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A MEANINGFUL OPPORTUNITY TO BE HEARD

HAROLD BROWN*

Sniadach,¹ *Randone*,² and soon, *Fuentes*,³ all cases to reckon with, as Dean Pound might have said in "Progress of the Law" (or as Frankfurter did say, "The history of American freedom is in no small measure the history of procedure.")⁴ Within the three year span since *Sniadach* first declared that the opportunity to be heard must be "meaningful" in fact as well as in theory, there has been a literal decimation of prejudgment attachment statutes. But there is much surprise in store for those who have failed to envision the far broader implications in the now constitutionally fostered requirement that "society . . . must recognize a moral obligation to see that disputes are resolved on the basis of their merits rather than on the basis of the relative power of the contestants."⁵

While technically *Sniadach* only found a lack of due process in a Wisconsin wage garnishment statute which failed to provide for a prior court hearing, thus sanctioning a "taking" without provision for prior notice and hearing, its import has been more broadly recognized as an assault on a whole variety of *ex parte* prejudgment remedies. In addition to its most recent application to a so-called trustee attachment, or garnishment, of a bank account,⁶ due process has invalidated statutory replevin,⁷ seizure by an innkeeper,⁸ confession of judgment,⁹ repossession of residence,¹⁰ landlord's levy on tenant's possessions,¹¹ seizure by

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¹ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

² *Randone v. Appellate Dep't of Superior Ct. of Sacramento County*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

³ *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

⁴ *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

⁵ B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 79 (1970) [hereinafter B. CHRISTENSEN]. See Brown & Cohen, Book Review, 5 VAL. L. REV. 683 (1971). The *Randone* court emphasized that, "[*Sniadach*] is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court." 5 Cal. 3d at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718.

⁶ *Randone v. Appellate Dep't of Superior Ct. of Sacramento County*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

⁷ *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

⁸ *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970).

⁹ *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1970).

¹⁰ *Mihans v. Municipal Ct.*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1st Ct. App. 1970).

¹¹ *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

a hospital,¹² imprisonment of a debtor,¹³ required prior payment of rent as a condition precedent to a proffered defense,¹⁴ termination of employment,¹⁵ and seizure by a landlord.¹⁶ Since many states have a variety of such statutory attachment procedures, without provision for pre-attachment notice and opportunity to be heard,¹⁷ it is patent that a silent revolution has occurred.

Nonetheless, in many jurisdictions, it has been "business as usual" with no visible change in statutory attachment procedures that are patently void on their face.¹⁸ Since the man on the street can hardly be expected to become sufficiently knowledgeable in such an abstruse subject, it is incumbent on counsel to assert these constitutional safeguards. Where such fundamental rights are involved, perhaps courts should act *sua sponte*. To the apparent dismay of many, since *Sniadach* and *Randone* each involved less than three hundred dollars, the laboring oar in their trials and appeals accordingly fell to conception and prosecution by OEO funded law offices.

While it is necessary to probe the rationale of these cases for the standards governing existing statutes as well as a guide for remedial proposals, it will be seen that a narrow view of their principles will not suffice. To the contrary, there has now developed a hard-nosed, practical approach to the constitutional guarantees that there be real meaning in the opportunity to be heard. In contrast with the previous syllogism under which a wage garnishment had been condoned as a "temporary" measure, rather than the "taking of property,"¹⁹ *Sniadach* enunciated the materialistic view that the "use" of the attached wages between garnishment and ultimate decision, was indeed "property,"²⁰ the denial

¹² *McConaghley v. City of New York*, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (N.Y.C. Civ. Ct. N.Y. County 1969).

¹³ *Desmond v. Hachey*, 315 F. Supp. 38 (D. Me. 1970).

¹⁴ *Amanuensis Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. N.Y. County 1971).

¹⁵ *Ricucci v. United States*, 425 F.2d 1252 (Ct. Cl. 1970).

¹⁶ See *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (seizure of clothing and personal possessions by innkeeper). *Mihans v. Municipal Ct.*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1st. Ct. App. 1970) (summary repossession of a debtor's dwelling); *Downs v. Jacobs*, 272 A.2d 706 (Del. Sup. Ct. 1970).

