

Wage Garnishment: Efficiency, Fairness, and the Uniform Act

*Steven L. Willborn**

| | |
|--|-----|
| I. INTRODUCTION | 848 |
| II. GARNISHMENT NEGLECT | 849 |
| III. A BRIEF HISTORY OF GARNISHMENT | 851 |
| IV. WAGE GARNISHMENT WRIT LARGE..... | 853 |
| V. THE FAIRNESS AND EFFICIENCY OF THE WAGE GARNISHMENT PROCESS..... | 855 |
| A. Who is Covered? | 856 |
| B. Beginning the Process | 858 |
| C. Notice | 859 |
| D. Limits on the Amount Subject to Garnishment | 860 |
| E. Handling the Money | 865 |
| F. Record-Keeping..... | 866 |
| G. Sanctions for Employers and Creditors | 868 |
| H. Protections for Employees Subject to Garnishment | 869 |
| VI. CONCLUSION..... | 870 |

* Spencer Professor of Law, University of Nebraska College of Law. The author was the reporter for the drafting committee of the Uniform Wage Garnishment Act, but this Article reflects only the author's views, and not the views of the drafting committee or the Uniform Law Commission. Thanks to Charlie Sullivan, Stewart Schwab, and Jim Hawkins for their helpful comments.

I. INTRODUCTION

Each year about eleven million Americans have their wages garnished.¹ The wages of these workers are reduced, on average, by over \$2,000 each year even though those most likely to be garnished only earn between \$25,000 and \$40,000 annually.² In comparison, about two million workers earn the minimum wage or below³ and about 85,000 discrimination charges are filed with the federal Equal Employment Opportunity Commission (EEOC) every year.⁴ And yet the newspapers are filled with debates about the minimum wage and discrimination with only the occasional mention of garnishment.⁵ Ditto the academic literature.⁶

This Article is about wage garnishment, primarily garnishment for consumer debt.⁷ Wage garnishment is a massive, largely unexplored part of the civil justice system. The laws are archaic, inefficient, and exceptionally complex. Workers and employers are unwilling participants in the process, and generally unfamiliar with their rights and responsibilities. The costs of the system are unnecessarily high. And yet, again, little attention is paid to

¹ A study conducted by ADP found that 7.2% of employees had their wages garnished in 2013. ADP RESEARCH INST., GARNISHMENT: THE UNTOLD STORY 8 (2014), <https://www.adp.com/tools-and-resources/adp-research-institute/insights/~media/RI/pdf/Garnishment-whitepaper.ashx>. The Bureau of Labor Statistics reported that about 128 million people were non-agricultural wage and salary workers in 2013. See U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2013 ANNUAL AVERAGES: HOUSEHOLD DATA tbl. 21 (2013), https://www.bls.gov/cps/cps_aa2013.htm (excludes self-employed workers working for unincorporated entities and unpaid family members). This means that about nine million employees had their wages garnished in 2013. These numbers are relatively consistent over time. See ADP RESEARCH INST., *supra*, at 1.

² See ADP RESEARCH INST., *supra* note 1, at 12; see also Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35, 37–38 (2015) (estimating, in different ways that the wages of “between five and eleven million workers” are garnished each year).

³ U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2017, REPORT NO. 1072 (2018), <https://www.bls.gov/opub/reports/minimum-wage/2017/pdf/home.pdf> (reporting that “1.8 million workers [earned] wages at or below the federal minimum”).

⁴ *Charge Statistics (Charges Filed with the EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jan. 17, 2019) (reporting annual charges ranging from 75,000 to 100,000, with an average of 86,000).

⁵ In 2017, Westlaw’s “Journals Magazines and Newsletters” database contained 917 articles with the words “minimum wage” in the title and 2,563 articles with the word “discrimination” in the title. The word “garnishment” appeared in the title to 44 articles.

⁶ See *infra* notes 9–10.

⁷ Child support is the leading reason for wage garnishment. See ADP RESEARCH INST., *supra* note 1, at 8 (about half of wage garnishments are for child support and about forty percent for debt); see also Paul Kiel, *Unseen Toll: Wages of Millions Seized to Pay Past Debts*, PROPUBLICA (Sept. 15, 2014), <https://www.propublica.org/article/unseen-toll-wages-of-millions-seized-to-pay-past-debts> (about four million workers had wages garnished for debt in 2013).

the issue.

This Article will begin with a general overview of wage garnishment. Part II will consider why wage garnishment receives so little public attention; Part III will briefly review its history; and Part IV will present the general structure of wage garnishment. In Part V, the Article will drill down more deeply into the garnishment process, and explore the many ways in which it is unfair and inefficient. This Part will look to a recent product of the Uniform Law Commission, the Uniform Wage Garnishment Act (UWGA),⁸ to suggest ways in which the process could be made more fair and efficient.

II. GARNISHMENT NEGLECT

Garnishment is a mass justice system affecting the wages of millions of workers every year. And yet it is largely invisible on the legal horizon. Since 2010, for example, eight articles have been published in law journals with the word “garnishment” in the title.⁹ By comparison, over 1,200 articles have been published since 2010 with the word “discrimination” in the title.¹⁰ What explains this lack of interest in garnishment? Let us count the ways.

First, garnishment is old and state-based. As discussed below,¹¹ garnishment arose organically with the rise of capitalism and wage labor. Until recently, there has never been an effort to harmonize the law across states,¹² and federal regulation came late and was minimal.¹³ In contrast, most other major labor initiatives during the New Deal¹⁴ and later¹⁵ attracted much more attention because they were all national in scope and, in large part because of that, enacted after major public and legislative efforts.¹⁶

⁸ See generally UNIF. WAGE GARNISHMENT ACT (UNIF. LAW COMM’N 2016).

⁹ Search conducted in Westlaw’s “Law Reviews & Journals” database on May 15, 2018. Only thirty-four articles had the word “garnishment” anywhere in them since 2010.

¹⁰ The search conducted in Westlaw’s “Law Reviews & Journals” database on May 15, 2018, produced 1,270 articles. A search in the same database for the word “discrimination” anywhere in an article produced more than 10,000 articles (the search terminates at 10,000 articles).

¹¹ See *infra* Part III.

¹² To the author’s knowledge, the UWGA was the first effort to harmonize wage garnishment law across states.

¹³ See *infra* Parts III–IV.

¹⁴ The major labor initiatives during the New Deal were the federal National Labor Relations Act and Fair Labor Standards Act and the hybrid state/federal unemployment programs. See *Chapter 3: The Department in the New Deal and World War II 1933-1945*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/history/dolchp03> (last visited Jan. 19, 2019).

¹⁵ In the 1960s, the Equal Pay Act and Title VII of the Civil Rights Act began a period of federal enactments that continues to today. See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 3–4 (6th ed. 2017).

¹⁶ For good reviews of the major efforts undertaken to enact federal employment laws, see, for example, CHARLES W. WHALEN JR. & BARBARA WHALEN, *THE LONGEST DEBATE: A*

Second, garnishment is complicated. One reason for this is that it does not fit neatly into one legal category. Garnishment is employment law, broadly construed, as it regulates the relationship between employer and employee. But it is also collection law as it structures the relationship between creditor and debtor. These legal regimes mesh only imperfectly making the topic complicated and technical.

Third, garnishment tends to affect a class of people who are largely out of the public eye and not overly sympathetic. Unlike the minimum wage, for example, garnishment is not focused on the poorest among us; creditors are interested in garnishing the wages only of people who have wages high enough to yield returns.¹⁷ On the other end of the economic spectrum, garnishment does not tend to affect friends and colleagues of those who might write about the topic. Law professors, for example, will know people who have experienced discrimination (or will have experienced it themselves); they are much less likely to know people whose wages have been garnished.¹⁸ And, of course, the people who are adversely affected by garnishment are people who by definition have not paid their debts.

