

Steven Iverson, assignee of  
Katherine Barnhart,

Judgment Creditor,

vs.

Frank Viggiano  
86 Spruce Street, Mahtomedi, MN 55115,

Judgment Debtor,

and

Saint Paul Public Housing Agency,

Garnishee.

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**MEMORANDUM OF LAW  
IN OPPOSITION TO  
JUDGMENT CREDITOR'S MOTION  
FOR SUMMARY JUDGMENT**

**Introduction**

Saint Paul Public Housing Agency ("Garnishee") submits this memorandum in opposition to Judgment Creditor's Motion for Summary Judgment. The facts of this case are undisputed and the sole issue before this Court is purely a question of law – whether federal funds distributed to Garnishee by the Department of Housing and Urban Development (HUD) for the exclusive use of administering the Section 8 program are subject to state garnishment proceedings. Based on federal statute and instruction by HUD, the Housing Assistance Payments (HAP payments) that Judgment Creditor seeks to garnish can only be paid to eligible landlords in the Section 8 program, making them exempt from state garnishment proceedings. Judgment Creditor's motion should therefore be dismissed and judgment should be entered in

Garnishee's favor because Garnishee does not have any non-exempt indebtedness to the Judgment Debtor.

### **Statement of Facts**

On March 7, 2013, Judgment Creditor sought to garnish HAP payments owed to Frank Viggiano as a landlord renting to eligible tenants under the Section 8 program. The garnishment was intended to satisfy a September 3, 2010, judgment entered against Mr. Viggiano in the amount of \$1,325.00 for failing to return a pre-lease deposit to prospective tenant Katherine Barnhart.

On March 12, 2013, pursuant to Minnesota Statutes § 571.75, subdivision 2(d), Garnishee responded with a letter informing Judgment Creditor that federal funds allocated for HAP payments are exempt from garnishment proceedings. (Iverson Affidavit in Support of Motion for Default Judgment at Ex. E). Garnishee enclosed an opinion letter, dated April 20, 1987, from HUD's then Assistant General Counsel in support of the position. (Iverson Affidavit in Support of Motion for Default Judgment at Ex. F). PHA also returned Judgment Creditor's \$15 check for the garnishee fee.

On March 22, 2013, Judgment Creditor sought a Default Judgment against Garnishee, or in the alternative leave to file a supplemental complaint. The Court granted Judgment Creditor leave to file a Supplement Complaint pursuant to Minnesota Statute § 571.75, subdivision 4.

On May 3, 2013, Judgment Creditor served a Supplemental Complaint on Garnishee demanding judgment of up to 110 percent of the amount claimed in the Garnishment Summons, or \$1,457.50. On May 20, 2013, Garnishee answered the complaint.

Judgment Creditor seeks summary judgment and Garnishee opposes the motion. Based on the law, judgment should be entered in Garnishee's favor.

## Argument

Judgment Creditor makes numerous arguments alleging that HAP payments are subject to state garnishment proceedings. The law, however, supports just the opposite conclusion and judgment should be entered in Garnishee's favor.

### **I. HAP PAYMENTS OWED TO JUDGMENT DEBTOR THROUGH THE SECTION 8 PROGRAM ARE NOT SUBJECT TO STATE GARNISHMENT PROCEEDINGS UNDER FEDERAL LAW AND HUD POLICY.**

Judgment Creditor alleges that HAP payments are subject to garnishment. However, federal funds in the possession of Garnishee are not subject to garnishment proceedings because they have not yet been paid out for the purposes for which they were appropriated. "So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agency of the government to the person entitled to it, the fund cannot, in any legal sense, be considered part of his effects." *Buchanan v. Alexander*, 45 U.S. 20, 20-21 (1846). "Even where the organization disbursing federal grant funds is not a governmental agency, the principal long ago established in *Buchanan* applies to prevent garnishment of federal funds not yet 'paid over to the person entitled to it.'" *Palmiter v. Action, Inc.*, 733 F.2d 1244, 1248 (1984) (citing *Buchanan*, 45 U.S. at 21). HUD provides federal funds to Garnishee for the statutorily authorized purpose of distributing HAP payments to eligible landlords in the Section 8 program. Until such payment is made, federal funds in possession of Garnishee are immune to garnishment proceedings to the extent that they have not yet been paid out for their intended purpose.