¹⁷ E.g., in Massachusetts, see trustee process (MASS. ANN. LAWS ch. 246, §§ 1 *et seq.* (Cum. Supp. 1963)); arrest on mesne process, with postjudicial sanction (*id.* ch. 224, §§ 1 *et seq.* (1955 recompilation)); attachment of real and personal property (*id.* ch. 223, § 42) with certain exceptions, such as for an automobile (*id.* ch. 223, § 44A), wherein prior court approval is required, or for garnishment of wages, where prior judgment as well as court approval is required (*id.* ch. 240, § 32 (Cum. Supp. 1963)).

¹⁸ See *Randone v. Appellate Dep't of Superior Ct. of Sacramento County*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

¹⁹ *McInnes v. McKay*, 27 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929).

²⁰ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J. concurring).

of which often resulted in serious hardship.²¹ In opening the door for discussion of "serious economic hardship," the Supreme Court has thus swept aside once and for all, the intransigence of the legal profession in failing to address itself to the economic realities of litigational expenses. It is this refreshingly clean approach that has excited so much law review exposition by neophyte attorneys.²²

To illustrate, while noting the argument that because a real estate attachment does not deny an owner the possessory use of his property, thus constituting a seemingly less severe deprivation, *Randone* acknowledged the comment that such freely allowed attachments may precipitate bankruptcies as the only procedure through which creditors can obtain pro rata treatment²³ rather than be subjected to the accidental priorities in their order of attachments.²⁴ Such attachments could thus be regarded as an invitation to bankruptcy for going concerns that might otherwise remain solvent. It might also have been noted that a property lien constitutes an immediate disparagement of credit, as well as a diminution in mortgageability. Strangely, while the ability to pay one's debts as they mature has long been recognized in insolvency matters, the importance of "cash flow" for litigants has been substantially ignored.

Perhaps more boldly, consideration was also given to the claim that in the absence of the availability of garnishment without prior notice, unsecured creditors would either have to increase their interest rates or decline to extend credit to marginal borrowers.²⁵ While noting that such claims were not proven²⁶ and that such liberal credit extension policies might not serve the public interest,²⁷ the court found the

²¹ *Id.* at 341-42.

²² See, e.g., Note, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A. L. REV. 837 (1971) [hereinafter *Constitutional Validity*]; Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970); Comment, *Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 12 B.C. IND. & COM. L. REV. 700 (1971); Comment, *Prejudgment Wage Garnishment: Notice and Hearing Requirements Under Sniadach v. Family Finance Corp.*, 11 B.C. IND. & COM. L. REV. 462 (1970).

²³ 5 Cal. 3d at 544-45 n.4, 556 n.18, 488 P.2d at 18 n.4, 26 n.18, 96 Cal. Rptr. at 714 n.4, 722 n.18.

²⁴ Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1264 (1970).

²⁵ 5 Cal. 3d at 555, 488 P.2d at 25-26, 96 Cal. Rptr. 721-22.

²⁶ *Id.*, 488 P.2d at 26, 96 Cal. Rptr. at 722, citing *Constitutional Validity* at 846 and Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1240-42 (1965).

²⁷ 5 Cal. 3d at 556, 488 P.2d at 26, 96 Cal. Rptr. at 722, citing Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986, 997 (1970).

crucial factor to be the inferiority of such sophistry to the constitutional requirement of due process. In the exact words of *Randone*:

The private interest of a creditor, even in the special circumstances of "absconding" or "concealing assets" . . . does not rise to the level of an "overwhelming consideration" . . . so as to justify a deprivation of such "brutal" dimensions without a prior hearing on the merits.²⁸

In substance, to authorize the general deprivation of a debtor's use of his property before notice and hearing, the statute must demonstrate some "state or creditor interest"²⁹ of "overriding significance"³⁰ that requires such procedure and which is confined to such extraordinary circumstances. The severity of that burden is disclosed in the two permissible situations cited by the majority in *Sniadach*, namely the summary seizure of bank assets in case of serious financial difficulty³¹ or the seizure of misbranded drugs by the Food and Drug Administrator.³² In the view of *Randone*, the legislature could constitutionally draft a statute of narrow application, exempting necessities, and permitting attachment after notice and hearing on the probable validity of the creditor's claim, or even permitting attachment before notice where an *ex parte* showing can satisfy a court of an actual risk of concealment or absconding.³³