Finally, garnishment is just not a very sexy topic. The issues that arise in garnishment tend to be small-scale and technocratic—what notice needs to be provided, how does one calculate limits on the amount that can be garnished, etc. These issues simply do not compare on the human-interest scale to the problems of the working poor addressed by the minimum wage or the often dramatic story lines of major discrimination cases.

This Article is a modest reaction to this unfortunate garnishment neglect. As noted, garnishment affects millions of people each year. Given these large numbers, small gains in efficiency could yield large benefits to be shared by everyone in the system, but which would accrue mostly to workers who bear most of the costs of the current system. Major improvements could also be made in fairness, for example, by providing employees with comprehensible notices and automatic protections rather than ones that need to be claimed. But to achieve these gains, garnishment must be brought out of the shadows.

LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978).

¹⁷ ADP RESEARCH INST., *supra* note 1, at 12 (finding that the garnishment rate for those making less than \$7,500 per year was 2.4%, while the rates for all other income brackets less than \$200,000 per year ranged from 3.0 to 10.0%).

¹⁸ *Id.* (finding that the garnishment rate for those making more than \$200,000 per year was 1.8% compared to rates ranging from 2.4% to 10.0% for all other income brackets).

III. A BRIEF HISTORY OF GARNISHMENT

Garnishment has deep historical roots,¹⁹ but wage garnishment first arose in the United States during the transition to an industrial economy.²⁰ Nebraska is typical.²¹ Wage garnishment is included within Nebraska's general collection statute, which was first enacted in 1867.²² Although wages were always subject to garnishment, they were first included explicitly in the statute in 1972 when the Unicameral enacted a major bill to create a system of county courts to replace an older system which included police magistrates and justices of the peace as well as county courts.²³ The general rule in the 1972 statute, still in place, applied a typical attachment approach to wages. That is, the employer begins to withhold wages as soon as the garnishment notice is served, but awaits a further court order with instructions for what to do with the money.²⁴ The only other major change to Nebraska's wage garnishment statute was made in 1988, when continuing garnishments were first statutorily authorized.²⁵ At base, Nebraska's wage garnishment statute, like most, is ancient, cobbled together, and highly inefficient.²⁶

¹⁹ See William E. Mussman & Stefan A. Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7–17 (1942) (tracing the origins of garnishment back to the concept of “foreign attachment” in the Middle Ages).

²⁰ See Joseph C. Sweeney, *Abolition of Wage Garnishment*, 38 FORDHAM L. REV. 197, 202 (1969) (“[W]age garnishment and the exemptions therefrom are a product of the modern industrial age . . .” (footnote omitted)). Consistent with this, it is interesting to note that wage garnishment statutes closely followed the abolition of debtors’ prisons. See *Boyd v. Buckingham & Co.*, 29 Tenn. (10 Hum.) 434, 435 (1850) (“[W]hen it is remembered that the right to imprison the debtor had been abolished by the act of 1842, . . . only one year before the passage of the attachment law under consideration, the object of the legislature in changing the attachment law, will plainly appear.”).

²¹ See NEB. REV. STAT. ANN. § 25-1056 (West 2018). For examples of other state garnishment statutes that can be traced back to the beginnings of the industrial age, see ARK. CODE ANN. § 16-66-208 (West 2018) (statutory credits begin in 1875); FLA. STAT. ANN. § 77.0305 (West 2018) (1845); IDAHO CODE ANN. § 11-201 (West 2018) (1881); 9 R.I. GEN. LAWS ANN. § 9-26-4 (West 2018) (1905). See generally *Owney v. Morgan*, 256 U.S. 94, 104–07 (1921) (statute in Delaware and other states date from early colonial times); Mussman & Riesenfeld, *supra* note 19, at 7–17 (same).

²² R.S. 1867, Code § 244, p. 433.

²³ 1972 Neb. Laws 1032, § 127.

²⁴ NEB. REV. STAT. ANN. § 25-1056(1) (West 2018) (“When wages are involved, the garnishee [employer] shall pay to the employee all disposable earnings exempted from garnishment by statute, and any disposable earnings remaining after such payment shall be retained by the garnishee until further order of the court.”).

²⁵ 1988 Neb. Laws 1030, § 17.

²⁶ Garnishment for child support provides an instructive counter-example. With prodding from the federal government, since 2012 every state has updated and modernized their system for collecting child support by enacting the Uniform Interstate Family Support Act (UIFSA) (amended 2008), 9 pt. 1B U.L.A. 148–49 (2015) (listing states and dates of enactment).

The modern history of garnishment begins in 1968 with enactment of the federal Consumer Credit Protection Act (CCPA).²⁷ The CCPA did two basic things. First, it provided a floor of protection to ensure that debtors could survive even though they were subject to garnishment. The floor was low. Wages were not subject to garnishment at all until weekly earnings exceeded thirty times the federal minimum wage,²⁸ and they could never exceed more than twenty-five percent of earnings.²⁹ Second, the CCPA provided a similarly modest protection against discharge for garnishment. An employer could not discharge a worker whose wages had been garnished only once.³⁰

The CCPA contains an anti-preemption provision that preserves state laws that are more protective of employees.³¹ This ensures a level of diversity (and chaos) between states. A few states outright prohibit wage garnishment for debt³² (although even they generally grant full faith and credit to garnishments coming from other states),³³ and most provide a higher level of protection than the CCPA in one or more ways, such as protecting higher multiples of the federal minimum wage, multiples of a higher state minimum wage, or a higher percentage of wages.³⁴

²⁷ Pub. L. No. 90-321, 82 Stat. 146 (codified at 15 U.S.C. §§ 1671–77 (2018)). Professor Budnitz attributes this surge of interest in consumer protection to President Johnson's War on Poverty and, more specifically, to establishment of the Legal Services Program which, at the beginning, had an explicit law reform agenda. Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. L. REV. 1147, 1151–53 (2010).

²⁸ Thus, with the federal minimum wage currently at \$7.25 per hour, no earnings can be garnished until a worker's weekly earnings exceed thirty times \$7.25, or \$217.50 per week. See *Minimum Wage*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/wages/minimum-wage> (last visited Apr. 15, 2019).

²⁹ See 15 U.S.C. § 1673(a). These are the limits for wage garnishment; the restrictions do not apply in some circumstances and are weaker for support payments. See *id.* § 1673(b). These restrictions apply to "disposable earnings" rather than wages. Disposable earnings exclude a portion of a worker's wages from garnishment (such as required taxes), so the UWGA provides effective protection for more than thirty times the federal minimum wage and twenty-five percent of gross wages. See § 1672(b).

³⁰ See *id.* § 1674.

³¹ See *id.* § 1677. This anti-preemption provision is similar to those in other labor laws, which permit states to provide stronger protections for employees. See, e.g., 29 U.S.C. § 218 (2018) (authorizing more protective state laws relating to the minimum wage, overtime, and child labor); 42 U.S.C. § 2000e-7 (2018) (authorizing more protective state discrimination laws).

³² See TEX. CONST. art. XVI, § 28; N.C. GEN. STAT. ANN. § 1-362 (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 8127 (West 2018); S.C. CODE ANN. § 37-5-104 (2018); see also N.H. REV. STAT. ANN. § 512:21 (West 2018) (prohibiting continuing wage garnishments, which means that wages earned after service of garnishment order are exempt).

³³ See *Knighton v. Int'l Bus. Machs. Corp.*, 856 S.W.2d 206, 210 (Tex. App. 1993).

³⁴ For a chart listing the levels of protection in each state, see AMORETTE NELSON BRYANT, COMPLETE GUIDE TO FEDERAL AND STATE GARNISHMENT 9-40 to 9-45 (2015 ed.).

Even if the CCPA had not had the anti-preemption provision, it would have had only a modest effect in updating and modernizing wage garnishment. The CCPA had no provisions at all on the wide range of other important components of a wage garnishment system, such as how garnishment starts (as a new case or as part of the underlying debt action), the notice provided to the debtor, how the money flows, when garnishment ends, and many others. As a result, garnishment in the United States is not only old, it is tired and inefficient within each state. It also varies considerably across states.

