Washington Law Review

Volume 39
Number 5 *Symposium: The Washington State Tax Structure*

1-1-1965

State Wage Collection Laws: Supplementing the Bankruptcy Act

D. McKay Snow

COMMENTS

STATE WAGE COLLECTION LAWS: SUPPLEMENTING THE BANKRUPTCY ACT

The general problem to be considered here is that of the employer's insolvency and consequent inability to pay wages which have already been earned. More specifically this comment examines the various types of state legislation designed to assist employees in the collection of these earned but unpaid wages, with primary consideration directed to those statutes which enable the employee to circumvent the limitations of the federal Bankruptcy Act. State wage priority statutes are therefore not included,[1] nor are general creditor collection devices, criminal sanctions against non-payment of wages,[2] and laws authorizing the assignment of wage claims to an administrative agency for collection.[3]

The Bankruptcy Act provides one method of collecting unpaid wages, but this remedy is frequently inadequate from the employee's standpoint because of the limitations imposed by the act. These limitations, though necessary for the protection of other classes of creditors, can, in many cases, mean the loss of earned wages if the employee has no remedy other than his claim in the bankruptcy proceedings. The major limitation is the size of the distributable bankruptcy estate.[4] Wage claims, like the claims of other unsecured creditors, can be paid only from assets remaining after secured creditors and lienors have realized on their security.[5] If the employer's property was heavily mortgaged or subject to large tax liens there may be nothing left for unsecured creditors.

---

[1] In bankruptcy proceedings state priority statutes are superseded by the priorities of the Bankruptcy Act. *In re* Inland Dredging Corp., 61 F.2d 765 (2d Cir. 1932), *cert. denied* 288 U.S. 611. Washington has established the same priorities as the federal Bankruptcy Act in state proceedings for dissolution of a corporation. REV. CODE WASH. § 23.01.610 (1961). For assignments for the benefit of creditors and insolvency proceedings the priority for wages is limited to $100 for services rendered within sixty days prior to the assignment or institution of proceedings. REV. CODE WASH. § 49.56.010 (1961). The same priority exists when another creditor seeks to collect by "execution, attachment and similar writs." REV. CODE WASH. § 49.56.030 (1961).

[2] In Washington, wrongful refusal to pay wages by one having ability to pay is a misdemeanor. REV. CODE WASH. § 49.48.060 (1961).

[3] *E.g.*, REV. CODE WASH. § 49.48.040 (1961).

[4] In fiscal 1961, nationally, no distribution was made to creditors in 89.2% of the straight bankruptcy cases. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TABLES OF BANKRUPTCY STATISTICS 4 (1961). In the state of Washington no distribution was made in 86.9% of the cases. *Id.* Table F 4a.

[5] 9 AM. JUR. 2d *Bankruptcy* § 955 (1963).

Any assets remaining after the secured creditors take their security are applied first to the payment of the costs and expenses of administration of the bankruptcy estate and then to the satisfaction of wage claims.[6] The costs and expenses of administration include the costs of preserving the bankruptcy estate, fees for the referee's salary and expense fund, filing fees if paid by someone other than the bankrupt, costs of recovering property transferred or concealed by the bankrupt, the trustee's expenses in opposing the bankrupt's discharge, fees and mileage payable to witnesses, attorneys' fees of the bankrupt and of creditors petitioning for involuntary bankruptcy, and in some cases attorneys' expenses for such items as accountants and appraisers.[7] These expenses can consume a sizeable portion, if not all, of the distributable assets.[8]

After secured creditors and expenses of bankruptcy administration, wage claims are paid from any remaining assets to the extent of $600 per claimant if the wages were earned within three months prior to bankruptcy.[9] Only workmen, servants, clerks, or traveling or city salemen are entitled to the priority.[10] This has been held to exclude executives,[11] officers,[12] managers,[13] purchasing agents,[14] foremen,[15] superintendents, and supervisors[16] of the bankrupt business. Even if the employee is within the priority class, $600 by our modern inflationary standards may be less than the monthly paycheck. Any part

[6] Bankruptcy Act § 64, 11 U.S.C. § 104 (1953).

[7] Bankruptcy Act § 64 (a)(1), 11 U.S.C. § 104 (a)(1) (1953).

[8] In fiscal 1961, in the 10.8% of the straight bankruptcy cases in which assets were distributed to creditors (see note 4 *supra*), expenses of administration consumed 25.8% of the total assets. BANKRUPTCY STATISTICS, *op. cit. supra* note 4 at 10.

[9] In fiscal 1960, the last year for which a detailed analysis of distribution is available, in only 12.4% of the straight bankruptcy cases were any assets distributed to creditors. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TABLES OF BANKRUPTCY STATISTICS 4 (1960). The percentage distribution of these assets is as follows: secured creditors, 30.5%; administrative expenses, 25.5%; unsecured creditors, 23.8%; tax claims having priority under § 64(a)(4), 11.7%; wage claims having priority under § 64(a)(2), 2.1%; other priorities, 1.7%; other payments, 4.7%. *Id.* at 10. However, these statistics are for *all* straight bankruptcies. The problems examined in this comment relates only to *business* bankruptcies. Since business bankruptcies accounted for only 11.2% of all bankruptcies in 1960, *id.* at 3, the above statistics can only be considered as giving a very general indication of the disposition of assets in business bankruptcies.

[10] Bankruptcy Act § 64(a)(2), 11 U.S.C. § 104(a)(2) (1953).

[11] *In re* Marshall E. Smith & Bro., 35 F. Supp. 56 (E.D. Pa. 1940); *In re* Goldman Stores, Inc., 3 F. Supp. 936 (W.D. La. 1933).

[12] *In re* Pacific Oil & Meal Co., 24 F. Supp. 767 (S.D. Cal. 1938).

[13] Blessing v. Blanchard, 223 Fed. 35 (9th Cir. 1915).

[14] *In re* Goldman Stores, 3 F. Supp. 936 (W.D. La. 1933).

[15] *In re* Bush Terminal Printing Corp., 32 F.2d 264 (E.D.N.Y. 1929), *aff'd mem.*, 32 F.2d 265 (2d Cir. 1929); *In re* Broudarge Bros. Novelty Yarn, 22 F. Supp. 891 (E.D.N.Y. 1938).

[16] Wintermote v. MacLafferty, 233 Fed. 95 (9th Cir. 1916).

of a claim over $600 has the same status as the claims of general unsecured creditors[17] and in most cases is worth, if anything at all, only a few cents on the dollar.

State legislation which either by design or coincidence gives the employee a remedy supplemental to the Bankruptcy Act has taken two basic forms: preventive and remedial. In the first group are bonding laws and laws which regulate the payment of wages and upon violation give the employee the right to collect an additional amount of civil penalty or liquidated damages.[18] In the second group are statutory labor liens and stockholder liability laws.

BONDING LAWS

With two exceptions,[19] bonding laws, much like statutory labor liens, apply only to specific industries. These industries are selected for legislative assistance presumably because of a stronger need due either to frequent management abuses or, more likely, to frequent business insolvencies. The basic purpose of a bonding law is to compel the employer to provide in advance a fund, beyond the control of the employer, which can be used for the payment of wages if ever the employer refuses to pay or becomes unable to do so himself. Labor unions, recognizing the utility in such an approach, have at the bargaining table sought to include provisions in union contracts for a wage bond by the employer, but such attempts have been frustrated by a National Labor Relations Board ruling that such bonds are not a mandatory subject of collective bargaining under the National Labor Relations Act.[20] Thus any relief under a bonding approach must come from the legislature.

