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Garnishment—State vs. Federal Procedures

Timothy M. Flanagan* and Lawrence G. Smith**

GARNISHMENT, a field once limited only by state or local regulation, has recently undergone a series of much-needed but somewhat questionable changes. These changes are not limited to one state alone, but encompass the entire nation. On July 1, 1970, when Title III of the Consumer Credit Protection Act became effective, this field of law came under the coverage of federal restrictions.¹ In attempting to bring the existing Ohio statutes on garnishment into line with the federal restrictions, the Ohio Legislature passed a series of amendments which became effective on September 16, 1970.²

To understand why the federal government has only recently taken an interest in this field, one must look to the purposes and sources of authority of the Act itself. The Act cites two disruptions of interstate commerce which Congress believes are sufficient cause for invoking the Commerce Clause of the Constitution as authority for entering this field.³ The first is that unrestricted garnishment has led to an increase in the making of predatory extensions of credit.⁴ The second disruption noted is that employees are often discharged as a result of their wages being subject to garnishment.⁵ Also because of the many different state garnishment laws, the legislators claim that the uniformity of the bankruptcy laws has been jeopardized.⁶ By use of the constitutional power to create and restrict uniform bankruptcy laws, Congress established another basis for entering the field of garnishment.⁷

The restrictions set out in the Act appear to be more of a minimum requirement on the restriction of garnishment than a hard and fast rule of law. When the statutes are read as a whole, it seems that Congress' intent was to establish a guideline for state garnishment laws and to encourage the states to voluntarily adopt local laws which will limit garnishment and benefit debtors even more than the federal statutes. The basis for this interpretation is the application of Section 1677 of the Federal Act, which says that if there is a conflict between the Federal

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¹ 15 U.S.C.A. §§ 1671-1677.

² Ohio Rev. Code, § 2329.621.

³ 15 U.S.C.A. § 1671(a)(1).

⁴ *Id.* at § 1671(a)(2).

⁵ *Id.* at § 1671(b).

⁶ *Id.* at § 1671(a)(3).

⁷ *Id.* at § 1671(b).

Act and state garnishment statutes, the law which imposes the greatest restriction on creditors and gives the maximum protection to debtors will be applicable.⁸ The effect of this provision is that the sections of state law which place a greater restriction on garnishments than do similar sections of the federal statutes, will supersede the federal restrictions and continue in effect. Another determinative factor in this interpretation is the application of Section 1675. This section of the Act deals with the exempting of state garnishment laws from the provisions of Section 1673(a). As will be discussed below, Section 1673(a) is used to determine what portion of a debtor's pay is to be subjected to garnishment. This section provides that should the Secretary of Labor determine that a state's garnishment restrictions are substantially similar to those in Section 1673(a), the Secretary may exempt the state from the federal provisions.⁹

Section 1673 of the Federal Statutes

Section 1673 may be regarded as one of the most important provisions of the new Federal Act. The application of this section determines what portion of an employee's disposable earnings may be exempted from garnishment proceedings. Under this section, the maximum part of a debtor's disposable earnings that may be garnished is the lesser of: (a) 25% of the employee's disposable earnings for that week, or (b) the amount by which the debtor's disposable earnings for that week exceeds 30 times the current federal minimum wage established by Section 6 of the Fair Labor Standards Act.¹⁰ Since the current federal minimum wage is \$1.60, this latter figure would be \$48. In applying these restrictions, if the debtor-employee has earned disposable earnings of less than \$48, his wages for that week cannot be garnished. Should the debtor's disposable earnings for the week exceed \$48, and yet be less than \$64, only the amount by which his earnings exceed \$48 will be subject to garnishment. However, if the debtor's disposable earnings exceed \$64, then 25% of these wages will be available for garnishment.¹¹

An important factor to be noted when determining the portion of

⁸ *Id.* at § 1677.

⁹ *Id.* at § 1675.

¹⁰ *Id.* at § 1673(a).

¹¹ When the debtor is paid on other than a weekly basis the Department of Labor has provided a formula for applying the exemptions set out in Section 1673(a). The 25% computation will apply just as it did for the single work week. However in those situations when the multiple of the minimum wage formula is applicable the minimum wage is not only multiplied by thirty but also the number of weeks the pay period covers. As a result if the employee is paid every two weeks the formula would be $30 \times \$1.60 \times 2$. If the pay period were for a full month $4\frac{1}{2}$ would be used and if the employee is paid semi-monthly the appropriate figure would be $2\frac{1}{2}$. Part 870 (29 CFR).

a debtor's pay to be subjected to garnishment is that the Act requires that disposable earnings and not the employee's take-home pay be used in making the computations. Disposable earnings are defined by the Act as the remaining part of an employee's earnings after deductions that are required by law have been made.¹² These required deductions do not, however, include such items as union dues or charitable contributions, which are often deducted from an employee's pay.

