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Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals

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WAGE GARNISHMENT IN NEW MEXICO—EXISTING DEBTOR PROTECTIONS UNDER FEDERAL AND STATE LAW AND FURTHER PROPOSALS

Within the past few years there has been renewed interest on the part of legislators and legal scholars in the traditional creditors' remedy of wage garnishment. In 1968 Congress, as part of the Consumer Credit Protection Act, [CCPA],[1] for the first time enacted federal controls on garnishments issued in state courts.[2] The Uniform Consumer Credit Code, also completed in 1968, provides for limitations on garnishments arising from consumer transactions.[3] The New Mexico Legislature in 1969 enacted significant restrictive amendments to our own garnishment statute.[4] Similarly, a number of authors have advocated the imposition of more stringent restrictions on state-regulated garnishments.[5] It is the purpose of the present Comment to analyze the protections afforded by both federal and state laws to a New Mexico debtor in a wage garnishment proceeding, and to propose certain further reforms in the New Mexico garnishment statute.

Subchapter II of the CCPA,[6] imposing restrictions on garnishment, became effective on July 1, 1970. The Act contains a statement of Congressional findings which make the garnishment provisions necessary "for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws."[7] The most significant features of the

1. 15 U.S.C. §§ 1601-77 (Supp. IV, 1969).
2. *Id.* §§ 1671-77.
3. Uniform Consumer Credit Code §§ 5.104-.106 (Final Draft 1968).
4. N.M. Stat. Ann. §§ 36-14-1 to 36-14-16 (Supp. 1969).
5. *See* Brunn, *Wage Garnishment in California: A Study and Recommendations,* 53 Calif. L. Rev. 1214 (1965); Sweeney, *Abolition of Wage Garnishment,* 38 Fordham L. Rev. 197 (1969); Comment, *Wage Garnishment–The Contemporary Shylock's Pound of Flesh,* 40 Miss. L.J. 151 (1968).
6. 15 U.S.C. §§ 1671-77 (Supp. IV, 1969).
7. *Id.* § 1671(b). The Congressional findings are set forth at § 1671(a):

> The Congress finds:
>
> (1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.
>
> (2) The application of garnishment as a creditor's remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production and consumption constitutes a substantial burden on interestate commerce.

garnishment provisions are the establishment of wage exemptions and the prohibition against discharge of an employee because of a single garnishment proceeding against him. Garnishment is defined in the Act as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for the payment of any debt."[8] In restricting the amount of an employee's wages that a creditor may garnishee, the Act stipulates that:

> the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage rate . . . in effect at the time the earnings are payable,
>
> whichever is less. . .[9]

Disposable earnings are defined as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld."[10] The Act specifically exempts from these restrictions any court order for the support of any person, any order of a bankruptcy court under Chapter XIII of the Bankruptcy Act, and any debt due for state or federal tax.[11] Subject to these exceptions, no state court can issue a garnishment against any debtor whose disposable earnings are less than $48 per week ($1.60 federal minimum wage x 30 = $48). If disposable earnings are between $48 and $64 per week, the excess over $48 is subject to garnishment, while if weekly disposable earnings exceed $64, 25% of the total may be garnisheed.

The Act provides further that:

> . . . [t]he Secretary of Labor may by regulation exempt from the provisions of Section 1673(a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in Section 1673(a) of this title.[12]

Pursuant to this provision, the Secretary of Labor has formulated standards to be used in determining whether the restrictions under

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

8. 15 U.S.C. § 1672(c) (Supp. IV, 1969).
9. *Id.* § 1673.
10. *Id.* § 1672(b).
11. *Id.* § 1673(b).
12. *Id.* § 1675.

state law on amounts subject to garnishment will be considered "substantially similar" to the federal restrictions. State-regulated garnishments are to be exempted if the state's laws "together cover every case of garnishment covered by the Act, and if those laws provide the same or greater protection to individuals."[13] In passing upon the exemption of a state garnishment statute,