The most common type of bonding law is that applying to public works contractors. While one of the purposes of such legislation is to protect the public interest in the event of the contractor's default,[21] thirty-four states[22] require that the bond also be conditioned upon the

[17] *In re* Ko-Ed Tavern, 129 F.2d 806 (3d Cir. 1942).

[18] Laws providing for a civil penalty or liquidated damages could properly be classed as remedial, but the preventive aspect of such laws is of greater import for the purposes of this discussion. See text following note 72 *infra*.

[19] See text accompanying notes 37 and 38 *infra*.

[20] Carpenters' Dist. Council, 145 NLRB No. 64 (1963) (three to two decision). See Local 164, Brotherhood of Painters v. NLRB, 293 F.2d 133 (D.C. Cir. 1961), *cert. denied* 368 U.S. 822; *Cf.* NLRB v. Dalton Telephone Co., 187 F.2d 811 (5th Cir. 1951), *cert. denied* 342 U.S. 824.

[21] 43 AM. JUR. *Public Works and Contracts* §§ 137, 144 (1942).

[22] ARK. STAT. ANN. §§ 14-604 (1956), 51-632 (1963 Supp.); CAL. GOV'T CODE §§ 4200-4208; CONN. GEN. STAT. ANN. § 49-41 (1960); DEL. CODE ANN. tit. 29, § 6911

payment of employees' wages.[23] Two states require a bond only for highway construction contracts[24] and fifteen states require one only if the contract price exceeds a specified amount.[25]

Eleven states[26] extend bonding laws to other industries. Industries selected for protection include: mining,[27] railroad construction,[28] well drilling,[29] manufacturing,[30] mineral refining,[31] farm labor contractors,[32]

(1953); D.C. CODE § 1-804 (1961); FLA. STAT. ANN. § 255.05 (1962); IDAHO CODE § 45--502 (1948); Smith-Hurd ILL. STAT. ANN. ch. 29, § 15 (1935); BURN'S IND. STAT. ANN. § 53-201 (1951); IOWA CODE ANN. § 573.6 (1950); KAN. GEN. STAT. ANN. § 68-410 (1950); LA. REV. STAT. § 38:2241 (1951); MASS. GEN. LAWS ANN. ch. 149, § 29 (1957); MICH. COMP. LAWS § 570.101 (1948); MINN. STAT. ANN. § 574.26 (1947); MONT. REV. CODE ANN. § 6-404 (1957); NEB. REV. STAT. § 52-118 (1960); N.H. REV. STAT. ANN. 447:16 (1955); N.Y. STATE FIN. LAW § 137 (1940); N.D. CENT. CODE § 48-01-01 (1960); OHIO REV. CODE ANN. § 153.54 (1953); OKLA. STAT. ANN. tit. 61, § 1 (1963); ORE. REV. STAT. § 279.510 (1963); PURDON'S PA. STAT. ANN. tit. 62, § 2267; tit. 53, §§ 36907, 46319, 56804, 65803 (1959); R.I. GEN. LAWS § 37-12-1 (1957); S.C. CODE § 33-224 (1962); TENN. CODE ANN. § 12-417 (1955); VERNON'S TEX. REV. CIV. STAT. ANN. § 5160 (1962); UTAH CODE ANN. § 14-1-5 (1962); VT. STAT. ANN. tit. 19, § 4(14) (1959); VA. CODE ANN. § 11-20 (1964); REV. CODE WASH. §§ 39.08.010, 60.28.010 (1961); W. VA. CODE ANN. § 3760 (1961); WIS. STAT. ANN. § 289.16(1) (1958).

[23] What constitutes wages can also be an issue under such statutes. Bernard v. Indemnity Ins. Co. of No. Am., 162 Cal. App. 2d 479, 329 P.2d 57 (1958), held that a public works contractor's bond to secure payment "for any work or labor" was liable for unpaid obligations to a union welfare fund.

[24] South Carolina and Vermont, note 22 *supra*.

[25] ARK. STAT. ANN. § 51-632 (1963 Supp.); statutes for the following additional states are cited note 22 *supra:* California, Connecticut, Idaho, Iowa, Louisiana, Massachusetts, Michigan, New Hampshire, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, Wisconsin. Minimum contract prices range from $200 in Idaho to $10,000 in New Hampshire and South Carolina.

[26] California, Colorado, Connecticut, Illinois, Indiana, Maine, Montana, Oklahoma, Oregon, Texas, Washington. Statutes are cited at notes 27 and 32-38 *infra*.

[27] CAL. LABOR CODE §§ 270, 272, held constitutional in Ephraim v. Jamestown Judicial Dist. Court, 120 Cal. App.2d 741, 262 P.2d 56 (1953); COLO. REV. STAT. §§ 80-15 to -4, 80-25-3, 92-11-8 to -10 (1953); SMITH-HURD ILL. STAT. ANN. ch. 48, §§ 39f-1 to -5 (1950); BURN'S IND. STAT. ANN. §§ 40-112 to -115 (1952), applied in Bell v. State, 217 Ind. 323, 27 N.E.2d 362 (1940); MONT. REV. CODE ANN. §§ 41-1315 to -1317 (1961); OKLA. STAT. ANN. tit. 45, ch. 1, §§ 305-310 (1954); UTAH CODE ANN. §§ 34-10-17 to -20 (1953).

[28] CONN. GEN. STAT. REV. § 16-92 (1960); ME. REV. STAT. ch. 45, § 48 (1954), applied in Blanchard v. Portland & R.F. Ry., 87 Me. 241, 32 Atl. 890 (1895), Palangio v. Wild River Lbr. Co., 86 Me. 315, 29 Atl. 1087 (1894) and Rogers v. Dexter & P.R.R., 85 Me. 372, 27 Atl. 257 (1893); REV. CODE WASH. § 60.04.010 (1959), applied in Cloud v. Greenwood Logging Co., 157 Wash. 261, 288 Pac. 910 (1930); Dixon v. Parker, 102 Wash. 101, 172 Pac. 856 (1918); Clarke v. Murphy, 99 Wash. 643, 170 Pac. 141 (1918); E.I. DuPont De Nemours Powder Co. v. National Sur.. Co., 94 Wash. 461, 162 Pac. 866 (1917); Laidlaw v. Portland, V. & Y. R.R., 42 Wash. 292, 84 Pac. 855 (1906). These statutes require the railroad to take a bond from its construction contractors or be liable for their labor debts. While the amount of the bond is discretionary, it would presumably in practice be based on the size of the payroll.

[29] Illinois, Indiana, Montana. Statutes cited note 27 *supra*.

[30] Illinois, Indiana. Statutes cited note 27 *supra*.

[31] Colorado, Montana. Statutes cited note 27 *supra*.

[32] CAL. LABOR CODE §§ 1684(c), 1693; REV. CODE WASH. § 19.30.040 (1961) (bond is discretionary with the director of the department of labor and industries).

logging,[33] theatrical enterprises,[34] stevedoring contractors,[35] and private construction contractors.[36] Two states have laws of more general application. In Oregon every employer is subject to a bonding requirement after an initial default in the payment of wages.[37] Wyoming requires a bond of every non-resident employer doing business within the state less than five years, unless he owns $5,000 worth of realty within the state which is subject to execution.[38]

The statutes affecting selected industries, other than public works contractors, are often so limited as to be of restricted application even in the selected industry. A common type of limitation is the requirement of a bond only when the operator of the business is a lessee of the business premises,[39] or when he has anything less than an unencumbered fee simple title to the premises,[40] or when he owns unencumbered real property located anywhere within the state of value less than a specified amount.[41] Under some statutes there is an additional limitation that the employer need post a bond only after an initial default in wages.[42] However, nearly one half of the statutes require a bond of every employer in the specified industry.[43]

Some statutes permit in lieu of the bond a bank deposit,[44] a deposit

---

[33] CAL. LABOR CODE §§ 270.5, 272.