The restrictions set out in Section 1673(a) apply in all cases except where there is a court order to pay the support of a person, or where there is an order of the court of bankruptcy under Chapter XIII of the Bankruptcy Act, or if there is a debt due on any federal or state tax.¹³

The Amendments to the Ohio Garnishment Law

The Ohio Legislature, in amending the Ohio garnishment laws, was clear as to the intent behind their action.

Title III of the Consumer Credit Protection Act, 82 Stat. 146 (1968), 15 U.S.C.A. 1671, provides for restrictions on garnishment of personal earnings to become effective July 1, 1970, to supersede the laws of any state which do not provide debtors with protection at least equal to the minimum protection provided in that Federal Act. It is the intention of the General Assembly to avoid the inevitable confusion which will result if any part of the Federal Act is superimposed on Ohio law, by enacting garnishment laws which provide protection to debtors which equals or exceeds that contained in the federal law, and all the laws of this state affecting such garnishments shall be construed so as to effect this purpose.¹⁴

Despite the intention asserted by the legislature in many areas, the Ohio law actually provides less protection for the debtor than do the federal statutes. The legislature's instructions for the Courts to construe the new amendments so as to provide limitations on garnishment, that are at least equal to those set out in the Federal Act, will have no effect on these provisions. These sections do not present questions of construction; rather they are clear, and to construe them as the legislature wants would be to rewrite the law, which the courts will not do.¹⁵

On its face, the new Ohio garnishment law appears to provide for more limited garnishments than does the Federal Act. The amendments to the Ohio law restrict the number of successful garnishment actions

¹² 15 U.S.C.A. § 1672(b).

¹³ *Ibid.*

¹⁴ O.R.C., *supra*, n. 2 at § 2329.621.

¹⁵ *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31, 62 S. Ct. 886, 86 L. Ed. 1246 (1942); *City National Bank, Lawton, Okla. v. United States*, 207 F. 2d 741 (10th Cir. 1953).

against a defendant to one per 30 day period.¹⁶ When compared to the federal restrictions, which make no provision for the number of garnishments allowable, it appears that the state has provided more stringent limitations on garnishment. The problem occurs with Sections 2329.62 and 2329.66 which, like the federal law, provide two formulas to be used in determining what part of a debtor's earnings will be subjected to garnishment; and again, like the federal rule, the lesser of these figures is to apply. The first provides for a monthly exemption of 175 times the current federal minimum wage,¹⁷ and the second establishes an exemption of 82½% of the employee's disposable earnings that are payable.¹⁸ When these are examined with the federal exemptions of 30 times the minimum wage and 75%¹⁹, it would appear that in all cases Ohio's limitations on garnishment are more beneficial to the debtor. However, in most cases this is not true.

Conflicts Between the Ohio Exemptions From Garnishment and the Federal Exemptions

In illustrating the conflicts between the federal and Ohio laws, which provide for exemptions from garnishment, consider the employee who is earning \$100 per week in disposable earnings. When applying the two formulas provided in Section 1673(a) of the Federal Act, the computations result in the figures \$25 (25% x \$100) and \$54 (\$100 less thirty times the minimum wage of \$1.60); and since \$25 is the lesser figure, it will be the amount of the employee's weekly wages that is subject to garnishment.²⁰

The Ohio exemptions are computed only on a monthly basis. Therefore \$433 (\$100 x 4½ weeks) is used in computing the monthly exemptions. As a result of this, the exemptions provided under the Ohio law would be \$75.77 (17½% x \$433) and \$153 (\$433 less 175 times the minimum wage of \$1.60). Because \$75.77 is the lesser figure, it will be the monthly pay subjected to garnishment under the Ohio law.²¹

The first problem area involves the employee who has worked for a period of time less than one month prior to the commencement of the garnishment proceeding. Using the illustration above, if the debtor had worked only one week prior to the garnishment action, under the federal exemptions, only \$25 of the disposable earnings of \$100 would be subject to garnishment for that week. However, under Section

¹⁶ O.R.C. *supra*, n. 2 at § 1911.33(B).

¹⁷ *Id.* at §§ 2329.62, 2329.66.

¹⁸ *Id.*

¹⁹ 15 U.S.C.A. § 1673(a).

