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State Law & State Taxation Corner

Garnishment Limits and Charging Orders

By Thomas E. Rutledge

Most if not all charging order[1] statutes provide that exemption laws applicable to the member's interest in the LLC remain available notwithstanding the charging order.[2] There has been essentially no consideration of the effort of this language. It has been suggested that one effort of this language has been to apply federal and state garnishment limits on charging orders, a view recently adopted by one federal district court. As discussed below, this application is typically not appropriate.

In *Alexander*,[3] the court held that a charging order against the distributions from a single member LLC to its sole member should be limited by the state law garnishment limit. Generally speaking, Arizona law limits a "garnishment" to 25% of the garnishee's "disposable earnings."[4] "Earnings" are defined in Arizona as including "compensation paid or payable for personal services, whether those payments are called wages, salary, commission, bonus or otherwise."[5] "Disposable earnings" are earnings less required Federal and state deductions.[6] The *Alexander* court reasoned that the LLC's sole member "receives distributions equivalent to the LLC's annual income. These are provided as compensation for his personal services to [the SMLLC]. These distributions qualify as earnings and are protected by the personal property exemption." From there, the *Alexander* court limited the charging order to "25 percent of [the Defendant's] disposable earnings."

Equating distributions to a member of an LLC with earnings is at best questionable. Often distributions are not paid in compensation to members for services rendered to and on behalf of the LLC, but rather are the receipt of the net earnings of the venture. Compensatory payments paid to employees, in contrast, are an expense due and owing irrespective of whether the venture is profitable. Garnishment statutes generally and the federal statute on garnishment limits[7] are intended to protect employees and the wages they have received in consideration for performance in an employer–employee relationship. Across any number of paradigms, members in an LLC are not employees of the LLC receiving what could be fairly characterized as "wages," and neither the federal nor the uniform garnishment statutes contemplate application to distributions from a partnership or LLC. Absent a statute specifically applying garnishment limitations to charging orders and distributions from LLCs and partnerships, they are and should be separate bodies of law.

LLC Members Are Not, for Tax Purposes, Employees

Wages are paid to employees, but an LLC's members are not the LLC's employees. Assuming that the LLC is taxed as a partnership, and in consequence thereof each member is treated as a partner, he or she cannot be treated as an employee receiving wages or salary from the LLC.[8] This is the case even as to guaranteed payments; they are not salary.[9] If, in contrast, the LLC has only one member and is for tax purposes classified as a disregarded entity, the sole member is treated as being self-employed and not as an employee of the LLC.[10] Either way, the member rendering services on the LLC's behalf does not treat any funds received consequent thereto as compensation received in consideration of an employment relationship.

Prior to an amendment of the Check-the-Box regulations effective August 16, 2007,[11] the sole member of a disregarded entity single-member LLC was treated as the employer of the LLC's employees. This treatment resulting in a number of decisions holding the sole member directly liable for federal trust fund taxes that were owed with respect to the LLC's employees.[12] Under the amended Check-the-Box regulations, the disregarded entity LLC will be treated as the employer of the LLC's employees.[13] However, the sole member does not fall within that treatment; the sole member is not an employee of the LLC and continues to be treated as self-employed.[14]

LLC Members Are Not, for State Law Purposes, Employees

Acknowledging that tax treatment is not dispositive of state law treatment, still, state law consistently treats LLC members not as employees of the LLC, but rather as self-employed. For example, in *Borkowski v. Commonwealth*,[15] it was held that a member of an LLC is not an "employee" for purposes of unemployment insurance benefits. By way of analogy, in *Kentucky Employers' Mutual Insurance v. Ellington*[16] it was held that a sole proprietor is not an employee of the sole proprietorship. To provide but a sample, under the laws of Alaska, Indiana, Kentucky, New York, North Carolina and Wisconsin, members are excluded, absent a separate rider, from the protections afforded by otherwise mandatory worker's compensation insurance.[17] The Restatement (3rd) of Employment Law makes it clear that a member of an LLC is not an employee thereof, providing "Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or part of the enterprise."[18] Decisions such as *Bowers v. Ophthalmology Group, LLP*[19] make clear that the focus is upon "a" voice in management, not a controlling or prevailing voice. Rather, "One's status does not change from partner to employee simply because the partner is out-numbered and finds herself in a minority position among the other partners … Bowers was a partner in Ophthalmology Group, not an employee."[20]