[34] CAL. LABOR CODE §§ 271,272.

[35] VERNON TEX. REV. CIV. STAT. ANN. arts. 5191-5195 (1962).

[36] REV. CODE WASH. §§ 18.27.010-.100 (1964 Supp.).

[37] ORE. REV. STAT. § 652.340 (1963).

[38] WYO. STAT. ANN. §§ 27-6, -7 (1959).

[39] COLO. REV. STAT. §§ 92-11-8 to -10 (1953) (coal mines).

[40] CAL. LABOR CODE §§ 270, 272 (mining); CAL. LABOR CODE §§ 271-272 (theatrical enterprises); COLO. REV. STAT. §§ 80-15-1 to -4, 80-25-3 (1953) (mining and mineral refining). MONT. REV. CODE ANN. §§ 41-1315 to -1317 (1961) (mining, mineral refining and well drilling) requires only half ownership of an unencumbered fee to qualify for the exemption. SMITH-HURD ILL. STAT. ANN. ch. 48 §§ 39f-1 to -5 (1952) and BURN'S IND. STAT. ANN. §§ 40-112 to -115 (1952) (mining, well drilling and manufacturing) exempt all but lessees, bailees and conditional buyers and even these are exempt if the value of their real and personal property within the state exceeds the amount of the bond.

[41] CAL. LABOR CODE §§ 270.5, 272 (logging); WYO. STAT. ANN. §§ 27-6, -7 (1959) (non-resident employers).

[42] COLO. REV. STAT. §§ 80-15-1 to -4, 92-11-8 to -10 (1953) (mining and mineral refining); MONT. REV. CODE ANN. §§ 41-1315 to -1317 (1961) (mining and well drilling); ORE. REV. STAT. § 652.340 (1963) (any employer).

[43] CAL. LABOR CODE §§ 1684, 1693 (farm labor contractors); CONN. GEN. STAT. REV. § 16-92 (1962) (railroad construction); ME. REV. STAT. ch. 45, § 48 (1954) (railroad construction); OKLA. STAT. ANN. tit. 45, ch. 1, §§ 305-310 (1954) (coal mining); VERNON'S TEX. REV. CIV. STAT. ANN. arts. 5191-5195 (1962) (stevedoring contractors); UTAH CODE ANN. §§ 34-10-17 to -20 (1953) (mining); REV. CODE WASH. § 60.04.010 (1961) (railroad construction); REV. CODE WASH. §§ 18.27.010-.100 (Supp. 1964) (private construction contractors).

[44] CAL. LABOR CODE §§ 270.5, 272 (logging). CAL. LABOR CODE §§ 270, 271-272 (mining and theatrical enterprises) and COLO. REV. STAT. § 80-25-3 (1953) (mining) apparently do not permit a bond but *require* a bank deposit instead.

with an administrative agency of cash or negotiable securities,[45] an assignment of accounts receivable,[46] or proof of ability to pay a specified amount.[47] The method of fixing the amount of the bond varies from the stipulation of a flat sum[48] to a sum based on the number of employees[49] or on the average payroll.[50] Only Utah allows a majority of the employees to waive the bonding requirement.[51]

Most of the statutes make failure to provide the bond of misdemeanor[52] and several authorize an injunction against continuing business until the bond is furnished.[53]

---

[45] REV. CODE WASH. §§ 18.27.010-.100 (Supp. 1964) (private construction contractors).

[46] COLO. REV. STAT. § 80-25-3 (1953) (mining).

[47] UTAH CODE ANN. §§ 34-10-17 to -20 (1953) (mining).

[48] CAL. LABOR CODE §§ 1684, 1693 (farm labor contractors: $1,000); VERNON'S TEX. REV. CIV. STAT. ANN. arts. 5191-5195 (1962) (stevedoring contractors: $5,000); REV. CODE WASH. §§ 18.27.010-.100 (Supp. 1964) ("general" private construction contractors: $2,000; "specialty" private construction contractors: $1,000); WYO. STAT. ANN. §§ 27-6, -7 (1959) (non-resident employers: $1,000).

[49] COLO. REV. STAT. §§ 80-15-1 to -4 (1953) (mining: $500 for each unit of five employees or less); COLO. REV. STAT. §§ 92-11-8 to -10 (1953) (coal mining: $1,000 for each unit of ten men or less, in addition to bond for all types of mining, but not more than $5,000); MONT. REV. CODE ANN. §§ 41-1315 to -1317 (1961) (mining: $500 for each unit of five employees or less); OKLA. STAT. ANN. tit 45, ch. 1, §§ 305-310 (1954) (coal mining: sliding scale ranging from $1,500 for three to twelve employees to $15,000 for 300 or more).

[50] CAL. LABOR CODE §§ 270, 271-72 (mining and theatrical enterprises: before starting work in any pay period an amount sufficient to meet the payroll for that period must be on deposit in a bank in the county where the work is performed); CAL. LABOR CODE §§ 270.5, 272 and 8 CAL. ADM. CODE § 13300 (logging: bond equal to highest contemplated semi-monthly payroll for coming year plus 10%, but not less than highest semi-monthly payroll for past year); COLO. REV. STAT. § 80-25-3 (153) (mining: before starting work in any pay period an amount sufficient to meet the payroll for that period must be on deposit in a bank in the county where the work is performed); CONN. GEN. STAT. REV. § 16-92 (1960) (railroad construction: discretionary with the railroad, see note 28 *supra;* SMITH-HURD ILL. STAT. ANN. ch. 48, §§ 39f-1 to -5 (1950) (mining, well drilling and manufacturing: double the semi-monthly or weekly payroll); BURN'S IND. STAT. ANN. §§ 40-112 to -115 (1952) (mining, well drilling and manufacturing: double the weekly payroll); ME. REV. STAT. ch. 45, § 48 (1954) (railroad construction: discretionary with the railroad, see note 28 *supra*); ORE. REV. STAT. § 652.340 (1963) (every employer: discretionary with the commissioner of labor, subject to summary judicial review); UTAH CODE ANN. §§ 37-10-17 to -20 (1953) (mining: double the largest monthly payroll); REV. CODE WASH. § 60.04.010 (1961) (railroad construction: discretionary with the railroad, see note 28 *supra.)*

[51] UTAH CODE ANN. §§ 37-10-17 to -20 (1953).

[52] CAL. LABOR CODE §§ 270-72 (mining, logging and theatrical enterprises); CAL. LABOR CODE §§ 1684, 1693 (farm labor contractors); COLO. REV. STAT. §§ 92-11-8 to -10 (1953) (coal mining); SMITH-HURD ILL. STAT. ANN. ch. 48 §§ 39f-1 to -5 (1950) (mining, well drilling and manufacturing); BURN'S IND. STAT. ANN. §§ 40-112 to -115 (1953) (mining, well drilling and manufacturing); OKLA. STAT. ANN. tit. 45, ch. 1, §§ 305-10 (1954) (coal mining); VERNON'S TEX REV. CIV. STAT. ANN. arts 5191-195 (1962) (stevedoring contractors); UTAH CODE ANN. §§ 37-10-17 to -20 (1953) (mining); REV. CODE WASH. § 18.27.020 (Supp. 1964) (private construction contractors).