> the laws of the State shall be examined with particular regard to the classes of persons and of transactions to which they may apply; the formulas provided for determining the maximum part of an individual's earnings which may be subject to garnishment; restrictions on the application of the formulas; and with regard to procedural burdens placed on the individual whose earnings are subject to garnishment.[14]

Thus far no state has applied for exemption under § 1675 of the Act. This does not mean, however, that the federal law supersedes all state laws which provide greater restrictions on garnishment. The Act also provides that:

> . . . [t]his subchapter does not annul, alter or affect, or exempt any person from complying with, the laws of any State . . . prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter . . .[15]

Thus a state law that provides for more restrictive garnishments is not affected by the exemptions provided in the federal law even if that state has not formally applied to the Secretary of Labor for exemption.

The second salient feature of the Act's protection of employees is the prohibition against discharge of an employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."[16] The garnishment of an employee's wages clearly imposes a burden on employer as well as on employee. The employer must take the time and effort to answer the writ of garnishment, and, if the plaintiff is successful in his action against the employee, to make the necessary exemption calculations and payroll adjustments to pay both the plaintiff and the employee. The risk of the employee being fired as a result of the annoyance caused the employer by the garnishment is obvious. Indeed, it has been estimated by the Administrator of the Wages and Hours Division of the Department of Labor that between 30,000 and 120,000 persons are fired

13. 35 Fed. Reg. 8227 (1970), adding 29 C.F.R. § 870.51.
14. *Id.*
15. 15 U.S.C. § 1677 (Supp. IV, 1969).
16. *Id.* § 1674(a).

from their jobs each year by employers who will not stand for the trouble they must endure when the wages of one of their employees are garnisheed.[17] Congress, while considering the CCPA, heard testimony that:

> . . . [t]he worker who faces garnishment or is even threatened with garnishment—whether carried out or not—will go to enormous lengths to avoid garnishment in order to protect his job—go to loan sharks, agree to pay upon an unjust debt, accept a "settlement" or declare bankruptcy. If he loses his job, his financial disaster is compounded, especially since he is unlikely to be able to collect unemployment insurance, having been fired for "just cause."[18]

While the Act does not forbid discharge of an employee for repeated garnishments, its prohibition against firing for garnishment for a single indebtedness does constitute a step in the direction of reducing the disruption of employment produced by garnishment of employees' wages. The Act again defers to more protective state legislation, providing that its terms do not affect any state law which prohibits the discharge of an employee by reason of the fact that his wages have been garnisheed for more than one indebtedness.[19]

The New Mexico garnishment statute,[20] through several 1969 amendments, also provides significant protections to an employee whose wages are garnisheed in an action commenced after June 22, 1969, the effective date of those amendments. Like the federal statute, the New Mexico law attempts to assure that the debtor will be able to keep most of his wages or salary by exempting a certain proportion from garnishment. Unlike the federal law, the New Mexico provision exempts the greater of (1) an amount each week equal to 40 times the federal minimum wage rate, or (2) 75% of disposable earnings for any pay period.[21] The New Mexico statute thus renders immune from garnishment any debtor whose disposable earnings are less than $64 per week ($1.60 x 40 = $64). If a writ of garnishment is issued in an action that was filed before June 22, 1969, however, the exemptions available to the debtor are substantially less protective. The exemption section in effect before that date applied only to the head of a family and exempted from garnishment 75% of any "wages or salary" due the employee for the last 30 days' service. If the wages or salary due for the last 30 days

17. Moran, *Garnishment Restrictions Under Federal Law*, 56 A.B.A.J. 678 (1970).

18. *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., at 185-86 (1967), statement of Andrew Biemiller, Department of Legislation of AFL-CIO [hereinafter cited *Hearings*].

19. 15 U.S.C. § 1677 (Supp. IV, 1969).

