MEMORANDUM

To: Drafting Committee
From: Steve Willborn
Date: February 14, 2014
Re: General Issues for Discussion

A. Forms

Wage garnishment is an area of the law that is particularly suited to forms. In the normal course, the wage garnishment process tends to be relatively rote and uniform. With such a process, forms can serve several functions: (1) to facilitate standardization and, hence, efficiency of the process; (2) to clarify the meaning of the substantive provisions of the law; and (3) to make it easier for courts, employers, debtors and others to follow and understand the process. On the other hand, statutory forms can bump up against concerns about the unauthorized practice of law, an issue that we have been asked to address. Forms make it easy and tempting for non-lawyers to fill in the blanks and perform these kinds of services.[1]

The Uniform Law Commission does not have a standard approach to forms in its products. Sometimes, the ULC includes forms in the statutes themselves,[2] sometimes it includes them as bracketed (optional) provisions,[3] sometimes it includes them only in the comments,[4] and sometimes it does not provide forms at all. The ULC Drafting Rules provide guidance for how to draft statutory forms,[5] but as far as I can tell there are no rules or policies or anything to help determine whether to use them at all. That decision appears to be left entirely to individual drafting committees.

Similarly, some states (such as Illinois and New York) have used statutory forms regularly and for a long time, while other states tend not to use them much. I have not done a survey, but I expect most states (maybe all) have a form somewhere in their statutes. As with the ULC, I doubt that state decisions whether to include or not include forms in statutes are based on well-developed policy considerations.

Thus, one general issue for us is how we want to treat forms in this Act.

B. The Exemption Amount and the Minimum Wage

The exemption amount is the amount of a person's wages that are exempt from garnishment; the amount the person gets to keep before any money can be withheld by the employer. The federal Consumer Credit Protection Act sets the minimum exemption

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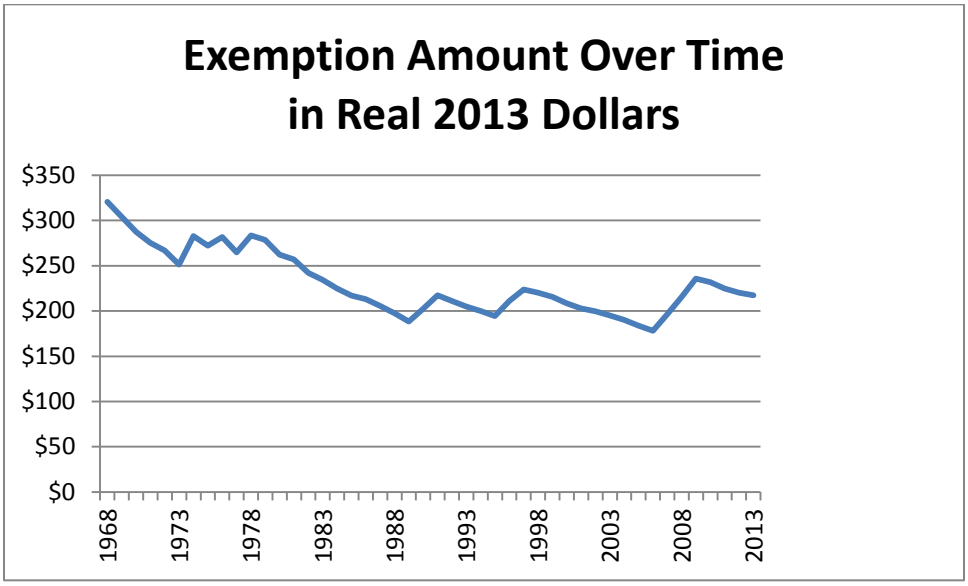
[1] See generally John M. Gradwohl, *Legislative Enactment of Standard Forms*, 91 NEB. L. REV. 273 (2012).
[2] See, e.g., Uniform Unsworn Foreign Declarations Act § 6 (2008).
[3] *See, e.g.*, Uniform Real Property Transfer on Death Act §§ 16-17 (2009); Uniform Power of Attorney Act § 301-302.(2006).
[4] *See, e.g.*, Uniform Nonjudicial Foreclosure Act §§ 202. 204 (2001).
[5] ULC, Drafting Rules, App. E, at 56 (2012 Edition).

amount at 30 times the federal minimum wage.[6] Most states adopt this amount; those that vary from it tend to use either a different multiple of the federal minimum wage or a multiple of the state's (necessarily) higher minimum wage.