[53] COLO. REV. STAT. §§ 80-15-1 to -4 (1953) (mining and mineral refining); MONT. REV. CODE ANN. §§ 41-1315 to -1317 (1961) (mining, mineral refining and well

Washington's statute,[54] making the bonding of private construction contractors mandatory, is apparently the only one of its kind, although this type of legislation was first recommended in the law reviews in 1958.[55] The statute is designed to eliminate some of the problems of the traditional mechanics' and materialmen's lien. A major drawback of such liens[56] is the frequent injustice to the owner of the property under construction. Typically, the owner of the premises contracts for the construction or remodeling of a building on his land and pays the construction contractor stipulated increments of the contract price as the work progresses. In theory the progressive payments are intended to defray the costs of labor and materials as the work progresses. However, if the contractor has underestimated his costs or is financially pressed elsewhere, the owner may suddenly find himself faced with an uncompleted building, a bankrupt contractor and liens against his property for the contractor's defaulted wages and materials. Therefore, the owner must in effect pay twice for that part of the project which was completed—once to the contractor and again to the contractor's workers and suppliers.

One solution which has been attempted in several states[57] with little success,[58] is a statutory provision giving the owner the option of requiring a bond from the contractor. If a bond is provided the owner is exempt from mechanics' and materialmen's liens. However, in practice the bond generally is required only by the owners of large construction projects. The small entrepreneur and the homeowner apparently either do not know of the option or do not realize the value of releasing the

drilling); OKLA. STAT. ANN. tit. 45, ch. 1, §§ 305-10 (1954) (coal mining); ORE. REV. STAT. § 652.340 (1963) (every employer); UTAH CODE ANN. §§ 37-10-17 to -20 (1953) (mining).

[54] REV. CODE WASH. §§ 18.27.010-.100 (Supp. 1964). The statute was held in violation of WASH. CONST. art. 2, § 19 in Treffry v. Taylor, No. 171271, Spokane County Super. Court, March 24, 1964, because the title of the act referred only to "registration," and the subject of the act was "regulation." An appeal is pending.

[55] Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138 (1958); Comment, *The Florida Mechanics' Lien Act: Interpretation and Analysis of Selected Provisions*, 14 U. MIAMI L. REV. 73 (1959). Other legislatures have also considered such legislation. Illinois Legislative Council, *Mechanics' Lien Laws*, Sept. 13, 1962 (unpublished memorandum on microcard in University of Washington Law School Library).

[56] The reader is referred to the law review comments cited *supra* note 55 for more detailed analysis and discussion.

[57] CAL. CIV. PROC. CODE § 1185.1(c) (1955); FLA. STAT. ANN. § 84.231 (1964); N.Y. LIEN LAW § 37; VERNON'S TEX. REV. STAT. ANN. art. 5472d (1962). The provision was also included in UNIFORM MECHANICS' LIEN ACT § 7 (1932), enacted only in Florida, which has since repealed the uniform act but retained the option provision. The Uniform Act is no longer being recommended by its promulgators.

[58] Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, *supra* note 55; Comment, *The Florida Mechanics' Lien Act*, *supra* note 55.

lien. Another factor is the cost of the bond, which is, of course, passed on to the owner in the contract price.[59] The mandatory requirement of the Washington act, should eliminate the problems of optional bonding.

Not only does the Washington act give better protection to the owner, it also better enables the workers and suppliers to collect on their claims.[60] The simple enforcement procedure against the bond[61] stands in marked contrast to the technical, expensive and time-consuming requirements of notice, filing and foreclosure under the lien law.[62]

The bonding approach to the general wage collection problem has in its favor the fact that a fund for the payment of wages is created, which is unaffected by the employer's insolvency or by bankruptcy proceedings. One disadvantage is that it offers protection only to workers in the selected industries. As mentioned earlier, Oregon applies the bonding concept to every employer, but only after an initial default. This approach appears effective and reasonable if the employer desires to continue in business,[63] but if the first default is in connection with the employer's bankruptcy it is like locking the barn door after the horse is out. Since it is obviously expensive and impractical to require initially a bond of every employer, the application of the bonding approach to the basic wage collection problem is essentially limited to expansion to additional industries as the legislature sees a need arise.[64] The drawback is that the usually sluggish legislative response may result in no relief or tardy relief for employees in the affected industry.

CIVIL PENALTY LAWS

These laws[65] generally provide that when an employer fails to pay wages statutorily due, he becomes liable to the employee for an addi-

[59] *Ibid.*

[60] A study of 33,000 mechanics' and materialmen's liens filed against private improvements in the greater New York City area over a six-year period showed that each year less than one-half of the liens were satisfied. BROOKE, OTHER PEOPLE'S LABOR AND MATERIAL IN THE BUILDING INDUSTRY OF GREATER NEW YORK (1933), cited in Comment, *Mechanics' Liens and Surety Bonds in the Building Trades, supra* note 55, at 168, n.150.

[61] Suit may be filed upon the bond in the superior court of the county in which the work was done or in any county where jurisdiction over the employer may be had. REV. CODE WASH. § 18.27.040 (Supp. 1964).

[62] REV. CODE WASH. §§ 60.04.020, .060, .120 (1961).

[63] The statute expressly provides the employer with recourse to the courts from the decision of the commissioner of labor to require a bond, at which time the employer may challenge the amount of the bond, whether there is just cause for requiring the bond and whether the bond is reasonably necessary or appropriate to secure the prompt payment of wages. ORE. REV. STAT. § 652.340 (1963).

[64] California appears to be following this approach. It first applied bonding to public works contractors (1919), and then to mining (1933), theatrical enterprises (1941) and logging (1957).

[65] These laws generally appear to be patterned after a model act drafted by a

tional sum of money. Some statutes denominate the sum a "civil penalty"[66] while others call it "liquidated damages."[67] The name should make no difference[68] unless a court is inclined to apply the rule that statutes providing for a penalty should be strictly construed.[69]

The statutes may be classified into three groups: (1) those which provide a penalty only if an employee is discharged and is not paid,[70] (2) those which provide a penalty only if the employee is either discharged or quits and is not paid,[71] and (3) those which provide a penalty whenever an employee is not paid.[72] While the purpose of the first

committee of state labor commissioners appointed in 1936 by the Secretary of Labor. The act has been recommended by the Third National Conference on Labor Legislation and the International Association of Governmental Labor Officials. The act may be found in UNITED STATES DEPARTMENT OF LABOR, DIVISION OF LABOR STANDARDS, WAGE PAYMENT AND WAGE COLLECTION LAWS, Bulletin No. 58 (1943). Twenty-two states have enacted such laws. See statutes cited notes 70 to 72 *infra*.

[66] ARK. STAT. ANN. § 81-308 (1960); CAL. LABOR CODE §§ 201-203; IDAHO CODE §§ 45-606, -607 (1947); KAN. GEN. STAT. ANN. §§ 44-301, -302 (1949); LA. REV. STAT. §§ 23:631-632 (1950); MINN. STAT. ANN. §§ 181.13-.17 (1945); VERNON'S MO. STAT. ANN. §§ 290.110-.120 (1949); MONT. REV. CODE ANN. §§ 41-1301 to -1306 (1961); NEV. REV. STAT. §§ 608.010-.060 (1957); N.M. STAT. ANN. §§ 59-3-1 to -4 (1960); ORE. REV. STAT. §§ 652.140-.150 (1953); S.C. CODE §§ 40-111, -112, -117, -118 (1962); W. VA. CODE ANN. § 2356 (1961).

[67] D.C. CODE §§ 36-601 to -610 (1961); SMITH-HURD ILL. STAT. ANN. ch. 48, §§ 39h, i (1961); BURN'S IND. STAT. ANN. §§ 40-101 to -105 (1952); IOWA CODE ANN. § 82.112 (1946); N.H. REV. STAT. ANN. §§ 275:42-:45 (1963 Supp.); OKLA. STAT. ANN. tit. 40, ch. 5, §§ 165.1, .3, .4 (1951); PURDON'S PA. STAT. ANN. tit. 43, § 260.10 (1963 Supp.).