20. N.M. Stat. Ann. § § 36-14-1 to 36-14-16 (Supp. 1969).

21. *Id.* § 36-14-7.

was $100 or less, the exempt amount was 80% of wages or salary.[22]

In addition to the present statutory exemptions, there is available to the defendant who does not own a homestead an exemption of $500 in lieu of the homestead exemption. That provision specifies that any resident of the state who is not the owner of a homestead may hold exempt from levy real or personal property of his choice not exceeding $500 in value "in addition to the amount of personal property otherwise exempted by law."[23] It would appear that the in lieu of homestead exemption could be tacked on to the ordinary $64 or 75% of weekly wages exemption. It has recently been held, however, by the Small Claims Court of Bernalillo County, that the in lieu of homestead exemption may not be tacked on.[24] This ruling, presently being appealed to the District Court for the Second Judicial District, seems indefensible in the light of a line of New Mexico cases holding that exemption statutes are to be liberally construed in favor of the debtor and that both statutory exemptions can be allowed in garnishment proceedings.[25]

Even though New Mexico has not made formal application for exemption from the federal law under § 1675 of the CCPA, the state law nevertheless governs in the magistrate and district courts. The state law provides for more limited garnishments than does the federal law[26] and it is thus not affected by the maximum allowable

22. N.M. Laws 1919, ch. 153, § 1, *as amended* N.M. Laws 1961, ch. 8, § 1 (repealed 1969).

23. N.M. Stat. Ann. § 24-6-7 (Supp. 1969).

24. Automotive Acceptance Corp. v. Martinez, No. 18878 (Small Claims Court of Bernalillo County, Jun. 17, 1970).

25. Advance Loan Co. v. Kovach, 79 N.M. 509, 445 P.2d 386 (1968); Hewatt v. Clark, 44 N.M. 453, 103 P.2d 646 (1940); Dowling-Moody Co. v. Hyatt, 39 N.M. 401, 48 P.2d 776 (1935); McFadden v. Murray, 32 N.M. 361, 257 P. 999 (1927).

26. That the New Mexico statute provides for more limited garnishments than does the CCPA can be seen from the table below. The table shows the maximum amount subject to garnishment under both laws, but not taking into account the in lieu of homestead exemption.

Weekly Disposable Earnings	Amount not Exempt	
	New Mexico Law	CCPA
Under $48	$ 0.00	$ 0.00
50	0.00	2.00
55	0.00	7.00
60	0.00	12.00
65	1.00	16.25
70	6.00	17.50
75	11.00	18.75
80	16.00	20.00
85	21.00	21.25
86 and above	25%	25%

garnishments specified in the CCPA.[27] One complication, however, arises from the fact that the present New Mexico statute applies only to garnishment proceedings in the magistrate and district courts, and not to those in the Small Claims Court of Bernalillo County. In actions filed after June 22, 1969, the small claims court, in order to garnishee a defendant's wages, must proceed under the authority of the garnishment section of the execution statutes.[28] This particular provision was a part of the Kearney Code[29] and does not provide for wage exemptions. It would thus seem that garnishment proceedings in the small claims court are controlled by the wage exemption provision of the CCPA and not by the more restrictive New Mexico provision. The creditor of a Bernalillo County debtor who contemplates having to garnishee the debtor's wages for the satisfaction of a judgment would therefore be well-advised to file his suit in small claims court and not in magistrate court.

The second protection afforded the debtor by the New Mexico statute is the protection against attachment of his wages before a judgment has been rendered against him for the amount of the debt. The New Mexico statute does permit the issuance of a writ of garnishment in advance of judgment if the plaintiff files a bond to the defendant in an amount double the sum claimed in the complaint. The plaintiff must also file an affidavit stating that one or more of the grounds for issuance of attachment exists in order to obtain the writ before judgment.[30] Service of a prejudgment writ has the effect

27. 15 U.S.C. § 1677 (Supp. IV, 1969).

28. N.M. Stat. Ann. § 24-1-3 (1953).

Levy—Insufficient property—Garnishment proceedings.—

When any execution shall be placed in the hands of any officer for collection, he shall call upon the defendant for payment thereof, or to show him sufficient goods, chattels, effects and lands, whereof the same may be satisfied; and if the officer fails to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court, out of which said execution issued, and make true answers, on oath, concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees, summoned in suits originating by attachments.