There are two principal problems with using the minimum wage as the metric for measuring the exemption amount.[7] First, minimum wage changes tend to be lumpy rather than smooth. For example, it did not change at all from 1997 to 2006 ($5.15), and then jumped more than 40% between 2006 and 2009 (to $7.25). It has not changed since 2009, although there is currently some discussion of raising it. This lumpiness has no relationship to the underlying policy of the exemption amount in garnishment law, which is to ensure a bare minimum standard of living.[8]

Second, in part because of its lumpiness, using the minimum wage as the metric for determining the exemption amount means that the exemption varies greatly over time in real terms. The graph below shows the amount of the exemption in real terms from 1968 to 2013. In 2013 dollars, the amount was as high as $321 in 1968 and as low as $178 in 2006. It is currently $218, and going down slowly (because inflation is low). The tie to the minimum wage meant that the amount protected from garnishment in 2006 was only 55% of the amount protected in 1968. Again, this result has no relationship to any considered public policies relating to garnishment. Instead, it's simply an artifact of the tie to the minimum wage.



[6] 15 U.S.C. § ___.

[7] These issues are present for links to both the federal and the state minimum wage, but it is more true for the federal one. The states that have their own higher minimum wages tend to be more regular in amending it to adjust to market conditions.

[8] The lumpiness does not have much to do with the underlying policy of the minimum wage either, but that's irrelevant for our purposes. We are dealing with garnishment and its policies, not the minimum wage.

These problems are ameliorated, but not eliminated, when States use their own State minimum wage instead of the federal one as a measure of the exemption amount. As of December 1, 2013, 18 States had minimum wages higher than the federal minimum wage of $7.25/hour; the higher minimum wage amounts ranged from $7.35/hour (in Missouri) to $9.19/hour (in Washington).[9] Interestingly, States differ on whether they use their higher State minimum wage as a measure of the garnishment exemption amount. Some States do (e.g., Connecticut and Illinois), but other States rely on the federal minimum wage to set the exemption even though their own State minimum is higher (e.g., Oregon and Washington). Although I've not done a careful study of this, I think using State minimum wages as the measuring stick would ameliorate the problems identified above because the state minimums tend to be updated more often (so they are less lumpy) and, because of that, they vary less over time in real terms. Even if that's the case (and, again, I expect it is), use of the State minimum wages for this purpose merely lessens the lumpiness and real-value-over-time problems; it does not eliminate them. (At the same time, however, using State minimum wages as this measuring stick aggravates other problems we are attempting to address, such as ease of administration and choice-of-law problems.)

It would be possible to set the exemption amount based on other metrics in a way that would maintain a smoother exemption amount based on what we think the appropriate policies are for garnishment and that would also make it more stable in real terms.[10] Of course, if we did decide to link the exemption amount to a different metric, we would have to ensure in some way that the amount was always above the minimum amount required by the Consumer Credit Protection Act and that it would be easy to determine. But both of those requirements are probably possible.

Thus, the issue here is whether we should continue the standard practice of linking the exemption amount to the minimum wage (state or federal), despite its flaws, or whether we should consider other metrics? Linking to other metrics would be new and may be startling to everyone. On the other hand, an alternative linking would permit better and more consistent alignment with the policies underlying the exemption.

C. Exemptions and Withholding Limits

As I indicated above, exemption limits vary across the States. Similarly, withholding limits above the exemption amount also vary across the States.