Judgment Creditor asserts that HAP payments are subject to garnishment based on the Louisiana Court of Appeals decision in *Southard v. Belnue*, 618 So.2d 27 (La. Ct. App. 1993). In *Southard*, the Broussard Housing Authority (BHA) contracted with Huey Henry Breaux to

provide low income housing to a number of individuals in exchange for rent subsidies to be paid by the BHA. Plaintiffs subsequently obtained a judgment against Breaux and filed garnishment proceedings against the BHA to collect on the rent subsidy payments. The BHA refused to garnish the rent subsidies, arguing that it was both a federal and state agency, immune to such proceedings under the doctrine of Sovereign Immunity. The trial court ruled for plaintiffs, finding (1) federal law did not prohibit the garnishment of rent subsidies owed to Breaux; and (2) the state had waived its immunity as to the seizure of BHA assets. The Louisiana Court of Appeals affirmed, holding that the federal funds in BHA's possession were "twice removed" from Treasury control and were thus subject to execution in garnishment proceedings where state immunity had been waived.

Judgment Creditor's reliance on *Southard* is improper. The *Southard* decision is based primarily on the Court's interpretation of Louisiana state law. The Louisiana Court of Appeals concluded that Louisiana Statutes § 13:3881(C) expressly waived the BHA's immunity to suit as a state agency. The Court further found that the Louisiana Legislature's intent in amending the statute "was to remove all doubt that the wages, salaries, and other *compensation of public* employees and *contractors* were *subject to garnishment*." *Southard*, 618 So.2d at 29 (quoting La. R. S. 13:3881(C)). As such, the reasoning in *Southard* is not applicable to the case at bar.

Recognizing that the Louisiana Court's interpretation of Louisiana law is not directly applicable to this case, Judgment Creditor next asserts that Minnesota Statute § 571.771 is analogous to the Louisiana statute in *Southard*. Section 571.771 states: "Money due or owing to any entity or person by the state on account of any employment, work, contract with, or services provided to any state department or agency is subject to garnishment." This statute not at all

similar to the Louisiana statute in *Southard*.<sup>1</sup> More importantly, it is wholly inapplicable because the PHA is not a state agency and HAP payments do not involve state funds. Judgment Creditor's further argument that Garnishee referred to itself as a "quasi-state agency" is similarly unpersuasive because it ignores the context for which the characterization was used and is irrelevant in terms of the statutory definition of state agency. *See* Minn. Stat. § 15.01-.012 (concerning designated Minnesota state agencies).

Furthermore, Judgment Creditor's reliance on *Southard* is improper is because the discussion of federal funds was based on the BHA's incorrect assertion that it was a federal agency under the U.S. Housing Act of 1937, which Garnishee does not argue here. The discussion in *Southard* relied on the Supreme Court decision in *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), in which the Court held that federal funds in the hands of the FHA, an agency which can sue and be sued, were subject to garnishment proceedings. Unlike the FHA, however, Garnishee is not a federal agency. Judgment Creditor's reliance on case law involving various federal agencies is therefore inapplicable where Garnishee merely possesses federal funds provided by a federal agency to be distributed according to federal law and agency policy.

## **II. SUBJECTING HAP PAYMENTS TO STATE GARNISHMENT PROCEEDINGS IS INCONSISTENT WITH THE FEDERAL STATUTORY SCHEME BECAUSE IT REQUIRES VIOLATING THE EXPRESS LANGUAGE OF FEDERAL STATUTE AND DISOBEYING A HUD DIRECTIVE.**

Judgment Creditor next argues that subjecting HAP payments to garnishment proceedings would be consistent with the statutory scheme that governs their purpose and distribution. Judgment Creditor cites the U.S. District Court of Colorado's decision in *Bank of*

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<sup>1</sup> The statute in *Southard* states: "The state of Louisiana expressly waives any immunity from suit insofar as the garnishment of the nonexempt portion of the wages, salaries, commissions, or other compensation of public officials, whether elected or appointed, public employees, or contractors is concerned, of itself, its agencies, boards, commissions, political subdivisions, public corporations, and municipal corporations." La. R. S. § 13:3881(C).

