishment. The test is the most appropriate vehicle for courts to ensure that debt collectors in St. Louis, Missouri, respect the due process rights of debtors because it allows courts to weigh the various interests at stake in debt-collection actions between two private parties.<sup>308</sup> The traditional *Mathews* test does not align perfectly with this sort of proceeding because the traditional application of the test balances a deprivation initiated by the government, not by a private actor.<sup>309</sup> However, the modified version of the test that the Court applied in *Doehr* is appropriate in the Missouri scenario, despite the focus of *Doehr* being a pre-judgment, versus a post-judgment, attachment. First, the debt-collection litigation occurs between two private parties who each have a claim to the property interest, as was the case in all of the *Sniadach* tetrad cases and *Doehr*. Second, the circumstances in Missouri mirror the property disputes brought in *Doehr* and the *Sniadach* tetrad, where wages and property assets were seized prior to a hearing as low-income Missourians deficient notice and lack of an opportunity to be heard are analogous to a pre-hearing situation.

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305. See *Sniadach*, 395 U.S. at 340 (emphasizing the potential for irreparable harm associated with a wrongful pre-judgment imposition of wage garnishment); *Mitchell*, 416 U.S. at 618 (finding the Louisiana statute constitutional because it sought to “protect[] the debtor’s interest in every conceivable way”).

306. See *Sniadach*, 395 U.S. at 340; *supra* notes 40–46 and accompanying text (citing the “pernicious” gap in access to resources in mostly black communities).

307. See *Sniadach*, 395 U.S. at 340; FERGUSON COMM’N, *supra* note 50, at 11–12 (linking the cycle of poverty in the region to the ongoing violence in St. Louis).

308. *Connecticut v. Doehr*, 501 U.S. 1, 10–11 (1991).

309. Allen C. Myers, Note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, 66 WASH. & LEE L. REV. 371, 395–96 (2009) (reviewing the application of the *Mathews* test to garnishment cases involving federal benefits).

The *Mathews-Doehr* test, therefore, correctly balances the following interests: (1) the protected interest of the debtor in improperly garnished wages, (2) the debt collector's property interest in reclaiming an outstanding debt, (3) the government interest in efficient and effective judicial proceedings, and (4) the veracity interest that ensures against the erroneous deprivation of a protected interest.<sup>310</sup>

The modified test provides an appropriate structure to balance (1) the competing private interests (the debtor and the creditor) at stake in the disputed property, with (2) the government's interest, and (3) the risks and rewards advanced by competing procedural processes.<sup>311</sup> Application of the modified balancing test demonstrates that debtors hold a substantial private interest in their garnished wages and that judgment-creditors, conversely, do not have a significant private interest in obtaining the entire judgment awarded in debt collection actions. Moreover, the fact that the government will not suffer from excessively increased administrative burdens in debt collection lawsuits in Missouri if more protection is afforded to debtors, coupled with the substantial risk inherent in erroneously awarding a judgment to debt collectors under current Missouri law, further bolsters the argument for enhanced protections for debtors.

1. *Judgment-debtors in Missouri have a substantial private interest in garnished wages*

Under the *Mathews-Doehr* test, a court will consider the substantiality of the debtor's private interest and will then evaluate that interest in relation to the competing interests of the private party creditor and the government.<sup>312</sup> A final piece of the balancing test is to weigh those competing interests against the risk of an erroneous deprivation under the current procedures.

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310. See *Doehr*, 501 U.S. at 11 ("We now consider the *Mathews* factors in determining the adequacy of the procedures before us with regard to the safeguards of notice and a prior hearing . . ."); *supra* notes 236–44 and accompanying text (discussing the use of the *Mathews* test in *Doehr*); see also *infra* notes 312–40 (applying the *Mathews-Doehr* test to the Missouri debt-collection crisis).

311. *Doehr*, 501 U.S. at 10 ("Here the inquiry is similar, but the focus is different."); Beale, *supra* note 179, at 1644 ("[T]he Court's modification of *Mathews* in *Doehr* represents an appropriate shift in the due process calculus . . ."). In *Doehr*, a prejudgment attachment statute was held as unconstitutional when the Court determined that the risk of an erroneous deprivation to the debtor was too great where the statute did not require notice or prior hearing or bond, and no adequate safeguards were in place. *Doehr*, 501 U.S. at 12.

312. *Doehr*, 501 U.S. at 12.