29. Kearney Code, Executions § 3 (1846).

30. N.M. Stat. Ann. § 36-14-1(A) (Supp. 1969). The grounds for issuance of attachment are listed in N.M. Stat. Ann. § 36-11-1 (Supp. 1969) as the existence of one or more of the following facts:

(a) the defendant is not a resident of this state;

(b) the defendant has concealed himself or left his usual place of abode in this state so that ordinary civil process cannot be served on him;

(c) the defendant is about to remove his personal property out of this state, or has fraudulently concealed or disposed of his property so as to defraud, hinder, or delay his creditors;

(d) the defendant is about to fraudulently convey or assign, conceal or dispose of his property so as to hinder or delay his creditors;

(e) the debt which is the subject of the action was contracted out of this

of attaching all personal property, money other than wages, rights, credits, bonds, bills, notes, drafts, and other choses in action of the defendant that are in the garnishee's possession at the time the writ is served.[31] The prejudgment garnishment may be dissolved, however, if before judgment the defendant files a bond to the plaintiff in double the sum claimed in the complaint, or double the value of the property garnished, whichever is less.[32] Filing such a bond when a garnishment has been issued before judgment has the effect of vacating all proceedings touching the garnished indebtedness or personal property. A garnishment in advance of judgment, then, does not necessarily deprive the defendant of all his property in the possession of the garnishee before the merits of the plaintiff's claim can be heard, provided the defendant is able to post the bond.

If the creditor does seek to have a writ of garnishment issued in advance of judgment, the New Mexico statute protects the integrity of the defendant's wages. One of the 1969 amendments specifies that "[s]ervice of a garnishment issued in advance of judgment does not attach any wages or salary due the defendant from the garnishee."[33] In prohibiting the garnishment of a defendant's wages before a judgment has been entered against him, the New Mexico Legislature presaged the holding of the United States Supreme Court later in 1969 in the case of *Sniadach v. Family Finance Corp.*[34] The Court in *Sniadach* invalidated the Wisconsin procedure by which a creditor could garnishee a defendant's wages in advance of judgment without giving the defendant any notice or opportunity to be heard. The Court held that this summary *in rem* seizure of property where *in personam* jurisdiction over the defendant was readily obtainable was a taking of property without *procedural* due process. The Court acknowledged that wages are a specialized type of property presenting distinct problems and that such a prejudgment garnishment may "impose tremendous hardship on wage earners with

state, and the defendant has secretly removed his property into this state with the intent to hinder, delay, or defraud his creditors;
(f) the defendant is a corporation whose principal office or place of business is out of the state and the corporation has not designated an agent in this state for service of process against the corporation;
(g) the defendant fraudulently contracted the debt or incurred the obligation which is the subject of the action or obtained credit from the plaintiff by false pretenses; or
(h) the debt which is the subject of the action is for labor, for any services rendered by the plaintiff or his assignor at the instance of the defendant or was contracted for the necessities of life.

31. N.M. Stat. Ann. § 36-14-3(A) (Supp. 1969).
32. *Id.* § 36-14-11.
33. *Id.* § 34-14-3(B).
34. 395 U.S. 337 (1969).

families to support."[35] In light of this statement, it is uncertain whether the Supreme Court would view the garnishment of property other than wages in advance of judgment and without giving the defendant an opportunity to be heard as a denial of due process.

The federal and state garnishment statutes do take significant steps toward providing needed protections to debtor. They do not, however, go far enough. It is suggested that the only way to truly protect the debtor against the myriad evils of wage garnishment is to abolish it as a creditors' remedy. Garnishment in New Mexico is a complex process which few attorneys have mastered. Those who have mastered its intricacies are likely to be representing finance companies or collection agencies, not debtors. Even when a debtor or his attorney does know enough to assert his statutory rights, the effects of even limited wage garnishment are vicious. As Representative Gonzales of Texas pointed out during the debate on the CCPA,

> ... [f]or a poor man—and who ever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief.[36]

The recommendation that wage garnishment be abolished is not a new one. Texas in its Constitution of 1876 provided that no wages should ever be subject to garnishment.[37] Pennsylvania and Florida have by statute abolished garnishment, although in Florida the 100% exemption applies only to heads of families.[38] The House of Representatives proposed abolishing garnishment in its version of the CCPA.[39] The Legislative Committee of the New Mexico Bar Association recommended abolishing garnishment, but the proposal was squelched by the Board of Bar Commissioners as being "too controversial."[40] The justifications advanced for the proposals to eliminate garnishment usually include the following: (1) garnishment or the threat of it is the triggering factor in the majority of voluntary

35. *Id.* at 340.

