COMMENTS

Bankruptcy: Enjoining Employers from Discharging Employees Because of Chapter XIII Wage Deduction Order.

Harvey Jackson was employed by International Harvester, Farmall Works, earning take home pay of $105 per week. By April, 1967, he was indebted to sixteen creditors for a total of $8,469.89. Because of this over-extension, Jackson entered into a Wage Earner Plan[1] which was approved on April 14, 1967. However, because of drinking and marital problems,[2] he did not make regular payments to the trustee. On January 24, 1968, at the request of the trustee, the Referee entered an order requiring International, Jackson's employer, to deduct $30[3] per week from his pay and to turn it over to the trustee. International complied with the order, but, in accord with the union contract, Jackson was notified that he must arrange the release of that "demand against wages" or suffer suspension and eventual termination. At Jackson's request, the Referee permanently enjoined his employer from suspending or firing him because of the wage deduction order. International petitioned for review and dissolution of the injunction. The Federal District Court, Northern District of Illinois held, *affirmed:* The Referee in Bankruptcy has authority to enjoin an employer from terminating an employee because of a Chapter XIII wage deduction order. In the absence of an

1. Bankruptcy Act, 11 U.S.C. §§ 1001-86 (1964). The Wage Earner Plan (also referred to herein as, Chapter XIII, and Plan) is a voluntary proceeding whereby one who earns his living by wages, salary, or commissions may arrange an extention or composition of his debts. Payment is made out of the debtor's future earnings pursuant to a plan submitted by him. Such payments are received by a trustee who distributes them to the creditors covered by the plan. *See generally* C. NADLER, THE LAW OF DEBTOR RELIEF, §§ 379-90 (1954); Note, *Chapter XIII of the Bankruptcy Act: As Maine Goes, So Should the Nation*, 5 SAN DIEGO L. REV. 329 (1968).

For a discussion of the status of secured creditors see Comment, *Enforcing a Chapter XIII Wage Earner's Plan Over the Objection of a Secured Creditor*, 6 SAN DIEGO L. REV. 69 (1969).

2. *In re* Jackson, No. RI-BK-67-69, Opinion of the Referee, published in 43 REF. J. 20 (1969) [hereinafter cited as Referee's Opinion].

3. In July, 1967, the Referee permitted reclamation of Jackson's 1966 automobile by the secured creditor, reducing the original debt to approximarely $5000. 290 F. Supp. 872 (N.D. Ill. 1968).

unreasonable burden upon the employer, such an injunction will be sustained. *In re Jackson,* 290 F. Supp. 872 (N.D. Ill. 1968).

Section 658 of the Bankruptcy Act[4] authorizes issuance of wage deduction orders and enforcement of such orders "in the manner provided for the enforcement of judgments."[5] Thus, if the debtor's employer were to resist the order, the court could levy execution upon the debtor's wages.[6] It would not be necessary to go beyond section 658 to find permission for execution. However, the injunction in *Jackson* goes beyond mere enforcement of an order. In effect, it preserves the debtor's future earnings upon which the Chapter XIII plan depends. With his income thus preserved, the basis is provided for later support of a section 658 order.

The *Jackson* court found authority for the injunction in section 2(a)(15)[7] of the Act. That section invests the bankruptcy court with equitable powers to do what "may be necessary for the enforcement of the provisions of [the Act]."[8] It seems at first reading that section 658 includes adequate protection for wage deduction orders and that section 2(a)(15) adds nothing to the power of the court. Section 2(a)(15), however, grants jurisdiction broad enough to encompass protection of the entire Wage Earner Plan. The Supreme Court has similarly employed this section of the Bankruptcy Act in a different situation. In *Continental Bank v. Chicago, Rock Island Ry.*[9] the holders of collateral notes were enjoined from selling the collateral because the proposed sale threatened to prevent the debtor-railroad from developing a satisfactory reorganization plan. In sustaining the injunction, the Court said:

---

4. 11 U.S.C. § 1058 (1964), which provides:

> During the period of extention, the court—(1) shall retain jurisdiction of the debtor and his property for all purposes of the plan and its consummation and shall have supervision and control of any agreement or assignment, provided for in the plan, in respect to any future earnings or wages of the debtor; and
>
> (2) may issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments.