IV. WAGE GARNISHMENT WRIT LARGE

Wage garnishment intermediates between two relationships. First, wage garnishment requires a creditor and a debtor. Although there are some exceptions, garnishment generally occurs only after a creditor has a court judgment against a debtor to recover a debt.³⁵ Second, wage garnishment requires an employer and an employee. Although garnishment is a broader term, wage garnishment occurs only when an employer owes money to an employee. Wage garnishment is the process that permits a creditor to seek payment for a debt from an employer that owes wages to an employee/debtor.

Viewed from 10,000 feet in this way, wage garnishment is primarily a process for connecting these two relationships. This connection raises many interesting questions, only some of which are regularly addressed. This Article is mostly about fairness and efficiency within the internal workings of the garnishment process, but we should at least nod to some of the broader issues presented by a wage garnishment system.

For example, why do creditors have this collection option at all? Interestingly, when the CCPA was enacted in 1968, the possibility of a national prohibition on wage garnishment was seriously considered as a measure to protect worker wages.³⁶ Ultimately, however, this prohibition was rejected because it would unduly restrict “honest and ethical creditors, while permitting those fully capable of paying just debts to escape such responsibilities.”³⁷ There was also concern that eliminating wage garnishment would make it difficult for people to borrow money; creditors would be less likely to extend credit if it was too difficult to collect.

2014).

³⁵ Minnesota permits pre-judgment wage garnishment in narrowly defined circumstances, such as a debtor attempt to hide assets to defraud a creditor. MINN. STAT. § 571.93 (2018).

³⁶ H.R. REP. NO. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1978, 1967 WL 4174 (original House “bill would have provided for a blanket prohibition against the garnishment of wages”).

³⁷ *Id.*

Moreover, if prohibiting wage garnishment did have this effect, it would hit low-income workers the hardest.³⁸

The option of eliminating wage garnishment was rejected because of these concerns in favor of the narrower measures that are still in place to protect workers from the worst effects of wage garnishment (destitution and unemployment). But it is unclear that the arguments should carry the day, then or now. Four states have largely eliminated wage garnishment³⁹ without any apparent decrease in the ability of people in those states to access credit. This may be because the worry about limiting access to credit was always misplaced, or it could be because the credit market has expanded and evolved since then in ways that avoid these effects.⁴⁰ Regardless, this broader discussion about the importance of wage garnishment to credit markets seems to have largely disappeared from political discourse.

Second, what effect does garnishment have on employment? For an employee, a wage garnishment is equivalent to a wage reduction of up to twenty-five percent.⁴¹ How might an employee react? One option might be to move to another job; even a lower-paying job may be better monetarily if twenty-five percent of the wages are not skimmed off the top.⁴² Another

³⁸ This concern was documented by studies that were authorized by the CCPA. See Pub. L. No. 90-321, §§ 401–407, 82 Stat. 146, 166 (1968) (authorizing establishment of the National Commission on Consumer Finance); see also William C. Dunkelberg & Robert Smiley, *An Analysis of the Impact of Rate Regulation in the Consumer Credit Industry*, in 6 TECHNICAL STUDIES OF THE NAT'L COMMISSION ON CONSUMER FIN. 3–28 (1974) (restrictions on consumer credit would harm consumers, especially low-income families); Douglas F. Greer, *Creditors' Remedies and Contract Provisions: An Economic and Legal Analysis of Consumer Credit Collection*, in 5 TECHNICAL STUDIES OF THE NAT'L COMMISSION ON CONSUMER FIN. 85–160 (1973) (if garnishment is restricted, creditors will tighten eligibility standards, which will affect all consumers but especially the poor and least credit worthy).

³⁹ See TEX. CONST. art. XVI, § 28; N.C. GEN. STAT. ANN. § 1-362 (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 8127 (West 2018); S.C. CODE ANN. § 37-5-104 (2018); see also N.H. REV. STAT. ANN. § 512:21 (West 2018) (prohibiting continuing wage garnishments, which means that wages earned after service of garnishment order are exempt).

⁴⁰ Several factors resulted in a sea change in consumer credit since enactment of the CCPA, including technological advances in data processing and telecommunications, financial deregulation, improvements in the ability to segment consumers based on credit-worthiness, and increased ability to securitize debt. One indicator of this sea change is that the percentage of families holding a general-purpose credit card increased from sixteen percent in 1970 to seventy-one percent in 2004. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON PRACTICES OF THE CONSUMER CREDIT INDUSTRY IN SOLICITING AND EXTENDING CREDIT AND THEIR EFFECTS ON CONSUMER DEBT AND INSOLVENCY 3–12 (2006).

⁴¹ See 15 U.S.C. § 1673(a)(1) (2018) (permitting no more than twenty-five percent of disposable earnings to be garnished). States may, however, impose greater restrictions on the maximum amount of wages that can be garnished, and many states do. See *id.* § 1677 (providing that this provision “does not annul, alter, or affect, or exempt any person from complying with, the laws of any State . . .”).

⁴² Data on the incidence of employees quitting to avoid garnishment is thin. See C. Kenneth Grosse & Charles W. Lean, *Wage Garnishment in Washington—An Empirical Study*,

2019]

WAGE GARNISHMENT

855

option might be to declare bankruptcy to try to wipe out the debt; although one would think garnishment might increase bankruptcies, evidence on the connection is mixed.⁴³ Finally, if efficiency wage theory is correct (that employees work harder when they are paid more),⁴⁴ garnishment may result in more shirking and, hence, less productivity for employers. All of these employee-relations considerations are murky and poorly explored; none play a conspicuous role in modern discussions about wage garnishment.

V. THE FAIRNESS AND EFFICIENCY OF THE WAGE GARNISHMENT PROCESS

The fairness and efficiency of the modern wage garnishment system is the focus of this Article. Because wage garnishment is a state-based system, it varies considerably across the country. But every system must have certain features: the process must be started, employees must be notified, money must be transferred, etc.

The Uniform Law Commission recently promulgated the UWGA, which is the first comprehensive attempt to address fairness and efficiency in the wage garnishment process.⁴⁵ This analysis will follow the outline of that law. But first a word about fairness and efficiency.

43 WASH. L. REV. 743, 750 n.46 (1968) (indicating that fifty-six percent of employers said that employees had quit when their wages were garnished and thirty-eight percent said that none had quit).

⁴³ Compare TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 305 (1999) (less than ten percent of bankruptcies were preceded by a property seizure or garnishment; about four percent of creditors in bankruptcy had filed a collection suit prior to bankruptcy), and Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 634 (2006) (few garnishments are followed by bankruptcy), with DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 29–32 (1971) (finding that bankruptcy filing rates are higher in states with stricter garnishment laws). Ironically, one of the reasons for exemptions in garnishment is to permit the employee to retain sufficient compensation to avoid the necessity of bankruptcy. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). The issue is complicated because while garnishment may (or may not) result in more bankruptcies, it is also possible that the absence of the ability to garnish may lead to what is known as “informal bankruptcy,” which is simply the failure to pay debts. See Sumit Agarwal et al., *Exemption Laws and Consumer Delinquency and Bankruptcy Behavior: An Empirical Analysis of Credit Card Data*, 43 Q. REV. ECON. & FIN. 273, 278 (2002) (more garnishment protections and higher cost of bankruptcy leads to higher rate of informal bankruptcy); Amanda E. Dawsey & Lawrence M. Ausubel, *Informal Bankruptcy* 8 (Jan. 26, 2001) (unpublished manuscript), <http://www.ausubel.com/creditcard-papers/informal-bankruptcy-jan2001.pdf> (explaining that the unavailability of wage garnishment in some states leads to an increase in the rate of informal bankruptcy).

⁴⁴ For classic descriptions of efficiency wage theory, see TRUMAN F. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 126–27 (1999); George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982); Carl Shapiro & Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 AM. ECON. REV. 433 (1984).

⁴⁵ See generally UNIF. WAGE GARNISHMENT ACT (UNIF. LAW COMM'N 2016).