The private interest that debtors in Missouri have in retaining their earned income is substantial, and too often creditors deprive debtors of their rightful income. For instance, a low-income debtor is likely eligible for an exemption, but that debtor generally has no knowledge that he or she must assert the protection.<sup>313</sup> The resulting deprivation can severely impact the ability of the household to function.<sup>314</sup>

Additionally, a debt collector must meet the FDCPA's requirements for validating debts with the creditor and communicating debts to consumers.<sup>315</sup> If a debt collector brings a suit against a debtor based on a non-validated debt, then the debt collector has brought that suit in error, and the debtor suffers yet another unjust deprivation of funds.<sup>316</sup> The FDCPA imposes liability on debt collectors that bring a suit without complying with the statutory requirements.<sup>317</sup> However, debt collectors that wrongfully seize funds after securing a judgment from an improperly filed suit are rarely held accountable for their actions.<sup>318</sup> A seizure of this sort is a clear and substantial deprivation of property. The communities in Missouri that are the most impacted by these practices can see unforgiving consequences from the resulting garnishment.<sup>319</sup>

The Court has repeatedly noted the substantial interest in protecting income in cases dealing with a deprivation of property that is essential to a person's survival. For example, in *Goldberg*, the Court recognized the great import of maintaining access to welfare benefits that families survive on.<sup>320</sup> Similarly, in *Sniadach*, one of the early cases addressing pre-judgment garnishment, the Court recounted the "tremendous hardship" imposed on families who see a reduction in

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313. See *supra* note 147 and accompanying text (referring to the burden that falls on debtors to assert that an exemption applies).

314. See Kiel & Waldman, *supra* note 5 (interviewing debtors who are constantly plagued by worries about how they will provide for their families).

315. 15 U.S.C. §§ 1692c, 1692g (2012).

316. See HUMAN RIGHTS WATCH, *supra* note 61, at 40–45. Debt buyers frequently bring suits based on debt portfolio purchases that include very limited information about who owns a debt, and when the suits have not been subjected to rigorous verification procedures yet result in a default judgment, debtors are stripped of their rightful property. See *id.* at 40–45 (emphasizing the negligent practices of debt buyers that engage in collection litigation).

317. 15 U.S.C. § 1692k.

318. See HUMAN RIGHTS WATCH, *supra* note 61, at 1 ("These problems are often discovered long after the debt buyers have already won court judgments against alleged debtors . . .").

319. See Kiel & Waldman, *supra* note 5 (detailing the myriad harms that befall families in St. Louis who are stricken with garnishments).

320. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

wages.<sup>321</sup> In the opinion for *Fuentes*, the Court equated the loss of critical household goods to that of the wage and welfare benefit deprivations in both *Sniadach* and *Goldberg*.<sup>322</sup> There is an analogous and similarly weighty property deprivation occurring in Missouri, where debtors' access to their rightful income is vital to many families' livelihoods.

2. *Judgment-creditors do not have a significant private interest in recovering the entire award in a debt-collection lawsuit*

Although judgment-creditors have an interest in retaining the profits they earn from collecting on debts, that interest is not nearly as significant as the judgment-debtor's interest in retaining access to the same funds. While a weightier interest in favor of the debt collector may exist when viewing the claims in the aggregate, the majority of the actions that debt collectors bring in Missouri courts are for very small sums of money,<sup>323</sup> and an undue property deprivation is evaluated in an analysis specific to the case at hand.<sup>324</sup> The volume of claims that most debt collectors pursue ensures a steady return on the resources they invest in litigation.<sup>325</sup> This debt recovery minimizes the substantiality of the interest and the likelihood that debt companies would suffer serious losses if courts barred them from pursuing certain suits.

Furthermore, enforcing or enhancing the procedural burdens on the debt collector at the time of filing would not actually constitute a deprivation of property for the valid owner of the debt. For instance, requiring enhanced documentation of proof of validation or augmented requirements for communication and notice will not prevent a debt collector from proceeding on a valid claim and securing a judgment in its favor.<sup>326</sup> Such requirements do not

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321. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969).

322. *Fuentes v. Shevin*, 407 U.S. 67, 89 (1972) (“[A] stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.”).

323. See *Kiel & Waldman*, *supra* note 5 (alleging that debt collectors typically bring smaller claims against debtors in majority black communities who have fewer financial options available to resolve the debt).

324. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (emphasizing that due process must be “appropriate to the nature of the case”).