LLC Members Are Not FMLA/FLSA Employees

The Family Medical Leave Act[21] ("FMLA") defines "employee" by reference to the Fair Labor Standards Act,[22] which in turn provides that an employee is "any individual employed by an employer" and further provides that employ means "to suffer or permit to work."[23] Whether a "partner" or "member" in an LLC is an "employee" under the FMLA is determined on a case-by-case basis depending on the actual structure of the firm's partnership/operating arrangement.[24] The Wage and Hour Division of the U.S. Department of Labor refers to *Clackamas Gastroenterology Assocs., P.C. v. Wells*[25] to guide employers in determining whether an owner should be counted as an employee under the FMLA.

In *Clackamas*, the Supreme Court adopted the EEOC's non-exhaustive, six-factor test for determining whether an individual is an "employee" under the Americans with Disabilities Act. The Court considered: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.[26] The issue in *Clackamas* was whether the professional corporation had 15 employees so as to bring it within the application of the ADA; it had 14 employees and four physician owners. Only if the owners were employees would the ADA apply. The Court, applying these factors, held the owners were not employees.[27]

In *Coldiron v. Clossman Catering, LLC*,[28] the court applied the *Clackamas* test to the question of whether two individuals were "employees" for the purposes of the FMLA, finding that they were not where the evidence showed that they had complete control over the company

as owners, could not be fired, were not supervised by anyone, did not report to anyone, had no written contract of employment, did not receive a weekly paycheck and shared in the company's profits and losses.

In *Ziegler v. Anesthesia Assocs. of Lancaster, Ltd.*, a Title VII discrimination case, the court ruled that almost all of the shareholders of the professional corporation were employers and not employees.[29] In so holding, the court emphasized that the defendant shareholders "share ownership and are accorded equal voting rights in virtually all matters including hiring, termination, offers of partnership and contracting with outside employers."[30] Likewise, in *Kirleis v. Dickie, McConey & Chilcate, P.C.*,[31] a shareholder in a law firm professional corporation was found to be an employer and not an employee for purposes of Title VII and the FISA.

This is not to say that on particular facts a member cannot be treated, for FLSA purposes, as an employee. In *Harris v. Universal Contracting, LLC*,[32] the court considered a labor staffing organization in which each individual become a Class B member of the staffing company. As members, those individuals had, individually and collectively, no control over the LLC, were subject to oversight, and could be terminated. The court had no problem, applying the *Clackamas* factors, finding these members were employees. But the fact that in extreme cases a member may be treated as an employee (here for purposes of the FLSA) does not alter the general rule that owners are not FLSA employees.

The Courts Have Recognized That Not All Income Is Wages

Numerous courts have recognized that not all income is "wages" or "compensation" that may fall within the ambit of the garnishment statute. For example, in *Gerry Nelson Agency, Inc. v. Muck*,[33] in determining whether the federal garnishment limit applied,[34] it was held that the sharing of profits derived from the leasing of equipment did not fall within the statute. Kissick Truck Lines had entered into a "Lease and Operating Agreement" with John Muck pursuant to which they split income derived from shipping contracts; Muck owned the equipment and Kissick brokered the jobs. Muck was the judgment-debtor of the Gerry Nelson Agency. When the Agency garnished the payouts due from Kissick to Muck, the question was whether 100% or 25% of those amounts should be delivered to the Agency. Kissick remitted only the 25% to the Agency, a determination the Court of Appeals rejected. Rather, it found that the payouts were not wages protected by the federal garnishment limits.