Current wage garnishment fails badly on both counts. On fairness, as will be explained in more detail below,⁴⁶ all three parties have something to complain about. For the employee/debtor, the standard notice in most states is legalistic and convoluted. It certainly is not designed to be understood by the typical employee/debtor. For employers, the process can be convoluted and time-consuming and, if they fail in some respect, the penalties can be draconian. For creditors, the payment system often includes unnecessary delays.

The current system also fails badly on efficiency. Few state systems take full advantage of modern payment systems, and exemption rules often require court hearings burdensome to courts and all the parties. The forms used by the states tend to be complicated and incompatible with modern technology.

To explore these issues in more detail, this Article will track the process as proposed by the UWGA. The UWGA was designed to address the fairness and efficiency shortcomings of the current system, so tracking it sheds light on the problems and suggests solutions to them.

A. *Who is Covered?*

Garnishment statutes facilitate garnishment of wages. Somewhat counterintuitively, however, workers may be better off when they are covered by the statutes. If they are covered, the limits on garnishment apply. If not, those worker protections are unavailable. For example, in *Idaho Pacific Lumber Company, Inc. v. Celestial Land Company Limited*,⁴⁷ the court held that the limits on garnishment did not apply to a debtor who was an independent contractor, rather than an employee. As a result, the creditor was entitled to the entire \$45,000 the garnishee owed to the debtor/independent contractor.⁴⁸ If the debtor had been an employee instead, the creditor would have been entitled to only \$11,250, twenty-five percent of the wages owed; the debtor would have been able to retain \$33,750.⁴⁹ This issue has become increasingly important in recent years as new forms of work have blurred the line between employee and independent contractor⁵⁰ and,

⁴⁶ See *infra* Part V.C–E.

⁴⁷ 348 P.3d 950 (Colo. App. 2013).

⁴⁸ *Id.* at 955.

⁴⁹ This case caused Colorado to extend its garnishment protections to independent contractors. See COLO. REV. STAT. ANN. § 13-54.5-101(2)(a)(i) (West 2018). The amendment to extend Colorado's garnishment protections to independent contractors, however, was a crude and hurried attempt. The amendment does not provide any guidance about which independent contractors might be covered, nor does it deal with any of the special problems of covering independent contractors.

⁵⁰ See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (denying summary judgment on issue of whether Uber drivers were employees or independent

2019]

WAGE GARNISHMENT

857

relatedly, as some employers have acted aggressively to move workers into the independent-contractor category.⁵¹

In most states, this issue is unresolved. Some states have held that the protections of garnishment statutes apply only to employees.⁵² Other states have applied garnishment protections to independent contractors. After *Idaho Pacific*, Colorado did this by statute.⁵³ A few states have done it through interpretation of their particular garnishment statutes; the general theory is that the protections should apply if the monies were earned through “personal services,” regardless of the employee status of the debtor.⁵⁴ The decisions extending garnishment protections to non-employees do not provide much guidance on the special problems created by the extension.

The UWGA applies to traditional employees and extends its protections to a defined class of independent contractors. Independent contractors are covered if they are individuals who perform personal services and are paid periodically.⁵⁵ Extending the UWGA’s coverage to this subset of independent contractors serves three functions. First, it provides the UWGA’s protections to individuals who look a lot like employees, but who are not treated as such by their employers through misclassification or design.⁵⁶ Second, it permits these types of workers (and their “employers”) to enjoy the efficiencies from the new and better procedures provided by the UWGA. Third, it ensures that the UWGA is at least as protective as the

contractors).

⁵¹ In a recent high-profile example, FedEx re-arranged its relationship with delivery drivers in an attempt to convert them from “employees” to “independent contractors.” The courts have been split on whether FedEx was successful in this re-classification effort. Compare *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1049 (9th Cir. 2014) (holding that the drivers were employees and, therefore, entitled to overtime premiums), with *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 518 (D.C. Cir. 2009) (holding that the drivers were independent contractors and, therefore, not able to unionize under the NLRA); see also *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 42 (Cal. 2018) (rejecting the company’s attempt to reclassify its drivers as independent contractors).

⁵² See, e.g., *In re Schlein*, 8 F.3d 745 (11th Cir. 1993); *Coward v. Smith*, 636 P.2d 793, 797 (Kan. Ct. App. 1981) (amount due to an independent contractor under a construction contract were not earnings); *In re Galvez*, 990 P.2d 187, 190 (Nev. 1999) (real estate commission earned by independent contractor was not earnings under state garnishment law), superseded by statute, NEV. REV. STAT. ANN. § 21.090 (West 2018); *SunTrust Bank v. Burke*, 491 S.W.3d 693 (Tenn. Ct. App. 2015); *Olson v. Townsend*, 530 A.2d 566 (Vt. 1987); cf. *Kokoszka v. Belford*, 417 U.S. 642, 652 (1974) (income tax refund is not entitled to the protections of the federal CCPA).

⁵³ See § 13-54.5-101(2)(a)(i).

⁵⁴ See *Cal.-Peterson Currency Exch. v. Friedman*, 736 N.E.2d 616 (Ill. Ct. App. 2000); *In re Sexton*, 140 B.R. 742 (Bankr. S.D. Iowa 1992); *In re Duncan*, 140 B.R. 210 (Bankr. E.D. Tenn. 1992); cf. *In re Pruss*, 235 B.R. 430, 436 (Bankr. 8th Cir.), vacated, 255 B.R. 314 (Bankr. 8th Cir.) (mem.) (lawyer’s accounts receivable were protected by garnishment exemptions).

⁵⁵ UNIF. WAGE GARNISHMENT ACT § 2(6)(B) (UNIF. LAW COMM’N 2016).

⁵⁶ See *supra* notes 50–51 and accompanying text.

CCPA, as required by the CCPA. The CCPA does not reference “employees” and “employers,” but rather simply protects earnings from personal services.⁵⁷

B. *Beginning the Process*

States provide two distinct ways for the wage garnishment process to commence; some states begin the process as a part of the underlying action on the debt against the employee, while in other states the garnishment action is a new proceeding. In states in which the garnishment is a new proceeding, the action is filed against the employer demanding that it withhold the wages of one of its employees. As a result, jurisdiction is based on whether the *employer* is subject to personal jurisdiction in the forum even though the employee may have minimal contacts there. For example, in *Nagel v. Westen*,⁵⁸ the court permitted a garnishment action to proceed in Minnesota even though the debtors/employees were located in Texas. More generally, in theory, creditors could forum-shop by suing national corporations in fora favorable to the creditor even though the employee has minimal contacts there.⁵⁹ The UWGA addresses this issue by generally requiring that garnishment actions be filed in the employee’s principal place of work at the time the action is commenced.⁶⁰

⁵⁷ As noted above, some states interpret the CCPA to provide protections to some independent contractors. *See supra* notes 53–54. If those interpretations are correct, then the CCPA would require state law to cover them as state law cannot provide narrower protections than the CCPA. *See* 15 U.S.C. § 1677(1) (2018).

⁵⁸ 865 N.W.2d 325 (Minn. Ct. App. 2015). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68 (AM. LAW INST. 1971).

⁵⁹ Due process considerations impose some constraints on creditor ability to shop for favorable fora. *See Nagel*, 865 N.W.2d at 335–40 (considering whether a non-resident, post-judgment debtor had sufficient contacts with the state to support a garnishment action based only on property within the state).

⁶⁰ UNIF. WAGE GARNISHMENT ACT § 4. A comment to the section explains that the “when the action is commenced” language signals that, if an employee is in State A when the action is filed there and is then transferred by the employer to State B, the garnishment action may continue in State A.” *Id.* § 4 cmt. at 9. The comment notes that

[t]his is in mild conflict with the policy that the state where the employee works is the one whose limits and exemptions should apply because in this situation the court in State A will be applying State A’s limits and exemptions even though the employee is now in State B.