5. *Id.*

6. FED. R. CIV. P. 69; *see* 10 COLLIER ON BANKRUPTCY § 29.08 (J. MOORE ed., 14th ed. 1968).

7. 11 U.S.C. § 11(a)(15) (1964).

8. *Id.*

> [A railroad reorganization under section 77] is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby render its provisions futile.[10]

Taking a broad view of the language of section 2(a)(15), as the Supreme Court has done, it can be seen that the injunction sustained in the *Jackson* case was necessary not only to prevent the wage deduction order from being an exercise in futility, but also to protect all other provisions of the Wage Earner Plan.

It seems, moreover, that the validity of this analysis does not depend upon the existence of a prior wage deduction. For instance, if, because of the possibility of being subject to wage orders, an employer were to terminate an employee who entered into a Chapter XIII plan,[11] an injunction to prevent such a discharge would seem to be as well justified as was the injunction in *Jackson*.

While the injunction in the *Jackson* case prohibits International from terminating the debtor because of the wage order, the opinion of the court suggests possible unwarranted extentions. The court states that the injunction does not bar termination of the debtor for any other "reason of any substance."[12] The meaning of "substance" in this context is not clear. If the court means that any subsequently named cause for discharge must have some precedent in custom or contract[13] to avoid a presumption that it is a ruse to circumvent the injunction, no difficulty is encountered in the "substance"

---

9. 294 U.S. 648 (1935).

10. *Id.* at 676.

11. In Central Packing Co., 36 Lab. Arb. 672 (1961), the company published the following shop rule:

> WAGE EARNER PLANS: NOTICE: EFFECTIVE DECEMBER 16, 1957. THOSE EMPLOYEES WHO GO ON ANY "WAGE EARNER" PLAN WILL BE SUBJECT TO DISMISSAL. THOSE PEOPLE PRESENTLY ON "WAGE EARNER" PLANS WILL *NOT* BE SUBJECT TO DISMISSAL UNLESS THEIR "AMOUNT DUE" IS INCREASED OR THEY ENTER INTO A NEW PLAN.

The rule was not enforced as written. However, the possibility of such a rule existing and being enforced is not as remote as a first impression of the text might indicate.

12. 290 F. Supp. at 875.

13. *See generally* B. WERNE, 1 ADMINISTRATION OF THE LABOR CONTRACT, *Discharge and Discipline* §§ 20.01 - .63 (1963).

requirement. However, if the court means that the cause for termination must have what may be termed "factual substance," that is, that the employer must be able to evidence reasonable cause, the requirement may be unjustified. Such a prerequisite for discharge could easily be extended to situations not involving a prior wage order or injunction. Thus, to obtain an extention of the existing injunction pending aribitration, the debtor-employee, in either case, would only need to show that there was reasonable probability that an arbitrator would decide in his favor.[14] While the purpose of the extention or temporary injunction would be the same as in the *Jackson* case, either would seem to represent an unwarranted intrusion on the right of the employer to discharge persons who, in the employer's opinion, are unfit for his purposes. The benefits to the debtor[15] and to the economy[16] in completed Wage Earner Plans do not seem to outweigh the burden of keeping such persons on the payroll even temporarily.

In finding that the wage deduction order did not impose an unreasonable burden on the employer, the *Jackson* court apparently relied on two factors: first, that the provision in the union contract calling for termination because of demands on wages was discretionary and that International's action was, therefore, purely voluntary;[17] and second, that since International was making more than 1800[18] voluntary deductions from wages each week,[19] one more would cause no serious hardship.

14. Two prerequisites to granting a temporary injunction are irreparable loss and probability of success at a plenary hearing of the matter. *E.g.*, Rothstein v. Manuti, 235 F. Supp. 39, 47 (S.D.N.Y. 1963). Irreparable harm in this instance would be the probable necessity of converting the Wage Earner Plan to straight bankruptcy because of the loss of income during the grievance procedures. *See, e.g.*, Central Packing Co., 36 Lab. Arb. 672 (1961) (date of discharge to date of reinstatement, six months).