[68] See *e.g.*, Leep v. St. Louis I.M. & S. Ry., 58 Ark. 407, 25 S.W. 75 (1894); Livingston v. Susquehanna Oil Co., 113 Kan. 702, 216 Pac. 296 (1923).

[69] 50 AM. JUR. *Statutes* §§ 407, 408 (1944). *E.g.* Deardorf v. Hunter, 160 La. 213, 106 So. 831 (1926); Monterosso v. St. Louis Globe-Democrat Publishing Co., 368 S.W.2d 481 (Mo. 1963), *cert. denied* 375 U.S. 908 (1964).

[70] ARK. STAT. ANN. § 81-308 (1960); IDAHO CODE §§ 45-606, -607 (1947); VERNON'S MO. STAT. ANN. §§ 290-110-120 (1949); N.M., STAT. ANN. §§ 59-3-1 to -4 (1960); S.C. CODE §§ 40-111. -112, -117, -118 (1962); W. VA. CODE ANN. § 2356 (1961). A Utah statute in this group, UTAH CODE ANN. §§ 34-10-2, -6 (1953), was declared unconstitutional in Justice v. Standard Gilsonite Co., 12 Utah 2d 357, 366 P.2d 974 (1961), because of the "arbitrary" exclusion from the act of banks and mercantile houses. An earlier case had sustained the constitutionality of the act against an attack on the same grounds. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

[71] CAL. LABOR CODE §§ 201-203; D.C. CODE §§ 36-601 to -610 (1961); SMITH-HURD ILL. STAT. ANN. ch. 48, §§ 39h, i (1961); LA. REV. STAT. §§ 23:631-632 (1950); MINN. STAT. ANN. §§ 181.13-.17 (1945); N.H. REV. STAT. ANN. §§ 275:42-:45 (1963 Supp.); OKLA. STAT. ANN. tit. 40, ch. 5, §§ 165.1, .3, .4 (1951); ORE. REV. STAT. §§ 652.140-.150 (1953).

[72] COLO. REV. STAT. ANN. §§ 80-10-1 to -8 (1953); BURN'S IND. STAT. ANN. §§ 40-101 to -105 (1952); IOWA CODE ANN. § 82.112 (1946); KAN. GEN. STAT. ANN. §§ 44-301, -302 (1949); MONT. REV. CODE ANN. §§ 41-1301 to -1306 (1961); NEV. REV. STAT. §§ 608.010 -.060 (1957); PURDON'S PA. STAT. ANN. tit. 43, § 260.10 (1963 Supp.); WISC. STAT. ANN. § 103.30 (1957). Statutes of Michigan and Texas in this group have been declared unconstitutional on the grounds of being special legislation and working a deprivation of property without due process of law. MICH. COMP. LAWS §§ 408.541, .543 (1948); Davidow v. Wadsworth Mfg. Co., 211 Mich. 90, 178 N.W. 776 (1920); VERNON'S TEX. REV. CIV. STAT. ANN. art. 6431 (1925); San Antonio & A.P. Ry. v. Wilson, 19 S.W. 910 (Tex. Civ. App. 1892); Missouri, K. & T. Ry. v. Braddy, 135 S.W. 1059 (Tex. Civ. App. 1911). The Michigan statute applied to various selected industries. The Texas statute applied only to railroads. The con-

two types of statutes is clearly remedial, the third group has an additional purpose which is more important for the purposes of this discussion, namely the deterrent effect against delaying the payment of wages.[73]

The theory of the deterrent effect is that a financially hard-pressed employer, faced with the choice of paying wages or paying other creditors, will be more likely to choose the former if the failure to pay wages would incur economic penalties. This deterrent will only be effective if the employer has hopes of surviving his financial crisis without bankruptcy. If bankruptcy is declared, civil penalty laws are of no avail to the employees unless there are sufficient assets in the bankruptcy estate to make distribution of share to unsecured creditors, since a penalty or liquidated damages presumably would not qualify as "wages" for the purpose of the bankruptcy priority.

The statutes generally apply to all employers in the state; however, Iowa's[74] applies only to coal mines and Colorado's only to corporations.[75] Indiana and South Carolina[76] each apply different penalties to two classes of employers.[77] Several states exempt certain employers from the operation of the act, *e.g.*, federal,[78] state and local governments,[79] farm labor employers,[80] employers of domestic help,[81] hos-

---

stitutionality of other statutes has been expressly upheld. Leep v. St. Louis I. M. & S.R.R., 58 Ark. 407, 25 S.W. 75 (1894); Davis v. Morris, 37 Cal.App. 2d 269. 99 P.2d 345 (1940); Marrs v. Oregon Short Line RR., 33 Idaho 785, 198 Pac. 468 (1921); Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N.E. 761 (1923).

[73] The federal Fair Labor Standard Act § 16(b), 29 U.S.C. § 216(b) (1958), uses the same type of deterrent to encourage compliance with the federal minimum wage and overtime pay requirements. The employer must pay the employee double the amount of wages originally underpaid. Where the minimum wage or overtime pay is involved the Fair Labor Standards Act supersedes the state penalties herein discussed. Sirmon v. Cron & Gracey Drilling Corp., 44 F. Supp. 29 (D. La. 1942); Divine v. Levy, 36 F. Supp. 55 (D. La. 1940).

[74] *Supra* note 72; compare the unconstitutional Texas statute *supra* note 72. The Iowa statute has apparently been applied but once on the appellate level. Mitchell v. Burwell, 110 Iowa 10, 81 N.W. 193 (1899). The case did not involve a challenge to the constitutionality of the statute.

[75] *Supra* note 72.

[76] *Supra* notes 72 and 70.

[77] Indiana applies a penalty of $1 per day to employers in mining and manufacturing and liquidated damages of 10% of the unpaid amount per day to all other employers. South Carolina applies a penalty of continuing wages to both groups but cuts off the penalty at thirty days for railroads, domestic labor, the lumber, logging and turpentine industries, telephone and telegraph companies and oyster canneries. For all other employers the penalty continues until the wages are paid.

[78] District of Columbia, *supra* note 71; Montana, *supra* note 72.

[79] District of Columbia, *supra* note 71; Kansas, *supra* note 72; Montana, *supra* note 72; Nevada, *supra* note 72.

[80] Minnesota, *supra* note 71; New Hampshire, *supra* note 71 (but only if less than five are employed); New Mexico, *supra* note 70; Wisconsin, *supra* note 72.

[81] New Hampshire, *supra* note 71; New Mexico, *supra* note 70; Wisconsin, *supra* note 72.

pitals and sanitoriums,[82] logging operators,[83] employers in bankruptcy or receivership,[84] and employers subject to the federal Railway Labor Act.[85]

The statutes use several methods of defining the amount of the penalty. Most commonly the penalty accrues at a rate equal to the employee's regular wage until the overdue wages are paid.[86] The majority of such statutes cut off the penalty wage at thirty days even if the overdue wage has not been paid by then.[87] Other cut-off points are sixty,[88] fifteen,[89] and ten days.[90] Louisiana, New Mexico and, in some cases, South Carolina, set no upper limit on the penalty.[91] Other penalty determinations are based on a percentage of the overdue wages which accrues daily until the wages are paid. Three states penalize ten per cent of the unpaid wage per day until the amount owing is either paid or doubled.[92] Kansas penalizes five per cent per month until paid, with no upper limit.[93] Oklahoma's rate is ten per cent per year until paid or doubled.[94] Colorado and Montana use a flat five per cent of the overdue wages[95] and Pennsylvania uses six per cent or $200, whichever is greater.[96] Indiana[97] and Iowa[98] have a rate of one dollar per day until paid or doubled. Wisconsin uses a sliding percentage scale with a fifty dollar maximum and also limits eligibility for the penalty by excluding employees who are paid a salary of more than $350 per month.[99]

---

[82] Wisconsin, *supra* note 72.