Id. But the UWGA accepted that limitation because

the alternatives are inefficient and avoiding the inefficiencies outweighs this state-interest concern. The inefficient alternatives are (1) to require the court in State A to dismiss the garnishment at the time of the transfer and force the creditor to file a new action in State B or (2) to require the court in State A to have a hearing to begin to apply State B’s limits and exemptions at the time of the transfer.

Id.

Proper service on the employer is a recurrent problem in commencing a wage garnishment action, regardless of whether the action is a new one or a continuation of the underlying debt action against the employee. Without direction, service might be made on an improper representative of the employer, for example, on a supervisor at the branch store where the employee works. This is a problem because it may delay the process while the company gets the summons into the hands of the proper executive (and, often, subsequently into the hands of an outside payroll processing firm). The UWGA handles this issue by requiring that the process start with service on the employer's registered agent, if there is one.⁶¹

Properly identifying the debtor is another common problem in garnishment. This problem may be especially acute when garnishment extends to individuals whom the employer identifies as independent contractors.⁶² The employer may not have as much identifying information for these individuals as it has for regular employees. The UWGA addresses this issue by requiring the creditor to provide date-of-birth and social security information through a non-public procedure that protects confidentiality.⁶³

C. Notice

Regardless of how the garnishment action is commenced, the employer and employee must receive notice that tells them about the process and their rights and obligations.⁶⁴

Because garnishment is mass justice with millions of cases each year, every state provides notice forms. The notice forms for employees vary from state to state, but they are similar in their legalistic approach. They tend to focus on legalistic accuracy, using terms of art such as "summons" and "judgment creditor," rather than on the ability of employees to understand what is going on. The current state notice forms also tend to fail on a variety

⁶¹ *Id.* § 5(b).

⁶² *See supra* notes 53–55 and accompanying text.

⁶³ UNIF. WAGE GARNISHMENT ACT § 5(d).

⁶⁴ The United States Supreme Court once held that due process did not require notice to debtors in a post-judgment wage garnishment action. *See Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285, 289–90 (1924). The theory was that debtors had already received all the process they were due in the underlying action upon which the wage garnishment was based. *Id.* But much has changed since then. In 1969, the Supreme Court, without mentioning *Endicott-Johnson*, held that due process required adequate notice before wages could be garnished in a pre-judgment proceeding. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341–42 (1969). Since then, a long line of lower-court cases has held that debtors in wage garnishment actions are constitutionally entitled to notice of exemptions and the procedures for enforcing them. For a review of these cases, see *Strickland v. Alexander*, 153 F. Supp. 3d 1397, 1406–09 (N.D. Ga. 2015). Consequently, it is likely that this notice is required by due process.

of other factors, such as layout,⁶⁵ mode of presentation,⁶⁶ language,⁶⁷ and ease of use.⁶⁸ The UWGA contains an employee notice form that was drafted with the assistance of a plain-writing group to ensure that employees understand the process.⁶⁹

The problem of notifying employers about the details of the garnishment process is less problematic, as they are likely to be repeat players. Instead, the problem for employers is that the forms (and the process itself) are not designed to permit efficient processing. In today's world, the employer form should be designed to interact with major payroll processing systems so that the required employer response can be completed at the touch of a button (or two). Instead, today, most garnishment responses need to be completed by hand.⁷⁰

D. *Limits on the Amount Subject to Garnishment*

The CCPA sets a floor of protection for employees. Wage garnishment cannot begin until an employee's wages exceed thirty times the federal minimum wage⁷¹ and cannot take more than twenty-five percent of an

⁶⁵ The forms tend not to attend to font size, background colors, type color, shading, headings, and other formatting considerations.

⁶⁶ The forms tend to be paper-based in an increasingly electronic-based world.

⁶⁷ Generally, the forms are not equally available to all target audiences, such as those with visual disabilities and non-English speakers.

⁶⁸ Even beyond fairness, the forms could add to the system's efficiency if they were of a standard size and format to facilitate electronic use and storage.

⁶⁹ Although the UWGA provides a better notice form, even a perfect one may not be up to the task of protecting employees. In the wage-garnishment context, the Nebraska experience hints that employees do not take advantage of available protections even after notice. *See infra* note 80 and accompanying text. Although this could be a problem with the notice form itself, it is consistent with the broader literature questioning the efficacy of notice as a regulatory device. *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089 (2007).

⁷⁰ A related efficiency problem is that the employer response generally needs to be filed in court which, if the normal rules apply, requires it to be filed by an attorney rather than a payroll-processing employee. This problem recently arose in Georgia. *See* State Bar of Ga., Unlicensed Practice of Law Dep't (UPL), Advisory Opinion No. 2010-1 (Sept. 12, 2011) (a non-attorney employee of a garnishee who files an answer to a garnishment in court is engaged in the unauthorized practice of law). In Georgia, the problem was addressed through a statutory amendment. *See* GA. CODE ANN. § 18-4-12 (West 2018) (an entity's officer or employee who files an answer or payment in court in a garnishment proceeding is not engaging in the practice of law). Since garnishment is a mass-justice system, a requirement that attorneys be involved with every court filing greatly increases the cost of the system, with little to no gain. The UWGA solves this problem by having the filings occur between the parties rather than through the courts. UNIF. WAGE GARNISHMENT ACT § 5 cmt. at 12 (UNIF. LAW COMM'N 2016).

⁷¹ *See* 15 U.S.C. § 1673(a)(2) (2018). A problem with this protection is that, because the federal minimum wage is amended rarely and not for this purpose, the level of this protection tends to be lumpy and unrelated to any public policies related to garnishment. On lumpiness,

employee's disposable earnings.⁷² About eighteen states have restrictions that mirror the federal limits,⁷³ but the rest of the states incorporate variations.

Three general types of variations currently exist. First, states may use the CCPA model, but simply increase the level of protection—garnishment cannot begin until wages exceed forty times the federal minimum wage⁷⁴ or cannot take more than twenty percent of an employee's disposable earnings.⁷⁵ Second, states can provide special protections for certain classes of workers—for example, an exemption providing employees with families a higher level of protection.⁷⁶ Or, third, states can revise the definition of “earnings” or “disposable earnings” to provide more protection.⁷⁷

The latter two types of enhanced protection represent explicit trade-offs between fairness and efficiency. In Nebraska, for example, a “head of family” is entitled to a higher level of protection; only fifteen percent of his or her earnings is subject to garnishment, rather than the standard twenty-five percent.⁷⁸ This reflects the legislature's determination that heads of families have higher needs and, as a result, should be afforded greater

for example, the minimum wage did not change at all from 1997 to 2006 (\$5.15), and then jumped more than 40% between 2006 and 2009 (\$7.25). It has not changed since 2009. *See History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-2009*, U.S. DEP'T OF LAB., <https://www.dol.gov/whd/minwage/chart.htm> (last visited April 19, 2019). 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. The Uniform Law Commission considered including an inflation index to its protections, but ultimately determined that it would impose extra costs and be overly complex.

⁷² *See* § 1673(a)(1). This is the percentage for debt garnishment. The limits are different for other types of garnishment, such as for support orders or state or federal taxes. *See id.* § 1673(b).

⁷³ BRYANT, *supra* note 34 (listing the restrictions in each state).

⁷⁴ *See, e.g.*, MINN. STAT. ANN. § 571.922(a)(2) (West 2018); N.D. CENT. CODE ANN. § 32-09.1-03(1)(b) (West 2018). Sometimes states also increase the floor by using a multiple of a state minimum wage that is higher than the federal minimum wage. *See, e.g.*, CAL. CIV. PROC. CODE § 706.050(a)(2) (West 2018) (forty times the state minimum wage of \$11 per hour); 735 ILL. COMP. STAT. ANN. 5 / 12-803 (West 2018) (forty-five times the state minimum wage of \$8.25 per hour).

⁷⁵ *See, e.g.*, DEL. CODE ANN. tit. 10, § 4913(a) (West 2018) (noting that no more than fifteen percent of disposable earnings may be garnished); 42 PA. STAT. AND CONS. STAT. ANN. § 8127(a)(3) (West 2018) (providing that no more than ten percent of disposable earnings may be garnished).

