

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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LINDA RALSTON, et al. :  
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 v. : CIVIL ACTION NO. 94-3723  
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 STEVEN B. ZATS, ESQUIRE, et al. :  
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MEMORANDUM & ORDER

Ditter, J.

August 25, 1997

Several state-court judgment debtors brought this proposed class action to challenge, among other things, the constitutionality of Pennsylvania's confessed judgment and post-judgment execution procedures. Claiming constitutional violations arising from the entry of confessed judgments and execution upon those judgments, pursuant to 42 U.S.C. § 1983, in Count V of their complaint, they sued the Montgomery County sheriff and prothonotary for declaratory and injunctive relief. I will grant in part and refuse in part the motion of the sheriff and prothonotary to dismiss that count.<sup>1</sup>

As required when deciding a motion to dismiss for lack of subject-matter jurisdiction or for failure to state a claim, see Fed. R. Civ. P. 12(b)(1), (6), I have taken as true all of the factual allegations in the complaint and made all reasonable

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1. The plaintiffs include other federal and state-law claims which are not the subject of this motion. (See Compl., Counts I-IV). They also named Steven B. Zats, Esquire, his law firm, Jody Zats, and S&L Marketing Research Company as defendants in Count V. Those defendants join in the motion to dismiss but do not raise any additional arguments. (See Doc. # 25). My reference to "defendants" in this opinion refers to the sheriff and prothonotary only, unless otherwise specified.

inferences in the plaintiffs' favor. I have also considered two additional sources of information: some of the relevant public records submitted by the parties of related state-court proceedings, the contents of which are not disputed, see Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.5 (3d Cir. 1994), and the attachments to the complaint. See Fed. R. Civ. P. 10(c).

#### I. FACTS

According to the complaint, Plaintiffs Linda Ralston, Kim Weyant, Geraldine Cropper, Kathleen Graves, David McCaughey, Marjorie and Leonard Pearson, Angela Spisso, and Dolores and Daniel Pannulla owed money to various providers of medical care.<sup>2</sup> To collect their debts, these providers retained Steven B. Zats, Esquire, and his law firm. Zats and his agents then contacted the plaintiffs demanding payment and, when it was not forthcoming, negotiated with the plaintiffs for payments over extended periods of time. The bargains they eventually reached were reduced to writing in "Payment Agreements" which also provided, in the event of default, for judgment to be confessed for the unpaid balance plus six percent interest, costs, and attorneys' fees. When the plaintiffs failed to make the

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2. The complaint names six other plaintiffs, Viola Hartman, Nora Fordham, Wanda Wilkerson, Anthony Maribello, Deborah Anderson, and Shawn Lent who do not make any claims against the sheriff or prothonotary. Thus, I will dismiss Count V as to these plaintiffs.

scheduled payments, at Zats' request, pursuant to the agreements and as then permitted by the Pennsylvania Rules of Civil Procedure, the prothonotary entered judgments against the plaintiffs. See Pa. R. Civ. P. 2950(a), 2956. Again at Zats' request, the prothonotary issued writs of execution which the sheriff served on the various banks at which the plaintiffs held accounts. See Pa. R. Civ. P. 3102, 3103(a), 3108(a). Pursuant to the writs of execution, the plaintiffs' bank accounts were frozen by their banks and at least some portions of the money in these accounts were paid to the creditors. The plaintiffs claim that the defendants violated their rights to due process by entering and execution upon the confessed judgments without prior notice and without a prior determination that the plaintiffs properly waived their rights to pre-deprivation notice and a hearing.

As relief, the plaintiffs seek a judgment declaring that the procedures used to enter and execute upon the confessed judgments in "non-commercial" cases in Pennsylvania (for the purposes of reviewing the defendants' motion to dismiss, I will draw the reasonable inference that the plaintiffs mean credit transactions involving individual consumers as contrasted with those involving a corporate debtor) violate the Due Process Clause of the Fourteenth Amendment. (Compl. ¶ 212). The plaintiffs also request an injunction prohibiting the defendants

from entering or executing upon confessed judgments and payment of their attorneys' fees and costs. (Id.).<sup>3</sup>

Prior to July 1, 1996, the Pennsylvania Rules of Civil Procedure allowed creditors to confess judgment against debtors without regard to the nature of the debtor. See Pa. R. Civ. P. 2950(a) (effective January 1, 1970). After the plaintiffs filed this lawsuit, the Supreme Court of Pennsylvania, pursuant to its rule-making authority, amended the confession of judgment rules on April 1, 1996. Those amendments became effective July 1, 1996. The amendments prohibit entry of judgment by confession in "credit transactions in which the party to whom credit is offered or extended is a natural person and the money, property or services which are the subject of the transaction are primarily for personal, family or household purposes." Pa. R. Civ. P. 2950 (April 1, 1996). By stipulation, the parties agreed that the amendments rendered moot the plaintiffs' requests for prospective declaratory and injunctive relief based on judgments entered and executed upon pursuant to these new rules.

The amendments, however, do not apply retroactively. Thus, the plaintiffs contend that they are still subject to garnishment, execution, or other collection procedures based on judgments entered pursuant to the old rules. For that reason, in the stipulation, the plaintiffs retained the right to pursue

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3. The plaintiffs request additional relief from Steven and Jody Zats, Steven Zats' law firm, and S&L Marketing in other counts of the complaint. That relief is not at issue in this motion.

claims relating to those judgments, but because the rules no longer allow entry of confessed judgment against consumers, the plaintiffs no longer seek to enjoin that practice.