325. See *supra* note 84 (citing to several reports on the hundreds of millions of dollars of revenue that debt collectors see from collection suits).

326. See *supra* Section II.B (detailing the various barriers to notice and opportunity to be heard that the low-income communities in Missouri are faced with in debt-collection suits); see also HUMAN RIGHTS WATCH, *supra* note 61, at 77–79 (calling for

preclude a debtor from eventually repaying a valid debt that a debt collector is collecting on.<sup>327</sup> The additional protections would simply ensure that the debt is collected in a manner that fully complies with current regulations, while protecting any funds of interest to the creditor that the debtor is legally entitled to retain.

The Supreme Court has made clear that when a debtor has a property interest in her wages, a court should strongly consider the importance of that interest.<sup>328</sup> However, the Court noted in the *Sniadach* tetrad and *Doehr* that whether one or both of the private parties had a preexisting interest in the property at issue was a critical determination related to the weight afforded to that party's claim.<sup>329</sup> If the creditor has no preexisting interest in the wages, a court's determination of where the greater interest lies weighs heavily in favor of the debtor.<sup>330</sup> This distinction is especially relevant in lawsuits brought by debt buyers or third-party collectors as opposed to the original creditor. Debt collectors who were never originally owed a debt, but who simply purchased the debt from the original creditor, have no preexisting interest in the property.<sup>331</sup> Accordingly, these third-party debt collectors have a far lower interest relative to the debtor's substantial interest in retaining their own wages.

3. *Affording judgment-debtors more protection in debt-collection suits will not create excessive administrative burdens for the government*

The government's interest in ensuring fair and effective debt-collection suits is significantly lower than either the debtor's private interest or the debt collector's property interest. To be sure, additional safeguards and procedural protections impose some administrative costs; however, adding procedures or judicial safeguards to the existing process would likely result in only a slightly

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increased burdens to be placed on debt buyers who initiate collection suits in order to protect the funds to which debtors or wrongfully sued parties are legally entitled).

327. See 15 U.S.C. §§ 1692c, 1692g (2012) (outlining creditor requirements for validating debts and communicating with debtors).

328. See Beale, *supra* note 179, at 1622 n.148 (citing Laurence Levine, *Due Process of Law in Pre-Judgment Attachment and the Filing of Mechanics' Liens*, 50 CONN. B.J. 335, 345 (1976)) (suggesting that a creditor's preexisting interest in property was a significant factor in the *Mitchell* decision).

329. *Connecticut v. Doehr*, 501 U.S. 1, 16 (1991) (finding that a party with no preexisting interest in property had "too minimal" of an interest to find in his favor); Beale, *supra* note 179, at 1632 (reviewing how a creditor's preexisting interest in a contested property is "key").

330. Beale, *supra* note 179, at 1630–37.

331. *Id.* at 1622 n.148.

heightened administrative burden. This burden is already justified by the time it should be taking courts to verify the accuracy of each claim.<sup>332</sup> Some examples of additional safeguards would be developing court procedures to ensure that debt collectors provide valid information to verify their claims and that the claims are not time-barred. Such additional safeguards or procedural protections would minimally increase the burden on the government in its role of adjudicating claims and enforcing judgments.

4. *A substantial risk of erroneously depriving a judgment-debtor of wages exists under current Missouri law*

The fourth and final step in the *Mathews-Doehr* analysis evaluates the risk of an erroneous deprivation under the current procedures and the potential value of adding new or alternative procedural safeguards.<sup>333</sup> Anecdotal evidence demonstrates that Missouri's current debt-collection procedures pose a substantial risk that courts will erroneously deprive debtors of their property.<sup>334</sup> Debt collectors frequently ignore the notice and validation requirements of the FDCPA by providing inaccurate information in their claims.<sup>335</sup> Authenticating debt becomes more burdensome when debt buyers purchase large quantities of debt portfolios that contain minimal or inaccurate information about who owns the debt or the value of the debt.<sup>336</sup> Debtors are often unrepresented and unaware of their rights, a problem further compounded by the fact that court clerks may be the only check on whether debt collectors satisfy verification

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332. See *supra* note 84 (listing various sources reporting that debt buyers file many thousands of claims for collection each year).

333. See *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

334. See Kiel & Waldman, *supra* note 5 (interviewing debtors who have an overall lack of understanding about the suits and garnishments levied against them); Kiel & Arnold, *supra* note 4 (reporting on a debtor who did not understand the debt-collection lawsuit process or what was required of him).