⁷⁶ *See, e.g.*, MO. ANN. STAT. § 525.030(2)(1) (West 2018) (providing that no more than ten percent of earnings may be garnished for a head of family, but allowing twenty-five percent for others); NEB. REV. STAT. ANN. § 25-1558(1)(c) (West 2018) (providing that no more than fifteen percent of earnings may be garnished for a head of family, but allowing twenty-five percent for others).

⁷⁷ *See, e.g.*, CONN. GEN. STAT. ANN. § 52-350a(4) (West 2018) (noting that disposable earnings do not include “taxes, normal retirement contributions, union dues and initiation fees, [or] . . . insurance premiums”).

⁷⁸ NEB. REV. STAT. § 25-1558(1).

protections. But, of course, most creditors do not know whether a debtor is a “head of family,” since family status is not uniformly included in debt instruments and, even if it were, it can change over time. Consequently, as one would expect, most creditors begin the garnishment process with an allegation that the debtor is not a head of family, thus permitting the creditor to collect more.⁷⁹ To switch to a “head of family” designation, the employee/debtor has to file a form requesting a court hearing. But two things appear to be the case in Nebraska. First, most employees do not file that form, even if they are heads of families. Thus, most of those entitled to the enhanced protection do not receive it.⁸⁰ Second, thousands of court hearings are held each year in Nebraska to determine whether debtors are heads of families.⁸¹ Back-of-the-envelope calculations indicate that Nebraska debtors would be better off if the special protections for heads of families were eliminated in favor of a somewhat better level of protection for everyone.⁸² Despite these kinds of problems, special exemptions for groups that seem to need special protection continue to exist. On paper, if not always in practice, such exemptions seem fairer, and have both emotive and political salience.

Modifying the treatment of “earnings” is the other major type of state variation used to provide additional protections to employees. There are two variations. First, states can expand the “earnings” that are covered by the garnishment protections. The state’s definition must be at least as broad as the federal CCPA’s floor of protections. But a state can sweep additional payments into earnings, which entitles an employee to the protections of the garnishment statute. Thus, a state might include an income tax refund as earnings even though they are not earnings under the CCPA.⁸³ Including income tax refunds as “earnings” would protect most of the payments from garnishment. This can be counter-intuitive: if a payment is “earnings,” in rough terms, only twenty-five percent of it can be garnished; on the other hand, if the payment is not “earnings,” all of it can be garnished. Second,

⁷⁹ Based on an informal survey of county clerks in eleven of the eighteen counties in Nebraska with more than 1,000 garnishments in fiscal year 2017, initial affidavits from creditors acknowledge head-of-family status only about one-quarter as often as one would expect based on census data. See Steven L. Willborn, *Informal Survey of Nebraska County Clerks* (Jan. 16, 2019) (unpublished survey) (on file with author).

⁸⁰ Based on the informal survey, less than half of those entitled to the head-of-family exemption level actually receive it. *Id.*

⁸¹ Based on the informal survey and the number of debt garnishments in Nebraska (over 55,000 annually), Nebraska courts hold almost 1,500 hearings annually on this issue. *Id.*

⁸² In Nebraska, if the head of family protection (at fifteen percent) was eliminated and the creditors were permitted to capture only twenty percent of disposable earnings (instead of the current general rate of twenty-five percent), Nebraska’s debtors would net in excess of \$500,000 annually.

⁸³ See *Kokoszka v. Belford*, 417 U.S. 642, 652 (1974) (holding that income tax refund is not earnings under CCPA).

states can expand what can be deducted from “earnings” to arrive at “disposable earnings.” Thus, some states permit union dues or health insurance premium payments to be deducted from earnings, even though the CCPA does not.⁸⁴ These extra deductions reduce the base upon which the garnishment amount is calculated and thus provide greater protections for employees. Again, states include these additional protections for employees because they are viewed as fair. At the same time, however, they impose extra compliance costs on employers.

The UWGA is officially neutral on whether states should provide protections that exceed the minimums of the CCPA and, if so, the form of those extra protections.⁸⁵ But a focus on efficiency would counsel that extra protections for employees should be included in state garnishment acts by increasing the general levels of protection, rather than by having more finely-tuned protections. General protections, such as increasing the base level of protection from thirty to forty times the federal minimum wage, would attend to the state’s interest in a fairer level of protection while imposing almost no extra costs. On the other hand, bespoke protections, while they can target particular groups more narrowly, tend to be much harder and more expensive to implement. The Nebraska experience is that, precisely because they are hard to implement, they may even miss their intended target.

Related issues arise when an employee is subject to multiple garnishments. The limits on garnishment discussed above apply to the total amount deductible from all garnishments.⁸⁶ As a result, multiple garnishments require two sets of determinations. First, what is the priority among the garnishments? As a general matter, debt garnishment falls behind other types of garnishments, such as child-support or tax-related garnishments.⁸⁷ Those others must be paid first, and then any amount available within the limits can be used for the debt garnishment. Second, how should payments for equal-priority debt garnishments be allocated? There are two general options: (1) pay them *seriatim*, or (2) pay them both a share of the available amount. Both options raise concerns. Paying creditors *seriatim* can result in a race to the courthouse and requires rules about how long the garnishment lasts (e.g., until the first creditor’s debt is paid in full or for a set period of time). Paying both (or all) creditors a share requires money to be transferred to more parties and a rule for determining the share

⁸⁴ See, e.g., CONN. GEN. STAT. ANN. § 52-350a(4) (West 2018) (excluding union dues and health and life insurance premiums from disposable earnings).

⁸⁵ UNIF. WAGE GARNISHMENT ACT § 2 cmt. at 5–6 (UNIF. LAW COMM’N 2016) (discussing “disposable earnings”).

⁸⁶ The limits for types of garnishment other than debt garnishment may be different. See 15 U.S.C. § 1673(b); see also *supra* note 72 and accompanying text.

⁸⁷ See BRYANT, *supra* note 34, § 8.08.

for each creditor (e.g., equal or proportional to the amount of debt). The UWGA opted for equal shared payments without regard to the amount of debt, time of filing, or any other factor.⁸⁸ This avoids the potential game-playing and complications of *seriatim* payments. The equal payments avoid the need for complicated rules about how the available amount should be allocated.

Another withholding issue is whether employers can retain a portion of the monies as an administrative fee. Most states currently provide administrative fees to employers (thirty-one states), although a substantial minority do not (nineteen states).⁸⁹ Of those that provide for fees, nine states have a one-time, up-front fee; eighteen states have some variation of a per-payment fee; and two states have both an up-front and a per-payment fee. Two states have idiosyncratic fee structures.⁹⁰

The issue of whether to permit an employer fee is a fairness issue. The employer is an involuntary participant in the collection process, and the participation is not costless. In practice, this fee would ultimately fall on the employee,⁹¹ but perhaps that is fair since it is the employee who incurred the debt and is failing to pay it. For this reason, the UWGA includes an administrative fee for employers and opts for a one-time, up-front fee.⁹²

A final issue is whether any of the restrictions on garnishment should be extended beyond wages. For example, little would be gained by ensuring that an employee receives seventy-five percent of her earnings from an employer if the amount could be immediately garnished from the bank when

⁸⁸ See UNIF. WAGE GARNISHMENT ACT § 14.

⁸⁹ See BRYANT, *supra* note 34, § 9.02[A] (listing the state rules for administrative fees).

⁹⁰ See *id.*

⁹¹ The total amount deducted from the employee's pay, including the fee, would have to fall within the limits of the exemptions. In practice, this means that the amount paid to the creditor would be less, which would lengthen the period of repayment and result in higher interest charges.