Understandably, there has been almost no discussion of the repercussions flowing from the voiding of such prejudgment attachment statutes. For example, under the Bankruptcy Act, certain preferences may satisfy the requirement of an "act of bankruptcy."³⁴ It would now appear doubtful, for example, whether the garnishment of a debtor's bank account under a void attachment statute, could legally constitute such an act of bankruptcy even if the debtor were unable to have the lien removed within the prescribed time limit. Similarly, accepting the proposition that such a bank garnishment statute is void, it may be questionable whether the garnishee is legally protected in the payment of debtor's funds to the attaching creditor even in response to what would now appear to be a void court order which is subject to collateral attack.

Obviously, the same due process principles govern both federal and state tax attachment statutes, most prominently the pervasive

²⁸ 5 Cal. 3d at 562, 488 P.2d at 30-31, 96 Cal. Rptr. at 726-27.

²⁹ *Sniadach v. Family Fin. Corp.*, 395 U.S. at 339.

³⁰ *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

³¹ See *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928).

³² See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

³³ 5 Cal. 3d at 562, 488 P.2d at 31, 96 Cal. Rptr. at 727.

³⁴ 11 U.S.C. § 21(a)(3) (1970).

Internal Revenue Code arsenal including wage attachments, bank account and account receivable garnishment, seizure of personal property, business seizure, and even real estate attachment.³⁵ Although there may be "overriding significance" in the ultimate collection of taxes, it is doubtful that such exigency encompasses *ex parte* threshold self-help by the bureaucracy. Although a narrowly redrafted statute might permit a modicum of such relief, the overreach of the existing statute precisely reflects the provisions which were stricken in *Randone*. Curiously, although such IRC liens would now seem to be void in themselves, certain of the tax priorities specified in the Bankruptcy Act would appear to retain their vigor because of their subordination to judicial sanction.³⁶

Nevertheless, there could be awesome repercussions through litigation in behalf of offended debtors against anyone who has denied them their constitutional rights through the use of such void prejudgment attachment statutes.³⁷ Significantly, the Supreme Court has recently held that under that seldom used statute of Civil War vintage, relief may be had against a private individual jointly engaged with state officials.³⁸ Perhaps some of the terrifying consequences of inaction may serve to galvanize both federal and state legislatures into the prompt revamping or repeal of void or voidable statutes which clearly trespass upon the constitutional rights of so many.

Of predictably comparable magnitude with *Sniadach* and *Randone*, is the case of *Fuentes v. Faircloth*.³⁹ In another OEO supported appeal, the Court will pass on the due process constitutionality of a U.C.C. type statute permitting a secured party to utilize self-help repossession and foreclosure procedures without judicial preview. In the particular instance, a Spanish-speaking woman purchased a space heater, executing a note and security agreement for the balance. Claiming a malfunction in the heater, she discontinued payment, whereupon the secured party proceeded on the basis of its unilateral determination that a default existed. While the district court sustained the constitutionality of Florida's typical state replevin law permitting forcible entry and taking, it is fair to speculate that in the light of *Sniadach*, the noting of probable jurisdiction could well forecast a due process reversal such as was

³⁵ INT. REV. CODE OF 1954, §§ 6321-26.

³⁶ 11 U.S.C. § 104(a)(4) (1970).

³⁷ See 42 U.S.C. § 1983 (1970).

³⁸ See *Griffin v. Breckenridge*, 403 U.S. 88 (1971); see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

³⁹ 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

dealt by a district court to New York's replevin statute.⁴⁰ The case may also involve the issue of the validity of a contractual waiver of constitutional rights where there is gross imbalance between the bargaining positions of the contracting parties.⁴¹

The generic problem inherent in these developments, is that of providing quality legal services in civil matters to people of moderate means, itself the subject of a recent scholarly exposition by Barlow F. Christensen,⁴² a Senior Research Attorney of the American Bar Foundation. While noting the obvious fact that the wealthy are both legally sophisticated and financially able to afford the best of legal services and that numerous agencies are available to try to service the needs of the indigent, Mr. Christensen severely faults the Bar for ignoring the plight of the tens of millions of middle class persons who neither know their rights nor can afford the currently prevailing costs for quality legal services.