## II. DISCUSSION

The defendants make several arguments relating to whether they are proper defendants, the plaintiffs' standing to bring this lawsuit, the existence of a case or controversy, the defendants' immunity from suit, whether the complaint properly pleads a cause of action under 42 U.S.C. § 1983, whether all necessary parties are present, and whether I should or must abstain from hearing it. For the reasons that follow, I will grant in part and deny in part the defendants' motion.

### A. The Alleged Constitutional Injury

Before considering the defendants' arguments for dismissal based on their subject-matter jurisdiction and related arguments, it is important to determine whether the plaintiffs properly allege a violation of a federal constitutional right or rights and, if so, the precise nature of the right or rights and the violation or violations. In their response to the defendants' motion to dismiss, the plaintiffs characterize their injury as a "depriv[ation] of their right to due process ... by allowing and effectuating deprivation of property without any valid waiver by plaintiffs of their due process rights." (Pls.'

Resp. at 1). The complaint similarly alleges that the defendants entered and executed upon the judgments without prior notice or a hearing and without obtaining valid waivers of the plaintiffs' due process rights to pre-deprivation notice and a hearing. (See, e.g., Compl. ¶¶ 1, 38, 72, 211(a), (b)). Thus, plaintiffs maintain that the prothonotary injured them by entering the confessed judgments without providing for notice and opportunity for hearing and the sheriff injured them by executing upon their property, again without notice or opportunity for hearing.

Entering judgment against a debtor or executing upon that judgment without providing prior notice or an opportunity to be heard is not necessarily unconstitutional because these rights may be waived by the debtor. D.H. Overmyer Co., Inc. v. Frick, 405 U.S. 174, 185 (1972); see also FRG, Inc. v. Manley, 919 F.2d 850, 855-56 (3d Cir. 1990). Accordingly, in order to state a federal due process violation, the plaintiffs must allege that they did not "knowingly waive [their] due process right to pre-judgment notice and hearing," Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1272 (3d Cir. 1994), but that the defendants entered and executed on the judgments anyway.<sup>4</sup> In order to be effective, the waiver must be with "understanding"

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4. It is true that the availability of a "prompt" post-seizure hearing could satisfy due process requirements. However, the United States Court of Appeals for the Third Circuit has specifically held that Pennsylvania's procedures then in force did not require a prompt post-seizure hearing. Pa. R. Civ. P. 2959; see Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1271 (3d Cir. 1994).

and "voluntary." Swarb v. Lennox, 405 U.S. 191, 198 (1972). Relying on Frick, the United States Court of Appeals for the Third Circuit has held that waivers of those rights in an out-of-court agreement allowing for confession of judgment must be "knowing and intelligent," the same standard employed in waiving certain rights in criminal cases. See Choi v. Kim, 50 F.3d 244, 249 n.10 (3d Cir. 1995); see also Jordan, 20 F.3d at 1272 ("The Pennsylvania system leading to confessed judgment and execution does comply with due process standards provided there has been an understanding and voluntary consent of the debtor in signing the document.") (quoting Swarb, 405 U.S. at 198). While the Court in Frick did not squarely hold that waivers of those rights must be knowing and intelligent in all cases involving confessed judgments, this Circuit has required such a waiver. In addition, "whether a debtor has effectively waived his right to pre-seizure notice and a hearing may not often be subject to quick resolution on a Rule 12(b)(6) motion to dismiss." Jordan, 20 F.3d at 1273.

It is the waiver issue that is at the heart of this case. Although the payment agreements explicitly authorize judgment by confession, four of the plaintiffs contend that they did not "understand" that provision of their payment agreement. Specifically, Plaintiff Ralston alleges that she was not represented by counsel and did not know that she was "giving up her right to notice and hearing and her opportunity to contest the debt." (Compl. ¶ 38). Plaintiff McCaughey alleges that he

first saw the payment agreement prior to a court hearing and did not understand the confession of judgment provision. (Compl. ¶¶ 114-15). Plaintiffs Marjorie and Leonard Pearson allege that they signed the agreement without having it explained to them, without assistance of counsel, and did not understand that they were giving up their right to notice and an opportunity to be heard. (Compl. ¶ 126).

While the complaint does not specifically allege that the remaining plaintiffs involved in this motion did not validly waive their due process right to notice and an opportunity to be heard before entry of judgment, the complaint contains the general factual allegations that the "judgments [were] entered by confession without any valid waiver by plaintiffs of their right to due process," (compl. at 1-2), and that the defendants "caused the entry ... of judgments by confession against plaintiffs ... without prior notice or opportunity for hearing and without valid, knowing and intentional waiver of the right to due process by ... plaintiffs." (Compl. ¶ 211(a)).

From these allegations, I can only conclude that all the plaintiffs, including those who did not make a specific averment, are contending they did not understand that they were giving up their constitutional rights to notice and hearing. An individual who did not "understand" the nature of the rights he was giving up or know that he has given up those rights does not intentionally relinquish a known right.

I recognize that the plaintiffs signed payment agreements that appear to be simple and understandable. I also recognize that there are indications in the complaint that at least some of the plaintiffs were experienced enough to understand that by signing the payment agreement, they would be giving up several important rights. It is entirely plausible that after discovery, the defendants will be able to establish that the plaintiffs knew exactly what they were doing when they made their bargains with Zats.