335. See CFPB ANNUAL REPORT, *supra* note 16, at 8 (“The sale and resale of debts has raised concerns about debt data integrity and information flows from creditor to debt buyer to subsequent debt buyers.”).

336. STRUCTURE AND PRACTICES, *supra* note 72, at ii (analyzing a three-year study that uncovered close to 90 million consumer debt accounts that had been purchased by debt buyers); Holland, *Junk Justice*, *supra* note 77 (calculating that debts are sold with minimal pieces of ownership information attached to them in order for debt buyers to reap a large profit from unreliable debts); see also *supra* note 88 (reviling the practices, such as robo-signing, of debt buyers that allow for so many collection claims to be brought successfully on the barest of assertions).

requirements.<sup>337</sup> While actual notice is not a strict legal requirement, debtors have reported never receiving notification of a suit against them.<sup>338</sup> Additionally, in the absence of an attorney, the few debtors who actually appear in court are unfamiliar with how to proceed and can be pressured by opposing counsel into giving up their due process rights.<sup>339</sup> Finally, while debt collectors often bring debtors to court over seemingly minimal amounts, those amounts are not insignificant for these families.<sup>340</sup> Each of these complications alone produce a significant risk that the debtor will be wrongly deprived of her property. Taken as a whole, the possibilities for bringing an erroneous suit are many. If implemented reliably, additional safeguards to protect debtors could easily overcome these risks.

### III. RECOMMENDATIONS

Given the existence of a protected property interest, the due process failures of current procedure in Missouri, and a clear indication from the *Mathews-Doehr* test that the debtor's interest in earned wages is superior to the debt collector's, reform is necessary. The Ferguson Commission addressed the broader racial and economic inequalities in the St. Louis area, and it seeks to begin a conversation with the goal of fostering a more peaceful and equitable place to live.<sup>341</sup> The Commission's approach to community change and development is communicative and interactive, providing an instructive starting point in evaluating what constitutes constitutionally adequate procedural due process protections for the low-income communities of Missouri.<sup>342</sup>

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337. See HUMAN RIGHTS WATCH, *supra* note 61, at 77 (suggesting that court systems should exert greater pressure on debt buyers to file valid claims by increasing the scrutiny with which current claims are examined, and asking legislatures to fund programs that will educate and represent low-income debtors who cannot navigate the system successfully on their own).

338. See *supra* note 271 (narrating accounts from debtors who saw their wages garnished when they had no recollection of ever receiving notice that their debt was in collection).

339. Kiel & Waldman, *supra* note 5.

340. See *supra* Section I.A and accompanying text.

341. FERGUSON COMM'N, *supra* note 50, at 6–7.

342. *Id.* (explaining the Commission's goals to make St. Louis fair, equitable, and just).



A. *Notice Must Be Tailored to Meet the Needs of Low-Income Communities in Missouri Whose Debts Are in Collection*

As the Court held in *Sniadach*, even when notice conforms to statutory requirements, a property deprivation resulting in “hardships,” like those felt in Missouri communities, can still violate procedural due process if notice and the opportunity to be heard are not tailored to the circumstances.<sup>343</sup> Notice requirements for debt-collection suits directed at low-income communities should be tailored to address “all [of the] circumstances” affecting community members.<sup>344</sup> For instance, landlord-tenant problems, health and safety concerns, or poor employment opportunities can all force a family to move from city to city.<sup>345</sup> As a result, the addresses that debt collectors have on file can be out of date, assuming they were even correct in the first place.<sup>346</sup> Process in debt collection suits should be augmented with additional procedures to ensure that debtors receive adequate notice to protect against the voluminous amount of suspect judgments entered against low-income debtors in St. Louis.<sup>347</sup> As a final layer of protection against erroneous judgments, the notice provided to debtors should clearly outline the procedure for claiming an exemption.

The government of Missouri should work to implement additional regulations to require debt collectors to meet a higher standard of pleading when filing debt collection lawsuits.<sup>348</sup> Currently, claims can

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343. See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969) (addressing the serious societal harms that result from the “hardship” imposed by the garnishment of wages).

344. See *Green v. Lindsey*, 456 U.S. 444, 449–50 (1982) (affirming that notice is best effected when it is “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

345. *Sniadach*, 395 U.S. at 342 n.9.