Despite some dampening efforts, it is no longer indiscreet to discuss such problems as solicitation and legal fees, particularly where some of the principal impediments to a meaningful opportunity to be heard may emanate from archaic concepts which may no longer be defensible. It would be an unenviable task to attempt to convince lay audiences that it is either unethical or criminal for an attorney to stir laymen to assert their constitutionally protected rights, particularly in such areas as civil rights, ecology, and consumer protection. Indeed, the implications of such repression would appear to fuel criticism that goes to the very foundation of the judicial system.

To illustrate further, while there are numerous problems inherent in contingent legal fees,⁴³ historically they have had to be condoned as one of the few available cash means of opening the doors of the law office to the ordinary man on the street. Only recently, in denying a motion to remove to a more convenient forum,⁴⁴ the court expressly relied on the plaintiff's financial inability to maintain the suit if the case were removed to a distant jurisdiction.⁴⁵ Yet other courts have wholly ignored the realities of obtaining competent counsel to handle complicated litigation on a contingent fee basis, by expressly ruling that

⁴⁰ *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

⁴¹ See Comment, *Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 12 B.C. IND. & COM. L. REV. 700 (1971).

⁴² B. CHRISTENSEN, *supra* note 5.

⁴³ See Brown, *Some Observations on Legal Fees*, 24 SW. L.J. 565 (1970).

⁴⁴ See 28 U.S.C. § 1404(a) (1964).

⁴⁵ *Beach v. National Football League*, TRADE REG. REP. ¶ 73,710 (S.D.N.Y. Sept. 17, 1971).

the "convenience of counsel [sic]" is an immaterial consideration in such a motion to remove.⁴⁶

In a related instance, while it has consistently been ruled that the antitrust laws cannot be used as a defense to a suit on a debt unless the latter implicitly involves an antitrust violation,⁴⁷ there may be serious due process question in the "brutal" exposure to which a debtor may thereby be subjected. While a state court has recently found a convenient solution to this dilemma by voluntarily staying further proceedings until a federal court determination of the antitrust issues,⁴⁸ certiorari has been denied in a petition raising the direct question.⁴⁹

There are many alternative methods designed to improve the delivery of quality legal services to the massive segment of the population now deprived of meaningful access. While the ABA has ruled unethical such extended payment plans as Bankamericard, the Bar of Oregon has officially sanctioned its use.⁵⁰ Prepaid legal cost insurance plans proliferate when associated with specific kinds of liability policies, yet insurance devoted exclusively to legal fees would appear to be considered improper. While numerous statutory remedies provide for exemplary damages and legal fees in order to encourage private enforcement, as a practical matter, the quaint eighteenth century rules against solicitation effectively chill the vigorous use which the legislature intended. For example, while it is now more than two years since

⁴⁶ See *Transcontinental Serv. Corp. v. True Temper Corp.*, 319 F. Supp. 920 (S.D.N.Y. 1970); *Cressman v. United Airlines*, 158 F. Supp. 404 (S.D.N.Y. 1958).

⁴⁷ See *Kelly v. Kosuga*, 358 U.S. 516, 520-21 (1959), quoting *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271 (Holmes, J., dissenting); In the matter of *Otto's Liquor, Inc.*, TRADE REG. REP. ¶ 73,538 (D. Minn. Sept. 28, 1970); see *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), rehearing denied *per curiam*, *id.* at 1072, cert. denied, — U.S. — (1971) (allegation that state detainer being used to enforce franchisor's illegal tying).

⁴⁸ *Diners/Fugazy Travel, Inc. v. Wirtz*, TRADE REG. REP. ¶ 73,682 (Sup. Ct. N.Y. County July 1, 1971) (franchisor's suit on debt in state court, met with antitrust defenses). Assuming that the defendant in a suit on a debt has a valid antitrust claim against the creditor it would appear obvious that, comparably with the unconstitutional attachment in *Randone*,

[a] creditor seeking to gain leverage in order to compel a settlement could exercise [his choice of attachment] so as to place a debtor under the most severe deprivation.

. . . Thus sanction of such prenotice and prehearing attachments of necessities will in many cases effectively deprive the debtor of any hearing on the merits of the creditor's claim.