I also note, however, that the payment agreements signed by the plaintiffs do not explicitly state that default on the payment schedule could lead to their property being seized immediately and without notice. See Jordan, 20 F.3d at 1273 (noting that document evidencing waiver must establish that default may result in debtor's property being seized "forthwith"). While the language of the payment agreement may be clear to a lawyer and probably any experienced person who took the time to read it carefully, the confession of judgment provision contains technical, legal language. That part of each of the agreements provides:

Should [name of plaintiff] default in these payment terms, [name of plaintiff] AUTHORIZES AND EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD OF PENNSYLVANIA OR ELSEWHERE TO APPEAR FOR AND CONFESS JUDGMENT AGAINST [name of plaintiff] IN ANY COURT OF PENNSYLVANIA OR ANY OTHER STATE FOR SUCH AMOUNT AS MAY BE DUE OR DETERMINED TO BE DUE HEREON, UPON AVERMENT OF DEFAULT FILED, WITH COSTS OF SUIT, RELEASE OF ERRORS, WITHOUT STAY OF EXECUTION, TOGETHER WITH INTEREST AT

THE RATE OF 1/2 % PER MONTH (6% PER ANNUM)  
FROM THE DATES OF SERVICE (INCLUDING POST-  
JUDGMENT) AND WITH ATTORNEY'S FEES IN AN  
AMOUNT EQUAL TO \$150.00 OR 25% OF THE  
OUTSTANDING BALANCE AND INTEREST (WHICHEVER  
IS GREATER) ADDED FOR COLLECTION FEES.

BY SIGNING BELOW, [name of plaintiff]  
UNDERSTANDS THAT ALL RIGHTS TO A HEARING ARE  
BEING WAIVED. The parties have indicated  
that they have read this agreement in its  
entirety and understand the terms hereto.

(See, e.g., Compl. Ex. A). While most of the provision is relatively clear, the consequences of the phrases "upon averment of default filed," "release of errors," and "without stay of execution" may not be familiar concepts to an inexperienced individual who has not sought the advice of counsel. For the purposes of this motion, I must accept the allegations of the plaintiffs that they did not understand this part of the payment agreement. In sum, I cannot say as a matter of law that the agreement, standing on its own, overcomes the presumption against waivers of federal constitutional rights and establishes that the plaintiffs intentionally relinquished a known right. See Brookhart v. Janis, 384 U.S. 1, 4 (1966).

The plaintiffs have alleged the minimum required to withstand a motion to dismiss. I do not hold that the plaintiffs have an iron-clad case against any of the defendants, that this case will survive summary judgment, or that the plaintiffs would win at trial. I merely conclude that the plaintiffs have alleged enough that, if their allegations are proven by competent evidence, a reasonable jury could -- not "must" or "probably

will," but only could -- find that they did not properly waive their due process rights to pre-deprivation notice and a hearing. Even so, at this point, I am required to give the plaintiffs the opportunity to prove their allegations that when they signed the payment agreements, they did not understand that they were giving up their due process rights.

As stated earlier, whether the plaintiffs properly waived their rights to notice and a hearing before the entry of and execution upon the confessed judgments is a dispositive issue in this case. For that reason, I will order the parties immediately to conduct discovery on that matter.

B. The Sheriff and Prothonotary are Proper Defendants

The sheriff and prothonotary initially argue that I do not have subject-matter jurisdiction because the plaintiffs fail to allege a "case or controversy." See U.S. Const. art. III. The defendants contend that their interests are not sufficiently adverse to the plaintiffs' interests and that they have little or no interest in defending Pennsylvania's confession of judgment procedures. Their interests are so minimal, the defendants claim, because their duties under the procedures are merely ministerial and nondiscretionary -- they have no choice but to enter and execute upon confessed judgments at the creditors' request. According to the defendants, only the Supreme Court of Pennsylvania has an interest in defending the procedures they utilized because only it may enact or modify the governing rules.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that a state official is a proper defendant in a suit challenging the constitutionality of a state law if, by virtue of his office, the official has "some connection" with the enforcement of the law. Id. at 156-57. In Young, the defendant, the state attorney general, had the authority, among other things, to bring a civil action to enforce an allegedly unconstitutional state law governing the setting of railroad transport rates. The attorney general was a proper defendant, the Court held, because if he brought suit against the plaintiff to enforce the allegedly unconstitutional law, the attorney general would violate the plaintiff's rights. The Court reasoned that because the state attorney general's actions would be the cause of the plaintiff's injury, he was a proper defendant.

Similarly, in Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980), the Third Circuit held that the Philadelphia County prothonotary and sheriff were proper defendants in a lawsuit challenging the constitutionality of Pennsylvania's post-judgment garnishment procedures. There, state law made the sheriff and prothonotary responsible for enforcing the allegedly unconstitutional garnishment procedures. The sheriff and prothonotary were proper defendants, the Finberg court reasoned, because like the state attorney general in Young, the defendants' enforcement of the allegedly unconstitutional procedures caused a violation of the plaintiff's rights. Accord Chaloux v. Killeen, 886 F.2d 247, 251 (9th Cir. 1989).