[83] *Ibid.*

[84] Minnesota, *supra* note 71.

[85] District of Columbia *supra* note 71.

[86] Arkansas, *supra* note 70; California, *supra* note 71; Idaho, *supra* note 70; Illinois, *supra* note 71; Louisiana, *supra* note 71; Minnesota, *supra* note 71; Missouri, *supra* note 70; Nevada, *supra* note 72; New Mexico, *supra* note 70; Oregon, *supra* note 71; South Carolina, *supra* note 70; West Virginia, *supra* note 70.

[87] California, *supra* note 71; Idaho, *supra* note 70; Nevada, *supra* note 72; Oregon, *supra* note 71; West Virginia, *supra* note 70; see also South Carolina, *supra* note 77.

[88] Arkansas, *supra* note 70; Missouri, *supra* note 70.

[89] Minnesota, *supra* note 71.

[90] Illinois, *supra* note 71.

[91] Louisiana, *supra* note 71; New Mexico, *supra* note 70; South Carolina, *supra* note 77.

[92] District of Columbia, *supra* note 71; Indiana, *supra* note 72; New Hampshire, *supra* note 71.

[93] *Supra* note 72.

[94] *Supra* note 71.

[95] *Supra* note 72.

[96] *Ibid.*

[97] *Supra* note 72. See also note 77 *supra*.

[98] *Supra* note 72.

[99] *Supra* note 72. On the sliding scale the penalty equals 10% of the overdue wage if the delay does not exceed three days, 20% for a delay not in excess of 10 days, 30% up to 20 days, 40% for 30 days and 50% for any greater delay, but in no case may the penalty exceed $50.

The cases arising under such statutes uniformly hold that a tender of the amount of wages originally overdue stops further accrual of the penalty and that a tender of the penalty thus far accrued is not necessary.[100] The majority of the cases hold that the employee may waive his right to the penalty.[101] There is a split as to the effect of an assignment by the employee of his claim to the penalty.[102]

The effectiveness of any type of deterrent is difficult to evaluate. There will always be some who believe there is more to be gained by risking the sanctions of the law. It would seem that the deterrent aspect of this type of legislation would be less effective than the bonding approach in an individual industry, but the penalty-type laws do have the advantage of being susceptible of general application to all employers. Another plus factor for the penalty-type law is that in addition to its deterrent effect it provides a needed remedy for delinquency in the payment of wages.[103] If wages are not paid on time, the employee is suddenly deprived of income on which he had relied for the payment of his monthly bills. The consequences may range from the exhaustion of savings to bankruptcy of the employee. At common law such damages are not recoverable unless they were reasonably foreseeable by the employer at the time the employment contract was entered.[104] The civil penalty or liquidated damage provision would appear to be an effective solution. This type of legislation is compatible with the bonding approach and both could be used effectively in combination.[105]

[100] St. Louis I. M. & S.R.R. v. Bryant 92 Ark. 425, 122 S.W. 996 (1909); Oppenheimer v. Sun Kist Growers Inc., 153 Cal.App. 2d 897, 315 P.2d 116 (1957); Lindsey v. McCatron, 78 Idaho 211, 299 P.2d 496 (1956); Hazel v. Robinson & Young, 187 La. 51, 174 So. 105 (1937).

[101] St. Louis I.M. & S.R.R. v. Broomfield, 83 Ark. 288, 104 S.W. 133 (1907); Home Equipment Co. v. Gorham, 218 Ind. 454, 33 N.E.2d 99 (1941); Mitchell v. Certified Finance, Inc., 183 Kan. 787, 332 P.2d 516 (1958); Monterosso v. St. Louis Globe-Democrat Publishing Co., 368 S.W. 2d 481 (Mo. 1963), *cert. denied* 375 U.S. 908. *Accord,* D.C. CODE §§ 36-601 to -610 (1961). *Contra,* Cato v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203 (1925).

[102] That an assignee may recover the penalty: Martin v. Going, 57 Cal.App. 631, 207 Pac. 935 (1922); Mitchell v. Burwell, 110 Iowa 10, 81 N.W. 193 (1899); (but the penalty stops accruing as of the assignment). That an assignee may not recover the penalty: Robinson v. St. Maries Lbr. Co., 34 Idaho 707, 204 Pac. 671 (1921); Chicago & S.E. Ry. v. Glover, 159 Ind. 166, 62 N.E. 11 (1901).

[103] Washington presently provides liquidated damages of $25 plus $10 to $25 attorney's fee, but only after a suit brought to enforce a purported "payment" of wages by "check, memorandum, token or evidence of indebtedness." The statute was enacted in 1888 and reflects the dollar values of seventy-six years ago. REV. CODE WASH. § 49.48.030 (1962). The only statutorily fixed time for payment of wages is that a discharged employee must be paid "forthwith." REV. CODE WASH. § 49.48.010 (1962).

[104] 5 WILLISTON, CONTRACTS § 1358, at 3810, § 1359, at 3816 (rev. ed. 1937); MCCORMICK, DAMAGES § 138 (1935); 25 C.J.S. *Damages* § 24 (1941).

[105] Indiana, *supra* notes 27 and 72; Montana, *supra* notes 27 and 72.

LABOR LIENS

These statutes will not be considered in detail since the general scheme of operation of such liens is well known. Labor liens may be created for the employees in any industry which the legislature deems to be in need of the protection. Perhaps the most common is the mechanics' lien discussed earlier.[106] Other representative labor liens, using Washington as an example, are the farm laborers' lien,[107] the timber and lumber workers' lien,[108] the hotel and restaurant workers' lien,[109] and the stevedores' and longshoremen's lien.[110] Other states may choose to protect different industries.

Such liens usually have a priority over other statutory or consensual liens only if the work was commenced before the other lien attached.[111] However, the statute may dictate that the labor lien is prior to all other liens, no matter when acquired.[112]

Making the lien prior to all other liens gives the employee maximum protection in state proceedings, but the protection may be completely or partially swept away in the case of the employer's bankruptcy. The lien is preserved in full effect only if it is against real property[113] or on personal property which the lienor has in his posession at the time the bankruptcy petition is filed.[114] If the lien is accompanied by levy, sequestration or distraint but not by possession, the lien is subordinated to the expenses of administration and wage priorities in bankruptcy[115] and is subjected to the same time and dollar limits as the wage priority.[116] In this situation the employee is in a better position if he waives his lien.[117] If there is neither possession nor levy, sequestration or dis-

[106] See text following note 54 *supra*.

[107] REV. CODE WASH. §§ 60.12.010 -.090, 60.16.010 -.030 (1962).

[108] REV. CODE WASH. §§ 60.24.010 -.200 (1962).

[109] REV. CODE WASH. §§ 60.34.010 -.050 (1962).

[110] REV. CODE WASH. §§ 60.36.030 -.050 (1962).

[111] *E.g.*, REV. CODE WASH. § 60.04.050 (1962) (mechanics' lien on real property); REV. CODE WASH. § 60.08.030 (1962) (mechanics' lien on personal property); REV. CODE WASH. § 60.34.010 (1962) (hotel and restaurant workers' lien).

[112] *E.g.*, REV. CODE WASH. § 60.12.030 (1962) (farm laborers' lien); REV. CODE WASH. § 60.24.038 (1962) (timber and lumber workers' lien).

[113] 4 COLLIER, BANKRUPTCY § 67.20, at 190, 195 (14th ed. 1962).

