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Utility Service for Tenants with Delinquent Landlords

Tenants who pay for utility service through their rent face unique shutoff problems when bills go unpaid. The scenario often develops like this: Utility service is provided to a house in a landlord's name, with the tenant paying for the service through his or her rent. At some point, the landlord fails to pay the bill, and service to the home is disconnected.[1] When the tenant seeks to have service renewed in his or her own name, the utility refuses unless and until the back bill is paid. On its face, it might seem obvious that the tenant may not be held liable for this arrearage. Resolution of the issue, however, is clouded by the fact that the service is provided not only to the same premises, but to the same end user as well. Only the name of the person who receives and is responsible for the bill is different.

I. The Case of the Delinquent Landlord

The rule is well established that a public utility may not require someone to pay the debts of another person prior to providing utility service. Remarkably, litigation over this issue extends back to the early 1900s. As early as 1914, the New Mexico Supreme Court held that a water company rule that authorized the utility to shut off service to consumers in all cases of nonpayment "would be unreasonable and void if so construed as to permit the water to be shut off, or not turned on, because a former owner or occupant had not paid his bill."[2] A utility, the New Mexico court held, may not "coerce the new owner or occupant into paying for water, or service, for which they did not contract and from which they received no benefit."[3]

Recent federal court decisions have addressed the same issue, primarily within the context of municipal utility practices.[4] The federal cases have addressed the issue on constitutional grounds. The language of the decisions, however, makes clear that the utility practice of seeking to impose liability for the debt of a third party on a person wishing utility service fails to meet basic precepts of justice, and reasonableness as well.

The Fifth Circuit case of *Davis v. Weir*[5] appears to be the seminal decision. *Davis* involved water service provided by the Atlanta, Georgia, municipal utility. Tenant Davis paid for his water service through his rent; in addition, he was current on his rent. A dispute developed, however, between the municipal utility and Davis's landlord. The landlord refused to pay for an "exorbitant waste of water" that resulted from defective plumbing. When the resolution of this conflict failed and service was disconnected, Davis sought to have the water account placed in his own name and to have service restored. The utility, however, refused that request, saying the back bill must be paid first. Only in that way, the utility argued, could it protect its interest in preserving the financial base underlying the issuance of its revenue bonds.

The Fifth Circuit acknowledged the fiscal interest of the utility in this regard. The court found the practice of rejecting water service applications until all back bills are paid at a given premise was "calculated to expedite the liquidation of unpaid bills."[6] The court noted that the collection of these debts helped

1. For an excellent discussion of whether there is a "property interest" in continued utility service, *see generally* T. Duhamel, *Rights of the Nonbilled Utility User,* 19 Clearinghouse Rev. 249 (July 1985).
2. State *ex rel.* Scotillo v. Water Supply Co., 140 P. 1056 (N.M. 1914).
3. *Id.* at 1057; *accord* Linne v. Bredes, 86 P. 858, 859 (Wash. 1906); Millville Improvement Co. v. Millville Water Co., 113 A. 516, 517 (N.J. 1921); Pool v. Paris Mountain Water Co., 62 S.E. 874, 876 (S.C. 1908); *see generally* Annot. 19 A.L.R.3d 1227.
4. Rural electric cooperatives may also be subject to constitutional restrictions. *See* R. Colton, Memo: Customer Service Protections for Rural Electric Cooperative Customers (May 1986) (available from National Consumer Law Center). The actions of a private utility do not constitute "state action" for purposes of applying constitutional doctrine. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1978); *but see,* Comment, *Constitutional Law—Notices of Utility Shutoffs Need Not Meet Due Process Standards Where Rules Promulgated by the Iowa State Commerce Commission Do Not Create State Action by Utility Companies—* Iowa Citizen/Labor Energy Coalition v. Iowa State Commerce Commission, 33 Drake L. Rev. 459 (1983-84).
5. Davis v. Weir, 497 F.2d 139 (5th Cir. 1974).
6. *Id.* at 144.