In Pennsylvania, the sheriff and prothonotary are intimately involved in Pennsylvania's procedures relating to the entry and enforcement of confessed judgments. See Jordan, 20 F.3d at 1262-64 (thoroughly describing Pennsylvania's confession of judgment procedures). Under the old rules of civil procedure, county prothonotaries were required to enter judgment against a defendant if a plaintiff presented an original agreement signed by the defendant allowing confession of judgment. Pa. R. Civ. P. 2950(a), 2956 (pre-amendment version). Entry of the judgment permitted the plaintiff to obtain satisfaction by attaching property held by the defendant or garnishing the defendant's property held by a third party. To do so, the plaintiff filed a praecipe for a writ of execution with the prothonotary. Pa. R. Civ. P. 3103(a) (pre-amendment version). The prothonotary then issued a writ of execution to the county sheriff who was required to serve the writ either on the defendant or on the person holding the property. Pa. R. Civ. P. 3108(a)(1), 3111(a) (pre-amendment version). In the complaint, Plaintiffs Ralston, Weyant, Cropper, Graves, McCaughey, Spisso, and the Pannullas allege that the prothonotary entered confessed judgments against them and that pursuant to state procedures, the sheriff executed upon those judgments without either giving notice or determining whether the plaintiffs had properly waived their rights to contest the entry of and execution upon the judgments. (See, e.g., Compl. ¶¶ 1, 39, 49, 74, 90, 91, 117, 158, 172). This conduct satisfies the standards for proper defendants described

in Young and Finberg because the defendants' allegedly unconstitutional actions caused the plaintiffs' injuries.

The Finberg Court found unpersuasive the same argument the defendants make in this case. It rejected the contention that the sheriff and prothonotary were not proper defendants because of their purported lack of interest in defending the state procedures. The court held that their reliance on and enforcement of the rules caused the plaintiff's injuries; the sheriff and prothonotary could not now claim that they had no interest in defending those rules. Doing so would be "inconsistent with their obligations to respect the constitutional rights of citizens." 634 F.2d at 54. The same holds true for these defendants. They relied on the rules of civil procedure when they entered and executed upon the confessed judgments against the plaintiffs.<sup>5</sup> They cannot now properly claim a lack of interest in defending those rules.

The Finberg Court also rejected the contention that dismissal was required because the defendants' duties are only "ministerial" and that the rules require them to act at a

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5. I recognize that what I am saying would mean that the sheriff and prothonotary were caught between the anvil of the Constitution and the sledge of the old rules of civil procedure. Armed with those rules and the payment agreements, Zats could insist that judgments be entered and enforced. If they did as he requested, the sheriff and prothonotary might then be violating the debtors' constitutional rights. While I sympathize with the sheriff's and prothonotary's plight, both the Supreme Court and Third Circuit precedent mandate my decision. Further, the existence of that precedent and its focus on Pennsylvania law gave the defendants at least some notice that the confession of judgment and execution procedures could come under attack.

judgment creditor's request. Pursuant to Young and Finberg, I may not inquire into the nature of the defendants' duties but rather must examine the effect of their performance on the plaintiffs. In the instant case, no matter how ministerial or nondiscretionary their duties are, if the plaintiffs' allegations are true, the defendants caused their injuries by entering constitutionally infirm judgments and executing upon them in violation of due process. My function is not to select the most suitable defendants, but to "decide whether the complaint has named defendants who meet the prerequisites to adjudication in federal court." Finberg, 634 F.2d at 53. I find that these defendants meet those prerequisites.

C. The Requests For Injunctive and Declaratory Relief

The defendants next argue that I must dismiss the request for an injunction because the plaintiffs do not allege they are subject to an "immediate" and "substantial" injury which may be remedied by an injunction. See Roe v. Operation Rescue, 919 F.2d 857, 864 (3d Cir. 1990). They claim that, through the entry of and execution upon the confessed judgments, the injury to the plaintiffs has already occurred. Thus, the defendants contend, entering an injunction will not prevent any future harm because the plaintiffs have already suffered the full extent of their injuries.

I first note that the issues have been substantially narrowed by the parties' agreement that the new rules of civil

procedure provide the relief sought by the plaintiffs as to confessed judgments entered and executed upon pursuant to those new rules. Under the new rules, the plaintiffs are no longer subject to the entry of confessed judgments. Pa. R. Civ. P. 2950 (adopted April 1, 1996). Obviously then, the entry of confessed judgments no longer poses any threat of injury to the plaintiffs. Therefore, because the rules already adequately protect the plaintiffs, I will dismiss their request for an injunction prohibiting the entry of confessed judgments in "non-commercial" cases.

As the plaintiffs point out, however, those who have not satisfied the judgments, Ralston, Weyant, McCaughey, the Pearsons, and Spisso, are still subject to execution based on the allegedly constitutionally infirm judgments entered pursuant to the old rules. This poses not only an immediate injury because the creditors may enforce the judgments at any time, but also a substantial injury because it would result in a violation of the plaintiffs' due process rights. See Carey v. Piphus, 435 U.S. 247, 266 (1978) (noting importance of individuals' due process rights and holding that their violation is injury). Upon request of Zats or his clients, the defendants could issue and serve writs of execution based upon the allegedly constitutionally infirm judgments by garnishing the plaintiffs' bank accounts or seizing other nonexempt personal property. See Finberg, 634 F.2d at 55. An injunction prohibiting further execution based on those judgments would end the allegedly unconstitutional action.

Accordingly, I must refuse to dismiss the request for an injunction as to those plaintiffs.

Plaintiffs Cropper and the Pannullas admit they have satisfied the confessed judgments entered against them. (Pls.' Resp. to Defs.' Mot. to Dismiss at 4; Pls.' Supp. Mem. of Law at 4; Compl. ¶ 174). Under Pennsylvania law, satisfaction discharges a judgment; no further proceedings on it, including execution, are allowed. Wilk v. Kochara, 647 A.2d 595, 596 (Pa. Super. Ct. 1994); Linde Enters. v. Hazelton City Auth., 602 A.2d 897, 902 (Pa. Super. Ct.), alloc. denied, 617 A.2d 1275 (Pa. 1992). Thus, neither the sheriff nor the prothonotary can do anything that would obtain further payments on these judgments even if requested to do so by Zats or his clients. Because Cropper and the Pannullas are no longer subject to the injury of further execution, an injunction is not proper and the request for that relief must be dismissed as to these plaintiffs.