> It is not necessary to the resolution of this case that we further distill or define the exact legal relationship of Muck-Kissick resulting in the existence of the fund here involved. It is sufficient for us to conclude that Muck under the facts and the law did not qualify for the statutory exemption either under the expressed and recorded intent of Congress or the terms of the act. He did not come within the descriptive ambit of a wage earned whose income and thus his employment (and the welfare of his family) would be jeopardized by burdensome garnishments or bankruptcy. Neither did his "compensation" depend upon "personal services" as used in the statue.[35]

In a similar vein, in *In re: Hugo Galvez*[36] the court found that a real estate commission earned by a self-employed realtor were not protected by the federal garnishment limitations.[37] In *Rice, Seiller, Cantor, Anderson & Bordy v. Fitzgerald*,[38] the proceeds of the sale of milk from either parallel sole proprietorships or a partnership (the opinion does not specify) were held not "earnings" and as such not subject to the exemptions from garnishment.

In *Roberts v. Frank Carrithers & Bros.*,[39] the Kentucky Supreme Court considered a statute exempting from attachment 90% of the "salary, wages or income earned by labor" in the context of gain realized in the sales of tobacco derived through a sharecroppers' arrangement. In rejecting the debtor's assertion that the tobacco constituted his wages and income for the year, the court wrote:

> It appears that he is a farmer, and in growing the crop of tobacco in controversy was conducting a business upon his own account, and not as a servant or employee of another … A salary is the consideration paid or agreed to be paid to a person at regular, fixed periods, in consideration for his services, and wages has a similar meaning, except that salary is ordinarily used when speaking of the employments of a more dignified character.
>
> But salary and wages are terms invariably used in defining the consideration which an employer bestows upon one who is serving him in consideration for his services, and is usually a consideration in money, and is never applied in describing the gain, profit or recompense which accrues to one who is conducting a business of his own and upon his own account.[40]

On the other hand, applying New Jersey law, in *Zavodnick v. Leven*,[41] it was found that distribution to a partner in a general partnership organized law firm were "profits due

and owing" under the New Jersey exemption statute.[42] The court wrote:

> A partner's periodic receipt of distributions from a partnership engaged in a professional practice plays substantially the same role in the partner's economic life as an employee's wages. The partner typically depends on such distributions to purchase food, shelter, and other necessities for himself and his family. If Leven were an associate rather than a partner in the Fuchs, Altschul law firm, any wage garnishment clearly would be subject to the limitations of N.J.S.A. 2A:17-56. Similarly, if Leven were a sole practitioner, the income that he derived from his practice would constitute "earnings" within the intent of N.J.S.A. 2A:17-56. Therefore, we conclude that distributions from the partnership through which Leven has chosen to practice his profession are subject to the same limitation on executions under N.J.S.A. 2A:17-56 as an employee's wages or a sole proprietor's earnings.[43]

Clearly the wording of the garnishment statute matters.

Bankruptcy Treats Charging Orders and Garnishments as Horses of Different Colors

Notwithstanding being similar in that they are means of collecting on a judgment, charging orders and garnishments are under bankruptcy law quite dissimilar. A charging order is a lien that survives the judgment-debtor's bankruptcy.[44] On the other hand, a garnishment is not a lien and is discharged by the garnishee's bankruptcy.[45]

The Uniform Wage Garnishment Act Does Not Extend to Charging Orders

Generally speaking, garnishments attach to "earnings." Earnings are paid in connection with an employment relationship. As set forth in the recently approved Uniform Wage Garnishment Act:

> "Earnings" means compensation owed by an employer to an employee for personal services. The term includes a wage, salary, commission, bonus, profit-sharing distributions, severance payment, fee, and periodic pension and disability payment.[46]