[114] Bankruptcy Act § 67(c), 11 U.S.C. 107(c) (1953); 4 COLLIER, *op. cit. supra* note 113, § 67.20 at 190, 195. Apparently an officer taking possession under legal process is an agent of the lienor for this purpose. 4 COLLIER, *op. cit. supra* note 113, § 67.20, at 195, 196.

[115] Bankruptcy Act § 67(c)(1), 11 U.S.C. 107(c)(1) (1953); 4 COLLIER, *op. cit. supra* note 113, § 67.20, at 190.

[116] Bankruptcy Act § 67(c)(1), 11 U.S.C. 107(c)(1) (1953); 4 COLLIER, *op. cit. supra* note 113, § 67.20, at 194.

[117] There appears to be no case deciding whether an employee, if his claim is for more than $600, can collect once under the § 64(a) priority and again under a subordinated lien. The author of 4 COLLIER, *op. cit. supra*, note 113, § 67.28, at 307 n.15, expresses the opinion that the legislative policy of § 67(c) would limit recovery to $600.

traint, the lien is invalid as to personal property.[118] Thus in the case of the employer's bankruptcy, the labor lien is fully effective only against realty and against personalty in the lienor's possession. Even if the state statute gives the employee a lien against real property, in the usual bankruptcy situation the lien would be subordinate to one or more mortgages or judgment liens. Also, although an independent contractor may take possession of a chattel in order to work on it, such is rarely the case with an employee. It is also unlikely that in the usual case there would be enough time between the non-payment of wages and the filing of the bankruptcy petition for the employee to distrain against the personal property of the employer.

The labor lien will therefore be generally effective only if it is against the real property of the employer and if the state statute gives the lien priority over all competing liens. Although such statutes exist[119] they provide a rather drastic remedy as far as prior mortgagees are concerned.[120] An approach which in some degree would alleviate the hardship to the mortgagee, yet preserve an effective remedy for the employee would be to extend the optional bond concept of the mechanics' lien statutes[121] to other labor liens and give the labor lien priority over all competing liens. This would give the employee the protection of either a bond or a first lien against the employer's real property at the election of the employer and his mortgagees.[122]

Stockholder Liability Laws

Laws making shareholders of a corporation secondarily liable for wages of the corporation's employees are found in six states: Massa-

[118] Bankruptcy Act § 67(c)(2), 11 U.S.C. 107(c)(2); 4 Collier, *op. cit. supra* note 113, § 67.20 at 195.

[119] *E.g.*, N.C. Gen. Stat. Ann. § 44-5.1 (1950), and Nev. Comp. Laws § 78.720 (1953) create a lien for two months wages if the employer has become insolvent.

[120] The problem is one of legislative policy. Which is the greater loss to the people of the state, the loss of capital by the investor or the loss of earned wages by the employee?

[121] See text accompanying note 57 *supra*. A similar situation exists in the case of railroads in Washington. If the railroad fails to take a bond from its construction contractors, the railroad is subject to a lien for the wages of the contractor's employees. Rev. Code Wash. § 60.32.010 (1962). Although the statute states that "no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien," the cases have reached the opposite result. Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147 (1901); Heal v. Evans Creek Coal & Coke Co., 71 Wash. 225, 128 Pac. 211 (1912); Seattle Ass'n of Credit Men v. Boersema, 8 Wn.2d 263, 111 P.2d 991 (1941).

[122] However, the statute would be ineffective if the employer is a lessee of the business premises or if the Bankruptcy Act should be amended to remove the distinction between realty and personalty. The distinction has been criticized and amendment to eliminate it recommended. Kennedy, *Statutory Liens in Bankruptcy*, 39 Minn. L. Rev. 697 (1955); 4 Collier, *op. cit. supra* note 113, § 67.20, at 191-193.

chusetts,[123] Michigan,[124] New York,[125] Pennsylvania[126], Tennessee[127] and Wisconsin.[128] Although this group[129] is comparatively small, it contains some of the nation's most commercially important states.

Stockholder liability for corporate debts is the exception rather than the rule;[130] however, this exemption from liability is a comparatively modern invention. The first breakthrough did not come until 1811 when New York exempted stockholders of manufacturing corporations from general liability.[131] California and Minnesota were the last states to abolish general stockholder liability and they did not do so until 1931.[132] The stockholder wage liability statutes appear to be a holdover from a previous era rather than the product of modern legislative efforts.[133]

In three of these states[134] the liability of the shareholder is limited to an amount equal to the par value of his stock, or if the stock has no par value, to an amount equal to the consideration he paid for his shares. The other three states have no upper limit. Massachusetts and Wisconsin limit recovery to six month's wages[135] and New York limits

[123] MASS. GEN. LAWS ANN. ch. 156, §§ 35, 38, 40 (1959). MASS. GEN. LAWS ANN. ch. 158, § 45 (1959).

[124] MICH. CONST. art. 12, § 4; MICH. COMP. LAWS §§ 450.30, 620.13 (1948).

[125] N.Y. BUS. CORP. LAW § 630. The statute became effective in 1963, replacing a prior stockholder wage liability law, N.Y. STOCK CORP. LAW § 71.

[126] PURDON'S PA. STAT. ANN. tit. 15, § 2852-514 (1958).

[127] TENN. CODE ANN. § 48-710 (1964).

[128] WIS. STAT. ANN. § 180.40(6) (1957).

[129] Until 1947 Oklahoma belonged to the group. OKLA. COMP. STAT. § 5463 (1921), repealed by Okla. Laws 1947, p. 115, § 84, now codified as OKLA. STAT. ANN. ch. 18, § 1.84 (1953).

[130] Generally stockholders are liable only for any unpaid consideration owing on the purchase of their shares. 1 MODEL BUS. CORP. ACT ANN. § 23, par. 1 (1960).

[131] Comment, *Stock Without Par Value*, 19 MICH. L. REV. 583 (1921).

[132] Cal. Stats. 1931, ch. 862, p. 1784, § 2; Minn. Sess. Laws 1931, ch. 210, p. 234; 13A FLETCHER, PRIVATE CORPORATIONS § 6224 (rev. ed. 1961); 1 MODEL BUS. CORP. ACT. ANN. § 23, par. 4 (1960).

[133] Massachusetts *supra* note 123, enacted in 1821; Michigan *supra* note 124, enacted in 1850; New York *supra* note 125, original statute enacted in 1848; Pennsylvania *supra* note 126, enacted in 1874; Tennessee *supra* note 127, earliest case in 1880; Wisconsin *supra* note 128, earliest case in 1873. The amendment of the earlier New York law, N.Y. STOCK CORP. LAW § 71, is the product of public clamor which resulted from a 1952 suit for $130,000 in fringe benefits against the donee holder of a $10 non-voting share. The new act represents a compromise between business interests who wanted complete abolition of liability and labor interests who wanted to retain the old law intact. The new law limits liability to the ten largest shareholders of corporations whose shares are not traded on a national exchange. It also provides a ninety-day statute of limitations instead of the prior thirty days. Hoffman, *The Status of Shareholders and Directors under New York's Business Corporation Law: A Comparative View*, 11 BUFFALO L. REV. 496, 543-546 (1962).

[134] MASS. GEN. LAWS ANN. ch. 156, § 40 (1959); Pennsylvania, *supra* note 126; Bush v. Eastern Uniform Co., 356 Pa. 298, 51 A.2d 731 (1947); Wisconsin, *supra* note 128; Parish v. Awschu Properties, Inc., 243 Wis. 269, 10 N.W.2d 166 (1943).