15. The primary benefits to the debtor are (1) maintaining status quo of assets; (2) avoidance of the stigma of being adjudged a bankrupt; and (3) the satisfaction of having debts paid. 10 COLLIER ON BANKRUPTCY, *supra* note 6, at § 20.01.

16. The benefit to the economy is the reduction of the vast losses to creditors attendant to straight bankruptcy. For an indication of the past and potential value of Chapter XIII in this regard see Nadler, *The Problems of the Insolvent Wage Earner*, 16 BUS. LAW. 390, 396-97 (1961). One of the purposes of the chapter is to procure this reduction. Chandler, *The Wage Earner's Plan: Its Purpose*, 15 VAND. L. REV. 169 (1961).

17. The court said that the Plan and the wage order were "in jeopardy because the employer [was] invoking a contract provision, clearly within its discretion not to invoke . . . ," and that the injunction was needed to protect the income on which the Plan depends "because of International's purely voluntary action." 290 F. Supp. at 876.

18. Referee's Opinion, 43 REF. J. at 20-21.

19. 290 F. Supp. at 878.

International's collective bargaining agreement provided that any employee who did not obtain a release of a writ of garnishment or other demand against wages within seven days would be suspended, and that "[t] o fail to present such release . . . within [sixty days] *will* result in the employee's termination . . . ."[20] Thus, the court's characterization of the contract is not supported by its language. International's action seems no more discretionary and voluntary than the act of one who seeks redress for breach of contract in the courts.

All employers may discharge employees whose wages are garnished. An employer not subject to a collective bargaining agreement may do so the first time he is served a writ of garnishment.[21] However, where a union contract controls the employer-employee relationship, the rule permitting termination is generally restricted to situations in which garnishments have become "so frequent" that they impose an intolerable burden upon the employer.[22] This limitation is of little help to the employee, however, since the loss of income by the first attachment often results in subsequent garnishments. Thus, the right to discharge because of garnishments is often exercised or threatened. As a result, wage earners have frequently been forced into straight bankruptcy because they have lost their employment or because bankruptcy provides a means of protecting their jobs.[23] In view of the dire consequences to the garnished

20. The section of the collective bargaining agreement is quoted in Referee's Opinion, 43 REF. J. at 20 (emphasis added).

21. The right seems taken for granted. A search of the DECENNIAL DIGEST, *Master and Servant, Grounds for Discharge* § 30(1) from 1658 to the present, produced no cases directly on point. The proposition is supported in dictum in only two cases under that heading. Chalker v. First Federal Savings and Loan Ass'n, 71 Ohio L. Abs. 87, 126 N.E.2d 475 (C.P. 1955); Louisville & N.R. Co. v. Cox, 145 Ky. 667, 141 S.W. 389 (1911).

22. *See* B. WERNE, *supra* note 13, at § 20.59; *e.g.*, Bagwell Steel Co., 41 Lab. Arb. 303 (1963) (three garnishments - shop rule); Capital Packing Co., 36 Lab. Arb. 101 (1961) (three garnishments contract provision).

23. Brunn, *Wage Garnishment in California: A Study and Recommendation*, 53 CAL. L. REV. 1214, 1234 (1965); Satter, *Wage Assignment and Garnishment Cited as Major Cause of Bankruptcy in Illinois*, 15 PERS. FIN. L.Q. REP. 50 (1961).

To correct this problem the recently passed Consumer Credit Protection Act (Truth in Lending Act), PUB. L. NO. 90-321, tit. III, §§ 301-07 (May 29, 1968), 82 STAT. 146, effective July 1, 1970, will prohibit the discharge of an employee because of "any one indebtedness." *Id.* at § 304. The term "garnishment" is defined broadly enough to include wage deduction orders from the bankruptcy court. *Id.* at § 302(c). The aggregate liabilities of a debtor in Chapter XIII will probably be construed as "one indebtedness," thus prohibiting the termination of a debtor because of a wage deduction order.

employee[24] and for sake of comparison to wage deduction orders, the burden which employers seek to avoid or eliminate should be identified.