5 Cal. 3d at 561-62, 488 P.2d at 30, 96 Cal. Rptr. at 726. It has been claimed that alleged antitrust violators use the same litigational strategy to deprive a debtor of a meaningful opportunity to be heard on the merits of his antitrust claims.

⁴⁹ See *Helfenbein v. International Indus., Inc.* 438 F.2d 1068 (8th Cir.), rehearing denied *per curiam*, *id.* at 1072, cert. denied, — U.S. — (1971).

⁵⁰ 2 ABA OPINIONS ON PROFESSIONAL ETHICS NO. 1120 (Supp. 1971); cf. OREGON ST. BAR BULL., Feb. 1970, at 11.

Massachusetts granted direct consumer recourse for any violation of the deceptive advertising prohibitions of the "Baby" F.T.C. Act,⁵¹ there has been no reported use of the remedy. That inactivity is assuredly not due to an absence of violations, but rather to an almost total lack of awareness among aggrieved consumers and the supposedly ethical barriers which impede consumer education.

With regard to the allegedly ethical considerations which impugn the effective delivery of legal services to the broad middle spectrum of the population, Mr. Christensen observed that:

[i]n presuming the infallibility and immutability of existing restrictions and in ignoring the expressed desire of the public . . . , those who would restrict enterprise by legal controls in the name of the public good have the burden of proof, and a heavy one. The public is not obliged to prove its need; the legal profession is obliged to justify the restrictions.⁵²

Recognizing that solicitation may be the only meaningful way to apprise people of their rights, he stated:

While the stirring up of frivolous or fraudulent claims is undoubtedly evil, the stirring up of legitimate claims which would otherwise go unasserted because of the prospective claimants' weakness, ignorance, or naivete may in fact be a positive good.⁵³

Stated otherwise, while there is no rational basis for an irrebutable presumption that attorneys will promote meretricious claims, there is every reason to observe that both the economically disadvantaged and the unsophisticated middle American need the crusading leadership of the only professional whom society permits them to consult in order to obtain all the recourse which the law provides. It is no longer acceptable to suggest that the wealthy should have the constant availability of professional advice as to the extent of their legal rights as well as skilled advocates to pursue their remedies, while it is a crime to "foment [sic]" the unknowledgeable concerning the protection now available against such abuses as slumlords, gross misrepresentation in seller's talk, or the attempted denigration of an express automobile warranty that is void because it is unreasonable.⁵⁴

⁵¹ MASS. GEN. LAWS., ch. 93A, §§ 1 *et seq.* (particularly §§ 9-10) (Supp. 1971).

⁵² B. CHRISTENSEN 255-56.

⁵³ *Id.* 145.

⁵⁴ UNIFORM COMMERCIAL CODE 2-316(i); *see* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In noting that "debtors are frequently unaware of available legal remedies," the *Randone* court commented that even post-attachment procedures to obtain relief based on statutory exemption for necessities, could in the interim subject debtors to the "extreme hardship" emphasized in *Sniadach*. 5 Cal. 3d at 562-63, 488 P.2d at 31, 96 Cal. Rptr. at 727.

After an exhaustive analysis of the numerous means which might be employed in an effort to reduce legal costs through improved management systems, Mr. Christensen turned at last to the "group legal services," which now appear to offer the best prospect for immediate satisfaction of the public need. Simply defined, such a plan involves the provision of legal services on a salary or reduced fee basis through a lay organization's activity in behalf of its members. While seeking to alleviate the deepseated resentment of attorneys to the supposedly economic threat to the profession, Mr. Christensen points out that the proffered ethical objection of "potential conflict of interest" must surrender to

other public-interest considerations—such as the importance of the individual rights being asserted or the practical unavailability of other sources of legal assistance.⁵⁵

In spite of the obdurate opposition of the organized bar,⁵⁶ it would appear that such "meaningful" protection for the public has been found in the first amendment's guarantee of the freedom of litigational association. Commencing with *NAACP v. Button*,⁵⁷ the Supreme Court struck down Virginia's anti-solicitation laws as applied to the civil rights litigating activities of the National Association for the Advancement of Colored People. A year later, the constitutionally protected scope of group legal services was expanded in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,⁵⁸ wherein the Court afforded similar protection to an arrangement in which a union negotiated a discount in contingent fee arrangements and recommended lawyers to union members for prosecution of their claims under the Federal Employees Liability Act.⁵⁹ Those who had read *Button* and *Brotherhood of Railroad Trainmen* as protections for the assertion of federal rights were disabused of such a narrow reading by *United Mine Workers v. Illinois State Bar Association*,⁶⁰ protecting an arrangement in which a union's salaried attorney-employees represented union mem-

⁵⁵ B. CHRISTENSEN 278.