Another issue for us to consider is our approach to these types of variances. One possibility would be to insert into the uniform law one exemption amount and one withholding percentage. If we did that, we would be encouraging states to adopt that as

[9] Some municipalities have even higher minimum wages. For example, SeaTac, Washington's minimum wage is $15/hour and San Francisco's is $10.74. As far as I know, however, none of these are used as a measure of garnishment exemption amounts.

[10] If we decide to go in this direction, I would expect to develop a variety of possibilities for consideration. For example, one could tie the exemption amount to a one-year lagged multiple of the average hourly wage in manufacturing, or some other readily available statistic from the Bureau of Labor Statistics.

their state policy. The other possibility would be to provide uniform definitions for the ways in which these limits would be applied (for example, the metric for determining the exemption amount and a uniform definition of disposable earnings), but leave a blank for the actual exemption amount and withholding percentage.[11] This would permit the states to make their own trade-offs in establishing those numbers; it would encourage the states to think about what their particular public policy should be on these issues.

One set of exemptions and one withholding limit would contribute to efficiency and ease problems of implementation across state lines. On the latter point, it would not matter if Nebraska or Iowa law applied if both laws were the same. On the other hand, both types of limits are an expression of state policy and, although most states follow the federal guidelines of the Consumer Credit Protection Act for both these limits, not all do. If we set one uniform limit, we would be discouraging states from examining their own states' policies on these issues.

Thus, the issue here is how uniform do we want this Act to be? Are we inclined to insert our own number for both of these limits, or are we inclined to encourage state variance?

D. How to improve efficiency of process?

One of the central goals of this process is to improve the efficiency of the garnishment process. Efficiency would work to everyone's advantage. Rather than list things myself, I want to encourage each of you to think of ways in which the current state of garnishment law is inefficient and, conversely, ways in which we could improve efficiency through this law. We will reserve time at our first meeting to talk about this issue in general terms.

E. Federal Interactions

There are two areas of interactions between federal law and state garnishment law that raise the question of whether we would want to attend to them in a uniform law.[12] First, two types of wage garnishment are authorized by federal law: (1) levies issued by the IRS to collect unpaid federal income taxes and (2) administrative wage garnishments.[13] One type of possible interaction is between these types of federal garnishments and state garnishments. Second, state garnishments can be affected by bankruptcy filings in federal courts.

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[11] For example, for the exemption amount, we might decide to stick with the federal minimum wage as the metric, but then leave a blank for the state to determine whether it wanted the exemption amount to be 30, 35, or 40 times the minimum wage.

[12] Garnishments for child support and medical child support are also deeply intertwined with federal law. But the federal statutes in these areas generally call on states to enact laws that meet certain federal guidelines. As a result, these areas seem particularly suited to our project. But if there are doubts about that, we could talk about these kinds of federal/state interactions, too.

[13] Federal administrative wage garnishments come in two varieties – one for delinquent student loans under the Higher Education Act and another for other types of federal debt under the Debt Collection Improvement Act. There are differences between these (and between both of them and tax levies), but those differences are not important for consideration of this issue.

Obviously, the federal statutes authorizing garnishments and bankruptcies supersede state law.[14] The issue for us, then, is whether our statute should attend to coordination issues between these federal statutes and state garnishments. This, in turn, may depend some on the extent to which a state law can resolve ambiguities in coordination. Some areas of potential coordination come to mind immediately, such as how the garnishment limits should apply when there are state and federal garnishments or the precise effect of bankruptcy on a state garnishment. But it may be that the complications of attending to these types of interactions may outweigh the benefits of attending to them.

F. Unauthorized Practice of Law

One topic we have been asked to explore is whether responding to a garnishment order constitutes the practice of law. This issue recently arose in Georgia when (1) the Bar issued an advisory opinion that corporate responses to garnishment orders were the practice of law; (2) which was adopted by the Georgia Supreme Court; and (3) which lead to a state statute providing that initial responses to garnishment orders were not the practice of law.[15] I don't know of this issue arising elsewhere (although it may have), but certainly it could flare up anywhere, anytime.