36. 114 Cong. Rec. 1833 (1968).

37. Texas Const., art. 16, § 28.

38. Fla. Stat. Ann. § 222.11 (1961); Pa. Stat. Ann., tit. 42, § 886 (1966).

39. H.R. 11601, 90th Cong., 1st Sess. (1967). Section 202(a) of Title II provided that "[n]o person may attach or garnish wages or salary due an employee, or pursue in any court any similar legal or equitable remedy which has the effect of stopping or diverting the payment of wages or salary due an employee."

40. Interview with Dale Walker, Chairman of the Legislative Comm. of the N.M. Bar Ass'n, in Albuquerque, Sept. 20, 1970.

bankruptcies; (2) garnishment is usually aimed at the poor and the ignorant, those who most need their weekly earnings for current expenses; (3) garnishment subjects the defendant to a mass of confusing procedures which often work to deprive him of the protections to which the law entitles him; and (4) abolishing garnishment will not significantly reduce the ability of creditors to collect just debts, but will force them to be more prudent in their extensions of credit.

Those who have studied the problems created by the garnishment of wages unanimously agree that it is frequently the last straw that leads the employee to seek bankruptcy to absolve himself of his debts. A wage earner who is deprived of a portion of his income is likely to find it very difficult to provide for his family while continuing to meet his other financial obligations. An employee whose wages are repeatedly garnisheed is also likely to find that his employer will not tolerate such a situation and is threatening to fire him. With his bills pressing him and the prospect of losing his job becoming quite real, it is no wonder that he turns to voluntary bankruptcy as a solution. Many people in this situation fully intend to pay all their debts if given a fair opportunity to do so. When they have been garnisheed, though, and find their incomes reduced and their jobs in jeopardy, they see bankruptcy as the only recourse.

Evidence linking garnishment to bankruptcy is not difficult to find. A recent study showed

> . . . [t]he states with the lowest per capita bankruptcy filings are mainly those that either prohibit wage garnishments or severely restrict their use. The highest filings in relation to population tend to occur in states where the garnishment remedy is fully available to creditors.[41]

The study found that the number of bankruptcy filings per hundred thousand population varied from 200 in Oregon and 184 in Tennessee (states allowing relatively unrestricted use of garnishment) to 2 in Texas and 4 in Pennsylvania (states prohibiting garnishment).[42] The Referee in Bankruptcy for the Eastern District of Tennessee testified before Congress that between 60 and 70 percent of bankruptcy filings in his district were the direct result of wage garnishments.[43] Other Referees agreed that "garnishment of wages or the threat thereof triggers the filing of the great majority of no-asset wage earner cases where the only object of the proceeding is to

41. Brunn, *supra* note 5, at 1214, 1236.
42. *Id.*
43. *Hearings, supra* note 18, at 424.

secure a discharge in bankruptcy."[44] A 1967 New Mexico study showed that in Bernalillo County 56% of those filing consumer bankruptcies either had their wages garnisheed or had been threatened by their creditors with garnishment.[45] It thus seems clear that abolishing the garnishment of wages could produce a significant decrease in the number of voluntary consumer bankruptcies.

The second reason for eliminating garnishment is that it is most frequently used against the poor, those who have the greatest need for every cent of their earnings. The Tennessee Bankruptcy Referee told Congress that:

> [t]he $60 average [weekly] income of bankrupts indicates that it is the lower income group that is resorting to the bankruptcy court for relief, that it is this group generally whose wages are being attached. In other words, the individuals whose wages are being garnisheed are the very individuals whose total wages are required for the payment of necessary living expenses: food, clothing, shelter, and medical expenses.[46]

It has been estimated that in an inflationary economy the average wage earner needs from 85 to 90 percent of his salary just to meet current expenses,[47] and suggested that any legislation exempting less than 90% of wages from garnishment might properly be characterized as "antisocial."[48] Thus the poor man whose wages are garnisheed may find it extremely difficult just to provide for his family's necessities. It is unlikely that he will be able to make any payments on other obligations, and the probability is high that he will resort to bankruptcy. Considering all the social legislation enacted in recent years to benefit low income consumers, it hardly makes sense to allow them to be driven to the wall by wage garnishments.

