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Larry S. Royster
Clerk of the Court
Michigan Supreme Court
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Lansing, MI

48933-2012

RE: ADM File No. 2015-07 – Proposed Amendment of Rule 3.101 of the Michigan Court Rules

Dear Clerk Royster:

At its July 24, 2015 meeting, the Board of Commissioners of the State Bar of Michigan considered the above rule amendment published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee and the Justice Policy Initiative. The Board voted to support the proposed amendment and to convey the additional comments and additions of both the Civil Procedure and Courts Committee and the Justice Policy Initiative.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Thomas C. Rombach, President

Civil Procedure & Courts Committee Recommended Amendments to 2015-07

MCL 600.4012 amended April 14, 2015 [and to take effect September 30, 2015] radically changed the requirements of the judgment creditor as well as the garnishee. The Proposed Court Rule change to MCR 3.101 does not go far enough to coordinate the court rules with amended statute.

We propose three changes. These are in bold font below.

1. First is Subsection “N”. The amended statute specifically states that if an installment payment order is set aside the affected garnishment retains its priority. The current court rule is silent on priority. Although a garnishment will retain its effectiveness does not mean that it retains the same priority. A garnishee should not be put in the position of having to guess which garnishment has priority.
2. Second is Subsection “S”. The current court rule provides that any default on any garnishment is taken as in any other civil action. The amended statute provides for a much more complicated method of how and when a default may be entered against a periodic garnishee. Further, there is a method by which a periodic garnishee may set aside the garnishment which is much different than MCR 2.603(D) and 2.612.
3. Finally the forms which are used in conjunction with the rules must also be amended or, in the case of “Notice of Failure” created.

In order to eliminate confusion by the Court, the attorneys, the parties and the garnishees, there needs to be consistency between the amended statute, court rules and SCAO forms.

Rule 3.101 Garnishment After Judgment

(A) [Unchanged.]

(B) Postjudgment Garnishments.

(1) Periodic garnishments are garnishments of periodic payments, as provided in this rule.

(a) Unless otherwise ordered by the court, a writ of periodic garnishment served on a garnishee who is obligated to make periodic payments to the defendant is effective until the first to occur of the following events:

(i) the amount withheld pursuant to the writ equals the amount of the unpaid judgment, interest, and costs stated in the verified statement in support of the writ;

or

(ii) ~~the expiration of 182 days after the date the writ was issued;~~

~~(iii)~~ the plaintiff files and serves on the defendant and the garnishee a notice that the amount withheld exceeds the remaining unpaid judgment, interest, and costs, or that the judgment has otherwise been satisfied.

(b) The plaintiff may not obtain the issuance of a second writ of garnishment on a garnishee who is obligated to make periodic payments to the defendant while a prior writ served on that garnishee remains in effect relating to the same judgment. ~~The~~

~~plaintiff may seek a second writ after the first writ expires under subrule (B)(1)(a).~~

(c) [Unchanged.]

(2) [Unchanged.]

(C)-(D)[Unchanged.]

(E) Writ of Garnishment.

(1)-(4)[Unchanged.]

(5) The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant or as otherwise provided under MCL 600.4012,

(a) without further notice the property or debt held pursuant to the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld until the expiration of the writ judgment is satisfied and in the discretion of the court paid directly to the plaintiff.

(6) [Unchanged.]

(F)-(M)[Unchanged.]

(N) Orders for Installment Payments.

(1) [unchanged]

(2) If an order terminating the installment payment order is entered and served on the garnishee, the writ again becomes effective and **retains its priority and** remains in force ~~until it would have expired~~ if the installment payment order had never been entered.

(O)-(R)[Unchanged.]

(S) Failure to Disclose or to Do Other Acts; Default; Contempt.

(1) For garnishments filed under MCR 3.101(B)(2) (non periodic):

~~(1)~~ (a) If the garnishee fails to disclose or do a required act within the time limit imposed, a default may be taken as in other civil actions. A default judgment against a garnishee may not exceed the amount of the garnishee's liability as provided in subrule (G)(2).