to preserve the city's municipal bond rating. The court continued to hold, however, that, even given this premise, the city had no valid governmental interest in securing revenue from innocent applicants. The utility's dispute over the past-due bill, the court said, "lies solely with the landlord. To require that Davis make this payment and attempt to recover it from the landlord amounts to nothing less than condemning Davis to pay the past debt of another before he is allowed to contract for water service."[7]

Two different constitutional theories support a challenge to the imposition of the debt of a third party as a precondition to the receipt of utility service. Municipal utility actions regarding imposing such a debt have been found constitutionally infirm on both due process and equal protection grounds. Equal protection dictates that the states do not have power to legislate different treatment to be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute.[8] The cases have uniformly held that imposing responsibility on tenants for "a pre-existing debt for which they are not liable" has no relationship to legitimate government interest.[9] The *Davis* court put it quite bluntly: "The fact that a third party may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between not otherwise eligible applicants for water service."[10]

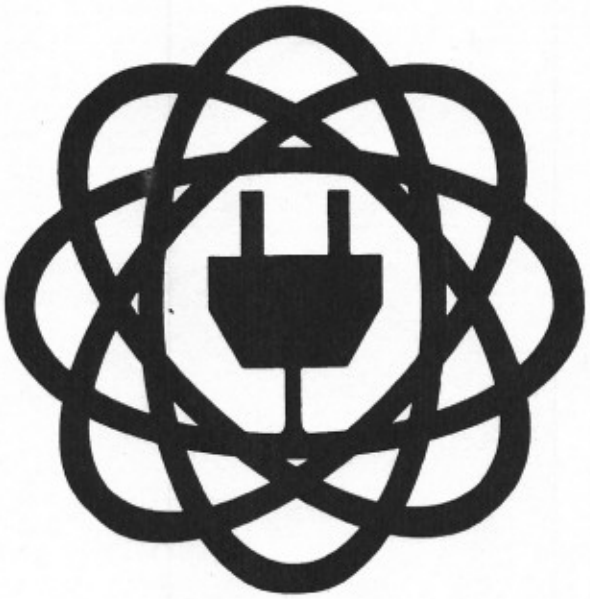
In contrast to the equal protection argument, a due process challenge addressed the governmental interest underlying a water collection scheme. The *Davis* court held there is "no valid governmental interest in securing revenue from innocent applicants."[11] Similarly, the court in *Koger v. Guarino* found that "defendants have no legitimate interest in collecting delinquent water bills from those who have no legal responsibility therefore."[12]

> A collection scheme that "divorces itself entirely from the reality of legal accountability for the debt involved is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor."[13]

The cases discussed above all dealt with the provision of water service. Nevertheless, while specifically addressed only once, the courts have held that the same principles would govern the provision of electric service.[14] Presumably, therefore, the provision of natural gas service would be treated in like fashion.

II. The Case of the Delinquent Tenant

A litigant needs to distinguish the *Davis* case and its progeny from the line of cases arising from the Fifth Circuit



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decision in *Chatham v. Jackson*.[15] *Chatham* approved the termination of water service to a landlord for the failure to pay a bill incurred by a tenant.[16] In *Chatham*, the plaintiff landlord owned a 264-unit apartment building. The City of Atlanta supplied water to the entire building through a single meter. Through a series of contracts and leases, Chatham entered into a landlord-tenant relationship with a firm called White House Towers on its property. When White House failed to pay the December and January bills, Chatham opened a water service account in its own name and thereafter kept all bills current. The December bill and a pro rata portion of the January bill[17] remained unpaid. Atlanta threatened to terminate even the new water service unless these back bills were paid.

The Chatham court approved Atlanta's actions notwithstanding the doctrine articulated in *Davis v. Weir*. *Chatham* stressed that *Davis* found constitutional infirmities only with efforts to "coerce applicants for such services to pay water bills *for which they are not liable*."[18] The emphasized observation, however, in reality adds little to the analysis. "Liability" is a conclusory term. To hold that a party need not pay a bill "for which she is not liable" assumes the very issue in controversy.