A third difficulty that can be dealt with most effectively by abolishing garnishment is the mass of procedural technicalities a defendant must wade through to claim the benefit of the exemptions to which he is entitled. As already mentioned, it is the poor man whose wages are most likely to be garnisheed. He is not likely to be able to afford the cost of an attorney to represent him, nor is he very likely to go to a legal aid office for help. Without counsel to

44. *Id.* at 417.

45. W. Madden, Jr., Consumer Bankruptcies in Bernalillo County, New Mexico 20, Nov. 1967 (unpublished thesis in the University of New Mexico Library).

46. *Hearings, supra* note 18, at 425.

47. Bureau of Labor Statistics Rep. No. 237-93, Consumer Expenditures and Income 1 (1965).

48. Sweeney, *supra* note 5, at 197, 203.

represent him he can easily be deprived of protections which the law affords him, particularly the in lieu of homestead exemption if he does not own a homestead. Indeed, even if he does retain an attorney, that attorney may not be familiar with the protections available unless he deals regularly with garnishments. The attorney will probably look to the general garnishment statute, found under the title on Magistrate Courts. He may not be aware of the in lieu of homestead exemption, found under the section on Execution and Foreclosure. If the action was brought in small claims court he may not know whether he can claim for his client the state exemptions or only the less restrictive federal exemptions. All these difficulties lead to the conclusion that frequently the debtor will not receive the protections the legislature has attempted to give him. The garnishment procedure is a complex and even mystifying one; rather than attempting to simplify it so that the creditor could garnishee the small amount left after all the available exemptions have been claimed, the legislature should abolish garnishment altogether.

Probably the biggest hurdles in the way of abolishing garnishment are the claims of creditors that they have no other means in many cases of collecting just debts and that eliminating garnishment will produce undesirable restrictions of credit. The available evidence from states that do not allow garnishment, though, does not conclusively support either of these propositions. The evidence instead suggests that collection rates will not suffer appreciably, because other creditors' remedies are available, and that any restrictions in the extension of credit will be desirable ones. Wage garnishment has been described as "just one tool in a creditors' kit that is full of tools."[49] The other tools include prelitigation collection procedures, skip tracing, repossession of items sold, judicial examination of judgment debtors, liens of various kinds, and attachment and execution levies against cars and bank accounts. There is conflicting evidence on the question of the relationship between availability of garnishment and collection agency recovery rates;[50] variations in recovery rates, however, have no observable influence on the amount of consumer credit extended.[51]

49. Brunn, *supra* note 5, at 1242-43.

50. *See* Brunn, *supra* note 5, at 1242; *Hearings, supra* note 18, at 501. Brunn indicates that there is some evidence that collection rates are lower in states where garnishment cannot be freely used. This result may be attributable, though, to high recovery rates in states imposing few restrictions on garnishment, since the same data suggest that an exemption as high as 90% would not interfere with recoveries. On the other hand, the manager of the Credit Bureau in Ft. Worth, Texas, a state that has prohibited garnishment for nearly 100 years, stated that there is no more of a problem collecting debts in Texas than there is in states which do have garnishment.