²⁰ *Id.*

²¹ O.R.C., *supra*, n. 2 at §§ 2329.62, 2329.66.

1911.332 of the new Ohio law, which provides instructions to the garnishee on how to compute the amount that is to be paid to the court, the garnishee must use either the previous month's disposable earnings or a hypothetical figure based on what the debtor would have earned at his present rate of pay if he had worked the previous month.²² Applying this to the above example, the amount that the garnishee must pay to the court would be \$75.77 (the estimated prior month's pay of \$433 x 17½%). As a result, under the Ohio law the garnishee must give up \$75.77 of the \$100 in disposable earnings the employee has actually earned. This figure, which constitutes more than 75% of the debtor's disposable earnings, clearly exceeds the maximum of 25% per week set out in the federal statutes. Because there is a conflict with the Federal Act, the federal exemptions would be applicable.²³

The fact that an employee has worked the previous month does not eliminate the problem. The Ohio law in Section 1911.33(B) provides that an action in garnishment can be brought no sooner than 30 days after the last successful action in garnishment.²⁴ As a result, the total monthly figure computed by the Ohio method must be taken out of the employee's pay at one time. Since over ⅔ of all Ohio employees are paid weekly, this means that during a month, three weekly paychecks will go untouched while the fourth week's check will have a deduction of roughly 70%. Again, during this one week the amount garnished exceeds the federal maximum of 25% per week. The only employees subject to garnishment who will actually have a more limited reduction from their pay are those who are paid monthly. In this situation alone will the Ohio exemptions from garnishment actually be more than those provided by the federal government. Since less than 5% of all Ohio employees are paid in this manner,^{24a} this will be of little consequence when considering the field of garnishment in Ohio as a whole.

Critics of this interpretation of the Ohio law have argued that there should be one monthly judgment for 17½% and to keep within the federal restrictions, which set a maximum of 25% and do not restrict the number of garnishments per month, the courts should allow a levy of 25% of each pay check until the 17½% monthly total has been accumulated. While this would seem to be within the limits set by the federal statutes, the problem is that, as previously noted, each of these levies is considered a proceeding in aid of execution on a judg-

²² *Id.* at § 1911.332.

²³ U.S. Const., Art. VI, ch. 2; *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964).

²⁴ O.R.C. *supra*, n. 2 at § 1911.33(B).

^{24a} Bureau of Labor Statistics, Area Wage Survey, Bulletin No. 1625-19 (March, 1969).

ment, and as such the creditor is required to institute a completely new proceeding in garnishment for each of these levies.²⁵ As a result of the initiation of more than one of these garnishment proceedings in any 30 day period, the state restriction on the number of garnishments per month will be violated. This restriction will be applicable because of Section 1677 of the Federal Act.²⁶

The next problem involves the contradictory language found in the Ohio statutes dealing with the formulas to be used in computing the exemptions from garnishment that are available to a debtor. The problem revolves around the application of Sections 2329.62 and 2329.66 which provide that the greater of 175 times the current minimum wage at the time the earnings are payable, or 82½% of the employee's disposable earnings payable, will be the applicable amount subject to garnishment.²⁷ The term "payable" appears to imply wages that have been earned yet still not paid to the debtor by the employer. The conflict arises when this is compared to Section 1911.332, which establishes the procedures to be followed by the garnishee in computing what he is to pay out of the debtor's wages to the court. Under this section, the garnishee is required to use the previous month's wages or a hypothetical figure in his computations.²⁸

While keeping in mind the Ohio restriction which limits the number of garnishments to one per 30 day period, again consider the employee who is paid weekly and receives \$100 in disposable earnings per week. Since as each \$100 becomes *payable*, it is paid, the maximum amount of wages payable at any time during the 30 day period would be only \$100, and if this were the case, then the amount of pay subject to garnishment would be \$17.50 (17½% x the payable disposable earnings of \$100). However, if Sections 1911.332 and 2715.02 were followed, the amount of the garnishment would be \$75.77 (17½% of the prior month's pay of \$433). In resolving this conflict of terms, the courts may decide to look to Section 2329.621 which states that it is the intention of the Ohio Legislature that the amendments to the Ohio Act are to be construed so as to comply with the federal restrictions.²⁹ If this were the case, the interpretation of the term "payable," meaning due and unpaid, would be the appropriate construction since it provides for more limited garnishment. While this is only one possible interpretation, and the final decision rests with the courts, when it is considered with the previous examples it points out the inconsistencies and ambiguities that exist in the amended Ohio statutes.