*Denver v. Romstrom*, 496 F.Supp. 242 (D. Col. 1980), for the proposition that “[t]here has been no showing, clear or obscure, that a garnishment proceeding is inconsistent with the statutory scheme or purpose of HUD.” *Romstrom*, 496 F.Supp. at 243. That garnishment proceedings are not inconsistent with the “purpose of HUD” is completely irrelevant and does not further Judgment Creditor’s argument. HAP payments in Garnishee’s possession are not subject to garnishment because to do so would require Garnishee to expressly violate the plain language of those statutes that make up the scheme.

Federal funds are disbursed to local housing authorities for purposes of providing low income housing to eligible tenants. *See* 42 U.S.C. § 1437(a) (1980). Management and administration of the federal funds is governed by extensive federal legislation and regulation up to and including the point at which the subsidy is paid to the landlord. In the Section 8 program specifically, federal law states that “agencies may enter into contracts to make assistance payments *to owners* of existing dwelling units in accordance with this section.” 42 U.S.C. § 1437f(b)(1) (emphasis added). Obliging Judgment Creditor’s request to garnish HAP payments would require Garnishee make assistance payments to someone other than the statutorily authorized recipient and would thus violate federal law.

Further bolstering Garnishee’s position that federal funds designated for HAP payments are not subject to state garnishment proceedings is a 1987 advisory opinion issued in a letter written by HUD’s then Assistant General Counsel, Joseph Gelletich. The advisory opinion was issued in response to the same question at issue here: whether HAP payments owed to a Section 8 landlord may be garnished. In his opinion, Mr. Gelletich concluded that local housing authorities could only make HAP payments to Section 8 landlords based on the legal scheme reflected in the statutes, regulations, and assistance contracts governing local housing authorities.

Mr. Gelletich further concluded that HAP payments could not be garnished without violating federal statute and were thus exempt from state garnishment proceedings. Even if Judgment Creditor disagreed with HUD policy or its interpretation of federal law concerning the administration HAP funds, Garnishee is not in a position to deviate from HUD's express instruction on the matter.

**III. HUD'S WAIVER OF SOVEREIGN IMMUNITY UNDER 42 U.S.C. SECTION 1404A DOES NOT MAKE GARNISHEE AMENABLE TO SUIT ON HUD'S BEHALF AND IS THEREFORE IRRELEVANT WHERE HUD IS NOT A PARTY TO THE SUIT.**

Notwithstanding the express conflict with federal law and HUD directive, Judgment Creditor argues that FHA and HUD waivers of sovereign immunity allow garnishment of the funds they distribute. Judgment Creditor primarily relies on 42 U.S.C. section 1404a, which states: "The Secretary of Housing and Urban Development may sue and be sued only with respect to its functions under the United States Housing Act of 1937, as amended [42 U.S.C. 1437 et seq]...." Additionally, Judgment Creditor cites a number of cases involving local housing authorities in other jurisdictions for the proposition that 42 U.S.C. section 1404a makes HUD amenable to suit in cases relating to the administration of the Section 8 program. *See Cathedral Square Partners v. South Dakota Housing Dev. Auth.*, 679 F.Supp.2d 1034 (D. S.D. 2010); *Greenleaf Ltd. Partnership v. Illinois Housing Dev. Auth.*, 2010 WL 3894126 (D. Ill. 2010); *Auction Co. of America v. F.D.I.C.*, 132 F.3d 746 (D.C. Ct. App. 1997).

Judgment Creditor's argument is not persuasive because a federal agency's consent to sue and be sued does not imply consent to allow Garnishee to be sued on the federal agency's behalf. Additionally, the cases cited by Judgment Creditor all involve the application of 42 U.S.C. section 1404a to HUD directly, not to the various housing authorities implementing HUD policy or handing federal funds. Furthermore, the cases are distinguishable because none involve

garnishment proceedings. HUD's waiver of immunity is irrelevant in this case because HUD is not a party to this suit and Garnishee is not a federal agency. Garnishee merely administers the Section 8 program by distributing federal funds in accordance with extensive federal rules, regulations, and HUD directives.