51. Brunn, *supra* note 5, at 1242.

It is likely that abolishing garnishment would have some restrictive effect on the extension of consumer credit. It is suggested, however, that most of such restrictions would be attributable to denials of credit to persons who are very poor credit risks and who may not realize that they are over-extending themselves financially. Many critics of wage garnishment acknowledge that it was at one time a legitimate device to protect merchants and lenders from unscrupulous buyers and borrowers. They suggest, however, that garnishment has now become a sword rather than a shield, used by those who extend credit to poor credit risks simply because those people are employed and therefore subject to garnishment.[52] The majority of credit purchasers, of course, are people who will pay their debts without having to be persuaded to pay by collection efforts. Eliminating garnishment should have little or no effect on the extension of credit to these consumers. Instead, its effect should be to eliminate what Congress called the "making of predatory extensions of credit"[53] to low income consumers. This in turn should encourage sellers and lenders to make more judicious use of sources of information about credit ratings[54] in order to make more informed judgments about which consumers are likely to be good credit risks. It is to be hoped that this would also encourage low income consumers to do more careful financial planning since they would find that credit is sometimes denied to them for purchases that are not really necessary ones.

If the New Mexico Legislature does not yet feel ready to abolish the garnishment of wages, it should at least take certain steps to clarify the existing garnishment statute. While a thorough review of the complex garnishment procedure is beyond the scope of the present Comment, the obvious need for certain substantive reforms can be pointed out. First, the garnishment statutes should be removed from the title of Magistrate Courts and placed under the title of Execution and Foreclosure. They should be consolidated under this title with any other statutes relating to garnishment, such as that dealing with the in lieu of homestead exemption. If only this much is done, the practitioner who is unfamiliar with the garnishment process and finds himself representing an employee

52. *Hearings, supra* note 18, at 69-70, statement of Representative Frank Annunzio.

53. 15 U.S.C. § 1671(a)(1) (Supp. IV, 1969).

54. Suggesting that those who extend credit will make wiser use of sources of credit information presupposes at least in part that credit bureaus and related agencies will do a more responsible job of collecting relevant information than they have done in the past. Making certain that the information they dispense is correct, or at least can be easily corrected, can help assure that those low income consumers who are in fact good credit risks will not be denied a reasonable amount of credit. *See* 10 Natural Resources J. 171 (1970).

being garnisheed could find in one place all that he needed to know to assure that his client would in fact receive the statutory protections to which he is entitled. Second, the legislature should take action to clarify whether it does intend to allow the in lieu of homestead exemption to be tacked on to the regular wage exemptions. In addition, the legislature should make it easy for the employee who cannot retain counsel, and for his employer, to know exactly how much of his wages is exempt and how much must be paid to the plaintiff. This might be done by requiring (1) that the employee be furnished with an explanation of the in lieu of homestead exemption and asked whether he wishes to claim it; (2) that the employee be told that any prejudgment attachment of property other than wages held by his employer, such as reinbursement for expenses, can be dissolved by the posting of a bond to the plaintiff; and (3) that the employer be furnished, along with the writ of garnishment, a simplified formula to be used to determine how much of the employee's wages are to be paid to whom. Third, the legislature should amend the garnishment statute to make it expressly applicable to small claims court as well as to magistrate court and district court. The fact that the present statute does not cover small claims court means that the defendant sued in that court may sometimes receive the benefit only of the federal wage exemptions and not of the more restrictive state exemptions. It makes little sense to require that exemptions the defendant can claim be dependent upon whether the plaintiff chooses to sue in small claims court or in magistrate court. Fourth, if the legislature be unwilling to abolish garnishment, it should increase the wage exemption to at least 85% of disposable earnings. Viewed in the light of the estimate of the Bureau of Labor Statistics that the average wage earner requires 85 to 90 percent of his wages just to meet current necessary expenses,[55] the 75% exemption appears to be clearly inadequate. Fifth, the legislature should act to prohibit an employer from discharging an employee for the reason that his wages have been subjected to garnishment for more than a single indebtedness. An employee who has been garnisheed more than once is already in perilous financial straits; if he loses his job the probability is high that he will seek bankruptcy as a release from his debts.[56]

55. *Supra* note 47.

56. The following proposed statute would guarantee certain substantive protections to the employee whose wages are garnisheed. The sections proposed do not deal with the procedures by which a writ of garnishment would issue and be answered, those topics being beyond the scope of the present Comment.