The defendants also claim that I do not have jurisdiction to order declaratory relief because of insufficiencies in the complaint.<sup>6</sup> The defendants' argument misses the mark. Following the narrowing of the issues, the dispute in this case concerns whether the sheriff and prothonotary violated the plaintiffs' rights by entering and executing upon allegedly unconstitutional confessed judgments.

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6. The defendants do not argue that they are state officials and thus, pursuant to the Eleventh Amendment to the United States Constitution, immune from suit for this type of relief.

This dispute is real. The plaintiffs claim the defendants violated their constitutional rights -- the defendants deny it. Any declaration I might make that the confessed judgments were entered and executed upon in violation of the plaintiffs' federal due process rights would settle this dispute. Finally, such a declaration will be "useful" as a means of emphasizing that in the future the prothonotary and sheriff must assure themselves that any waiver of constitutional rights is real and not merely purported. See generally Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 647-51 (3d Cir. 1990) (discussing required allegations for declaratory judgment). Thus, I have subject-matter jurisdiction and will not dismiss the request for declaratory relief.

D. The Plaintiffs Have Standing and Their Claims are not Moot

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Defendants make several related arguments that the plaintiffs have not suffered a sufficiently concrete injury, that the defendants did not cause the plaintiffs' alleged injury, and that any relief I would order would not remedy the plaintiffs' alleged injuries. The essence of the defendants' arguments is that I lack subject-matter jurisdiction because of mootness, failure to allege a case or controversy, or lack of standing.

Because resolution of the standing issue disposes of all of these contentions, I will address it. In order to have

standing to bring a lawsuit in federal court, a plaintiff must satisfy the requirements of Article III of the United States Constitution. First, he must allege that he suffered an "actual" injury. This injury must be "distinct" and "palpable," and not merely "abstract." Second, it must be caused by the allegedly illegal action of the defendants. Third, the injury must be subject to redress by a favorable decision in the district court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

As I explained above, the plaintiffs sufficiently allege each of these elements in their complaint. They claim a denial of their rights to procedural due process, namely that the defendants entered and executed upon the confessed judgments without giving notice or an opportunity to be heard despite there having been no waiver by the plaintiffs of those rights. They claim those actions resulted in their property being seized. A violation of the right to procedural due process is a distinct, palpable injury and is not merely abstract. See Carey, 435 U.S. at 266 (denial of procedural due process actionable under § 1983); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1077 (3d Cir. 1990) (same). Further, the plaintiffs aver that the allegedly illegal actions of the defendants caused that injury. The prothonotary entered the judgments against them, and the sheriff served the writs of execution directing the seizure of the plaintiffs' property and causing the seizure of their bank accounts. Finally, a judgment in the plaintiffs' favor would

declare that the entry of and execution upon the judgments violated due process, and an injunction would prevent additional attempts to satisfy those allegedly illegal judgments.

For those reasons, the plaintiffs have standing to bring this action. Also, for these same reasons, I conclude that the parties have a live dispute. Thus, a case or controversy exists and the plaintiffs' claims are not moot.<sup>7</sup>

E. The Plaintiffs Properly Allege a Section 1983 Claim

The defendants also argue that the plaintiffs have failed to allege all of the elements of a § 1983 claim. They are wrong.

To state a § 1983 procedural due process claim, the plaintiffs must allege that: (1) they were deprived of a protected property interest; (2) the deprivation was without due process; (3) the defendants caused the deprivation; (4) the defendants acted under color of state law; and (5) the plaintiffs suffered an injury. Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). Additionally, because the plaintiffs sued the defendants in their official capacities, they must allege that the defendants acted pursuant to an official custom or policy of

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7. The defendants also contend that the plaintiffs' claims are moot because they may obtain relief in the state courts. Because the mere availability of an alternate forum does not require dismissal of a claim from federal court, I must reject that argument. Cf. Schall v. Joyce, 885 F.2d 101, 112 (3d Cir. 1989) (abstention not proper merely because state law makes relief available to plaintiff).

the state. As I have explained, in their complaint the plaintiffs allege that they were deprived of a property right without procedural due process, that the defendants caused that deprivation, and that they suffered an injury. The complaint also satisfies the custom or policy requirement because the plaintiffs allege that the defendants acted pursuant to authority granted them under the previous version of the Pennsylvania Rules of Civil Procedure, clearly an official state policy. Moreover, the plaintiffs sufficiently allege state action as both defendants are state actors and acted pursuant to the authority granted them under these rules.<sup>8</sup>

F. The Supreme Court of Pennsylvania is Not a Necessary Party

The defendants next contend that I must order the joinder of the Supreme Court of Pennsylvania as a defendant or, if I do not do so, dismiss this case because the court is an "indispensable party."