346. See *supra* note 54 (recounting the stories of people in the St. Louis area who have been forced to relocate due to circumstances beyond their control); see *supra* notes 76–78 and accompanying text (detailing the practices of debt buyers that result in nominal, often erroneous, amounts of information regarding debt ownership to be conveyed in debt portfolio sales).

347. HUMAN RIGHTS WATCH, *supra* note 61, at 78 (calling for both debt collectors and courts to independently provide notice to debtors regarding debt-collection suits).

348. See Attorney General’s Letter, *supra* note 278, at 6 (requesting that the Missouri Supreme Court Commission on Racial and Ethnic Fairness revise court rules to “require plaintiffs in lawsuits to collect consumer debt to provide with their petition documentation of all assignments demonstrating the plaintiff’s right to collect the debt from the consumer”); accord JON LEIBOWITZ ET AL., FTC, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 14–19 (2010), <https://www.ftc.gov/sites/default/files/documents/rep>

be filed based solely on the debt collector's assertions that a debtor owes a debt; however, because debt buyers purchase debt in large portfolios, there is oftentimes no mechanism to verify individual debts beyond an affidavit claiming that the debt can be traced back to the original creditor.<sup>349</sup>

Furthermore, requiring heightened accountability from debt collectors filing collection claims also addresses the problems caused by time-barred debts, or "zombie debts."<sup>350</sup> Debt collectors may allege that debtors have extended the statute of limitations by, for example, making voluntary payments, and without the debtor present to raise the affirmative defense, the suit proceeds.<sup>351</sup> The Attorney General of Missouri recently enacted new regulations, one of which begins to address this problem.<sup>352</sup> The new regulation makes any threat to file or filing of a lawsuit past the statute of limitations unlawful.<sup>353</sup> The other new regulation works to eliminate a loophole that allows debt collectors to restart the clock on a statute of limitations-reaffirmation.<sup>354</sup> Under the regulation, debt collectors cannot "seek or obtain without valuable consideration" any reaffirmation of a debt that was previously time-barred.<sup>355</sup> The full effect of the new regulations has yet to be seen, but in furtherance of the Attorney

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orts/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf (noting that if states adopted increased pleading standards similar to those required by Federal Rule of Civil Procedure 8, they could better protect consumers from debt-collection suits both filed against them in error or without the requisite proof of ownership demonstrated by the filer); HUMAN RIGHTS WATCH, *supra* note 61, at 77 (appealing to state governments to require debt collectors to provide "meaningful evidence" when filing claims).

349. See *supra* notes 277-79 and accompanying text (detailing the frequency with which debt-collection claims are filed on bare assertions of unverified information); *supra* notes 85-94 and accompanying text (reviewing the litigation practices of debt buyers that rely on sparse amounts of identifying information when filing collection suits).

350. See *supra* note 284 (defining the increased prevalence of suits filed on time-barred debt claims, or "zombie debt").

351. Kiel & Waldman, *supra* note 5 (doubting the validity of a debt collector's claim that the statute of limitations in Rosalyn Turner's collection suit had been extended because of a voluntary payment when Turner denied such a payment).

352. *AG Koster's Reforms Against Abusive Debt-Collection Practices Effective Today* (June 30, 2016, 3:56 PM) [hereinafter *AG Koster's Reforms*], <https://ago.mo.gov/home/ag-koster-s-reforms-against-abusive-debt-collection-practices-effective-today>.

353. *Id.*; MO. CODE REGS. ANN. tit. 15, § 60-8.100 (2016). The regulation also makes unlawful the threat to file or filing of any claim that has been discharged by a bankruptcy court, voided by a court, or deemed satisfied under a debtor-creditor agreement. § 60-8.100.

354. *AG Koster's Reforms*, *supra* note 352.

355. MO. CODE REGS. ANN. tit. 15, § 60-8.100.

General's objectives, courts should also require creditors to affirmatively offer proof verifying that a collection suit still falls within the statutory time frame for filing.<sup>356</sup>

*B. Access to Legal Advice Will Ensure that Low-Income Communities in the St. Louis Area Have the Opportunity to Be Heard*

In Missouri debt collection lawsuits, low-income debtors rarely have legal representation.<sup>357</sup> The courtroom is an intimidating place for any lay person, and debt collection lawsuits in Missouri proceed under a complex layering of federal statutes and state regulations that a debtor with “virtually no understanding of the law” will struggle to navigate.<sup>358</sup> While defending against a debt collection suit is more than just saying some “magic words,”<sup>359</sup> debtor's chances of deploying an effective defense are slim when they appear pro se.<sup>360</sup>