In turn, employee status is determined first by reference to federal employment tax liability.[47] While the UWGA was crafted so as to extend its protections to independent contractors,[48] it does not otherwise extend beyond the employer–employee relationship. While one seeking to apply garnishment limits to LLC distributions might focus and seek to rely upon "profit-sharing distributions,"[49] that would be in error. Rather, the focus must first be upon the necessity of an employee–employer relationship. As the LLC is not the employer of a member thereof, there are no "earnings" to be garnished and no "disposable earnings" against which to apply the limits. As a member in an LLC is not for federal employment tax liability purposes an employee but rather is self-employed,[50] the UWGA will not extend to them.[51]

But that analysis need not be undertaken (although it is helpful as to other garnishment statutes) as the UWGA excludes charging orders from its reach. Section 201(a)-(b) of the UWGA provides:

(a) This [article] applies only to a garnishment action.
(b) This [article] does not apply to any other remedy available to a creditor under law of this state other than this [article].

Under the UWGA, a charging order will not be treated as a garnishment because it is an "other remedy available to a creditor." Ergo, both a garnishment and a charging order one cannot be; rather, they are separate and distinct.

The Federal Garnishment Statute Never Contemplated Application to Partnership Distributions

Similar to statutes in most states, there is a federal garnishment statute that limits any garnishment to 25% of an employee's "disposable earnings."[52] Adopted as part of the Consumer Credit Protection Act, the underlying intent of Congress was to unify the bankruptcy laws and to protect the employer–employee relationship.[53] Specifically, Congress sought to restrict the garnishment of wages because it found this practice "to be a frequent element in the predatory extension of credit, resulting, in turn, in a disruption of employment, production, and consumption."[54] Limiting the ability of creditors to garnish a debtor's wages responded to an unprecedented increase in personal bankruptcies linked to the pressures created when wages were garnished.[55] Congress found that "[h]undreds of workers among the poor lose their jobs or most of their wages each year as a result of garnishment proceedings."[56] The restrictions on wage garnishment included in this Act were aimed at "protect[ing] the hard-earned wages and the jobs of those who need the income most" and "reliev[ing] countless honest debtors driven by economic desperation from plunging into bankruptcy in order to preserve their employment and insure a continued means of support for themselves and their families."[57]

To this end, the final version of the bill set a restriction on the maximum level an employee's earnings could be garnished, and provided that an employer could not discharge an employee based on the "fact that his earning have been subject to garnishment for any one indebtedness."[58] The definition of earnings includes "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."[59] However, nowhere in this language or the legislative history are distributions from partnerships specifically discussed or contemplated as being included as "earnings."[60] In fact, the words "partner" and "partnership" do not appear in the legislative history of the restriction on wage garnishment statutes.[61]

Conclusion

The *Alexander* court equated the net-profits of a single-member LLC with that sole member's "earnings," and held that a portion of those earnings were exempt from garnishment.[62] As demonstrated herein, (i) that determination was questionable and (ii) its application in other states is at minimum debatable. If, as is typically the case, garnishment limits are intended to exempt the compensation that flows from the employer–employee relationship, absent that relationship, *ab initio*, garnishment law does not apply as an overlay to the charging order. As LLCs are now the dominant form of organization in each of the states, there is no doubt a potential block that could seek charges in garnishment law to encompass LLC distributions. There appears to be, however, no efforts being made in that direction. Rather, the 2016 approval of the UWGA and its exclusion of charging orders indicate that there is no pressure to alter the outcome.

Some may assert that the differentials in treatments of charging orders and garnishments *vis-a-vis* what are otherwise indistinguishable as compensatory payments is illogical. That may well be the case, but it does not change the analytic outcome. Were a service provider to incorporate and thereafter draw W-2 wages, they would enjoy the benefits of the various federal and state garnishment exemptions. Alternatively, that service provider could organize as an LLC and, as is here detailed, typically not enjoy the benefit of garnishment protections. The fact that there are different consequences to a choice of entity determination is not an anomaly but rather the intended effect of having a range of business organization forms that have different outcomes both *inter-se* the organization and as to third parties.[63] Again, if equivalence is desired, and distributions to members of an LLC are to enjoy garnishment limits, the legislatures are free to effect that outcome. However, in doing so, they will face the significant problems of distinguishing what should be considered compensatory payments from returns on, for example, passive real estate investments and the related tracing of funds problems.