The burden imposed by garnishment is said to be the bookkeeping expense.[25] However, if only accounting costs were involved, the rule would seem unwarrantedly harsh. Rather the involuntary nature of such process may cause other liabilities and inconveniences. The garnishee-employer may be required to appear in court as a stakeholder in the case of a disputed claim. Failing that, he runs the risk of double liability.[26] Beyond these legal contingencies, the employer may be subjected to frequent calls from creditors.[27] Moreover, worry and harassment outside of work might affect the employee's performance on the job.[28] Additionally there is a risk that a worker with access to money or property belonging to the employer or customers will be tempted to steal to make up for the sudden reduction in his income. These potential expenses and inconveniences are indeed a burden and an employee whose wages are garnished repeatedly is justifiably dismissed.

In contrast to these several contingencies, bookkeeping expenses are the only burden placed on the employer by a wage deduction order. A wage order is essentially voluntary on the part of the debtor. Although, in *Jackson*, the order was made at the request of the trustee, the debtor had previously submitted his future earnings to the control of the court. Accordingly, a wage deduction order, by its terms,[29] should relieve the employer from

---

The importance of the holding in the *Jackson* case is not reduced by this Act. Many, perhaps most, debtors will have suffered attachment of their wages before petitioning for relief in the bankruptcy court. A wage deduction order issued subsequently would then be the second, or later garnishment of a different debt and would not be protected by the Act. The value of Title III of the Truth in Lending Act is that it will aid in avoiding "inverse" defeat of Chapter XIII by giving wage earners time to get to the court while still employed and eligible to have a Wage Earner Plan worked out.

24. Termination often only adds the finishing blow to an already sad story. *E.g.*, Lester Engineering Co., 43 Lab. Arb. 1268 (1965). The arbitrator in Borg-Warner Corp., 14 Lab. Arb. 745, 746 (1950), points out that the threat of discharge may force the employee to pay a disputed debt or accept non-conforming goods.

25. B. WERNE, *supra* note 13, at § 20.59; American Sugar Refining Co. v. Taylor, 115 So. 2d 898, 899-900 (La. App. 1959).

26. 1 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* § 100 (1954). The possible legal expenses are many and varied. *See Id.* at §§ 101-06.

27. Moccasin Bushing Co., 14 Lab. Arb. 380 (1950).

28. *Id.*

29. For an example of a clearly worded order see United States v. Krakover, 377 F.2d 104, 105 (10th Cir. 1967).

any liability to the debtor. Because the plan is designed to leave the debtor with adequate funds for his daily living,[30] the danger that he might steal from his employer is no greater than with the average employee. Moreover, a confirmed plan should aid the debtor in his work by relieving him of many of his debt worries. Finally, the fact that the debtor has entered upon a Wage Earner Plan is a clear indication that he is doing his best to extricate himself from the situation which presents the threat of inconvenience and undue expense to his employer.

In resting its determination upon the theory that one more deduction will not hurt, the *Jackson* court has hit wide of the mark. It is the voluntary nature of a wage deduction which renders the burden reasonable. This relieves the employer of the uncertainties and inconveniences involved in involuntary proceedings like garnishments. If the reasoning of the court were followed in future cases, an injunction of this kind would issue only against large employers. Smaller companies, perhaps nonunion, which make only those deductions required by law, would be free from such an order of the court. With respect to small companies, then, the basic incongruity of permitting the decree of the bankruptcy court to bring about the defeat of the plan it was administering would remain.

In view of this incongruous result, the foregoing comparison of garnishment and wage deduction orders, and the purpose of Chapter XIII (enabling debtors to avoid straight bankruptcy and to avert the resulting losses to the economy), it seems that a wage order should never be seen to impose a burden so unreasonable as to justify permitting a debtor to be discharged because of it, or to convert his plan to straight bankruptcy to avoid the job loss. This conclusion is reinforced by the fact that there are at least two ways of further reducing the inconvenience of the employer.