7. *Id.* at 145.
8. *Id.* at 144.
9. Craft v. Memphis Light, Gas & Water Div. 534 F.2d 684, 690 (6th Cir. 1976).
10. *Davis*, 497 F.2d at 145; *accord* Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976).
11. *Davis*, 497 F.2d at 145.
12. *Koger*, 412 F. Supp. at 1392.
13. Sterling v. City of Maywood, 579 F.2d 1350, 1355 (7th Cir. 1978); *accord Craft*, 534 F.2d at 690; *Davis*, 497 F.2d at 144-45; *Koger*, 412 F. Supp. 1375; *see also* Haynsworth v. South Carolina Elec. & Gas Co., 488 F. Supp. 565, 567-68 n.2 (D.S.C. 1979).
14. West v. Village of Morrisville, 563 F. Supp. 1101 (D. Vt. 1983).
15. Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980).
16. *Id.; see also* Union Circulation Co. v. Russell, 463 F. Supp. 884 (N.D. Ga. 1978).
17. The pro rata portion was for the portion of January during which Chatham did not have its own account.
18. *Chatham*, 613 F.2d at 76-77 (emphasis in original); *Union Circulation Co.*, 463 F. Supp. at 886.

The Fifth Circuit found in *Chatham* that there was an express imposition of liability. Such liability can be created through the placement of a lien against the property for unpaid water bills. This lien can be created either judicially or legislatively. The owner or property against which a lien has been placed for past-due water bills can have water service to the property shut off, or not turned on, as a means of enforcing the lien.[19] The enforcement of liens against the property of a landlord for nonpayment of water bills by a tenant, while perhaps not universal, is well accepted.[20]

Not all constitutional questions, however, are resolved by the mere creation of a lien. Even this collection process must bear a rational relationship to the governmental ends being pursued. The legal issue thus resolves itself into whether government action creating a lien for unpaid water service is so irrational as to violate notions of due process or equal protection. These constitutional issues are to be resolved by reference to the objectives of the lien. The court found that the city's objective in *Chatham* was "to remain fiscally sound through the collection of sums owed it for water and sewer services."[21] The city had a further objective, the court continued, of "dispensing benefits to property only upon the payment of proper compensation."[22]

Given these municipal policies, the Fifth Circuit distinguished *Davis*, and the refusal of service to tenants, on both factual and policy grounds.[23] Factually, the court said, a tenant receives no benefit from services furnished to a prior occupant, while "on the other hand, an owner's property is benefitted by the utility services."[24] In addition, the court continued, service is not terminated to all property owned by the landlord, but rather only to the address at which the back bill is accrued.[25]

Moreover, according to the Fifth Circuit, several policy factors further mitigate in favor of making the distinction between landlord and tenant liability. A landlord, the court said, is in a bargaining position sufficiently strong to create his or her own protections. The landlord can, for example, provide for the possibility of a tenant's nonpayment of a bill through a lease, by collecting a deposit or by imposing other security clauses. In addition, the landlord can retain the right to evict for nonpayment of utility bills.[26]

Poverty advocates may even be able to use the reasoning of the *Chatham* line of cases to their benefit in the "defaulting landlord" situation. *Chatham* speaks of the presence of sufficient bargaining power to obtain protection outside the scope of constitutional doctrine. Low-income tenants seldom, if ever, have such power. *Chatham* speaks of the easy accessibility to alternative remedies. Low-income tenants would not have such remedies. *Chatham* speaks of the limited impact of a utility service shutoff to the landlord, since only the affected premises and not all property owned by the landlord would be subjected to the service termination. The effect on tenants would be devastating.[27] The *Chatham* line of cases, as can be seen, may be a help, not a hindrance, to obtaining tenant protections.