²⁵ *Id.* at § 2715.17.

²⁶ 15 U.S.C.A. § 1677.

²⁷ O.R.C., *supra*, n. 2 at §§ 2329.62, 2329.66.

²⁸ *Id.* at § 1911.332.

²⁹ *Id.* at § 2329.621.

The Application of the Ohio and Federal Garnishments Acts Prior to September 16, 1970

Following the July 1, 1970 enactment of the Federal Act, and prior to September 16, 1970, the date the new Ohio amendments were to become effective, the major Ohio municipal courts began to apply the new Ohio law. This premature application of the new law gives a preview of the possible interpretations of the amended act.

In the Columbus Municipal Court, one of the courts applying the new Ohio law, Title III standards were completely ignored and only the Ohio statute was applied, even though it was not yet in effect. The instructions given to garnishees by this court completely disregarded federal restrictions even though, as mentioned earlier, this application often resulted in deductions from the debtor's weekly pay check of up to 75% of the total pay.

In Cincinnati, the Municipal Court was providing garnishees with instruction forms to be used in computing the amount of an employee's pay that would be subject to garnishment. These forms, like those of the Columbus Municipal Court, applied only the Ohio law and ignored the federal restrictions. In Cincinnati, however, General Electric and Cincinnati Bell are providing the first real challenge to this application of the Ohio and federal laws. General Electric and Cincinnati Bell, in computing garnishments, applied only Section 1673(a) of the Federal Acts and disregarded the Municipal Court's forms which applied only the Ohio Acts. On July 6, 1970 in *J. English and Co. v. Melvin Allen a.k.a. Bobby Allen*,³⁰ a creditor challenged this form of computation used by General Electric. On July 28, 1970 the case was heard, along with *J. English and Co. v. Dunn*³¹ which was a similar challenge against the computations used by Cincinnati Bell. In comparing the computations it was found that the federal restrictions would in fact provide for a more limited garnishment. In his decision, Judge Bunyan held that regarding these two cases the Federal Act was more restrictive and upheld the form used by General Electric and Cincinnati Bell. Since these cases were immediately appealed, this is not the termination of these cases. However, it does lend some support to those interpretations which regard the federal law as more restrictive.

The Toledo Municipal Court, in an attempt to prompt debtors to pay their creditors and thus avoid garnishments, has adopted a procedure in which the garnishee-employer is ordered by the court to appear at some future date to testify as to the amount of wages the garnishee owes the debtor. As a part of this order, the garnishee is enjoined from paying the debtor any wages until the garnishee's appear-

³⁰ Hamilton County Mun. Ct., Case No. 80248 (Sept., 1970).

³¹ *Id.* at 80249.

ance in the court. The garnishee may be required to appear in court any time up to three weeks after receiving the order. Thus the employee and his family would be forced to subsist without receiving the three weeks' pay involved.³² Prior to September 16, 1970, no Ohio case successfully challenged this new procedure. However, the U.S. Supreme Court has held that the withholding of an employee's wages subject to a garnishment proceeding violates the Constitution's due process clause and as such is void.³³

Before September 16, the Cleveland Municipal Court was one of the few Ohio courts applying the pre-amendment Ohio laws and the Federal Act together. As a result of this joint application, this court construed the state law so as to provide for garnishment of only one week's pay per month. The court then applied the federal formulas to determine the weekly exemption. In following this procedure, the Cleveland court was in line with the Federal Act. However, the court has given some indication that after September 16, 1970 it may apply only the Ohio law.

These interpretations are untested by appellate court adjudication. They seem to indicate that for the most part the state courts intend to ignore the restrictions in the Federal Act. The burden would therefore be upon the courts, primarily the federal courts, to bring about required application of the restrictions set out in this new Federal Act.

Federal Restrictions on Discharging Employees Because of Garnishments

Section 1674 of the Federal Act prohibits:

(The) discharge (of) any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.³⁴

Despite its apparent simplicity, this provision is bound to be the center of much controversy.

Before Section 1674 can be applied, a clarification of terms is first necessary. The term "garnishment," a source of possible controversy, is defined by the Act to mean:

Any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.³⁵

³² *Midwest Finance Company v. William E. Jackson*, Toledo Mun. Ct., Case No. 269893 (Sept. 1970).

³³ *Sniadach v. Family Finance Corp. of Bay View*, Lab. Rel. Rep. (BNA), 19 Wage & Hour Rptr. 5 (1969).

³⁴ 15 U.S.C.A. § 1674(a).

³⁵ *Id.* at § 1672(c).