While the public policy of Chapter XIII may create a duty on the part of the employer "to assist . . . in the rehabilitation of the Debtor . . . ,"[31] this assistance need not be rendered unnecessarily or free of charge. Mere convenience to the debtor

30. The Plan must be fair, equitable, and feasible in order to be confirmed. Bankruptcy Act, 11 U.S.C. § 1056(3) (1964). Obviously, it would not be feasible if the debtor could not live on the remainder after deduction.

31. 290 F. Supp. at 878.

and the court does not appear to be adequate reason for imposing this responsibility on the employer;[32] therefore, a wage deduction order should not issue automatically. The debtor should be given every opportunity to make full regular payments[33] and the court should require an explanation of any failures in that regard.[34] Only when, as in the *Jackson* case, it becomes apparent that the debtor will be unable to complete the plan without such aid should an order to the employer be made. Additionally, since the deduction will be as regular as the debtor's pay check and for a definite period of time, the employer's costs would seem to be determinable. The debtor could, therefore, be assessed for those costs.[35] It may be urged that if the debtor's entire check were turned over to the trustee for disbursement to the debtor and his creditors no expense at all would be involved. However, the probable embarrassment of the debtor before his co-workers would seem to be inconsistent with the attempt of Chapter XIII to eliminate the stigma of being adjudged a bankrupt.[36] And, in the words of one Referee, that procedure is too reminiscent of the "company store."[37]

32. The reason for the injunction in *Jackson* was that it was necessary to protect the Plan. If a wage deduction order were made primarily for convenience of administration, the basis of a temporary injunction—irreparable loss—would be lacking. *See* note 14, *supra*.

33. It seems that a Wage Earner Plan will be of more value to the debtor and the economy if he is called on to exercise the self-discipline needed to make the payments himself. Education of debtors has been urged as a necessary adjunct to Chapter XIII proceedings. Cowans, *Present Bankruptcy Act Defective, New Solutions Advocated, Including Credit Counseling*, 22 PERS. FIN. L.Q. REP. 40 (1968); Hanford, *Consumer Bankruptcy: Some Underlying and Triggering Causes*, 23 PERS. FIN. L.Q. REP. 25 (1968); Meth, *Ethical and Economic Considerations in Chapter XIII Proceedings*, 36 REF. J. 41 (1962). However, it has been urged that the truly root problem is the inability or refusal of many debtors to use discretion in making credit purchases before becoming over-extended. Miller & Kopp, *Abuses of Consumer Credit—A View from the Bankruptcy Court*, 4 BUS. LAW. 241, 248 (1966). The bankruptcy court is not now equipped to offer or compel remedial consumer finance education. It can, however, require the debtor to exercise the self-discipline which may aid discretion later.

34. The court is able to oblige him to explain missed payments. *See* C. NADLER, THE LAW OF BANKRUPTCY, § 850d at 708-09 (2d ed. 1968) (sample Application for Order to Show Cause, and Order, for use by the trustee).

35. If the expense of determining the actual cost of making the deduction, writing the check and mailing it to the trustee were prohibitive, some reasonable amount (such as the 10c or 15c per check charged by many banks) could be levied. Authorization of such fees may require amendment of the Act; however, it is submitted that if the charge were made to the trustee, it could be included under 11 U.S.C. § 1059(2) which provides for payment of his actual and necessary expenses.

36. *Cf.* Perry v. Commerce Loan Co., 383 U.S. 392, 395 (1966).

37. Interview with the Hon. Arline Rossi, Referee in Bankruptcy, Southern District of California, in San Diego, Cal., Feb. 2, 1969.

Some Referees prefer wage deduction orders but, nevertheless, have indicated that an order should issue only if the employer is willing to cooperate.[38] Others have said that wage deduction orders are essential to the success of the Wage Earner Plans.[39] Despite this preference and even insistence upon wage deductions, there is some evidence that many such orders have been made and withdrawn when the employer objected or threatened termination of the debtor.[40] In other cases, it appears that Referees have denied confirmation of Wage Earner Plans because past experience indicated that the debtor's employer would object.[41] It is surprising, therefore, that during the thirty years of Chapter XIII's operation no court has previously passed upon the question presented by the *Jackson* case.