**IV. FEDERAL LAW PREEMPTS MINNESOTA LAW REGARDING THE USE AND DISTRIBUTION OF FEDERAL FUNDS THAT HAVE NOT YET BEEN SPENT FOR THEIR STATUTORILY AUTHORIZED PURPOSE.**

Beyond the threshold issue regarding whether HAP payments are subject to state garnishment proceedings given the conflict with federal law, Judgment Creditor further argues that Minnesota law obliges Garnishee to retain up to 110% of the amount claimed in the Garnishment Summons. Judgment Creditor cites Minnesota laws governing garnishment proceedings generally, but the statutes themselves recognize that only "nonexempt indebtedness" is subject to garnishment. *See* Minnesota Statute § 571.78(2). Furthermore, to the extent that federal law conflicts with state law regarding the distribution of federal funds, federal law is controlling due to principles of federal preemption.<sup>2</sup> A state court cannot compel Garnishee to expressly violate the plain language of federal statute, regardless of state law.

**V. GARNISHEE SHOULD NOT BE MADE LIABLE FOR MONTHLY HAP PAYMENTS DISTRIBUTED TO JUDGMENT DEBTOR AFTER SERVICE OF THE GARNISHMENT SUMMONS BECAUSE FEDERAL LAW MANDATES SUCH PAYMENTS TO ELIGIBLE LANDLORDS IN THE SECTION 8 PROGRAM.**

Finally, Judgment Creditor argues that Garnishee should be held liable for any garnishable indebtedness paid to Judgment Debtor since the Garnishment Summons was served. Put another way, Judgment Creditor seeks to hold Garnishee responsible for any monthly HAP payments that were distributed to Judgment Debtor since these proceedings were initiated. For

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<sup>2</sup> *See* U.S. Const. Art. VI, cl. 2 (Supremacy Clause); *see also Altria Group v. Good*, 555 U.S. 70 (2008) (holding that a federal law that conflicts with a state law will preempt that state law).



this final argument Judgment Creditor cites a number of cases, each of which is inapplicable because they deal with garnishees knowingly distributing nonexempt and nonfederal funds to debtors. Even if this court found that federal HAP payments were subject to state garnishment proceedings, it would be inequitable to make Garnishee responsible for Judgment Debtor's indebtedness where the initial refusal was made in good faith and based on the law and HUD directives.

In this case, Judgment Creditor has asked Garnishee to retain and remit HAP funds in direct violation of federal law and a HUD directive. Garnishee responded to Judgment Creditor's Garnishment Summons by filing the required disclosure and specifying the legal basis for its good-faith determination that HAP payments are exempt from state garnishment proceedings. Garnishee indicated that it had no additional nonexempt indebtedness to the Judgment Debtor and thus discharged any and all further obligations to Judgment Creditor. Minn. Stat. § 571.79(a).

In addition to the Garnishee's good faith refusal of Judgment Creditor's garnishment request, the same federal laws that prohibit the garnishment of HAP funds also require that Garnishee continue to remit monthly HAP payments to eligible landlords in the Section 8 program. It would be inequitable to make Garnishee liable for indebtedness that must be paid to the Judgment Debtor by the Garnishee under federal law.

### **Conclusion**

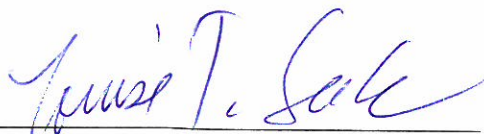
Federal statute requires Garnishee to remit HAP payments to participating owners of dwelling units in the Section 8 program. HUD has directed local housing authorities, including Garnishee, not to garnish HAP payments for the satisfaction of third-party judgments. Judgment Creditor has failed to provide a legal basis for defying HUD directive and violating the express

language of federal statute in the process. Though HUD has waived immunity from suits involving the administration of the Section 8 program, it has not authorized Garnishee to litigate on its behalf.

Judgment Creditor's supplemental complaint and all claims therein should be dismissed, on the merits and with prejudice, and summary judgment granted in favor of Garnishee.

Dated: June 21, 2013

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