Federal Rule of Civil Procedure 19 governs the joinder of necessary and indispensable parties. Under the federal

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8. The defendants argue that qualified immunity requires dismissal of Count V. That doctrine would protect them only from money damages and not from the injunction, declaratory relief, or statutory attorneys' fees and costs requested in the complaint. See Harlow v. Fitzgerald, 457 U.S. 800, 819 n.34 (1982); Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975). The defendants' claim that they are protected from suit by a state immunity statute is meritless, because that immunity will not protect them from allegations of federal statutory violations brought in federal court.

joinder rules, there are three types of defendants: proper, necessary, and indispensable. A proper defendant is one that may be joined in a lawsuit. A person may be joined as a defendant if the plaintiff asserts a right to relief against that person either jointly, severally, or in the alternative with respect to the same transaction, occurrence, or series of transactions or occurrences and any question of law or fact common to all defendants will arise in the action. Fed. R. Civ. P. 20(a).

A necessary party (also referred to as the "absent person") is one that must be joined in the lawsuit because complete relief cannot be accorded among those already parties, Fed. R. Civ. P. 19(a)(1); the absent person claims an interest in the litigation, and disposition of the suit in his absence may impede or impair his ability to protect that interest, Fed. R. Civ. P. 19(a)(2)(i); or the absent person claims an interest in the litigation, and disposition of the suit in his absence will leave a party to the suit subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. Fed. R. Civ. P. 19(a)(2)(ii); see also Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404-05 (3d Cir. 1993).

An indispensable party is a necessary one who cannot be joined and, in whose absence, the action cannot in equity or good conscience proceed. Fed. R. Civ. P. 19(b); see also HB Gen. Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1190 (3d Cir. 1996); 4 James W. Moore, et al., Moore's Federal Practice

§ 19.02[d][2] (3d ed. 1997).

In their motion, the defendants do not draw a distinction between a necessary party and an indispensable one. They argue that the Supreme Court of Pennsylvania is an indispensable party and must be joined. However, as just stated, an indispensable party is one that cannot be joined. See Fed. R. Civ. P. 19(b); Shepard Niles, 11 F.3d at 405. There is no indication in the parties' papers that joining the Supreme Court of Pennsylvania would destroy subject-matter jurisdiction as to the entire lawsuit, make venue improper, or that the court is not subject to service of process.<sup>9</sup> It follows that the analysis must be to determine whether the court is a necessary party as defined by Rule 19(a).

Specifically, the defendants contend that the Supreme Court of Pennsylvania is necessary because only it has the authority to change the confession of judgment rules. According to the defendants, any order that I might enter granting the plaintiffs relief must include a direction to the Supreme Court of Pennsylvania to modify the rules to make them constitutional.

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9. Of course, the immunity from suit provided to states in the Eleventh Amendment would prevent naming the Supreme Court of Pennsylvania, itself, and state-federal comity concerns would raise problems with my entering an order requiring the court to change its rules of civil procedure. It may be, however, that the individual justices could be named as defendants with the request for relief crafted as one for prospective declaratory judgment or injunction pursuant to Ex Parte Young, 209 U.S. 123 (1908). Given my conclusion that the court is not a necessary or indispensable party, I need not reach this issue and will treat the court as though it is a suable entity for the purposes of this discussion.

(Defs.' Mot. to Dismiss at 52). The defendants also argue that the court is necessary because it has a greater incentive to defend the constitutionality of the rules than the sheriff and prothonotary given that the court enacted them. (Id.). Finally, the defendants contend that they will be subject to inconsistent or multiple obligations if the Supreme Court of Pennsylvania is not joined. The defendants do not identify these conflicting obligations. For the following reasons, the defendants' arguments do not require joinder.

First, complete relief can be accorded among those already parties even if the Supreme Court of Pennsylvania is not joined as a defendant because a decision in the plaintiffs' favor would preclude the sheriff's executing upon the relevant judgments. The plaintiffs do not request an order requiring the Supreme Court of Pennsylvania to change the confession of judgment rules. Instead, the plaintiffs are requesting, among other things, that I strike down the rules, i.e. find them unconstitutional. I note that, in light of the United States Supreme Court cases holding that confession of judgment procedures are proper when a debtor validly waives his right to notice and an opportunity to be heard, it is unlikely that I could find the rules unconstitutional on their face in all cases involving consumers as requested by the plaintiffs. Frick, 405 U.S. at 185; see also Manley, 919 F.2d at 855-56. It is more likely that -- at most -- I would find that the confessions of judgment here were entered against and executed upon these

plaintiffs in violation of their federal constitutional rights. Such a decree would not require the joining of the Supreme Court of Pennsylvania because I would not have entered an order requiring it to do anything. See Dintino v. Dorsey, 91 F.R.D. 280, 283 (E.D. Pa. 1981); Finberg, 634 F.2d at 55.<sup>10</sup>

Further, a decision in this case that the rules are unconstitutional will not impair or impede any interest of the Supreme Court of Pennsylvania cognizable under Rule 19(a)(2)(ii).

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10. There is a facially appealing argument that the Supreme Court of Pennsylvania adopted the rules and, therefore, is the "real" wrongdoer here. Pursuant to this argument, three entities allegedly caused the plaintiffs' injuries: the court, which was the major force behind the injuries because it enacted the rules, and the sheriff and prothonotary who only minimally participated in the violation of the plaintiffs' rights because their roles are ministerial. Viewed in this light, the Supreme Court of Pennsylvania appears to be "getting away with something" because only the current defendants, and not the court, will be held liable. The argument goes that the Supreme Court of Pennsylvania, the sheriff, and the prothonotary are jointly liable, i.e. joint tortfeasors, and should all be defendants in the suit.