⁹² See UNIF. WAGE GARNISHMENT ACT § 5(d)(2). The fee would be a set amount per garnishment, but the UWGA leaves the amount of the fee to the discretion of each state. *Id.* The UWGA's comment to the fee provision notes that "a one-time fee can provide the same relief from the unwelcome costs of garnishment as per-payment fees if the one-time fee is set at a level that approximates the total returns of the multiple-fee alternative." *Id.* cmt. at 13. But it identifies two advantages of the one-time fee approach:

First, it is significantly more efficient both because it only has to be paid once and because it is easier to implement. Second, it is fairer in some circumstances. For example, a large number of payments may be required when individual payments are low because debtors have low earnings. Indeed, it is possible in some circumstances, that the fee could exceed the amount paid to the creditor to service the debt. As a result, the poorest debtors may often pay the highest fees under a per-payment fee schedule. An up-front fee avoids this possibility.

Id. The UWGA contains an appendix that details several changes in the UWGA that would be required by a per-payment fee. *Id.* at app. A.

it is automatically deposited pursuant to the employer's normal payroll practices.⁹³ Although most states provide some type of garnishment protection for bank depositors, the nature and scope of the protections vary considerably.⁹⁴ Most of these protections are independent of and uncoordinated with the protections for wage garnishment.⁹⁵ Those drafting the UWGA considered extending its protections for wages to bank accounts, but ultimately decided against such an extension.⁹⁶ A separate project on bank garnishment is currently under consideration by the Uniform Law Commission.

E. *Handling the Money*

At its core, garnishment is about getting debts paid. So every garnishment system must have a process for transferring money from employee to creditor. In Nebraska, for example, when an employer receives a garnishment affidavit notifying it of the proceeding and requesting information, it begins withholding money from the employee at the next paycheck.⁹⁷ The employer transfers the money to the creditor, however, only later when (if) it receives a subsequent order from the court.

Nebraska's process for handling the money creates some obvious efficiency issues. For example, sometimes creditors drop the ball after the affidavit and never ask the court for an order. At some point, the employer has to ask the court for direction, or simply return the money to the

⁹³ In addition to undermining garnishment protections, bank garnishment is a factor driving people to become unbanked. Unbanking, which is especially prominent among low-income persons, makes it difficult to save, obtain credit, and participate fully in the modern economy. See John P. Caskey, *Bringing Unbanked Households Into the Banking System*, CAP. XCHANGE J., Jan. 2002, at 2, <https://www.brookings.edu/articles/bringing-unbanked-households-into-the-banking-system/>.

⁹⁴ Thirty-five states currently provide some type of garnishment protection for bank depositors. See CAROLYN CARTER & ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., NO FRESH START: HOW STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY 23–26, 39–40 (2013), www.nclc.org/images/pdf/pr-reports/report-no-fresh-start.pdf.

⁹⁵ Several cases hold that the CCPA's wage garnishment protections do not extend to bank deposits. See, e.g., *Usery v. First Nat'l Bank of Ariz.*, 586 F.2d 107, 109 (9th Cir. 1978); *In re Lawrence*, 219 B.R. 786, 792–93 (E.D. Tenn. 1998); *John O. Melby & Co. Bank v. Anderson*, 276 N.W.2d 274, 276 (Wis. 1979). But see *MidAmerica Sav. Bank v. Miede*, 438 N.W.2d 837, 839–40 (Iowa 1989) (holding that earnings that have been garnished maintain protection in bank accounts for ninety days if debtor claims exemption and can segregate funds); *Daugherty v. Central Tr. Co. of Ne. Ohio*, 504 N.E.2d 1100, 1102 (Ohio 1986) (holding that garnished earnings maintain protection in bank accounts “so long as the source of the exempt funds is known or reasonably traceable” (footnote omitted)). For a case on lack of coordination between protections for wage and bank garnishment, see *Miller v. Monrean*, 507 P.2d 771, 775 (Alaska 1973) (holding that the Alaska general exemption statute protects the first \$350 in a bank account so the CCPA protections do not apply).

⁹⁶ See UNIF. WAGE GARNISHMENT ACT § 3(a)–(c)(4).

⁹⁷ See NEB. REV. STAT. ANN. § 25-1056(1) (West 2018).

employee.⁹⁸ In every case, the employer has to develop and maintain a system for holding money that, at the time, is the employee's, not the employer's.

The actual transfer of the money also tends to inefficiency. Until recently,⁹⁹ the employer could cut a check to the creditor and mail it to the court, which would then record it and forward it to the creditor. Sometimes large employers would cut one check for all employees subject to garnishment in a particular court, and send that check to the court with a list of the employees and amounts owing. Then the court would need to record the amounts paid and cut its own check to each individual creditor. This is how Nebraska handles garnishment within its large counties. In either event, the process fails to take advantage of modern payment systems, making it slow and subject to error.

The UWGA has no delay period during which the employer must hold the employee's money on behalf of creditors. The employer only begins to deduct money from an employee's pay thirty days after receiving the garnishment order (to give the employee time to raise objections)¹⁰⁰ and, at that point, the withheld amount is transferred directly from employer to creditor.¹⁰¹ The UWGA authorizes, and hence encourages, electronic payments.¹⁰²

F. Record-Keeping

Garnishment records are kept, at least in theory, by multiple parties: the court; the creditor; the employer; and the employee. Record-keeping processes raise four issues that do not always cut in the same direction.

First, which set of records is the "official" one that should be given special weight if disputes arise? If the court maintains records, then that would be the official set. But, of course, the court's records can be incorrect so even they must be subject to challenge. The same special weight of presumptive accuracy could be given to a different record-keeper. The

⁹⁸ A bill was introduced in the Nebraska Unicameral in 2017 to address this problem by setting the time limit for holding funds at 60 days. It was not enacted into law. L.B. 136, 105th Leg., 1st Sess. (Neb. 2017), <https://nebraskalegislature.gov/FloorDocs/105/PDF/Intro/LB136.pdf>.

⁹⁹ Commendably, Nebraska recently implemented a system to permit electronic payments, even though not specifically authorized legislatively. See *State of Nebraska's Garnishment Payment System*, NEBRASKA.GOV, <http://www.nebraska.gov/demo/ePayments-Garnishments/two.html> (last visited Jan. 16, 2019).

¹⁰⁰ UNIF. WAGE GARNISHMENT ACT § 7.

¹⁰¹ See *id.* § 8(a) (providing that the employer will send garnished amounts directly to the creditor).

¹⁰² See *id.* § 5(c)(7) (authorizing payments to be made through any reasonable means authorized by the creditor).

2019]

WAGE GARNISHMENT

867

UWGA, for example, assigns this role to the employer's records.¹⁰³ This assignment has advantages over court records on other dimensions, such as ease of updating and speed of payment.¹⁰⁴

Second, how easy is it to update the records? Debt garnishment involves debt, so interest will accrue and the amount of interest may change over time—in fact, it usually does change over time—as payments are larger or smaller than expected, or missed. Similarly, the debtor might make side payments on the debt outside of the garnishment process. Approving and recording these changes through the courts entails extra costs, so this consideration weighs in favor of making the employer or creditor records the official ones.¹⁰⁵

Third, how accessible are the records? Accessibility is most important to the parties, of course; the employee needs to know how much he or she owes, the creditor needs to know how much is owed, and the court needs to know when to terminate the case. But there may also be public interest in the records by outsiders, such as participants in the credit markets and policy researchers. Any recording system could satisfy the former function, assuming an obligation exists to share records amongst the parties,¹⁰⁶ but a court recording system would perform the latter system best.¹⁰⁷ So another consideration is the importance of public accessibility to wage garnishment information.

Fourth, to what extent, if any, does record-keeping slow the payment process? A common procedure requires the employer to send the money to the court, which records it and then forwards it to the creditor. With an electronic payment system, that process would not necessarily create any more delay than a direct-payment system. But with a paper system, there would be delay.

¹⁰³ See *id.* § 8(f). The UWGA provides employees and creditors with rights of access to the employer's records analogous to the access that would be available through a court-preferred recording system. See *id.*

¹⁰⁴ See *id.* § 8(d) (allowing records to be updated through notice from creditor to employer).