Garnishments and charging orders are similar in that they are both remedies. Other than that, they are based upon different policies and are distinct statutes. Courts should look with prejudice upon a claim that LLC distributions being diverted by a charging order should be limited by garnishment limits.[64]

ENDNOTES

1 This discussion assumes an understanding of the charging order as utilized in partnership and LLC law. For those not already in possession of that background, *see*, *e.g.*, Jay Adkisson, The Charging Orders Practice Guide (ABA/BLS 2018); Thomas E. Rutledge and Sarah S. Wilson (now Reeves), *An Examination of the Charging Order Under Kentucky's LLC and Partnership Acts (Part I)*, 99 Kentucky Law Journal Online 85 (2011); *An Examination of the Charging Order Under Kentucky's LLC and Partnership Acts (Part II)*, 99 Kentucky Law Journal Online 107 (2011).

2 *See*, *e.g.*, Ariz. Rev. Stat. §29-655(B) (entry of a charging order "does not deprive any member of the benefit of the exemption laws applicable to his interest in the [LLC]."); Rev. Unif. Part. Act §504(e), 6 (pt.II) U.L.A. 443 (2015); Ind. Code §23-18-6-7(c); Ky. Rev. Stat. Ann. §275.260(5); Del. Code Ann. tit. 6, §703; Colo. Code §7-80-703; Rev. Prototype LLC Act §503(e), 67 Bus. Law. 117, 166 (Nov. 2011); Rev. Unif. Ltd. Liab. Co. Act §503, 68 U.L.A. 498 (2008). The official comments to both Uniform Partnership Act § 18 and Revised Uniform Partnership Act §504 are silent as to the application of this provision.

3 *Alexander,* No. CR-05-00472-001-PHX-DGC, 2016 WL 2893406 (D. Ariz. May 18, 2016).

4 Ariz. Rev. Stat. §33-1131(B).

5 Ariz. Rev. Stat. §12-1598(4).

6 Ariz. Rev. Stat. §12-1598(3).

7 *See infra* notes 52 through 61 and accompanying text.

8 *See* Rev. Rul. 69-184, 1969-1 CB 256; IRS Gen. Couns. Mem. 34001 (Dec. 23, 1969); IRS Gen. Couns. Mem. 34173 (July 25, 1969); CCA 201436049; Alan J. Tarr, *USC Law School Institutes on Major Tax Planning* ¶ 606.1(c) (2012) ("A partner rendering services in his capacity as a partner is not an employee of the partnership. This mutual exclusivity characterization is made clear in various provisions, especially in the context of employment taxes."); *Paying Yourself*, IRS (May 31, 2013), *www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Paying-Yourself* ("Partners are not employees and should not be issued a Form W-2 in lieu of Form 1065, Schedule K-1, for distributions or guaranteed payments from the partnership."); Internal Revenue Service, Entities, Question: Are partners considered employees of a partnership or are they considered self-employed? Answer: Partners in a partnership (including members of a limited liability company (LLC)) are considered to be self-employed, not employees, when performing services for the partnership, available at *www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-1*; Self-Employment Tax Treatment of Partners in a Partnership That Owns a Disregarded Entity, available at *www.federalregister.gov/articles/2016/05/04/2016-10383/self-employment-tax-treatment-of-partners-in-a-partnership-that-owns-a-disregarded-entity. See also* J. Leigh Griffith, *Partners and W-2 Employee*

Status, J. Passthrough Entities, Jan./Feb. 2015, 27. Assuming the LLC is taxed as a partnership, agreed compensatory payments to a member will be treated as guaranteed payments under Code Sec. 707. *See also Model LLC Operating Agreement Organizational Checklist*, 69 Bus. Law. 1251, 1264–1265 (Aug. 2014).