The United States Supreme Court has specifically rejected this argument and held that a joint tortfeasor (one who along with others causes an injury) is not a necessary party for purposes of Rule 19. Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7 (1990); see also 7 Charles A. Wright, et al., Federal Practice and Procedure § 1623, at 342-43 (2d ed. 1986). The Supreme Court rejected the argument because nothing in the language of the rule requires automatic compulsory joinder of all joint tortfeasors, see Fed. R. Civ. P. 19 advisory committee note ("a joint tortfeasor with the usual 'joint and several liability' is merely a permissive party to an action with like liability"), and because Rule 19 incorporates the presumption that the plaintiff may decide whom to sue. 7 Wright, et al., § 1602, at 18. Accordingly, there must be a strong reason (one of those listed in Rule 19) in order to override the plaintiffs' selection of the defendants and force them to name others. The existence of a joint tortfeasor is not one of those reasons. See Temple, 498 U.S. at 8 (status as joint tortfeasor does not meet threshold requirements of Rule 19(a)); 4 Moore, et al. at § 19.02[1] (same).

The most such an order will mean to the court is a potential precedent unfavorable to some of its prior rules. Preventing the existence of unfavorable precedent is simply not a sufficient reason to override the plaintiffs' autonomy and require the joining of the supreme court as a party. See Shepard Niles, 11 F.3d at 407, 411; Dintino, 91 F.R.D. at 283. This follows from the fact that no decision of mine will bind (via res judicata or collateral estoppel) anyone who is not a party here. Therefore, the Supreme Court of Pennsylvania is free to argue, if sued by some other plaintiff, that its rules were constitutional. Further, one could imagine the havoc wrought on the legal system if a party became "necessary" every time it faced the possibility of an unfavorable precedent. See Shepard Niles, 11 F.3d at 411. Indeed, the courts would be buried in an avalanche of Rule 19 motions because every party potentially adversely affected by a ruling would get the chance to argue for or against it.

Next, I turn to the defendants' argument that they are not the proper parties to defend the constitutionality of the rules because they have less incentive to do so than the Supreme Court of Pennsylvania. (See, e.g., Defs.' Mot. to Dismiss at 2 and my discussion, supra, at 11-15). If the defendants do not have incentive to defend the rules, they may choose -- as they have so far -- to defend the lawsuit on the ground that their conduct did not violate the Constitution. (See, e.g., Defs.' Mot. to Dismiss at 9-17 (arguing that each plaintiff afforded due process); at 40 ("each of the ... Plaintiffs availed themselves

of their constitutional rights"); at 46 ("Plaintiffs ... failed to assert any conduct by the [defendants] which allegedly resulted in a deprivation of rights guaranteed by the United States Constitution"). An absent person's greater incentive to defend the rules does not make him a necessary party. Neither the plaintiffs nor I can require the defendants to present any particular defense. If the defendants are successful in their contentions following discovery, then I will never even reach the issue of the constitutionality of the rules. Regardless, the defendants' interest is to avoid liability and that interest is sufficient incentive to defend this lawsuit.

Further, the defendants point to no possibly inconsistent obligations arising from the Supreme Court of Pennsylvania's absence. I will not try to imagine what they might be either.

#### G. Abstention

Finally, the defendants argue that I should abstain based either on Younger v. Harris, 401 U.S. 37 (1971), as to Graves' claim, or as to the entire lawsuit pursuant to Burford v. Sun Oil Co., 319 U.S. 315 (1943), or Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). I will first address the Younger argument. Abstention is required under Younger if there is: (1) an ongoing state judicial proceeding (2) that implicates important state interests (3) which affords an adequate opportunity to raise federal constitutional claims.

See Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 432 (1982). If this test is met, abstention is required. Colorado River, 424 U.S. at 816 n.22.

Because that test is met as to Graves, I must abstain as to her claim in Count V. First, there is an ongoing state judicial proceeding. Following the entry of and execution upon the confessed judgment which is the subject of this lawsuit, Graves petitioned the Montgomery County Court of Common Pleas to open that judgment. See Pa. R. Civ. P. 2959. When that court denied her petition, she appealed to the Pennsylvania Superior Court, which remanded the case to the lower court to consider Graves' arguments that the entry of and execution upon the confessed judgment violated federal due process. By all indications, that proceeding is still pending in the court of common pleas.<sup>11</sup> Second, the pending judicial proceeding implicates important state interests, namely, the "special interest that a state has in enforcing the orders and judgments of its courts." Schall v. Joyce, 885 F.2d 101, 109 (3d Cir. 1989); see also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 13 (1987). Finally, there is no doubt that Graves has an adequate opportunity to present her federal constitutional claims because she actually presented those claims in her appeal to the superior court. See Forman v. Graves, Appeal No. 01584 Philadelphia 1994 (Pa. Super. Ct. Mar 28, 1995). The superior court ordered the

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11. If it is no longer pending, the parties shall notify me by letter of the date and circumstances of its termination.

lower court to consider Graves' constitutional arguments, and nothing in Pennsylvania law limits her rights to litigate those claims there. See Pa. R. Civ. P. 2959.<sup>12</sup>

I conclude that as to the entire lawsuit, however, abstention under Burford is not warranted. Unlike Younger abstention, Burford abstention is not mandatory; I have discretion to decline to hear a claim when appropriate circumstances are present. It is proper only when timely and adequate state procedures for review are available and when there are either (1) "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or [(2)] where the exercise of federal review of the question in a case and similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Feige v. Sechrest, 90 F.3d 846, 847 (3d Cir. 1996) (emphasis added). It is axiomatic that abstention under Burford is an exceptional course and that federal courts have an "unflagging obligation" to exercise the jurisdiction given them