The term "one indebtedness" which Section 1674 uses rather than "one garnishment" may be construed to refer to a single financial obligation instead of one legal proceeding. This interpretation recognizes the distinction between a single debt and the subsequent garnishment proceedings brought to collect it. This has particular importance in states such as Ohio, which require a series of levies, brought in the form of several individual garnishment actions, to garnish an employee for only one financial obligation.³⁶ The Federal Act is silent with regard to limitations on time and number of separate garnishment actions resulting from a single debt. The apparent reason for this is that the number of garnishment proceedings and the length of time required to collect the amount garnished are unimportant. Insofar as the Federal Act is concerned, only the number of individual obligations is important in determining whether an employee has been justifiably discharged. Under the above circumstances a company, corporation, partnership, or sole proprietorship is prohibited from discharging an employee because his wages have been subjected to garnishment for one indebtedness. Again, the number of levies which may take the form of a garnishment action are unimportant under the Federal Act.

Unlike the Ohio statutes, the Federal Act is silent on the issue of whether an employer may discharge an employee for a second indebtedness which follows the first indebtedness after an extensive period of time. To illustrate, under the Federal Act if an employee has had his wages garnished by one creditor and then five years later his wages are again garnished, except this time by a second creditor and for a different debt, it would appear, no matter how unreasonable, that under the federal regulations the employer would be justified in discharging the employee.

One serious problem that the Act creates is that an employer may be required to establish that an employee had been discharged because he was incompetent and not because he had been garnished. This is important in view of the penalties set out in the Federal Act for the wrongful discharge of an employee:

Whoever willfully violates subsection (a) of this section shall be fined not more than \$1,000 or imprisoned not more than one year or both.³⁷

Discharge Provisions of the Ohio Act

The Ohio statutes, in restricting the discharge of employees because their wages have been garnished, state:

No person shall discharge an employee solely by reason of such employee's personal earnings from such person having been at-

³⁶ O.R.C., *supra*, n. 2 at § 2715.17.

³⁷ 15 U.S.C.A. § 1674(b).

tached through no more than one action in garnishment in any 12-month period.³⁸

This provision of the state act seemingly favors the debtor since it prohibits the discharge of an employee who has been garnished for more than "one indebtedness." All that is required is that a period of 12 months separate each garnishment action. Again, the Federal Act prohibits the discharge of an employee because he has been garnished for one indebtedness and no mention is made in the federal provisions regarding time limits.³⁹ When the Federal and State Acts are compared it appears that the state provides for a more limited garnishment law, and because of Section 1677 the state law may often be applicable.⁴⁰ The question of discharge is, however, not solved this simply. As mentioned earlier, in Ohio, a garnishment proceeding is considered a proceeding in aid of execution on a judgment. If the debt is not liquidated by the first garnishment the plaintiff-creditor must again, after a 30 day period,⁴¹ serve a garnishment notice upon the garnishee-employer and the procedure must be initiated anew.⁴² While the same mode must be followed as in the initial garnishment action, the state statute permits the attorney to use copies of the original proceeding. However this does not guarantee that the second action in garnishment will be successful. Thus while a series of garnishments for a single indebtedness does indeed appear to be only a series of levies, each monthly garnishment is in fact, a "de novo" proceeding. Because of this procedure, an employee in Ohio may be subjected to several actions in garnishment for one indebtedness and subsequently be justifiably discharged by the employer. The federal restriction prohibiting the discharge of an employee due to his earnings being subjected to garnishment for one indebtedness,⁴³ should be applied however, because in this situation the federal restriction provides for more limited garnishment than does the state statute.

The only answer to the correct interpretation of these provisions is to apply both the state and federal restrictions to each individual case and then determine which affords the employee the greater protection from discharge.

³⁸ O.R.C., *supra*, n. 2 at § 2715.01.

³⁹ 15 U.S.C.A. § 1674.

⁴⁰ *Id.* at § 1677.

⁴¹ O.R.C., *supra*, n. 2 at § 1911.33(B).

⁴² *Id.* § 2715.17.

⁴³ 15 U.S.C.A. § 1674.

Conclusion

In view of the inconsistencies and ambiguities in the Ohio Garnishment Act, it will be the duty of the legislature to clarify its intent. If the legislature's intent was, as it said in Section 2329.621, to bring Ohio in line with the Federal Act, then Ohio should have adopted the provisions of Title III. However, since it has not done this, it is apparent that the Ohio Legislature should reexamine the recently added amendment and again amend the bill or enact another garnishment law which will be free from the present ambiguities and inconsistencies.