[9] *See*, *e.g.*, Reg. §1.707-1(c) ("For the purposes of other provisions of the internal revenue laws, guaranteed payments are regarded as a partner's distributive share of ordinary income. Thus, a partner who receives guaranteed payments for a period during which he is absent from work because of personal injuries or sickness is not entitled to exclude such payments from his gross income under section 105(d). Similarly, a partner who receives guaranteed payments is not regarded as an employee of the partnership for the purposes of withholding of tax at source, deferred compensation plans, *etc.*"); Rev. Rul. 81-301 (payments to a partner for services rendered outside the scope of the partnership most resemble an independent contractor relationship, not an employer–employee relationship).

[10] *See*, *e.g.*, Reg. §301.7701-3(b)(1)(ii); *Nottingham, Bertha v. Est*, (1956) TC Memo. 1956-281 ("A sole proprietor cannot deduct amounts paid to himself as compensation unless he restores that amount to income by reporting the compensation."); IRS Publication 334 ("You cannot deduct your own salary or any personal withdrawals you make from your business. As a sole proprietor, you are not an employee of the business."); Reg. §54.4980H-2(a)(15) (defining an "employee" as "an individual who is an employee under the common-law standard. *See* Reg. §31.3401(c)-1(b). For purposes of this paragraph (a)(15), a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in section 3508 is not an employee.").

[11] *See* T.D. 9356, IRB 2007-39 (Sept. 24, 2007).

[12] *See*, *e.g.*, *FA. Littriello*, CA-6, 2007-1 USTC ¶50,426, 484 F3d 372, *aff'g*, 2005 WL 1173277 (W.D. Ky. 2005), *mot. for reconsideration denied* 2005 WL 1862156; *S.P. McNamee*, CA-2, 488 F3d 100, *aff'g*, 96 AFTR2d 2005-6746; *Kandi*, 2006 WL 83463, 2006 U.S. Dist. LEXUS 2687 (W.D. Wash. 2006). *See also* T.E. Rutledge, *The Dispute Over Check-the-Box, SMLLCs and Liability for Employment Taxes*, J. Passthrough Entities, July/Aug. 2007, 21; Thomas E. Rutledge and Scott E. Ludwig, *Second Circuit Affirms McNamee: Validity of Check the Box Regulations Again Confirmed*, J. Tax'n, July 2007, 32; Thomas E. Rutledge and Scott E. Ludwig, *The Sixth Circuit Affirms Littriello: "Check-the-Box" Classification Regulations Are Upheld*, J. Tax'n, June 2007, 325.

[13] *See* Reg. §301.7701-2(c)(2)(iv).

[14] *See id.* ("The owner of an entity that is treated in the same manner as a sole proprietorship under paragraph (a) of this section will be subject to the tax on self-employment income.").

[15] *Borkowski v. Commonwealth*, 139 S.W.3d 531 (Ky. App. 2004).

[16] *Kentucky Employers' Mutual Insurance v. Ellington*, No. 2013-SC-000802-WC, 2015 WL 2340284 (Ky. May 14, 2015).

[17] *See* Alaska Stat. §23.30.240(b) ("Except as provided in this subsection, a member of a limited liability company organized under AS 10.50 is not an employee of the company under this chapter."); Ind. Code §22-3-6-1(b)(9); Ky. Rev. Stat. Ann. §342.012 (absent special endorsement, member of LLC not covered by workers compensation insurance); New York State Worker's Compensation Board, OC-923 ("Members of an LLC or LLP are considered partners of a partnership and do not need to be covered by a worker's compensation or disability benefit policy."); *www.wcb.ny.gov/content/main/onthejob/CoverageSituations/LLCandLLP.jsp*; State of Wisconsin, Sole Proprietors, Partners and Members of Limited Liability Companies, available at *https://dwd.wisconsin.gov/wc/employers/soleproprieters_etc.htm* ("Limited liability companies that have members only and no employees are not required to carry worker's compensation insurance in Wisconsin."); *id*. ("All worker's compensation policies *exclude* the sole proprietor, partners and members of limited liability companies unless specifically endorsed to include them.") (emphasis in original); *Crabtree v. EVP Properties, LLC*, 2015 N.C. App. LEXIS 365 (May 5, 2015). *But see* Florida Division of Workers Compensation, available at *www.myfloridacfo.com/division/wc/Employer/coverage.htm#.V4erdGf2ZbU* (counting LLC members as employees and not excluding them from coverage, but they may elect out of coverage).