The issue is a sensitive one because the courts normally define this boundary, not the legislature. Thus, in some states, a statute such as the one in Georgia may be viewed as outside of the legislature's authority. (This may also be an issue in Georgia, as noted in the materials cited in note 15.) This poses a problem for a group like ours which drafts suggested state statutes for legislatures to consider, not court rules.

As a result, there are two general issues here:

> 1) What is the appropriate way to address this issue? Through comments alone? Through bracketed statutory language? Through unbracketed language?
>
> (2) Where precisely should the boundary be set? Precisely what, if anything, can non-lawyers do in this process before they begin engaging in the practice of law?

G. Scope Issues

The ULC's Scope and Program Committee has authorized us to look at certain aspects of wage garnishment and has instructed us to return to them if we want to address additional issues. As I've prepared this memo, two issues have arisen which may implicate the scope of our charge from the Committee.

1. *Wage Garnishment*

[14] There are certain areas in which federal bankruptcy law defers to state law and some of those (such as exemptions for wages) are relevant to our issue. But let's leave that aside for the moment to consider the more general issue of how our statute should approach federal interactions.

[15] Information on this recent Georgia episode are included in the Meeting Materials Appendix.

We have been authorized to think about ***wage*** garnishment. This raises an issue about scope because most garnishment statutes permit garnishment from entities other than employers. Some statutes are explicitly very broad,[16] while others use the word "employer" but define the term broadly enough to encompass many non-employment relationships.[17] 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.
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> (2) 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.[18]
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> (3) We could provide States with options about what kinds of entities and relationships they want the statute to cover. Again, this again may require permission from Scope and Program.

2. *Limits on Employer Retaliation for Garnishments*

The Consumer Credit Protection Act protects employees from discharge because of any one garnishment. 15 U.S.C. § 1674. Some States have stronger protections and better remedies than provided by federal law.[19]

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[16] 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").

[17] 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.

[18] Whether our current charge would permit this or not is somewhat ambiguous. On the one hand, the charge from the Scope and Program Committee talks only about "wage garnishment." On the other hand, in its initial proposal to the Scope and Program Committee, the American Payroll Association defined "wage garnishment" broadly to include the attachment of "property or wages" by any "third party." The Study Committee report does not address this issue specifically. In all probability, neither the Study Committee nor the Scope and Program Committee considered explicitly whether "wage garnishment" should be construed narrowly (as the words imply) or more broadly (as initially presented to Scope and Program by the APA). Given this ambiguity, it would probably be advisable to consult with Scope and Program before we expanded beyond wages, narrowly construed.

[19] For example, some States permit private causes of action to enforce this restriction. The federal law has generally been interpreted to permit enforcement actions only by the Secretary of Labor and not to authorize an implied private cause of action. *See LeVick v. Skaggs Companies, Inc*., 701 F.2d 777 (9th Cir. 1983).

If we addressed this issue, we could make two types of improvements. First, we could make the protections more uniform. This is squarely within the central mission of the ULC. Second, we could clarify some areas where the protections have been uncertain. *See, e.g., Donovan v. Southern California Gas Company*, 715 F.2d 1405 (9th Cir. 1983)(employee could not be discharged even though employer received garnishment notices from two different creditors because employee secured release of second creditor before any wages were withheld); *Brennan v. Kroger Co*. 513 F.2d 961 (7th Cir. 1975)(employee could not be discharged when two garnishment notices were pending because state's garnishment priorities system held second garnishment in abeyance; no dismissal until wages actually withheld on second garnishment). Including this kind of provision in the Uniform Act would also make the Act look more complete; it might look kind of odd if we forwarded a garnishment statute without this kind of provision.

On the other hand, this issue is not within the scope of the charge we received from the Executive Committee. As a result, if we wanted to include a provision like this, we would need to go back to the Committee and ask them to expand our scope to consider this.