III. The Equal Credit Opportunity Act Exception

A more disturbing exception to the general rule of *Davis* was established in *Haynsworth v. South Carolina Electric and Gas Company*.[28] In *Haynsworth*, the court was faced with an Equal Credit Opportunity Act (ECOA) challenge to the denial of utility service.[29] Plaintiff lived with her husband until their separation in 1975, at which time her husband moved elsewhere. Utility service to plaintiff's home, however, remained in the husband's name.[30] When plaintiff finally requested utility service in her own name, there was an outstanding balance in the current account; the request for new service was denied because of the arrears.

The *Haynsworth* court held that plaintiff was "obligated under an implied contract[31] . . . and delinquent on the payment of this obligation."[32] The court relied on the observation that the wife "resided in the dwelling and consumed power over the period the outstanding bills to that location were run up . . . ."[33] The court said that it would not require the utility to continue to serve the dwelling, in spite of a large overdue balance, "just because a request is made by another member of that dwelling to put the account in his or her own name."[34] Such a requirement, the court concluded, would allow "every member of every household . . . to take a swing at the power company, amassing a substantial bill at the price of a small deposit."[35]

It is unclear how far the *Haynsworth* reasoning extends. *Haynsworth* appears to approve the denial of service in the event that the new applicant had access to, and use of, the previously unpaid-for service, and received benefits from that service. The slippery nature of this issue, as thus framed in *Haynsworth*, is reflected in the Tennessee appellate court decision in *Smith v. Tri-County Electric Membership Cooperative*.[36] In that case, the Tennessee court held that the debt of a third party could not be imposed as a precondition to receiving utility service.[37] The language of the Tennessee decision, however, is disturbing in the extension it makes of the *Haynsworth* reasoning. The Tennessee court found that the "plaintiff contracted for

19. *Chatham*, 613 F.2d at 77; *Union Circulation Co.*, 463 F. Supp. at 886; *see also West*, 563 F. Supp. at 1102.
20. *See, e.g.*, Dunbar v. City of New York, 251 U.S. 516 (1980).
21. *Chatham*, 613 F.2d at 80.
22. *Id.*
23. Note, however, that the municipal policies in both *Davis* and *Chatham* are the same.
24. *Chatham*, 613 F.2d at 80.
25. *Id.*
26. *Id.* at 80-81.
27. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Palmer v. Columbia Gas Co., 342 F. Supp. 241, 244 (N.D. Ohio 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 721 (D. Kan. 1972).
28. *Haynsworth*, 488 F. Supp. 565.
29. The ECOA prohibits discrimination in a credit transaction on the basis of sex or marital status. 15 U.S.C. § 1691(a). A utility transaction is considered to be a "credit transaction."
30. *Haynsworth*, 488 F. Supp. at 566.
31. *Compare* Duhamel, *supra* note 1. He argues that one reason that a "nonbilled utility user" has a "property interest" in utility service is because of an implied contract. It is important for poverty advocates to recognize, therefore, that this argument does not always cut in favor of low-income customers.
32. *Haynsworth*, 488 F. Supp. at 567.
33. *Id.* at 568.
34. *Id.*
35. *Id.*
36. Smith v. Tri-County Elec. Membership Coop., 689 S.E.2d 181 (Tenn. Ct. App. 1985).
37. *Id.* at 184.

: electric service, was using the service, was not delinquent, /ed the defendant no bills for prior service at any location, d *had no connection with the delinquent customer* when her lls were incurred."[38]

The line between the *Smith* and *Haynsworth* cases and *avis* seems slim at best. The *Davis* tenant had access to and :e of the previously unpaid-for service. The tenant had re-:ived benefits from the service unpaid for by the landlord. By :finition, a tenant has a "connection with" the delinquent ndlord. Under these facts, it seems arguable that the tenant, ıo, has an implied contract with the utility company to pay for ıe service. Under this theory, the fact that the service *had* been aid for through the rent is irrelevant to the utility. The tenant's :medy in that regard would be against the landlord.

