MEMORANDUM

To: Drafting Committee
Uniform Wage Garnishment Act
From: Steve Willborn
Date: October 23, 2014
Re: Issues

This memo discusses some specific topics we should talk about sometime during our next meeting. In addition to the issues below, I want to ask all of you (but especially the Advisors) to pay special attention to the technical details of this draft. There are many technical details, especially in the sections with forms. I'm quite certain that I've gotten stuff wrong. (I just don't know where, or I would correct it!) But we have to get it right by the end of the day, so please pay special attention to these technical details so we can attend to them at our meeting.

A. Definition of "Earnings." As indicated on the draft, the definition of "earnings" here conforms (with some stylistic changes) to the Consumer Credit Protection Act. We should discuss whether we want to address and resolve issues that have arisen. For example, we could address specifically whether these items qualify as "earnings": (1) income tax refunds, *Kokoszka v. Belford*, 417 U.S. 642 (1974)(no); (2) severance payments, *Shah v. City of Farmington Hills*, 748 N.W.2d 592 (Mich. Ct. App. 2008)(yes); (3) payments from a 401(k) plan, *U.S. v. Lee*, 659 F.3d 619 (7th Cir. 2011)(yes); (4) payments from profit-sharing plan and recognition awards, *Genesee Co. Friend of Court v. General Motors*, 626 N.W.2d 395 (Mich 2001)(yes); (5) disability payments, *U.S. v. Ashcroft*, 732 F.3d 860 860 (8th Cir. 2013)(yes); (6) gold dust, Montana Code Ann. § 25-13-501 (yes)(just kidding, the statute's not precisely on this issue, but I couldn't resist including it). If we decided to make the definition of earnings more specific, we could do so either by listing certain specific items (such as those above) as included or excluded, or we could provide other language with more detail about what we mean.

In thinking about this, it's important to keep in mind the effects of this determination. Strictly speaking, if a particular payment is not "earnings," it would not fit within this statute at all. This relates to item C below on the scope we intend for the Act. Setting that aside, to the extent the Act would apply to an attempted wage garnishment of non-earnings, if a particular payment did not fit within the definition of "earnings," an employee would not be able to take advantage of the exemptions and limits of Section 7, which apply only to "earnings." Consequently, if the Act applied, a creditor could access the total amount of a severance payment or recognition award if they were determined not to be "earnings."

B. Definition of "Employee." We will need to discuss how we want to deal with the definition of "employee." One option would be to be very bare-bones. For example, the Model Employment

Termination Act (META) defines "employee" as: an individual who works for hire, but not an independent contractor.[1]

Another option would be to follow the structure of the ALI's relatively recent Restatement of Employment Law. This would involve nested definitions of employee, independent contractor, and owner. So the definitions might be something like this:

> "Employee" means an individual who provides personal services to further the interests of an employer that consents to receive the services. The term includes an owner who provides personal services to an employer, but does not include an independent contractor.
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> "Independent contractor" means an individual who exercises entrepreneurial control over the manner and means by which personal services are provided to an employer, such as control over whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide personal services to other persons.
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> "Owner" means an individual who through an ownership interest controls all or part of the employer.

This set of definitions follows the Restatement's definition of employee with adjustments to account for its special application to garnishment. The Restatement's definition uses the basic definition of "employee" above, but then excludes (1) independent contractors (using the definition above), (2) owners (with the definition above) and (3) volunteers.[2] We should talk about this but, as you see above, my intuition is that we should also exclude independent contractors, but include some owners and ignore volunteers. If we adopt this approach, we will need to discuss these intuitions and the advisability of following the Restatement model.

But the basic distinction between the two major options here is that one is very bare-bones (META), while the other provides more guidance (Restatement).

C. Responses to Employee Debt Other than Wage Garnishment. At our first meeting, we talked briefly about alternatives that creditors might pursue if wage garnishment became burdensome or impracticable. The main worry (voiced by Jack, among others) was that creditors would begin to garnish bank accounts rather than wages. Since our meeting, I had a discussion with a Texas poverty lawyer who agreed with this prediction; he said that workers in Texas (where garnishment is not permitted) are in a weaker position than workers in other states because Texas creditors have reacted to the wage garnishment prohibition by garnishing bank accounts instead. For that type of garnishment, however,

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[1] The META definition is slightly longer than this. It has a phrase that specifically includes supervisors, managers and confidential employees. Those inclusions were necessary in an employment termination statute for labor law reasons that I won't go into here. But I don't think they are necessary in a garnishment statute. Such employees would be covered by this statute even without any special mention. But if we go with this option, we may want to discuss this point.

[2] A "volunteer" is defined by the Restatement, in our terminology, as an "individual who provides personal services to an employer without coercion and without a material inducement."

none of the protections that attach to wage garnishment apply (e.g., there are no minimum exemptions or withholding limitations).