Assurance of successful completion of Wage Earner Plans is enhanced by the result reached in *Jackson*. This stability is needed because the benefits of Chapter XIII seem to be declining as enticements to its use. It is generally believed that the vast expansion of our economy through credit began after 1938, the year of the creation of Chapter XIII. In 1969 built-in obsolescence competes with the normal desire to hold on to possessions.[42] The "stigma" of being adjudged a bankrupt is

38. Benson, *Wage Earner Plans in Bankruptcy Court*, 41 MICH. ST. B.J. 10, 13 (Aug. 1962).

39. Allgood, *Why Chapter XIII of the Bankruptcy Act Works Successfully in Birmingham*, 15 PERS. FIN. L.Q. REP. 46 (1961); Woodbridge, *Wage Earner Receiverships*, 23 J. AM. JUD. SOC. 242 (1940). A survey of Michigan, Ohio, Virginia and Wisconsin statutory programs and Chapter XIII, led the author to the conclusion that,

> [N]o Personal Receivership Act can operate successfully unless the wages of the debtor are paid by the employer directly to the court under a wage assignment . . . . *Id.* at 280.

40. Central Packing Co., 36 Lab. Arb. 672, 675 (1961), reporting a conversation with a trustee, the arbitrator states:

> However, it is the usual practice . . . if the employer objects to making such deductions and threatens the employee with dismissal, to revoke the order to the employer . . . . The plan is continued in effect as long as there is any prospect of succeeding.

41. Allgood, *supra* note 39, at 47, appparently referring to an earlier mention of companies which would not cooperate by making wage deductions, the author states:

> We try not to confirm cases where the employment is such that our past experience leads us to believe that the debtor cannot be forced to make payments.

42. The system of massive production supported by credit consumption has assured the debtor that, by the time he has completed a Wage Earner Plan, many of his possessions will be obsolete or worn out and in need of replacement. *See* A. TROELSTRUP,

waning due to the increase in the number of bankruptcies,[43] the greater recognition of bankruptcy as a remedy,[44] and the impersonality of our large cities.[45] Although the satisfaction of seeing debts paid remains a valid inducement, it has more meaning as relief from anxiety manufactured by bill collectors,[46] than as virtue's reward. With the assurance provided by the *Jackson* decision, it is hoped that the Wage Earner Plan may begin to realize some of its creator's hopes.

KENNETH GLEASON

CONSUMER PROBLEMS AND PERSONAL FINANCE (3d ed. 1965). In a discussion of this general problem the author quotes a manufacturing executive: "An engineer's principal purpose is to create obsolescence." *Id.* at 13; *cf.* note 44, *infra*.

43. Comprehensive statistics are set out in *Hearings on H.R. 1057 and H.R. 5771 Before a Subcomm. of the House Comm. on the Judiciary*, 90th Cong., 1st Sess., Ser. 10, at 52-60 (1967).

44. *See* Cowans, *supra* note 33, at 41; *Cf. Black Power Advocate Threatens Bankruptcy Boom*, 21 PERS. FIN. L.Q. REP. 29 (1966), reporting that a Washington, D.C. welfare employee has recommended bankruptcy as a means of relief for the oppressed black population; *Do It Yourself Bankruptcy Service Offered In California*, 21 PERS. FIN. L.Q. REP. 29 (1966), where the following rhyme was used by a typing service which offered to fill in bankruptcy forms:

> Men and women
> Deep in debt
> Do not worry
> Do not fret
> Uncle Sam
> Has made a way
> Liquidate
> Instead of pay.

45. One needs only the experience of living in a few of the large cities of the United States to agree that "Who's to know?" is a valid observation.

46. Dr. E. H. Barnes, psychologist and research director for National Accounts Systems, Inc.—a group of seven successful bill collection agencies in the Chicago area—has said:

> You can't get away from the use of fear in collecting bills. We can't offer the debtor anything positive like a nice frosty cake. We can only offer relief from anxiety, and, therefore, the collector has to make sure that a certain amount of anxiety is present.

H. BLACK, BUY NOW, PAY LATER 202 (1961).