[18] Restatement (3rd) of Employment Law §1.03.

[19] *Bowers v. Ophthalmology Group, LLP*, 2012 U.S. Dist. LEXIS 118761 (W.D. Ky. 2012).

[20] *Id*. at 14–17. *See also Marshall v. G.E. Marshall*, Cause No. 2:09-CV-198 APR, 22 Wage & Hour Cas.2 (BNA) 691, 2014 WL 1414864, *8 (N.D. Ind. April 14, 2014) ("Although an employer's preferences may not always be followed in cases where a business is jointly owned, this does not strip the individual from her designation as an employer. The key appears to be whether the individual had a say in the decisions of the business and possessed an equal vote." (citing to *Smith v. Castaways Family Diner*, CA-7, 453 F3d 971, 983).

[21] 29 USC §2601 *et seq*.

[22] *See* 29 USCA §2611(3) (referring to 29 USC §§203(c), (e) and (g)).

[23] 29 USC §203(e)(1), (g).

[24] WHD Opinion Letter FMLA2004-1-A (April 5, 2004).

[25] *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 US 440 (2003).

[26] *Id.* at 449–450. *See also id*. at 450 ("[A]n employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed.").

[27] Still, context matters. Just a year after *Clackamas*, in *Yates v. Hendon*, 541 US 1 (2004), applying statutory law and not the common law of employment, it was held that the sole owner of a professional corporation would for purposes of ERISA be treated as an employee.

[28] *Coldiron v. Clossman Catering, LLC*, 2015 US Dist. LEXIS 173311 (S.D. Ohio Oct. 27, 2015).

[29] *Ziegler v. Anesthesia Associates of Lancaster, Ltd*., CA-3, 74 Fed. Appx. 197 (3rd Cir. 2003).

[30] *Id*. at *200, quoting *Ziegler v. Anesthesia Associates of Lancaster, Ltd*., No. CIV.A. 00-4803, 2006 WL 387174, *4–5 (E.D. Pa. Mar. 12, 2002).

[31] *Kirleis v. Dickie, McConey & Chilcate, P.C*., No. 06cv1495, 2009 WL 3602008 (W.D. Pa. Oct. 28, 2009).

[32] *Harris v. Universal Contracting, LLC*, No. 2:13-CV-00253 DS, 2014 WL 2639363 (D. Utah. June 12, 2014).

[33] *Gerry Nelson Agency, Inc. v. Muck*, 509 S.W.2d 750 (Mo. App. 1974).

[34] 15 USCA §1671; *see infra* notes 52 through 61 and accompanying text.

[35] 509 S.W.2d at 755. *See also Kane v. Steward Tilghman Fox & Bianchi, P.A.*, 197 So.3d 137 (Fla. Dist. Ct. App. 2016) (treating "salary" paid to owners of professional association, irregularly as funds were available and not consistent with "employment agreement," as distributions to which garnishment limits were inapplicable); *In re Cook*, 454 B.R. 204 (Bankr. N.D. Fla. 2011) ("bonuses" paid to shareholder were disguised dividends that were not within the scope of the Florida garnishment limits).

[36] *In re: Hugo Galvez*, 990 P.2d 187 (Nev. 1990).

[37] A footnote to the *Galvez* decision collects and differentiates other decisions applying or rejecting the application of the federal garnishment statute.

[38] *Rice, Seiller, Cantor, Anderson & Bordy v. Fitzgerald*, 824 S.W.2d 435 (Ky. App. 1992).

[39] *Roberts v. Frank Carrithers & Bros.*, 202 S.W. 659 (Ky. 1918).

