

OFFICIAL OPINION NO. 00-01, Garnishment of State Wages

December 7, 2000

The Honorable Vern L. Larson
South Dakota State Auditor
500 East Capitol Avenue
Pierre, SD 57501-5070

OFFICIAL OPINION NO. 00-01

Garnishment of State Wages

Dear Mr. Larson:

You have requested an opinion from this Office concerning the following factual situation:

FACTS:

Part of the responsibility of the State Auditor involves the processing of garnishment of wages of state employees. Procedures for garnishment are established by state and federal laws. In the development of a new payroll system for the State of South Dakota, we are attempting to automate as much of the processes as possible. One of the positive aspects of automation is removing the possibility for human error.

Presently this office has interpreted state law to require us to withhold potential monies due from a properly filed garnishment even though the paycheck has been written but not delivered or mailed to the state employee.

In working with the software company on implementation of a new payroll system, the question has been raised as to whether authority exists for the State to establish a deadline for receipt of garnishment summons. The preferred deadline would be just prior to the automated processing of the payroll warrant. Consequently, this would then permit the State to eliminate any manual processes in regard to payroll garnishments.

Based upon these facts you have posed the following question.

QUESTION:

If the State cannot establish a deadline for the filing of garnishment summons under current statutes, could state law be amended to allow such a deadline?

IN RE QUESTION:

Garnishment is a statutory remedy, existing at the will of the Legislature. State garnishment procedures are found at SDCL Chapter 21-18.

[T]he following prerequisites are necessary before a garnishment action can occur: (1) The garnishee must be indebted to or have property in its possession or under its control belonging to a judgment debtor; or (2) the garnishee's liability to the judgment debtor must be absolute and without dependence on any future contingency.

Sigler v. St. Paul Fire & Marine Ins. Co., 298 N.W.2d 792 (1980). The federal Consumer Credit Protection Act (15 U.S.C.A. §§ 1671-1677) is also implicated when wages are garnished.

Under the current state statutory scheme, the date on which a garnishment summons is served establishes the time at which a garnishee becomes liable to a plaintiff in garnishment. Woodbine Savings Bank v. Yager, 58 S.D. 542, 237 N.W. 761 (1931). SDCL 21-18-12 provides as follows:

From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, money, credits, and effects in his possession or under his control belonging to the defendant, or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution.

Under this statute wages owed to a debtor/employee which are in the possession of the garnishee at the time the summons in garnishment is served are subject to garnishment. See Wasserburger v. Consolidated Mgt. Corp., 502 N.W.2d 256 (1993). In fact, the disclosure form to be completed by the garnishee as found in SDCL 21-18-27.1 provides: "If the garnishee summons was served upon you at a time when earnings from a

prior completed pay period were owing but not paid, complete the following disclosure for earnings from both the past pay period and the current pay period." These statutes also apply when the State is the garnishee. SDCL 21-18-28.

Wages due to a state employee which are still in the possession of the State at the time of the service of the summons in garnishment on the State are subject to garnishment. SDCL 21-18-40 provides:

No judgment shall be entered against the state of South Dakota, nor shall any actual liability be incurred by the state in any garnishment proceeding. Any judgment entered against the principal defendant when the state is garnishee shall be paid only out of moneys due such principal defendant at the time of the service of the summons in garnishment and service of such summons on the state shall be of the same force and effect only as an assignment of the sum claimed or as much thereof as may be due the defendant from the state.

Clearly the Legislature has established the time of the service of the summons in garnishment as the point at which garnishee liability attaches. That is the point at which the State becomes liable to turn over to the garnishor funds which are owed to the state employee, but still in the State's possession. There is nothing in the current statutory scheme that would allow the State Auditor to create a different point in time for the attaching of that liability. Although the State Auditor does have rule making authority over the procedure for issuing state warrants, SDCL 4-9-1.1, that authority does not include the power to adopt rules that are inconsistent with state law. Estate of Dahl v. Department of Revenue, 286 N.W.2d 528 (S.D. 1979).

The question then becomes whether the Legislature may establish a different time at which garnishee liability attaches. Your goal is to have a deadline which is before the automated printing of a salary warrant so that changes, like garnishment, do not have to be made once a warrant is printed. You want to avoid disruption of the proposed automated payroll system.

What you are seeking is tantamount to a legislative determination that a warrant is beyond garnishment after it is printed, even though it is still in the possession of the State. For example, if the Legislature imposed a deadline for the service of a summons in garnishment against the State, and the summons was served after that deadline, the garnishment

proceeding would not apply to that warrant. This would eliminate the need for hand processed changes to warrants already printed, but still in the possession of the State.

As pointed out, garnishment is a statutory creation. The Legislature may limit garnishment proceedings as it sees fit, as long as it does so consistent with constitutional requirements.

Remedies are the creatures of legislation and the power that creates may suspend, modify, or change the remedy

The power to suspend, modify, or change a remedy does not authorize the enactment of a law which would so modify or change an existing remedy or suspend a remedy for such length of time as to, in effect, deny a remedy to one seeking to enforce a right or redeem a wrong growing out of a contract existing at the time of the enactment of such law.

Granger v. Luther, 42 S.D. 636, 176 N.W. 1019 (1920). The same reasoning applies to existing liens. The "Legislature may not enact a law rendering more difficult or uncertain the enforcement of a right under an existing lien." Lee v. Clark Implement Co., 31 S.D. 581, 141 N.W. 986 (1913).

As to future liens, however, the Legislature may modify remedies. Thus if the Legislature decides to establish a deadline for when a garnishment summons must be filed in actions seeking to garnish wages where the State is the garnishee, there should not be a constitutional due process impediment as long as liens existing at that time are protected. That is not, however, the only constitutional concern to be considered. Whatever approach is taken would have to be carefully crafted to avoid creating equal protection claims or privilege and immunity arguments for discriminating in favor of state employees.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

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