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12. The plaintiffs also argue that Younger abstention is inappropriate because Stephen Zats filed the suits against them in bad faith, to harass them, or because some other extraordinary circumstances make abstention improper. Their only support for this argument is the fact that the judgments were entered pursuant to the confessed judgment provision in the payment agreements, that such a provision violates federal regulations, and that Zats filed the judgments in an improper venue. While those facts may be grounds to strike the judgment before the state court, they do not, by themselves, establish bad faith, harassment, or extraordinary circumstances sufficient to override Younger.

by Congress. See, e.g., Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995). Burford abstention is appropriate only when it would prevent lower federal court interference in determinations of "inherently local matters" made by state courts pursuant to complex and detailed state regulatory schemes. General Glass Indus. Corp. v. Monsour Med. Found., 973 F.2d 197, 200 (3d Cir. 1992). Burford involved Texas' highly structured administrative scheme regulating oil and gas field mining rights. The Third Circuit has allowed Burford abstention only in cases where a highly structured state regulatory scheme is in place, such as ones establishing rates for natural gas, discontinuing railroad passenger or intrastate air service, or applying state eminent domain procedures. See, e.g., Grode v. Mutual Fire, Marine & Inland Ins. Co., 8 F.3d 953, 956 (3d Cir. 1993) (citations omitted).

The conditions required for Burford abstention do not exist in this case. First, Pennsylvania's procedures to collect consumer debts are not subject to complex and detailed regulations, but rather to straightforward court procedural rules, the type which federal courts examine and construe virtually every day. See Baltimore Bank for Coops. v. Farmers Cheese Coop., 583 F.2d 104, 110 (3d Cir. 1978) (deciding basic debt-collection issue not outside of federal courts' competence and did not require Burford abstention). Second, the issues raised in connection with Pennsylvania's confession of judgment and execution procedures do not relate only to "inherently local

concerns" or raise "difficult questions of state law." Whether a particular state policy complies with constitutional due process requirements is a federal question. In fact, Count V of the complaint raises no state-law questions; neither the legality of the procedures under state law nor the meaning of the state law is at issue in this case. Third, any decision I reach on the merits of this case will not improperly interfere with Pennsylvania's ability to implement a coherent policy, especially since the parties agree that the policy presently in place -- the new rules of civil procedure -- passes constitutional muster. In short, there are no special circumstances warranting abstention. For those reasons, I must decline to abstain based on Burford.

Abstention under Colorado River is even more rare than under Burford. I have examined the appropriate factors -- the convenience of this forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained in the concurrent forums -- and find they do not warrant abstention. Simply put, this is not a case where there is "clear justification" for abstention pursuant to Colorado River. See Grode, 8 F.3d at 953.<sup>13</sup>

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13. The defendants also argue that res judicata bars Graves' claim because she litigated the constitutionality of the entry of and execution upon the confessed judgment in the state courts. Because I must abstain from hearing her claim, I need not decide this issue.

The defendants also contend that collateral estoppel precludes all the defendants from pursuing their claims before me by virtue of the entry of the confessed of judgments in the state courts. Whether a party is collaterally estopped from raising a

(continued...)

### III. CONCLUSION

For the reasons stated, I will grant the defendants' motion to dismiss as to Plaintiffs Graves, Cropper, the Pannullas, Viola Hartman, Nora Fordham, Wanda Wilkerson, Anthony Maribello, Deborah Anderson, and Shawn Lent and to the extent the remaining plaintiffs seek an injunction prohibiting the entry of confessed judgments arising out of consumer debts, but deny the motion in all other respects.

An appropriate order follows.

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13. (...continued)  
defense is governed in this case by Pennsylvania law. Pennsylvania courts do not give preclusive effect to confessed judgments. In re Graves, 33 F.3d 242, 248 (3d Cir. 1994).

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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LINDA RALSTON, et al. :  
 :  
 v. : CIVIL ACTION NO. 94-3723  
 :  
 STEVEN B. ZATS, ESQUIRE, et al. :  
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O R D E R

AND NOW, this 25th day of August, 1997, it is hereby  
ORDERED that:

1. The defendants' motion to dismiss is GRANTED in  
part and DENIED in part.

2. Count V of the complaint is DISMISSED as to  
Plaintiffs Kathleen Graves, Viola Hartman, Nora Fordham, Wanda  
Wilkerson, Anthony Maribello, Deborah Anderson, and Shawn Lent.

3. To the extent that Count V requests an injunction  
prohibiting the Montgomery County sheriff and prothonotary from  
entering confessed judgments in cases involving consumer debts,  
it is DISMISSED as moot.

4. To the extent that Count V requests an injunction  
prohibiting the sheriff and prothonotary from executing upon  
confessed judgments entered against Plaintiffs Cropper and the  
Pannullas, it is DISMISSED as moot.

5. The defendants' motion to dismiss is DENIED in all  
other respects.

6. In the interests of judicial economy and  
efficiency, the parties are directed immediately to focus  
discovery on the issue of whether the remaining plaintiffs

properly waived their right to notice and an opportunity to be heard prior to entry of and execution upon the confessed judgments. This discovery shall include depositions of the remaining plaintiffs who assert claims against the sheriff and prothonotary.

7. Prior to the September 9, 1997, telephone conference, all counsel shall attempt to agree on a proposed schedule regarding discovery on the waiver issue.

BY THE COURT:

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J.