This problem with a statute restricted to wage garnishment is aggravated because most existing garnishment statutes encompass garnishment from entities other than employers. Some statutes are explicitly very broad,[3] while others use the word “employer” but define the term broadly enough to encompass many non-employment relationships.[4] Although I’ve not done a complete survey, I expect only a few garnishment statutes are strictly limited to “wage” garnishment from “employers.”

This leaves us with difficult choices. Some options:

(1) We could limit our statute to wage garnishment from employers. This would require states to either amend our statute to broaden it to include garnishment from other types of entities and relationships, or to draft a separate statute for other types of garnishments.

(2) We could limit our statute to wage garnishment, but define wages expansively to encompass situations where the “wages” are being held by entities other than employers. For example, if wages included monies received for personal services within the preceding 30 days, then whatever restrictions that might apply to an employer directly would also apply to others that were holding such “wages” (such as a bank which had received the monies through a direct deposit from an employer).

(3) We could draft a statute that explicitly extended beyond wage garnishment to encompass garnishments from other types of entities and relationships. This would probably require permission from the Scope and Program Committee.

(4) We could provide States with options about what kinds of entities and relationships they want the statute to cover. This again may require permission from Scope and Program.

D. Interaction with the Uniform Interstate Family Support Act (UIFSA). There are two points at which this Act may intersect with UIFSA: (1) the choice of law provision, § 3, and the priorities section, § 8. In this draft, you’ll see that I explicitly included language (lots of language) to accommodate those interactions. But it’s lots of extra definitions[5] and some extra statutory language (e.g., §§ 3(d)&(e)), even

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[3] See, e.g., Del. Code Ann. tit. 10, § 9588(b)(plaintiff may seek garnishment from anyone who has “in his or her hands, or possession, any attachable goods, or chattels, rights, credits, money, or effects of the defendant”).

[4] See, e.g., Conn. Gen. Stat. § 52-362(a)(4)(employer defined to include any person “who owes earnings to an obligator”); Ariz. Rev. Stat. § 12-1598.03(4)(permits garnishment if garnishee is “believed to be the employer of the judgment debtor or otherwise owes or will owe to the debtor disposable earnings”). On their face, these statutes permit garnishment from entities that have independent contractor and other non-employment relationships with debtors.

[5] These definitions are drawn from UIFSA: Child; Child-support order; Convention; Foreign Country; Registered order; Support Order; and Tribunal.

though these kind of support orders are not the main focus of this statute. We might want to discuss the issue of the extent to which this statute should attend to the interaction with UIFSA.

E. Administrative Fee. I have not included any provision for an administrative fee to be paid to the employer. Currently, about a dozen states do not provide for any administrative fees. Of the others, most require the payment to be paid by the creditor rather than by the debtor. So these are the three general options on administrative fees:

1) No fee, as in the current draft.

2) A fee to be paid by the creditor. This would be fairly simple to implement. The main issues would be (a) how much and (b) when does it have to be paid. Both issues could cause enactability problems, especially in states that do not now require such fees to be paid.

3) A fee to be paid by the debtor. This is possible and occurs currently in some states, but it's a little bit more complicated to insert into the statute as it would affect things like the forms, the limits, and the priorities.

F. Penalties for Creditors. The issue here is whether to have something in the Act that discourages creditors from filing garnishment actions without paying any attention to whether an individual actually is an employee of the employer.[6] Or stated the other way around, should there be a penalty to encourage creditors to do some due diligence to determine whether debtors are employees before they file a garnishment action.

In general, three types of penalties could be relied on to encourage due diligence:

1. ***The court filing fee itself***. If high enough, this would discourage frivolous, fishing filings. An advantage of adopting this approach is that it would require nothing in our statute; it's a part of the background rules. On the other hand, (a) it will vary by state and (b) it may not be enough of a discouragement.

2. ***An administration fee***. Option 2 in subsection E above would create an incentive in the right direction and, as indicated, would be fairly easy to implement. On the other hand, (a) it's hard to know what the proper amount of the fee should be for this purpose[7] and (b) as indicated above, it may raise enactability problems.

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[6] Similarly, we may want to think about having a penalty for a failure of a creditor to comply with Section 4(b)(1)'s obligation to respond if an employer reports that the debtor is not an employee.

[7] Note that the purpose here is ***not*** to compensate the employer for its costs, but rather to encourage due diligence by the creditor. There is little reason to think that the "proper" amount for those two purposes would be the same and there will be precious little empirical guidance about what the proper amount should be for the latter purpose.

3. ***An explicit penalty***. The Act could provide an explicit penalty for creditors who file garnishment actions willy-nilly. This would be the most targeted way to encourage due diligence. But (a) it would require some sort of standard for when the penalty would apply that would probably be hard to apply ("penalty for filing without reason to believe the debtor is an employee…", or something mushy like that); (b) it would apply only rarely and be expensive to enforce when it was invoked; (c) it would need to have a higher penalty than either of the other options because creditors will properly discount the face amount of the penalty by the low probability that it will ever be applied to them no matter how they act; and (d) because the amount of the penalty will have to be significant (see (c) above), it will probably create enactability problems.