⁵⁶ See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, Disciplinary Rule 2-103(D)(5), criticized in Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR-2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334, 350 (1970); See also Brown, *ABA Code of Professional Responsibility: In Defense of Mediocrity*, 5 VAL. L. REV. 95 (1970); Moore, *The Bar as Trade Association: Economics, Ethics, and the First Amendment*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 301 (1970).

⁵⁷ 371 U.S. 415 (1963).

⁵⁸ 377 U.S. 1 (1964).

⁵⁹ 45 U.S.C. §§ 51 *et seq.* (1964).

⁶⁰ 389 U.S. 217 (1967).

bers in prosecution of their personal injury claims under state law. And in recently commenting on that trilogy of cases, the Supreme Court again declared:

The common thread running through our decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.⁶¹

In spite of that exhortation by the nation's highest court, a federal district court in Chicago has dismissed a class antitrust suit by forty-two convenience food mart franchisees on the ground that their attorney had knowledge of their "solicitation" of support within their own association.⁶² In that case, after ten months of unsuccessful bargaining with a franchisor, a franchisees' association notified its members of the need to litigate, and requested their participation and financial support. When these facts were disclosed at a preliminary hearing, the court dismissed the suit on the merits and referred, to the Illinois Bar Association, a complaint against the association's attorney for his participation in alleged solicitation.⁶³ Yet, the small businessman's need for legal protection is so desperate, and the public policy favoring private enforcement of the antitrust laws is so strong,⁶⁴ that Senator Philip Hart, Chairman of the Senate Subcommittee on Antitrust and Monopoly, has suggested that the Small Business Administration should make loans to small businessmen to finance meritorious antitrust claims.⁶⁵

In conclusion, it would appear obvious that *Sniadach* "et al" are not to be narrowly translated within the confines of what prejudgment attachment procedures may be sustainable.⁶⁶ They are rather a clarion call to the organized Bar and to all courts commanding the elimination of every obstacle to the meaningful assertion of legal rights. For example, counsel should not be required to tread a narrow path between the terrifying consequences of alleged solicitation and the salutary

⁶¹ *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971).

⁶² *Halverson v. Convenience Food Mart, Inc.*, C.A. No. 70C-499 (7th Cir. Mar. 3, 1970) (appeal pending).

⁶³ Both the Illinois Bar Association and the Executive Committee of the District Courts declined to take action against the attorney; cf. *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970), regarding the rule for sparing the use of dismissal as a means of enforcing a court's order.

⁶⁴ See *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-52 (1947).

⁶⁵ Release by the Senate Subcommittee on Antitrust and Monopoly, Sept. 16, 1968.

⁶⁶ [*Sniadach*] is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court. *Randone v. Appellate Dep't of Superior Ct. of Sacramento County*, 5 Cal. 3d 536, 550, 488 P.2d 13, 22, 96 Cal. Rptr. 709, 718 (1971).

protection of the first amendment.⁶⁷ Regardless of the begrudging consent of the organized bar or of other courts, the nation's highest tribunal has now made it emphatically clear that the first amendment assures that "groups can unite to assert their legal rights as effectively and economically as possible,"⁶⁸ that it is improper to "jeopardize the exercise of protected freedoms,"⁶⁹ and that ". . . that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation."⁷⁰ Rather than hewing to the bare edge of the constitutional thrust, both the courts⁷¹ and the Bar should constructively reexamine supposedly sacred dogma and cooperatively strive to build a structure that can realistically obtain justice. No less will suffice.

⁶⁷ "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1962).

⁶⁸ *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 580 (1971).

⁶⁹ *Id.* at 581.

⁷⁰ *Id.* at 585-86.

⁷¹ Court decisions have determined that matters of ethics are exclusively within the jurisdiction of courts and cannot be changed by the legislature. See *In re Unification of the New Hampshire Bar*, 109 N.H. 262, 248 A.2d 711 (1968); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).