[135] MASS. GEN. LAWS ANN. ch. 156, § 35 (1959); Wisconsin, *supra* note 128; Kreuzer v. Gallagher, 229 Wis. 273, 282 N.W. 22 (1938); Sleeper v. Goodwin, 67 Wis. 577, 31 N.W. 335 (1887).

liability to the ten largest shareholders of the corporation and then only if the stock is not traded on a national exchange.[136] Only Massachusetts applies its wage liability law to stockholders of foreign corporations.[137]

The prerequisites to recovery from the shareholders vary significantly. Massachusetts requires an adjudication of bankruptcy.[138] Michigan requires either the return of execution unsatisfied against the corporation or an adjudication in bankruptcy.[139] New York's statute requires written notice to the stockholder within ninety days of the termination of service and that suit be commenced within ninety days of the return of an unsatisfied execution on a judgment.[140] In Pennsylvania the plaintiff may join both the shareholder and the corporation as defendants but execution on the judgment must first be levied against the corporation.[141] The Tennessee statute requires only the corporation's insolvency,[142] but an early case holds that the exhaustion of the corporate assets is required.[143] The Wisconsin statute makes no explicit provision, but cases have allowed suit against the stockholder where the corporation was in equity receivership[144] and where it had assigned its assets for the benefit of creditors.[145]

Massachusetts, Michigan, New York, and Pennsylvania expressly provide any shareholder found liable with a right of contribution from other shareholders.[146] The Tennessee and Wisconsin statutes are silent on contribution but the Wisconsin court has held that equities between

---

[136] *Supra* note 125. See also note 133 *supra*.

[137] MASS. GEN. LAWS ANN. ch. 181, § 14 (1955). New York, under its earlier statute, and Pennsylvania have by judicial decision declined to apply their laws to foreign corporations. Arenwald v. Douglas Machinery Co., 183 Misc. 627, 50 N.Y.S.2d 39 (Sup. Ct. 1944); Armstrong v. Dyer, 268 N.Y. 671, 198 N.E. 551 (1935); Reiter v. Castle Foundry Co., 103 THE LEGAL INTELLIGENCER (Philadelphia, Pa.) 181 (July 31, 1940), 1 LAWRENCE COUNTY L.J. 91 (Ct. Com. Pls. 1940). The constitutionality of the application to foreign corporations was upheld in two cases testing the old California law, *supra* note 132 and accompanying text. Thomas v. Matthiessen, 232 U.S. 221 (1914); Pinney v. Nelson, 183 U.S. 144 (1901).

[138] MASS. GEN. LAWS ANN. ch. 156, § 38 (1959).

[139] MICH. COMP. LAWS § 620.13 (1948). *Cf.*, Knapp v. Palmer, 324 Mich. 694, 37 N.W.2d 679 (1949).

[140] *Supra* note 125. See also note 133 *supra*.

[141] *Supra* note 126. Eiffert v. Pennsylvania Central Brewing Co., 141 Pa. Super. 543, 15 A.2d 723 (1940); McDowell v. C.H. Boley Co., 34 Pa. D.&C. 307 (1938).

[142] *Supra* note 127.

[143] Jackson v. Meek, 87 Tenn. 69, 9 S.W. 225 (1888).

[144] Kreuzer v. Gallagher, 229 Wis. 273, 282 N.W. 22 (1938).

[145] Sleeper v. Goodwin, 67 Wis. 577, 31 N.W. 335 (1887).

[146] Massachusetts, *supra* note 135; Cary v. Holmes, 82 Mass. (16 Gray) 127 (1860); MICH. COMP. LAWS § 450.30 (1948); New York, *supra* note 125; Pennsylvania, *supra* note 126.

stockholders must be adjudicated in the original action brought by the employee.[147]

Although these statutes provide the employee with an effective remedy, the cost would seem to be too high. Not only is it possible that such statutes would discourage investment in corporate enterprises, there is some evidence that they tend to encourage incorporation outside the state.[148] Such a statute would require a constitutional amendment in the state of Washington.[149]

THE NEED FOR LEGISLATION IN WASHINGTON[150]

In the fiscal year ending June 30, 1963, 16,302 business bankruptcies were filed in the United States.[151] This constitutes an increase of 4.1 per cent over the previous year.[152] In the fiscal 1963 there were 496 voluntary bankruptcy petitions filed by businesses in the state of Washington.[153] Of these, eighty-nine were merchants, twenty-seven were farmers, twenty were professionals, ten were manufacturers and the remaining 350 were engaged in other businesses.[154] How many dollars in wages were lost from these 496 bankruptcies it is impractical to determine, but to that sum must be added wages uncollectible in receiverships and assignments for the benefit of creditors.[155]

The four types of legislation which have been herein considered are essentially only four different means of distributing the losses caused by business insolvencies.

The asset distribution presently existing under the Bankruptcy Act has been discussed; but to summarize in terms of loss distribution, the

---

147 Foster v. Posson, 105 Wis. 99, 81 N.W. 123 (1899).

148 Hoffman, *supra* note 133.

149 "Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock *and no more.*" WASH. CONST. art. 12, § 4 (Emphasis added).

150 The Washington State Labor Council, AFL-CIO, at its annual convention held in August 1964 in Port Angeles, by resolutions 39 and 69 made general recommendations of legislation in the field of wage payment and collection.

151 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS ANNUAL REPORT 172 (1963).

152 *Ibid.*

153 *Id.* at 266. The number of involuntary petitions involving businesses is not given, but there were only twenty-three involuntary petitions of all kinds in the state for fiscal 1963. *Id.* at 263.

154 *Ibid.*

155 A 1944 Department of Labor bulletin estimated that each year "tens of thousands" of wage claims amounting to "several million dollars" are collected by judicial or administrative action. It was estimated that California collected for its workers "a half million dollars" in back wages each year. New York collected about $100,000 in delinquent wage claims in 1942. UNITED STATES DEPARTMENT OF LABOR, DIVISION OF LABOR STANDARDS, BULL. No. 69 (1944). See also Brooke, *supra* note 60.

greatest loss, as measured by the percentage of the debt owed by the insolvent business, is suffered by general creditors who in most cases would be other businesses, such as suppliers, wholesalers, and public utility companies. The next largest loss is by governmental units in the form of uncollectible taxes. On the next notch up the ladder are the employees of the business, and on the top rung are the secured creditors, generally the banks and finance companies and in some cases landlords, mechanics and materialmen. Of the losers in these four categories, most can redistribute part of their losses and general creditors can often deduct their losses for income tax purposes while this is unavailable to an employee.[156] Governmental bodies can allow for such losses in determining the business tax and thereby spread their losses among the businesses in the state, who in turn make allowances in fixing their prices, further spreading the original loss among the state's consumers. Banks and finance companies account for such losses in setting their interest rates, spreading their losses among businesses and ultimately among the consumers. The general creditors can for the most part also spread the ultimate burden for loss among the general population. But there is no one to whom the employee can pass on his losses. In addition he has lost his source of income—his job. The question for the legislature is whether this loss should also be spread among a larger segment of our society.

Bonding laws place the initial loss on bonding companies, and from there it spreads to other businesses in the forms of bond premiums and then to the general population. The deterrent effect of the civil penalty laws is to encourage the financially pressed employer to pay wages instead of other creditors. Labor liens are paid at the expense of general creditors and, in some cases, secured creditors. As mentioned, these creditors can for the most part pass on some of their losses. On the other hand, stockholder liability laws appear to only *shift* the loss from the employees to the stockholders. This may or may not involve a *spreading* of the loss depending upon the relative size of the two groups, but it would be a rare case when the spreading would be over as broad a segment of the population as is accomplished by the other laws, for the stockholder, like the employee, will in most cases have no one to whom he can redistribute his loss.

D. McKAY SNOW

[156] INT. REV. CODE § 166.