An even greater threat to an unrepresented debtor is falling victim to “hallway conferences.”<sup>361</sup> While negotiated settlements between debtors and debt collectors are, in theory, a positive and proactive result for all parties involved, the reality is that experienced lawyers bully debtors into settlements that they do not understand.<sup>362</sup> These

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356. See Attorney General's Letter, *supra* note 278, at 7 (charging Missouri courts to amend the rule governing default judgments to include a requirement that debt collectors certify a claim is still within the statutory limiting period when filed); accord NAT'L CONSUMER LAW CTR., RULES NEEDED TO STOP DEBT COLLECTION ABUSES I (2016), [http://www.nclc.org/images/pdf/debt\\_collection/Debt-Collection-Priorities-2016.pdf](http://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Priorities-2016.pdf) (advocating for a prohibition on the collection of time-barred debt both in and out of litigation). See generally Sobol, *supra* note 94 (justifying the need to better regulate debt-collection actions over “zombie debt” with an analysis of the increasing prevalence of and problems with time-barred debt).

357. See Kiel & Waldman, *supra* note 5 (determining that in debt-collection lawsuits filed in St. Louis between 2008 and 2012, only 8% of defendants had legal representation, and only 4% of defendants from black communities had such representation).

358. See HUMAN RIGHTS WATCH, *supra* note 61, at 53 (assessing the difficulties that arise when a layperson attempts to appear unrepresented in a debt-collection suit).

359. *Magic Words*, THIS AM. LIFE (Aug. 15, 2014), <http://www.thisamericanlife.org/radio-archives/episode/532/transcript> (covering the proceedings of a debt-collection claim where the debtors caused the debt collector to drop the action by saying the magic words “show me the evidence”).

360. HUMAN RIGHTS WATCH, *supra* note 61, at 53.

361. See *id.* at 4 (“Many defendants come to court intending to fight the case against them but end up capitulating in the courthouse hallways. Some are persuaded that they have no choice.”); *Magic Words*, *supra* note 359 (recounting an experience where a reporter observed and engaged in a courtroom battle with a lawyer representing a debt collector who was attempting to pressure a couple into settling by bringing them out into the hallway to “negotiate”).

362. See Holland, *Junk Justice*, *supra* note 77, at 224.

conferences can easily veer into the realm of coercive and threatening practices that violate the explicit provisions of the FDCPA.<sup>363</sup> Without any legal knowledge to rely on, debtors are essentially “[t]hrown to the [w]olves.”<sup>364</sup> To alleviate the difficult situation that many debtors in the low-income communities of St. Louis find themselves in when unrepresented in a debt-collection suit, Missouri lawmakers should work to promote legal access for impoverished debtors.<sup>365</sup>

*C. Additional Financial Protections Are Necessary to Protect Low-Income Communities in Missouri from the Overly Harsh Practices of Debt Collectors*

Congress should update the Credit Consumer Protection Act, the federal law regulating wage garnishment, to reflect the current financial climate. Since Congress enacted the CCPA in 1968, the statute has not kept pace with inflation, and rather than rely on state law, courts have generally deferred to the CCPA’s regulatory scheme.<sup>366</sup> Lowering the after-tax income amount eligible for garnishment below its current rate of 25% will protect low-income debtors who are demonstrably misrepresented in the allocation of debt collection judgments.<sup>367</sup>

Interest rate regulation compounds the failures of Missouri’s regulatory system in protecting low-income households.<sup>368</sup> The interest rates attached to many loans are predatory and often are set at extraordinarily high levels.<sup>369</sup> Not only do debtors face exorbitant

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363. See 15 U.S.C. § 1692e (2012) (outlining illegal debt-collection practices, including false representation that nonpayment will result in damaging legal consequences); *supra* Section I.A.1 (examining the legal requirements of the FDCPA).

364. HUMAN RIGHTS WATCH, *supra* note 61, at 53.

365. Kiel, *supra* note 141 (suggesting that many plaintiffs in debt-collection suits in Missouri, such as utility companies or hospitals, that have an “obligation to serve the public” offer assistance programs to lower-income debtors and that few have knowledge of the programs); see also HUMAN RIGHTS WATCH, *supra* note 61, at 77 (discussing the need for state legislatures to “fund programs that provide independent legal advice or representation to low-income defendants in debt-collection cases”).