~~(2)~~ (b) If the garnishee fails to comply with the court order, the garnishee may be adjudged in contempt of court.

(2) For garnishments filed under MCR 3.101(B)(1) (periodic):

MCL 600.4012(6)-(10) governs default, default judgments and motions to set aside default judgments for periodic garnishments.

(3) The court may impose costs on a garnishee whose default or contempt results in expense to other parties. Costs imposed shall include reasonable attorney fees and shall not be less than \$100.

(4) This rule shall not apply to non periodic garnishments filed for an income tax refund or credit.

Comments:

A. Proposed amendment for Subdivision "N" is a result of the amended section of MCL 600.4012 (3).

Although the current rules provide a garnishment will retain its effectiveness does not mean that it retains the same priority. A garnishee should not be put in the position of having to guess which garnishment has priority. The purpose for the change is to clarify the following situation:

- 1) garnishment "1" is successful and garnishment "2" sits behind "1";
- 2) The parties in "1" enter into an installment payment order.
- 3) The judgment creditor in "2" now collects money;
- 4) The judgment debtor defaults under the installment payment order;
- 5) The judgment creditor in "1" sets aside the installment payment order;
- 6) Judgment creditor "1" should now start collecting money instead of "2".

Sometimes the garnishments will be issued out of different courts. Thus the clerks will not be privy to the priority. Therefore the SCAO form MC16a in the area of line 2 should also be changed to reflect that:

effective

"is again effective, [retains its original priority] and remains in force until it would have otherwise expired".

B. MCR 3.101(S) does not distinguish between a periodic and non periodic garnishment. The default provision under the current court rules (and now for a non periodic garnishment) follows the default provisions set forth in other civil actions.

However, the amended sections of the periodic garnishment, MCL 600.4012 (6)-(10), provide a new set of requirements for the duties and remedies if a garnishee fails to file a timely disclosure. Further SCAO should draft the following forms:

1. a "notice of failure" which complies with MCL 600.4012(2)(6)(a) and the new proposed MCR 3.101(S)(2)(a); and
2. a certification form for the garnishee to fill out to cure the "failure" as set forth under MCL 600.4012(2)(8) and (10)(a) and the new proposed MCR 3.101(S)(2)(e) and (g).

In order to eliminate confusion by the Court, the attorneys, the parties and the garnishees, there needs to be consistency between the amended statute, court rules and SCAO forms.

Justice Policy Initiative Recommended Amendments to 2015-07

While the Initiative recognizes that the proposed amendment to eliminate subrule (B)(1)(a)(ii) is a result of the statutory changes in 2015 PA 14 and 15, the Initiative believes that the court rules should set up a procedure to allow the defendant some mechanism to object to the continuing garnishment, or stop the garnishment if the garnishment is paid or there is potential overpayment. Prior to the statutory change, a writ of garnishment of wages remained in effect for 182 days and the plaintiff could seek a second writ of garnishment when the 182 days expire. The statutory change eliminates the expiration period and now allows the writ of garnishment to remain in effect until the balance of the judgment is satisfied. This, in effect, eliminates any opportunity for the defendant to defend or object to a continuing garnishment. Eliminating the filing of a second writ denies the defendant the opportunity to defend against the writ especially if there are issues as to the accurate accounting of the balance owed.

Although the statutory changes provide that the plaintiff should provide a statement of the balance every 6 months, there is nothing in place to allow the defendant an opportunity to challenge the statement. Further, there is nothing in place to ensure that the plaintiff provides the statement every 6 months. In fact, there is no incentive for the plaintiff to comply with this obligation since the bill still allows the garnishment to occur even if the plaintiff fails to send the statement. By eliminating any objective "end date" for such continuing garnishments, the legislation may violate defendants' due process rights, which could be ameliorated somewhat by the adoption of the additional rules proposed by the Initiative.

The Initiative proposes the following subsections:

Rule 3.101(E) - Writ of Garnishment.

(7) The defendant can file an objection to the continuing writ within 14 days after service of a statement of the balance from the plaintiff.

(8) At any time during the period of the continuing writ, the defendant may object to the continuation of the writ.