[40] *Id*. at 661.

[41] *Zavodnick v. Leven*, 773 A.2d 1170 (N.J. Super. Ct. 2001).

[42] The New Jersey garnishment statute extends to not only "wages" and "salary" but also "profits due and owing" *Id*. *See* N.J.S.A. §2A:17-56a ("In no case shall the amount specified in an execution issued out of any court against the wages, debts, earnings, salary, income from trust funds or profits due and owing, or which may thereafter become due and owing to a judgment debtor, exceed 10%..."). Wages are otherwise subject to a 25% cap. *See id*. §2A:17-56(b).

[43] 773 A.2d 1175.

[44] *See*, *e.g.*, *In Re Keller*, Case No. 99-2-4703-DK, Memorandum of Decision at 12 (Bankr. D. Md. Jan. 16, 2001) (copy on file with author). ("Accordingly, under the doctrine discussed above, although any action to collect upon the lien was stayed during the bankruptcy case, the lien itself 'Road through' the bankruptcy case and remains viable upon property captured before the case commenced. Consequently, the rights of the holder of the lien remain unaffected after the bankruptcy case, including the right to collect income due to the partner (debtor) on account of the Partnership Interest.") (citation omitted).

[45] *See*, *e.g.*, *In Re Keller*, Memorandum of Decision at 6–7.

[46] Uniform Wage Garnishment Act ("UWGA") §102(4).

[47] UWGA §102(6) ("Employee includes a former employee who is owed earnings and means an individual who: (a) is treated by an employer as an employee for federal-income-tax purposes; or (b) receives earnings from an employer through periodic payments and is not treated by the employer as an employee for federal-income-tax purposes."). *See also supra* notes 8 through 14 and accompanying text; Rutledge and Ludwig, *The Sixth Circuit*, *supra* note 12.

[48] *See* UWGA, Prefatory Note ("it extends protection to a cadre of individuals who are classified as independent contractors but who are virtually indistinguishable from employees."); *Id*. §2, comment ("'employee covers'... (b) other individuals who, while treated by the employee or as independent contractors, are in much the same position as ordinary employees. Subsection (b) is intended to include some, but not all, independent contractors. Employees are only covered if they (a) are individuals, (b) who performed personal services, and (c) are paid periodically.").

[49] In other statutes the reliance could be placed on "profits." *See*, *e.g.*, Ind. Code §24-4.5-5-105(1)(a).

[50] *See supra* notes 8 through 14 and accompanying text.

[51] It is not possible to suggest that the drafters of the UWGA were unaware of the treatment of LLC distributions and as such inadvertently missed the point. The UWGA drafting committee included Garth Jacobson, at the time of UWGA's approval the chair of the LLCs, Partnerships and Unincorporated Entities Committee of the Section of Business Law of the ABA.

[52] 15 USCA §1673(a).

[53] *See* H.R. Rep. 90-1040.

[54] *Id.*

[55] *Id.* at 2016 ("The problem is sufficiently severe, however, that something more had to be done to protect the consumer who faced potential economic disaster because of excessive garnishment of wages or loss of his job resulting from objections by his employer to the assumption of the administrative difficulties attendant to the handling of garnishment procedures.").

[56] *Id.*

[57] *Id.*

[58] 15 USC §§1673–1674.

[59] 15 USC §1672.

[60] *See* H.R. Rep. 90-1040.

[61] *Id.*

[62] *See supra* notes 3 through 6 and accompanying text.

[63] *See*, *e.g.*, *CML V v. Bax*, 28 A.3d 1037, 1043 (Del. 2011) ("Ultimately, LLCs and corporations are different; investors can choose to invest in an LLC, which offers one bundle of rights, or in a corporation, which offers an entirely separate bundle of rights.").

[64] I am indebted to Jay Adkisson and Garth Jacobson for their thoughts as to this article. Still, they bear no responsibility in any shortcomings in, and they may not necessarily agree with, the analysis herein set forth.