366. “Missouri does not regulate collection agencies . . .” *Debt Collection*, *supra* note 136.

367. See Kiel, *supra* note 141 (noting that four states prohibit the use of garnishment in debt-collection actions for most debts—Texas, Pennsylvania, North Carolina, and South Carolina—and arguing that more states need to follow suit because “low-income workers can’t afford to lose a quarter of their pay”).

368. See *supra* notes 56–58 and accompanying text.

369. See *supra* note 57 and accompanying text (discussing how high predatory loan interest rates can be, citing to some in the triple digits).

interest accruing on their loans, but Missouri regulations allow a judgment-creditor to attach that same interest rate from the original credit extension contract to the judgment.<sup>370</sup> The “exploding debts” that ensue from such deleterious practices have created cycles of debt that can be likened to indentured servitude.<sup>371</sup>

Finally, a loophole in the current law allows debt collectors to seize a debtor’s entire bank account.<sup>372</sup> When a debtor’s paycheck is eligible for garnishment, the federal law limits creditors from seizing more than 25%.<sup>373</sup> However, if the debtor places that paycheck into a bank account, the entire contents of that account can be seized, and in the absence of any statutory language addressing such seizures, collectors commonly engage in the practice.<sup>374</sup> Such seizures severely constrain debtors’ ability to support themselves financially.

#### CONCLUSION

Over the course of only a handful of years, Missouri courtrooms have become infected with uncontrolled and unchecked lawsuits over the collection of debts. Both the debt-buyer industry’s unbridled growth in recent years and the outdated federal laws that regulate debt collection have contributed to the rampant increase in court judgments that result in garnishment in the St. Louis area. This increase in garnishments has had a particularly devastating impact on the low-income communities in St. Louis, especially in majority black neighborhoods. When faced with the aggressive, and frequently unlawful, practices of debt collectors, members of these communities have neither the financial resources to address the debts nor any form of affordable or accessible legal advice to defend their rights. Debtors are often unfamiliar with the procedural protections and exemptions

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370. See *supra* notes 139–43 and accompanying text (referring to the law that allows contracted rates of interest to be attached at judgment, and noting that the minimum interest level attached to a judgment in Missouri is 9%).

371. Kiel, *supra* note 138 (describing a scenario where a debtor’s balance increased forty times over due to high judgment interest rates); see also Liberty, *supra* note 140, at 281 (likening modern debt collection to indentured servitude).

372. See *supra* notes 132–33 and accompanying text (examining the failure of the CCPA to address the seizure of funds deposited into a debtor’s bank account).

373. See *supra* note 130 and accompanying text (stating the legal cap on garnishment as set by the CCPA).

374. See Kiel, *supra* note 141 (listing as one “commonsense reform[]” that debt-collection laws should “[r]estrict how much can be taken from debtors’ bank accounts”); *supra* notes 132–33 (expounding on the loophole that debt collectors exploit to seize an entire bank account).

available to them in debt collection suits. Yet, the current law forces debtors to bear the burden of asserting these defenses.

The current status of federal and state law regulating debt collection practices and lawsuits in the state of Missouri violates the Fifth and Fourteenth Amendment procedural due process rights of low-income communities. The lawsuits brought by debt collectors against members of these communities neither provide adequate notice nor ensure debtors an opportunity to be heard, and the situation that results is in effect a seizure absent a valid judgment. Similar to the Supreme Court's findings in the series of cases reviewing pre-judgment garnishment statutes, there is a constitutional violation of due process rights when creditors garnish the wages of low-income debtors under Missouri's current regulatory scheme.

The population of St. Louis has seen far more than its fair share of turmoil in recent years. Underlying the increases in violence, there emerges a pernicious disparity in the economic treatment of low-income communities in Missouri, many of which are majority black communities. The current legal procedures surrounding debt collection in Missouri works only to aggravate the already pervasive poverty in the region. A leader of the Ferguson Commission noted, "If you're still stuck in this web of indebtedness, you're not going to be economically mobile."<sup>375</sup> The choices that a family is forced to make when they see a post-judgment garnishment seize hundreds of dollars of their income each week are some of the hardest imaginable. "That was the worst time in my life," one woman in Jennings, Missouri, recalled, "I used to cry myself to sleep."<sup>376</sup>

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375. Kiel & Waldman, *supra* note 5.

376. *Id.*