There is no question but that *Haynsworth* is disturbing. t is at significant odds with the thrust and reasoning of *Davis* nd its progeny. *Haynsworth* ignores the distinctions that the ifth Circuit made in *Chatham*. The *Haynsworth* plaintiff did ıot have bargaining power to obtain protections outside the :ope of constitutional doctrine as referenced by *Chatham*. The *Haynsworth* plaintiff did not have easy accessibility to alterna-ive remedies as spoken of in *Chatham*. Finally, the *Haynsworth* ervice disconnection did not have the limited impact as discussed in *Chatham*. Application of the *Haynsworth* "implied contract" doctrine, without consideration of the policy implications outlined in *Chatham*, is bad law.

The best that can be said for *Haynsworth* may be that the court simply sought to determine whether there was unlawful "discrimination" pursuant to the ECOA and that a determination of whether the utility's actions were "just and reasonable" on other grounds was not necessary to that narrow issue. The court, in other words, was not seeking to apply traditional utility doctrine; rather, it was only making an assessment of whether "discrimination," as statutorily defined by the ECOA, was occurring. If the holding of *Haynsworth* has any vitality at all, it is on those narrow statutory grounds.

IV. Conclusion

It is a well established rule that responsibility for the debt of a third party may not be imposed on a utility applicant as a precondition to the receipt of natural gas, electric, or water service. Most often, this situation will arise within the context of landlord-tenant relations. If a tenant pays for his or her utility service through rent, and if the landlord in turn fails to pay for the service, thus resulting in a service termination, the utility may not require payment of the arrearage prior to restoration of service in the tenant's name. The rule extends beyond the landlord-tenant setting. Exceptions to the rule do exist, with perhaps the most disturbing one being in the husband/wife situation of *Haynsworth*. The holding of that case, however, can be limited to the facts of that particular situation.

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38. *Id.* at 185.

Intercept of Tax Refunds to Offset Debts Owed Federal Agencies: Part I

The Department of Education (ED) has intercepted millions of dollars in tax refunds from thousands of clients who allegedly owe it money on student loans. The Department of Housing and Urban Development has also done so on HUD-insured (Title I) loans, and the Veterans Administration has done so on veterans loans. Millions of dollars have been intercepted; the National Consumer Law Center (NCLC) estimates that by year-end ED will have intercepted $150 to $200 million, the VA will intercept around $10 million, and HUD will intercept around $7 million. ED expects to refer substantially more accounts for offset for the 1986 tax year than the 600,000-plus accounts referred for the 1985 tax year.[1] Between 20 percent and 50 percent of intercepted dollars are Earned Income Tax (EITC) credits.

This article will describe the statutory and regulatory preconditions to a tax intercept, the federal agency review processes, due process requirements, defenses to intercept, and debt collection claims against debt collectors hired by ED.

Many of these claims have been raised by individual action and in a New York statewide class action filed by Brooklyn Legal Services against the ED; the Internal Revenue Service (IRS); and a debt collector working with ED, GC Services.[2]

This article discusses only the non-child support tax intercept provisions.[3] The first part, published here, discusses the statutory and regulatory provisions regarding intercept. The second part, to be included in the next issue of *Clearinghouse Review*, discusses the due process, debt collection, and statute of limitations claims.

1. 51 Fed. Reg. 24098 (July 1, 1986).

2. *See, e.g.*, Richardson v. Baker, C.A. No. 86 CIV 2329 (S.D.N.Y. filed Mar. 19, 1986) (Clearinghouse No. 40,719).

3. The child support federal tax intercept provisions, in 26 U.S.C.A. § 6402(c) (West Supp. 1985) and 42 U.S.C.A. § 664 (West Supp. 1985), are discussed in Roberts *Federal Income Tax Intercept*, 19 CLEARINGHOUSE REV. 853 (Dec. 1985).