ARTICLE 7—GARNISHMENT

24-7-1. Definitions.—For the purposes of this article:

There can be little doubt that society does have an interest in seeing that creditors be able to collect just debts. The price of allowing them to do it through the garnishment of wages, though, is too high a price to pay. Wage garnishment is a costly process both to the defendant and his employer and to society. The community must subsidize the garnishment process in the courts. The employer must answer the writ, compute how much his employee should be paid, and then adjust his payroll accordingly. The employee is subjected to an economic hardship that frequently leads to bankruptcy, with the

(1) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for the payment of any debt.

(2) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(3) The term "disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(4) The term "federal minimum hourly wage rate" means the highest federal minimum hourly wage rate for an eight (8) hour day and a forty (40) hour week. However, it is immaterial whether the garnishee is exempt under federal law from paying the federal minimum hourly wage rate.

24-7-2. Maximum allowable garnishment–Exemptions from garnishment.–A. In any garnishment action in any court of this state the greater of the following proportions of the defendant's weekly disposable earnings shall be exempt from garnishment:

(1) ninety per cent (90%) of the defendant's disposable earnings; or

(2) an amount equal to forty (40) times the federal minimum hourly wage rate. The commissioner of banking shall provide to employers a simplified formula for calculating the amounts exempt from garnishment under this subsection, and tables showing such amounts and giving equivalent exemptions for pay periods of other than one week.

B. The amounts exempted from garnishment under Subsection A of this section shall be in addition to all other exemptions from execution provided by law, including the in lieu of homestead exemption provided in section 24-6-7 NMSA 1953. In calculating the total exemption where more than one exemption is applicable, the amount of earnings remaining after the application of exemptions other than those provided in Subsection A of this section shall be deemed to be "disposable earnings."

24-7-3. Writ of garnishment–Service Required information.–The plaintiff in any garnishment action shall cause two copies of the writ of garnishment to be served on the garnishee, and the garnishee shall furnish one such copy to the defendant. The writ of garnishment shall contain the following information:

(1) the formula provided by the commissioner of banking for calculating the amount exempt from garnishment under section 24-7-2(A) NMSA 1953;

(2) a simplified explanation of the in lieu of homestead exemption provided in section 24-6-7 NMSA 1953 and instructions on how to claim that exemption; and

(3) a notice that if the writ of garnishment was issued in advance of judgment, the garnishment may be dissolved by the posting of a bond to the plaintiff.

24-7-4. Service of writ of garnishment in advance of judgment–Effect on garnishee–Dissolution.–A. Service of a writ of garnishment upon the garnishee in advance of judgment has the effect of attaching all personal property, money other than wages, salary, or reimbursement for expenses, rights, credits, bonds, bills, notes, and other choses in action of the defendant in the garnishee's possession or under his control at the time of service, or which may come into his possession or under his control or be owing by him between the time of service and the time of making his answer. Service of a writ of garnishment issued in advance of judgment does not attach any wages, salary, or reimbursement for expenses due the defendant from the garnishee.

B. At any time before judgment in an action in which a garnishment has been issued, the

attendant losses to his creditors. Garnishment is not absolutely necessary to the extender of credit; he can protect himself through other collection devices and through the use of a more judicious system of extending credit. For these reasons, the garnishment of wages should be abolished in New Mexico; if it is not abolished, the changes already suggested should be enacted as soon as possible.

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defendant in the action may obtain a dissolution of the garnishment by filing in the action a bond to the plaintiff in double the sum claimed in the complaint, or double the value of the indebtedness and personal property garnished, whichever is less, with sufficient sureties, conditioned for the payment of any judgment that may be rendered against the garnishee in the action. When a garnishment is dissolved, all proceedings touching the garnished indebtedness or personal property are vacated.

24-7-5. Prohibition against discharge from employment by reason of garnishment.—No employer may discharge any employee by reason of the fact that his wages have been garnished. However, if the wages of an employee are garnished for more than a single indebtedness within any six (6) month period, the employee shall be liable to the employer for a $5 processing fee for every such indebtedness in excess of one within the six month period. This processing fee may be withheld by the employer from any wages or salary due the employee notwithstanding any exemptions in section 24-7-2 NMSA 1953.