¹⁰⁵ See *id.* One commenter noted that this reminded him of foxes and henhouses. Less snarkily, this raises a monitoring issue. Removing courts from the process is likely to have little adverse effect on monitoring. Because garnishment is mass justice, courts tend to do little monitoring when they are involved in the process; they tend to assume a ministerial role rather than a regulatory one. At the same time, although there is one fox in this scenario (the creditor), both the employer and the employee would prefer that the employee retain as much of her wages as possible. They are likely to be the effective monitors, whether or not the court is involved.

¹⁰⁶ See UNIF. WAGE GARNISHMENT ACT § 8(c)–(f).

¹⁰⁷ Although it is true that a court filing system could, in theory, facilitate public access better than other recording systems, in practice, public access to information about garnishment is very limited. See Hynes, *supra* note 43, at 607 n.22 (“[T]he overwhelming majority of states do not publicly report data on the use of their collections proceedings.”).

Most current garnishment processes balance these considerations in favor of a court recording system, although the processes arrived there through historical inertia rather than deliberative choice. The UWGA balances them by eschewing judicial recording of payments and opting instead in favor of the employer's records. Payments are made directly from the employer to the creditor, and the employer's records are presumptively accurate.¹⁰⁸ The general balance was that ease of updating and speed of payment were present repeatedly in every case, while the other considerations rarely arose. That is, challenges to the records were unusual and generally easily resolved, and public interest in the records was rare.¹⁰⁹

G. Sanctions for Employers and Creditors

Garnishment statutes generally provide sanctions for employers who fail to comply.¹¹⁰ Much less frequently, they contain sanctions for creditors who abuse the process, relying instead on general rules prohibiting abuse of judicial process. Interestingly (perhaps), no sanctions are necessary for the party most interested in the proceeding—the employee/debtor. As an involuntary participant, he or she has no options that need to be influenced by sanctions.

Employer sanctions can be draconian. Some states impose penalties or hold employers liable for the entire debt if they fail to comply with a garnishment order.¹¹¹ This seems odd for a number of practical reasons: it imposes a heavy penalty for what can be a minor violation; it arbitrarily releases some employees from their debts; and it encourages creditors to look for minor employer defaults rather than to make the system work smoothly. It also seems odd theoretically.¹¹² A better system would be more focused on making the system work. The UWGA does this by calibrating the size of

¹⁰⁸ See UNIF. WAGE GARNISHMENT ACT § 8.

¹⁰⁹ See Hynes, *supra* note 43, at 607 (“Surprisingly, this is the first article in thirty years to carefully examine garnishment statistics.” (footnote omitted)).

¹¹⁰ See BRYANT, *supra* note 34, § 9.03–.53 subsec. 5 (listing employer sanctions for each state).

¹¹¹ See, e.g., *In re Marriage of Miller*, 879 N.E.2d 292, 305 (Ill. 2007) (upholding \$1,172,100 judgment against employer based mostly on penalties for failure to pay garnishment amounts); *cf. Smith v. Smith*, 165 S.W.3d 285, 296 (Tenn. Ct. App. 2004) (reversing, on procedural grounds, an order that employer pay entire underlying debt of more than \$80,000 for failure to respond appropriately to garnishment).

¹¹² In theory, penalties should be slightly more than the benefit an employer would obtain by not complying with a garnishment order, adjusted upwards if the non-compliance is hard to detect. See WILLBORN ET AL., *supra* note 15, at 1172–73. For garnishments, the employer receives only a small benefit by refusing to comply—basically, the administrative cost of complying with the order. (The money that has to be paid, after all, is the employee's, not the employer's.) And the probability of detection is close to 100%; the creditor is watching closely. Thus, in theory, employer penalties for non-compliance should be very low, the opposite of draconian.

penalties to the type of employer default¹¹³ and, even then, imposing those penalties only after notice and continued failure of the employer to comply.¹¹⁴

Creditor sanctions are underdeveloped despite considerable evidence that some creditors abuse the process.¹¹⁵ The challenge is to separate out truly bad-actor creditors. In theory, courts should be able to do this with standard abuse-of-process tools. If creditors are filing suits without adequate evidence of debt or abusing the process in other ways, courts can sanction using their inherent contempt powers. But garnishment is mass justice, and debtors tend to be unrepresented.¹¹⁶ The UWGA justifiably¹¹⁷ calls for more severe sanctions against creditors than employers,¹¹⁸ but, like the employer sanctions, they are designed to encourage compliance rather than to punish. Compliance is encouraged by requiring notice before any sanctions are imposed, and making the penalties avoidable and calibrated.¹¹⁹ This calibration and focus on compliance rather than punishment are not possible if a court's only options are its general contempt powers.

H. *Protections for Employees Subject to Garnishment*

Garnishments are an annoyance for employers. Thus, they might be tempted to just fire the employee and get rid of the problem. The CCPA provides some protection for employees. It prohibits an employer from discharging an employee for a single garnishment.¹²⁰ The UWGA expands this protection¹²¹ by prohibiting any adverse action by an employer “because

¹¹³ See UNIF. WAGE GARNISHMENT ACT § 16.

¹¹⁴ See *id.* § 15.

¹¹⁵ See *CFPB Takes Action to Halt Illegal Debt Collection Practices by Lawsuit Mill and Debt Buyer*, CONSUMER FIN. PROTECTION BUREAU (Apr. 25, 2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-halt-illegal-debt-collection-practices-lawsuit-mill-and-debt-buyer> (reporting on fines for massive improprieties in collecting consumer debt); Ray Rivera, *Suit Claims Fraud by New York Debt Collectors*, N.Y. TIMES (Dec. 30, 2009), <https://www.nytimes.com/2009/12/31/nyregion/31-debt.html> (reporting lawsuit against New York debt collectors for improprieties, including “sewer service”).

¹¹⁶ See Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016), <https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine> (reporting that over ninety percent of debtors in collection cases are unrepresented).

¹¹⁷ Sanctions against creditors should be more severe because creditors benefit more from non-compliance than employers and because improprieties are much less likely to be discovered. See *supra* note 112.

¹¹⁸ See UNIF. WAGE GARNISHMENT ACT § 17(a), (f) (authorizing penalties and attorney's fees against non-complying creditors without limiting other possible remedies).

¹¹⁹ See *id.* § 17(b), (c) (permitting sanctions only after notice and continued non-compliance by creditor, and permitting court to waive penalties for good cause).

¹²⁰ See 15 U.S.C. § 1674 (2018).

¹²¹ The UWGA's provisions would also clarify some areas where protections under the

of a garnishment or attempted garnishment.”¹²² Thus, it is broader than the CCPA because it provides protection regardless of the number of garnishments, for both actual and attempted garnishments, and from all types of employer adverse actions (not only discharges). The UWGA also provides an enforcement mechanism by applying an enacting state’s procedures for enforcing anti-discrimination laws to alleged violations of this provision.¹²³

VI. CONCLUSION

Garnishment affects millions of mostly middle-class workers each year. Despite its ubiquity, garnishment operates in the shadows. The last major initiative to address its unfairness and inefficiencies occurred in 1968. As this Article demonstrates, if full attention were to be paid to garnishment, significant improvements could be made in both fairness and efficiency. And since the efficiency gains would be multiplied millions of times each year, the total savings would be huge. The UWGA is an invitation to the states to reconsider their garnishment procedures. It provides a comprehensive approach to modernizing the wage garnishment system, and making it much fairer and more efficient.

CCPA have been uncertain. *See, e.g.*, *Donovan v. S. Cal. Gas Co.*, 715 F.2d 1405, 1406, 1408 (9th Cir. 1983) (holding that an 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, 963–64 (7th Cir. 1975) (finding that an employee could not be discharged when two garnishment notices were pending because the state’s garnishment priorities system held the second garnishment in abeyance, thus there could not be a dismissal until the wages were actually withheld on the second garnishment).

¹²² UNIF. WAGE GARNISHMENT ACT § 19(a).

¹²³ *Id.* § 19(b).